

Cultivating Intellectual Property

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Culture and intellectual property are connected. Culture, etymologically, is related to the work cultivate, or to work the soil.¹ Creations of individuals, words, images, music, serve as building blocks for the symbolic system used to interpret the world which is also referred to as culture. Similarly, intellectual property starts, at least within a Lockean conception, from individual labour and develops into a system that reflects the personalities of the creators, joined together in communities. Intellectual property and culture is not a surprising topic for a special issue, and arguably not a controversial one.

Where controversy emerges is in the challenge of a cultural view of intellectual property to the more accepted utilitarian theory of intellectual property. Whether in the United States, or in global institutions, intellectual property law and policy are shaped by the balancing of interests with respect to the production and use of creations and inventions. Reducing intellectual property law to a set of interests ignores the role of intellectual property in shaping the various dimensions of culture: artistic artifacts, scientific understandings, shared values and outlooks, linguistic and religious symbols. Furthermore, these dimensions of culture inform what legal and policy analysts may reduce to interests. Recognising the cultural dimensions of intellectual property provides a curative to a body of law and policy shaped solely by considerations of utilitarianism.

At the same time, however, cultural and utilitarian theories should not be seen in opposition. The danger is that culture and interests can be viewed as fixed and unchanging categories when in fact there are many dimensions to what we might refer to as culture and what we might characterise as interests. To see the latter point, the interests of identified intellectual property owners are not simply aligned towards preventing uncompensated uses of the work. Instead, identified owners may also be users in other circumstances when interests might support allowing uncompensated uses. Similarly, culture is not an undifferentiated and homogeneous concept. Artists and scientists, creative people of all stripes, do not represent one culture, which might coalesce into an interest group supporting strong intellectual property rights (or for that matter user rights). Instead, the practices of different creative groups would reflect those of the particular fields within which they operate, and the corresponding interest might have multiple dimensions. The challenge for scholars and policymakers is to recognise this complexity without becoming lost in it.

As further illustration about my point on cultural and utilitarian approaches to intellectual property, consider the often overused, yet under-appreciated, concept of the market. When policymakers refer to a market for intellectual property, the reference is to a world in which the products of the creative fields (art, literature and scientific breakthroughs) are turned into commodities that are distributed to consumers through a price mechanism. Negotiating, transacting, buying, selling and licensing are the action words that describe the workings of the market. These acts serve to transform interests into quantifiable value captured in transferable objects. But, of course, there is a culture to the market mechanism. That culture may be characterised as crass and commercial, but it also may be important for the development of a public sphere. The agora, or the forum, were public spaces, defined by its own rules of comportment and

¹ Richard R. Wilk, *Economics and Culture: Foundations of Economic Anthropology* (Boulder: Westview Press, 1996), pp.103–104; David Throsby, *Economics and Culture* (Cambridge: Cambridge University Press, 2001), pp.7–12.

decorum. The modern notion of the market as a domain for the realisation of pure self-interest and greed is only one manifestation of the market institution, one that may reflect other aspects of contemporary culture as opposed to any inherent characteristic of the market.

Just as the market has a culture, what we refer to as culture has overlap with the transactional features of the marketplace. Culture is not static; as stated above, it has many dimensions. The dimensions of culture, whether artifact or deep seeded, and intangible norms and customs represent a negotiation, a tacit agreement among people on how to behave and how to agree on what is acceptable and what is not. This negotiation is of course different from a price mediated market negotiation, but like any negotiation, it entails sacrifice and trade-offs. If a group agrees that marriage or religion or linguistic systems have one meaning, then options are foreclosed until the group rethinks these meanings. The trade-offs may not reflect an application of utilitarian principles, but they have utilitarian implications. Some are made worse off, and some are made better off by cultural choices. Just as markets have implicit norms of behaviours, cultures represent a transaction among people on how to organise the world and give it meaning.

The point of this discussion is to show that binary oppositions between cultural and utilitarian theories and between culture and market may offer misdirection for the creation of intellectual property law and policy. By focusing on markets, we ignore values beyond price. By focusing on culture, we ignore how the market serves as an institution that can free individuals from arrangements such as patronage. Designing intellectual property law and policy requires a keen attention to history and the context within which law-making and creating occur.

Of course, it is not possible to simply reduce my points to an exegesis of a paradigm for this cultural-utilitarian analysis of intellectual property (to coin an awkward phrase). Instead, I would like to show by example through a description of an ongoing research project on the historical roots of copyright and patent in contemporary India. The project traces contemporary copyright and patent to colonial India. The goal is to identify the roots of contemporary debates and to illustrate how today's policy concerns have analogues in past policy debates.

Within the context of this special issue, the example of intellectual property in Colonial India illustrates the relationship between cultural and utilitarian approaches to intellectual property policy. Interests are not only static, but also have a cultural context. The rest of this article demonstrates the interplay between interests and culture.

Cultural contours of copyright in Colonial India

India's relationship with Great Britain started as an economic one with the East India Company entering into a trading agreement in 1615 with the Mughal emperor governing territorial India at the time.² This economic relationship turned into one of governance and control as the East India Company, chartered by the Crown in 1600, expanded its dominion over the territory, and the Mughal rulers ceded their sovereignty to the Company, which eventually obtained sovereignty over India in 1757 after the defeat of the French on Indian soil in the Battle of Plassey.³ Governance by the East India Company was pursuant to the common law of England which was introduced into India. Concern over corruption by the East India Company led the British Parliament to enact the Government of India Act of 1833, which established the Governor General of India.⁴ The Governor General was empowered to enact laws for India which did not interfere with or contradict British law. Under the Government of India Act of 1858, England directly governed India, maintaining the Governor General to enact local Indian legislation pursuant to British

² Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Oxford: Ecco, 2007), p.53.

³ Guha, *India After Gandhi* (2007), p.287.

⁴ Rajesh Sagar, "Introduction of Exclusive Privileges/Patents in Colonial India: Why and for Whose Benefit?" (2007) 164 I.P.Q. 164, 165–166.

law. Through this Act, India obtained dominion status in the British Empire, meaning it was not fully self-governing and was subject to control by the Home Office in London.⁵

Copyright legislation entered India through the Copyright Act of 1847, enacted pursuant to the copyright law reform in England passed in 1842. Three issues motivated the enactment of Indian copyright law.⁶ First was the enforcement of copyrights under English common law as introduced into India under the East India Company. Second was the enforcement of copyright under principle of equity in Indian courts. Third was the jurisdiction of English copyright law in India. Legislation in India was necessary to clarify these three issues and allow for protection of UK copyrights in India. Under the terms of the Copyright Acts of 1842 and 1847, works published anywhere in the colonies would be subject to protection under English copyright law. Indian copyright law governed infringement within India of works first published in the United Kingdom. The Indian Copyright Act of 1847 followed the details of English copyright law as far as duration of rights, but copyright extended only to literary and artistic works, and not to musical or dramatic works.⁷ Furthermore, registration of copyright was with the Secretary of State's Office in India, rather than the Copyright Office in the United Kingdom. Most importantly, the Indian copyright act did not treat unauthorised importation of works copyrighted under UK law as infringement. It thereby created a ready market for what was deemed to be pirated literary works from the United Kingdom.⁸

Copyright reform did not stop with the 1842 and 1847 statutes, which created controversy as well as addressing some issues. The Imperial Copyright Act of 1911 and the subsequent Indian Copyright Act of 1914 were the next set of copyright legislation during the colonial period. The reforms responded to three challenges in the international environment.

First was the need for uniformity of copyright laws across the colonies in order to deal with the unauthorised importation of copyrighted works into the local colonial marketplace.⁹ Under the International Copyright Act of 1886, any work produced in the colonies was given the same copyright protection as a work created in the United Kingdom.

The second challenge came from unauthorised translations of UK copyrighted works in the colonies. A letter from John R. MacGrath, Vice-Chancellor of the University of Oxford, to Secretary of State for India, dated January 24, 1896, reported on a decision by the High Court of Mumbai against MacMillan Press, which had brought a copyright challenge against the publisher of an unauthorised translation of books.¹⁰ The High Court had ruled that a translation was not copyright infringement. MacGrath, representing the interests of Oxford University and Clarendon presses, noted that a British copyright holder had less protection in the colonies than a non-British copyright holder and recommended reforms of Indian copyright law. In a separate letter, dated November 30, 1885, the Under Secretary of State rejected an appeal from the Governor General of India, urging for copyright reform in India.¹¹ The Under Secretary, citing commentary from Sir Henry Maine on copyright reform, stated that copyright reform in India should co-ordinate with reform efforts in Britain. The translation issue was addressed by the Indian Copyright Act of 1914, which created a compulsory license system for translations.¹²

The third challenge came from the Berne Convention of 1896 and the 1908 Berlin Act of that Convention, each of which required revisions of copyright law to conform to international standards. These treaties

⁵ John Darwin, *The Empire Project: The Rise and Fall of the British World System 1830–1970* (Cambridge: Cambridge University Press, 2009), p.81.

⁶ Walter Arthur Copinger, *The Law of Copyright* (London: Stevens and Haynes, 1893), pp.812–813.

⁷ Copinger, *The Law of Copyright* (1893), p.814.

⁸ Copinger, *The Law of Copyright* (1893), p.815.

⁹ J.M. Easton, *Copinger on the Law of Copyrights* (1915), p.332.

¹⁰ Letter from John R. MaGrath, Vice-Chancellor, University of Oxford to Secretary of State for India, January 24, 1896 (available in the British Library).

¹¹ Letter from Board of Trade, November 30, 1885 (available in the British Library), rejecting copyright reform in India until bill introduced in England.

¹² Lionel Bently, "Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries" (2007) 82 Chi.-Kent L. Rev. 1181.

required amendments to address issues of duration and moral rights.¹³ The Berlin Act specifically required copyright protection for cinematographic works as either a literary or artistic work. The Imperial Copyright Act of 1911 and the Indian Copyright Act of 1914 responded to these challenges by attempting to harmonize the copyright law of the colonies. At the same time, the Imperial Copyright Act of 1911 allowed dominions to diverge from the Imperial Copyright Act in local application of its copyright laws.

Professor Lionel Bently and other academics have provided details of the Imperial Copyright Act and its Indian companion.¹⁴ Here I will focus on how the two copyright acts addressed film in order to comply with the Berlin Act. Indian law on this point tracked the Imperial Copyright Act without variation. The Imperial Copyright Act defined a cinematographic work as “a series of instantaneous photographs projected on the screen in rapid succession so as to give effect of motion”.¹⁵ The Act defined the work as an artistic work and “entitled [it] to copyright as such”. The statute also treated a cinematographic work as a dramatic work since the photographs “may also be arranged in a particular way or they may represent original acting form or combination of incidents”. The Act however, excluded from protection the filming of single or different incidents in real life or of a non-copyrighted play unless the film creator gave the material an original form. Finally, the Imperial Copyright Act recognised that “the author of a literary dramatic or musical work has the sole right to make a Cinematograph of his work”.

Like the 1909 Copyright Act in the United States, neither the Imperial Copyright Act nor the Indian Copyright Act recognised film as a separate copyrighted work. However, the treatment of film under copyright law was confusingly complex under Imperial Copyright and therefore under Indian Copyright. In the United States, a motion picture was categorized as a dramatic work. The Imperial Copyright Act, by contrast, treated film as both a dramatic work and an artistic work. This dual treatment created confusion in the resulting case law.¹⁶ The case law was confounded by film’s dual status as both an original work and a derivative work. For example, courts split on whether selling a movie constituted a public performance and hence an infringement of copyright.¹⁷ However, promotion of a movie was viewed as contributory infringement of copyright.¹⁸ The film’s dual status as dramatic and artistic works also created confusion as to copyright ownership with one British court splitting copyright ownership in film between the producer (who was deemed to own copyright in the photographic elements) and the screenwriter (who was deemed to own copyright in the dramatic elements).¹⁹

Indian copyright during the Colonial period shows an intimate connection between copyright reform in Britain with the emerging understanding of copyright in the colonies. This connection was flexible, with the dominion colonies, like India, given latitude in the development of copyright. However, with respect to the emerging area of film copyright, India adopted British law without variation. The confusion in British film copyright law became a source of debate within India after Independence and shaped post-Independence copyright reform.

The pro-copyright orientation of contemporary Indian jurisprudence comes across in the 2009 Delhi High Court decision in *Warner Bros Entertainment v Santosh*.²⁰ At issue was an online movie DVD rental business created by the defendant using DVD’s purchased legally overseas. The online service was aimed at the Indian consumer interested in watching non-vernacular movies, meaning American films. Warner Brothers sued in the High Court of Delhi, raising claims under the Indian Copyright Act which grants

¹³ Pascal Kamina, *Film Copyright in the European Union* (Cambridge: Cambridge University Press, 2002), pp.18–21.

¹⁴ Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Cambridge: Cambridge University Press, 2010), pp.142–143; Bently, “Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries” (2007) 82 Chi.-Kent L. Rev. 1181.

¹⁵ Harish Chandra Mital and Bhagwan Das Jain, *The Law of Copyright in India* (Calcutta: Eastern Law House, 1939), p.85.

¹⁶ F.E. Skone Jones, *Copinger on Copyright* (London: Sweet & Maxwell, 1927), p.218.

¹⁷ See *Glenville v Selig Polyscope* (1911) 27 T.L.R. 554 (no infringement); *Kurno v Pathe Freres* (1909) 100 L.T. 260 (no infringement); *Kilmer v Harper Brothers* 222 U.S.R. 55 (1911) (infringement).

¹⁸ *Falcon v Famous Players Film Co* [1926] 2 K.B. 474; *Fenning Film Source v Wolverhampton Co Cinemas* [1914] 3 K.B. 1171.

¹⁹ *Milligan v Broadway Cinema Palace Co* (1923) S.L.T. 35.

²⁰ *Warner Bros Entertainment v Santosh* 2009 INDLAW DEL 970.

film copyright owners the exclusive right to “sell, or offer for sale any copy of the film, regardless of whether such copy has been sold or hired earlier”.²¹ Although the Indian Copyright Act does not grant rental rights, Warner Brothers read this rights provision to include rental rights. The High Court ruled in favour of Warner Brothers and enjoined the defendant’s business.

A critical issue in the case was the limitation on the copyright owner’s rights from the first sale doctrine. The Indian Copyright Act does not recognize a general first sale doctrine as existed under US Copyright law. Instead, the first sale doctrine is applied on a case by case and work by work basis. Santosh raised an exhaustion, or first sale, defence before the High Court of Delhi, arguing that the legitimate purchase of the DVD’s overseas exhausted the copyright holders’ rights in the work. The High Court, looking to US²² and Canadian²³ case law on copyright exhaustion as well as the language of the Indian Copyright Act, ruled against Santosh. Looking to the text of the Indian Copyright Act, the High Court reasoned that limitations on the copyright holders’ rights for works in circulation applied to literary, artistic, dramatic or musical works, and not to cinematographic works. The statute provides the owner of a cinematographic copyright the right to distribute “whether such copy has been sold or hired earlier”. The qualifying clause meant that the first sale doctrine did not apply to film.

Furthermore, the High Court distinguished the various applications of the first sale doctrine. Contrasting the European approach with the US approach, the High Court describes the former as adopting regional exhaustion, applying only to sales within the European Union, and the latter as adopting international exhaustion, applying to sales made by the US copyright owner anywhere in the world. The High Court remained silent on the scope of exhaustion under Indian law, but relied on the distinction between Europe and the United States to conclude that the scope of the first sale doctrine depends on national law. Accordingly, the court looked to the treatment of film copyright under the Indian statute to find against the defendant’s first sale doctrine defence. Under Indian law, the sale of a film does not exhaust distribution rights, and the film copyright owner retains the right to rent and resell the work.

The High Court also addressed the importation as well as the rental issue. Warner Brothers had argued that the importation of the copyrighted films into India after the purchase from the United States violated its importation rights. Once again, the court delved into the structure and language of the statute to determine the scope of an Indian copyright holder’s importation right. Starting from the provisions of the statute on licensing and the power of the Copyright Board to control imports,²⁴ the court concluded that the importation right was a separate right of the copyright holder and was not exhausted by Santosh’s purchases of the DVD’s in the United States.

On the point of whether the first sale doctrine limited the importation right, the court relied on US case law, which held that the first sale doctrine applied only to the distribution right and not to other rights like reproduction or adaptation. Since the importation right was a separate right, the High Court reasoned that the first sale doctrine did not exhaust the distribution right. In its analysis of the importation right, the court’s decision did not rest on language specific to cinematographic works as it did with respect to the scope of the first sale doctrine. Consequently, the High Court’s holding on importation arguably applies to all works while its analysis on resale and rental would apply only to film.

The 2009 Delhi High Court opinion in Warner Brothers represents a pro-copyright decision, grounded in a strict application of copyright legislation. However, there are clear policy goals that inform the court’s decision. To understand these policy inclinations, consider the policy argument raised by Santosh in defence of his online service:

²¹ Indian Copyright Act 1957 §14(1)(d).

²² *Bobbs-Merrill Co v Straus* 210 U.S. 339 (1908); *Quality King Distributors v Lanza Research International Inc* 523 U.S. 135 (1988).

²³ *Euro-Excellence Inc v Kraft Canada Inc* 2007 S.C.C. 37.

²⁴ Indian Copyright Act 1957 §53.

“The defendant ... submits that this Court should also take into account the Constitutional imperative that providing entertainment is a part of the fundamental right of freedom of speech and expression. Therefore, when a business seeks to exercise its fundamental right to provide entertainment as part of its freedom of speech and expression limitations should be restricted to those based on societal needs and benefits.”²⁵

The defendant characterised these societal needs and benefits as creating a video club which allowed Indian consumers to have access to non-vernacular films, access that was limited by the inadequate number of theatres screening English language films in India. The defendant concluded that not finding an exception under copyright law that would allow the distribution of the films would make the Indian Copyright Act unconstitutional.

The High Court dismissed the defendant’s constitutional argument. Relying on US case law, the court points out that the US copyright jurisprudence also noted the tension between copyright and constitutional values like free speech. “Yet”, the High Court reasons,

“the express terms of the US Constitution enjoin Congress to enable copyrights, to promote creativity. It is therefore a long held view, in academic quarters, as well as by the courts, that copyright law promotes free speech, by promoting originality of expression”.²⁶

The Indian Constitution, it should be pointed out, does not have an express provision granting Parliament the power to enact copyright legislation. Although the High Court does not acknowledge this point, it does address the policies inherent in copyright law:

“Copyright law, and the protections afforded to owners and those entitled to it ... is a balance struck between the need to protection expression of an idea, in a given form to promote creativity, on the one hand, and ensure that such protection does not stifle the objective, i.e. creativity itself. Copyrights are part of intellectual property, which are but a species of property law ... Just as the owner of real property ... is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these laws, enabled to protect unwarranted exploitation or unauthorized use of what are his property rights.”²⁷

Copyright law affirms property rights for the purpose of promoting creativity. This policy objective supports protection of copyright owner’s rights over other social and public policy goals, including freedom of expression. Although this policy analysis is writ large, the strong protection the court finds for film copyright under the Indian Copyright Act vindicates the nearly century long criticism of Indian copyright law, starting with the Cinematograph Committee of 1928. These criticisms culminate and are assuaged by the 2009 decision.

Culture, interests and intellectual property

The discussion of copyright in India is an excerpt from a larger project exploring the colonial roots of contemporary intellectual property law in India. The excerpt also provides a glimpse into the relationships among law, interests and culture. Contemporary debates in copyright are longstanding, illustrating contested issues about markets, rights and the distribution of expressive materials. Informing both cultural and utilitarian understandings of intellectual property is the fundamental problem of how individuals manage to deal with artifacts, with technologies and with each other.

²⁵ *Warner Bros* 2009 INDLAW DEL 970 at [14].

²⁶ *Warner Bros* 2009 INDLAW DEL 970 at [85].

²⁷ *Warner Bros* 2009 INDLAW DEL 970 at [86].

Cultural approaches are often presented in opposition to utilitarian theories of intellectual property. This opposition reflects the narrow application of utilitarianism, often used to reduce policies to quantitative comparisons of benefits and costs. But utilitarianism's origin was in support of progressive reform, to expand the reach and benefits of law. However, utilitarianism has developed into a narrow consideration of political interests derived from a reductionist model of rational actors counting benefits and costs. Cultural approaches respond to this narrow view of policy by recognising law making as a cultural phenomenon and law itself as a cultural artifact. Rational actors are placed in social contexts within which law acts and to which law responds.

But cultural approaches to law need to be effective in changing law and reshaping institutions without falling into the traps of utilitarianism. Cultural analyses can readily produce yet another set of interests seeking to assuage. To avoid this, cultural analyses need to be attuned to how interests are shaped by culture and in turn shape legal institutions that define intellectual property law. The example of colonial copyright in India illustrates how to confront this challenge through a more detailed historical and contextual understanding of the dynamic origins of the contemporary landscape.