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Intellectual Property and the Knowledge Culture Commons

The ALF-SARAI Collaboration on "Intellectual Property and the Knowledge / Culture commons"

For much of its history intellectual property research and practice was considered a niche area of property law, properly considered as hard private law. There are clearly major limitations of such a traditional black letter approach, particularly since it does not have the ability to adequately reflect the larger public interest concerns embedded in these forms of regulation of knowledge and cultural commodities. With the rise of information technology and the transformation of the ways in which information was produced, intellectual property has emerged a site of major conflict, encompassing conflict over legitimate production of goods and legitimate production of meaning. An important shift in legal scholarship around IP has been the recognition of the importance of understanding the cultural implications of certain forms of intellectual property protection, the social and historical contexts in which cultural proprietorship is (or is not) assumed, and the manner in which these rights are (or are not) exercised and enforced to intervene in everyday struggles.

Some of the areas that we are currently examining include the following:

- i. Copyright, contemporary media practices and conflicts around property
- ii. Cultural Licenses
- iii. Patents and Innovation

The project began in 2002 and since then we have attempted to make a number of critical interventions in the debate including the following:

Three workshops have been organized:

- a. **The Daily Life of Intellectual Property** (<http://preview.sarai.net/events/ipl/ipl.htm>) in December 2002 in collaboration with Sarai.
- b. **Intellectual Property Social Knowledge and Conflict** (<http://altlawforum.org/campaigns/new-technologies-social-knowledge-and-intellectual-property-law/>) in collaboration with Sarai and Hivos in November 2003.
- c. **Intellectual Property and media Conflicts** in collaboration with Sarai, July 2004. This workshop also saw presentations which was the culmination of work enabled by student stipends.

Additional activities:

1. An important international conference "**Contested Commons/ Trespassing Publics** (<http://altlawforum.org/intellectual-property/contested-commons-trespassing-publics/>)" was organised in January 2005. For more details and audio files of the conference click [here](http://sarai.net/contested-commons-trespassing-publics/) (<http://sarai.net/contested-commons-trespassing-publics/>).
2. We have made a compilation of our publications over the past two years in the key areas of the IP debate, and this amounts to over 300 pages at the moment in different journals, magazines and web sites.

3. **Commons Law** (http://mail.sarai.net/pipermail/commons-law_mail.sarai.net/), a mailing list has seen an active participation and growth over the past two years with over 270 members, and a compilation of some of the key debates
4. We have been involved in teaching courses on IP in various colleges including National Law School, Asian College of journalism, NALSAR etc.
5. The creation of a vast database/ archive on materials on IP, which are available both at Sarai and at ALF.
6. The creation of open content pedagogical materials released in November 2005.

For a detailed list of events and publications, click [here \(http://www.sarai.net/research/knowledge-culture/critical-public-legal-resources\)](http://www.sarai.net/research/knowledge-culture/critical-public-legal-resources).

In many ways the first phase of the project will culminate with the January workshop, and then we take the project ahead. There are a number of directions that we see the research work heading towards, as well as defining the ways in which the materials and information generated from the research will be disseminated to create a larger debate on IP beyond the legal community alone. Below is a note on where the IP research is headed.

Media Laws/ media Practices/ Media Histories

Midway through the IP research project we realized that the area that we were working on would necessarily have to be broadened to provide a much broader account of the nature of media histories and regulatory histories that inform the debates. We saw this as a perfect coming together of some of the ethnographic research that was being carried out by Sarai on media histories, and media spaces and linking this to some of the media discourses that were being produced. We then redefines a framework that would allow for the integration of IP research and PHPP research, we realized that there was just no discrete mode in which the contemporary changes occurring in media practices could be comprehensively presented. We concluded that in order to get a sense of the contemporary, we would have to expand the domain of our work and document the history of media regulation and practices from various vantage points. We have established a model that analyses the idea of media histories in terms of space, carriage/technology, content and property, and their vital intersections.

ALF has taken on the responsibility for charting out and carrying on research in the following areas in the project:-

a. Analysis of Players and Issues at the Global Level:

TRIPS, WTO, World Intellectual Property Organization

b. Analysis of Players and Issues at the National Level:

-Copyright law and its elaborations, new rights, as media products and their exhibition/consumption practices evolve for film, music, cable, satellite, VCD/DVDs.

-Laws for the regulation of media space, eg., cinematograph acts (cinema halls), information technology act (internet service providers, cyber cafes), laws relating to the regulation of markets.

-Content regulation, through censorship requirements and certification as these evolve into various media forms:

(i) Public discourse on intellectual property in media: An archival collection of op- eds of newspapers, specialized columnists, general and trade specific periodicals, especially year end projections; such archival collection will also look to discourses about significant cases emerging from (v) below.

(ii) Policy formulation: The role of industrial lobbies, law firms

(iii) Cases that address and define various types of rights: Discussion and analysis of such cases as these emerge along the grid of old and new media technologies; this includes interpretation of cases and judgments, and of their impact on legal codification

(iv) Legal networks and processes:

• **Networks:** rights holders – trade specific institutions/associations – lawyers – investigators – police (enforcement wing)

• **Processes:** how the various agents in the legal circuit are linked, the order of their mobilization; study of specific nodes in the legal process, the raid, the FIR, the case; and the court process; how the process may be short circuited through negotiations at various points in the chain

All of the above involves extensive documentation of media laws and cases, at the global and national level, with a focus on the disaggregating of the media spectrum into film, audio and video, satellite and cable, computer software and hardware. This work has been initiated, and will develop a chronological account of the last 25 years (starting with contests regarding music in the 1970s), along with commentaries on significant cases. We have already developed a solid database of cases that

pertain to media conflicts. These cases fall outside of the usual account of the history of freedom of speech and expression in India, and over the next two years we intend to create a narrative of a history of media, using these cases as the hidden archive to document the transitions into the contemporary.

In addition to this we are also doing some amount of research on the history of particular media spaces, and contrasting it to the legal history that exists for these spaces, including theaters, video libraries, grey markets etc. This ethnographic work will serve as a contrast to the legal account of the same field that we find.

IP Traditional Knowledge and Markets

The debates on traditional knowledge revolve around ownership and control of the source of knowledge. Property protection which has been the dominant response / solution emerged as the solution in which the state regulates and controls the indigenous knowledge, thus wresting control from the communities. The knowledge flows within and outside the communities hardly have transit points nor checks and boundaries except for geographical distance and the interaction of the communities with the outer world.

The plethora of discussions, conventions, legislations and rules on the protection of traditional knowledge ignores the significance of the existing practices within the communities, the cultural and historical importance of such practices which may have played a key role in the very survival of the communities.

The research aims to look at the practices of the communities in the light of the open source movement, which has merged as a solution to the monopoly over the information. But, how would you look at the state's hold over information? The research aims to look at practice of the farmers in exchanging innovative knowledge developed by individuals or communities. The exchange of seeds developed by the farmers without any control over it is in stark contrast to the property model envisaged in the Plant variety protection and farmer's right Act. The dangerous proposition (closed domains) set out in the legislation and rules regulate the flow of information breaking or destroying the chains and links developed over centuries. The legislation fails to capture the dynamics of information, its importance to the society. What could be the impact within and outside the communities, groups, societies if the knowledge is enclosed? How does the individual or community deal with concept of property in ideas and knowledge developed over centuries, the violence of such closed domains?

The bureaucratic model envisaged to control the knowledge ignores the historical factors looking at the process merely as revenue generated from the diversity in the resources and indigenous knowledge over its utility as well as a process of preventing the pilfering of its resources and knowledge of its utility. The state positions itself as the guardian angel seeking to negotiate the terms and conditions on behalf of the communities in exchange for the access to their knowledge. This discourse of espousing knowledge in the name of the larger interest of the community, its development etc is the fulcrum around which the property protection is enthused. The conventions and legislations envisage that the communities are the ultimate beneficiaries of the royalties, fees coming out as a result of this set up which could be used in the development of the communities. It also hopes that the process leads to the transfer of technology which is often used to justify the shift to protectionist model. The use of the resources for the benefit of the community is a contentious issue as it is controlled by the State. The Masai tribe of Kenya was dispossessed of their traditional lands on the pretext of creating game parks which could generate a lot of revenue for the State. A part of the revenue would be used for the welfare and development of the Masai. To say the least, the Masai is confined to one fourth of their original lands which has given rise to conflicts within the tribe and this has disrupted their traditional practices. The overuse of the land has led to environmental problems for which the Masai has been blamed. The nomadic tribe used to live in harmony with the nature, but with traditional migratory routes being cut off as well as being confined to a limited patch of land has upset the balanced use of the resources. The fact that the Masai are forced into selling images of their tradition to make a living demonstrates the effectiveness of the benefit flowing back to the communities. The research attempts to look at the disruptions in the traditional practices due to the protectionist approach and the violence of the various state actors as well as the possible alternatives.

The state discipline may not be the panacea to maintain and protect the biodiversity. The Convention on biodiversity is unclear about the approach to be adopted. It proposes conservation of biodiversity through indigenous communities but at the same time speaks of benefit sharing and technology transfer which has been interpreted in commercial terms. While it recognizes the role of the indigenous communities in the protection of biodiversity, it invests ownership of the resources with state. Thus, it leaves a lot in the hands of the state which has devised a model that is power centric enhancing its hold over knowledge. Costa Rica is a stark reminder of the state control over the knowledge. The government stepped into take control

over all the biological resources and the knowledge that goes with it. It fixed the price of information, the rent for access to such information as well as requisite support system; all on behalf of the community. How has the community fared in this commodity market? It leaves a lot to be decided, the commodity market may have a lot to offer but may not be in the best interest of the communities as it may make them reliant on certain technologies which destroys their traditional networks, therefore cutting them off from their indigenous systems and reducing them to a state of mere recipients of technologies which they hardly relate to, thus locking them up in a time twister which transmits them to an unfamiliar terrain, which is a point of no return. The green revolution offers a similar story which enabled the destruction of traditional practices by forcing the farmers to increasingly rely on the chemical farming and locking them up forever. It is a Herculean task to go back to the traditional practices and networks as generations of farmers have become dependant on chemical farming losing connection of the past practices, knowledge, activities etc. The research attempts to understand the impact of the lost chain by drawing from the experiences of the green revolution.

Objective: To look at the property model, the role of the state as the holder of the property, the violence and destruction of the practices it seeks to protect.

In the light of the increasing acceptance of Intellectual property as a response or an answer to biopiracy, there is a temptation to respond to the problem by pushing for property rights over traditional knowledge. This seems to have gained momentum and the Southern states are demanding for such inclusion within the TRIPS Agreement. This approach suits the North as they can demand for extension of property rights over all forms of information as well as better enforcement of the Agreement in exchange for protection over traditional knowledge. This model does little to change the position of the Southern states which are rich in genetic resources, it still remains at bottom of the value chain but ends up destroying its own resources and practices. The research therefore attempts to examine the possible impacts of such practices by drawing in parallels from past instances and conflicts. In the process it aims to look at alternative models which might be viable in the long term without compromising the interests of the various groups in the chain of information production.

The research involves review of existing literature, comparative studies, interviews of various interest groups like the farmers, policymakers, government officials, civil society organizations, academics as well as drawing parallels and analysis from past instances, legislations and cases.

The research could lead to a better understanding of the knowledge chains, links and dynamics in the cycle of knowledge/ information production.

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