

Contested Commons /
Trespassing Publics

A Public Record

The contents of this book are available for free download and may be republished
www.sarai.net/events/ip_conf/ip_conf.htm

Contested Commons / Trespassing Publics: A Public Record

Produced and Designed at the Sarai Media Lab, Delhi

Conference Editors: Jeebesh Bagchi, Lawrence Liang, Ravi Sundaram, Sudhir Krishnaswamy

Documentation Editor: Smriti Vohra

Print Design: Mrityunjay Chatterjee

Conference Coordination: Prabhu Ram

Conference Production: Ashish Mahajan

Free Media Lounge

Concept/Coordination: Monica Narula

Production: Aarti Sethi, Aniruddha Shankar, Iram Ghufuran, T. Meriyavan, Vivek Aiyyer

Documentation: Aarti Sethi, Anand Taneja, Khadeeja Arif, Mayur Suresh, Smriti Vohra, Taha Mehmood, Vishwas Devaiah

Recording: Aniruddha Shankar, Bhagwati Prasad, Mrityunjay Chatterjee, T. Meriyavan

Interviews Camera/Sound: Aarti Sethi, Anand Taneja, Debashree Mukherjee, Iram Ghufuran, Khadeej Arif, Mayur Suresh, Taha Mehmood

Web Audio: Aarti Sethi, Bhagwati Prasad

http://www.sarai.net/events/ip_conf.htm

Conference organised by

The Sarai Programme

Centre for the Study of Developing Societies, Delhi, India

www.sarai.net

Alternative Law Forum (ALF), Bangalore, India

www.altlawforum.org

Public Lectures in collaboration with

Public Service Broadcasting Trust, Delhi, India

www.psb.org

Published by

The Sarai Programme

Centre for the Study of Developing Societies

29 Rajpur Road, Delhi 110054, India

Tel: (+91) 11 2396 0040 Fax: (+91) 11 2392 8391

E-mail: dak@sarai.net

Printed at

ISBN 81-901429-6-8

November 2005

Delhi, India

Price: Rs 100, US\$ 10, € 10

Contents

Introduction VI

Conference Brief VIII

Rapporteur's Note IX

Conference Narrative 1

New World Order and the Public Domain 1

Rewiring the Circuit: Property and the Public Domain 3

The Not-Quite Publics and the Public Domain 10

Patents, Public Health and the Public Goods Problem 17

Between Anarchy and Oligarchy 21

The Persistence of Authorship 23

The Possession of the Authors 27

Authors, Owners and Appropriators 35

Media Empires and the Figure of the Pirate 40

Culture beyond Property 51

US Path to Wealth and Power: Intellectual Piracy and the Making of America 56

Embodied Property to Disembodied Signs 59

Network Conflicts 66

Spatial Conflicts and Property Regimes 72

Media Practice and the Figure of the Pirate 77

Open Round Table 82

Magna Carta and the Commons 85

Free Media Lounge 91

Conference Interviews 101

Conference Participants 163

About Us 167

Introduction

The transformation of Intellectual Property Law, from an esoteric legal subject to an intrinsic part of daily conversation and discussion today, has occurred in a relatively short span of time. Over the past few years, the aggressive acceleration of property claims into all domains of knowledge and cultural practice has interpolated almost everyone, from the academic to the musician, into the heart of the IP debate. No account of the contemporary moment would be complete without an examination of the dominance of the copyright sign or the small print of the trademark on our lives.

In many ways, the mere act of looking at, reading, listening to, making, understanding, or communicating any objects that embody thought, knowledge or feeling, are as fraught with danger and anxiety today as the appropriation of material wealth, or the trespassing into private property, were through much of human history.

The concern over the expansionist tendency of intellectual property has also motivated a rearticulation of the importance of the commons of knowledge and cultural production. This is exemplified by various processes: through the important scholarship that has arisen on the public domain, the increasing popularity of non-proprietary modes such as free software, open content, digital networks, etc. A number of these concerns have historically emerged from the experience of Europe and the United States.

However, when one attempts to translate the terms of the IP debate into the contemporary experience of countries in Asia, Latin America and Africa, it is difficult to locate any easy indexical reference of ideas such as the 'enclosure of the commons'. Intellectual property concepts folded into many of these nations through the dual tropes of a triumphalist fantasy of harnessing IP 'to catch up with the West', or an account of paralysing fear and images of persecution, destruction and violence that surround the reality of IP infringement. The latter is best exemplified by the sharp conflicts and anxieties over the prevailing mediascape (from non-legal software to cheap DVDs) that is a key aspect of contemporary urban experience in the developing world.

We, at the Sarai Programme at the Centre for the Study of Developing Societies, Delhi (Sarai-CSDS) and at the Alternative Law Forum, Bangalore (ALF), arrived at our perspective on the IP question through our different engagements with researching contemporary realities, looking at cultural production, at the processes by which media are generated, and at the manner in which law and legal instruments encroach upon the most intimate details of social and cultural life. Our interest in the terrain of IP overlaps with our ongoing curiosities and creative projects with regard to media production and experience, and digital proliferation.

We were motivated to organise 'Contested Commons/Trespassing Publics: A Conference on Inequalities, Conflicts and Intellectual Property' as a move towards addressing some of the complex questions, arising out of our work, about the modes in which IP plays out globally. Our intent was to open up various strands within the

existing global IP debate, and to create the foundations for a substantive critical intervention that would begin to see the question of IP in a more complete manner than that afforded by accounts of either crisis of knowledge/culture, or one of providing alternatives alone.

The conference, held in Delhi from 6-8 January 2005, brought together some of the leading minds on the subject from all over the world, and from a variety of disciplines and backgrounds – law, anthropology, media theory and history, economics, computer and information sciences, medicine, new media practice, contemporary art and social activism. What follows is a narrative summary of the discussions and debates that took place at this very stimulating event.

This book is our attempt to bring to public life the ‘oral’ practices that animated the conference. We had already recorded the proceedings, and these recordings were made available for browsing, free download and listening as audio files on the Sarai website (http://www.sarai.net/events/ip_conf.htm). On listening to these recordings, we realised that the ‘orality’ that made the conference exciting brought alive complex questions in an almost hyperlinked manner, provisionally, incompletely, but tantalisingly redolent with the possibilities of undertaking creative intellectual leaps.

We felt the need for a form that would make these possibilities more accessible and transparent. This book, the narrative and the transcripts of conference interviews, the discussions and conversations that it contains, the many unresolved questions, intriguing stories, elusive histories and angry assessments that it embraces, is an attempt to bring this palimpsest of possibilities to the attention of the curious and interested reader.

As an aide-memoire, or souvenir of that excitement, we hope it will contribute towards more original thinking and critical reflection on the vexation that is Intellectual Property.

It would be our pleasure to receive critical feedback, comments and suggestions from those readers who find it in their hands. In keeping with Sarai-CSDS tradition, and our commitment to queering the pitch of ‘IP’, the book’s contents are available for free download and republication for non-commercial and educational purposes.

Conference Editors

November 2005

Delhi

Contested Commons / Trespassing Publics

A Conference on Inequalities, Conflicts and Intellectual Property

Conference Brief

The past three years have seen conflicts over the regulation of information, knowledge and cultural materials increase in scope and intensity across the globe. These conflicts have widened to include new geographical spaces, particularly China, India, South Africa and Brazil. Moreover, a spectrum of new issues, including the expansion of intellectual property protection to almost all spheres of our social life, has aggravated the problem. It is also important to recognise that the nature of the conflict gets configured differently, and often in a radical manner, as we move from the United States and Europe to social landscapes marked by sharp inequalities, in Asia, Latin America and Africa.

The information era has brought with it an intricate set of tribulations in the form of a set/sets of rights seeking to control the use and dissemination of all forms of information and media practices. The last few decades have witnessed an unbridled expansion of property rights/regimes in the sphere of knowledge and cultural materials. The expansion of copyright has generated intense conflict over the incessant production and archiving of information, and seeks to regulate the availability as well as the scarcity of this commodity.

Rights-based regimes appear to assume that the creation of new information takes place in complete isolation from past sources of creation and from the public domain. Absolute notions of property rights can be visualised, felt and absorbed through various media, activities and daily practices. The language of copyright, patents, trademarks, etc., has so permeated consumer culture globally that we have almost become blind to the range of new problems this language poses to the knowledge commons, creativity and innovation.

The notion of property rights in information envisages a world wherein each act of creation and innovation is defined and restricted within the domain of property regimes. But the culture of innovative practice does not fall within this purview. Practices such as file-sharing, music downloading, peer-to-peer networking, photocopying or the creation of joint authorship/collaborative production through the Internet, allow users/creators/innovators to engage with the world of information in a manner that clashes with the rules of the game set in place by the powerful groups that have introduced, reified and valorised rights-based language. This conflict has led to information being policed, through the criminalisation of specific activities in the area of knowledge production and distribution. It has also led to acts of serious cultural appropriation and exclusion.

In the light of such conflicts, this conference intends to examine whether it is possible to revisit earlier discussions on creativity, innovation, authorship and the making of property. Is it possible to draw comparative registers between earlier histories of violence and dispossession that accompanied the making of property, and the current turbulence around intellectual property on a world scale?

The conference will probe existing arguments within the open source movement, and push the debate on traditional knowledge and biodiversity. It will also attempt to facilitate a dialogue between different movements in media history – print, film, music and the new media – so as to prise open urgent questions around cultural production, circulation and distribution, and interrogate the philosophical persuasions, social dynamics, political economies and legal grids that constitute the parameters of the contemporary global debate on intellectual property.

July 2004

Rapporteur's Note

In *Six Memos for the Next Millennium*, Italo Calvino remarked that with regard to the narrative genre of the very brief tale, he had so far not found any opening line to match this one by the Guatemalan writer Augusto Monterroso: "*Cuando despertó, el dinosaurio todavía estaba allí*" (When I woke up, the dinosaur was still there). This observation aptly reflects my experience of compiling this report, over long weeks of concentrated work. I was intimidated by the sheer magnitude and quantity of what the Sarai documentation team had gathered from this conference. I was overwhelmed by the nature of the material: the complexity of categories, symbols, facts, ideas, subjectivities, styles; the contrapuntal voices and trajectories, tensions and interweavings; the avid explosion of detail; the tenacity of assertions and denials. Occasionally, following the unexpected momentary withdrawal of ongoing discursive clamour, I became disoriented through sudden contact with pure signification, the rustle of single leaves in the forest of language.

Each time I felt I was a few faltering steps closer to emergence from the labyrinth of ratiocination, each time I felt I had sifted through the masses of information with at least partial clarity and efficiency, each time my fingers withdrew from the keyboard after editing a segment, I would wake up, so to speak, and find the dinosaur still there. Not having any prior conceptual understanding of intellectual property, I initially responded to the conference material as if it was indeed an alien manifestation. I scrutinised it with awe, just as one might gaze at the bones of dinosaurs in museums, or as one might attempt to uncover inherent structure and order with the meticulous strokes of a paleontologist's brush, all the while slowly becoming aware of the incredible subtleties and complicated evolutionary grace immured within grotesque proportions. Insistently, the discourse revealed itself as a living topos of ardour and antinomy, of opacities and translucencies, democracies and hierarchies contained within each other, and within what appeared to be accepted historical orders and self-organising sociocultural systems. And having undertaken the risk – and shock – of such an encounter, I also found myself returning over and over to the incandescent flicker of rebel subtexts walled within standard theoretical parameters, like fireflies in a glass jar.

"Contested", "trespassing", "publics"...What was being contested, and by whom, for whom, with whom? How should one define the act of trespass, locate its stubborn root, predict its revolutionary consequences? Who were these publics: a few known, many unfamiliar; some identified, most unnamed; invisible abstractions, yet powerful presences muscling themselves into each domain related to intellectual property?

And how did one interpret the "commons"? Did IP discourse imply that if this phenomenon was actualised, appropriately and adequately, it would enable the crystallisation of new kinds of equity, and more ethical practices of production and consumption? Did it imply a radical dismantling of the established notions of enclosure, property, authorship, ownership, and of claims violently asserted in the interest of profit? Did it imply a genuine, tenable expansion of alternatives to counter

the fiercely entrenched dialectic of exclusion and inclusion? Did it imply a crucially different ecological awareness? Did it imply an irreversible reconfiguration of the aesthetic and cognitive frames that are the site of our imaginaries, as well as an unrelenting reassessment of the thorny politics of race and class, of gender, nation, hemisphere?

Those of us more optimistic about the potential of the human spirit might wonder if the actualisation of a true commons also implies a vision of larger unity and transformed relationships, as in Borges' beautiful lines: "*Nadie es la patria, pero todos los somos/ Arda en mi pecho y en el vuestro, incesante/ Ese límpido fuego misterioso*" (No one is the homeland, it is all of us/ May that clear, mysterious fire burn/ Without ceasing, in my breast and yours).

And the most incorrigibly idealistic among us might even add that if we seriously, successfully, manage to rework our understanding of all dimensions of property (material and immaterial, individual and collective), we could indeed some day wake up to find that the dinosaur of the deeply-embedded human impulse to enclose, to appropriate and possess, to privilege the self at the cost of the other, is miraculously no longer there.

Smriti Vohra

October 2005