

GLOBAL COMMONS, PUBLIC SPACE AND CONTEMPORARY IPR

Media and development, March 2001

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1. Introduction

Recent debates about intellectual property rights have been marked by a spurt of critiques aimed at the very normative basis of intellectual property. These debates are marked by their dissatisfaction with the traditional theories of justification, and have instead attempted to locate the historical and material basis of the emergence of intellectual property rights, and the role that they play in the politics of information and knowledge production in contemporary societies.¹ Perhaps the best known instance of such a challenge is the ongoing case of *Eldred v. Reno*², being argued by Lawrence Lessig in the Supreme Court of the United States. Eldred is challenging the constitutional validity of Sonny Bono Act which seeks to extend the term of protection for copyright in the US.

This critical approach to intellectual property have also gained from other movements and attempts at rearticulating ideas of creativity and property, like the free software movement. The free software/ open source movement has inspired a whole generation of “open” initiatives including open content, open publishing, open art etc. At the heart of the varied open initiatives is the belief that there is a need to rearticulate the public domain to include a strong element of the idea of the commons³. The idea of the commons of course is not a new one and traces its historical roots back to the Roman times. The most common usage of the “commons” however is derived from England, when land was held as communal property and was not owned by any person or institution. In recent times it has found articulation in legal developments in international law recognizing the common heritage of mankind. An attempts is therefore being made by these various scholars to understand cyberspace or the world wide web as the new global commons, which is under threat by the operation of intellectual property laws.

This paper seeks to understand these critical developments around the ideas of the “global commons”, the new “public domain” and how these terms get translated in contemporary practices in India and whether they offer an alternative conceptualization of spatial politics within the imaginary of the public domain in India? My argument is that these terms cannot be taken as stable reference points without understanding the micro developments at the national/ local level and that in fact a more nuanced understanding would be required to take into account the tensions produced by the mapping of the global upon the national/ local.

2. The Global Commons And The Debate On Intellectual Property Rights

¹ See generally the works of Rosemary Coombe, Peter Jaszi, James Boyle, Yochai Benkler, Lawrence Lessig.

² See <http://eon.law.harvard.edu/openlaw/> for details on the progress of the case.

³ See Harry Arthurs, *Reconstituting the Public Domain*, available at http://www.robarts.yorku.ca/pdf/apd_arthursf.pdf. for an overview of the legal history of the commons

Before we proceed on an examination of the manner in which the global gets mapped out onto the local, it is imperative for us to understand the current critical debates around intellectual property and also a brief historical overview of the very idea of the commons itself. The critical movement in its varied forms have largely emerged in the context of legal scholars and practitioners from the US examining the ways in which intellectual property have come to dominate almost every aspect of life.

To very briefly summarise, the arguments made runs like this:

1. Every aspect of what we call the public domain is now proliferated with images, signs and inventions and products which are protected by one form of intellectual property or another. In addition there is an increasing tendency where domains which were earlier outside the scope of intellectual property protection are also being brought under the rubric of intellectual property right.
2. This expansion of IPR into public life has resulted in an privatization of the public domain itself, where increasingly almost every cultural resource is the subject of protection. There is an argument that there is therefore a shrinkage of the public domain.
3. Scholars like Rosemary Coombe, have made a consistent argument that the very practice of a political public domain has been relied on the ability for various people (consumers) to engage in critical dialogic practices and these practices do not merely take existing signs for what they are but through processes of appropriation, recodification and transformation determine what meaning itself is.
4. If all signs are therefore the subject of IPR and entitled to protection, there is a danger that dialogic practices themselves are under threat as the owner of the sign will have the ability to determine the scope of the use of such signs, and that the owners of these signs will have the ability to freeze the meanings of these signs and hence curtail the very possibility of critical dialogue.
5. Through an analysis of various case studies it is then argued that over the years there has been a strong trend towards curtailing any kind of critical practice and that this is a violation of the 1st amendment rights or the right of freedom of speech and expression.

It is in this context that an opposition to the current practice of intellectual property law has emerged. It would of course be a misnomer to characterize the movement as a homogenous one with a single voice, as clearly even within the critical tradition there are very different positions ranging from an abolitionist stand to a lesser or softer protection stand). And the movement has certainly developed over the years to accommodate various positions. At a narrow level the crucial claim that has been argued consistently and currently being tested before the US Supreme Court has its basis in the fact that the US law of copyright is grounded in the constitution of the US. At a wider level it raises the larger issue of the relation relationship between information and property and the forms and the implications that the internet and cyberspace has for the classical understanding of information and property. The invocation of a historically rich metaphor of the commons in relation to cyberspace as the 'last frontier' of the commons universalizes the debate beyond the concerns of the US alone.

These debates in the US have also resulted in a ripple effect sprouting similar critiques of intellectual property in different countries. In India the critique of intellectual property has

classically worked within the high nationalist framework of protection of national resources and national interest, and generally confined to the debate around patents. However there are now attempts at understanding the cultural politics of copyright as well as various moves towards articulating an alternative conceptualization, and it is in this context that the debate on the global commons has emerged in India..

Clearly the idea of the commons has a very rich history and it is imperative for us to understand the trajectory which this concept has taken before arriving at its present avatar in its dominant correlation to cyberspace. The earliest use of the idea of the commons arises from Roman times where a particular concept of the public domain as *res publicae* or “inherently public property” existed, whereby all land not privately owned - unoccupied land as well as land used specifically for public works - was thought not only to be vested in the state but to be “inalienable”; it could not be bought and sold; it would remain forever public and vested in the sovereign. The metaphor however bears a closer resemblance to the commons as envisaged in the nature of property relations in early England, where lands were held by villagers in common; cattle were grazed and grains were reaped in common; natural resources such as wood, peat, minerals, fish and game were exploited in common. The familiar argument goes that the absence of any incentive in the preservation of the as a result of the absence of private property resulted in the *tragedy of the commons*⁴ and it was the responsibility of private property to rescue the commons.

The most violent and most ‘universal’ history of the commons is articulated in the 17th century legal doctrine of *terra nullius*, or land that belonged to no civilized state and could be claimed by the first sovereign who happened to stumble upon it. In this commons the “aboriginal, itinerant peoples of America, Africa and Australia were to learn each in their turn, being the inhabitant of such a public domain was a distinct liability”⁵. Despite the absolute onslaught of colonialism, there have been brave attempts as evidenced by the indigenous peoples movement, to claim the possibility of such a public domain existing even within the time space of late modernity.

The next move is a move in the direction of political philosophy where the commons is articulated in the 18th and 19th century liberal thought as the sphere of public activity. Of course this public was not a sphere where everyone could participate and to be a part of the public sphere meant that you had to be worthy of public participation, and needless to say that the vast majority of the population like the landless, non Europeans etc were not deemed worthy to be a part of this public.

In the mid twentieth century the commons is converted into a post nationalist vision of the greater common good or where the public domain gets converted into a normative sphere of governance for the public good. The national state is rendered as the only trust worthy custodian of the commons. In countries the national public is also marked by its destiny being linked integrally to the national ideal of a particular form of modernity. From the 80’s and more critically now in the era of globalization, the commons has emerged as the new global marketplace for products and services (phrases like ‘global village’, ‘common culture’ now have an almost nostalgic ring to it). A market whose rules of engagement and terms of operation have been substantially altered by the prominence that it gives to intellectual property. The idea of the commons and the public domain

⁴ See, Garrett Hardin, *The Tragedy of the Commons*, Science, 162(1968):1243-1248

⁵ Harry Arthurs, op.cit.

has also shifted from being a property right in its origin to being about a use right in its present usage.

It is in light of the crisis caused by the totalizing discourse of intellectual property, particularly in the US that the critical movement against intellectual property has emerged. The new global commons is particularly identified with the realms of high technology in the form of cyberspace and the various open movements in software itself. A number of these debates about the idea of the global commons and the emergence of a critical community of practitioners and academics critiquing the scale and scope of intellectual property has also caught on in India and there is indeed a community of practitioners in India who could be counted as being a part of this larger critical community.

One of the reasons for outlining the history of the common concept is to understand the tension that it has always been ridden with, namely that it is a historical specific movement on the one hand and yet based on a particular notion of universality. I would however like to clarify that this is not a critique of the 'open' movements and I think they have radically alerted the terms of the IPR discourse in a very positive manner. It is however to caution against accepting an uncritical version of the idea of the global commons without taking into account the complex web through which such a discourse is even made possible. In the rest of the paper I shall attempt to understand the tensions that arise when this global commons is mapped out onto the national and local, and how a more nuanced understanding of the process of globalization is needed to enrich the debate in India.

3. The Global Mapped Onto The Various Publics In India

Ravi Sundaram in his insightful analysis⁶ argues that the usage of the term public in India, even within the realm of cyberspace and new media is a complex one and the term includes within its fold a number of publics, whose entry point into modernity is markedly different. He says "If one were to adopt a certain diffusionary model of the spread of cyberpractices in India, we would have to consider the following:

a) The simple fact of India being a peripheral society in the capitalist world-economy: with one of the lowest saturation rate of telephones in the world; only a small minority of the population has electricity.

b) India has no tradition of cyberpunk, in fact there is no indigenous science fiction tradition. Most existing cultural communities have remained ambivalent about technology. Historically, representations of science and technology have been state-sponsored and social-realist in form. Despite this, a significant number of people are linked to electronic networks in India and the number is fast growing. For a Third World country with inequalities like India this is quite remarkable....What is significant is that "cyberspace" has emerged as a significant term in public

⁶ See, Ravi Sundaram, *Recycling modernity: Pirate electronic cultures in India*, Sarai Reader 01: The Public Domain, pp.93-99., Ravi Sundaram, *Beyond the Nationalist Panopticon: the Experience of Cyberpublics in India*, available at <http://amsterdam.nettime.org/Lists-Archives/nettime-l-9611/msg00018.html>, Ravi Sundaram, *Electronic Marginality Or, Alternative Cyberfutures in the Third World*, <http://www.ljudmila.org/nettime/zkp4/08.htm>

discourse in India, becoming the focal point of much coverage and speculation in the media . Behind all of this is the growing community of users. Till date anonymous, and lacking the "heroic" qualities of the old nationalist scientist, the contemporary user lacks any visible representation of his or her agency. there are various publics at play in the use of the idea of the public⁷.

He identifies three movements in the formation of the public in India, the first is the most ambitious task of nation building which utilizes the category of the 'national public', a category upon whom is played the ultimate fantasy of the great pan national panopticon. From the 50's to the 60's this public is formed through various discursive practices of the state and by the 80's, when the first media revolution is set in place by the establishment of the grid is almost complete for the entry point of the ultimate panopticon, the NIC (National Infomatics Centre).

The NIC was set up in the mid 1970's to promote computerisation in administration, but really took off in the 1980's with the inauguration of a satellite linked network: It emerges as the largest network in the country which links up all district, state and national centres, runs large databases on social science, medicine and law and works with all state research institutes in the country. Apart from putting all these centres on the NICNET e-mail network, NIC provides users with web and Internet access. Internally, large research projects on artificial intelligence and CAD are being undertaken. Today NICNET has easily eclipsed India's other state network ERNET (Educational and Research Communication Network) to become a visible *public* presence”.

Sundaram argues that the NICNET was however not only about more computers in administration and education and that it intended to change the very deployment of power. It had an aggressive 'public' profile and sought to mold a new state cyberpublic from the late 1980's onwards, through regular, well-publicised demonstrations on networking, e-mail and international connectivity. It was unusual for a state organisation in India to adopt such an aggressive public profile. This brought NICNET in conflict with other institutions of the state which argued for the older, more centralised bureaucratic forms of control. NICNET was run by people who understood the need for a new panoptics of state power - the older methods of surveillance would just not work.... The NICNET experiment attempted to rework the old modernist grid of Nehruvianism which was based on representational realism, a production of identity based on Westphalia-style national borders and a model of development which privileged the 'economy' as a site of national renewal and subsequent transition to modernity.

The second public that Sundaram identifies are what he called the cyber elites, the beneficiaries of the infrastructure that the state has put into place in the 80's. By 1995, both state and private networks had spread to connect around 120,000 users in India and while this number may seem small in comparison with the West, it represents one of the largest figures for a Third World country. This number has of course now increased immensely. These users are of course technologically savvy and find themselves represented in media as the new face of India. The fable that is spun is that "India's access to western modernity (and progress) would obtain through a vast virtual universe, programmed and developed by 'Indians'. The model: to develop techno-cities existing in virtual time with US corporations, where Indian programmers would provide low-cost

⁷ Ravi Sundaram, *The nationalist Panopticon* op.cit. n.6

solutions to the new global techno-space”⁸. Within the space of this cultural elite are also the voices that emerge in solidarity with the various movements against intellectual property and a considerable number of these ‘techies’ are a part of the larger free software movement across the world. They are also often the ones most familiar with the language of cyberspace as the final frontier and the last global commons.

Sundaram then provides us with a very fascinating account of another aspect of electronic culture which lies beyond the grids of both the public mapped out by state led modernity and that of the cyber elite. He says that “Outside the universe of the cyber-elite, is another one, which speaks to a more energetic technoculture. This is a world of innovation and non-legality, of ad-hoc discovery and electronic survival strategies. But before I talk about this, a story of my own. Some years ago, I was on a train in Southern India where I met Selvam, a young man of 24, who I saw reading used computer magazines in the railway compartment. Selvam's story is fascinating, for it throws light on a world outside those of the techno-elite. Selvam was born in the temple town of Madurai in Southern India, the son of a worker in the town court. After ten years in school, Selvam began doing a series of odd jobs, learnt to type at a night school after which he landed a job at a typists shop. It was there that Selvam first encountered the new technoculture - Indian-style. From the late 1980's, India witnessed a unique communicative transformation – the spread of public telephones in different parts of the country. Typically, these were not anonymous card-based instruments as in the West or other parts of the Third World, but run by humans. These were called Public Call Offices (PCOs). The idea was that in a non-literate society like India the act of telecommunication had to be mediated by humans. Typically literates and non-literates used PCOs, which often doubled as fax centres, photocopy shops and typists' shops. Open through the night, PCOs offered inexpensive, personalized services that spread rapidly all over the country. Selvam's typing shop was such a PCO. Selvam worked on a used 286, running an old version of WordStar, where he would type out formal letters to state officials for clients, usually peasants and unemployed. Soon Selvam graduated to a faster 486 and learnt programming by devouring used manuals, and simply asking around. This is the world of informal technological knowledge existing in most parts of India, where those excluded from the upper-caste, English-speaking bastions of the cyber-elite learn their tools. Selvam told me how the textile town of Coimbatore, a few hours from Madurai set up its own BBS, by procuring used modems, and connecting them later at night. Used computer equipment is part of a vast commodity chain in India, originating from various centres in India but the main centre is Delhi. Delhi has a history of single-commodity markets from the days of the Mughal Empire. Various markets would specialise in a single commodity, a tradition that has continued to the present. The centre of Delhi's computer trade is the Nehru Place market. Nehru Place is a dark, seedy cluster of grey concrete blocks, which is filled with small shops devoted to the computer trade. Present here are the agents of large corporations, as also software pirates, spare parts dealers, electronic smugglers, and wheeler-dealers of every kind in the computer world. This cluster of legality and non-legality is typical of Indian techno culture. When the cable television revolution began in the 1990s, all the cable operators were illegal, and many continue to be so even today. This largely disorganized, dispersed scenario makes it impossible for paid cable television to work in India. This is a pirate modernity, but one with no particular thought about counter-culture or its likes. It is a simple survival strategy. The computer trade has followed the pirate modernity of cable television. Just as small town cable operators would come to the cable market in the walled city area of Delhi for

⁸ Ravi Sundaram, *Recycling Modernity op.cit. n.6*

equipment, so people from small towns like Selvam would come to Nehru Place to source computer parts, used computers, older black and white monitors, and mother-boards out of fashion in Delhi. This is a world that is everyday in its imaginary, pirate in its practice, and mobile in its innovation. This is also a world that never makes it to the computer magazines, nor the technological discourses dominated by the cyber-elite. The old nationalists and Left view this world with fascination and horror, for it makes a muddle of simple nationalist solutions. One can call this a recycled electronic modernity. And it is an imaginary that is suspect in the eyes of all the major ideological actors in techno-space. For the Indian proponents of a global virtual universe, the illegality of recycled modernity is alarming and 'unproductive'. Recycled modernity, prevents India's accession to WTO conventions, and has prevented multinational manufacturers from dominating India's domestic computer market. For the nationalists, this modernity only reconfirms older patterns of unequal exchange and world inequality. In cyber-terms this means smaller processing power than those current in the West, lesser bandwidth, and no control over the key processes of electronic production. I suspect that members of the electronic avant-gardes and the counter net-publics in the West will find recycled modernity in India baffling. For recycled modernity has no discrete spaces of its own in opposition to the main cyber-elites, nor does it posit a self-defined oppositional stance. This is a modernity that is fluid and mocking in definition. But is also a world of those dispossessed by the elite domains of electronic capital, a world which possesses a hunter-gatherer cunning and practical intelligence"⁹

4. Global And Local Tensions

Relying on the arguments made by Ravi Sundaram, I would like to highlight some of the tensions that arise from an any attempt at mapping out the space of the global within that of the national or the local, without an attempt to critically locate the various publics within the sphere of the local itself. I will try and link examine two apparently unrelated phenomena, the first is the impact that the globalization of intellectual property has on the practices of the marginal electronic culture that Ravi Sundaram speaks of and the second is the debates raised by the recent claim made by Rajnikant to protecting the sign that he uses in his latest blockbuster *Baba (2002)*.

Implicit in our current understanding of globalization is the fact that information and communication technology, especially the internet plays a great role in constituting the very process that we now understand as globalization. There have been various levels of descriptive frameworks used to understand the ongoing process. In the institutional description of globalization for instance, one often hears about the role that trans national organizations such as the world bank and the emergence of the World Trade Organization as major players in the process of globalization. The chief aim of the WTO is the establishment of standard rules and regulations for trade, and ensuring that legal systems across the world comply with the established global standard for the protection of intellectual property rights. There has for instance been much fanfare about the entry of China into the WTO, as it signaled not only the entry of arguable one of the worlds emerging economic superpowers but also the symbolic victory of the western legal model of intellectual property rights over the non western legal systems which were marked by a more ambivalent attitude about intellectual property, leaning more on the side of tolerance. In countries like India for instance while there has been a copyright law in place from 1957, it has only in the post liberalization years from 1992 been an active demand to make the enforcement of

⁹ Ibid.

IPR more stringent.¹⁰ The need for enforcement has translated into a public-private partnership between the info entertainment industry and the state. It is therefore acceptable to say that all the debates that take place in the world currently on intellectual property are preceded by the socio economic forces of globalization, and that these forces are what even makes the debate possible.

In 2002, the biggest star of the South Indian film industry Rajnikant launched his mega film *Baba* amidst much fanfare which included an announcement that Rajnikant has decided to protect a particular sign that he uses in the film. It was unclear as to how he could protect this sign and under what law he sought to protect it but from our point of view what was interesting about his decision, what was more interesting from the debate was the fact that he had decided that it was important for him to have this sign protected. For many years Rajnikant has cultivated a certain image which has included a number of antics like the manner he lit his cigarettes or the manner in which he wore his sun glasses etc to the extent that one would always in popular usage refer to them as Rajnikant's trademark style. So what then was the motivation in 2002 for him to want an official protection of this sign. There are a number of attributed reasons, one of them being the fact that given his popularity within days or weeks of the release of his film, elements of the film are used incorporated into other films or his actions are emulated by various mimic artists across Tamil Nadu. Rajnikant felt that he needed to protect himself against such appropriation, and the best way for him to do this would be through claiming an intellectual property right over his image. (India unlike the US does not yet have a developed right to publicity).

Taking from this particular instance I would like to push Ravi Sundaram's argument that there are a number of cyberpublics in India to state that there are also a number of global publics in India and that very often their entry point into the global economy may have very different trajectories, many of which may conflict with each other. I would like to draw the analogy of the developments in the entertainment and film industry to the developments in the open source movements etc to illustrate what some of these conflicts are. So what are some of these various global publics in India?

a. Rajnikant and the nationalist entrepreneur

In the past few years the film industry in India has found a new audience in the US and the UK. This is particularly so of some of the blockbusters from Bollywood which has found a new audience in the diasporic Indian audience living in the west. In the exceptional instance a star like rajnikant has also attained somewhat of a cult status in a country like Japan. The importance of the 'overseas' market has of course resulted in a few changes in the very structure of the film industry in India, where the imagined overseas audience has become central to the imagination of the narrative content of the film itself. This shift in the value of the star as a national or local commodity into being a global commodity also signals the entry point of the star into the language of the global entertainment industry. This language is one which is most accented by its use of the dialect of intellectual property, i.e. the star is a valuable commodity which has been created and authored through various procedures of investment, and these investments need to be protected from unauthorized appropriations. The story seems to sound distinctly like the story of the nationalist grid narrated earlier and the entry that India makes into the global economy. What gets transformed in this story is the conversion from a popular and informal use of the language of

¹⁰ See The Report on Copyright Piracy produced by the Ministry of Human Resources and development.

intellectual property ‘Rajnikant’s trademark style’ into a formalized language with no other option, rajnikant actually trademarking his style. This is the first part of the story of the global mapping itself out onto the national and the local. It is the story of the global commons as the marketplace where the Indian techno artists may deal on equal terms with his global contemporaries.

b. The Mimic artist, the fan and the electronic marginal

What is invisible to Rajnikant in his act of self recognition, is the fact that his star value has not been framed and crafted in a manner which is independent of the investment made by his fans and the mimic artists. And that the rajnikant persona is itself a result of various acts of appropriation and transformation. Thus when he seeks to protect his image from these fans and the mimic artists, it sounds deceptively like the story of the emergence of intellectual property enforcement in India with the state being asked by its new found global alliance to crack down on infringement. The story of India’s emergence as an IT superpower cannot be a story told only within the framework of the nationalist framework of software engineers from the various IIT’s but also about the countless vendors of software and hardware who have provided the infrastructure backbone of the IT industry. A backbone used by both the cyber elite and the many experimental users living on the marginality of the electronic industry experiencing their version of ‘new media’ to transform their contemporary realities. Therefore if earlier Rajnikant did not have a problem with the mimic artists, the state did not either understand nor could it control the ‘grey economy’ and in that version of the story, this economy existed in the marginal spaces of legality and illegality. With the mapping of the global upon the local, various domains of relationships and transactions get a visibility which it previously did not have, transforming them into acts clearly illegal and volatile of the very structures that would make their entry point into the global possible.

c. The cyberelite who does not watch Indian films

Within this large complex scenario are also the many cyber elites who do not watch films or rather do not have the need to. These users could be metaphorically equated to the various users in India having great access to the global debate on intellectual property and contributing and shaping the new reality of software ownership and production. They have the greatest access to the terms of the debate on the global commons in cyberspace and in code, but because of the time that they have spent in cyberspace have had little time to see the changes that have taken place in the landscape out side their doors. And yet their practices (free operating systems for instance) also could also at the same time prove to make possible the conditions of the mimic artists re entry into electronic culture after their existing market places have been shut by the global offices of Microsoft et al.

5. Conclusion

The idea of the commons has great value as a symbolic fiction attempting to critique the politics of intellectual property laws, and yet in a country like India it can be a very vacuous term devoid of any significant content if it is not mapped out onto the various publics and practices within India. My argument in this paper has been that globalization has made possible the emergence of the idea of a global commons being articulated in the context of the politics of IPR in software and cyberspace, and yet the conditions of globalization also create a new visibility to practices which

have always existed on the margins of legality in terms of IPR. Any attempt at understanding the 'emancipatory' possibilities of the global commons will have to understand and attempt to resolve this tensions and conflict as well.