Encountering the Sustaining Myths of Copyright

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(First Printed for Sarai/ ALF / Hivos workshop on Intellectual Property, Social Knowledge and Conflict, and then published on the web by www.infochangeindia.org) Encountering the Sustaining Myths of Copyright

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1. Encountering the sustaining myths of copyright

Copyright in recent years has acquired an all-pervasive status, entering into the realms of the everyday through various forms. It's most common appearance is as a newspaper story about the losses caused by piracy or a description of the latest threatno-innovative attempt to fight piracy. Post September 11th, the war against terrorism and the war against piracy have become close allies. Sometimes it acquires a certain glamorous appeal when a celebrity sues another for copyright infringement as in the recent case of Bappi Lahiri against Dr. Dre or Rajnikant claming a right over a sign that he uses in his film. Apart from these stories of anxieties around copyright piracy, there are also self-congratulatory nationalist messages of how India is mobilizing on its vast pool of knowledge workers to become a global super power. Irrespective of the nature of the story told, there often seems to be a number of elements in these narratives which have a common thread running through them, and in fact it could be said that it is precisely these

threads which makes it possible for us to weave together a story of copyright in the contemporary context.

It is our argument that an understanding of the insertion of the discourse of copyright into quotidian imagination is critical for an understanding of the profound transformations that are taking place within the realm of production and distribution of knowledge and cultural commodities. It is in these spaces that the myth of copyright is carefully constructed and constantly reinforced, and out very experience of media in any form is pre mediated by our understanding of its circulation within the economy of intellectual property. As Nitin Govil says "The uncanny "everywhereness" of piracy is, of course, merely the inverted image of the properly interpolated spaces of intellectual property"

This brief concept paper seeks to identify and interrogate some of the assumptions that underlie most of the common media stories about copyright. Copyright's greatest success has been to successfully transform itself into the status of myth by constantly rendering familiar certain figures (the poor struggling author), arguments (a man deserves to own what is his rightful labour) and rhetorical data (billions of dollars lost due to piracy). By specifically naming these assumptions as myths, we seek to question their truth premise. This is however, a task that has just begun and we shall have to work collectively to strive towards making arguments beyond merely providing counter factual, if we are to effectively counter the totalling rhetoric of copyright.

1. Some familiar tales of loss and anxiety

Exhibit 1:- "The failure to enforce the Intellectual Property Rights (IPR) laws has taken a heavy toll on the Government revenues and reduced employment opportunities, with the Government forgoing a tax revenue of over Rs.10,000 crores annually due to the proliferation of counterfeit consumer products alone, the Chief Justice of the Delhi High Court, S. B. Sinha, said here today. Inaugurating a seminar on new IPR laws organised by The Associated Chambers of Commerce and Industry of India (ASSOCHAM), Justice Sinha emphasised the need for training of judicial and police officers in all aspects of implementation of IPR laws so that there is adequate protection to the manufacture of

genuine products and the consumer is not exposed to the dangers of consuming fake products.

Mr. Sinha emphasised the need for creating consumer awareness and class action by manufacturers so that the counterfeiters could be brought to book. He said that counterfeit products were flourishing because there was a ready market in the country for such cheap, look-alike products. The acceptance of counterfeit products by consumers comes in the way of implementation of laws. Responding to the concerns expressed by the alternate president, ASSOCHAM, R. K. Somany, Justice Sinha said there was sufficient awareness among law makers and the enforcement agencies about the need to contain the menace of counterfeiting by proper implementation of IPR laws. What was, however, urgently required was all-round societal action against the offenders. The Minister of State for Coal, Mines, Law and Justice, Ravi Shankar Prasad, in his keynote address said it was critical to adjust the legal system to respond rapidly to the new technological environment in an effective and appropriate way, because technologies and markets evolve increasingly rapidly. This will ensure the continued furtherance of the fundamental guiding principles of copyright and related rights, which remain constant whatever may be the technology of the day.

It would involve giving incentives to creators to produce and disseminate new creative materials; recognising the importance of their contributions providing appropriate balance for the public interest, particularly education, research and access to information and thereby ultimately benefiting society by promoting the development of culture, science and the economy". The Hindu- 22nd September' 02

Exhibit 2:-

Mr Hardee told FE in an exclusive interview that Indian government needed to take a much more proactive approach to deal with copyright issues.

"India has not yet ratified the WIPO Copyright treaty and BSA would like to convince the Indian government to accept it for effective protection digital rights," Mr Hardee said, adding that he would also

discuss WTO services agreement related issues that are crucial for conducting electronic commerce over Internet.

“Intellectual property rights protection are the key to the continued growth of the software industry and a critical factor in attracting direct foreign investment. We want that Indian politicians and government official to talk about copyright issues to create awareness and also adopt strict anti-piracy policies in government departments to set an example,” he said”.

The Financial Express-21st August 02’

Exhibit 3:- Book piracy racket busted

By Our Staff Reporter

THIRUVANANTHAPURAM Aug. 26. The City Police today busted a racket involving unauthorised duplication and sale of foreign medical books from two photostat business centres in the Medical College area. As many as 150 unauthorised reproductions of several costly publications were seized in the raid. Police have filed a case under the Copyright Violation Act against the owners of the two shops. The raid followed a nationwide campaign by the Indian arm of the Publishers Association, U.K., to unearth piracy of books published by international firms. According to the police, the clandestine operation in the Medical College area was targeted at medical students. The modus operandi was to make a master copy of the foreign technical books which cost up to Rs. 4,000 each. Multiple copies made from the master pages are bound into book form and sold at Rs. 500 to 1,000 each. Counsel for the publishers, Priya Rao, who had arrived from Delhi said the raid had unearthed bound books as well as loose photostat copies. The books were neatly reproduced and sold with brochures.

Similar raids carried out in the Museum and Thampanoor police station limits during the last two days had uncovered a similar racket in popular novels. Police raids in these areas revealed about 200 reproductions of `Harry Potter' and Sydney Sheldon novels. While the original novels cost about Rs. 300, the pirated editions were selling for Rs. 50.

The unauthorised versions were seized from book shops as well as footpath vendors dealing in second hand books

Exhibit 4:-

SOON THE Indian Music Industry will be out of sight, there will be a cultural blackout and consumers will no longer be able to listen to music, virtually. That is what the Indian Music Industry - IMI - joining hands with the police and researchers tried to convey to consumers and media persons this past week as it held a conference to highlight the threat of music piracy. At a briefing at India Habitat Centre addressed by V.J. Lazarus, IMI President, J.F. Rebeiro, former Commissioner of Police, Abhik Mitra, MD, Saregama India Limited and Prakash Singh former Director General of BSF, the issue of piracy was raised and a campaign called `Sounds of Silence' to fight the "illegitimate music" was launched.

"Due to piracy we have lost over Rs. 1800 crore in the last three years. Despite being an offence as per the copyright act - Article 52 (1) (i) that calls for severe penalties - piracy is eating into the music companies," lamented Lazarus.

Though he reasoned that IMI has recorded 3652 criminal cases and made 4096 arrests in the last four years, only 30 cases ended in prison sentences or fines, although 191 cases ended in conviction.

He felt that this sorry state was due to a lenient attitude by those who should be providing the deterrent, while Rebeiro too admitted that for police it is one of the very low priorities. Moreover, slow processing in the courts adversely affects the required enforcement. The source of the trouble also lies in the lack of major hits and the high price of the original cassettes and CDs. For the latter they have their reasons. "People come to us asking why can't you sell a CD for Rs. 20 while the raw material costs you only Rs. 8, but they don't realise that the lyricists and each of the artistes have to be paid a good amount," said Abhik Mitra.

"If the government does not look into it fast, the industry will come to a halt within a year, for two out five cassettes and CDs get pirated now," says Lazarus.

1. Encountering the myths of copyright

The snippets of news items quoted above are just a glimpse of what has become a regular staple of newspaper stories, and yet there is a stubborn logic that refuses to accede so easily to the threats, blackmail and pleas of copyright protectionists. The spectral figure of copyright looms large over, but fails to entirely haunt our imagination. As with any other conflict, the 'battle for souls' is perhaps as important as the transformations talking place in the material world of practices. And it is within these spaces of imagination that we insert our current intervention. Drawing from the stories that we have taken from the contemporary representations of the conflict over copyright, we would like to examine some of the basic assumptions in copyright's self-narrated life.

Copyright has a rather straightforward justification for itself. We shall being with what may be considered a rather typical account of the necessity of copyright law. Copyright is that branch of intellectual property law which protects original works of authorship. These include literary, artistic, musical and dramatic works. In recent years Copyright law has been amended to include protection for performers rights. The key assumption that sustains copyright law is that authors have a natural right over their works of intellectual labour, and copyright protection is required to provide an incentive to create intellectual works. Copyright therefore grants an exclusive right to the author over his works, and these rights include a basket of rights including the right to authorize reproduction of the work, adaptation, performance, distribution etc. In the absence of a system like copyright, there would be no incentive for authors to produce and hence there would be a general decline in the world of creativity and the arts. However copyright inherently includes a balance between the protection of authors on the one hand and the interest of the public on the other. It is recognized that excessive protection may result in a curbing the ability of the public to use works, and hence copyright protects only unique expressions and not ideas per se. Copyright therefore seeks to achieve this balance by providing a limited term of protection (life of the author plus sixty years). Any person who therefore uses the works of another person's intellectual labour is indulging in an act of stealing the other person's ideas and this act of theft will result in huge losses for the author of the work.

As with any other totalizing story, the tale of copyright seems to have some intrinsic appeal, relying as it does on a progress account (copyright promotes creativity) and the dystopic world that it prevents (there will be no creativity without copyright). The reason why we choose to use the phrase the myth of copyright, is because we recognize the wonderful success of copyright in narrating itself as a universal truth. The history of copyright is always narrated in an ahistorical manner following a universal natural teleological route as though it were the natural culmination of events. Following Barthes, we would however like to interrogate the mythologies as forms of language, which are ideologically embedded in various practices of power and ideology.

We would in this section of the paper like to interrogate some of the arguments that seems to form the mythological structure of copyright:

1. Challenging the ahistorical account of Copyright: Contextualizing authorship and originality B. Copyright, information and the language of property C. Copyright and incentive for creativity D. Copyright protects the rights of authors E. The use of the language of theft and piracy in the discourse of copyright
2. Contextualizing authorship and originality

Copyright assumes as the subject of its enquiry the rights of the author. Simple as it sounds, this assertion has great import to our understanding of the conflict over copyright, for at the heart of the statement lies the presumption that we can clearly make sense of the idea of authorship without any problems. To juxtapose this statement with another ask any person to rattle of the names f the great authors, and you will find a varied crowd from Shakespeare, Chaucer, Kalidas, Valmiki to Salman Rushdie and perhaps Jeffrey Archer. There are then two sets of self fulfilling prophesies that are achieved by the assertion that copyright protects the rights of authors. It assumes a category which makes universal sense across cultures and across time, namely that of the author, and having erected this universal figure of the author and asserting that copyright is meant for the protection of the author, it universalizes the relationship between copyright and creativity as well. Our first task is then to historicize the emergence of the author figure or the author function, as a relatively modern phenomenon that arises in the context of the crisis caused by the print revolution.

Before the invention of the printing press, the act of writing was a very localised activity and it was impossible to disseminate knowledge in any significant manner since the inaccuracies of copying prevented any widespread use of the written work. The invention of the printing press enabled a number of innovations. Duplication became easier and more accurate. Mass distribution became viable. The printing press revolutionized information storage, retrieval and usage. Printing, unlike writing, allowed a society to build on the past with a confidence that each step was being made on a firm foundation. Printing generated confidence that new information was an improvement over old. The revolution in the ability to accurately reproduce works fostered an understanding that progress can occur through a process of revision and improvement. The increased accuracy and rapidity of new editions made possible by the printing press made the most recent editions more valued than the older. Additionally, access was now available to the literate public. Printing provided a mechanism by which a larger reading public developed, thus constituting the emerging public sphere.

This new reading public that emerged demanded books, original and reprints, and set in stage the crucial conflict over the ownership of such information. As Mark Rose observes, “a sufficient market for books to sustain a commercial system of cultural production” had to exist before the coming into being of a formal regime of intellectual property. What was earlier the monopoly of the Stationers Company, a guild recognised and regulated by the Crown, became a mass industrial activity with a number of publishers in the provinces (Scotland) publishing cheap reprints for the new reading public.

The reaction from the literary and artistic world was to move away from the ‘ills of industrial revolution’, and they began deploying the notion of the author as a unique and transcendent being, possessing originality of spirit. This romantic model was used as a means of rescuing the artists’ works from the hostile market and the public for whom mass production made works available as never before, but at the risk of turning it into an industrial product. The romantic artist was therefore deemed to have property in an uncommodifiable imaginary self, so originality was elevated to being located in and belonging to the self of the author. And

because the artist owns his original person or spirit, works created by such authors were also deemed to be original; and they could thus distinguish their personality from the expanding realm of mass produced goods. This is the moment when the romantic theory merges with the prevailing doctrine of property of the time, namely the Lockean theory of conversion, where an individual through his labour creates something of value out of nothing. This is of course also the theory that justifies the appropriation of the commons, including lands that did not belong to any civilized nation.

There is then a dual move which is set in place where the concept of the 'modern proprietary author' is used as a weapon in the struggle between the London booksellers and the booksellers of the provinces, culminating in the landmark case of Donaldson v. Becket. The entire claim in Donaldson v. Becket is made in the name of protecting the rights of the author (it must be noted that no author was involved in the case) and the individuality of their ideas, even though the primary benefactors from this new system of knowledge ownership were publishers, since all authors assigned their copyright to the publishers before publication. The modern proprietary author simply created a useful euphemism for protecting company rights to copy.

This invocation of the author significantly ties up copyright to the concept of an author. The proprietary author emerges as the London publisher's mode of maintaining strict control over copyright. However, once unleashed, the idea of the author starts taking on a new meaning with unexpected consequences. It emerges as a new social relationship, which will transform the way society perceives the ownership of knowledge. This establishment of the ideological figure of the author naturalises a particular process of knowledge production where the emphasis on individual contribution denigrates the concept of community knowledge and helps promulgate the notion of the individual as owner.

The significant contribution of literary theory through the works of Barthes, Foucault and Derrida has been to problematize our notions of the romantic individual author. What then do the work of Foucault, Barthes and Derrida mean for the legal interpretation of authorship. If legal scholarship and practise were to take note of the inroads made into the very notion of authorship and originality by these thinkers, we will need to reconceptualise the terrain that

we understand to be intellectual property laws. This reconceptualisation will necessarily have to shed of the burden of the author's originality and recognise the millions of traces which shadow the arrival of any work, and provide a means of structuring the relationship between such texts, its readers and society at large. It will mean a more nuanced understanding of the public sphere or what IP laws calls the public domain, with the presumption being that the author is not a figure who has to be protected from this public sphere but one resides and works within the public sphere. This restructuring of the relationship between authors, texts and interpretative communities will also demand a major increase in the ways in which these works may be modified, adapted and appropriated to enable what Derrida would call the field of infinite substitutions

1. Copyright, Information and the language of property

"If you have an apple and I have an apple and we exchange apples then you and I will still each have one apple. But if you have an idea and I have one idea and we exchange these ideas, then each of us will have two ideas" George B. Shaw

In this section we examine how, conceptually, intellectual property is justified. On examining Hegelian and Lockean theories of how Property is created, the fundamental question to be posed is whether information can be considered property in the same sense that a house or a car is considered property. The fundamental character of information is that it is a non rival good which means that the same assumptions of depletion, scarcity etc that are used while analyzing classical theories of property cannot fit in the same manner.

Many explanations for the propertisation of intellectual creations are based on a Lockean theory of the creation of property. Locke's theory relies on three basic principles; firstly that every person has property in herself; secondly, everything that is in a state of nature, i.e. not as yet propertised and is still held in common, was given by God to be propertised; and thirdly that labour converts things in a state of nature into a state or property and adds value to things so laboured upon. Therefore, Locke was of the opinion that if A mixed her labour into a thing that is in a state of nature, that thing becomes the property of A. In terms of copyright, author's can be

said to take the ideas that are ‘out there’ in common, add their labour to it, and what we have is the ‘work’. What Locke fails to answer is why, if authors add labour to ideas, it becomes the property of the author, and simply rests at the assumption that property is the deserts for labour.

The next question that may be asked is whether and how a person actually has property in herself. This property in oneself cannot be a product of one’s labour, and therefore must be premised upon something else. However, at the core of Locke’s theory, lies the notion of personal freedom, with state power severely constrained and limited to the protection of liberty, and it is in this context that he, again, presumes the ownership of oneself. Unlike Locke, however, Hegel does not see humans as naturally free, and therefore as having natural ownership rights in themselves. It is only through the historical process of objectification and hence self-confrontation that one comes to be free: “It is only through the development of his own body and mind, essentially through his self-consciousness’s apprehension of itself as free, that he takes possession of himself and becomes his own property and no one else’s.” In both theories, ownership of ourselves enables the ownership of natural objects as they become assimilated to our bodies.

Such a proposition meets several objections. Robert Nozick poses an interesting question. If I were to pour a bowl of radioactive soup (so that it could be traced), of which I was the owner of, into the ocean, and this radioactive soup mixed throughout all the oceans and seas, could it be said that I am now the owner all this?

Hegel would answer this in the negative for the reason that Nozick’s soup is not an expression of his personality. Central to Hegel’s concept of property is the notion that property is not only a necessary component in the development of personality, but a manifestation of this personality itself. Similar to the Romantic movement of the 18th century, for Hegel, a person must translate his freedom into an external sphere in order to exist as Idea, and the resultant property is the manifestation of this translation.

According to Hegelian arguments, occupancy, not labor, is the act by which external things become property. This occupancy, or taking possession, can be done in three ways; firstly, by directly

grasping it physically; next, by forming it; and thirdly, by merely marking it as ours. It is the second of these ways of possession that is most interesting for our purposes. As Hegel remarks, "When I impose a form on something, the thing's determinate character as mine acquires an independent externality and ceases to be restricted to my presence here and now and to the direct presence of my awareness and will." This statement reverberates in copyright law's recognition of the rights of the author of works when those works are changed or 'mutilated'. The law looks upon this 'mutilation' as an violation of the personality of the author as manifested through that work. However, the fundamental question that law does not answer is how this constitutes a violation of the author's 'personality'.

Moreover, as is seen with the Romantic conception of the Author, Hegel fails to account for the external influences on creations. Hegel's conception of property being the expression of the will of the individual fails to see that this 'work' is influenced by various other factors; painters, musicians, writers, all learn their skills and are classified into genres and styles; artists may take inspiration from everyday scenes, and author from gossip. In such situations can their 'works' be said to be an expression of their soul?

Locke locates the desire for propertisation of the commons in need for preservation of resources. According to him, if resources are left in the commons their utility will gradually diminish because of over use or neglect. Land, for example, may be overgrazed or may by neglect become unarable, and in both cases the utility that this land provides is diminished. Locke assumes that once a resource is taken from the commons and transformed into private property the owner of that property will use such property in a manner that preserves its value in use. Even if we accept these assumptions, can this theory of the need for propertisation be extended to incorporeal ideas? Does the 'over use' or neglect of ideas lead to the reduction of their value in use?

Bernard Shaw's quotation about the sharing of the ideas is a simple yet effective demonstration of the nature of ideas and information goods. Information just does not share the same characteristics as classical 'real property'. The dissemination of ideas, for instance, does not reduce their use value. Information is considered a 'non-rival' good, in the sense that usage of that information cannot

impair the utility to another user of that information. It has also been characterised as non-excludable in the sense that use of that information does not exclude other users from utilising that information. The best example of this is software. The only way a person can prevent the copy of software is by preventing third persons from accessing it. Once access is granted, it can be copied for almost no cost. This copying, moreover, does not affect the utility of the software itself, nor does it prevent the usage of that software by the original owner

The sharing of information goods, especially in the digital context for instance does not diminish in any manner the quality of the good that is shared. There is clearly a movement away from the idea of property as we have always understood it, and copyright displays a stubborn drive towards taming this new monster created out of developments in information technology.

There are a number of contradictions in the attempt to equate information goods with classical property which are becoming more glaring. Some of these are internal contradictions within the larger machinery of production and consumption. Thus, on the one hand you have hardware manufacturers creating better CD writers at a cheaper price advertising their products with the magical words, BURN, RIP, COPY, DUPLICATE, STORE etc. On the other hand you have the content industry screaming hoarse at these new technologies which are making it easier for people to steal information unethically.

1. Copyright and the incentive for creativity

It is often argued that in the absence of copyright protection that Authors would lack the incentive to create more works thereby depriving society of useful works that may have been produced. This part questions the subsumption of incentive in copyright theory.

One of the main justifications for copyright law is that in the absence of an intellectual property rights regime, authors of works would lack the incentive to further create; that artists cannot produce new works without economic incentive. Intellectual property law, therefore, is often justified on the basis that it stimulates investment of time and money in the creation of new

works and that many authors of the works of copyright rely on the income that they derive from the publication of their works for their livelihood.

Additionally, it is claimed that in the absence of copyright protection covering an author's creation, the low cost of copying such works will induce competitors to 'steal' another's product without penalty and therefore, rivals may profit from another's intellectual efforts without expending any energy or costs other than the relatively minor costs required to duplicate the socially valuable creation. Consequently, the incentives of authors to generate beneficial informational works will be greatly diminished, if not entirely eliminated. They will not be able to reap pecuniary rewards for their efforts or even recover their costs in many cases because of competitors copying their works and undercutting their prices. Given that authors will have little hope of recovering their investment, the production of works will be seriously curtailed, and its associated benefits upon society will be lost.

While there may be a case for the proposition that without incentives authors would fail to create new works, the statement that copyright law is the basis for this incentive requires a closer examination. What is essentially argued here is that copyright is not synonymous with incentives, and that in the absence of copyright authors have created. It is also argued that in many instances, this incentive that copyright appears to give authors is illusory.

Firstly, many authors who have little hope of ever finding a market for their publications, and whose copyrights are, as a result, virtually worthless, have in the past, and at present, continue to write. While it may not be a general phenomenon, it is possible that people produce works for pure personal satisfaction, or even for peer respect and recognition.

Secondly, historically, there is much to suggest that copyright law and incentive were rarely linked. The 19th century saw the prolific authorship of literary works, in the absence of any meaningful protection afforded to authors by virtue of their copyright. While copyright protection existed, these rarely benefited the author beyond an initial payment for the copyrights in their works. This payment, often referred to as an honorarium, bore no relationship to the exchange value of that work, but was rather an

acknowledgment of the writer's achievements. In the vast majority of cases most of the profits went to the publisher and, on occasion authors were even asked to underwrite a portion of the publishing costs. Moreover without the publisher the copyright in effect had no value, as the work could never get published. Hence copyright protection in reality benefited the publisher, and rarely the author.

Furthermore, with the enactment of every subsequent Copyright Act, the protection given to authors was reduced. In England, prior to the 1814, copyright in the work reverted to the author after a term. The author could renew proprietary rights in its work, and could conceivably gain from again transferring the copyright. However after 1814 such renewal terms were eliminated and the author lost its position in the mechanisms of copyright. The typical transaction consisted of the transfer of the copyright to the publisher by the author, of a one-time payment. Subsequent to that the author had little role to play in the publication of his work and the author reaped little reward.

This can be seen in a number of recent cases regarding the translation of works into new media. What is at issue is in these cases is, whether the author, who has transferred copyright in, say a cinema, to another party, has a proprietary interest in translations of this work into new media, say release over the internet, the development of which was unforeseen at the time of transfer of copyright. In the United States, there are a number of cases where it has been held that the author no longer has a proprietary interest in these works that have been translated into new media. In such cases where does copyright provide an incentive to authors?

In addition, the existence of alternative and different types of incentives further erodes the incentive claim of copyright protection. Two non-pecuniary incentives have been identified above; personal satisfaction and recognition. Many people have created works without the thought of pecuniary benefit. It is doubted that Anne Frank wrote her diary or Nehru his letters with the intent to eke the benefits arising out of copyright protection.

Furthermore, advancement and honour in one's field, and recognition, are other forms of compensation for authorship. As the honorarium discussed above shows, there is a great prestige value to composing a book or article or piece of art recognized as a

leading piece in its field. These incentives will always be present, regardless of whether one is awarded monopoly rights in her work.

Original authors may also have the benefit of being the first mover in the market. By entering the market first, the authors of works may be able to capture a certain degree of the economic rewards that intellectual property rights aim to bestow even without the actual conferral of such legal rights.

Currently there exist several mechanisms, which are primarily internet based, for creating incentives that stand independent from copyright. The Street Performer, or the Fairshare Protocols are examples such devices. Under the latter system several people make a payment directly to the author to finance future works with the understanding that they are given access to a portion of the consequent profits. Under the first method, the authors contemplate a menu of options available to artists. What each have in common is that a release price will be set for a work, and that it will be made available in digital form, without (or largely so) copyright restrictions, once members of the public voluntarily donate sufficient funds to meet the asking price. An author might set up her own website and announce her book project directly to her public. Usually, although not necessarily, the author might begin by posting a chapter or two to give readers the flavour of what is to come.

1. Copyright protects the poor struggling author

We are constantly regaled with stories of how copyright as a system acts as the basic protection for poor struggling authors who would otherwise not have any mode of protecting themselves against pirates who reproduce their goods or others who steal their ideas. Let us at the very outset clarify that we are certainly not enemies of creative workers, and we would of course like to see all creative labour recognised and rewarded. But the question for us to answer is does copyright really achieve that, and if not why does this image of the poor struggling author keep coming to mind?

What the metaphor of the poor struggling author does is invisibles the critical difference between the authorship of a work of intellectual labour and the ownership of the same. While there is a tendency in copyright law “to invoke liberal individualism to justify

economic structures that frustrate the aspirations of real-life individuals, it is somewhat surprising to encounter the individualistic Romantic conception of "authorship" deployed to support a regime that disassociates creative workers from a legal interest in their creations: the "work-for-hire" doctrine of American copyright law. Where the doctrine applies, the firm or individual who paid to have a work created, rather than the person who created it, is regarded as the "author" for purposes of copyright ownership". Thus we have a situation where more often than not works of copyright conflict are created by unromantic authors sitting in their cubicles creating for a large corporation like Microsoft.

When a work is deemed to have been made "for hire," the alienation of labour is formally and legally complete: the "author" of the "work" is the person on whose behalf the "work" was made, not the individual who created it. In this legal configuration, the employer's rights do not derive from the employee by an implied grant or assignment. Rather, those rights are the direct result of the employer's status. Ironically, the employers' claims are rationalized in terms of the Romantic conception of "authorship" with its concomitant values of "originality" and "inspiration."

Secondly if one were to closely analyze the publishing agreements of various publishing houses, one notices immediately that unless you are an author of some fame, the contracts are absolutely one sided, with the individual author having little bargaining power, as s/he assign all rights in favour of the publishing house.

Piracy has always been portrayed as being an assault on the rights of authors. It is interesting to note for instance that during the initial days of T series, T series were often approached by various small time ghazal singers requesting them to release their works through the pirated circuit, as HMV, the owners of the copyright in the work were unable or uninterested in issuing the works, and the authors of the works therefore did not have a chance to ensure that the works were available to the consuming public.

The example of J K Rowling as a struggling singe mother is often used as the analogy for whey copyright protects the rights of poor authors. While we are all happy for Ms. Rowling, what is not convincing is how the example applies even after the publication of

the fifth or sixth Harry Potter book, by which time Ms. Rowling is now of the highest paid authors in the world, with many millions in excess. Clearly pirates respond only to a market demand, and it is not every book that is pirated. There is a particular popularity or price limit that is required to be achieved before it enters into the piracy circuit, and presumably if a book has achieved a certain status for it to become pirated, the poor struggling author has already disappeared. Thus, the sight of Madonna appearing in TV ads condemning piracy, because it deprives her of livelihood does not quite convince when images of her many villas and islands flash in your mind.

1. Economic Losses caused by Piracy

The most common use of statistics in the copyright tale is the amount of losses caused as a result of piracy. Thus for instance in the case of computer software one would encounter the following:

The extent of software piracy and losses due to such piracy cannot be given in exact quantitative terms though it is believed that piracy in this sector is wide spread. In Europe alone the sofware industries lose an estimated $ 6 billion a year. In fact, Europe holds the dubious distinction of accounting for about 50 per cent of world wide losses from software piracy, more than any other region including the number two Asia. According to a study of Software Publishers Association, a US based body, losses due to piracy of personal computer business application softwares nearly equalled revenues earned by the global software industry. In 1996, piracy costed the software industry US $ 11.2 billion, a 16 percent decrease over the estimated losses of Us $ 13.3 billion in 1995. The country-specific data show that in 1996 Vietnam and Indonesia had the highest piracy rate of 99 per cent and 97 percent respectively, followed by China (96%), Russia (91%), Thailand (80%) etc. In India software piracy is costing the IT industry quite dear. According to a survey conducted jointly by Business Software Alliance (BSA) and NASSCOM in May 1996, total losses due to software piracy in India stood at a staggering figure of about Rs. 500 crores (US $ 151.3 million) showing about 60 per cent piracy rate in India. - MHRD Report on Copyright Piracy

These statistics often rely on certain dubious economic assumptions. The main one of course is the assumption that a

person buying an illegal copy would necessarily buy as legal copy of the same if piracy did not exits. Thus while we know that most computers in India have an illegal copy of Microsoft XP and Microsoft Office, can we assume that every user would be willing to pay an additional Rs. 23,000 for these two software alone, especially in light of a free alternative in the form of Linux.

In a very insightful study, Carlos Osorio seeks to empirically understand the phenomenon of piracy. He starts with the assumption that Computer software have the characteristic of being a non-rival and quasi non-excludable good. Thus "One may prohibit a third person from using it only by not letting him (or her) to access a version of the software. Once access is granted, however, the software can be copied at almost zero cost. By doing so, new users cannot exclude the earlier from using the software -as with a bicycle or a jacket- and, by direct and indirect network effects, the new user adds value to the whole network of users (legal and illegal)". The question for him then is What are the effects of illegal copying of software, commonly known as "piracy", on the overall software market? Why do some software companies enforce their intellectual property rights differently across countries?

He states that classically, illegal copying is commonly assumed to be function of the software's price, potential market's average income per capita, and marginal cost of copying versus producing the software. However he states that in addition to these common assumptions, it is also important to examine the role of direct and indirect network effects in explaining the importance of illegal users in the diffusion process. His argument is that software companies might have a direct and indirect role in helping the generation of illegal copying in underdeveloped markets, and incentives for doing so. In terms of business strategies, for instance, some ways of doing it are by undersupplying system compatibility, generating lock-in for users of their product, and by lack of "sponsorship" in some markets

Furthermore, piracy often acts in underdeveloped markets as the most efficient manner of creating a market or user base and also to create a lock- in period for the product. Thus Microsoft has consistently refused to enforce its intellectual property rights in markets in developing countries till such time that market base is created for its products. Piracy works to produce network effects:

Network effects are important because, in terms of the total user base, the illegal users of software add value to all the users, legal and illegal, and act as agents in fostering the software's diffusion process by word-of-mouth. By this way, they indirectly generate additional positive effect for the software company.

Conclusion

"Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one." -John Rawls in A Theory of Justice

"the admiring fascination of the rebel can be understood not merely as the fascination for someone who commits a particular crime but that someone, in defying the law bares the violence of the legal system or the juridical order" -Jaques Derrida, The mystical foundation of authority

The task of this paper has been to examine the various myths that sustain copyright. This is just the beginning of the process and if we are to seriously engage with the totalizing logic of copyright, there are two tasks. Firstly, we will need to continue to chip away at the foundational logic of copyright, exposing the shaky grounds on which it makes its universal claims. Secondly, we need to actively examine alternative models through which we can understand the production and dissemination of knowledge and culture. The existence of alternatives to copyright, such as Copyleft, the Open Source Movement, Fairshare and Open Street Protocols belie the reality of Copyright. Conceptually, these alternatives challenge the fundamentals upon which copyright rests; there is no single, the emphasis is on the ability of users to modify and distribute works, yet there is still 'incentive' to create as is evidenced by the success and spread of Linux; essentially there is no contradiction of purpose as it creates public rights for a public purpose.

If the world of copyright constructs itself as the only model of incentive, reward etc for creative labour, the symbolic power of the

open source movement rests in the creation of alternative social imaginaries which turns every assumption of copyright upon itself.

There is however a world of quotidian media practises which do not fall squarely within the alternative progress narratives of copyleft, open source etc., and this is the world of illegal media networks and practises. This is also the world that copyright seeks to demonize and in our search for alternative models, it is also critical for us to engage with the 'subterranean' other of the open source movement, as the pirates go about redistributing wealth in the information era.

Annexure-1

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Annexure-2 Basics of Copyright Law Understanding Copyright Law makes a distinction between tangible property and intangible property. Your car, house, land etc are all examples of your tangible property. Whereas if you are the author of a book, then the way in which you express your idea is your valuable property. This intangible property is also known as intellectual property. We will examine the provisions of the copyright law in India by answering some frequently asked questions. What is copyright? It is an exclusive right granted to an author of an original work (e.g. lyrics, movies, computer programmes, paintings and even an architectural building) for a limited period of time. What are the classes of works covered under copyright? There are three types of works in which copyright subsists. a) original, literary, dramatic, musical and artistic works. Literary : literary work basically means any form of written work e.g. J. K Rowling's "Harry Potter". Literary work also includes tables, compilations, computer programmes etc. Dramatic: dramatic work is generally work that can be enacted e.g. the play script of Devdas. It also includes recitations, choreography, dumb shows etc. Musical : a piece composed by Ravi Shankar is an example of a musical work. It is basically the combination of melody and harmony. Artistic work: artistic work means visual art (painting, sculpture, drawing etc).. An artistic work could also include a comic strip, photography etc. Remember The stress here is on the word 'original'. The word 'original' for the purpose of copyright law has a much narrower meaning than common sense. Copyright law is not concerned with originality of ideas but with the expression of thought, for e.g. the idea is " reaching the moon" on which Mr X has written a poem. Then Mr. Y decides to write a poem on the same idea of 'reaching the moon". The poem that Mr Y writes is different, the words that he uses to express the idea are different. So one can conclude that Mr Y's poem is an "original literary work" b) Cinematograph films: A cinematograph film is a

visual recording. It is a combination of all arts and music (e.g. soundtrack, acting, dancing etc.) which cannot be detached from itself. When a cinematograph producer commissions a composer of music or a lyricist for the purpose of making a cinematograph film, or composing music or lyrics, and in return he pays them duly for their work, he becomes the owner of all the copyright in the work that is produced. Remember No copyright subsists with the composer of the lyrics or music composed unless there is a contract to the contrary.

c)sound recording: “sound recording” means recording of sound regardless of the medium or method in which such recording is made. E.g. (tapes, records, disc, perforated roll and other devices) A good example of a sound recording would be an audio cassette. For example ‘Pandit Hari Prasad Chaurasia’s greatest hits’ by HMV. What is the owner of a copyright authorised to do? The copyright owner has various rights. The law authorises him to: 1. Reproduce the work- reproduce basically means making copies. When I make copies of a master copy of a tape called ‘music with Ram’ then I am actually reproducing it. In the case of a book every copy and every new edition can be considered as a reproduction. 2. Perform the work in public. 3. Make a cinematograph film or sound recording in the case the work is a literary, dramatic or musical work. 4. Make translations of the work. 5. Make adaptation of the work 6. In the case of a computer programme to sell or give on commercial rental, any copy of the computer programme. 7. In the case of a cinematograph film/ sound recording sell or give on hire any copy of the work. How long can a person have copyright in a work? In the case of a published literary, dramatic, musical or artistic work the copyright subsists during the author’s life time and 6o yrs after his death (one will have to start counting the 60 yrs from the beginning of the calendar year that follows the year in which the author died.). In the case of an anonymous work, cinematograph film and sound recording the copyright shall subsist until 6o years from the beginning of the calendar year that follows the year in which the work is publish. E.g. Mr. Z publishes a book in the month of January 2000. He dies in December 2000.The copyright will vest with the copyright owner of the book until December 31st 2060. Remember After the lapse of the term the work will belong to the public domain. Any person can now make copies the book, translate the book etc., without permission. e.g. Tagore’s work can now be published by anyone because it’s been sixty years since Tagore

died. When is a copyright infringed? Copyright is infringed when: a) a person who does not have a licence granted by the owner of the copyright or registrar of copyrights, does something which only the owner of the copyright has the exclusive right to do. e.g. Mr. X is the distributor of VCDs for a film titled “cats and dogs”. Mr. Y who does not have the licence, imports VCDs of “cats and dogs” from Malaysia and distributes it to various video stores who rent out VCDs. Here Mr. Y and the Video stores that buy the VCDs are infringing the copyright that vests with Mr. X and the producer of the film. b) When a person permits(for profit) the use of a place for the communication of the work to the public (here the communication of the work is an infringement of the copyright of the author or owner).E.g. if a person allows an infringing play to be staged in his auditorium this will be an infringement. However, if he/she were not aware that such communication to the public would be an infringement of copyright, he/she would not be liable.

Remember that all ‘infringing copies’ of a work in which copyright subsists are deemed to be the property of the owner of the copyright. The owner can sue for the recovery of possession of the copies. What is the penalty for infringement? Sec 63 of the Copyright Act 1957 envisages three situations: a) In the first case it covers a person who has infringed another person’s copyright for a commercial purpose or for profit. Example, Video Parlours, VCD sellers etc., The person infringing should have knowingly made an infringement or knowingly helps in making an infringement. He/she will be punishable with imprisonment for six months, which could extend up to three years and a fine of Rs.50, 000 that could extend up to Rs 2,00,000. b) In case the infringement has not been made for gain in the course of trade or business the person will be punishable for a sentence of imprisonment for a term less than 6 months or fine less than Rs. 50,000. c) In the case of a computer programme, any person who knowingly makes use of an infringing copy on a computer will be punishable with imprisonment for seven days which may extend up to 3 years. And with fine not less than fifty thousand rupees, which may extend up to 2 lakh rupees.

In Indian Express Newspaper (Bombay) Pvt. Ltd. v. Jagmohan (AIR 1985 Bom 229), the Bombay High Court has emphatically stated that there is no copyright for happenings and events which could be news stories, and reporter cannot claim any copyright over such events because he has reported it for the first time. The Bombay

High Court said that the ideas, information, natural phenomena; and events on which an author expends his skill, labor, capital, judgment and literary talents are common property and are not the subject of copyright. Hence, there is no copyright in news or information itself. However, copyright may be obtained for the form in which they are expressed, because of the skill and labor that goes into the writing of stories or features and in the selection and arrangement of the material. In the case of R G Anand v. Delux Films and Others, (AIR 1978 SC 1614),RG Anand penned, produced and staged a drama called "Hum Hindusthani" and Delux Films made a film `New Delhi' on the same theme and released in 1956. RG Anand saw the film and found it an exact copy of his drama. On a suit filed by Anand, the lower courts found no infringement of copyright. The case reached the Supreme Court, and the Supreme Court found that while there similarities in the two works, it could not be said to be a violation of copyright, as there were also substantial dissimilarities between the two works. The Supreme Court explained what the tests of infringement were: 1. There can be no copyright in idea, subject matter, theme, plots, or historical or legendary facts. 2. Where the same idea is being developed in different manner it is manifest that source being common, similarities are bound to occur. In order to be actionable the copy must be substantial and a material one which at once leads to the conclusion that the defendant is guilty of an act of piracy. 3. According to the Court, one of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the same opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original. 4. Where the theme is the same but is presented and treated differently so that subsequent work becomes a completely new work, no question of violation of copyright arises. 5. Where, however, the question of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. A similar situation arose recently when the serial “Karishma-A Miracle of Destiny” was alleged to be a plagiarised version of Barbara Taylor Bradford’s novel “Woman of Substance”. The High Court has reversed the stay order on the telecast of the serial and directed Ms. Bradford to pay damages. The petition to challenge this HC order was dismissed by the Supreme Court, which reversed the order directing damages.

Exceptions: Doctrine of Fair Use The moral justification for copyrights is that a person should be able to reap the benefits of his own creation or mechanical labour. The doctrine of fair use, seeks to limit that exclusive right, to some extent, in specific instances of overriding social interest. A copyrighted work can be used without the consent of the copyright holder to facilitate education, research, dissemination of knowledge and information for promotion of economy and culture of a society. Fair use doctrine is a valid defence when there is market failure, or transfer or transfer of the use to the defendant will benefit the society, or when such a fair use would not cause any substantial injury to the copyright owner. Some typical circumstances under which the exceptions to copyright infringement are invoked (fair use or otherwise) are described below: i) Factual material is open to public inspection, ii) Act was done for Parliamentary/judicial proceedings, iii) Acts done in pursuance of ends specifically authorised by statute like advancement of education, library, research, copied in the course of instruction, performance in classroom, broadcast recorded for educational use, iv) Protection of public's right to be informed through photographs, news shots, reporting of events, v) Use for the purposes of criticism or review, vi) Reasonable limits are envisaged on the use of copyright monopoly, vii) Public reading or recitation of a literary work, viii) Recording of a work, by a party that is entitled to broadcast it, ix) Showing of broadcast to public audience, who have not paid for admission to venue, x) Home-taping of broadcast, xi) Reproducing one's own work, or using parts of it, xii) Once a sculpture/work of art is publicly situated, it is permissible to film and broadcast it, xiii) Reproduction of a article not in an artistic effort, xiv) Backup copies of computer software, xv) Where author may be presumed to be dead for more than the time gap that is permitted for copyright to exist, after the death of the author/artist, xvi) Copies made to advertise the product itself.

In the Indian Copyrights Act, 1957, section 52 indicates the incorporation of the "fair use" doctrine. Section 52 explains what is not an infringement. If `fair dealing' is not allowed, and everything other than `original' is not hindered from reaching the world, the copyright regulation would have become a hindrance for the democratic need of communication and information flow. Under this section clause (ab) permits the lawful possessor of a computer program, to `obtain any other essential information' for interoperability of an independently created computer program, if

that information is not readily available. Secondly, clause (ac) the `observation, study, or test of functioning' of the computer program in order to determine the ideas and principle which underline any elements of the program while performing such acts necessary for the functions for which the computer program is supplied. Thirdly, clause (ad) allows the making of copies or adaptation of the computer program from a personal legally obtained copy for non-commercial personal use. Importing of books into India is an infringement according to Section 51 (b) (iv) of the Copyrights Act of 1957. Earlier importing for the private and domestic use of the importer was not an infringement. The words "except for the private and domestic use of the importer" omitted by Act 65 of 1984, Section 3 with effect from October 8, 1984. Another provision is added to this section saying that the import of one copy of any work, for the private or domestic use of the importer is not an infringement.

Another look at the myths of copyright Finally, it would be interesting for us to have a look at a classical example how the myths of copyright are explained. Brad Templeton's little table is perhaps the most downloaded guide on the myths of copyright.

FICTION FACT 1#Unless there is no notice of copyright, it is not copyrighted. Notice is not required, especially under the Berne Convention.If it looks copyrighted, you should assume it is. 2# If one doesn't charge for it, it is not a violation. Commercial value will only affect damages, and not change the fact that infringement invites legal action. 3# Posting on the net are in the public domain, and can be freely made use of and distributed. Nothing is in the public domain unless explicitly indicated.You abandon all rights the moment you grant something to the public domain. 4# A posting on the net can be defended by the fair use doctrine. Intent, and damage to the commercial value of the original determine the availability of the "fair use" defence.It is only available for vary socially useful purposes. 5#Copyright is lost, unless you don't defend it. Copyright is effectively never lost, unless you explicitly giver it away. 6# You can have a name copyrighted. You can't have a title copyrighted. 7#In indicted, I have access to the rights of a defendant. Conviction is difficult. Copyright is covered by civil law, where the rights of the accused do not apply. But, in many countries copyright is being shifted to the relams of criminal law. Recently in the USA commercial copyright, violation involving more

than 10 copies and value over $2500 was made a felony. 8# I am actually helping the copyright-holder, as the infringement will result in free advertising of his work. The infringer does not have to rationalise. It is up to the copyright-holder to decide whether he wants that kind of advertising or not. 9# If you are emailed something, you can post it. If you own a copy, you don't own a copyright.If you want to report on an email, you are free to discuss it, reveal its contents, even quote parts of it, but not post the entire mail. On the other hand, you are unlikely to get nay damages, for the posting of non-secret, personal of little or no commercial value.

Annexure-3: A chronology of Copyright:

"Gutenberg and Caxton changed the possibilities of copying a work with the introduction of mechanical printing, and the subsequent viability of commercial publishing. Half a millennium later, the Internet has further revolutionised matters, because it permits virtually unlimited duplication of documents at a single key-stroke." The following timeline enumerates the events leading to the evolution of the modern copyright framework vis-à-vis UK/US:

1. -Johannes Gutenberg is the first in the Western world to print using movable type. 1492 -William Caxton introduces the printing press into England. 1557 -Queen Mary I gives control of all printing and bookselling to a single guild, the Stationer's Company. 1662 -The Licensing Act establishes a register of licensed books, as well as requiring a copy of a licensed book to be deposited with the Stationer's Company, who are given powers to seize books suspected of being hostile to Church or Government. 1681 -The Licensing Act is repealed, but the Stationer's Company has now passed a by-law establishing rights of ownership for books registered to its members, so the Company is able to continue regulating the printing trade. 1709/10 -The Statute of Anne is enacted in 1709, which becomes effective on 10th April, 1710. Copyright in books and other writings now has the protection of an Act of Parliament. Prior to this, disputes over the rights to the publishing of books could be enforced by common law. The Statute of Anne (being a law passed during the reign of Queen Anne) is the first modern copyright law in England, and the first in the English-speaking world. Writers are given control of their works for a limited period of 14 years (with the option of renewing for another 14 years). 1774 -The House of Lords declares that authors and

publishers have no absolute property rights over their works. 1790 -Like the Statute of Anne in Britain, the U.S. Copyright Act of 1790 gives writers of books, maps, and charts a 14-year copyright, with the option of renewing for a similar period. Major revisions to the Act are undertaken in 1831, 1870, 1909 and 1976. 1833 -In the reign of William IV, the Dramatic Copyright Act is enacted. This is effectively the first British Act to protect performing rights in dramatic works, though only for a limited number of years. (The performing right is defined as the "sole right of representation or performance"). After this Act, many other copyright measures are passed, most of which are repealed on the passing of the great codifying Act of 1911. 1842 -In the subsequent Literary Copyright Act of 1842, authors are granted lifetime property rights in their own work. This Act grants copyright for 42 years from the date of publication, or the life of the author plus 7 years, whichever is the greater. But the Act fails to cover performances of dramatization of non-dramatic works. Unless an author dramatizes his own literary works, stage productions are not copyright protected. Further, if a play is published before being produced, the performing right is usually lost. As a consequence, some authors employ actors to give a single "copyright performance" - of a stage dramatization of one of their works (a novel, or narrative poem, for instance) - "in a place of public entertainment", in order to establish dramatic copyright. 1886/7 -The seminal Berne Convention for the Protection of Literary and Artistic Works is signed (in Berne, Switzerland). It intends to give international copyright protection to the creative works of the citizens of European member state signatories. Works protected include: novels, short stories, poems and plays; songs, operas, musicals, sonatas and symphonies; drawings, paintings, sculptures and architectural works. In the International Copyright Act of 1886, Great Britain gives assent to the obligations of the Berne Convention. This Act abolishes the requirement to register foreign works, and introduces an exclusive right to import or produce translations. The U.K. ratifies the Berne Convention with effect from 5th December, 1887. The U.S., however, remains governed by its 1790 Copyright Act, and is not subject to the Berne Convention. Longstanding U.S. literary and musical piracy of works by European authors and composers (and vice-versa) continues to be an accepted way of life for publishers, until finally brought to an end by the establishment of separate bilateral copyright agreements with the U.S. The Berne Convention is revised in 1908 and 1928. The Berlin Act of 1908 extends the duration of copyright to the life

of the author plus 50 years, takes account of new technologies, and declares that formal registration is unnecessary in order to hold a copyright. The Rome Act of 1928 is the first to codify the moral rights of authors and artists. 1909 – A major third revision to the U.S. Copyright Act is completed. More categories of protected works are included than ever before (effectively, all works of authorship). The renewal term is also extended from 14 years to 28, taking the total possible period of protection to 56 years. 1911/12 – The Copyright Act, 1911, comes into force in Britain on 1st July, 1912. For the first time, all provisions on copyright are unified in one Act. The Act adds to the composer's rights that of controlling reproductions of his work by any mechanical means, and his right to authorise performances. Sound recordings are now protected (as are works of architecture). The Act abolishes the requirement to register copyright with Stationer's Hall, and abolishes common law copyright protection in unpublished works, apart from unpublished drawings and photographs. Copyright duration is extended: it is granted for the life of the holder plus fifty years after his death. This new Act gives the copyright holder three principal rights: (1) to print and sell copies of his work [largely via publishers]; (2) to reproduce his work by means of mechanical contrivances, such as gramophone records and perforated piano rolls [thus the necessity of establishing what became the MCPS]; (3) to perform works in public, and to authorise these acts [thus the necessity of establishing the PRS]. Each of these rights can be separately exercised.

2. –Following a test case brought by the Gramophone Company against a coffee shop [Gramophone Company Ltd. v. Stephen Cawardine & Co. (1934)], the British courts now recognised that owners of sound recordings should be paid for the broadcasting and public performance of their copyrights (songwriters were already being remunerated for these activities by virtue of their membership of the Performing Right Society). This acknowledgement of a separate right (from songwriters' rights), led to the establishment of a new collection society – PPL (Phonographic Performance Limited) – with a specific permit to collect and distribute broadcasting and public performance royalties on behalf of UK sound recording owners. 1956/7 –The Copyright Act, 1956, comes into force on 1st June, 1957. It takes into account further amendments to the Berne Convention, and also the Universal Copyright Convention, to which the U.K. is a signatory. Films and broadcasts are now protected in their own right. The

Performing Right Tribunal, predecessor of the Copyright Tribunal, is established. 1961 –The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations is signed. This proves important to the recording industry, and assists in the prevention of recorded music piracy (further strengthened by the later Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, of 1971.) 1976 –In the fourth major revision of the U.S. Copyright Act, fair use and first sale doctrines are codified for the first time, and copyright is extended to unpublished works. In anticipation of becoming a Berne signatory, this statute is framed to bring the U.S. more into line with international copyright law. 1984 –Richard Stallman, working at MIT, founds the Free Software Foundation, which is believed to be the first anti-copyright organisation of the digital era. 1988 –The United States finally becomes a signatory to the Berne Convention. 1995/6 –The period of copyright is extended, in Europe and then America, to the life of the author plus 70 years p.m.a. (post mortem auctoris) for most printed works. (Sound recordings remain at 50 years.) In the U.K., works created on/after 1st January 1996 become 70-years p.m.a..) 1996 –In the U.S., the TRIPS Agreement restores, from 1st January, 1996, copyright protection to many works of foreign origin which are already in the public domain in the United States. 1996 –On 1 December, the UK formally adopted European Union Directive 92/100/EEC which was concerned with rental, lending and neighbouring rights matters. This meant that those featured artists and session performers who performed on sound recordings which were broadcast or performed in public after 1 December 1996 in the UK now had a legal right to receive "equitable remuneration" for this use of the copyright. 1998 –The Digital Millennium Copyright Act (DMCA) is enacted in the United States. It is soon criticised as being already out of date in respect of new Internet and other technological developments. The Internet music-file swap site, Napster, when sued by all the major record companies, is to use the Act to argue (unsuccessfully) in court that Napster is merely a "dumb pipe" – a conductor of digitised information – and therefore is not liable for users' copyright infringements (which Napster facilitates). 2001 –The European Copyright Directive (Directive 2001/29/EC) which harmonises certain aspects of copyright across the 15 member states is approved by the European Parliament and the European Council (22 May).

Annexure-4: Roadmap of copyright law in India

History of Copyright in India The development of Copyright Law in India closely parallels the history of British Copyright Law and it is relevant to consider the history of Copyright Law in England. Copyright Law began in England when the Crown passed the Statute of Anne in 1710. The Statute of Anne conclusively laid down that Copyright was a creature of statute and not a natural law right in perpetuity, thereby curtailing the term of copyright and preventing an absolute monopoly on the part of booksellers.

Since the Statute of Anne , copyright law has been revised to broaden the scope of what is covered by a copyright , to change the term of a copyright and to incorporate new technologies.

1. : Indian Copyright Act , 1847 In India the first legislation on copyright was the Indian Copyright Act, 1847 on the lines of the English Copyright Act , 1842 enacted by the Victorian Parliament. The provisions of both the acts were in force till the Copyright Act 1914 was enacted.
2. : Berne Convention The Berne Convention is an international copyright treaty signed by 143 countries including India which signed the convention on April 1 , 1928. The Berne Convention, last revised in 1971, is the principal treaty protecting authors of various classes of work. This treaty provides a list of rights enjoyed by these authors-such as the right to authorise or prohibit reproduction, public communication, or adaptation of these works. It also allows treaty countries to provide certain exceptions to protection. Some countries also protect producers of sound recordings as "authors" with Berne-type protections.
3. countries are members of the Berne Convention, which is administered by the World Intellectual Property Organisation (WIPO), a United Nations body based in Geneva, Switzerland. WIPO convened a Committee of Experts in the early 1990s to consider possible updates to the Berne Convention, which resulted in two new WIPO treaties, The goals of the Berne Convention were to provide the basis for mutual recognition of copyright between sovereign states in foreign works and promote development of international norms with regard to copyright protection.
4. : Berlin Act The Berne Convention has been revised five times since 1886.Of particular note are revisions of 1908 and 1928. The

Berne Convention was revised by the Berlin Act. This was done in order to provide additional protection to authors due to the new technologies: photography, sound recordings and cinematography. The Berlin Act afforded authors even more power over their works by emphasizing their rights of exclusivity over their works. Authors could authorize how their works were to be published and used

Indian Copyright Act of 1914 The Copyright Act of 1914 was the first modern copyright legislation in India. Ironically it was a complete copy of the U.K.Copyright Act 1911 with suitable modifications to make it applicable to the then British India. There were four major reasons for the introduction of the 1914 act. These were a. To amend the act to include a wider range of literary works b. To include the various obligations under the Berne convention c. To include photography and cinematographic films and sound recordings d. To extend the term of copyright

1. : Rome Act The Berne Convention has been revised five times since 1886.Of particular note are revisions of 1908 and 1928. The Berne Convention was revised by the Rome Act. Again, emerging technologies, this time mass media, were to be staved off and authors once again needed protection. Two major question arose here: a. establishment of the moral rights of the author to claim authorship of the work and b. to object to any distortion, mutilation, any modification that would threaten the reputation of the author; In debating the moral rights of the author, the issue of the social function of copyright resurfaced. For whom was copyright to be beneficial: the author solely, or could the public share in the information? Simply put, the compromise came with the affording of exclusive rights of the author over broadcast of his/her work. Broadcasters, on the other hand, were allowed to restrict how the author used his/her right over broadcasting, dependent upon each country's broadcasting rules.
2. : Copyright Act , 1957 The Copyright Act of 1957 came into force on the 21st of January , 1958. On the same date , the Central Government under powers conferred by the act , passed orders S.R.O. no. 271 and S.R.O.no. 272 in respect of International Copyright. The Act besides consolidating and amending the law relating to copyright , also introduced a number of changes and new provisions. The act provides for setting of a copyright office under the control of the Registrar of Copyright, for the purpose of registration of books and other works of art .A body called the

Copyright Board was established under the act to deal with certain kinds of disputes pertaining to copyright.

3. : Geneva Phonograms Convention This convention has been signed by 72 states. An additional treaty was adopted in 1971 to deal with the growing problem of piracy of recorded music. The Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms, known as the "Geneva Phonograms Convention," protects against unauthorised duplication of sound recordings, and against unauthorised import and distribution of such copies. India signed the convention on February 12 , 1975.

4. : Universal Copyright Convention This Convention was signed at Geneva on 6th September 1952. Driven by the desire to ensure in all countries copyright protection of literary, scientific and artistic works and convinced that a system of copyright protection was required which would be appropriate to all nations of the world , the Universal Copyright Convention was introduced. This was to ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts, to facilitate a wider dissemination of works of the human mind and increase international understanding. The Universal Copyright Convention ("UCC"), last revised in 1971, protects authors and other copyright proprietors against unauthorised reproduction, public performance and broadcasting, again subject to certain exceptions. India signed the convention on April 7 , 1988.

5. Eastern India Motion Pictures Association and others v. Indian Performing Right Society Ltd. AIR 1974 Cal. 257 The court held that the definition of cinematograph films included soundtracks, and the producer of such a film becomes the first owner of copyright in the entire film including other copyrightable works, like literary, dramatic or musical works, which are produced for the purpose of the film.

Fortune Films International v. Dev Anand AIR 1979 Bom. 17 The main issue in this case was whether the performance of a cine artiste in a film is a work protected as an artistic work or dramatic work or that of a cinematograph film. The Court held that the copyright of the respondent actor extended to his work in the film and not in the film as a whole. As to the nature of the respondent’s work, the Court considered whether it would fall into any of the protected categories. It held that it was not an artistic work as it was not a painting, sculpture, drawing, engraving or a photograph.

It was not a dramatic work as it was not a piece of recitation, choreographic works, or entertainment in a dumb show and further. Also, since ‘dramatic work’ in the sub-section excluded cinematographic film, it could not be said to be a dramatic work. It could not be said to be a cinematograph film as a film could not be held to have different owners of different portions thereof (in the sense of performers who had collectively played roles in the motion picture). Hence there was no protection that could be afforded to the respondent actor’s performance in the picture. 1978 R.G. Anand v. Deluxe Films AIR 1978 SC 1613. The main question before the court was whether the making of a film based on a play, without the consent of the playwright constituted an infringement of copyright. The court held that ideas per se are not protectable and only unique expressions of the idea can be protected. In the present case while there were similarities between the play and the film, there were also a number of dissimilarities between the two. Applying the test of whether a lay observer would find the two works similar, the court held that there was no infringement because of these substantial dissimilarities. Furthermore, the court took into account that the newer work was in a different medium, and it treated the same underlying idea in a different manner. 1983 : Copyright Amendment Act India had been a member of the Berne Convention and the Universal Copyright Convention . The Copyright Act of 1957 conforms to these two conventions. Both these conventions were revised at Paris in 1971 enabling developing countries to grant compulsory licenses for translation and reproduction of works of foreign origin required for the purposes of teaching , scholarship or research or for purposes of systematic instructional activities , if these rights could not be obtained on freely negotiated terms under conditions enabling their publication or ensuring their availability at prices reasonable in their context. Provision was also made for publication of unpublished works where the author is either dead or unknown or the owners of the copyright cannot be traced. Further the Copyright Board was empowered to settle disputes . Provision was made for copyright in lectures made in public. Owing to these developments decided upon in the Paris Convention, the Copyright Act , 1857 had to be amended in 1983.

1. : Copyright Amendment Act This Act introduced certain amendments with the object of discouraging and preventing piracy prevailing in Video films and records. This Act came into force with effect from 8th October , 1984.

The salient features of this act in brief are as follows : According to this Act , Video films would be deemed to be work by a process to cinematography.Definitions of duplicating equipment and computer programmes were introduced.Import of infringing copy of cinematographic film for private or domestic use of the importer , formerly allowed was considered an infringement.The punishment for committing the offence of infringement of copyright and for making or possessing instruments for the purpose of infringement of copyright was enhanced.Police officers were given powers to seize without warrant copies of a work. Publication of a record or film which does not display particulars required under s.52 A was made an offence punishable with imprisonment or fine. Infringment of copyright was made an economic offence under Economic Offences Act , 1974.

Birendra Bahadur Pandey v. Gramophone Company of India Limited AIR 1984 Cal. 69 In this case the court held that 'pirated' material that was in transit through Calcutta to Nepal, did not constitute an 'import' to India and hence no infringement of copyright as per Indian law had taken place. 1985 Indian Express Newspapers (Bombay) Pvt Ltd. v. Jagmohan Mudhara AIR 1985 Bom 229. In this case, it was held that there could not be a copyright in an event, which has actually taken place. It said that there was a distinction between the materials upon which one claiming copyright could have worked, and the product of the application of his skill, judgment, labours and literary talent to these materials. Ideas, information, natural phenomena and events were common property and are not the subject of copyright. Penguin Books Ltd. v. India Book Distributors AIR 1985 Del 29. Where certain American books imported into India without license of its copyright owner, the import is infringement of copyright. It was observed that the import distributors are not printing these books therefore are not guilty of what is called primary infringement however, when they issue copies of these titles for public distribution they are guilty of secondary infringement.

1986: Introduction of new round of negotiations at GATT with the focus on Trade Related Aspects of intellectual Property

The negotiations finally end with the Uruguay round, with the introduction of the TRIPS Agreement which covers copyright,

trademark, patents, geographical indications, design, semi conductor chips, plant varieties etc. A complaint mechanism is established under the institutional framework of the WTO. The dispute resolution basically consists of consultations between the parties, and there is a panel that adjudicates the dispute. For instance a complaint was filed against India for its pharmaceutical patents law (WT/DS/791 DS 50)

1. Najma Heptulla v. Orient Longman Ltd. AIR 1989 Del 63. A literary work consists of matter, material or subject, which is expressed in a language and is written down. Both the subject matter and the language are important. The court refused to accept the contention that when two people agree to produce a work where one provides the material, on her own, and the other expresses the same in a language which is presentable to the public then the entire credit for such an undertaking or literary work should go to the person who transcribed the thoughts of another. It held that if there is intellectual contribution by two or more persons pursuant to a pre-concerted joint design to the composition of a literary work then those persons have to be regarded as joint authors.
2. : Copyright Cess Bill This Bill was introduced in the Parliament on the 16th of July 1992. This bill I provided for the levy and collection of a cess on copying equipment and for transfer of the same to the owner of rights. This bill was not passed by the Parliament and lapsed.
3. : Copyright Amendment Act , 1994 The Copyright (Amendment) Act, 1994 came into force on 10th May, 1995, vide S. O. 421(E), dated 5th May, 1995. This has made the Indian copyright law, one of the toughest in the world. The amendments to the Copyright Act in June 1994 included the definition of Computer Program. The Copyright (Amendment) Act 1994, clearly explains the rights of copyright holder, position on rentals of software, the rights of the user to make backup copies and the heavy punishment and fines on infringement of copyright of software. The Copyright Amendment Act , 1994 effected many major amendments in the Copyright Act of 1957.

The salient changes made by this Act in brief are as follows : Changes were made in the definition of adaption and author in relation to cinematographic film , computer generated library ,

communication to the public , composer , sound recording , publication , etc.

It made changes in the constitution and powers of copyright , assignment and licenses of copyright and the rights conferred on the owner of copyright.

The 1994 amendment to the Copyright act also prohibits the sale or to give on hire, or offer for sale or hire, any copy of the computer program without specific authorisation of the Copyright holder.

Indian law prohibits unauthorised duplication of software, making multiple copies for use by different users within an organisation, and giving an unauthorised copy to another individual. If caught with pirated software, the copyright infringer may be tried under both civil and criminal law.

It however also introduced significant ‘use rights’ in the form of the fair use provision relating to computer software. There is now considerable pressure to amend the fair use provision for software.

This amendment also introduced the idea of copyright societies as opposed to performer’s societies.

The introduction of moral rights for authors. A civil and criminal action may be instituted for injunction, actual damages (including infringer's profits), or statutory damages per infringement etc. Moreover, with the amendments to Indian Copyright Act in 1994, even the criminal penalties have substantially increased.

1. : Uruguay Round Agreements The "Final Act" signed in Marrakesh in 1994 is like a cover note. Everything else is attached to this. Foremost is the Agreement Establishing the WTO (or the WTO Agreement), which serves as an umbrella agreement. Annexed are the agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements. The schedules of commitments also form part of the Uruguay Round agreements.
2. : World Trade Organisation The World Trade Organisation was established in Geneva , Switzerland on January 1 , 1995 under the Uruguay Round Negotiations (1986 - 1994) signed at the Marrakesh ministerial meeting in April 1994. There are about 60

agreements totalling 550 pages. It has a total membership of 146 states. India became a member on January 1 , 1995. Under its TRIPS obligations India will have to out in place an international class IPR protection by 2005. The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

3. : TRIPs Agreement

One of the important obligations of World Trade Organisation (WTO) members is to protect intellectual property, under the Agreement on Trade-Related Aspects of Intellectual Property Rights. This treaty, which applies to the 146 WTO members, came into effect in 1995 for developed countries. Intellectual-property obligations came into effect for developing countries on 1 January 2000, and will apply from 1 January 2005 for least-developed countries. The TRIPs agreement requires all members to comply with the substantive provisions of the Berne Convention. It mirrors the Rome Convention protections against unauthorised copying of sound recordings, and provides a specific right to authorise or prohibit commercial rental of these works. It also provides a detailed set of requirements relating to the enforcement of rights which, in sum, require remedies and procedures that effectively deter piracy. In July 1996, the U.S. initiated WTO dispute settlement procedures over India's failure to implement its TRIPS obligations. The final panel report on this case was issued in August 1997, and ruled that India had failed to meet its obligations under the TRIPS agreement. Indian officials have pledged to introduce another bill in parliament which, if passed, will put India in compliance with its TRIPS obligations.

4. : Sub-regional Consultation on Easy Flow of Copyright for Intellectual Property A two-day consultation on easy flow of copyright for intellectual property in South Asia was convened as a UNESCO/APPREB project by the Afro-Asian Book Council (AABC) on 7 and 8 February 1996 with 25 participants from 8 countries in Asia and Africa (viz. Bangladesh, PeopleÕs Republic of China, India, Malaysia, Mauritius, Nepal, Sri Lanka, and South Africa). The programme was intended to bring the non-adhering countries within the copyright fold under a sub-regional copyright convention applicable to South Asia.

In South Asia, all the seven Member States except Bhutan and Maldives have a national copyright protection law and Nepal does not adhere to any international copyright convention.

Representatives were invited from the concerned public and private sectors in South Asia, to discuss the copyright situation in each country and problems being faced by them in formulating or enforcing copyright legislation and to suggest ways and means of facilitating the observance of copyright protection. Furthermore, the possibility of formulating a South Asian Copyright Convention (without prejudice to the already existing international Copyright Conventions viz. Berne and UCC) on the lines of the Arab Copyright Convention 1981 that came into force in 1985 and has since been adopted by a few Arab States was explored.

The main achievement of the activity was the unanimity among the participants on designing a special Sub-regional Copyright Agreement to suit the South-Asian situation and requirements. Another unexpected development was the awareness created among the participants from outside South Asia viz. China, Malaysia, Mauritius and South Africa, about the need to streamline their respective copyright laws so that copyright protection is adequately enforced at national and international levels. Burlington Home Shopping Pvt. Ltd . v. Rajnish Chibber 1996 PTR 40. Here it was held, relying on several authorities, that a compilation of addresses developed by any one by devoting time, money labour and skill though the sources may be commonly situated amounts to a 'literary work' wherein the author has a copyright. Civic Chandran v. Ammini Amma 1996 PTR 142. In a where a counter drama was alleged to have infringed the copyright of the original drama, the court found that there was similarity between the ideas and themes in the two plays but there was no slavish copying. Moreover, the appellants claimed that the counter-drama was protected under s 52(1) (b) which related to fair dealing for the purposes of criticism. The court found that there was ample evidence that the counter drama was written to contest the ideologies of the drama and did not reproduce portions of it to develop a competing script. 1997 King Features Syndicate Inc. & ors. v. Sunil Agnihotri & ors. The court reiterated stated that ideas per se could not be protected and it was only the unique expression of an idea that could be protected. Raja Pocket Books v. Radha Pocket Books 1997 Arb. L. R. 150. The Court held that the best test to determine whether there

has been infringement of copyright is to see whether it would create confusion in the minds of the purchasers. Video Master v. Nishi Productions 1997 Arb. L. R. 47. The Court held that there were different kinds of rights with regard to cinematographic films, and need to be specifically assigned. It was also held that as per Sect 52(2), making an ephemeral recording by the broadcasting organization by using its own facility for broadcasting did not amount to infringement. 1999 Amendments Significant Features

1. Introduction of commercial rental rights for software b. Increase of duration of performers rights from 25 to 50 years c. Power to the central government to make broadcasting and performers rights applicable to some companies in other countries. d. Power to restrict foreign broadcasters and performers e. Introduction of inter operability fair use provision for software 2001 Eastern Book Co v. Navin J. Desai AIR 2001 Del. 185 In this case, the court found that a genuine abridgment of judgments of the Court is an original work and can be the subject-matter of infringement of a copy right even if the amount of originality is very small. However, in case the head-notes are verbatim extracts from the judgments of the Courts, there is no amount of skill or labour involved in preparing the head-notes and no person can claim a copyright therein. 2002. Anil Gupta v. Kunal Das Gupta 2002 DLT 257. It was held that though ideas were themselves not protected under copyright law, where the idea was developed in some detail and was novel and original it could be the subject of copyright protection and hence it was a copyright infringement even in cases of non-literal copying.

2. Gramophone Co. of India Ltd. v. Mars Recording Pvt. Ltd. 2002 Supreme Court Cases 103 The court held that licence or consent could be obtained under Section 30 of the Copyright Act. If licence was not given even within 15 days, then the person producing the cassette after 15 days could not be said to have infringed copyright. It also observed that the intention was not copying but making sound recording. The musician and singers were both different, and only the lyrics were in common. The person copying the music has made an independent recording, which also differed in sound quality, and hence was not an infringement of copyright.