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# Copyright/Copyleft: Myths About Copyright

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[Infochangeindia.org](http://Infochangeindia.org)

Copyright has acquired all-pervasive status in recent years, entering the realms of the everyday in various forms. It appears in the public sphere most commonly as a newspaper story about the losses caused by piracy or the latest 'threatno-innovative' attempt to fight piracy. Post September 11, 2001, the war against terrorism and the war against piracy have become close allies. Sometimes the battle acquires a certain glamorous appeal when one celebrity sues another for copyright infringement, as in the recent case of Bappi Lahiri against Dr Dre for using his song, Kaliyon Ka Chaman, or Rajnikant claiming rights over a sign that he uses in his film, Baba.

Apart from these stories recording anxieties around copyright piracy, there are also self-congratulatory nationalist messages about India leveraging its vast pool of knowledge workers to become a global superpower. Irrespective of the nature of the story told, a number of elements discernible in these narratives have a common thread running through them. In fact, it could be said that it is precisely these threads that make it possible for us to weave 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 insight into the profound transformations that are taking place within the realm of the production and distribution of knowledge and cultural commodities. It is in these spaces that the myth of copyright is carefully constructed and constantly reinforced. Our experience of media in any form is pre-mediated by our understanding of the networks of their circulation within the economy of intellectual property. As film scholar 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 media stories about copyright. The greatest success of the concept of copyright has been its successful elevation to the status of myth through the constant rendering of certain familiar figures (the poor struggling author), arguments (people deserve to own the fruit of their labour) and rhetorical data (billions of dollars lost due to piracy). By specifically labelling these assumptions 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 that go beyond merely providing counter-facts if we are to effectively counter the totalising rhetoric of copyright.

## 2. Some familiar tales of loss and anxiety

### Exhibit 1:



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*"The failure to enforce Intellectual Property Rights (IPR) laws has taken a heavy toll on government revenues and reduced employment opportunities, with the government forgoing a tax revenue of over Rs 10,000 crore 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 the training of judicial and police officers in all aspects of the 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 the 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, September 22, 2002*

#### **Exhibit 2:**

*Mr Hardee told FE in an exclusive interview that the Indian government needed to take a much more proactive approach to dealing 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 of digital rights," Mr Hardee said, adding that he would also discuss WTO services agreement related issues that are crucial for conducting electronic commerce over the Internet.*

*"Intellectual property rights protection is the key to the continued growth of the software industry and a critical factor in attracting direct foreign investment. We want Indian politicians and government officials 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, August 21, 2002*

#### **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, UK, 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 bookshops as well as footpath vendors dealing in secondhand 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 the India Habitat Centre addressed by VJ Lazarus, IMI President, JF 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 1,800 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 the IMI has recorded 3,652 criminal cases and made 4,096 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 the 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 of five cassettes and CDs get pirated now," says Lazarus.

**The currency of copyright**

The excerpts from news reports quoted above provide just a glimpse of the discourse that has become a regular staple of the media's coverage of copyright-related issues. 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 taking place in the material world of practices. And it is within these spaces of the human imagination that we insert our current intervention. Drawing on these stories taken from contemporary media representations of the conflict over copyright, we would like to examine some of the basic assumptions in the self-narrated life of copyright.

The promoters of copyright have a rather straightforward justification for it. We shall begin 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 or her works; this includes a basket of related rights such as the right to authorise reproduction, adaptation, performance, distribution etc, of the work. In the absence of a system like copyright, it is argued, 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 interests of the public, on the other. Since it is recognised that excessive protection may result in curbing the ability of the public to use works, copyright protects only unique expressions and not ideas per se. Some balance is also sought to be achieved by providing a limited term of protection (ie, the lifetime of the author plus 60 years). Within these limits, any person who uses the works of another person's intellectual labour without permission is, according to copyright law, guilty of indulging in an act of stealing the other person's ideas. The rationale is that such theft will result in unacceptable losses for the author of the work.

As with any other totalising story, the tale of copyright appears 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 deliberately choose to use the phrase, 'the myth of copyright', is that we recognise the wonderful success of the apologists of copyright in presenting it as a universal truth. The history of copyright is always narrated in an ahistorical manner, following a universal teleological route as though it were the natural culmination of events. Following the works of Roland Barthes, an important scholar of semiotics, we would 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 seem to form the mythological structure of copyright:

>Challenging the ahistorical account of copyright: Contextualising authorship and originality

>Copyright, information and the language of property

>Copyright and incentive for creativity

>Copyright and protecting the rights of authors

>Use of the language of theft and piracy in the discourse of copyright

>Contextualising authorship and originality

Copyright assumes as the subject of its enquiry the rights of the author. Simple as it sounds, this assertion is of great import for our understanding of the conflict over copyright. At the heart of the statement lies the presumption that we can clearly and without any problem make sense of the idea of authorship. To juxtapose this statement with another, ask any person to rattle off the names of the greatest authors, and you will find a varied crowd ranging from Shakespeare, Chaucer, Kalidas, Valmiki to Salman Rushdie and perhaps Jeffrey Archer. This is, quite obviously, a list of authors; it is not difficult to come to that conclusion. However, this commonplace understanding of the author as a category needs to be challenged.

Two sets of self-fulfilling prophecies are achieved by the assertion that copyright protects the rights of authors. First, it assumes a category which makes universal sense across cultures and across time – namely, that of ‘the author’. Second, by erecting this universal figure of the author and asserting that copyright is meant for the protection of the author, it universalises the relationship between copyright and creativity. Our first task is, then, to historicise the emergence of the author figure or the author function as a relatively modern phenomenon that has arisen 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. It was impossible to disseminate knowledge in any significant manner since the inaccuracies of copying prevented widespread use of the written word. The printing press enabled a number of innovations. Duplication became easier and more accurate. Mass distribution became viable. The printing press also revolutionised information storage, retrieval and usage. Printing, unlike writing, allowed a society to build on the past with the confidence that each step was being made on a firm foundation. Printing affirmed the belief that new information was an improvement over the old. The revolution in the capacity 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 ones. Additionally, by providing access to the written word to the literate public, printing made possible a larger reading public which then formed the emerging public sphere.

This new reading public demanded books -- originals and reprints -- and set the stage for the crucial conflict over the ownership of such information. As copyright historian 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 publishing cheap reprints for the emerging reading public.”

The reaction from the literary and artistic world was to move away from the ‘ills of the industrial revolution’. They began to deploy 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 artists’ works from the hostile market and the public, for whom mass production made works available as never before, but at the risk of their turning into industrial products.

The romantic artist was, therefore, deemed to have property in an uncommodifiable imaginary self; originality was thereby elevated and

located in the self of the author. And because the artist owns his/her original person or spirit, works created by such authors were also deemed to be original; in this way they could distinguish their personality from the expanding realm of mass produced goods. This is the moment when the romantic theory merges with the doctrine of property prevalent at the time, through the theory of conversion propounded by John Locke, wherein an individual, through his/her labour, creates something of value out of nothing. It is important to note that this is also the theory that justifies the appropriation of the commons, including lands understood as not belonging to any 'civilised' nation.

A dual move is thus set in place, with the concept of the 'modern proprietary author' used as a weapon in the struggle between London-based booksellers and the booksellers of the provinces, culminating in the landmark case of *Donaldson v Becket*. The entire claim in the case is made in the name of protecting the rights of the author (even though no author was actually involved in the case) and the individuality of their ideas. This is despite the fact that the primary beneficiaries of this new system of knowledge ownership were publishers, since all authors assigned their copyright to the publishers before publication. The concept of the modern proprietary author simply created a useful euphemism for protecting the rights of publishing companies to copy.

This invocation of the author significantly ties 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 to literary theory through the works of Roland Barthes, Michel Foucault and Jacques Derrida has been to problematise 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 practice were to take note of the inroads into the very notion of authorship and originality by these thinkers, we would need to reconceptualise the terrain that we understand to be intellectual property legislation. This reconceptualisation will necessarily have to shed 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 call 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 who resides and works within the public sphere.[1] 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.

### **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 Bernard Shaw

In this section we examine how intellectual property is justified at the conceptual level. The theories of George Hegel and John Locke regarding the manner in which property is created raise a fundamental question: can

information 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 assumptions of depletion, scarcity etc, that are used while analysing classical theories of property do not quite fit.

Many explanations for the propertisation of intellectual creations are based on the Lockean theory of the creation of property. Locke's theory relies on three basic principles: firstly, that every person has property in himself/herself; secondly, everything that is in a state of nature -- ie, not as yet propertised and still held in the commons -- was given by God to be propertised; and thirdly, that labour converts things in a state of nature into a state of property and adds value to things so laboured upon. Locke was, therefore, of the opinion that if A mixes her labour into a thing that is in a state of nature, that thing becomes the property of A.[2] In terms of copyright, authors can be said to take ideas that are 'out there' in the commons, add their labour to it, and thereby create the 'work'. The question that Locke fails to answer is why, if authors add labour to ideas, the result becomes the property of the author; his theory simply rests on the assumption that property is the reward for labour.[3]

The next question that may be asked in this context is whether and how a person actually has property in himself or herself. This property in oneself cannot be a product of one's labour and, therefore, it must be premised upon something else. 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. 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 as having natural ownership rights in themselves. According to him, it is solely 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 and apprehension of itself as free, that he takes possession of himself and becomes his own property and no one else's." [4] 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. Philosopher 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, into the ocean, and this radioactive soup mixed throughout all the oceans and seas, could it be said that I am now the owner of all this?[5]

Hegel would answer this in the negative on the ground 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 an actual manifestation of this personality.[6] One can see Hegel's influence on the Romantic movement that flourished in literature in the 18th century, which finally concluded that a person must translate his or her freedom into an external sphere in order to exist as Idea, and that the resultant property is the manifestation of this translation.[7]

According to Hegelian arguments, occupancy, not labour, 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 one's own. 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." [8] This statement reverberates in the recognition by copyright law of the rights of the author of works when those works are changed or 'mutilated.' The law looks upon this 'mutilation' as a 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 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 authors from gossip. In such situations can their 'works' be said to be expressions of their soul?

Locke locates the desire for propertisation of the commons in the need for the 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 it 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 concerning the sharing of ideas is a simple, yet effective, demonstration of the nature of ideas and information goods. Information just does not possess 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 a particular piece of information cannot impair the utility of that information to another user. It has also been characterised as 'non-excludable' in the sense that use of a certain piece of information does not exclude other users from utilising the same information.

The best example of this is software. The only way a person can prevent the copying 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, 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. However, the concept of copyright represents a stubborn drive towards taming this new monster of accessibility created by developments in information technology.

There are a number of contradictions in the attempt to equate information goods with classical property which are becoming ever 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 and advertising their products with the magical words, BURN, RIP, COPY, DUPLICATE, STORE, etc. On the other hand, you have the content industry screaming itself hoarse at these new technologies that are making it easier for people to steal information unethically.

### **Copyright and the incentive for creativity**

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

One of the main justifications for copyright legislation is that in the absence of an intellectual property rights regime, authors of works would have no incentive to further create, and that artists cannot produce new works without an economic incentive. Intellectual property law, therefore, is often justified on the basis that it stimulates the investment of time and money in the creation of new works and that many authors of copyrighted works

depend for their livelihood on the income that they derive from the publication of their works.

Additionally, it is claimed that in the absence of copyright protection covering an author's creation, the low cost of copying such works would induce competitors to 'steal' another's product without penalty and, as a result, rivals could 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 motivation of authors to generate beneficial informational works would be greatly diminished, if not entirely eliminated. With competitors thus copying their works and undercutting their prices they would not be able to reap pecuniary rewards for their efforts or even, in many cases, recover their costs. Given that authors would have little hope of recovering their investment, the production of works would be seriously curtailed, and the associated benefits upon society would be lost.[9]

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 a prerequisite for such incentives requires closer examination. What is essentially argued here is that copyright is not synonymous with incentives, and that authors have created in the absence of copyright. It is also argued that, in many instances, the 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 copyright is, as a result, virtually worthless, have in the past, and even in the present, continued to write. While it may not be a general phenomenon, it is possible that people produce works purely for personal satisfaction, or even for respect and recognition from peers.[10]

Secondly, historically, there is much to suggest that copyright law and incentive were rarely linked. The 19<sup>th</sup> century saw the prolific authorship of literary works in the absence of any meaningful protection afforded to authors by virtue of their copyright.[11] While copyright protection existed, these rarely benefited the author beyond an initial payment for the copyright for their works.[12] 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.[13] In the vast majority of cases, most of the profits went to the publisher[14] and, on occasion, authors were even asked to underwrite a portion of the publishing costs. Moreover, without the publisher the copyright had no effective value, as the work would never get published. It is clear that in reality copyright protection usually benefited the publisher, and rarely the author.[15]

Furthermore, with the enactment of every subsequent Copyright Act, the protection given to authors was reduced.[16] In England, prior to 1814, copyright for the work reverted to the author after a term. The author could renew proprietary rights over his or her work, and could conceivably gain from again transferring the copyright. However, after 1814 such renewal terms were eliminated and the author lost his/her position in the mechanisms of copyright. The typical transaction consisted of the transfer of the copyright to the publisher by the author on the basis of a one-time payment. Subsequently the author had little role to play in the publication of his/her work and the author reaped little reward from future sales.[17]

This can be seen in a number of recent cases regarding the translation of works into new media. What is at issue in these cases is whether or not the author, who has transferred copyright in, say, a film, to another party, has a proprietary interest in translations of this work into new media – eg, its release over the Internet -- the development of which was unforeseen at the time of the 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.[18] Where does copyright provide an incentive to authors in such cases?

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 any thought of pecuniary benefit. It is doubtful that Anne Frank wrote her diary or Nehru his letters with the intention of reaping the monetary benefits arising from copyright protection.

As the honorarium discussed above shows, considerable prestige and value are attached to the work of composing a book, an article or a piece of art recognised as an example of excellence in its particular field. These incentives will always be present, regardless of whether the author is awarded monopoly rights in his or her work.[19]

Original authors may have the additional 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.[20]

Currently there are several mechanisms, primarily Internet-based, for creating incentives that are independent of copyright. The Street Performer, or the Fairshare Protocols, are examples of 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 has in common is that a release price will be set for a work, and that it will be made available in digital form, without copyright restrictions, once members of the public voluntarily donate sufficient funds to meet the asking price. For instance, an author might set up his/her own website and announce a book project directly to the public. Usually, though not necessarily, the author might begin by posting a chapter or two to give readers a flavour of what is to come.

### **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 have no means 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 that we would, of course, like to see all creative labour recognised and rewarded. But the question that begs an 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 render invisible the critical difference between the authorship of a work of intellectual labour and the ownership of the same. Copyright scholar Peter Jaszi states that 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 this 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." It is abundantly clear that in the current era of industrial production of cultural commodities, copyrighted works are more often than not 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 rationalised in terms of the Romantic conception of 'authorship' with its concomitant values of 'originality' and 'inspiration'.

Secondly, if one were to closely analyse the agreements between various publishing houses and the authors of works published by them, 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 he or she assigns 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, the company was often approached by various small-time ghazal singers with requests that they release their works through the pirated circuit because HMV, the owners of the copyright in their work, were unable or disinterested in issuing the works and, as a result, the authors of the works were not able to ensure that the works were available to the consuming public.

Recently J K Rowling, author of the Harry Potter series, has been in the news for enforcing her copyright against cheap pirated copies. In more ways than one she stands as a role model for copyright enforcers, and her status as a struggling single mother is often used as the analogy for the way 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 the writer had become one of the highest paid authors in the world, with many millions of pounds in excess.

Clearly pirates respond only to a market demand, and not every book is pirated. There is a particular popularity or price limit that has to be achieved before it enters into the piracy circuit. Presumably, if a book has achieved a certain status that leads to it being pirated, its author is no longer poor and struggling. Thus, the sight of Madonna appearing in TV ads condemning piracy because it deprives her of her livelihood is not terribly convincing as images of her many villas and islands flash in one's mind. If the terms of the debate were around property and monopolies alone, then there are many ways in which the issue can be addressed -- for instance, under anti trust laws etc -- but the fact that it is always this image of the sole struggling author that is used hides questions regarding the political economy of publishing, and so on.

### **Economic losses caused by piracy**

The most common use of statistics in the copyright tale concerns the losses caused by piracy. Thus, for instance, in the case of computer software one would encounter the following narrative:

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 widespread. In Europe alone the software industries lose an estimated \$ 6 billion a year. In fact, Europe holds the dubious distinction of accounting for about 50 per cent of worldwide losses from software piracy, more than any other region including the number two, Asia. According to a study of the Software Publishers Association, a US-based body, losses due to piracy of personal computer business application software nearly equalled revenues earned by the global software industry. In 1996, piracy cost the software industry US \$ 11.2 billion, a 16 per cent 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 per cent 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 a legal copy of the same if piracy did not exist. 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 the light of a free alternative in the form of Linux? Is it not likely that most users would not go in for the Microsoft software were it not for the fact that pirated software is available for free?

In a very insightful study, Harvard economist Carlos Osorio seeks to empirically understand the phenomenon of piracy. He starts with the assumption that computer software has the characteristic of being a non-rival and quasi non-excludable good.[21] Thus, he says, "One may prohibit a third person from using it only by not letting him (or her) 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 one 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 a function of the price of the software, the average income per capita of the potential market, and the marginal cost of copying versus producing the software. However, he states that, in addition to these common assumptions, it is 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 this are by undersupplying system compatibility, generating lock-in for users of their product.

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 until a market base is created for its products. Piracy works to produce 'network effects,' which means that with every added user, whether legal or not, the popularity of a product increases. 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 diffusion of the software by word-of-mouth. In this way, they indirectly generate additional positive effects 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.”

- Jacques 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 of questioning the assumptions on which copyright is based. If we are to seriously engage with the totalising logic of copyright, two tasks lie ahead. 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, the Fairshare and Street Performer protocols -- belie the reality of copyright. Conceptually, these alternatives challenge the fundamentals upon which copyright rests. The emphasis is on the ability of users to modify and distribute works -- yet there is still 'incentive' to create, as is evident in 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 turn every assumption of copyright upon itself.

There is, however, a world of quotidian media practices 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 practices like piracy. This is also the world that copyright seeks to demonise. 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.

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