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**INTELLECTUAL PROPERTY AND INDIA'S
DEVELOPMENT POLICY***Sudhir Krishnaswamy****I. INTRODUCTION**

As India wades into the 21st century, we are faced with a strategic choice about how we imagine and institutionalise new modes of regulation of access, control and production of information, knowledge and cultural resources. The rapid legislative activity on intellectual property, most recently the Patent (3rd Amendment) Act, 2005, has so radically shifted the goalposts of the debate that we are still to catch our breath! This essay is an exercise in deep breathing and careful reasoning to relieve us from our present breathless state.

Let us begin with Garrett Hardin's contestable prognosis on the 'tragedy of the commons'¹ which has grounded recent debate on intellectual property policy. Operating from his premise, we can agree that the ideal regulatory framework for public goods is one that maximises access and use of these goods while ensuring the sustainable preservation and regeneration of the resource. We may then deploy this ecological metaphor of the commons to set up a benchmark against which we assess the relative merits of regulatory strategies which respond to analytically identical problems with information, knowledge and cultural resources.² Let us name the two facets of this regulatory benchmark

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¹ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

² The application of this ecological metaphor to intellectual property policy has been the subject of much theoretical work. See, e.g., Yochai Benkler, *Commons-Based Strategies for Global Redistribution of Information and Knowledge*, at http://www.benkler.org/Commons-based_strategies_for_development.html (last visited Oct. 18, 2005).

the 'access maximising' and 'sustainable production' imperatives. Having got this far, the rest of this essay seeks to identify the best regulatory strategy as one that responds adequately to both these strategies simultaneously.

II. FRAMING A POST-INDEPENDENCE INTELLECTUAL PROPERTY POLICY

A. Patent Law

The Ayyangar Committee Report on Patent Law offers us a well-articulated insight into the regulatory mindset of the Indian State with respect to patent policy in the 1970s.³ The Report takes stock of patents granted and pending applications to find that ownership of patents is primarily with multi-national companies. It recommends that the best response to this situation, 'in the national interest', is to adopt a defensive patent policy which accommodates the drive for the autarkic, endogenous development of the national economy. This policy, which denied product patents in two key sectors of the economy - pharmaceutical drugs and agricultural chemicals - endured until we signed the Trade Related Intellectual Property Rights Agreement in 1994.

Before going any further, let us assess this strategy. It was certainly successful in promoting domestic pharmaceutical and fertiliser companies in developing a low-cost, high-access generics market. These firms innovatively developed new production processes and novel formulations and modes of delivery and the technological capacity to emerge as new players in the global market for generics. However, even the most passionate advocate for this policy would grudgingly concede that this policy failed to discover newer drugs.⁴ These firms which exploited the commons of ideas created by the patent policy failed to sustain this commons by replenishing it with a culture of innovation and invention. The patent turn in the 1990s, which is now complete with the Patent (3rd Amendment) Act, 2005, though not clearly articulated in a policy

³ N.R. AYYANGAR, REPORT ON THE REVISION OF THE PATENTS LAW (1959).

⁴ See generally N. Lalitha, *Indian Pharmaceutical Industry in WTO Regime*, 37 ECON. & POL. WKLY. 3542 (Aug. 24, 2002). See also Nandan Kamath, Operation Successful but Patient Dead?: Law Reform, The Growth of India's Pharmaceutical Industry, and the Effects on Health and Development (2001-2002) (unpublished M.Sc. thesis, University of Oxford), available at <http://users.ox.ac.uk/~edip/kamath.pdf> (last visited Oct. 5, 2005).

document, promises to reorient these priorities.⁵ We are likely to see a significant increase in the patenting of new drugs and molecules by foreign and Indian companies, but there will be a concomitant rise in prices and deterioration in access to drugs for consumers. It may be that a vigorous competition or drug price control policy may contain some of the adverse affects of this turn, but it seems that we are condemned to the eternal play of one imperative at the cost of the other.

B. Copyright Law

Now we move from drugs to music. Till the early 1990s, the Gramophone Company of India and the public broadcasting behemoths, All India Radio and Doordarshan, authored the cultural policies and market practices which defined both the content of music and the spatial and pricing terms on which it was accessed. The maverick Gulshan Kumar deployed a combination of superior production technology, guile and market savvy to unseat the Gramophone Company of India from its lofty perch. The Indian state had not, as it had with patent law, evolved a copyright law policy which paid heed to the imperative of reasonable access to these resources. What it lacked in policy it more than made up with lax implementation. The ability of the T-Series music phenomenon to storm the sound recording market with affordable classics and a rapidly expanding repertoire of musical forms in several languages is well documented by Peter Manuel.⁶ Lawrence Liang's insightful legal analysis of this phenomenon goes beyond the stale legal binaries of legal and pirated music to understand how Super Cassettes with the T-Series brand recreated the mass market by generating new audiences for sound recordings.⁷ Far from drawing support from copyright law policy, this market was created in the grey interstitial spaces in copyright law. Ironically, Super Cassettes Limited, which was among the key beneficiaries of the lassitude of the Indian state in enforcing

⁵ For criticisms of the amendment, see generally Biswajit Dhar & Niranjan Rao, *Reflections on a TRIPs Compliant Law*, 40 ECON. & POL. Wkly. 1500 (Apr. 9, 2005); K.M. Gopakumar & Tahir Amin, *Patents (Amendment) Bill 2005: A Critique*, 40 ECON. & POL. Wkly. 1503-1505 (Apr. 9, 2005).

⁶ PETER MANUEL, *CASSETTE CULTURE: POPULAR MUSIC AND TECHNOLOGY IN NORTH INDIA* 67-71 (1993).

⁷ Lawrence Liang, *Porous Legalities and Avenues of Participation*, in SARAI READER 05: BARE ACTS 6, 8-11 (Monica Narula et al., eds., 2005).

copyright, is now among the most vigorous enforcers of its copyrights. The ongoing court battles on version recording and radio broadcasting are testimony to this new dynamic in the sound recording industry.⁸

Presently, satellite broadcasting and private FM radio threaten the broadcasting monopolies of All India Radio and Doordarshan much like T-Series did HMV! The sloth bears of the public broadcasting era seem set to be buffeted by stormy weather from the new upstarts who threaten to change the rules of the game. The Supreme Court's efforts at offering ingenious public law remedies to facilitate low-priced access to cricket match spectators via Doordarshan at Ten Sports' expense failed to account for the costs of production involved.⁹ At this early stage it is unclear if the legal territory of broadcasting is likely to be defined in the realm of constitutional rights-based writ litigation or by the creativity and foresight of private lawyers working the contours of copyright law.¹⁰ Radio Mirchi's efforts at securing a compulsory license to broadcast music owned by Super Cassettes Limited is another early case that will etch out the likely contours along which copyright law will regulate broadcasting in India. As this contest is being played out in the courts, and not the executive and legislative branches of government, judges will need to display great dexterity in fashioning remedies which appreciate the twin imperatives of maximising access while sustaining the production of goods of a public character.

Copyright policy faces its sternest test in the realm of computer software. The open-source movement, while asserting copyright over code, has developed an innovative licensing strategy that keeps source code in the public domain. By ensuring that rights over distribution and further modification are not monetised, the virally transmitted obligations of the open source license satisfy the twin imperatives of the commons: maximising access and sustaining

⁸ *Super Cassettes Ltd v. Bathla Cassette Industries*, I.A. No. 1766/93 in Suit No. 381 of 1993, Delhi High Court, decided on Sept. 9, 2003.

⁹ See *Ten Sports v. Citizen Consumer and Civic Action Group*, (2004) 5 S.C.C. 351.

¹⁰ For detailed analysis of recent cases on free speech, see V. Raghavan, *Reflections on Freedom of Speech and Broadcasting in India*, in HUMAN RIGHTS, CRIMINAL JUSTICE AND CONSTITUTIONAL EMPOWERMENT (K. Chockalingam & C. Raj Kumar eds., 2004).

the production of public goods.¹¹ When President A.P.J. Abdul Kalam endorses open-source software as the development alternative for India in the field of information technology, he pays heed only to the cost implications of such a move.¹² In other words, open-source software provides a contingent strategy to him that furthers the developmentalist visions of a surging Indian economy catching up with the west. Such a blinkered view, like the patent policy in the 1970s, blinds us to the crucial second imperative of a sustainable commons which is continually replenished by the production of public goods. This second limb holds out far greater revolutionary potential for the ways in which knowledge is configured, developed and used.

C. Traditional Knowledge

The debate on protecting traditional knowledge in India best depicts the multi-dimensional character of the debate on the regulation of information, knowledge and cultural resources. We may usefully isolate two strands of this debate on the basis of the policy frameworks they offer to resolve of the problem. First, there are those who entrap the policy debate in colonialism, where wealthy Western nations and multi-national companies are seen to be expropriating 'our' indigenous knowledge to immense profit.¹³ The moral panic around neem, basmati and turmeric, among others, bears testimony to this view. The biopiracy agitators fail to interrogate the nationalist premise on which this polemic stands. Is the threat of biopiracy merely one that comes from without? Would we be content if it were established that Indian pharmaceutical companies exploited this knowledge? The nationalist lens characteristic of this view prompts a regulatory response transferring control over traditional knowledge resources to a select cabal of state bureaucrats in a move that would rival the nineteenth- and twentieth-century transfers of

¹¹ See Jonathan Zittrain, *Normative Principle for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265 (2004) for an attempt at developing a normative analysis of free and proprietary software. See Richard A. Epstein, *The Creators Own Ideas*, available at http://www.technologyreview.com/articles/05/06/issue/feature_creators.asp (last visited Oct. 7, 2005) for recent criticism on the free software movement.

¹² Go for Open Source Code, *Kalam tells IT Industry*, FIN. EXPRESS, May 29, 2003, http://www.financialexpress.com/fe_full_story.php?content_id=35147 (last visited Oct. 12, 2005).

¹³ See *India Wins Landmark Patent Battle*, at <http://news.bbc.co.uk/2/hi/science/nature/4333627.stm> (last visited Sep. 9, 2005) (discussing the recent European Patent Office decision to revoke neem patents).

natural resources such as forests to the hands of the colonial forest department. Madhav Gadgil and Ramachandra Guha have, in fact, explored the scale and perversion of the expropriation whereby state bureaucrats developed into a breed of rent-seekers over forest lands to the exclusion of tribal communities.¹⁴ There is little evidence to suggest that the state bureaucracies constituted by the recently enacted Biological Diversity Act of 2002 will conduct themselves in any differently. Our recent history teaches us that 'nationalising' resources in the name of 'our' common heritage has a troubled legacy and, notwithstanding the emotive appeal of the biopiracy debate, we must resist such an option with traditional knowledge.

A second strand to the debate avoids the clutches of the self-aggrandising state and argues for a regulatory response which facilitates individuals and communities acting in their own interest by securing conventional intellectual property protection or a suitably designed *sui generis* property regime.¹⁵ It diagnoses the problem with traditional knowledge as merely one of accommodating these knowledge forms within pre-existing legal formats or, if that proves too difficult, of devising new stronger property regimes which iron out these difficulties. By focusing on communities and individuals who operate out of the spotlight of urban intellectual property lawyers, organisations such as Sristi and the National Innovation Foundation attempt to secure to innovators the fruits of intellectual property protection and venture capital funding, which nurtures enterprises to scale. Such an approach supposes the problem not to be with a property regime per se but only with who the beneficiaries of such a regime are and the terms and conditions under which one secures legal protection.¹⁶ Therefore, if the Indian state or other civil

¹⁴ RAMACHANDRA GUHA & MADHAV GADGIL, THIS FISSURED LAND: AN ECOLOGICAL HISTORY OF INDIA 140-145 (1993).

¹⁵ For a detailed elaboration of the latter version, see generally N.S. Gopalakrishnan, *Protection of Traditional Knowledge: The Need for a Sui Generis Law in India*, 5 J. WORLD INTELL. PROP. 725 (2002) (identifying the basic principles based on which a *sui generis* law can be enacted in India to effectively protect the interests of the holders of traditional knowledge).

¹⁶ Anil K. Gupta, *How Can Asian Countries Protect Traditional Knowledge, Farmers Rights and Access to Genetic Resources through the Implementation or Review of the WTO TRIPS Agreement?*, Address at the Joint ICTSD/CEE/HBF Regional Dialogue for Governments and Civil Society, Chiang Mai, Thailand (March 29-30, 2001), available at <http://www.ictsd.org/dlogue/2001-03-29/Gupta.doc> (last visited Nov. 3, 2005).

society actors were to develop facilitating structures which allow previously excluded peoples to access these property regimes, the market would take care of the rest. Ironically, the role of such intermediaries in generating databases of traditional knowledge or ex situ and in situ conservation sites for biodiversity, whether motivated by developmental or ecological concerns, may have inadvertently obviated the possibility of protection under existing patent rules.¹⁷

Setting aside such crucial problems which arise with the extension of property protection to traditional knowledge, the success of this approach would be measured by the number of innovators earning financial rewards. There is no significant evidence of this as yet but in the event of such success there are likely to be serious issues relating to individual innovators laying claim to communal creations, or the need for trusts and societies representing communities of creators. This would call for a great deal of legal ingenuity¹⁸ and insight into the political economy of communal creation. The battles between the power-loom weavers and traditional handloom weavers with respect to the geographical indication filing for Pochampalli sarees is an example of the kinds of issues that we will confront using such an approach.¹⁹

Both approaches to traditional knowledge discussed above fail to satisfy the benchmarks identified at the start of this essay. While a state regulation model fails to deliver on both access-maximising and sustainable production standards, the property model will almost certainly fail to satisfy the latter standard. Art historians remind us about how active borrowing (read copying!) from existing weaving and art traditions such as ikat, as well as the influence of political movements such as Vinoba Bhave's Bhoojan movement, moulded the aesthetic practices of the Pochampalli silk weavers. By freezing this tradition within an intellectual property format, we will arrest this rich process of creativity enabled by a culture of sharing and borrowing. A property strategy threatens to ossify cultural creativity and starve the commons.

¹⁷ Anil K. Gupta, *Is All TK a Prior Art?*, at <http://www.sristi.org/papers/new/Is%20all%20TK%20a%20prior%20Art.PDF>, ¶ 3-4 (last visited Nov. 3, 2005).

¹⁸ See *Bulun Bulun v. R & T Textiles Pty. Ltd.*, 86 F.C.R. 244 (1998) (discussing a similar problem in Australia).

¹⁹ Nithya Reddy, Traditional Knowledge Protection: A Case Study of Pochampalli Sarees, Address at ALF-SARAI Student Workshop, Bangalore (July 23, 2004).

III. IN LIEU OF A CONCLUSION

As we peep over the ledge looking into the new century, our genius will lie in devising a regulatory policy for information, knowledge and cultural resources which revitalises and sustains a vibrant public domain. A commons-based approach does not automatically mean that all resources must be committed to an unregulated public domain. On the contrary, a carefully designed legal strategy, such as that developed by the open-source movement, responding to the political economy of computer software, needs to be imagined and deployed in fields ranging from traditional knowledge protection²⁰ to trademark and patent law. The Directory of Open Access Journals (www.doaj.org) and the Public Library of Science (www.publiclibraryofscience.org) are efforts in the field of academic publishing pioneering the extension of public domain strategies beyond computer software. It is only the vitality of our understanding and imagination and clarity of purpose that can see us through the battles over the regulation of information, knowledge and cultural resources that lie ahead.

²⁰ For a recent discussion of attempts to advance public domain strategies for traditional knowledge, see Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1366-1372 (2004).