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ABSTRACT

Independent India's copyright law has mostly centred around facilitating "access". This is because India is a large country with a predominantly poor population, limited research facilities and budgets, and constrained access to knowledge-driven products and services. The politics of standard-setting in international copyright frameworks, however, has prevented government from realising a completely access-based copyright regime. It has had to resort to anachronistic measures to actualise such a framework, resulting in a lack of emphasis on enforcement-centric provisions in the Copyright Act, 1957. Little has changed over the years, despite the emergence of a flourishing domestic creative economy that is driven by knowledge and technology. In contrast, property theory and the right to property in India have, over time, adapted to reflect economic exigencies. This paper argues that India must make a concerted effort to reconstruct its copyright narrative to balance the requirement for access to knowledge products and services—such as those made available through the creative economy—against the need to extract commercial value for sustaining such economies.

INTRODUCTION

A study of the evolution of property theory reveals that the idea of property has changed drastically from its original conception as "the right to exclusively own an object." Indeed, modern theories of property, such as the bundle theory, propose that there is no core concept that guides how property entitlements should function or be understood;[1] instead, it is the law that determines the nature of these entitlements.[2] Substantive ownership, then, is wholly irrelevant to proponents of this school of thought.[3] Thus, the bundle theory eviscerates the concept of property altogether by reducing it to a set of jural relations between individuals.

The bundle theory's conception of property was the dominant line of thought for most of the 20th century. Eventually, however, the theory came under fire as it was deemed "impractical" and fostered insecurity.[4] As a result, newer theories of property emerged, which sought to resuscitate a consolidated notion of property and refute the disintegrative premises of the bundle theory.[5] Of these theories, two—the theory of exclusion and the theory of full liberal ownership—succeeded in establishing a consolidated notion of property, but only the integrated theory could effectively counter the bundle theory argument.

Traditional property doctrines in India have followed a trajectory parallel to that of theoretical conceptions of property. The Indian Constitution originally declared the right to property as a fundamental right. Subsequent amendments to the Constitution, however, continually conscribed the scope of this provision, culminating in the removal of its status as a fundamental right.[6] Similarly, the property foundations of some forms of intellectual property, specifically copyright, were weakened due to considerations surrounding India's socioeconomic ground realities.

For the better part of India's independent history, copyright policy centred around facilitating access. This is primarily because India was a large country with a predominantly poor population, limited research faculties, and expensive knowledge products. The politics surrounding the standard-setting process in international copyright, however, often prevented the government from realising its goal of an access-based copyright regime. Consequently, the government had to resort to an achronistic measures to actualise such a framework, e.g., the lack of emphasis on enforcement-centric provisions in its new copyright statute, the Copyright Act, 1957.[7]

Just as new theories emerged to refute the premises of the bundle theory, property rights jurisprudence in India saw a movement to strengthen the right to property and imbue it with its former "fundamental right" status.[8] Both shifts were spurred largely by the changing political and economic exigencies of the time. Unfortunately, there has not been a concomitant shift in India's attitudes towards copyright, despite the economic success and significance of the domestic creative economy.

This paper argues that India must make a concerted effort to reconstruct its copyright narrative in a way that balances the requirement for access to creative products against the need to extract commercial value from these items. India's copyright policy must be adapted to mirror the economic and political urgencies of the present. Part I delineates the trajectory of theoretical conceptions of property. Part II discusses the journey of the right to property and how it has mirrored the course taken by the theoretical conception of property. Part III expounds the history and development of copyright in India and some of the issues stemming from the disproportionate focus on access. Finally, part IV talks about the way forward, specifically the economic urgency of reconstructing the copyright narrative and how to operationalise the process.

I. THERE AND BACK AGAIN: THE ROUNDABOUT JOURNEY OF PROPERTY THEORY

Traditionally, property rights were viewed as rights *in rem*, i.e., arising from objects or things in the tangible realm.[9] Property was something one 'owned'. This concept of property came to dominate legal and political thought for three reasons. First, as mentioned earlier, it reflected the economic realities of the time.[10] Wealth, in the pre-industrial era, was predominantly found in houses, small and large land holdings, and shops and tools.[11] Second, ownership of objects served as an important ideological counter to the draconian feudal system.[12] Property ownership was an egalitarian notion that did away with the hierarchical structure of feudalism.[13] Simply put, ownership signified freedom. Third, ownership expanded the scope of an individual's freedom, beyond his or her corporeal structure onto the material world.[14] This justified the exploitation of resources for commercial gain, an important consideration at the time.[15]

As economic output shifted from chiefly agrarian to principally industrial, newer conceptions of property were sought to mirror the commercial realities of the time.[16] Proprietorship was now being claimed over a host of things, many of which populated the intangible realm, e.g., intellectual property, stocks, bonds.[17] Simple ownership became a restrictive premise that could not lend itself efficiently to this level of abstraction.[18] New entitlements needed to be designed to capitalise on efficiencies earned from scale and adequately address claims to intangible objects.[19] These sentiments eventually gave rise to a new theoretical conception of property that sought to do away with any determinate conception of property altogether: the bundle theory.

Proponents of the bundle theory claimed that there was no core or prior idea of property that guided how property entitlements were understood and how they functioned,[20] and that the law determined the

extent and the nature of legal relationships between individuals with regard to different objects and entities.[21] The property held by an individual was merely a composite of the entitlements that the law bestowed upon that individual in a particular instance.[22] The nature and number of these entitlements changed as and when the law did. Substantive ownership was altogether irrelevant as a person simply had certain entitlements over an item, which were established and governed by the law.[23]

The basis for the bundle theory lay in Wesley Hohfeld's seminal work on the analysis of rights.[24] Hohfeld suggested that all entitlements could essentially be distilled down to their constitutive elements, which he termed "jural relations."[25] Jural relations were merely the legal relationships that arose between individuals based on broader legal entitlements.[26] Although Hohfeld defined eight jural relations, only four are relevant to this paper:

1. **Claim:** An individual, P, had a claim to a good or service only if another individual, Q, had a duty to provide that good or perform that service for P.[27]
2. **Privilege:** P had a privilege or liberty only if P had "no duty not to" do the thing P was so privileged or free to do.[28]
3. **Power:** A person had power if he/she had the ability to alter legal relations between two other individuals.[29]
4. **Immunity:** A person had an immunity only if another individual lacked the capacity to alter his/her legal relations.[30]

It was possible to dissect any given right into this taxonomy,[31] including property rights. For instance, one had the liberty to use one's property; one could claim that others may not encroach upon one's property; one had the power to sell one's property; and one had immunity from other's trying to sell one's property.

Breaking property rights down into the Hohfeldian system presented a fragmented notion of property, where rights no longer emanated from objects or things but from the dynamics that arose between individuals with respect to those objects. Although it was not Hohfeld's intention, the fragmentation brought about by his analysis allowed bundle theorists to do away with the concept of property altogether.[32]

Specifically, it reinforced two justifications used by bundle theorists to reject the idea that property emanated from a predetermined concept. The first concerned the increasing intricacy of modern property entitlements in the 20th century.[33] As mentioned earlier, when newer forms of enterprise emerged, property rights were ascribed to a diverse set of items such as rivers, radio spectrum, "airwaves," "labour," television shows, books and paintings.[34] It seemed untenable that the same set of jural relations could be applied to such a diverse set of entities that were subjected to different regulatory regimes.[35] Moreover, multiple individuals could have claims over a single item, as in the case of a trust or common property.[36] Thus, the traditional concept of property was too one-dimensional for the modern industrial economy.[37]

The second justification was couched in ethical and political considerations as stronger property rights generally interfered with the State's ability to acquire property for welfare schemes or the delivery of public goods.[38] Thus, it made more sense to view property as determined by regulation and policy rather than a pre-set theoretical notion.[39] Thus, the State received primacy in delineating the constituents of property rights.[40]

The bundle theory soon emerged as the predominant view amongst legal scholars and economists alike.[41] While lawyers began to regard property as a composite of legal relations between individuals, economists started seeing property rights as a bundle of ad-hoc

privileges that individuals had, to specific resources.[42] The association of property with objects and ownership was all but done away with. In under 200 years, property had gone from a key notion that embodied distinct institutions, such as the right to life and liberty, to an incoherent and irrelevant category within our larger theoretical system.[43]

Though the traditional understanding of property had fallen out of vogue amongst academia, lay people continued to use simpler, more direct notions of property to traverse the complexities of the legal world,[44] making scholars question the practicality of the bundle theory's atomised premise of property. Eventually, the utility of a consolidated notion of property became apparent as it allowed for conceptual homogeneity and consistency across political establishments in different jurisdictions.[45] Thus began a movement to rescue the notion of property from the disintegrative effects of the bundle theory.[46]

Two theories of property emerged from this movement: the theory of full liberal ownership and the theory of exclusion. Legal scholar A.M. Honore propounded the theory of full liberal ownership and suggested that property rights constituted ownership of a thing or an object.[47] This ownership, in turn, was broken down into 11 "incidents" that served as the different privileges the owner of chattel was entitled to, such as the right to possess the object, the right to extract income from the object, the right to consume or waste the object, and ownership in perpetuity.[48] The exclusion theory, on the other hand, was predicated on the premise that the right to property denoted a single essential characteristic: the right to exclude.[49] Having a property right in land or chattel meant having the ability to prevent anyone from accessing these items. It also meant that an individual with a property right could do what they liked with their property, without seeking approval from anyone else before doing so.[50]

Although both the theory of full liberal ownership and the theory of exclusion presented a concrete notion of property rights as rights *in rem*, both fell short in terms of refuting the notions of the bundle theory.[51] Bundle theorists used Honore's incidents to provide a fuller description of the types of jural relations that arose from different types of proprietorship. For instance, an individual may have a right to income from an object, but the term of proprietorship may be limited.[52] Similarly, the exclusion theory presented an exceedingly narrow view of property that limited the scope of property rights to the single trait of exclusion.[53] It failed to adequately describe and account for the variegated political and economic institutions subsumed within property.[54]

Contemporary scholars are now gravitating towards a more consolidated view of property, known as the "integrated theory of property." The integrated theory propounds that possessory rights—such as the right to use, alienate and manage one's property—form the core of property ownership.[55]

The argument for the integrated theory of property finds expression in the work of legal scholar and philosopher Adam Mossoff. Mossoff substantiates his argument in favour of the integrated theory by highlighting the historical pedigree of the idea that usage rights are central to the notion of property.[56] Indeed, everything from the works of ancient Greek philosophers such as Aristotle and early Roman laws, to the writings of English philosopher John Locke is centrally concerned with the possessory rights of usage, alienation and management when defining property.

Aristotle, for instance, defined a property right as the power to alienate a thing or retain it.[57] Similarly, the famous Roman orator Cicero used the analogy of how people used seats in the theatre to explain the workings of property ownership in nature (a hypothetical situation that

delineates what individual's lives may have been like before the inception of civil society).[58] Cicero stated that though the theatre is a public place, it follows that a seat taken by a man naturally belongs to him.[59] He has the right to claim and use the seat insofar as he is watching the show at the theatre.[60] Once the show is over, he does not take the seat home with him; he leaves it for the next patron to occupy.[61] The sea of seats at the theatre serves as a commons and a parallel to the resources available in the state of nature.

Locke initiates his account of property by stating that the earth (and everything on it) is a gift from God to all humankind.[62] Each human being has an undivided partial interest in all of earth's natural resources.[63] This divine gift is meant to serve as the means to humanity's survival and prosperity. To utilise these resources, however, people must take some action to bring them under their control and make them their own.[64] In other words, they must expropriate the resources from the natural world.[65] For example, say a person wants to pick an apple from a tree and eat it to satisfy their hunger. If they wanted to take the common consent route, they would need to ask permission from the tree's rightful owner, i.e., the entire human race.[66] As there is no mechanism in the state of nature to garner this consensus, the person would necessarily starve.[67] Thus, they must take the object—the apple, in this case—from the state of nature.[68] But how does this expropriation give rise to the institution of property?

The answer lies in Locke's famous "mixing labour" metaphor.[69] Since, as Locke propounds, the earth is commonly owned by all people, for an individual to appropriate an object from these commons, they must necessarily expend some effort or "labour" on it.[70] As one owns one's body, one indisputably owns the labour or effort produced by it.[71] By extension, one owns whatever one's labour is "mixed" or "annexed" with.[72] The patent ownership of labour thus provides the footing on which a legitimate property right is built.[73] Thus, using our example

from earlier, the effort the individual makes to pick the apple essentially establishes their property right over the fruit.

Locke establishes that the concept of property originates from "labour" by extending to objects within the tangible realm, one's exclusive moral right to life.[74] Further, by demonstrating the impossibility of common consent, he shows how "labour" or "use" in itself is a necessary and sufficient means to create property.[75] Locke, thus, establishes that the right to property essentially derives from an individual using or labouring upon an object in the world.[76]

The integrated theory successfully disproves the bundle theory in two key ways. First, by setting a historical precedent of use rights as the progenitors of property rights, it does away with the contention that there is no predetermined concept that defines property. Second, the integrated theory demonstrates that while it is theoretically possible to differentiate between the rights subsumed under property rights, it is impractical to segregate them, as the bundle theory does, in terms of the practical application of the law. Therefore, the integrated theory's consolidated idea of property serves as a better representative of how property rights function in the real world.

II. THE RIGHT TO PROPERTY IN INDIA: COMING FULL CIRCLE

In India, the right to property started as a legal guarantee against any arbitrary action taken by the colonial state.[77] The colonial government was barred from appropriating an individual's property, unless it was doing so in pursuance of a valid law, a public purpose or for just compensation.[78] Thereafter, the right was granted a higher statutory status under Section 299 of the Government of India (GoI) Act:[79]

299.– (1) No person shall be deprived of his property in British India save by authority of law.

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking.

The first clause personified a common-law principle which prevented the executive from terminating property rights without legislative consent. The second clause acted as a guarantee against arbitrary legislation, mandating the compulsory acquisition of land by ensuring that this legislation contained provisions detailing how an owner would be compensated. The third clause protected the vested interests of aristocrats who owned vast tracts of land (*zamindars*).[80]

After Independence, the Constituent Assembly reviewed the right to property under Section 299 of the GoI Act.[81] The members of the

assembly sought to balance an individual's right to property with the interests of society and the economy.[82] This led to the adoption of Article 31, which was similar to Section 299 in that clause (1) and (2) of Article 31 were exactly the same as the first and second clauses under Section 299.[83]

However, Article 31 differed from Section 299 in three key ways. First, Article 31 safeguarded land-reform laws. This was ostensibly done to do away with certain entrenched feudal systems such as *zamindari* and *talukdari*.[84] Second, it allowed the state to issue legislation to address concerns about public health and safety, even if such concerns called for acquiring or possessing a property without compensating the owner.[85] Third, the compensation requirement now extended beyond cases of compulsory acquisition to cases where the government merely took possession of an individual's property without any transfer of title.[86]

The right to property was accorded the status of a fundamental right under the new Constitution. Article 19(1)(f) guaranteed all Indian citizens the fundamental right to "acquire, hold, and dispose of property."[87] The guarantee under 19(1)(f) was by the qualification of public interest as meted out by Article 19(6). Concomitantly, the laws exempted under Article 31 had to meet the requirements under Article 19(6) as well.

The right to property soon became a litigious issue, as individuals began challenging certain laws, claiming that they violated the constitutional guarantees to property.[88] Specifically, zamindars contested the constitutionality of the zamindari abolition laws in Bihar, Madhya Pradesh (MP) and the United Provinces (now Uttar Pradesh or UP).[89] They contended that the laws unfairly discriminated against zamindars and failed to meet the "public purpose" requirement set forth in the Constitution, fell short in terms of adequately compensating them for the loss of their landholdings, and violated the right to equality under Article 14.[90]

While the constitutionality of the MP and UP laws was upheld, the Patna High Court struck down the Bihar law, conceding that it violated Article 14.[91] The executive moved quickly to negate this decision by enacting the First Constitutional Amendment (First Amendment) Act, 1951, which introduced Articles 31 (A and B) and the Ninth Schedule to the Constitution.[92] These provisions allowed the state to expressly demarcate the interests that were to be placed beyond the purview of the compensation mandated under Article 31.[93] Article 31A provided for the protection of laws that called for the acquisition of estates and the extinguishment of rights therein.[94] Article 31B declared that none of the Acts included in the Ninth Schedule could be invalidated on the basis that they conflicted with any fundamental right.[95] Thus, Article 13, which nullified laws or parts of laws that were inconsistent with any fundamental rights—specifically Articles 14 and 19—was essentially rescinded in as far as the Ninth Schedule was concerned.[96]

In the decade that followed, both the High Courts and the Supreme Court spent most of their time resolving cases concerning the zamindari abolition.[97] The courts, for the most part, aligned with the Parliamentary stance and, thus, upheld the laws in their entirety.[98]

Possibly looking to capitalise on the momentum gained from its victories in the zamindari abolition cases, Parliament went on to introduce the Constitution (Fourth Amendment) Amendment Act, 1955. The Fourth Amendment sought to pave the way for the second phase of land reforms, which involved "the imposition of land ceilings and the redistribution of land holdings."[99] The Fourth Amendment extended the range of "rights" that could be extinguished under Article 31A.[100] As stated earlier, these rights were no longer safeguarded by the guarantees under Article 19(1)(f), Article 14 and Article 31. The Fourth Amendment also abolished land tenures of individuals in certain areas.[101] Thus, the courts could freely demarcate which types of land-

revenue arrangements could be considered "estates" and "rights in relation to estates" within Article 31A.[102]

The court initially gave these terms an expansive definition to uphold the constitutional validity of laws terminating land tenures. In Atma Ram vs State of Punjab, for instance, the court stated that the term "rights" in the context of estates was all-encompassing and embraced the interests of all types of occupants, not just proprietors and sub-proprietors.[103] Eventually, however, the court began to challenge government acquisitions of land on the issue of compensation.

In K.K. Kochuni vs State of Punjab[104] (Kochuni), the court stated that in matters pertaining to compensation, judicial review could only be eliminated if the land was specifically being acquired for a scheme relating to land or agrarian reform.[105] Additionally, the court added that in all other cases of acquisition, the amount of compensation had to be at the market value of the land.[106] Further, in Karimbil Kunhikoman vs State of Kerala[107] (Kunhikoman), the court established that a "ryot" was not a proprietor but a tenant, as a ryot could not abandon his property in favour of the government.[108] A ryot's land, then, was not an estate within the meaning of Article 31A. Therefore, while the Kerala Agrarian Relations Act, 1960 was an agrarian reform, it was impeachable if it violated any fundamental rights. The law was ultimately struck down as it violated the right to equality under Article 14.[109]

Both Kunhikoman and Kochuni served as direct threats to the land-ceiling laws and agrarian reforms in South India.[110] Resultantly, they spurred a reaction from Parliament in the form of the Constitution (17th Amendment) Act, 1964. The 17th Amendment provided states with the power to acquire land beyond the stipulated land ceiling at a rate that was lower than market value.[111] Additionally, it expressly brought "ryots" under the ambit of "estates" under 31A.[112] The scope of the term "estate," too, was expanded to include agricultural land,

pastoral land, forest land, building sites, and land occupied by agricultural labour.[113]

In Vajravelu Mudaliar vs Special Deputy Collector, the court decided that the judiciary could intervene in cases where compensation was arbitrarily calculated.[114] The courts established that the inclusion of the word "compensation" meant that the individual must be compensated and the amount of compensation could not be arbitrary.[115] This case was overruled in State of Gujarat vs Shanti Mangaldass, which was then overturned by the Bank Nationalisation case, reinstating the ability of the courts to intervene when compensation was arbitrary.[116] Predictably, Parliament came out with yet another amendment—the Constitution (25th) Amendment Act—to overturn the decision in the Bank Nationalisation case. The amendment replaced the word "compensation" in Article 31 with "amount."[117] This explicitly did away with the ability of the judicial review to determine the adequacy of compensation.[118]

In 1973, in the Kesavananda Bharati case, the Supreme Court declared that the judiciary was well within its right to intervene in matters where the compensation given for acquisition was illusory or arbitrary.[119] However, the court refrained from delineating the parameters that constituted "illusory" or "arbitrary" compensation. This matter would be decided on a case-by-case basis. Expectedly, shortly after, Parliament enacted the Constitution (44th) Amendment Act, 1978, which eliminated Articles 19(1)(f) and 31 and introduced Article 300A into a new chapter in Part XII of the Constitution.[120] Article 300A stated that no person could be deprived of his property except by the authority of law.[121] The right to property, then, lost its status as a fundamental right. Additionally, there remained no express constitutional mandate instructing the state to pay market-value compensation for any acquisition, except when the property of a minority institution or land used for personal cultivation was acquired.[122]

For the next 20 years, there were no judicial reviews of matters addressing the issues of "public purpose" or "compensation."[123] This allowed the government to continuously expand the purposes for which it could acquire property, without having to pay market-value compensation. Following the 44th Amendment, the court could no longer test the adequacy of compensation, only whether the compensation was illusory or not.

Recently, however, the tide has begun to turn, as several arbitrary acquisitions of property by the state—and the resultant displacement of communities—have prompted the Supreme Court to attempt to restore the status of the right to property as a fundamental right by reading the conditions of "public purpose" and "compensation" into Article 300A.[124] In K.T. Plantation Private Ltd vs State of Karnataka, the Supreme Court held that dispossession of property under Article 300A must necessarily be for the larger public interest.[125] Any law that dispossesses an owner for a private interest is "unlawful and unfair" and is open to judicial scrutiny.[126] Similarly, on the issue of compensation, the court held that a person is entitled to compensation when they have been deprived of their property under Article 300A.[127]

In 2010, in Thakur Kuldeep Singh vs Union of India, the Supreme Court—interpreting the calculation of compensation under Ss. 23 and 24 of the Land Acquisition Act, 1894—determined that the compensation amount must be reasonable and adequate, as well as in accordance with the market value of the land.[128] The final determinant of compensation would be what a vendor would offer for the land and what a rational individual would pay for the land under the prevailing market conditions at the time of the notification.[129]

The public ire against the state's arbitrary acquisitions of land prompted action on the part of the legislature as well. In 2013, Parliament enacted the Right to Fair Compensation and Transparency

in Land Acquisition, Rehabilitation, and Resettlement Act, 2013 (LARR). The LARR differed significantly from the existing law on land acquisition, the 1894 Act. First, while both the LARR and the Land Acquisition Act, 1894 called for compensation based on market value, the former required doubling of market value in rural areas. Second, the 1894 Act based the market value on the current use of the land, whereas the LARR based it on either the value of the land specified for stamp duty or the average of the top 50 percent of recorded sale prices for land in the vicinity, whichever was higher. Third, the LARR required a 100 percent solatium to be added while tabulating the final compensation amount. Thus, enacting the LARR bolstered the compensation requirement that had been weakened by the watering down of the right to property in the Constitution. Fourth, the LARR called for rehabilitation and resettlement of families displaced by land acquisitions. Fifth, it required that a detailed Social Impact Assessment (SIA) be conducted before any acquisition. An independent committee of experts would then vet the SIA. Finally, in cases where land was acquired for use by private entities or public–private partnerships, the LARR required the consent of 80 percent of the individuals who would potentially be displaced by such an acquisition.

Much like the traditional conception of property, which flourished as a counter to the tyranny of feudalism, the right to property in India originated as a check on the arbitrary exercise of the colonial state power. Thereafter, it became a fundamental right, but as it contravened state interests, it was continuously circumscribed until it was all but discarded by the 44th Amendment. This is similar to how bundle theorists used Hohfeld's analysis of rights to do away with any concrete conception of property for fear that it would intervene with the ability of the state to deliver public goods and services.

Now, as scholars are turning once again to a more concrete notion of property—the integrated theory—there is an effort to reinstate the

"fundamental right" status of the right to property by reinstating the conditions of "public purpose" and "compensation."

III. COPYRIGHT IN INDIA: THE FIGHT FOR ACCESS

Much like the right to property, the scope of other property doctrines, such as intellectual property rights (IPR), have also been curtailed over the years. Although all forms of intellectual property (IP) have borne circumscription, this paper will specifically address the weakening of copyright in India.

The whittling down of copyright in India was largely due to the complex interplay between two competing concerns. The first was the country's domestic development agenda. After Independence, India identified "access to education" as a critical lever for growth. This required a copyright regime that facilitated the availability of affordable study materials for its citizens. Copyright was placed under the aegis of the Ministry of Education (MoE). This was in contradistinction to other IP rights, such as patents and trademarks, which were under the purview of the Department of Industrial Policy and Promotion (DIPP), in the Ministry of Commerce and Industry.

The second was the commercial ambitions of India's creative community and a global cabal of rich and powerful nations, all of whom were copyright exporters. Both had a joint interest in maintaining a strong standard of copyright, within India and around the world. As a result, attempts by the government to weaken copyright measures faced strong opposition and were successfully thwarted on many occasions. This compelled the government to take anachronistic steps towards meeting its policy objectives.

Copyright law was first addressed in independent India in 1952.[130] The government moved a resolution in Parliament to ratify the

revisions made to the Berne Convention for the Protection of Artistic and Literary Works (Berne Convention) at the Brussels Conference in 1948.[131] The Berne Convention was an international agreement created in 1886 by a group of rich and developed European nations including Britain, Belgium, Italy, France, Spain and Germany. It laid down certain standards for copyright protection and governance, which member states needed to incorporate within their domestic copyright laws.[132] Many of the colonial states that were members of the Berne Convention brought their colonies under the Convention's purview, even though these territories required a mode of copyright protection that was aligned with their own socioeconomic needs.[133] India, too, was made a party to the Berne Convention by Britain in 1887.[134]

Like most other developing nations, India was a net importer of copyrighted work during the mid-20th century.[135] At that time, the production of copyrighted products was largely the domain of countries such as the United States (US) and Europe. Membership to the Berne Convention meant that Indians had to pay royalties to foreign copyright owners if they wished to access their works.[136] The expense of printing coupled with the cost of copyright made most works inaccessible to the average Indian and led to a significant deficit in India's book supply.[137] As such, it would have been preferable for India to leave the Convention than to ratify a set of amendments for a stronger standard of copyright.[138] Illustratively, the revisions made during the Brussels conference extended the term of copyright from 25 years after the death of an author to 50 years after their death.[139]

Surprisingly, however, the ratification went through Parliament without much debate.[140] Scholars suggest that this was because Parliament was full of members of India's creative community such as authors, editors and poets.[141] These individuals were dependent on foreign copyright markets for subsistence. If India were to abandon the Berne Convention, it is likely that these foreign markets would exact

retribution by refusing to recognise the copyrights of Indian authors.[142] Therefore, it was in the interest of the authorial community for the Brussels ratifications to go through and for India to remain a party to the Berne Convention.[143]

III. a. The Copyright Bill, 1955

Adamant to ensure that the economic interests of a few creative individuals did not trump the socioeconomic welfare of the nation, the government introduced a new Copyright Bill in the Rajya Sabha in 1955.[144] Certain provisions of the Bill were a significant departure from the spirit of the Berne Convention. Specifically, the Bill called for a reduction in the term of copyright from the life of the author plus 50 years after his or her death, to the life of the author plus 25 years after his or her death.[145] The Bill also introduced a new provision stating that a copyright had to be registered to be legally enforceable.[146] This went against one of the founding tenets of the Berne Convention, which explicitly forbade administrative interference in copyright enforcement.[147] A registration requirement for copyright was necessarily burdensome for copyright owners, as it introduced inefficiencies such as bureaucratic delays and costs in the enforcement process.[148] It was particularly inconvenient for foreign copyright owners who would have had to register their copyrights across different jurisdictions to enforce them.[149]

Following its introduction in Parliament, the Bill was referred to a 45-member Joint Parliamentary Committee (JPC).[150] The JPC had to examine the contents of the Bill, invite expert testimony and public opinion, and recommend any necessary changes to the Bill.[151] The government generally accepted the recommendations of the JPC, even though it was not obligated to do so.[152] The JPC heard evidence from both national and international organisations, most of whom represented

authors' interests.[153] These entities managed to convince the JPC that the inclusion of the two new provisions would put India at odds with its obligations under the Berne Convention.[154] As such, the JPC recommended retaining the original term of copyright of 50 years after the death of the author.[155] It also suggested abandoning the compulsory registration requirement on grounds that it would unnecessarily restrict the ability of an author to enforce his or her right.[156]

The government acquiesced to the JPC's recommendations and discarded the controversial new requirements.[157] Both houses of Parliament passed the new bill without much debate.[158] Once again, both the national and international copyright industries had successfully prevented the watering down of copyright protection in the country.

III. b. A New Direction

In 1963, India appointed a new Minister of Education, Mahommedali Currim Chagla.[159] Chagla was a staunch supporter of an access-based copyright regime, one that ensured the availability of inexpensive books.[160] According to him, such a framework would improve the standard of education and accelerate development in the country.[161]

Chagla deployed a bipartite method to realise his vision of an access-centric copyright law. First, he urged African nations to work with India to reform the Berne Convention and other international copyright norms.[162] African countries had long been arguing for a modification of the normative framework surrounding international copyright.[163] India could leverage their support to push its agenda in international forums such as the Berne Union.[164] Second, Chagla shifted the focus of the copyright debate from matters related to the term of copyright and registration, to translations and the exorbitant expense of importing copyrighted works.[165] Chagla targeted translation rights to address

issues concerning access to knowledge, and copyright importation expense to strengthen the domestic publishing industry.[166]

The Copyright Act, 1914 first introduced "translation rights" in the Indian copyright law.[167] Until this point, translation rights had not been protected under any copyright legislation enacted by Britain, either within its own territory or within those of its colonies.[168] Thus, if a person translated a book written in English into another language, their actions would not have fallen foul of any copyright provision. In 1895, Macmillan and Co., a renowned British publishing house, lost a case against the defendant, Zaka Ullah, who had been distributing Urdu translations of Macmillan's copyrighted works.[169] The judge presiding over the case pronounced that if the legislature sought to protect translation rights, it would have expressed this intention through a provision in the Copyright Act.[170] The case set a dangerous precedent for publishing houses, who had identified India as a lucrative market for translated works.

Consequently, Macmillan united with other prominent British publishing houses and lobbied Parliament to amend the copyright law to include a provision for translation rights.[171] British and Indian administrators initially opposed this demand, as it would inevitably deprive many Indians of European knowledge,[172] but eventually capitulated to the publishers' implorations and included a provision for translation rights in the new Indian Copyright Act, 1914.[173] However, the provision included a stipulation stating that translation rights would cease to exist if a work was not translated into another language within the first 10 years of publication.[174]

When the JPC was deliberating the content of the new Copyright Bill in 1955, it attempted to cull out a similar exception for translation rights.[175] The provision stated that an individual could publish translations of an Indian work if the copyright owner failed to do so

within 10 years from the date of publication.[176] It was, however, shot down in Parliament by the vast contingent of MPs who were members of the authorial fraternity.[177] The Copyright Act, 1957 did include a provision that allowed for the issuance of compulsory licences for translating works that had not been published in India within seven years of the first publication.[178] This provision was likely not compliant with the Berne Convention, which did not permit the grant of compulsory licences for translations.[179] As such, Chagla suggested that the Convention be revised to include a clause that allowed member countries to issue compulsory licences for translating works into their local languages.[180]

Regarding the importation of books, Chagla recommended that developing nations issue compulsory licences for the reproduction of works that had not been domestically published within the first two years of their publication.[181] Most copyrighted works were published abroad at the time.[182] As such, India had to spend its valuable foreign exchange to import these books. The implementation of Chagla's recommendation would both bolster India's domestic publishing businesses and conserve its forex reserves.[183]

III. c. The Stockholm Conference

By the time of the Stockholm Diplomatic Conference in 1967, where the Berne Union was to discuss the demands of developing countries, India's stance was clear: If the Berne Convention was not recalibrated to meet the needs of developing nations, India would actively consider withdrawing from it.[184]

The decline of colonialism had rejigged the balance of power within the Berne Union.[185] Developing nations now constituted 40 percent of the Union's membership.[186] For the first time in history, they were in a position to legitimately demand the revision of international copyright

standards.[187] Consequently, the main item up for discussion at Stockholm was the "Protocol for Developing Countries (PDC)."[188] Along with a list of substantive provisions that met the development needs of emerging nations, the PDC contained a set of reservations.[189] A reservation legally exempted countries from adhering to specific obligations under the Convention.

The PDC contained five significant revisions:

1. A reduction in the term of copyright to the life of an author plus 25 years after his or her death.[190]
2. The termination of translation rights, if translations were not published within 10 years from the first publication of the work.[191]
3. The issuance of compulsory licences for reproductions and translations within three years from the first publication of the work.[192]
4. Swapping out the current text on broadcasting rights with the Rome Text of the Berne Convention.[193]
5. Incorporation of exceptions that allowed copyrighted works to be used for academic and educational purposes.[194]

Although developed nations initially scoffed at the provisions in the PDC, they eventually yielded to its terms.[195] Developing economies were an important market for the copyrighted material produced in developed countries.[196] As such, the latter could not risk a blanket abdication of the Berne Convention by the former. Additionally, an assessment made by the British suggested that the PDC was technically unenforceable.[197] The mechanism for issuing compulsory licences in the PDC was considered so complex that it was altogether unworkable.[198] Thus, the developed nations would not suffer any loss by agreeing to the incorporation of the PDC in the Berne Convention.[199]

Though India led the negotiations for the passage of the PDC, it never ratified the PDC's provisions. Scholars propound that this was primarily because efforts were underway to recall the PDC.[200] In 1969, the Permanent Committee of the Berne Convention and the Intergovernmental Copyright Committee of the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) met and decided to form a Joint Study Group to conduct an assessment of the extant international copyright framework.[201] In October of the same year, the study group came out with a proposal, now colloquially known as the "Washington Recommendations."[202] This document formed the basis of the agenda for the Paris Conference of the Berne Union, which was set up with the express purpose of revising the PDC.[203]

The deliberations in Paris ultimately resulted in the enactment of the Paris Act, 1971, which included a provision that precluded member nations from making reservations under the PDC.[204] Developing countries acceded to this condition in exchange for the inclusion of an Appendix to the Berne Convention.[205] The Appendix included a stipulation under which developing nations could issue compulsory licences: after three years for scientific and technological books, and after seven years for literary fiction, art and dramatic publications.[206] The passage of the Paris Act, then, was a significant setback for India as it virtually rescinded the PDC.[207]

After the Paris Conference, multilateral forums such as the Berne Union had little value for developing nations to further their copyright agenda. Most of these settings were either created or facilitated by developed nations, who were generally able to manipulate the negotiation process to ensure that outcomes favoured their own interests. This notion was reinforced by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), which resulted in the Agreement on Trade Related Aspects of Intellectual Property (TRIPS). There, the US and other IP-exporting nations structured the debate in a

way that prevented developing nations from influencing the substantive content of the TRIPS agreement.[208]

The politics behind the standard-setting process in international copyright law had created an air of mistrust between India's copyright administration and its creative community. The divergent nature of their goals for copyright compelled both constituencies to view each other as adversaries instead of cohorts. On the one hand, the MoE, the nodal ministry for copyright issues, still vied for ways to ease access to copyrighted works. In 1985, the MoE became the Ministry of Human Resources and Development (MHRD). Though the MHRD had a broader mandate than its previous iteration, education was still its top priority and copyright was still within its purview. On the other hand, India's creative community—to extract maximal commercial value from their products—sought higher standards of copyright and better enforcement. Thus, the former fervently sought ways to weaken the standard of copyright protection in India, while the latter lobbied to strengthen it.

India's membership to the Berne Convention meant that its copyright law was beholden to a framework determined by the interests of international copyright exporters. As India had to uphold its commitments under the Convention, which were often averse to its internal policy objectives, Indian authorities were forced to deploy both direct and indirect measures to weaken copyright and facilitate access to knowledge materials. Some direct measures included the broadening of fair-use[209] measures within the Act and introducing provisions for compulsory licensing, most of which were in line with the Berne Convention's provisions. The most prominent indirect measure taken by the Indian authorities was a softened stance on copyright piracy.

III. d. A Circuitous Route to Access

There are newspaper reports dating as far back as 1982 that discuss the pervasive nature of copyright piracy in India.[210] The problem was

primarily attributed to the price and popularity of copyrighted products coupled with the advent of cheap reproductive technologies such as the tape recorder, the facsimile and the photocopy machine.[211] However, another significant factor was the lackadaisical approach of Indian authorities towards the enforcement of anti-piracy measures.

Till 1984, piracy was not a cognizable offence under the Act. Search and seizure of pirated products was only possible if a magistrate issued an order in pursuance of a complaint. By the time a search would start, all contraband would have been cleared from the transgressing premises.[212] Authors such as Khushwant Singh and Shrikant Verma, both of whom were Members of Parliament (MPs), pressed the government to introduce more stringent measures to deter piracy.[213] Consequently, the Act was amended in 1984 to increase the punishment for copyright infringement and make it a cognizable offence, making it easier for the police to sequester pirated works.[214]

Enhancing the penalty, however, was not an effective deterrent to piracy since most cases did not culminate in convictions.[215] Conviction required a concerted effort on the part of the police, who were busy tackling crimes of a more palpable nature, e.g. the theft of real property.[216] Thus, capacity issues in enforcement coupled with the lack of real emphasis on the need to curb piracy rendered the amendment practically ineffective.

Procedural hurdles significantly hindered enforcement as well. For instance, while the Act specified the types of infringement and punishment, it did not set out the procedure to be followed by enforcement authorities. In the absence of a clear procedural mandate in the Act, the police had to follow provisions in the Code of Criminal Procedure, 1973 (CrPC). The CrPC mandated the submission of a complaint before any action could be taken against a pirate. Thus, the police never carried out suo motu raids.

In 1999, while the Act was amended for compliance with TRIPS, the ambit of fair-dealing provisions was concomitantly broadened to implicitly allow for reverse engineering of computer software.[217] In addition to reverse engineering, the amendment also sanctioned the reproduction of legally acquired copyrighted computer programs for personal use.[218] According to the International Intellectual Property Alliance, the new fair-dealing provisions fell foul with the three-step test laid down in Article 13 of the TRIPS agreement.[219] The three-step test under TRIPS required the member countries to restrict limitations and exceptions of copyright to special cases, which did not interfere with the normal "exploitation of the work" and did not legitimately prejudice the interests of the rights holder.[220]

The last amendment to the Act was made in 2012. The amendment introduced criminal and monetary sanctions for the evasion of digital rights management (DRM).[221] DRM included the technological protection measures (TPM) deployed by copyright owners to limit the usage of their works such as the scrambling of DVDs and CDs to prevent copying, and restrictive licensing agreements. The amendment inducted a new section—65A—into the Act. The first clause of Section 65A criminalised any circumvention of effective TPMs intended to infringe the rights accorded by the Act.[222]

While the introduction of Section 65A seemed like an attempt to strengthen the standard of copyright in India, the provision's construction suggested the opposite. Making intent a necessary condition for prosecution increased the burden of proof for copyright owners who wished to adjudicate claims. Section 65A also had several exceptions incorporated into its structure. First, it exempted any activity that was not expressly prohibited by the Act.[223] Second, anyone either directly or indirectly facilitating the circumvention of DRM could not be held accountable – ostensibly included to safeguard

innovation.[224] Third, the offences listed under this provision were not cognizable, making enforcement even more difficult.[225]

The 2012 amendment introduced "safe harbour" provisions in Section 52 of the Act. Safe harbour stipulations essentially limit the liability for infringement under copyright law. One new clause limited the liability of internet intermediaries in matters of "transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public."[226] The second new clause was incorporated to protect websites such as Google and Myspace from liability by requiring them to take down any infringing material identified by the copyright owner for a duration of 14 days.[227] If the owner wished for the permanent removal of the offending content, they had to obtain a court order within the 14-day period ordering the website to do so.

Copyright law in India, then, has followed a trajectory quite different from that of the theoretical conception of property and the constitutional right to property. While amendments to the Act ostensibly ramped up the rigour of copyright protection, hardly any provisions strengthened enforcement and some even made enforcement more difficult. While the Act was, *prima facie*, in consonance with global standards, the ground reality surrounding enforcement of the provisions painted a different picture.

As stated earlier, copyright was weakened in this way mainly due to the clash of the interests of the Indian government, the domestic creative community and the global copyright machinery. Since the Indian government failed to create a copyright regime predicated on access through direct means, it resorted to anachronistic measures to achieve its goals. Specifically, it neglected to enact robust enforcement measures, which rendered much of the copyright protection under the Act defunct.

III. e. The Drawbacks of an Entrenched Access-based Ethos

The aggressive pursuit of access has continued despite the emergence of new commercial realities, such as the rise of India's creative economy. Consisting predominantly of the Media and Entertainment (M&E) and publishing sectors, the creative economy has charted significant growth over the years, contributes significantly to India's GDP and employs millions of people. Yet, the narrative around copyright still focuses on how to increase access to creative materials, not on how to stimulate the growth of this economic paradigm and safeguard it from piracy.

The government is now taking steps to change this by calling for a more robust IPR regime. For instance, it released a new IPR policy in 2016, advocating the strengthening and commercialisation of IPRs.[228] Further, it has made the DIPP the nodal authority for all copyright related issues. However, at the same time, certain state actors, in the name of access, are jeopardising the ability of the M&E and the publishing to fully exploit the commercial value of their copyrights.

Illustratively, the Telecom Regulatory Authority of India (TRAI) issued a regulation in 2016, namely the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2016, which effectively capped the rate at which broadcasters could sell their content by linking the rates of channels offered individually and channels offered in a bundle or a bouquet.[229] Under this regulation, a channel may only be bundled with others if it is priced at INR 19 or below,[230] and a bundle of channels may only be offered with a maximum discount of 15 percent on their individual rates.[231] This regulation prevents broadcasting organisations from offering their content at market rates.[232] TRAI claimed that this regulation was intended to increase consumer choice and access.

Broadcasting organisations and their reproduction rights are covered under "Chapter VIII" of the Act. Section 37 under this chapter

allows such organisations to freely decide the rate of remuneration for their broadcasts.[233] The TRAI order directly contravenes this provision as it does not allow broadcasters to freely price their content. The larger issue with the TRAI order is that a cap on channel pricing limits the amount broadcasters can spend on the creation of content. Thus, the effect of the order is altogether counterintuitive to its purported purpose as it places limits on the ability of broadcasters to generate new content. Certain broadcasters took TRAI to court over these legislations and the matter is currently subjudice.

Another bizarre instance of weakening copyright laws in India is Justice Rajiv Endlaw's exposition on the nature of copyright in the Chancellor, Masters and Scholars of the University of Oxford and Ors. vs Rameshwari Photocopy, otherwise known as the DU Photocopy case.[234] The issue in this case was that the respondent had been photocopying books published by the plaintiffs and providing these copies to the faculty and students of a university at a nominal rate. The question before the court was whether this amounted to an infringement of copyright under the Act. While expounding on the nature of copyright, Justice Endlaw considered whether the attribute of ownership, an essential aspect of other property rights, was inherent to copyrights as well and whether copyright was a natural right.

Justice Endlaw concluded that the creators had no natural copyright over their works.[235] Their rights over their creations began and ended with the Act itself. Though this judgment was set aside by the Division Bench of the High Court, the judges in the latter proceeding did not contest this particular opinion.

Glimmers of the bundle theory are visible in both the reasoning behind the TRAI order as well as the DU Photocopy case. Bundle theorists tend to dissect copyrights into their respective "bundle of rights," weakening their property foundations.[236] As a result, copyrights

are commonly treated as mere "state-granted monopolies or privileges."[237] TRAI's unwillingness to cede to the rights given to broadcasters under the Act, for instance, echoes this notion. Similarly, Justice Endlaw's opinion in the DU Photocopy Case renders copyrights adrift without an underlying doctrinal justification and essentially cuts them loose from their moorings as property rights.

An assessment of the provisions of the Act reveals that the structure of entitlements enumerated under the Act exemplify the concept of property enshrined within both the integrated theory of property as well as the fundamental right to property under Article 19(1)(f) of the Constitution. Section 14 of the Act, for instance, explicitly grants the owner of a copyright the exclusive right to use the copyrighted work in a variety of ways.[238] This is reflective of the integrated theory, which views use rights or possessory rights as the core of property. This is not to say that the drafters endorsed this theory consciously. The drafters could not avoid describing the legal entitlement in this way because—contrary to the judge's opinion in the DU Photocopy case—they were essentially defining legal protections for a type of property.

The integrated theory of property also refutes the notion that copyrights are not natural rights by making a strong moral argument for IP. To review, property arises from two stark facts in Locke's setup.[239] Natural resources in the world are available to all in equal measure.[240] To make use of these resources, however, an individual must somehow bring them under their control.[241] As already established, procuring consent for this purpose is untenable.[242] Thus, the individual must individually appropriate the resource in accordance with their needs.[243] But does a parallel scenario of individual appropriation exist in the intangible universe of intellectual property? Is there an impalpable equivalent for the state of nature within this realm? As IP scholar Professor Robert Merges points out, the answer lies in the public domain.[244]

Most intellectual creations today draw heavily from the vast trove of shared, relinquished material known as the public domain.[245] The addition of individual "labour" to the "unowned resources" in the public domain gives rise to a unique creative product.[246] Some may object to this rationale, as Locke's state of nature and the public domain are fundamentally different.[247] The state of nature is inhabited by tangible objects whereas the public domain comprises of mostly intellectual items such as stories, articles, research papers, inventions and a host of other manifestations of human ingenuity.[248] Tangible objects, such as apples, are rivalrous goods. Their consumption by one individual precludes simultaneous consumption by others. If I am eating an apple, you cannot eat it at the same time. Intellectual items, such as the ones populating the public domain, are non-rivalrous goods. They can be used or consumed by many people at the same time with little to no additional cost.[249] The thrust of this objection is that bestowing IP rights on such items creates "artificial scarcity" and inhibits the natural fluidity of information exchange.[250]

While it may seem intuitive for society to prohibit claims to something that can be shared so easily, this contention overlooks an important fact. IP rights are not granted for any works residing within the public domain.[251] They are conferred upon works that are original and unique.[252] Although the creator may draw from the public domain to create a particular work, the work itself is completely new.[253] Now, allowing the widespread dissemination of these works acts as a disincentive for their creation.[254] One would hardly take the time out to recast or reframe something from the public domain if one could not (monetarily or otherwise) gain from it.[255] Thus, awarding property rights to the creators of intellectual items stimulates further production of these works by rewarding the effort made to create them.[256] Technical details, e.g. the nature of the item appropriated, are wholly irrelevant to Locke's central thesis. Again, Locke's theory centres around how

property is necessary for humanity to flourish.[257] It demonstrates the role and necessity of individual appropriation to achieve this goal.[258]

Locke's theory of property fits well with the modern conception of IPR for two reasons. First, Locke's main premise for the establishment of a property right—"appropriation from the state of nature"—is akin to drawing from the wealth of information available within the public domain.[259] Unlike assets in the tangible realm, which are largely colonised, the public domain comprises an abundance of unowned information.[260] Second, just as "labour" plays a key role in justifying claims to property in the tangible universe, the effort expended in researching and writing lends legitimacy to rights in the domain of intellectual property.[261] Professor Merges points out that Locke notes biographically, "I am employed as an Under-Labourer in clearing Ground a little, and removing some of the Rubbish, that lies in the way to Knowledge."[262] Thus, for Locke, the effort expended on writing should translate into the same result as the effort expended on a physical object: a valid moral claim to legitimate property.[263]

Locke's argument reveals the inherency of IP, and more specifically copyrights. It is intuitive that in the absence of any contract to the contrary, one should own what one creates. Incidentally, the Act reinforces this inherency by not mandating the registration of copyrightable works.

IV. RECONSTRUCTING THE NARRATIVE TO MIRROR THE ECONOMIC REALITY

Access was a significant consideration at the time India enacted its copyright law and in the decades that followed. As stated earlier, this was primarily because India was a country with a large population of poor people, limited research faculties, and expensive knowledge

products. And while access still remains important, its significance must be balanced against new economic realities.

India's creative economy was worth about US$20 billion as of 2016,[264] and the bulk of the value creation in this ecosystem comes from the broadcasting and publishing industries. The creative economy has grown at a CAGR of 11 percent and is slated to grow to US$50 billion at the current growth rate.[265] Similarly, the indigenous broadcasting and publishing industries have charted CAGRs of 13 percent and 19.3 percent, respectively.[266] And while broadcasting will grow to US$27 billion by 2025 at the current rate, publishing is slated to grow to US$11.5 billion by 2020.[267]

One reason for the acceleration in broadcasting revenues is that many Indians are millennials, a demographic known to consume vast amounts of content on different platforms.[268] Another reason is that India's mobile revolution has ensured that a majority of these individuals now have a screen in their hands.[269] The country currently boasts of more than a billion mobile connections and a quarter of a million smartphones.[270] This is in addition to the reach of the television, which most households now own.[271] Similarly, increasing literacy rates coupled with a burgeoning middle-class have fuelled the demand for reading materials.[272] The publishing industry has also benefitted immensely from the growth of the indigenous e-commerce industry.[273]

The growth in revenue in the broadcasting industry has seen a parallel trajectory in its employment rate.[274] While employment in broadcasting has grown at a 13 percent CAGR, it is set to surge to 19 percent over the next five years.[275] This is driven, in part, by a 32-percent surge in the digital-media employment market.[276] Going forward, India should endeavour to ensure that revenue and employment trajectories continue to mirror one another and expand by 19 percent.[277] At this CAGR, the creative economy would soar to US$100 billion by 2025.[278]

A new copyright narrative is required to support this ecosystem and unlock its potential. The trajectory charted by both the theoretical conception of property and the right to property in India adapted to address the political and economic needs of the time. Property theorists moved back to a more consolidated notion of property because of the impracticality of applying the bundle theory in real-world circumstances. Similarly, the Indian judiciary began reading compensation requirements into Article 300A to check the arbitrary acquisition of property by the state. The process of changing the ethos towards copyright has started with the release of the new National IPR Policy 2016, which seeks to emphasise the economic value of IP rights. However, the continued lack of emphasis on copyright enforcement coupled with the TRAI order and the DU photocopy judgment illustrate that the approach is significantly fragmented. Authorities must present a united front to facilitate a change in mindset, uphold the sanctity of copyrights in India, and help unlock the economic potential of the creative economy.

For the judiciary, this means going back to a stronger, more propertised/market-based notion of copyright and interpreting the statute in ways that reconnect the provisions to their traditional property foundations. "Propertising" copyright allows creative individuals to capture the effort of a moment by according these recordings legal protection.[279] Without legal protection, the artist or the singer can only profit from a single copy of their work.[280] Property rights offer a type of legal protection over a captured performance that is strong and flexible.[281] They apply to audience members who enter into contracts, as well as complete strangers.[282] Essentially, property rights are rights that hold good against the world. These rights allow the creator to earn money continually on a given measure of effort.[283] They protect the work from being copied without authorisation. This is significant in a world where thousands of copies of a work can be made at the push of a button. Therefore, the propertisation of labour is the most effective means of protecting works in the digital realm.[284]

Propertising intellectual works is valuable for the creators in numerous ways. First, it allows creators to monetise these works through several different avenues.[285] Second, it allows them to be compensated for a given effort repeatedly. Third, propertisation can benefit creators even when they don't own the asset.[286] Creative professionals employed across industries have higher potential for value addition when work can be propertised;[287] greater prospects for the employer generally translate into greater earnings for the employee.[288]

The government must be consistent in its approach. This means that in the case of the TRAI order, the DIPP should issue a clarification recognising the rights of broadcasters under the Copyright Act instead of waiting for a court case to settle the issue. This is an issue of policy, not legislative interpretation, as it threatens an important ecosystem both in terms of revenue generation and employment. Concomitantly, it is necessary for TRAI to harmonise and rationalise with the current copyright framework, instead of eroding it.

Moreover, the government must address issues related to copyright enforcement within the legislative framework. In this regard, it should issue a notification that establishes a procedure for pursuance of piracy matters that allows enforcement authorities to initiate action suo moto. Additionally, it could establish a National Copyright Enforcement Cell,[289] which would target the infringement of copyright in the digital sphere. An IP crime unit could be formed within the Central Bureau of Investigation to ensure the proper investigation of IP crimes, with an emphasis on digital piracy.[290]

Employment is a particularly significant consideration in India. One survey revealed that the public perception about employment generation is worse than what it was during the second term of the United Progressive Alliance (UPA).[291] Although another survey showed that job growth had ostensibly been robust during the first two years of the current government, reports suggest that it was mostly in the

informal sector.[292] Compounding the issue of jobs is the looming threat of automation, which is poised to do away with many of the employment opportunities available today.

If the government is looking for avenues for high-quality job creation, it must look no further than India's creative economy. Jobs in the creative economy are associated with higher levels of income, well-being, standards of living and overall worker satisfaction. Creative industries are also relatively more immune to computerisation. A study by Nesta reveals that 87 percent of creative workers are at low to no risk of losing their jobs to technology.[293] Machines are the most adroit at handling jobs where problems are indicated beforehand and the work environment supports self-sufficiency.[294] They generally have a hard time with tasks where the outputs are nebulous in nature, where the final goal has not been conceived yet.[295]

The process of reconstructing the Indian copyright narrative has already begun. The recognition of the economic exigencies is clear in the recent alteration of policies and laws. To reiterate, the growth of the copyright industry catalysed the transfer of the Copyright Board from the MHRD to the DIPP. Further, through the Finance Act, 2017, the Copyright Board has been subsumed under the IPAB, which also administers aspects of trademarks and patents. The way forward is for the judiciary to recognise a more propertised/market-based version of copyright and for TRAI to work with the extant copyright framework and recognise the rights of broadcasters under Section 37 of the Act. This may be, as reports have suggested, the key to unlocking the economic potential of India's creative economy.[296] ORF

ENDNOTES

1. Hugh Breakey, "Property," Internet Encyclopedia of Philosophy, 2016, http://www.iep.utm.edu/prop-con/.
2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
6. Namita Wahi, "Property," in The Oxford Handbook of the Indian Constitution (United Kingdom: Oxford University Press, 2016).
7.
8. Ibid.
9. Thomas Merrill and Henry Smith, "What Happened to Property in Law and Economics?" Yale Law Journal 111, no. 2 (2001): 357–98.
10. Thomas Grey, "The Disintegration of Property," in Nomos XXII: Property, eds. J.R. Pennock and J.W. Chapman (New York: New York University Press, 1980), 69–85.
11. Ibid.
12. Ibid.
13. Ibid.
14. Ibid.
15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
19. Ibid.
20. Hugh Breakey, "Property," op. cit.
21. Ibid.
22. Ibid.
23. Ibid.
24. Adam Mossoff, "What Is Property? Putting the Pieces Back Together,"

Arizona Law Review, Public Law and Legal Theory Working Paper Series, no. 45 (2003): 371–443.

25. Leif Wenar, "Rights," Stanford Encyclopedia of Philosophy (Stanford University, 2015), https://plato.stanford.edu/archives/fall2015/entries/rights/.
26. Ibid.
27. Ibid.
28. Ibid.
29. Ibid.
30. Ibid.
31. Ibid.
32. Hugh Breakey, "Property," op. cit.
33. Ibid.
34. Ibid.
35. Ibid.
36. Ibid.
37. Ibid.
38. Ibid.
39. Ibid.
40. Ibid.
41. Thomas Merrill and Henry Smith, op. cit.
42. Ibid.
43. Ibid.
44. Hugh Breakey, op. cit.
45. Ibid.
46. Adam Mossoff, op. cit.
47. Hugh Breakey, op. cit.
48. Ibid.
49. Adam Mossoff, op. cit.
50. Ibid.

51. Ibid.
52. Hugh Breakey, op. cit.
53. Ibid.
54. Adam Mossoff, op. cit.
55. Hugh Breakey, op. cit.
56. Ibid.
57. Adam Mossoff, op. cit.
58. Ibid.
59. Ibid.
60. Ibid.
61. Ibid.
62. John Locke, "Two Treatises of Government," in The Works of John Locke, vol. 5 (London, 1823), http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf.
63. Robert Merges, Justifying Intellectual Property (Cambridge, MA: Harvard University Press, 2011).
64. Ibid.
65. Ibid.
66. Ibid.
67. Ibid.
68. Ibid.
69. Adam Mossoff, op. cit.
70. John Locke, op. cit.
71. Ibid.
72. Ibid.
73. Robert Merges, op. cit.
74. Adam Mossoff, op. cit.
75. Ibid.
76. Ibid.
77. Namita Wahi, op. cit.

78. Ibid.
79. "Government of India Act, 1935," § 299 (n.d.), http://lawmin.nic.in/legislative/textofcentralacts/GOI%20act%201935.pdf.
80. Namita Wahi, op. cit.
81. Ibid.
82. Ibid.
83. Ibid.
84. Ibid.
85. Ibid.
86. Ibid.
87. "The Constitution of India," § 19(1)(f) (1949), http://ijustice.in/video-tags/article-191f.
88. Namita Wahi, op. cit.
89. Ibid.
90. Ibid.
91. Ibid.
92. Ibid.
93. "The Constitution (First Amendment) Act, 1951," http://indiacode.nic.in/coiweb/amend/amend1.htm.
94. Ibid.
95. Ibid.
96. Namita Wahi, op. cit.
97. Ibid.
98. Ibid.
99. Ibid
100. Ibid.
101 "The Constitution (Fourth Amendment) Act, 1955," http://indiacode.nic.in/coiweb/amend/amend4.htm.
102. Namita Wahi, op. cit.
103. Ibid.

104. Ibid.
105. Ibid.
106. Ibid.
107. Ibid.
108. Ibid.
109. Ibid.
110. Ibid.
111. "The Constitution (Seventeenth Amendment) Act, 1964," http://indiacode.nic.in/coiweb/amend/amend17.htm.
112. Ibid.
113. bid.
114. Namita Wahi, op. cit.
115. Ibid.
116. Ibid.
117. "The Constitution (Twenty-Fifth) Amendment, 1971," http://indiacode.nic.in/ coiweb/amend/amend25.htm.
118. Namita Wahi, op. cit.
119. Ibid.
120. "The Constitution (Forty-Fourth) Amendment, 1978," http://indiacode.nic.in/coiweb/amend/amend44.htm.
121. "The Constitution of India" Article 300A, 1949.
122. Ibid.
123. Namita Wahi, op. cit.
124. Ibid.
125. Ibid.
126. Ibid.
127. Ibid.
128. Ibid.
129. Ibid.
130. Prashant Reddy and Sumathi Chandrashekaran, Create, Copy, Disrupt: India's Intellectual Property Dilemmas (Oxford University Press, 2017).

131. Ibid.
132. Ibid
133. Ibid.
134. Ibid.
135. Ibid.
136. Ibid.
137. Ibid.
138. Ibid
139. Ibid.
140. Ibid.
141. Ibid.
142. Ibid.
143. Ibid.
144. Ibid.
145. Ibid.
146. Ibid.
147. Ibid.
148. Ibid.
149. Ibid.
150. Ibid
151. Ibid.
152. Ibid.
153. Ibid.
154. Ibid.
155. Ibid.
156. Ibid.
157. Ibid.
158. Ibid.
159. Ibid.

160. Ibid.
161. Ibid.
162. Ibid.
163. Ibid.
164. Ibid
165. Ibid.
166. Ibid.
167. Ibid.
168. Ibid.
169. Lionel Bently, "Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries," Chicago-Kent Law Review 82, no. 3 (n.d.): 1181–240.
170. Ibid.
171. Prashant Reddy and Sumathi Chandrashekaran, op. cit.
172. Ibid.
173. Ibid.
174. Ibid.
175. Ibid.
176. Ibid.
177. Ibid.
178. Ibid.
179. Ibid.
180. Ibid.
181. Ibid.
182. Ibid.
183. Ibid.
184. Ibid.
185. Ibid.
186. Ibid.
187. Ibid.

188. Ibid.
189. Ibid.
190. Ibid.
191. Ibid.
192. Ibid.
193. Ibid.
194. Ibid.
195. Ibid.
196. Ibid.
197. Ibid.
198. Ibid.
199. Ibid.
200. Ibid.
201. Ibid.
202. Ibid.
203. Ibid.
204. Ibid.
205. Ibid.
206. Ibid.
207. Ibid.
208. Peter Drahos, "Developing Countries and International Intellectual Property Standard-Setting," The Journal of World Intellectual Property 5 (2002): 765–89, doi: 10.1111/j.1747 1796.2002.tb00181.x.
209. Fair use provisions allow for the use of a copyrighted work to a limited extent without compensating the copyright owner.
210. Samuel Israel, "Copyright in India National and International-The 1983 Amendment of the Indian Copyright Act, 1957," Economic and Political Weekly, no. 47 (19 November 1983), http://www.epw.in/journal/1983/47/special-articles/copyright-india-national-and-international-1983-amendment-indian.
211. Lawrence Liang, "Exceptions and Limitations in Indian Copyright Law for Education: An Assessment," The Law and Development Review, SPECIAL

ISSUE (2010): NEW VOICES FROM EMERGING POWERS - BRAZIL AND INDIA 3, no. 2 (2010): 198–240.

212. Samuel Israel, "Copyright in India National and International-The 1983 Amendment of the Indian Copyright Act, 1957," Economic and Political Weekly, no. 47 (19 November 1983), http://www.epw.in/journal/1983/47/special-articles/copyright-india-national-and-international-1983-amendment-indian.
213. Prashant Reddy and Sumathi Chandrashekaran, op. cit.
214. Ibid.
215. Samuel Israel, op. cit.
216. Ibid.
217. "The Copyright (Amendment) Act, 1999," http://www.wipo.int/wipolex/en/text.jsp?file_id=128095.
218. "The Copyright (Amendment) Act, 1999," op. cit.
219. "2001 Special 301 Report India," International Intellectual Property Alliance, 2001, http://www.iipawebsite.com/rbc/2001/2001SPEC301INDIA.pdf.
220. "Agreement on Trade-Related Aspects of Intellectual Property Rights," 1994, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.
221. "The Copyright (Amendment) Act, 2012," http://www.wipo.int/edocs/lexdocs/laws/en/in/in066en.pdf.
222. Ibid
223. Ibid
224. Ibid
225. Ibid
226. Ibid.
227. Ibid.
228. "National IPR Policy 2016," Government of India, 2016.
229. Telecommunication (Broadcasting and Cable Services) (Eighth) (Addressable Systems) Tariff Order, 2016, 10 October 2016.
230. Vivan Sharan and Prachi Arya, "Promoting the Creative Economy: India's USD 100 Billion Imperative," Koan Advisory, New Delhi, 2017.

231. Ibid.
232. Ibid.
233. "The Copyright Act, 1957," 14 § 37 (1957), http://www.wipo.int/edocs/lexdocs/laws/en/in/in107en.pdf.
234. Rajiv Endlaw, "The Chancellor, Masters & Scholars of the University of Oxford & Ors. Vs. Rameshwari Photocopy," 2016, http://lobis.nic.in/ddir/dhc/RSE/judgement16-09-2016/ RSE16092016S24392012.pdf.
235. Ibid.
236. Adam Mossoff, op. cit.
237. Ibid.
238. "The Copyright Act, 1957," 14 § 14 (1957), http://www.wipo.int/edocs/lexdocs/laws/en/in/in107en.pdf.
239. John Locke, op. cit.
240. Ibid.
241. Ibid.
242. Ibid.
243. Ibid.
244. Robert Merges, op. cit.
245. Ibid.
246. Ibid.
247. Ibid.
248. Ibid.
249. Ibid.
250. Ibid.
251. Ibid.
252. Ibid.
253. Ibid.
254. Ibid.
255. Ibid.
256. Ibid.

257. Ibid.
258. Ibid.
259. Ibid.
260. Ibid.
261. Ibid.
262. Ibid.
263. Ibid.
264. Vivan Sharan and Prachi Arya, op. cit.
265. Ibid.
266. Ibid.
267. Ibid.
268. Ibid.
269. Ibid.
270. Ibid.
271. Ibid.
272. Ibid.
273. Ibid.
274. Ibid.
275. Ibid.
276. Ibid.
277. Ibid.
278. Ibid.
279. Robert Merges, op. cit.
280. Ibid.
281. Ibid.
282. Ibid.
283. Ibid.
284. Ibid.
285. Ibid.

286. Ibid.

287. Ibid.

288. Ibid.

289. "2017 Special 301 Report India," International Intellectual Property Alliance, 2017, http://www.iipawebsite.com/rbc/2017/2017SPEC301INDIA.PDF

290. Ibid

291. Tadit Kundu, "Creating High-Quality Jobs to Be Narendra Modi Government's Big Test," *LiveMint*, 13 July 2017, http://www.livemint.com/Politics/tu2KF0LtRS52FcU0YWKl1M/Creating-highquality-jobs-to-be-Narendra-Modi-governments.html.

292. Ibid.

293. Hasan Bakshi and George Windsor, "The Creative Economy and the Future of Employment," London, April 2015, https://www.nesta.org.uk/sites/default/files/the_creative_economy_and_the_future_of_employment.pdf .

294. Ibid.

295. Ibid.

296. Vivan Sharan and Prachi Arya, op. cit.

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