Gender Perspectives on the Information Society
South Asia Pre-WSIS Seminar 2005

18th – 19th April
Bangalore

TINTORETTO'S DAUGHTER : GENDER, INTELLECTUAL PROPERTY AND THE PUBLIC DOMAIN

Lawrence Liang

Alternate Law Forum, Bangalore

IT for Change
with Development Alternatives with Women for a New Era and Centre for Public Policy, Indian Institute of Management - Bangalore
supported by UNIFEM and UNDP-APDIP


itfc


DAWN


IIMB
तेजस्वि नावधीतमस्तु


UNIFEM


UN
DP
APDIP

ABSTRACT

The senseless expansion of intellectual property in every domain of life has been a cause of concern for a number of people. In the context of Copyright for instance, the argument is that while copyright began as a system of balances, the balance has tilted in favour of owners of Copyright to the detriment of users and creators, and that this expansion of copyright threatens future creativity. Towards that end , inspired by the Free Software Movement there has been a significant attempt to articulate the idea of the public domain as being a critical domain that needs to be cultivated and promoted. Scholars, particularly in the US, like Lawrence Lessig, James Boyle, Yochai Benkler etc have played an important role in advancing the idea of Copyright and the public domain. The question that I am interested in understanding is how this idea of the Public domain translates in terms of the experience of South Asia, and also the question of whether there can be a gendered critique of the 'gender neutral' terms through which contemporary critical scholarship on IP is framed, and how a feminist reconstruction may allow us diverse entry points beyond the terms set by existing liberal scholarship.

TINTORETTO'S DAUGHTER : GENDER, INTELLECTUAL PROPERTY AND THE PUBLIC DOMAIN

While feminist legal scholarship has successfully interrogated and expanded the debate in almost every legal field (from torts to contracts to criminal law), there has been surprisingly little feminist scholarship in the arena of intellectual property generally, and copyright and patent law in particular.[1] In all honesty, as a person who has been working on the politics of IP for the past few years, the question of gender has been equally marginal in my own work. This paper is therefore a very tentative and initial attempt at theorizing one aspect of the IP debate, namely the question of IP and the public domain, from the perspective of a feminist critique. The paper can not address every aspect of the problem[2], and I will be looking at one aspect of the question viz. the unproblematic acceptance of certain key concepts such as authorship, creativity and the public domain amongst supporters of intellectual property, as well as critical scholars advocating public interest. I will then argue that it is this blindness to the histories of exclusion implicit in the discourse of IP that makes it impossible to respond to some of the contemporary conflicts within the liberal terms of freedom of speech and expression.

It would be a truism to say that the language of intellectual property ('IP") has entered into the realms of our everyday life both as consumers and practitioners living in the material conditions of globalization. This movement away from the initial description of IP as an esoteric techno legal field into a discourse around property rights, legality and illegality has been facilitated to some extent by the hype created over the importance of IP in the new economy. IP is both a product of as well as a constituent factor in the formation of the contemporary, a contemporary shaped within the realities of that geo spatial arrangement which we call globalization. Recent debates about intellectual property rights have been marked by a spurt of critiques aimed at the very normative basis of intellectual property. These debates are marked by their dissatisfaction with the traditional theories of justification, and have instead attempted to locate the historical and material basis of the emergence of intellectual property rights, and the role that they play in the politics of information and knowledge production in contemporary societies.[3]

[1] Some notable exceptions include Donna Haraway Jane Gaines, Vandana Shiva, Deborah Halbert and Rosemary Coombe

[2] If one were to make an initial map of the possibilities, they would include the following: question of the gender divide in the ownership of IP, patents on seeds and impact on women, the epistemological enquiry into the idea of knowledge and its impact on IP, the question of the ethic of collaboration and creativity

This critical approach to intellectual property have also gained from other movements and attempts at rearticulating ideas of creativity and property, like the free software movement. The free software/ open source movement has inspired a whole generation of "open" initiatives including open content, open publishing, open art etc. At the heart of the varied open initiatives is the belief that there is a need to rearticulate the public domain to include a strong element of the idea of the commons[4]. The idea of the commons of course is not a new one and traces its historical roots back to the Roman times. The most common usage of the "commons" however is derived from England, when land was held as communal property and was not owned by any person or institution. In recent times it has found articulation in legal developments in international law recognizing the common heritage of mankind. An attempt is therefore being made by these various scholars to understand cyberspace or the World Wide Web as the new global commons, which is under threat by the operation of intellectual property laws.

The critical movement in its varied forms have largely emerged in the context of legal scholars and practitioners from the US examining the ways in which intellectual property have come to dominate almost every aspect of life.

To very briefly summarize, the arguments runs like this:

- Every aspect of what we call the public domain is now proliferated with images, signs and inventions and products that are protected by one form of intellectual property or another. In addition there is an increasing tendency where domains, which were earlier outside the scope of intellectual property protection, are also being brought under the rubric of intellectual property right.
- This expansion of IPR into public life has resulted in a privatization of the public domain itself, where increasingly almost every cultural resource is the subject of protection. There is an argument that there is therefore shrinkage of the public domain.
- Scholars like Rosemary Coombe, have made a consistent argument that the very practice of a political public domain has been relied on the ability for various people (consumers) to

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

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

engage in critical dialogic practices and these practices do not merely take existing signs for what they are but through processes of appropriation, recodification and transformation determine what meaning itself is.

- If all signs are therefore the subject of IPR and entitled to protection, there is a danger that dialogic practices themselves are under threat as the owner of the sign will have the ability to determine the scope of the use of such signs, and that the owners of these signs will have the ability to freeze the meanings of these signs and hence curtail the very possibility of critical dialogue.
- Through an analysis of various case studies it is then argued that over the years there has been a strong trend towards curtailing any kind of critical practice and that this is a violation of the 1st amendment rights or the right of freedom of speech and expression.

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

These debates in the US have also resulted in a ripple effect sprouting similar critiques of intellectual property in different countries. There are also initiatives like the Free Open Source Software Movement in software, the creative commons in the arena of content that have become very popular as an effective alternative to the expansionist tendency of IP law. In India the critique of intellectual property has traditionally worked within the discourse of nationalist protection of national resources and national interest, and generally confined to the debate around patents. However there are now attempts at understanding the cultural politics of copyright

as well as various moves towards articulating an alternative to the IP regime.

While the copyleft movement, and the advocates of the public domain have emerged as an important critique of copyright, I would argue that there are certain fundamental assumptions that are shared by both sides of the debate. Underlying much of copyright's mythology is the modernist idea of creativity, innovation and progress. Scholars who argue for more restrictions on copyright and a wider notion of the public domain do not fundamentally disagree with any of these assumptions, and if at all, what they seek to do is to provide a counter narrative which says that copyright actually fails in fulfilling its own normative goals, and that the copyleft movement can do a better job in promoting creativity and innovation. By setting itself up as an alternative account of the idea of progress and creativity, public domain arguments nonetheless reinforce core assumptions of copyright theory.

Central then to the discourse of both copyright/ copyleft are key terms such as 'creativity', 'authorship', 'innovation' and the 'public domain'. These terms appear as self evident, value neutral aspirations. A historical examination of these terms and their related histories however reveal that far from being value neutral or gender neutral, they are often been the basis through which social relations of power are coded and contested.

The Public Domain and Authorship

While not synonymous, the idea of the public domain does have a number of parallels with the Habermasian idea of the Bourgeoisie public sphere. The public domain is seen as the domain in which information and knowledge are freely available to ensure genuine public debate, and also promote creativity by making materials accessible to all. Like the public sphere, it is an arena that is marked by "characteristic institutions of modern associational life originating in western societies that are based on equality, autonomy, freedom of entry and exit, contract, deliberate procedures of decision-making, recognized rights and duties of members, and other such principles"[5]

One of the spectral figures from copyright law that hovers over the idea of the public domain is the figure of the author. The modern author emerges concomitantly with the print mediated public; the very act of publishing implies an appeal to reason i.e. to the capacities of a readership engaged in relationship to a print based public sphere. Coombe says, "The unitary

[5] Partha Chatterjee, Beyond the Nation? Or Within ? *Economic and Political Weekly* 32:1/2 (January). pp. 30-34

author who speaks with a single voice and possesses a singular self embodied in unique textual expressions deemed to be his work and thus his property is the conceptual foundation of copyright".[6]
Historically the public sphere in which rational selves addressed other rational selves in languages deemed transparent vehicles for the expression of unmediated thought was of course both partial and exclusionary. Excluding women, children, various savages, primitives and barbarous others, the social boundaries between subjects and objects of pubic discourse were always clearly marked. [7] The figure of the author also served to legitimize cultural exclusions and political disenfranchisement. Attributions of authorship served to differentiate culturally productive labour using aesthetic ideas of originality and creativity that, when legally institutionalized secured special conditions, status and recognition as the creative works of the author and as his exclusive property.

Copyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from his labour. But before the modern concept of an author with legally enforceable rights to his IP could make sense, literary production and consumption went through massive changes similar to those in the history of land; the literary commons was enclosed and collective processes of production was appropriated for individual owners.[8]

The history of authorship as narrated by the world of art history serves as the best site through which we can begin our excavation of the gendered subjectivity of the author. My first evidence stems from the conversion of women as productive artistic subjects to being the objects of art.

---

[6] Rosemary Coombe, The Cultural Life of Intellectual Property, (Durham: Duke Univ. Press, 1998)

[7] Nancy Fraser's critique of Habermas points out that Habermas does not pay due attention to `nonliberal, nonbourgeois, competing public spheres' even within the context that he studies. Fraser argues that while Habermas does recognize the existence of other publics he fails to examine them and `it is precisely because he fails to examine these other public spheres that he ends up idealizing the liberal public sphere'. Citing revisionist adaptations of Habermas's work Fraser says, `[V]irtually contemporaneous with the bourgeois public there arose a host of competing counterpublics, including nationalist publics, popular peasant publics, elite women's publics and working class publics,' adding that `[t]he relations between bourgeois publics and other publics were always conflictual'. See, Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy." Henry A. Giroux and Peter McLaren eds. *Between Borders: Pedagogy and the Politics of Cultural Studies*. London and New York: Routledge.

[8] There is a range of critical scholarship on the 'Author effect' in copyright law that draws from the work of Barthes and Foucault. For an excellent introduction see, Peter Jaszi and Martha Woodmansee, Eds., The Construction of Authorship: Textual Appropriation in Law and Literature. Durham: Duke UP, 1994.

Two of the founding members of the British Royal Academy of Art in 1786 were women. Angelica Kauffmann and Mary Moser were both accomplished painters who were instrumental in the setting up of the academy. Yet when Johann Zoffany's portrait celebrating the founding of the royal academy appeared, there was no place for the women. The painting which portrays a group of artists studying and debating male nude models was as much about the ideal of the academic artists as it is about the royal academicians. On the wall of the academy however lies the bust of Kauffmann and Moser who have become the object of art, rather than its producers. Their rightful place is alongside other paintings and plaster casts that are the objects of contemplation and inspiration for male artists.

Zoffany: The Academicians of the Royal Academy

Subsequent feminist art history has tried to uncover the history of women painters to secure for them their rightful place status as 'equally great painters'. This is of course a complex terrain and often the bestowal of a posthumous historical recognition of the greatness, heroicness or original qualities of a woman painter returns us back to the notions of originality, intentionality and transcendence as set up by the terms of male creativity.

My second witness from whom I also draw the title of this paper is an artists Marietta Robustii, the eldest daughter of Tintoretto, long recognised as one of the early masters in European art history. Painting during the early days of the emergence of the figure of the genius creator in the 16th century, the signature style of Tintoretto has entered the vocabulary of art history. A Tintorettoesque style refers to "the enrichment of the style of Tintoretto as it enters into innumerable combinations with the personal style of the master, it makes transitions and mixtures possible and expands the master's scope, augments his effectiveness and affords opportunity for trying out on a larger scale, artistic principles which in reality are his own property".[9]
It is not surprising that Tintoretto would lend his name to a style that describes the collective process of art production since Tintoretto painted in an era in which the mode of artistic production in Italy shifted form the idea of the craft of the artisan to the inspired genius of a creator. The family as a unit of production 9 and consumption) was also the basis through which most of art production took place. Tintoretto had a guild that consisted of many of his family members, and Tintoretto's genius was also marked in part by his prolific production.

Marietta Robusti was a part of Tintoretto's guild and was an accomplished painter who had been invited to the courts of Austria and Spain. Tintoretto however did not allow Marietta to leave his guild and go t her married to a guild artists, and she continued with the guild till she died early at the age of 31 during childbirth. After the death of Marietta, there was a sudden decline in the output of Tintoretto and most art historians attributed this to the grief that the master felt over his daughter's death. However recent discoveries of Robusti's signature on the paintings of Tintoretto reveal a very different story. Far from being about the grief over the death of his daughter, the decline in Tintoretto's work has to be read as being caused by the death of the most skilled and prolific painter in Tintoretto's guild.

The workshop as a site of a range of production and invisible labour gets transformed through the modernist categories of genius and originality into he narrative of individual authorship and the loss of a muse. It is therefore not surprising to Marietta Robusti resurrected in a series of 19th century paintings (from Cogniet's*Tintoreeto painting his dead daughter* to Phillipe Jeanrou's *Tintoretto and his daughter)* as the muse of the creative genius. This bizarre though commonplace transformation of the woman artists as producer in her own right into a subject for representation serves as the dominant motif in the history of art.

[9] See, Whitney Chadwick, Women, Art and Society, (London: Thames and Hudson, 2002)


Old Man with a Boy (For a long time credited to Tintoretto as one of his masterpieces, but now it is attributed to Marietta Robusti)

If the history of Art and the emergence of the figure of the author is premised on the history of exclusion, the history of science and the story of innovation is not very different. It is also marked by similar exclusions but alongside this, is the emergence of the figure of the unmarked abstract individual or in Haraway's term, the modest witness. Examining the story of the emergence of scientific rationality, Haraway looks at the conditions that allow for the emergence of the idea of the public space of scientific experiments and debate. This public space is curiously marked by the most secretive practices (as is the case for most of the R&D work in top secret defense labs even today), and yet it is possible to understand them epistemologically as being public activity.[10]

The objectivity of science and its self-proving nature has to be conditioned on an ironical duality of visibility and invisibility. Thus the interlocutor in the history of science, in order to make or allow science to speak for itself takes a modest backseat. “In order however for the modesty to be visible, the man / the witness whose account mirrors reality must be invisible i.e. an inhabitant of the potent unmarked category. The world of subjects and objects was in place. Acting as the object’s transparent spokesman, the scientist has the most powerful allies. As men whose only visible trait was their limpid modesty, they inhabited the culture of no culture. Everybody else was left in the domain of culture and society. The issue was whether women had the independent status to be modest witnesses, and they did not. Technicians who were physically present were also epistemologically invisible persons in the experimental way of life; women were invisible in both the physical and epistemological sense”.

[10] Donna J. Haraway,Modest_Witness@Second_Millennium. FemaleMan©_Meets_OncoMouseª: Feminism and Technoscience. (New York and London: Routledge, 1997)

Though excluded from most accounts of creation or innovation, the labour of women had to be allegorized via the terms of creation as a second order act. A distinction was made between the creative processes as creation and procreation (drawing from the gendered metaphors of allegedly distinct male and female modes of action). The former was seen as the imposition of humanly determined form on inert or submissive matter while the latter is the generation of new life through reproduction rather than production.

Much of patent law still depends on the critical mythology of invention and in Diamond v. Chakrabarty[11], the first case which allowed for the patenting of life forms, the court saw Chakrabarty's bacterium as a product of human ingenuity, of labour mixed with nature in that magical constitutional way that legally turns the human being into nature's author or inventor and not simply its inhabitant".
The figure of the unmarked author and the modest witness can now allow us to move back into our contemporary time, to understand the conflicts over symbolic resources, where a number of immodest witnesses refuse to become property constituted members of the public domain. The autonomy of the speaking subject/ the author is so valued within the liberal tradition hat it often becomes that faultline that divides, and unites the copyright brigade with the public domain advocates.

The Limits of Freedom of Speech and Expression

The ideal of the autonomous speaking subject and the emphasis on freedom of speech still forms much of the basis of the critical intellectual property scholarship and activism today. The best instance of this is the case of Eldred v. Ashcroft[12] which sought to question the constitutional validity of the Sonny Bono Act, an act that extend the life of copyright by twenty years. The argument that was made in Eldred was that the extension of copyright term violated the copyright clause of the US constitution as well as the first amendment that guarantees the freedom of speech and expression. The Act was held by the Supreme Court to be valid on both counts.

The modest witness's faith in the constitutional process may have been shaken but not stirred.

The unquestioned major premise that unites the advocates of the copyright/ copyleft debate are ideas of the public domain, freedom of

[11] 447 US 303 (1980)
[12] 537 US 186 (2003)

speech and expression and of course the progress narratives of creativity and innovation. Apart from the historical exclusion, it is also pertinent to pose the question of the continued relevancy of individuals autonomy to speak when the forums for speaking and the circuits of communication are increasingly privately owned. Often the only mode of speech in such a context is speech that is unruly, that is derived, that is parodic and illegal.

An examination of the kinds of battles that have taken place in the domain of speech/ property reveals a fascinating terrain where the battle lines are drawn on the very symbolical resources that makes any communication activity possible. It would seem that an approach that relies on the liberal discourse of freedom of speech and the public domain ends up recycling the bracketed exclusions that have not just been a part of the history of the idea of the public sphere but its chief constituent element. The autonomous speaking subject/ the author are akin to the category of the citizen as the unmarked individual, with constitutionally guaranteed rights of equality, access and participation in democratic processes. In the Indian context the history of the citizen, tied to the project of the nation as "the largest imagined space which claimed the nomenclature of the new, or at least with the Utopian projection of the ideal community, freed from colonial domination, and free to create a world untainted by inequalities of caste-class, community or gender. It was a community, however, only of those who were eligible to be citizens, and the question of how citizenship was conferred is in many ways the same question as how the nation was imaged. Nationalism was a marker of the readiness to enter the 'modern' age, and the modern person produced as "Indian" was also the free, agentive, romantic subject of liberal humanism"[13]

The regime of IP serves to sustain the mythical public sphere by containing any disruptful speech act that threatens the integrity of the authorial text, any unfair appropriation of the sign and punishes any transgressive alteration that is not ‘author’ized. In the era of flexible capital where value has shifted form the commodity to the sign, and form the tangible to the intangible, the law of intellectual property guarantee the exchange value of sign, symbols and ideas. But just as the law abiding citizen has no choice but to encounter the excessive bodies of those who cannot disavow their positivity, the official world of signs and authored meanings constantly face the challenges of unauthorized alterity.

IP Law can simultaneously limits the aspirations and claims of individuals and groups and at the same time provides resources for the marginalized to refigure identities; people recreate law in their everyday lives as they

[13] Tejaswini Niranjana, Introduction, Careers of Modernity, Journal of Arts and Ideas, Nos. 25-26, 1993

draw upon its norms and form s in both conventional and transformative practices. Such centralizing forces of authority (those of the state and the interests of capital) must always contend with alterity- unpredictable, centrifugal forces that find expression in practices like those of satire, parody, irony, quotation and collage.

I would look to look at a few instances of such acts of altertity and their conflicts with copyright and trademark law to pose the question of how we read these cases. Most of the cases have relied on the defense of freedom of speech and expression, and inevitably the judges have ruled in favour of proprietary rights. An examination of the cases however reveal that these cases cannot be read merely within the abstract account of freedom of speech and expression, but raise substantial question of how copyright can be used to curtail appropriative practices around sexuality and gender. If the speaking subject of Art. 19(1)(a) in the Indian constitution and the first amendment in the US, is presumed to be the same romantic autonomous subject of the bourgeoisie public sphere, then what happens to the speech claims of publics who do not fit within the properly constituted public sphere. Traditionally , the state was the only institution to whom one addressed speech claims, but increasingly as we can see, speech acts which appropriate private signs and symbols are addressed against private owners of intellectual property, and the state plays the part of the modest witness to the contest.

In 1981, a gay rights activists group decided to sponsor an international athletic contest, modeled on the Olympics, involving gay athletes. The purposes of the contest were to draw attention to the gay cause and to counteract negative and stereotypical biases toward sexuality minorities. The group formed a non-profit corporation, San Francisco Arts & Athletics, Inc. ("SFAA"), and began promoting its event as the "Gay Olympic Games." The group sold T-shirts, buttons, bumper stickers, and other items bearing the title "Gay Olympic Games" to help raise money for the event. The United States Olympics Committee filed an infringement suit in 1982, seeking to enjoin the SFAA from using the word "Olympic." The USOC holds a trademark in the word "Olympic" and in the various Olympic symbols, including the familiar five interlocking rings emblem, and also enjoys special exclusive use rights granted by Congress in section 110 of the Amateur Sports Act of 1978. [14]

The Supreme Court held that since the mark was the private property of the USOC, they could prevent any person from using the sign in a disparaging manner, and that the freedom of speech and expression

[14] 483 U.S. 522 (1987)

defense was not a valid one. Alex Kozinski, the dissenting judge in the case makes an equally problematic justification for allowing the group to use the sign stating that “It seems that the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic torch, but homosexuals are not."

Ironically, the Committee's lawyer was a member of an exclusive all-male social club with a history of discrimination against minorities. The name of this elite institution? You guessed it--The Olympic Club. No legal injunction was launched on that front[15].
In many ways this case like many others signals to the increasing ability to restrict and control meaning because you "own" the sign may be most readily apparent in the trademark field, but it is more widespread

In Canada, Air Canada had started a campaign which was meant to showcase the multicultural aspect of Canada. A whole host of billboards ranging form Sikhs fly Air Canada to Mounties fly Air Canada were used as a part of the campaign. A lesbian rights organization decided to use the campaign and created a slogan “Lesbians Fly Air Canada”. The slogan lasted all of one day because they received an injunction notice which stated that their use of the Air Canada sign was unauthorized and resulted in a tarnishing of the carefully created image of the company.[16]

Another rather bizarre intellectual property right is the ‘right to publicity’. The right to publicity is a common law right which accrues to the individual persona of a celebrity. It does not preclude any claim of protection over the work etc. from copyright or allied laws. It must be stated that the right to publicity has a long history in Hollywood and all kinds of claims have been made by actors/ actresses about their rights. In India Rajnikant’s claim on a sign that he used in the film Baba was perhaps the first public claim towards such a right to publicity. In common law, the right to publicity then is a right to certain distinguishing and identifying characteristics, features or behavior of a celebrity. These rights are assignable and tradable.

In an interesting case, a small group brought out a card bearing a picture of John Wayne, wearing cowboy hat and bright red lipstick, with a caption, "It's such a bitch being butch." Wayne's children, among others, objected to the card not only on the ground that its sellers were making money from The Duke's image -- money that should go to them but also that the card was "tasteless" and demeaned their father's (hard-earned)

[15] Rosemary Coombe supra n.6

[16] Rosemary Coombe supra n.6

conservative macho image. They objected also, indeed primarily, because in their view the card was "tasteless" and demeaned their father's (hard-earned) conservative macho image. To his children, as to most of his fans, "John Wayne" epitomizes traditional America's mythic and idealized view of itself, its history, and its national character. What Wayne stands for -- what his image means in the mainstream cultural grammar -- is rugged individualism, can-do confidence, physical courage, and untroubled masculinity. That is the "preferred meaning" of "John Wayne." [17]

The appropriation of star images has of course been central to a number of minority groups, especially in the early days of the LGBT movement, the identification with stars like Judy garland, James Dean and Marlene Dietrich has been well documented. Similarly in India, the use of the tragic figure of Meena Kumari and macho excesses of Akshay Kumar by sexuality minority groups has been critical in the formation of counter hegemonic readings. Liberal notions of freedom of expression will always fail to grasp the nature of contemporary cultural politics of speech and appropriation. [18]

This paper has (even if rather incoherently) has tried to map out two sets of questions. The first section attempted to have a critical historical look at the historical basis that informs a number of assumptions about the public domain in intellectual property law. The second section looks at some of the existing conflicts over speech and appropriation. I would end by arguing that even while defending the rights of various minority groups to use and appropriate existing signs and symbols, the failure of the critical scholarship on intellectual property has been its inability to contend with the historical processes through which ideas of the public domain come into being. There is not distinct notion of the public domain that can be involved for the purposes of copyright law which is not at the same time linked to older histories of violence, of exclusion and of dispossession.

Rather than looking at the idea of the public domain as a pre given norm that assists us in resolving the problems of access created by copyright, we perhaps needs to go closer to Nancy Fraser’s idea of multiple publics, and see the idea of the public as an allegory of claims and contests which may not be resolvable as a legal issue, or as an issue of free speech, but

[17] Michael Madow, Private Owership of Public Image: Popular Culture and Publicity Rights, 81 Calif. L. Rev. 125, 1993 , Rosemary Coombe, Author/Izing The Celebrity: Publicity Rights, Postmodern Politics, And Unauthorized Gender, The Marketplace of Ideas: Twenty Years of the Cardozo Arts and Entertainment Law Journal (Kluiwer International, 2002) pp. 236-266., "Embodied Trademarks: Mimesis and Alterity On American Commercial Frontiers" 11 (2) Cultural Anthropology: Journal of the Society for Cultural Anthropology 202 - 224

[18] See also , Commons-law debate on Rajnikant (August 2002), http://mail.sarai.net/pipermail/commons-law/

necessarily draws us into the specificity of certain kinds of contests over the symbolic and cultural terrain that does not merely mirror pre existing social relations but actively fashion such relations. Intellectual property laws, which defines private property rights in cultural forms, then emerges as a fertile field where we can consider the social intersections of law, culture, property and interpretive agency.