

# INTELLECTUAL PROPERTY SCHOLARSHIP AND THE NEW LEGAL REALISM MOVEMENT: REFLECTIONS FROM BOLLYWOODLAND

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*This paper argues that IP scholars ought to engage with New Legal Realism, a socio-legal research movement rooted in pragmatism. The paper experiments with New Legal Realism while studying film piracy in India, and proposes a template for such research.*

## INTRODUCTION: A CASE FOR BALANCED PRAGMATISM

Last year, Sony Pictures' servers were mauled by hackers. Allegedly, the North Korean government orchestrated the hacking to avenge the release of a film that mocked its Supreme Leader, a cuddly but evidently humourless man.<sup>1</sup> To Sony's embarrassment, hundreds of salacious internal emails were posted on Wikileaks. The emails revealed that Sony executives underpaid female actors, opposed casting African-Americans in lead roles, and cracked racist jokes about President Obama.<sup>2</sup> Amidst the contraband correspondence was an email by the Chairman of the Motion Picture Association of America (MPAA). The email referred to an MPAA-funded project to institute research grants. The Chairman emphasised the need "to solicit pro-copyright academic research papers and to identify pro-copyright scholars."<sup>3</sup> The email was seized upon by TorrentFreak, an online mouthpiece for the trendy global pirate movement.

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\* A lengthier version of this paper has been accepted for publication in the *Cardozo Arts & Entertainment Law Journal*. The genesis of the paper lies in a presentation I made at the 10<sup>th</sup> WIPO-WTO Colloquium for Teachers of Intellectual Property, Geneva, 2013 (funded by organisers). I was able to write a full-length paper after being awarded a competitive research grant from the Global Research Intellectual Property Program (GRIPP) of the Motion Picture Association of America (MPAA) — the very programme referred to in this paper (though I was awarded the grant before the Sony hacking incident). Working drafts of the full-length paper were presented at the 6<sup>th</sup> Harvard Law School Institute for Global Law and Policy Workshop in Doha, 2015 (funded by organisers) and the inaugural Transnational Law Summer Institute Workshop at King's College London, 2015 (funded by organisers). [*This information was added by the Author post-competition; Editors' remark*]

<sup>1</sup> Andrea Peterson, *The Sony Pictures Hack, Explained*, WASHINGTON POST, Dec. 18, 2014, <https://www.washingtonpost.com/blogs/the-switch/wp/2014/12/18/the-sony-pictures-hack-explained>.

<sup>2</sup> Sara Stewart, *Meet the Winners and Losers of the Sony Hacking Scandal*, NEW YORK POST, Dec. 22, 2014, <http://nypost.com/2014/12/22/meet-the-winners-and-losers-of-the-sony-hacking-scandal>.

<sup>3</sup> Email from Christopher Dodd to Rebecca Prentice and others, Dec. 4, 2014, *available at* <https://wikileaks.org/sony/emails/emailid/111948>.

TorrentFreak claimed that the MPAA had a sinister agenda — to “steer researchers by giving them precise directions” on what to write.<sup>4</sup>

In my opinion, Torrentfreak’s criticism is rather simplistic. If IP scholars concur with a Microsoft or a Monsanto position, the root cause is arguably a deeper ideological conviction. Academicians like to claim that judges are influenced by personal prejudices and life experiences.<sup>5</sup> Surely, this is also true for academicians themselves. For example, Bentham’s views blossomed at a young age, after he read a courtesan’s sensationalist memoirs and gullibly “vowed war” against the legal system that supposedly wronged her.<sup>6</sup> Savigny’s romanticism was inspired by his sheltered experiences in rural Germany. Savigny’s belief in the superiority of the “Christian approach to life”<sup>7</sup> even led him to oppose the appointment of a Jewish law professor.<sup>8</sup> To use contemporary examples, Duncan Kennedy, founder of the left-wing Critical Legal Studies movement, once worked with the CIA and “hated Communists above all.”<sup>9</sup> Kennedy gradually became disillusioned with his employer and concluded that the US was “a much worse threat” than the Soviets.<sup>10</sup> He then enrolled at law school, and shifted “significantly to the left.”<sup>11</sup> Richard Posner grew up with “extremely left-wing parents.”<sup>12</sup> But while Posner’s parents grew up in Romania amidst hardship, Posner was born in the US, at a time his parents had

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<sup>4</sup> Ernesto, *MPAA Offers \$20,000 Grants for “Unbiased” Piracy Research*, TORRENT FREAK, <https://torrentfreak.com/mpaa-offers-20000-grants-piracy-research-140619>.

<sup>5</sup> See JEROME FRANK, *LAW AND THE MODERN MIND* xxxiv (1930); Richard Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 584 (2011).

<sup>6</sup> JOHN BOWRING (ed.), 19 *THE WORKS OF JEREMY BENTHAM* 35 (1842).

<sup>7</sup> ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* 130 (2005).

<sup>8</sup> See TERRY PINKARD, *HEGEL: A BIOGRAPHY* 530-4 (2000).

<sup>9</sup> See JAMES R. HACKNEY, *LEGAL INTELLECTUALS IN CONVERSATION* 20 (2012) (interview with Duncan Kennedy).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 24.

<sup>12</sup> Ronald Collins, *The Man Behind the Robes — A Q&A with Richard Posner*, CONCURRING OPINIONS, Dec. 1, 2014, <http://concurringopinions.com/archives/2014/12/the-man-behind-the-robos-a-qa-with-richard-posner.html>.

become “prosperous, educated, and completely assimilated Americans,” and he turned rightwards.<sup>13</sup>

As Kennedy says, most law professors can be categorised into “hard guys” who lean right and “soft guys” who lean left, and “the hard/soft distinction” defines academia.<sup>14</sup> Today, many scholars entangle themselves with corporations, whether as legal advisors or research grantees. Arguably, such linkages are only incidental. For example, during the Viacom-YouTube litigation, Ronald Cass, Dean Emeritus at Boston University Law School, co-authored an amicus brief supporting Viacom’s position on intermediary liability.<sup>15</sup> A cynic might point out that Cass’ School has received hefty donations from Viacom’s chairman.<sup>16</sup> However, those familiar with Cass’ work would know that he is an archetypal law-and-economics “hard guy.” Cass served under Reagan and Bush, and is a member of the right-leaning Federalist Society. Cass’ arguments in the amicus brief (couched in law-and-economics- jargon) only echo arguments he has made earlier. Cass once defended Microsoft from allegations of anti-competitive licensing, arguing that “success in the marketplace does not dispossess a firm of the benefits that copyright law and contract generally convey.”<sup>17</sup> Similarly, William Patry has condemned the MPAA arguably not because he advises its nemesis Google, but because he opposes “free market fundamentalism” and Reaganomics.<sup>18</sup>

Furthermore, academicians and corporate patrons can often be at odds. For instance, Harvard Law School’s Institute for Global Law and Policy (IGLP) is dominated by “soft”

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<sup>13</sup> *Id.*

<sup>14</sup> See HACKNEY, *supra* note 9, at 24.

<sup>15</sup> Brief of Amici Curiae Ronald Cass et al. in support of plaintiffs-appellants, Viacom v. YouTube, No. 07 Civ. 2103, [https://www.eff.org/files/2013/11/01/amicus\\_brief\\_cass\\_nimmer\\_brotman.pdf](https://www.eff.org/files/2013/11/01/amicus_brief_cass_nimmer_brotman.pdf) [hereinafter *Cass Amicus Brief*].

<sup>16</sup> Susan Seligson & Leslie Friday, *Sumner Redstone Gives \$18 Million to School of Law*, BU TODAY, Sep. 4, 2010, <http://www.bu.edu/today/2012/sumner-redstone-gives-18-million-to-school-of-law>.

<sup>17</sup> Ronald Cass, *Copyright, Licensing, and the First Screen*, 5 MICH. TELECOMM. & TECH. L. REV. 35, 71 (1999).

<sup>18</sup> See generally, WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009).

professors who lean left — like Sheila Jasanoff, who borrows from Foucault and argues that biotechnology patents represent an extension of “the biopolitical imagination of the neoliberal state and its corporate partners.”<sup>19</sup> Yet, the IGLP’s main donors are — hold your breath — Santander Bank and the Qatar Foundation.<sup>20</sup> I do not claim that academicians can never be puppeteered by corporations. For example, the Oscar-winning documentary *Inside Job* revealed how some business school professors concealed links with corporate funders and fudged data.<sup>21</sup> But as a law professor-cum-practitioner has pointed out, professors who compromise with their intellectual integrity will eventually have to face the scrutiny of other academicians<sup>22</sup> — the trusty marketplace of ideas argument that *Inside Job* actually vindicates.

My second problem with TorrentFreak’s criticism is the premise that there is something very scandalous about “pro-copyright” scholarship. Copyright scholars can generally be divided into “optimists” (who believe that authors should be entitled “to every last penny that other people will pay to obtain copies of their works”) and “pessimists” (who consider social interests and believe that copyright should “extend only so far as is necessary”).<sup>23</sup> Pessimists have never opposed the validity of copyright itself. Lawrence Lessig, for example, has clearly stated that his notion of a “free culture” is “not a culture without property.”<sup>24</sup> During a debate with the MPAA’s Jack Valenti, Lessig pointed out, “We have no disagreement about what’s properly called piracy, and we have no disagreement that Harry Potter and every creative product has and should have the opportunity for copyright protection.”<sup>25</sup> Thus, what TorrentFreak advocates is what Lessig

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<sup>19</sup> Sheila Jasanoff, *Biotechnology and Empire: The Global Power of Seeds and Science*, in 2 THE GLOBAL POLITICS OF SCIENCE AND TECHNOLOGY 273, 283 (Maximilian Mayer et al., eds., 2014).

<sup>20</sup> *About the IGLP*, HARVARD LAW SCHOOL, 2015, <http://iglp.law.harvard.edu/about>.

<sup>21</sup> Shira Poliak, *After Documentary, B-school Rethinking Ethics*, COLUMBIA SPECTATOR, April 15, 2011, <http://columbiaspectator.com/news/2011/04/15/after-documentary-b-school-rethinking-ethics>.

<sup>22</sup> Rory Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345, 374 (2001).

<sup>23</sup> PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 10-11 (2003).

<sup>24</sup> LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY xiv (2004).

<sup>25</sup> *A Debate on “Creativity, Commerce & Culture” with Larry Lessig and Jack Valenti*, University of Southern California, Nov. 29, 2001 34-5, available at <http://learcenter.org/pdf/LessigValenti.pdf>.

calls “copyright abolitionism,” a view that “rejects copyright and believes that the law is nothing more than an ass to be ignored.”<sup>26</sup>

Lessig states, somewhat dismissively, that copyright abolitionism is a form of “extremism” that exists “among our kids.”<sup>27</sup> However, there are distinguished scholars who advocate it. A Columbia professor has authored the *dotCommunist Manifesto*, which draws from Marxian concepts of class struggle and calls for the “[a]bolition of all forms of private property in ideas.”<sup>28</sup> A Virginia professor has referred to American cultural history and called for a “thin” form of copyright that is “just strong enough” to reward *aspiring* artists.<sup>29</sup> Lawrence Liang, a well-known Indian scholar, has declared himself to be a “defender of film piracy”<sup>30</sup> and criticised Lessig.<sup>31</sup>

In developing countries, support for copyright abolitionism (and IP abolitionism in general) can also be drawn from the writings of the erudite Third World Approaches to International Law (TWAIL) movement. TWAIL scholars critique international law as “statist, elitist, colonialist, Eurocentric and masculine.”<sup>32</sup> One of TWAIL’s founders has remarked, “The regime of international law is illegitimate. It is a predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West.”<sup>33</sup> TWAIL-ers oppose the TRIPS Agreement for emphasising “private rights” rather than the “social and economic rights of the

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<sup>26</sup> Lawrence Lessig, *Laws that Choke Creativity*, TED, Mar. 2007, [https://www.ted.com/talks/larry\\_lessig\\_says\\_the\\_law\\_is\\_strangling\\_creativity/transcript?language=en](https://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity/transcript?language=en)

<sup>27</sup> *Id.*

<sup>28</sup> Eben Moglen, *The dotCommunist Manifesto*, Jan. 2003, [http://emoglen.law.columbia.edu/my\\_pubs/dcm.html](http://emoglen.law.columbia.edu/my_pubs/dcm.html).

<sup>29</sup> SIVA VAIDYANATHAN, COPYRIGHTS AND COPYWRONGS 5 (2003).

<sup>30</sup> Lawrence Liang, *Insights on Film Piracy*, 47 ECON. AND POL. WEEKLY 29, 30 (2014).

<sup>31</sup> Lawrence Liang, *Meet John Doe’s Order: Piracy, Temporality and the Question of Asia*, 2 INDIAN J. INTELL. PROP. L. 154, 169-170 (2009).

<sup>32</sup> BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD 46 (2003).

<sup>33</sup> Makau Mutua, *What is TWAIL*, 94 AM. SOC’Y INT’L L. PROC. 31 (2000)

poor.”<sup>34</sup> The TWAIL position on copyright is characterised by this statement, by a TWAIL-er from Trinidad: “[C]opyright was framed with Anglo-American norms [...] In trying to decipher how Trinidad fits into the global IP paradigm, I problematise *the very idea that it should*.”<sup>35</sup> However, TWAIL has rightly been criticised for being “nihilistic” and “disinterested in...pragmatic reforms,” providing insights that are “too radical to be of use.”<sup>36</sup> As a well-meaning critic has observed, those who “attempt to destabilise the international system by challenging the military, political, and economic hegemony of the West” simply face too uphill a task.<sup>37</sup> Indeed, how would TWAIL-ers respond to the fact that even Iran is lobbying to enter the WTO, as part of recent backroom dealings with the US?<sup>38</sup> And what would TWAIL-ers make of the 200 Iranian artists and filmmakers who wrote a petition terming internet pirates as “thieves of art and culture,” and condemned their excuse of Iran’s non-TRIPS status?<sup>39</sup> Thus, despite its intellectual rigour, TWAIL arguably holds little practical relevance. The same can be said for copyright abolitionism.

As Posner argues, there is a distinction between an approach that employs merely a sceptical perspective, versus one that employs an all-pervasive sceptical theory. While the former can be rooted in pragmatism and have a positivistic respect for authority, the latter tends to rely

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<sup>34</sup> B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L. COMM. L. REV. 3, 17 (2006).

<sup>35</sup> Terrine Friday, *Copyright Economy: Protecting “Works of Mas” in Trinidad and Tobago’s Culture Industry* 12, December 2014, YORK UNIVERSITY CENTRE FOR RESEARCH ON LATIN AMERICA AND THE CARIBBEAN, <http://www.yorku.ca/cerlac/Terrine%20Friday%20-%20Copyright%20Economy%20in%20T&T.pdf> (emphasis added).

<sup>36</sup> José E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIO JURIS, Sep. 28, 2010, <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris>.

<sup>37</sup> See also David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT’L L. 29, 74 (2003).

<sup>38</sup> Allison Carnegie, *Here’s What Will Happen if Iran Joins the WTO*, WASHINGTON POST, Oct. 24, 2015, <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/24/heres-what-will-happen-if-iran-joins-the-wto>.

<sup>39</sup> See, Rakhshan Banietemad et al., *Letter of Iranian Filmmakers for Audiences of their Films Over the Internet.*, Jul. 20, 2014, available at <http://www.khanehcinema.ir/en/news/38/Letter-of-Iranian-filmmakers-for-audiences-of-their-Films-over-the-Internet>;

on “moral law” and veer towards “radical scepticism.”<sup>40</sup> For instance, a senior academic has argued that film producers have “no moral right to fight against piracy when they themselves are engaged in illegal activities.”<sup>41</sup> Now, a “pragmatic” sceptic would have little use for such reasoning. A pragmatist would argue that global copyright regimes have existed for many years and are not going away anytime soon, whatever one may think of Sony or the MPAA. Furthermore, as an eminent left-wing economist has pointed out, the economic contribution of the creative industries is just as important as their cultural contribution, even for the “poorer countries of the world.”<sup>42</sup>

Today, the Western critique of “emphasising abstract theory at the expense of practical scholarship” in law schools<sup>43</sup> is being echoed in developing countries.<sup>44</sup> Thus, rather than espousing IP abolitionism, developing country scholars should arguably be pragmatic. They ought to examine how TRIPS and domestic IP laws operate in the real world, in a globalised economy where the interests of corporations and nation-states are indispensable. Indeed, many developing countries themselves act like rational wealth-maximisers, a phenomenon Peter Yu calls “intellectual property schizophrenia.”<sup>45</sup> Yu argues that “it is unwise for policymakers and commentators to take either a high-protectionist or low-protectionist position without

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<sup>40</sup> See generally, Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

<sup>41</sup> ARUL SCARIA PIRACY IN THE INDIAN FILM INDUSTRY: COPYRIGHT AND CULTURAL CONSONANCE 200 (2014) (quoting N.S. Gopalakrishnan).

<sup>42</sup> Amartya Sen, *Foreword*, in Patrick Kabanda, *The Creative Wealth of Nations* ii, World Bank Policy Research Working Paper 7118 (2014), <http://documents.worldbank.org/curated/en/2014/11/20400813/creative-wealth-nations-performing-arts-can-advance-development-human-progress>.

<sup>43</sup> Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 24 (1992).

<sup>44</sup> See, e.g., Luciana Gross Cunha & José Garcez Ghirardi, *Legal Education in Brazil: The Challenges and Opportunities of a Changing Context*, HARVARD LAW SCHOOL CENTRE FOR THE LEGAL PROFESSION, Nov. 5, 2014, <http://clp.law.harvard.edu/assets/Panel-3-Legal-Education.pdf>; N.R. Madhava Menon, *The Future of Law Teaching Institutions*, THE HINDU, Jul. 30, 2002, <http://www.thehindu.com/thehindu/edu/2002/07/30/stories/2002073000100200.htm>.

<sup>45</sup> See generally, Peter K. Yu, *International Enclosure, The Regime Complex, and Intellectual Property Schizophrenia*, MICH. ST. L. REV. 1 (2007).

considering which economic sectors are at issue.”<sup>46</sup> Yu cites India’s contrasting interests in the areas of pharmaceutical patents and Bollywood copyrights.<sup>47</sup> One can also take the example of Cuba, and compare its morally irreconcilable positions on pharmaceutical patents vis-à-vis tobacco plain packaging.<sup>48</sup>

Philosophically, pragmatism “stands for no particular results” and “has no dogmas, and no doctrines.”<sup>49</sup> This makes pragmatism a “perfect theoretical foundation” for legal research.<sup>50</sup> However, pragmatism can have its shortcomings. As argued earlier, scholars tend to possess inherent prejudices and slants. In the name of pragmatism, some scholars could lean disproportionately towards elitism and realpolitik, becoming impervious to the human condition. For example, Posner states that pragmatism requires an “emphasis on the practical and useful,” where the “right rule” is the “the sensible, the socially apt, the reasonable, the efficient rule.”<sup>51</sup> Each of Posner’s adjectives is susceptible to elitist biases. This is epitomised by Posner’s infamous article where he applied law-and-economics concepts to advocate baby-selling.<sup>52</sup> Posner has stated that, in his outlook, human beings are nothing but “monkeys with large brains”<sup>53</sup> — a statement that may be scientifically correct, but is deeply insensitive and problematic.

In the context of IP research, elitist pragmatism has serious shortcomings. For example,

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<sup>46</sup> Peter K. Yu, *Intellectual Property and the Information Ecosystem*, MICH. ST. L. REV. 1, 9 (2005).

<sup>47</sup> *Id.*

<sup>48</sup> Cuba has demanded that the WTO adopt lenient pharmaceutical patent rules to allow greater access to medicines in the interests of public health (*see* Statement by the Cuban Delegation on IP and Access to Medicines, IP/C/W/299 (July 5, 2001)). However, Cuba has aggressively enforced the trademark rights of its cigar industry, even complaining to the WTO against tobacco plain packaging laws in Australia.

<sup>49</sup> WILLIAM JAMES, PRAGMATISM 32 (1907).

<sup>50</sup> Brian Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 355 (1996).

<sup>51</sup> RICHARD POSNER, OVERCOMING LAW 8, 399 (1995).

<sup>52</sup> Richard Posner & Elisabeth Landes, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

<sup>53</sup> Richard Posner, *The Personal Philosophy of Richard Posner*, BIG THINK, <http://bigthink.com/videos/the-personal-philosophy-of-richard-posner>.

Posner, referring to R&D costs, has argued that the “pharmaceutical-drug industry is the industry that can make the strongest case for needing patent protection.”<sup>54</sup> This may be an economically sound argument, but its disturbing corollary is what the CEO of Bayer said while opposing a compulsory licence issued by India on an anti-cancer drug: “[W]e did not develop this product for the Indian market, let’s be honest. We developed this product for Western patients who can afford this product.”<sup>55</sup> Thus, where Posner and the Chicago School fall short is that they consider the “maximisation of economic wealth as the only proxy for well-being.”<sup>56</sup> And for all the criticism that this paper has levelled against TWAIL, it must be said that one of TWAIL’s underlying motives is truly valuable — to study law “from below,” focusing on the “lived experiences of ordinary people.”<sup>57</sup> Yet, jettisoning the notion of wealth-maximisation is unwise, for that is what governments and businesses usually consider. Hence, what IP scholars should ideally adhere to is some sort of *balanced* pragmatism, where laws are studied from *both* above and below. This can keep ideological biases and agendas in check, and provide policymakers with constructive inputs. In this paper, I consider how the burgeoning New Legal Realism (NLR) movement might be useful, sharing findings from an experiment in India.

## I. NLR AND ITS RELEVANCE

Oliver Wendell Holmes had argued that lawyers ought to look beyond textual formalism.<sup>58</sup> “The life of the law has not been logic: it has been experience,” Holmes had famously remarked.<sup>59</sup> Holmes’ call was responded to, by the American Legal Realism (ALR) movement.

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<sup>54</sup> Richard Posner, *Pharmaceutical Patents*, POSNER-BECKER BLOG, 12 Dec. 2004, <http://www.becker-posner-blog.com/2004/12/pharmaceutical-patents--posner.html>.

<sup>55</sup> Adam Peck, *Pharmaceutical CEO: Cancer Drug Is Only For Westerners Who Can Afford It*, THINK PROGRESS, Jan. 26, 2014, <http://thinkprogress.org/health/2014/01/26/3205861/pharmaceutical-ceo-cancer-drug-westerners-afford> (quoting Marijn Dekkers).

<sup>56</sup> Estelle Derclaye & Tim Taylor, *Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach*, 37 EUR. INTELL. PROP. REV. 197, 209 (2015).

<sup>57</sup> RAJAGOPAL, *supra* note 32, at xiii.

<sup>58</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV L. REV. 457, 467-469 (1897).

<sup>59</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

The movement focused on those “[b]ehind decisions”, i.e. judges with fallibilities, and those “beyond decisions”, i.e. “people whom rules and decisions directly and indirectly touch.”<sup>60</sup> However, ALR scholars often leaned towards the post-Depression politics of the American left. Even a senior Roosevelt administration official, who supported the pro-poor New Deal, described ALR scholars as “Lenin baby chicks”<sup>61</sup> ALR’s ideology was particularly visible in the writings of Felix Cohen. Cohen, the son of a prominent socialist ideologue, grew up in a working-class immigrant neighbourhood, and was disdainful of capitalism following the Depression.<sup>62</sup> Writing in the mouthpiece of the Socialist Party of America, he attacked “capitalist law” and “capitalist courts.”<sup>63</sup> In one of his most famous articles, Cohen set his sights on IP law, specifically trademarks. Cohen argued that advances in trademark law were only increasing the “power of business monopolies.”<sup>64</sup> He claimed that “dominant economic forces” were behind this, with corporations hiring skilled lawyers and judges being influenced by their own privileged backgrounds.<sup>65</sup>

One of Cohen’s targets was Frank Schechter’s seminal paper advocating trademark dilution.<sup>66</sup> While Schechter is not considered a part of the ALR fraternity, it has been argued that he was “a moderate legal realist” who “was also a practising lawyer and... had limited time for abstract jurisprudential reflection,” preferring a “pragmatic style of argument.”<sup>67</sup> Schechter’s reasoning was based on “how marks were actually used by companies” and “what sort of legal

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<sup>60</sup> Karl Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV L. REV. 1222 (1931).

<sup>61</sup> GEORGE PEEK & SAMUEL CROWTER, WHY QUIT OUR OWN 117 (1936).

<sup>62</sup> DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 59 (2007).

<sup>63</sup> Felix Cohen, *Socialism and the Myth of Legality*, 4 AMERICAN SOCIALIST Q. 3 (1935).

<sup>64</sup> Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 814 (1934).

<sup>65</sup> *Id.* at 845.

<sup>66</sup> Frank Schechter, *The Rational Basis of Trademark Protection* 40 HARV. L. REV. 813.

<sup>67</sup> Robert Bone, *Schechter’s Ideas in Historical Context and Dilution’s Rocky Road*, 24 SANTA CLARA HIGH TECH. L.J. 469, 483, 505 (2007).

protection was needed to support that use.”<sup>68</sup> Arguably, Cohen’s subalternist realism and Schechter’s elitist realism both have their limitations. Here, NLR offers a much-needed compromise.

The NLR movement was constituted a decade ago by a group of eminent US scholars, who suggested that ALR had grown outmoded. NLR’s similarities and differences with ALR can be seen from a series of papers explaining the movement’s aims. In a nutshell, NLR “implies a rejection of theory-driven orthodoxies that do not take account of people’s lived experience of the law in particular settings” (like ALR).<sup>69</sup> It adopts a “ground-level up perspective,” yet pays heed to “the experiences of elites and professionals” (the former visible in ALR but not quite the latter).<sup>70</sup> It seeks to provide “serviceable empirical answers to practical policy questions” (not a typical ALR trait).<sup>71</sup> NLR is thus “fundamentally pragmatic,” rejects “head-in-the clouds empiric-free reasoning” and recognises the relevance of governments and markets (unlike ALR).<sup>72</sup> In the context of international economic law, NLR adopts “both a top-down and a bottom-up approach” and “examine[s] the ways in which the national/local and international/transnational are linked.”<sup>73</sup> In doing so, the narrow US-centric focus of ALR naturally gives way to one conscious of “the contemporary situation of economic and cultural globalisation.”<sup>74</sup>

NLR has been described as “contemporaneous and kindred” with Empirical Legal

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<sup>68</sup> *Id.*

<sup>69</sup> Howard Erlanger et al., *Is It Time for a New Legal Realism?* WISC. L. REV. 335, 345 (2005).

<sup>70</sup> Mark Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANNUAL REV. L. SOC. SCI. 555, 561-2 (2010).

<sup>71</sup> *Id.* at 576.

<sup>72</sup> Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 130, 137 (2009).

<sup>73</sup> Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 29, 39 (Colin Picker et al. eds., 2008)

<sup>74</sup> Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT’L L. 189, 190 (2015).

Studies (ELS), but “distinct, occasionally discordant.”<sup>75</sup> A fundamental difference is that while ELS favours quantitative analysis, NLR favours “field-intensive methods such as participant observation and interviewing.”<sup>76</sup> Thus, for NLR, “empirical” research implies an “empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world.”<sup>77</sup> In defence of this approach, one can argue that the distinction between quantitative and qualitative data “is essentially the distinction between numerical and non-numerical data,” and that qualitative data is thus “richer in meaning.”<sup>78</sup>

Ideologically, NLR tends to be centrist and moderate. It rejects “the privileging of markets by neo-classical law and economics and rejects left-leaning postmodernism.”<sup>79</sup> NLR’s politics is also moderate. For example, Victoria Nourse, an NLR pioneer, had been nominated by Obama as a judge. Nourse’s appointment was stubbornly filibustered by a Republican Senator, forcing her to decline her nomination. In a letter to Obama, Nourse remarked, “I have served under two Presidents, one Democratic, the other Republican. [...] [I] refer you to the letter sent by legal experts across the nation, among them many conservatives, supporting my nomination.”<sup>80</sup> Nourse’s gratification in being acceptable to conservatives is distinguishable from the attitudes of many ALR scholars, who were firmly left-leaning.

NLR’s agenda has faced some criticism. One scholar has noted that NLR does “not bring the legal system itself into question, only its functional mechanisms.”<sup>81</sup> Another has criticised

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<sup>75</sup> Suchman & Mertz, *supra* note 70, at 557.

<sup>76</sup> *Id.* at 563.

<sup>77</sup> Nourse & Shaffer, *supra* note 72, at 79.

<sup>78</sup> EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 36 (9<sup>th</sup> ed., 2001).

<sup>79</sup> Nourse & Shaffer, *supra* note 72, at 137.

<sup>80</sup> Bruce Vielmetti, *Nourse asks Obama to withdraw her nomination to federal appeals court*, MILWAUKEE JOURNAL SENTINEL, Jan. 19, 2012, <http://www.jsonline.com/blogs/news/137702938.html>.

<sup>81</sup> EVE DARIAN-SMITH, *LAWS AND SOCIETIES IN GLOBAL CONTEXTS: CONTEMPORARY APPROACHES* 18-9 (2013).

NLR’s “withdrawal from theory.”<sup>82</sup> With reference to the first criticism, it is perhaps a re-articulation of the same charge made against law-and-economics scholars — that of being “fancy apologetics for capitalist law.”<sup>83</sup> Here, NLR scholars have admitted that the movement’s future “could potentially” lie in the direction of pro-market scholarship.<sup>84</sup> Some NLR scholars have even claimed that Posner’s recent, more moderate writings bring him within the NLR fold.<sup>85</sup> Therefore, in some ways, NLR could be viewed simply as Posner Lite. But, to return to my earlier comments, it is naive to shun capitalism and not be pragmatic. Moreover, NLR’s conscious attempts to incorporate bottom-up perspectives can check elitist biases. For example, Gregory Shaffer, a leading NLR scholar, has admitted that he “gained a greater appreciation” of developing country perspectives on the WTO through visits to developing countries, and revised his “American frame.”<sup>86</sup>

With reference to the second criticism, one of the limitations of theoretical scholarship is that it is often impractical. For example, in a forthcoming volume, several leading IP scholars have put forward alternative models of copyright law, such as “(re)conceiving copyright as a right to access rather than a right to forbid.”<sup>87</sup> However, despite the book’s brilliant contributions, its editors have acknowledged that the book “is a collection of impossible ideas.”<sup>88</sup> I do not suggest that such scholarship is of no value. On the contrary, an idea that seems implausible today could, in the distant future, become a reality — say, for example, Stiglitz’s

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<sup>82</sup> Hanoch Dagan et al., *Legal Theory for Legal Empiricists*, L. & SOC. INQUIRY (2015) (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2626335](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626335).

<sup>83</sup> Paul Reidinger, *Civil War in the Ivy*, 72 A.B.A J. 67, 68 (1986) (quoting Richard Posner).

<sup>84</sup> Suchman & Mertz, *supra* note 70, at 577

<sup>85</sup> Nourse & Shaffer, *supra* note 72, at 69.

<sup>86</sup> Shaffer, *supra* note 74, at 193.

<sup>87</sup> Christophe Geiger, *Copyright as an Access Right*, in WHAT IF WE COULD REIMAGINE COPYRIGHT (Rebecca Giblin & Kimberlee Weatherall, eds., 2016, forthcoming), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2643304](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643304).

<sup>88</sup> Rebecca Giblin & Kimberlee Weatherall, *Conclusion*, in WHAT IF WE COULD REIMAGINE COPYRIGHT (Rebecca Giblin & Kimberlee Weatherall, eds., 2016, forthcoming).

idea of abolishing pharmaceutical patents and instituting prize schemes instead.<sup>89</sup> Furthermore, scholars who advance theoretical arguments often possess valuable practical experience beyond academia (Stiglitz is a former World Bank Vice President). The purpose of NLR is thus not to displace theoretical perspectives, but provide perspectives that are rooted in present-day realities and social observation.

## II. AN EXPERIMENT IN BOLLYWOODLAND

There exists little or no NLR scholarship on IP. But it is not difficult to imagine how such scholarship should look like. From an Indian perspective, there exist a few top-down and bottom-up papers on Indian IP law employing social science methods. An NLR approach essentially has to reconcile the two approaches. In the context of patents, an example of bottom-up research is a study by Peter Drahos, where he has interviewed patent examiners in Bombay, in buildings with “hanging wires and pigeons.”<sup>90</sup> In the context of copyrights, Liang has studied how some slum dwellers in Bombay have watched pirated films and created their own home-video films.<sup>91</sup> Methodologically, these studies are excellent specimens for NLR researchers. But where they fall short is that they do not diligently adopt top-down perspectives. Drahos, to be fair, has referred to the “patent arms race” between China and India and the views of “policy elites.” Yet, Drahos’ analysis here is largely doctrinal, unlike his interviews with patent examiners. In Liang’s case, his paper entirely excludes a top-down analysis. In another study, however, Liang has looked into corporate strategies on piracy to supplement bottom-up perspectives — a better indicator of how NLR IP scholarship should be.<sup>92</sup>

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<sup>89</sup> Joseph Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L. J. 1693, 1719-1721 (2009).

<sup>90</sup> Peter Drahos, *The Jewel in the Crown: India’s Patent Office and Patent-Based Innovation*, in INTELLECTUAL PROPERTY POLICY REFORMS 80 (Christopher Arup & William van Caenegem eds., 2009). See also PETER DRAHOS, *THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS* (2010).

<sup>91</sup> Lawrence Liang, *Piracy, Creativity and Infrastructure: Rethinking Access to Culture*, July 20, 2009, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1436229](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436229).

<sup>92</sup> Lawrence Liang & Ravi Sundaram, *India*, in MEDIA PIRACY IN EMERGING ECONOMIES 339 (Joe Karganis ed., 2011).

In contrast with the bottom-heavy studies above lie a smattering of top-heavy studies on Indian IP. One study has applied law-and-economics theories and frowned upon compulsory licensing.<sup>93</sup> However, this study is an unsuitable model for NLR researchers as it excludes a bottom-up perspective (for instance, the plight of patients) and is fixated with quantitative analysis. In another study, Shaffer, in a paper co-authored with an international relations (IR) professor, has commented on how developing countries can implement TRIPS obligations by “building from the foreign in a manner that advances the local.”<sup>94</sup> Examining an Indian patent infringement case where a court cited a US precedent to deny a US pharmaceutical company an injunction, the study observes that developing countries can “creatively” cite case law from Western countries and “help to foil” pressure from those very countries.<sup>95</sup> Shaffer’s paper is one of the few works by major NLR scholars on IP law. Although Shaffer has not engaged in any NLR-style field work, the fact that he has co-authored the paper with an IR professor and alluded to international politics is instructive. To augment the top-down component of NLR research, it may be helpful to empirically test IR theories.

Drawing from the above, I conducted an NLR experiment in India, focusing on the film industry. Some of the methods I employed were conducting “loosely structured” interviews, using inductive reasoning, and employing a “grounded theory” method that “involves developing theory as the research proceeds rather than testing a hypothesis posited in advance.”<sup>96</sup> I selected interviewees using the method of “purposeful sampling,” which aims to select “[i]nformation-rich cases...from which one can learn a great deal about issues of central importance to the purpose of the research.”<sup>97</sup> Simply put, I embarked on an eight-month journey across India,

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<sup>93</sup> Padmanabha Ramanujam & Yugank Goyal, *One View of Compulsory Licensing: Comparative Perspectives From India and Canada*, 18 MARQ. INTELLECTUAL PROPERTY L. REV. 369 (2014).

<sup>94</sup> Gregory Shaffer & Susan K. Sell, *Transnational Legal Ordering and Access to Medicines*, in PATENT LAW IN GLOBAL CONTEXT 97, 121 (Ruth L. Okediji & Marco A. Bagley eds., 2014).

<sup>95</sup> *Id.*

<sup>96</sup> Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 926 (Peter Cane & Herbert Kritzer eds., 2010)).

<sup>97</sup> MICHAEL QUINN PATTON, QUALITATIVE EVALUATION AND RESEARCH METHODS 169 (1990).

knocking on various doors and meeting a motley bunch of characters. I attempted to construct an NLR template for studying film piracy, incorporating top-down and bottom-up perspectives, that would possibly be adaptable to other types of IP infringement. My finished template consisted of five elements: a) IR realism, b) contextualisation of IPRs, c) the interests of the film industry, d) the working of the pirate economy, and e) reforms in the law and industry strategies. My findings are nearly the size of a book, and too lengthy to reproduce here. I will thus only provide a brief glimpse.

### *A. IR Realism*

In IR theory, the concept of “realism” holds that “national interest” assumes primacy over moral considerations.<sup>98</sup> States are selfish actors who “do not inherently possess a normative interest” in international law.<sup>99</sup> Thus, “power”, “struggle” and “accommodation” are more influential than “authority and law.”<sup>100</sup> IR realists hold that the WTO reflects “highly asymmetric bargaining power.”<sup>101</sup> However, TRIPS has also left considerable “wiggle room” to countries.<sup>102</sup> Thus, “[t]o a realist, the machinery of the TRIPS agreement...is capable of manipulation, distortion, and even abandonment if such actions serve the interests of states.”<sup>103</sup> In international negotiations, this can have “positive sum possibilities.”<sup>104</sup>

IPRs are a major bone of contention in bilateral relations between India and the West. India

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<sup>98</sup> See Hans J. Morgenthau, *Six Principles of Political Realism*, in INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES 7, 12 (Robert J. Art & Robert Jervis eds., 2011).

<sup>99</sup> Note, *Tackling Global Software Piracy under TRIPS: Insights from International Relations Theory*, 116 HARV. L. REV. 1139, 1145 (2003).

<sup>100</sup> KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 113, 117 (1979).

<sup>101</sup> Stephen Krasner, *Realist Views of International Law*, 96 AM. SOC'Y INT'L L. PROC. 265, 267 (2002)

<sup>102</sup> J.H. Reichman, *The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?*, 32 CASE W. RES. J. INT'L L. 441, 459 (2000).

<sup>103</sup> Note, *supra* note 99, at 1146.

<sup>104</sup> Krasner, *supra* note 101, at 266-7.

even features in the U.S. government’s Special 301 watch list of countries with inadequate IP protection, primarily due to its pharmaceutical patent laws.<sup>105</sup> During recent talks between Obama and Prime Minister Modi, health activists expressed fears that India would accede to US demands on pharmaceutical patents law, in an attempt to secure much-needed US investment. In Parliament, members of India’s Communist Party even accused the Modi government of establishing a National IPR Think Tank — which, shortly before Obama’s visit to India, had suggested “transform[ing] India into a world class manufacturing hub” by providing foreign investors a “strong, balanced, predictable and transparent IP regime”<sup>106</sup> — at the behest of the US.<sup>107</sup> However, the Think Tank also advocated the protection of “public health, food security and environment.”<sup>108</sup> Furthermore, an eventual joint statement by the two governments merely contained a bland promise of “enhancing engagement” and “sharing information and best practices” on IPR-related matters.<sup>109</sup> The Modi government also strategically sought investments from US corporations unthreatened by pharmaceutical patent laws, a prime example being Boeing.

Boeing’s India counsel shared with me that the US government had sent a questionnaire to US companies operating in India, seeking their opinion on Indian IP laws.<sup>110</sup> According to him, this measure stemmed from “pressure from the pharmaceuticals lobby.” However, he pointed out that, unlike the pharmaceutical industry, the aviation industry did not face many patent-related challenges in India. He explained that “due to a lack of technological sophistication on the part of Indian companies,” the possibility of infringing patents to

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<sup>105</sup> USTR, SPECIAL 301 REPORT 37 (2014).

<sup>106</sup> NATIONAL IPR THINK TANK, DRAFT NATIONAL IPR POLICY 25 (2014).

<sup>107</sup> See Rajya Sabha Debates, Dec. 10, 2014 (Statement of M.P. Achuthan and D. Raja), *available at* <http://dipp.nic.in/English/questions/10122014/ru1872.pdf>.

<sup>108</sup> NATIONAL IPR THINK TANK, *supra* note 106, at 5.

<sup>109</sup> *U.S.-India Joint Statement — “Shared Effort; Progress for All”* ¶¶ 16, 25, Jan. 25, 2015, WHITE HOUSE PRESS OFFICE, <https://www.whitehouse.gov/the-press-office/2015/01/25/us-india-joint-statement-shared-effort-progress-all>.

<sup>110</sup> Interview with Akhil Prasad, New Delhi, May 1, 2015.

manufacture aircrafts “looks quite remote.” Thus, Boeing gave a high rating to Indian IP laws in the questionnaire. In a hearing before the US government, Boeing reiterated that its experience with Indian patent laws had been “positive.”<sup>111</sup> Subsequently, Modi met with the Chairman of Boeing during his US visit, who expressed interest in deepening the company’s investments in India.<sup>112</sup> Following the meeting, Boeing stated that Modi had assured Boeing of adequate IP protection.<sup>113</sup> A similar development has underlined India’s engagement with Honeywell, another aerospace and defence giant.<sup>114</sup> This illustrates that, in the real world, international IP standards can be manipulated by countries to suit domestic interests.

### B. Contextualising IPRs

To carry forward the previous discussion, a defining feature of legal pragmatism is “context sensitivity.”<sup>115</sup> In India, the academic discourse surrounding IPRs and TRIPS has been marked by scepticism. In this discourse, the terms “IPRs” and “patents” have often been used interchangeably.<sup>116</sup> Yet, India has acted aggressively to protect IPRs other than patents. For example, the Tea Board of India, a government entity, has aggressively litigated worldwide to protect the Darjeeling geographical appellation. A former Tea Board Chairman, who oversaw some of these cases, told me, “All countries look after their self-interest and we should do the

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<sup>111</sup> Lalit Jha, *Boeing Says India has Strong Legal Framework to Protect IP*, MINT, Feb. 15, 2014, <http://www.livemint.com/Politics/htzSxG6MluxOM8b6UBuUiO/Boeing-says-India-has-strong-legal-framework-to-protect-IP.html>.

<sup>112</sup> *PM Modi’s US visit: Boeing Keen on Greater Engagement with India*, TIMES OF INDIA, Sep, 29, 2014, [http://articles.economictimes.indiatimes.com/2014-09-29/news/54437419\\_1\\_c-17-indian-air-force-globemaster](http://articles.economictimes.indiatimes.com/2014-09-29/news/54437419_1_c-17-indian-air-force-globemaster).

<sup>113</sup> *Boeing Bullish on “Make in India”*, STRATPOST, Mar. 9, 2015, <http://www.stratpost.com/boeing-bullish-on-make-in-india>.

<sup>114</sup> See Huma Siddiqui, *US Defense Giants Back India’s IPR Regime as Big Pharma Frets*, Mar. 12, 2014, FINANCIAL EXPRESS, <http://archive.financialexpress.com/news/us-defence-giants-back-india-s-ipr-regime-as-big-pharma-frets/1232784>.

<sup>115</sup> Shyamkrishna Balganes, *Gandhi and Copyright Pragmatism*, 101 CALIF. L. REV. 1705, 1710.

<sup>116</sup> See, e.g. B.S. Chimni, *Towards Technological Wastelands: A Critique of the Dunkel Text on TRIPS*, in INTELLECTUAL PROPERTY RIGHTS 91 (K.R.G. Nair & Ashok Kumar eds., 1995)

same.”<sup>117</sup> I gleaned similar sentiments from the Deputy Secretary General of the Asian African Legal Consultative Organisation, who previously represented Iran at WIPO.<sup>118</sup> He felt that developing countries ought be “more aggressive” in international negotiations to protect their IP. He informed me that he had proposed at WIPO that a mechanism be devised that would require users of traditional knowledge originating from developing countries to transfer royalties to public institutions in those countries.

In India, copyrights have sometimes been equated with patents in the country’s IP-sceptic discourse. In 2012, when amendments to Indian copyright legislation were being discussed by lawmakers, one lawmaker argued that IPRs were “inherently anti-India,” and that the amendments would be used by “American Companies” to say, “[S]ince you have this in the field of music... then why cannot you do the same thing in the field of drugs and chemicals?”<sup>119</sup> Yet, in reality, the Indian copyright law has largely “developed independently of global influence.”<sup>120</sup> From being mere replicators of Western works and opposing copyright laws in British India,<sup>121</sup> Indian industries today generate their own IP, and interest groups push for stronger copyright laws. An interesting illustration is a pre-TRIPS amendment to Indian copyright legislation. The amendment increased the term of protection for authorial works by a further ten years than the Berne Convention standard (which would later become the TRIPS standard). The sole reason for doing so was the fact that the works of the Nobel Prize winning writer Rabindranath Tagore were on the verge of falling in the public domain. Tagore’s copyrights were vested with a state university in West Bengal. The then government of West Bengal — led by the Communist Party — lobbied to pass the amendment.<sup>122</sup> Similarly, a Communist Party government in the state of

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<sup>117</sup> Interview with Basudeb Banerjee, Calcutta, Apr. 1, 2015.

<sup>118</sup> Interview with Mohsen Baharvand, New Delhi, Apr. 23, 2015.

<sup>119</sup> For Discussion on the motion for consideration of the Copyright (Amendment) Bill, 2012, Lok Sabha Debates, Mar. 22, 2012 (Statement of Tathagata Satpathy), *available at* <http://indiankanoon.org/doc/104277827>.

<sup>120</sup> Shubha Ghosh, *A Roadmap for TRIPS: Copyright and Film in Colonial and Independent India*, (2011) QUEEN MARY J. INTELL. PROP. 146, 161.

<sup>121</sup> See Lionel Bently, *Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHI-KENT. L. REV. 1181, 1227-8 (2007)

<sup>122</sup> Lok Sabha Deb (Copyright (Amendment) Ordinance, 1991), 17 March 1992 (Statement of Girdhari Lal

Kerala enacted stringent anti-piracy laws, including the preventive detention of suspected film pirates.<sup>123</sup> In contrast, the Communist Party’s national manifesto states its commitment to “[r]everse changes in the IP regime that favor big business.”<sup>124</sup>

I perceived a difference in attitude between copyright and patent issues in conversations with a former government minister and senior politician, who handled copyright matters. He informed me that while he would be “hesitant” to support strong patent laws if it impacted access to medicines, he would not feel the same way if there was to be a “crackdown” on “rogues” who were “personally profiting” from selling pirated films.<sup>125</sup> He reasoned that medicines were a “necessary expenditure” and it was important to provide access to medicines that “the vast majority of Indians cannot afford,” while films were a “discretionary expenditure.” A former senior bureaucrat, who represented India in TRIPS negotiations, told me that while India could ally with other developing countries and support diluted pharmaceutical patent laws, India might find it advantageous to “be on the side of the hawks” on certain copyright-related matters.<sup>126</sup>

Prior to the Modi-Obama meetings, a newspaper claimed that India had complained to the US about pirated Indian films being available on websites hosted by US servers.<sup>127</sup> The Indian government rejected a freedom of information request from me and refused to confirm whether this report was true, citing national interest grounds.<sup>128</sup> However, the US government

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Bhargava) <<http://parliamentofindia.nic.in/lsdeb/ls10/ses3/2217039203.htm>> accessed 11 November 2013.

<sup>123</sup> See T. Prashant Reddy & N. Sai Vinod, *The Constitutionality of Preventing “Video Piracy” Through Preventive Detention in Indian States*, 7 J. INTELL. PROP. L. & PRACTICE 194, 198 (2012).

<sup>124</sup> COMMUNIST PARTY OF INDIA (MARXIST), MANIFESTO FOR THE 16<sup>TH</sup> LOK SABHA ELECTIONS 16, 32 (2014), available at [http://www.thehindubusinessline.com/multimedia/archive/01831/CPI-M\\_Manifesto\\_1831198a.pdf](http://www.thehindubusinessline.com/multimedia/archive/01831/CPI-M_Manifesto_1831198a.pdf).

<sup>125</sup> Interview with Shashi Tharoor, New Delhi (Mar. 30, 2015).

<sup>126</sup> Interview with Jagdish Sagar, New Delhi (Feb. 16, 2015).

<sup>127</sup> Sidhartha, *India to US: Tech Companies Violating Copyright Law*, TIMES OF INDIA, Nov. 26, 2014, <http://timesofindia.indiatimes.com/tech/tech-news/India-to-US-Tech-companies-violating-copyright-law/articleshow/45277212.cms>.

<sup>128</sup> Letter from V.P. Srivastav, Central Public Information Officer, Ministry of Human Resource Development to the author, Feb. 20, 2014.

replied to a freedom of information request from me and confirmed that the Indian government had lodged such a complaint, annexing a list of 476 websites complained of.<sup>129</sup> Incredibly, the list contained not just pirate websites, but also the likes of YouTube, Google and Yahoo. But isn't it enough that these websites have takedown mechanisms, and wouldn't it be unreasonable to club such websites with pirate websites? When I asked an Indian bureaucrat in charge of IP matters about this, he said that if the US government expected India to act beyond its TRIPS obligations, the US government ought to reciprocate.<sup>130</sup> Hence, the foregoing indicates that the Indian state is adopting a more nuanced position on IPRs, based on national economic interest, and strategises accordingly during bilateral negotiations.

### *C. Interests of the Film Industry*

I interacted extensively with not just mainstream Bollywood producers, but also producers of regional and arthouse film industries. I also looked beyond producers and sought perspectives from authors, directors and performers. Industry studies have blamed piracy for causing financial losses and hindering employment in India.<sup>131</sup> Many mainstream Bollywood producers expressed the same view to me. For example, one company informed me that piracy cost it a million dollars a year on existing content, and up to 30 percent of revenues on new releases.<sup>132</sup> In interactions with the arthouse film community, I discerned mixed experiences. The director of a Cannes-nominated film informed me that his film received more exposure due to piracy, and he even “decided to let the film exist on torrents” for the benefit of “cinephiles.”<sup>133</sup> However, he also stated that the film adversely affected the film's revenues, especially as it was a project “not very commercial in nature.” He informed me that he was “not okay” with people

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<sup>129</sup> Email from Jacqueline B. Caldwell, Office of the USTR, to the author, May 2, 2015.

<sup>130</sup> Interview with G.R. Raghavender, New Delhi, May 10, 2015.

<sup>131</sup> See, PRICEWATERHOUSECOOPERS, INDIA ENTERTAINMENT AND MEDIA OUTLOOK 20 (2013); US-INDIA BUSINESS COUNCIL & ERNST & YOUNG, THE EFFECTS OF COUNTERFEITING AND PIRACY ON INDIA'S ENTERTAINMENT INDUSTRY (2009).

<sup>132</sup> Interview with Chaitanya Chinchlikar, Vice President, Mukta Arts Limited, Jan. 9, 2015.

<sup>133</sup> Interview with Ashim Ahluwalia, Bombay, May 28, 2015.

profiting from piracy.

One of my most illuminating encounters was with a producer at Overdose, an arthouse cinema enterprise far removed from Bollywood, operating from a modest apartment in Calcutta.<sup>134</sup> One of Overdose's first films was a provocative, sexually explicit film banned by the Indian government. However, the film received critical acclaim and was screened at festivals abroad. The producer informed me that a pre-release copy of the film had been leaked and uploaded on YouTube without her permission. She complained about the matter to YouTube, which promptly took down the video. This sequence of events repeated itself four more times, after which pirated copies of the film flooded the internet, and she gave up. She revealed to me that this did have some unexpected benefits. Thousands of individuals in India who were unable to view the film due to the ban were able to do so, and appreciation for the film grew. She also stated that the losses Overdose suffered due to piracy were not substantial, as the film had been made with a very low budget. However, she informed me that Overdose was "looking to make money someday." For this to happen, it needed to recoup at least three times the production and marketing budget, since it did not have the financial strength of a large production house. "People should realise that it costs money to make a film," she said. Similar indignation was expressed by Soumitra Chatterjee, one of India's most revered arthouse actors and star of many films by the legendary director Satyajit Ray. Chatterjee told me that he felt "very upset" to see pirated copies of his films being freely available, as he had devoted "a great deal of labour" to those films.<sup>135</sup>

The above is not to suggest that producers and artists are uncritically united against piracy. Tensions between producers and artists are arguably a universal phenomenon. In India, producers have long insisted on one-sided contracts with royalty-waiver clauses (now prohibited by the 2012 amendments). In the case of actors, affirmative performers' rights did not exist in Indian copyright legislation until recently. Chatterjee, while opposing piracy, pointed out to me

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<sup>134</sup> Interview with Celine Loop, Calcutta, Jan. 22, 2015.

<sup>135</sup> Interview with Soumitra Chatterjee, Calcutta, Dec. 23, 2015.

that he had received “not one penny” from royalties of acclaimed classic films he had acted in, due to this legal loophole. “If you ask me, producers are the first pirates,” Chatterjee told me. He thus felt that artists often “do not care” about piracy, their rationale being “the producer has already robbed me.” Anik Dutta, a prominent Bengali director and screenwriter, informed me that he signed a one-sided screenplay copyright assignment contract for his first film. The film went on to become one of Bengali cinema’s most successful hits, but he received no royalties. Like Chatterjee, he told me that artists were sometimes “not bothered” about piracy, as they did not see themselves directly losing revenues.<sup>136</sup> Both Dutta and Chatterjee found it cumbersome to sue.

Thus, it seems that a variety of artists and producers across India are opposed to piracy and concerned over its financial implications. However, this unity is marked by some ambivalence and resentment towards producers, who are seen to have a greater financial stake in preventing piracy.

#### *D. The Working of the Pirate Economy*

India presently has the world’s third-highest number of internet users after China and the US, and, by some estimates, will overtake the US in 2015 itself.<sup>137</sup> However, in percentage terms, India’s internet penetration rates are among the world’s lowest, and its internet speeds are equally abysmal.<sup>138</sup> Thus, even though illegal downloading in India is common, physical piracy is also widespread. Pirated DVDs are openly sold in Indian cities. While making test purchases, I enquired from vendors if they downloaded these films from the internet themselves. The vendors replied in the negative and informed me that they received their wares from a larger supplier.

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<sup>136</sup> Interview with Anik Dutta, Calcutta, Dec. 24, 2015.

<sup>137</sup> See DELOITTE, BROADBAND: THE LIFELINE OF DIGITAL INDIA 6 (2014), <http://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-broadband-noexp.pdf>.

<sup>138</sup> AKAMAI, STATE OF THE INTERNET 24 (2014), <http://www.akamai.com/dl/akamai/akamai-soti-q114.pdf>.

A senior police official told me that although such piracy was common and well-organised, it generated modest profits compared to trade in narcotics or illegal arms.<sup>139</sup> It was thus “low priority” for large criminal gangs, and “at the bottom of the list for law enforcement too.” The official pointed out that even if one assumed that the pirate trade was as large and harmful as the narcotics or illegal arms trade, the fact that piracy is widely seen by the public as socially acceptable would make it difficult for the police to clamp down on it. “It is not seen as a crime in the perception of the people,” he said.

As far as online piracy is concerned, a report by the former Intellectual Property Advisor to the British Prime Minister has highlighted the trend of pirate websites earning substantial revenues through advertising, including auto-generated advertisements of household brands.<sup>140</sup> To test this, I accessed torrents of pirated Bollywood and Hollywood films through a series of Google searches. On most torrent websites, I encountered advertisements for dodgy dating and gambling websites. However, pop-up advertisements of many well-known companies also surfaced. I visited a cyber-sleuthing company that shared with me an internal report where it had tracked pirated copies of 80 Hollywood and Bollywood films on 602 websites. According to the report, advertisements of over 800 well-known Indian and global companies had surfaced. Explaining the lucrative nature of the online piracy business, the company informed me of a case it had handled for the producers of the hit Bollywood film *Queen*.<sup>141</sup> In 2014, two websites specifically designed to offer pirated versions of *Queen* were traced by the company to pirates in Latvia. The company faxed a complaint to the Latvian police, which acted on the matter.<sup>142</sup> It is unlikely, it was pointed out to me, that natives of Latvia would be motivated to distribute copies of a film in an alien language out of altruism. It was also explained to me that pirates abroad purchase prints of such films through secretive online “auctions”, sometimes on the Dark Net. A

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<sup>139</sup> Interview with Rajeev Kumar, Additional Director-General of Police, Calcutta, Apr. 1, 2015.

<sup>140</sup> Mike Weatherley, “*Follow the Money*”: *Financial Options to Assist in the Battle Against Online IP Piracy*, 2014, *available at* [http://www.olswang.com/media/48204227/follow\\_the\\_money\\_financial\\_options\\_to\\_assist\\_in\\_the\\_battle\\_against\\_online\\_ip\\_piracy.pdf](http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf)

<sup>141</sup> Interview with Abhishek Dhoreliya, CEO, Markscan, New Delhi, Feb. 3, 2015.

<sup>142</sup> The relevant documents can be viewed at [www.markscan.co.in/casestudies/Rigacomp.pdf](http://www.markscan.co.in/casestudies/Rigacomp.pdf).

regional film industry representative explained to me that there are around 200 major pirate rings in India, and members of these rings camcord films and auction them online. According to the representative, there have occurred instances of staff in theatres receiving bribes between USD 400 to USD 1,000 to facilitate a single instance of camcording.<sup>143</sup>

To gauge an idea of how pirated films are consumed, I conducted separate surveys among students of two reputed law schools — one an expensive private institution and the other a subsidized, state-funded public institution. My surveys revealed that practically all the respondents consumed pirated films, a majority through the internet. While both law schools had installed filters to block access to torrent websites, several respondents claimed that they still accessed pirated content through streaming websites (not blocked by these filters), or by torrent downloads using their private connections at home. At the public law school, the respondents revealed a pervasive culture of file sharing within the law school's Local Area Network.

While the popularity of pirated content among law students might be disheartening for the film industry, the surveys did offer the industry some hope. A large number of respondents stated that they also consumed films through legitimate channels, namely the theatre, television, licensed streaming websites, and stores selling genuine DVDs. Only a minority of respondents cited price as a reason for consuming pirated content, the number being especially small in the private law school. The majority of respondents stated that they downloaded pirated content because the content they wished to watch was not readily available at local theatres or through other legitimate channels, or because it was simply more convenient to watch a film in the comfort of one's room. At the public law school, respondents were specifically asked whether they would consider subscribing to Netflix, if and when it was introduced in India. A sizeable majority answered in the affirmative, citing reasons such as ease of access, greater variety, and assurance of picture quality.

#### *E. Reforms in the Law and Industry Strategies*

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<sup>143</sup> Interview with Akella Rajkumar, Chairman, Anti-Video Piracy Cell, Andhra Pradesh Film Chamber of Commerce, New Delhi, Feb. 4, 2015.

I interviewed some of India’s leading IP lawyers to explore the scope for legal reforms.<sup>144</sup> Most respondents expressed satisfaction with Indian substantive law, and a recent trend of Indian courts liberally granting website-blocking injunctions.<sup>145</sup> The main grievances I received concerned patchy criminal enforcement, with practices between different states in India varying widely. For example, many lawyers I interviewed complained of untrained police officials in some states insisting on copyright registration certificates as evidence of copyright ownership, despite Indian case law holding that copyright is an inherent right which exists on the creation of a work and is not dependent on registration.<sup>146</sup> Here, some reform is relatively easy to accomplish, such as the publication of a manual by the Indian government specifying the practices that ought to be followed in criminal copyright matters. The more difficult question, however, is enacting laws such as graduated response, which has been proposed by a government committee at the suggestion of industry groups.<sup>147</sup> Interestingly, the committee proposed bandwidth throttling “for a few hours or so” as a sanction, rather than disconnection. Such a measure could well be considered lawful by Indian courts, strengthened by foreign case law sympathetic towards graduated response schemes.<sup>148</sup> However, an NLR analysis sensitive to bottom-up views would also factor in public reaction to such a measure. Recently, an Indian ISP proposed a scheme to allow users faster access to certain partner websites. This led to wave of online protests across India, with many claiming that this violated the principle of net neutrality. The protests gradually found support from politicians.<sup>149</sup> In the case of graduated response schemes, a similar situation is a possibility. I was able to find at least one example of lawmakers being wary of a public backlash. In India, some states have enacted preventive detention laws to

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<sup>144</sup> Some of the law firms whose partners I interviewed were Naik, Naik & Co, Saikrishna & Associates, and Anand & Anand.

<sup>145</sup> See Juhi Gupta, *John Doe Copyright Injunctions in India* 18 J. INTELL. PROP. RIGHTS 351 (2013).

<sup>146</sup> *Satsang v. Mukhopadhyay*, (1972) A.I.R. (Cal. H.C.) 533, ¶17.

<sup>147</sup> COMMITTEE ON PIRACY, REPORT OF THE COMMITTEE ON PIRACY 35-36, ¶ 5.8.1 (2010),

<sup>148</sup> *E.M.I. v. Eircom* (2010) I.E.H.C. 108, ¶ 5 (Ir. H. Ct.).

<sup>149</sup> Ketki Angre, *Net Neutrality: Support Pours in Across Party Lines*, NDTV, Apr. 14, 2015, <http://www.ndtv.com/india-news/net-neutrality-support-pours-in-across-political-lines-754994>.

curb piracy, and the constitutionality of these laws has been upheld.<sup>150</sup> However, the Home Secretary of West Bengal informed me that although the state recently strengthened criminal sanctions against piracy, it did not go so far as to allow preventive detention. He explained that the state had experienced violent political turmoil in the 1960s and 1970s, and the use of preventive detention laws against political agitators during that era still remained a sensitive subject.<sup>151</sup>

#### CONCLUDING THOUGHTS

There are aspects of the template proposed in this paper that can certainly be improved. It can be argued that bottom-up research should focus not just on the consumption of entertainment by middle-class university students, but also individuals living in poverty. Similarly, the views of the most marginalised members of the film industry, such as low-wage earners and stunt crew, deserve to be heard alongside actors and screenwriters. From a top-down perspective, one could conduct more focused, micro-level research on losses faced by rights owners due to piracy. However, what must be non-negotiable is NLR's emphasis on pragmatism. And here, I wish to conclude by pre-empting a possible critique from other Indian scholars.

NLR's roots admittedly lie in American pragmatism,<sup>152</sup> and the movement is dominated by American scholars. This risks exposing Indian NLR scholars to trite attacks of imitating intellectual trends in the Western academy.<sup>153</sup> It does not help that, in India, there has traditionally been a culture of scepticism towards IPRs. Historically, ancient Hindu texts instructed individuals to carry out duties, rather than conferring them with "a catalogue of personal rights."<sup>154</sup> The fact that the authors of some Hindu legal texts chose to remain

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<sup>150</sup> *Siva v. Commissioner*, 2005 Indlaw MAD 199 (Mad. H.C., June 24, 2005).

<sup>151</sup> Interview with Basudeb Banerjee, *supra* note 117.

<sup>152</sup> Shaffer, *supra* note 74, at 203.

<sup>153</sup> See, e.g., Ramachandra Guha, *The Ones Who Stayed Behind*, 38 ECON. & POL. WEEKLY 1121 (2003).

<sup>154</sup> A.M. BHATTACHARJEE, HINDU LAW AND THE CONSTITUTION 9 (1994).

anonymous possibly suggests a juristic outlook antithetical towards IPRs.<sup>155</sup> Similarly, ancient Indian healers were motivated by “the ideal of humanism” and opposed the “merchandisation of...knowledge and skill.”<sup>156</sup> Among modern thinkers, the examples of Jagadish Chandra Bose and Mahatma Gandhi are sometimes cited. Bose had invented short-distance radio wave transmission, predating Marconi. However, Bose refused to apply for a patent and rejected an offer worth millions.<sup>157</sup> In a letter to Tagore, Bose justified his decision by arguing that his research was “above commercial profits.”<sup>158</sup> Bose’s attitude has been described as “the position of the old *rishis* [sages] of India...whose best teaching was ever open to all.”<sup>159</sup> In Gandhi’s case, he was a critic of capitalism, and believed that the “object of making money...should be eschewed.”<sup>160</sup> Gandhi found the “idea of making anything out of” his writings to be “repugnant” and stated, “I have not the heart to copyright my articles.”<sup>161</sup>

One way to counter the above narrative would be to argue that it is based on a selective reading of Indian history. As Sen has argued, there has been an incorrect emphasis on the spiritual elements in Indian culture, to contrast it with “Western rationality.”<sup>162</sup> The notion of IPRs are usually traced back to the writings of John Locke, who had stated:

Thus the Grass my Horse has bit; the Turfs my Servant has cut; and the Ore I have digg’d in any place where I have a right to them in common with others, become my Property [...]. The labour that was mine, removing them out of that

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<sup>155</sup> An example is the classical Hindu legal text the *Manu Smriti*. The text probably had a string of authors and editors, who chose to remain anonymous, perhaps to emphasise the primacy of the content. See J.D.M. DERRETT (tr.), *THE CLASSICAL LAW OF INDIA BY ROBERT LINGAT* 87-92 (1973).

<sup>156</sup> DEBIPRASAD CHATTOPADHYAY *SCIENCE AND SOCIETY IN ANCIENT INDIA* 209-11 (1977) (quoting the *Caraka-saṃhitā*).

<sup>157</sup> STATHIS ARAPOSTATHIS & GRAEME GOODAY, *PATENTLY CONTESTABLE: ELECTRICAL TECHNOLOGIES AND INVENTOR IDENTITIES ON TRIAL IN BRITAIN* 152-6 (2013).

<sup>158</sup> Probir K. Bondyopadhyay, *Marconi’s 1901 Transatlantic Wireless Communication Experiment*, 31<sup>st</sup> European Microwave Conference, London, 1995, available at <http://home.online.no/~kgroenha/bondy.pdf>.

<sup>159</sup> PATRICK GEDDES, *THE LIFE AND WORK OF SIR JAGADIS C. BOSE* 64 (1920)

<sup>160</sup> M.K. GANDHI, *INDIAN HOME RULE* 102 (5<sup>th</sup> ed., 1922).

<sup>161</sup> Balganes, *supra* note 115, at 1729, 1733.

<sup>162</sup> AMARTYA SEN, *THE ARGUMENTATIVE INDIAN* 23-4, 140 (2005).

common state they were in, hath fixed my Property in them.<sup>163</sup>

Now, compare this with what the ancient Indian thinker Kautilya (371 BC to 275 BC) wrote in his treatise the *Arthashastra*: “Unarable land, prepared for cultivation by any one [by their own efforts] shall not be taken away.”<sup>164</sup> Kautilya also penalised “calumnies” against musicians and outlawed the theft of “big articles” and “articles of small value” from them.<sup>165</sup> Why can’t these statements be taken as a rudimentary recognition of copyright?<sup>166</sup> And Kautilya further wrote that “wealth and wealth alone is important” for a kingdom, and that kings should “seduce” powerful enemies “by conciliation or by giving gifts”<sup>167</sup> — statements that made Max Weber describe the *Arthashastra* as “[t]ruly radical ‘Machiavellianism,’ in the popular sense of the word.”<sup>168</sup> Why can’t this be seen as compatible with IR realism in TRIPS matters?<sup>169</sup> As for Bose and Gandhi, Bose later accepted the inevitability of patents and accepted a proposal to jointly patent one of his inventions with an American financier, albeit grudgingly.<sup>170</sup> And Gandhi later showed “a willingness to accept the utility of copyright” and restricted the unlicensed reproduction of his writings, a position that has been described as a departure from his “abstract economic ideas” and one of “practical idealism” and “pragmatism.”<sup>171</sup> Hence, although NLR and pragmatism are American schools of thought, their intellectual foundations are certainly not alien to Indian intellectual traditions, and this is possibly true for other non-Western cultures as well.

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<sup>163</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 5, § 28 (1689).

<sup>164</sup> L.N. RANGARAJAN (tr.), KAUTILYA: THE ARTHASHASTRA 153 (1992).

<sup>165</sup> R. SHAMASASTRY (tr.), KAUTILYA’S ARTHASHASTRA 263, 276, 321 (1915).

<sup>166</sup> See BALBIR SIHAG, KAUTILYA: THE TRUE FOUNDER OF ECONOMICS 264-5 (2014) (arguing that Kautilya anticipated Locke’s labour theory).

<sup>167</sup> SHAMASASTRY, *supra* note 168, at 17, 396, 548.

<sup>168</sup> Max Weber, *The Vocation of Politics*, in THE ESSENTIAL WEBER: A READER 257 (Sam Whimster ed., 2004).

<sup>169</sup> See Colin Elman, *Realism*, in INTERNATIONAL RELATIONS THEORY FOR THE TWENTY-FIRST CENTURY: AN INTRODUCTION 11 (Martin Griffiths ed., 2007) (identifying Kautilya as a political realist).

<sup>170</sup> ARAPOSTATHIS & GOODAY, *supra* note 160, at 152-5.

<sup>171</sup> Balganes, *supra* note 115.

