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Gandhi and Copyright Pragmatism

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Gandhi and Copyright Pragmatism

Shyamkrishna Balganesh[†]

Mahatma Gandhi is revered the world over for his views on freedom and non-violence, ideas that he deployed with great success during India's freedom struggle. As a thinker, he is commonly believed to have been a moral perfectionist: anti-utilitarian in mindset and deeply skeptical of market mechanisms. Yet, when he engaged with the institution of copyright law during his lifetime—as a writer, editor, and publisher—his approach routinely abjured the idealism of his abstract thinking in favor of a lawyerly pragmatism. Characterized by a nuanced, internal understanding of the institution and its conflicting normative goals, Gandhi's thinking on copyright law reveals a reasoned, contextual, and incremental transformation over time, as the economic and political circumstances surrounding his engagement with copyright changed. In it we see a dimension of Gandhi's thinking that has thus far been ignored, emanating from his training as a common lawyer. This Essay traces the development of Gandhi's views on copyright to show how he anticipated several of the central debates and controversies that are today the staple of the copyright wars, and developed an approach to dealing with copyright's various problems, best described as "copyright pragmatism". As an approach that draws on legal and philosophical pragmatism, copyright pragmatism entails a critical engagement with copyright as a legal institution on its own terms, but contextually and with an eye towards its various costs, benefits, and normative goals at each stage of engagement. The Essay then unpacks the analytical moves that copyright pragmatism entails to show how it holds important lessons for the future of copyright thinking and reform.

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“He was no simple mystic; combined with his religious outlook was his lawyer-trained mind, quick and apt in reasoning.”

— Sir Stafford Cripps, *Gandhi*.¹

INTRODUCTION

In late 2008, scholars and publishers in India began to realize that the copyright in Mahatma Gandhi's collected works was set to expire at the end of the year, i.e., on December 31, 2008.² Commonly regarded as the “Father of the Nation” in India,³ Gandhi died in 1948, bequeathing the copyright in his works to a trust that he had helped establish, the Navjivan

¹ Sir Stafford Cripps, *Gandhi*, in MAHATMA GANDHI: ESSAYS AND REFLECTIONS 383, 384 (Sarvepalli Radhakrishnan ed. 2000) (emphasis supplied).

² See, e.g., *Copyright on Mahatma Gandhi's Literary Works to Expire Soon*, TIMES OF INDIA, Jan. 2, 2009, <http://timesofindia.indiatimes.com/videos/news/Copyright-on-Mahatma-Gandhis-literary-works-to-expire-soon/videoshow/3926062.cms>; Rathin Das, *Copyright on Gandhi's Works Set to Expire on 1 January*, LIVEMINT.COM, Dec. 29, 2008, <http://www.livemint.com/Consumer/EnoGTzI92FVIpw5xtiHA70/Copyright-on-Gandhi8217s-work-set-to-expire-on-1-January.html>; Vikram Rautela, *Now, Copyright of Mahatma Gandhi's Writings Belongs to the People*, INDIAN EXPRESS, Jan. 5, 2009, <http://www.indianexpress.com/news/now-copyright-of-mahatma-gandhi-s-writings-belongs-to-people/406670>.

³ See JUDITH M. BROWN, GANDHI: PRISONER OF HOPE 2 (Yale 1991)(noting how Gandhi is “often assumed to be the father of modern India”).

Trust.⁴ A prolific writer, Gandhi had during his lifetime authored thousands of articles and several books, including an autobiography that has since been translated into several languages.⁵ Since copyright law computes its term of protection based on the year of the author's death (the idea of *post auctor mortis*), the copyright in his works was to subsist for a period of 60 years after his death, under existing copyright law.⁶

As was to be expected, when news of Gandhi's works falling into the public domain got around, it began to generate calls for extending the copyright in his works retroactively.⁷ As the leader of the Indian freedom movement, whose philosophy had influenced numerous other movements ranging from Nelson Mandela's efforts in South Africa to Martin Luther King, Jr.'s role in the civil rights movement, granting Gandhi's works additional protection through an extension remained both politically expedient and morally justifiable.⁸ The U.S. had just succeeded in effecting a similar retroactive extension for Walt Disney's copyright in Mickey Mouse,⁹ and India itself had introduced a similar extension for Nobel Laureate Rabindranath Tagore's works in 1991.¹⁰ Yet, to everyone's surprise, very shortly after the idea of extending the copyright in Gandhi's works became public, the Navjivan Trust, which owned the copyright in Gandhi's works, issued a statement announcing that it would not seek such an extension of term, but would instead allow Gandhi's works to enter the

⁴ Mohandas Gandhi, *Last Will and Testament*, Jan. 29, 1948.

⁵ See generally MAHATMA GANDHI, THE COLLECTED WORKS OF MAHATMA GANDHI (1960) (compiling all of Gandhi's written work in a series of multiple volumes) (hereinafter CWMG).

⁶ Indian Copyright Act, No. 3 of 1914, s. 3.

⁷ See, e.g., *Gandhi Works to Go Public 60 Years After his Death*, REUTERS, Jan. 5, 2009, <http://www.reuters.com/article/2009/01/05/us-gandhi-works-idUSTRE50418A20090105> (quoting a Gandhi scholar as observing that "[t]he government should immediately do something about it and entrust the copyrights back to Navajivan Trust").

⁸ Nita Bhalla, *Mandela Calls for Gandhi's Non-Violence Approach*, REUTERS, Jan. 29, 2007, <http://www.reuters.com/assets/print?aid=USDEL342197> (quoting Mandela as saying that Gandhi's "philosophy contributed in no small measure to bringing about a peaceful transformation in South Africa and in healing the destructive human divisions that had been spawned by the abhorrent practice of apartheid"); Placido D'Souza, *Gandhi's Influence on King*, S.F. CHRONICLE, Jan. 20, 2003, <http://www.sfgate.com/opinion/openforum/article/COMMEMORATING-MARTIN-LUTHER-KING-JR-Gandhi-s-2640319.php> (describing using King's own language, how Gandhi came to influence his approach to social reform in the civil rights movement).

⁹ Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998).

¹⁰ *Govt Extends Tagore Copyright for 10 Years*, THE TELEGRAPH, Dec. 31, 1991, <http://www.cscsarchive.org:8081/MediaArchive/clippings.nsf/%28docid%29/464A928EDF1489C46525694200313BE7?OpenDocument>.

public domain.¹¹ The trustees claimed to have come to the realization that Gandhi “never wanted copyright law,” and that he was opposed to the institution.¹² Ownership of Gandhi’s copyrights had been an enormous source of revenue for the Trust, and it was now willing to sacrifice all of this solely to abide by Gandhi’s own principles and beliefs.¹³ While this development generated a good deal of interest in leading Indian newspapers at the time,¹⁴ to those familiar with Gandhi’s economic philosophy and views on the market, it seemed but logical.

Gandhi’s beliefs on the ideas of non-violence, truth and freedom are fairly well-known the world over, and commonly revered. Less respected, both within India and outside however, is Gandhi’s economic philosophy. Writing during the British rule of India, Gandhi’s economic thinking was openly hostile to “modern civilization”, “capitalism” and utilitarian thinking.¹⁵ Believing that an exclusive focus on “material progress” would direct attention away from the “real” and “moral” progress that India needed, Gandhi routinely rejected utilitarianism, which he associated with Bentham’s oft-quoted ideal of the “greatest happiness of the greatest number”.¹⁶ Simple utilitarianism, he believed, would provide insufficient protection for minorities and other disadvantaged groups within society, by treating them as mere numbers.¹⁷

Gandhi’s rejection of copyright was thus believed to have been informed by his philosophical opposition to market-oriented utilitarianism. Indeed, this is known to have been true for his opposition to private ownership.¹⁸ According to Gandhi, private ownership was justifiable only when owners saw themselves as trustees who held their assets not in the pursuit of their own self-interest, but instead for the benefit of society at

¹¹ Rathin Das, *Gandhians Unfazed as Mahatma’s Copyright Ends*, HINDUSTAN TIMES, Dec. 29, 2008, <http://www.hindustantimes.com/India-news/Ahmedabad/Gandhians-unfazed-as-Mahatma-s-copyright-ends/Article1-361690.aspx> (quoting the Managing Trustee of the Navjivan Trust).

¹² *Id.*

¹³ Jahnavi Contractor, *Gandhi Copyright Breathes Life into Navjivan Trust*, TIMES OF INDIA, Oct. 1, 2003, http://articles.timesofindia.indiatimes.com/2003-10-01/ahmedabad/27179585_1_printing-press-navjivan-trust-gandhiji; Kamran Sulaimani, *With Navjivan’s Copyright on them Gone, Gandhi’s Literary Works Now Available in a New Avatar*, INDIAN EXPRESS, Mar. 23, 2009, <http://www.indianexpress.com/news/with-navjivan-s-copyright-on-them-gone-gandhi-s-literary-works-now-available-in-a-new-avatar/437723>.

¹⁴ *Id.*

¹⁵ See Kenneth Rivett, *The Economic Thought of Mahatma Gandhi*, 10 BRIT. J. SOCIO. 1, 1 (1959).

¹⁶ *Id.* at 1-2. See also *infra* text accompanying notes __-__.

¹⁷ See MOHANDAS KARAMCHAND GANDHI, SARVODAYA 4 (1954) (hereinafter GANDHI, SARVODAYA).

¹⁸ MOHANDAS KARAMCHAND GANDHI, MY THEORY OF TRUSTEESHIP 102 (1970) (hereinafter GANDHI, TRUSTEESHIP).

large. Ownership thus had to become a form of “trusteeship”, wherein owners sacrificed the pursuit of individual self-interest for the uplift of the socially and economically backward segments of society.¹⁹ To those familiar with Gandhi’s views on property, the claim that he rejected copyright seemed to cohere.

The rhetoric about Gandhi’s supposed “rejection” of the institution unfortunately cast him as a naïve idealist, who despite being well-intentioned and noble in motive, failed to fully appreciate the practical importance (and role) of copyright law in the production and dissemination of original expression. Gandhi’s views on the subject were portrayed as saint-like and utopian, and while worthy of admiration, nonetheless dismissed as incapable of emulation in the real world.

In reality however, nothing could be farther from the truth. Gandhi’s views on copyright were far more nuanced than they are made out to be. What is often forgotten about Gandhi in discussions of his political and moral theory is the fact that he was a trained lawyer. Trained as a common lawyer in England, Gandhi practiced in the courts of South Africa before returning to India.²⁰ Much of his political theory and strategy drew heavily from his training as a lawyer, and he readily merged law and politics in his early days as a lawyer in South Africa.²¹ His engagement with copyright, a *legal institution*, was thus hardly visceral, or uninformed. An examination of his various writings between 1926 and 1946, reveal his engagement with the institution to have been characterized by a lawyerly pragmatism and nuance that is rarely ever ascribed to Gandhi today. While this engagement no doubt reveals a deep unease about the utility of copyright and its inherent incompatibility with some of Gandhi’s other beliefs, it also highlights how careful and pragmatic he was in navigating the legal structure of copyright when he viewed it as necessary to his ultimate purposes. Instead of rejecting the institution in its entirety, Gandhi at times chose to actively engage with the institution and then develop complex mechanisms of abandoning his rights, fragmenting them, or licensing them to the public for free. He even saw the importance of copyright as a mechanism of ‘attribution,’ and in the process sought to segregate copyright’s market-based aspects from its attributive ones. Towards the later part of his life, he also came to deploy

¹⁹ *Id.* at 43-45, 49-54.

²⁰ *See, e.g.*, RAJMOHAN GANDHI, *GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE* 53-88 (2008); YOGESH CHADHA, *GANDHI: A LIFE* 121-49 (1997); JOSEPH LELYVELD, *GREAT SOUL: MAHATMA GANDHI AND HIS STRUGGLE WITH INDIA* (2011).

²¹ *See* MOHANDAS K. GANDHI, *AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH* 155-59 (1957) (hereinafter *GANDHI, AUTOBIOGRAPHY*).

copyright law to curtail market-based exploitation when he could. In many ways then, Gandhi's approach did with copyright law, what Open Source Licensing and the Creative Commons Project would begin doing with copyright in the twenty-first century.²²

Gandhi's nuanced engagement with the institution of copyright drew extensively from his belief in the importance of access to information and education for the masses, the centrality of truth in public and private interactions, his disdain for censorship, and perhaps most importantly, his steadfast commitment to ensuring that legal change come about through a bottom-up process. Very interestingly, not once in his discussion of copyright, does he reference notions of property and ownership—suggesting a willingness and ability to engage with it as an independent institution, a practice unique to those familiar with the law and legal institutions. Gandhi's cautious engagement with, and contextual antipathy towards, copyright law thus holds several important lessons for today's debates about the proper scope of copyright law, a debate that is routinely cast in overly simplistic and binary terms.

First, his use of copyright law to realize goals that are antagonistic to copyright's dominant utilitarian understanding reveals how its legal framework may be used and deployed towards the realization of a plurality of normative goals. Meta-ethical pluralism has in recent times come to be seen as essential to discussions of copyright (and intellectual property more generally), and yet scholars and activists have struggled to develop mechanisms and strategies to realize this pluralism in practice. To many committed to this ideal, rejecting the existing framework and foundations of the institution seem essential. Gandhi on the other hand chose to engage with the institution despite his personal discomfort with its purported goals, only to circumvent those goals from within, i.e., by embracing it and then deploying its legal machinery to suit his own purposes. Second, Gandhi's actions in engaging with the legal structures of copyright reflect an approach to practical reasoning as a process of resolving conflicts between incommensurable ends. In the political sphere, Gandhi is commonly thought of as an "idealist." Yet, perhaps as a consequence of his training as a common lawyer and despite his disdain for the legal profession as it existed during his time, Gandhi's own actions when dealing with copyright showcase a form of pragmatism that is characterized by a willingness to achieve a reasoned compromise when needed and a readiness to alter one's

²² See Creative Commons, *History*, <http://creativecommons.org/about/history> (last visited Oct. 24, 2012); Duncan Geere, *The History of Creative Commons*, WIRED.CO.UK., Dec. 13, 2011, <http://www.wired.co.uk/news/archive/2011-12/13/history-of-creative-commons?page=all>.

thinking when circumstances change. Despite its roots in the specifics of the Indian freedom movement, his thinking in this latter respect exhibits an uncanny resemblance to American pragmatism, a philosophical (and legal) movement that was beginning to take shape around the same time in the U.S.

Legal and philosophical pragmatism have long been understood as uniquely American approaches to thinking, characterized by the ideas of anti-foundationalism, instrumentalism, and context-sensitivity.²³ Pragmatism as a way of thinking took shape in the 19th century, principally through the writing of Oliver Wendell Holmes Jr., Charles Pierce, William James and later John Dewey. While there is no evidence that Gandhi and the 19th century pragmatists ever interacted, the parallelism of their thinking and approach to philosophical questions is stark and revealing. Gandhi's approach to copyright provides us with a wonderful illustration of this and in the process lays the groundwork for the development of a fairly unique approach to engaging the copyright system, which this Essay describes as "copyright pragmatism". Copyright pragmatism emphasizes a healthy and constructive skepticism towards copyright, but at the same time recognizes the importance of several of the institution's goals and objectives. As a method of participating in copyright's actual working, it entails infusing copyright law with a plurality of normative ideals through a reliance on the techniques of practical reasoning and situation-sensitivity. As an approach to thinking about copyright law, copyright pragmatism allows copyright scholars, lawyers, and activists to adopt a midway position between the extremes of copyright nihilism (or minimalism), and copyright expansionism (or maximalism), approaches that are thought to be the dominant positions in today's "copyright wars".²⁴ In the process, it enables the institution to continue functioning, while at the same time engaging with (and questioning) the universalizability of its core values and premises.

²³ See, e.g., Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1660 (1990) (describing these three features). See also Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1564 (2010)

²⁴ For recent discussion of these two positions in the copyright wars, see: WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 1-41 (2009); Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996); Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1869-70 (2011); Justin Hughes, *Copyright and its Rewards, Foreseen and Unforeseen*, 122 HARV. L. REV. F. 81, 82 (2009); Mike Masnick, *Copyright Maximalists Try to Regroup and Figure Out How to "Fight Back" Against the Public*, TECHDIRT, Apr. 17, 2012, <http://www.techdirt.com/articles/20120416/12020318506/copyright-maximalists-try-to-regroup-figure-out-how-to-fight-back-against-public.shtml>.

This Essay reconstructs Gandhi's views on copyright law to show how it sits somewhat oddly with the abstract philosophical views on markets, ethics, and property that are often attributed to him. It then shows how contrary to common belief, Gandhi's engagement with the institution of copyright reveals a complex interplay of moral, political, ethical, and most importantly legal ideas, which the lore about his rejection of the institution fails to capture in any significant measure. It thus sets the stage for a broader examination of what Gandhi's views were on the normativity of law, and the unstated role he envisioned for legal reasoning and legal institutions in his overall world-view.

Part I begins by setting out Gandhi's basic economic philosophy, and the simplistic view of copyright law that is commonly attributed to Gandhi. Focusing on his rejection of utilitarianism, markets, modernity and ownership as an autonomous ideal, Gandhi is thought to have rejected copyright law as alien to his thinking and belief.

Part II then reveals that Gandhi's actual engagement with copyright departs from what an analysis of his abstract philosophy might have suggested. It reconstructs Gandhi's views on copyright law by focusing on his engagement with copyright between 1926 and 1946, the period when he wrote and published the most, bringing him into direct contact with the copyright system. Here we see three different strands of thinking (about copyright) motivating Gandhi's actions and beliefs. In the first, the strand of "personal rejection", Gandhi's rhetoric adheres to the dominant belief set out in Part I—i.e., that of rejecting the institution in its entirety. Yet, even here what is often missed is that Gandhi's rejection of the institution was a deeply personal one, rather than one that he would advocate as a normative political matter for everyone, since he recognized and acknowledged that copyright's utilitarian purpose *might* have value for others. In the second, the strand of "reluctant engagement", we see Gandhi willing to accept the limited utility of copyright for some purposes, including somewhat surprisingly, market-driven, distributive ones. In the third strand, that of "strategic deployment", we see Gandhi actively using the institution of copyright law to further his other normative ideals—truth (integrity), expressive diversity, and ensuring that market motives do not crowd-out other non-market-based ones.

Part III then argues that Gandhi's views on copyright law are best understood as a form of copyright pragmatism, an approach that draws on both philosophical and legal pragmatism, and that discussions of Gandhi's political and moral theories almost always ignore the likely effect that his training as a lawyer might have had on his views. It begins by showing the

intellectual, conceptual, and analytical parallels between Gandhi's own philosophy of action—practical idealism—and American pragmatism, as a philosophical and legal movement. It then unpacks copyright pragmatism to show how it relies on a nuanced, incremental approach to thinking about the institution's myriad costs and benefits, its fundamental problem of incommensurability, and indeed its normativity as a "legal" institution. It finally concludes by suggesting that copyright pragmatism might hold important structural (rather than substantive) lessons for contemporary debates about the proper scope and purposes of copyright law.

I. THE MYTH OF GANDHI AS A COPYRIGHT NIHILIST

As noted earlier, the standard observation to come out of the failed attempt to extend the copyright in Gandhi's work was that Gandhi was somehow opposed to the institution of copyright and rejected its value. Opposition to copyright is hardly new, and has assumed some significance in the last decade or so, as the infamous "copyright wars" have entered the public spotlight.²⁵ Leaving aside the validity or otherwise of these arguments in opposition, the story about Gandhi's rejection seemed to ally his economic thinking with the idea that copyright was morally wrong, and worthy of rejection. In this Part, I disaggregate this facially intuitive connection to show how Gandhi's supposed rejection of copyright actually sat rather well with his views on the market, utilitarianism, property, and modernity—a position that the simplified accounts of his opposition to copyright all too readily accept. In the next Part, I show how this simplified account doesn't at all capture Gandhi's actual views and actions on the subject, which as Part III shows, originated in his theory of action, which was overtly pragmatic and contextual in orientation.

A. *Gandhi's Economic Philosophy*

To fully explicate Gandhi's economic ideas with any measure of brevity is a challenge. For one, Gandhi never developed his abstract philosophy (economic or otherwise) in a coherent and comprehensive manner, which required scholars to piece them together from his several writings over extended periods time. Additionally and as many scholars have noted, Gandhi's economic thinking drew in large measure from his

²⁵ See, e.g., PATRY, *supra* note __.

spiritual, religious, ethical, and moral philosophy.²⁶ Consequently, cabinining his economic ideas and studying them in isolation is likely to render them both incomplete and on occasion incomprehensible. Despite these challenges however, this Section attempts to provide a short overview of four ideas that were central to Gandhi's economic philosophy, which on the face of things suggest an oppositional stand towards copyright, and feed into the myth of his being a copyright nihilist.

1. The Rejection of Utilitarianism

Of the various aspects of Gandhi's economic thinking, his rejection of utilitarianism is perhaps the best known, and commonly thought to have formed an organizing principle in his own economic thinking.²⁷ This is at best an incomplete account of how Gandhi developed his own economic philosophy, for, while he certainly rejected utilitarianism, his basis for doing so wasn't because he was altogether opposed to consequentialist approaches to reason and action, but rather because of utilitarianism's fundamental inability to accommodate the ethical ideas that Gandhi believed ought to be central to all normative justifications of human action and behavior.

The version of utilitarianism that Gandhi routinely criticized was the simplistic version, best captured by the phrase "the greatest good of the greatest number", which he associated with Jeremy Bentham.²⁸ Gandhi's objections to basic utilitarianism had two independent bases. First, he was dissatisfied with simple utilitarianism's willful antipathy towards distributive questions, given its singular focus on maximizing aggregate welfare or happiness.²⁹ Gandhi was thus intolerant of the idea that for the benefit of a majority, a minority of society could have their interests and welfare altogether ignored, not just in practice, but additionally as a matter of principle.³⁰ Second, he viewed utilitarianism—to the extent that it was a

²⁶ See AJIT K. DASGUPTA, *GANDHI'S ECONOMIC THOUGHT* 7-12 (1996).

²⁷ Rivett, *supra* note __, at 1-2.

²⁸ See Mahatma Gandhi, *Letter to Jal A.D. Naoroji*, in 55 CWMG, *supra* note __, at 481, 482.

²⁹ DASGUPTA, *supra* note __, at 8-9. It is crucial to emphasize here that Gandhi's discomfort with utilitarianism didn't consider subsequent modifications of utilitarian thinking, which allow room for important distributive and egalitarian considerations. Scholars have indeed shown how utilitarianism, even in the versions put forth by Bentham and Mill, remains capable of accommodating the rights and concerns of minorities. See FREDERICK ROSEN, *CLASSICAL UTILITARIANISM FROM HUME TO MILL* 232-44 (2003). Gandhi's rejection of utilitarianism was thus hardly a scholarly one, and relied on a simplistic, and somewhat caricatured version of the philosophy.

³⁰ SHANTI S. GUPTA, *THE ECONOMIC PHILOSOPHY OF MAHATMA GANDHI* 42 (1994).

normative theory for action—to be morally and ethically vacuous. Speaking of utilitarianism, as commonly advocated, he thus observes how “[h]appiness is taken to mean material happiness exclusively, that is economic prosperity,” which implies that “[i]f in the pursuit of this happiness, moral laws are violated, it does not matter much.”³¹

Gandhi’s objections to utilitarianism appear to however have a common origin: utilitarianism’s willingness to distance individual and aggregate welfare from each other not just as a descriptive matter, but as a normative principle. It certainly wasn’t that Gandhi didn’t care about “welfare”. To the contrary, Gandhi remained committed to welfare, but he insisted that it originate in an intense focus on how individuals motivate themselves, instead of taking that as a given and attempting to aggregate it in the abstract. Gandhi’s own idea of welfare is captured to some degree in his principle of *sarvodaya*, which translates to the uplift (or welfare) of all.³² In his rendering of the idea, Gandhi identifies three principles, and the first of these is the recognition that “the good of the individual is contained in the good of all.”³³ Instead of viewing individual welfare as likely furthered through an aggregation of social welfare—a deductive approach—Gandhi’s conception of welfare was an inductive one that treats collective social welfare as a central normative tenet of how the very idea of individual welfare ought to be conceptualized. Rather than taking it as a given and attempting to maximize it, Gandhi sought to inject substantive content into it, by connecting it to his ethical theory of behavior. The failure to add normative content to the idea of ‘welfare,’ was to Gandhi a reflection of the moral vacuity of standard utilitarian thinking. A theory of action—especially one purporting to be normative—had to focus not just on individual action, but on the “right” individual action that society ought to care about.³⁴ This in turn necessitated seeing individual and social welfare as intricately connected to each other.³⁵

³¹ Gandhi, *Letter to Jal A.D. Naoroji*, *supra* note __, at 482.

³² See GANDHI, *SARVODAYA*, *supra* note __, at 4.

³³ GANDHI, *AUTOBIOGRAPHY*, *supra* note __, at 299.

³⁴ DASGUPTA, *supra* note __, at 10; UNTO TAHTINEN, *THE CORE OF GANDHI’S PHILOSOPHY* 38-39 (1979).

³⁵ Gandhi’s objection to utilitarianism is in many ways similar to Bernard Williams’ criticism of utilitarianism as a stand-alone philosophy. In his famous attack on utilitarianism, Williams too criticizes utilitarianism for its reliance on what he calls the notion of “negative responsibility”. J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 93 (1973). According to Williams, utilitarianism is content with its focus on particular states of affairs and pays no attention to distinguishing between specific actions that bring about those states of affairs, and indeed the morality of those actions. In the process, it underplays the idea of moral agency and the fact that individuals do and should take responsibility for their actions and the consequences that they

In summary then, Gandhi did reject utilitarianism. Yet, he didn't construct his own philosophy in opposition to utilitarianism. His rejection of utilitarianism did not form the basis for his development of his thinking about welfare, but was instead a consequence of his own philosophy that required a richer normative account of individual action and its morality.

2. Preference Limiting

Gandhi's rejection of utilitarianism was thus a natural consequence of his own moral vision of the role that individual behavior and action played in society, and how it ought to be channeled. Gandhi's normative economic philosophy was additionally deeply informed by his ethical vision of society and individual behavior therein.³⁶ This in turn produced two important characteristics. The first is the fact that the economic dimension of Gandhi's philosophy is often difficult to separate from its ethical dimension, and indeed in numerous instances the economic dimension of his philosophy is derived as a by-product of the ethical vision. Gandhi himself often observed that he did "not draw a sharp distinction between economics and ethics."³⁷

The second feature, which also derives from Gandhi's ethical vision, is the fact that despite the fact that his economic account is rooted in an ethical one, the normative significance of the theory/philosophy is only ever meant to be realized through internal and not external motivations. Gandhi in other words, believed that adherence to the ethical and economic vision he was advocating would come about through individuals' self-realization of its virtues, and never in a top-down or coercive manner.³⁸ Accepting his normative precepts was thus a deeply personal act, and Gandhi believed that he could bring about this self-realization through example and

produce, what Williams refers to as the value of "integrity". *Id.* at 108. Where Gandhi and Williams possibly diverge however is in their orientation. Williams' objection to utilitarianism is a largely theoretical one, which explains why much of his criticism of utilitarianism routinely translates into a criticism of all consequentialism, in his own account. To Gandhi however, the critique of utilitarianism was practically motivated, allowing him to embrace a consequentialist orientation in other contexts.

³⁶ See OM PRAKASH MISRA, *ECONOMIC THOUGHT OF GANDHI AND NEHRU: A COMPARATIVE ANALYSIS* 14 (1995); DASGUPTA, *supra* note __, at 7.

³⁷ Mahatma Gandhi, *The Great Sentinel*, in 24 CWMG, *supra* note __, at 412, 415.

³⁸ See DENNIS DALTON, *MAHATMA GANDHI: NONVIOLENT POWER IN ACTION* 6 (2012); S.K. Saxena, *The Fabric of Self-Suffering: A Study in Gandhi*, 12 REL. STUD. 239 (1976).

elaboration—which perhaps accounts for why he continually reasoned publicly through his numerous, often contradictory, actions.³⁹

One of the fundamental ways in which Gandhi's ethical vision informed his economic ideas relates to his views on individual preferences and wants.⁴⁰ To Gandhi, conspicuous consumption was morally reprehensible, and he argued that an individual's welfare is best achieved through limiting the wants and desires that an individual has and develops over the course of his or her life.⁴¹ To him, once the idea of "maximizing" one's wants entered the picture, it was likely to take on a life of its own, producing a sense of restlessness that might induce unreflective behavior among individuals. Contentment was thus a core tenet of Gandhi's vision of happiness, which necessitated not the maximization of wants and preferences, but rather limiting them. As a leading scholar of Gandhi's economic ideas Ajit Dasgupta observes of Gandhi's thinking in this area: "self-indulgence and the ceaseless multiplication of wants hamper one's growth because they are erosive of contentment, personal autonomy, self-respect and peace of mind...it is from these that one's long-run happiness can be found, not just from obtaining what one likes at the moment."⁴² Preference-satisfaction, the organizing ideal of utilitarianism was a misguided idea to Gandhi, in whose philosophy, this satisfaction always needed to have an outer limit.

Preference limiting was thus to Gandhi a virtue that individuals needed to cultivate, and which when realized would contribute to overall social welfare through the interplay between individual and collective well-being. Such limiting had to come from within each individual for it to serve its true purpose.

3. Markets and Modernity

Flowing directly from his rejection of utilitarianism and the idea of preference limitation, Gandhi's economic philosophy was rooted in a

³⁹ GLYN RICHARDS, *THE PHILOSOPHY OF GANDHI: A STUDY OF HIS BASIC IDEAS* 51 (1995) (noting Gandhi's emphasis on "persuasive reasoning" and "voluntary suffering" as the twin bases of convincing an opponent).

⁴⁰ DASGUPTA, *supra* note __, at 14; GUPTA, *supra* note __, at 4-13;

⁴¹ GANDHI, *TRUSTEESHIP*, *supra* note __, at 8-9; GANDHI, *INDIAN HOME RULE*, *supra* note __, at 37; Mahatma Gandhi, *Who Can Offer Satyagraha?*, in 9 CWMG, *supra* note __, at 339, 342 ("Contentment is happiness.").

⁴² DASGUPTA, *supra* note __, at 15.

fundamental opposition to what he called “modern civilization,⁴³” characterized by industrialization, an exclusive focus on the material (as opposed to moral) advancement of society, and the unending multiplication of wants.⁴⁴ The market and market forces were to Gandhi mechanisms that reinforced modern civilization. In Gandhi’s philosophy, the market was a mechanism of greed and selfishness, which while advancing material prosperity, always compromised the moral and ethical dimensions of social existence.⁴⁵ Market competition was thus described as one of the “most inhuman among the maxims laid down by modern economics”.⁴⁶ Adam Smith’s basic tenets were thus to Gandhi deeply “disturbing” and needed to be “overcome” by society.⁴⁷

Gandhi’s vitriolic attack on markets and modern civilization was likely in large measure a response to colonial rule that merged the political ideals of imperialism with the economic goals of capitalism.⁴⁸ From this, it is commonly assumed that Gandhi was sympathetic to the communist and socialist ideas—of Marxism—that had begun to take shape and gain prominence in Russia. Yet, his merger of means and ends in action forced him to part ways with communism as a philosophy, to the extent that it relied on violence to achieve its goals.⁴⁹ Gandhi also saw the traditional brand of normative communism as premised on the same kinds of beliefs about human behavior as market capitalism—that individuals were selfish, greedy, and consumption-driven.⁵⁰

Indeed in some ways, Gandhi’s rejection of Marx’s traditional communism was inevitable in that it portrayed Indian civilization—prior to the advent of the British—as barbaric and without any rational or logical basis. Writing about the British rule in India, Karl Marx had in 1853 observed that the “English interference [in India]... dissolved these small semi-barbarian, semi-civilized communities, by blowing up their economical basis, and thus produced the greatest, and to speak the truth, the

⁴³ GANDHI, *INDIAN HOME RULE*, *supra* note __, at 6, 39 (“This booklet is a severe condemnation of ‘modern civilization’.”). *See also* RAJESHWAR PANDEY, *GANDHI AND MODERNISATION* 23 (1979).

⁴⁴ Kazuyi Ishii, *The Socioeconomic Thoughts of Mahatma Gandhi: As an Origin of Alternative Development*, 59 *REV. SOC. ECON.* 297, 299 (2001).

⁴⁵ *Id.* at 299; *see* Mahatma Gandhi, *Speech at Muir College Economic Society, Allahabad*, in 15 *CWMG*, *supra* note __, at 272, 277.

⁴⁶ Mahatma Gandhi, *The Secret of It*, in 25 *CWMG*, *supra* note __, at 12, 16.

⁴⁷ Mahatma Gandhi, *Interview to Khadi Workers*, 64 *CWMG*, *supra* note __, at 339, 339.

⁴⁸ *See* Ishii, *supra* note __, at 299-300.

⁴⁹ GANDHI, *TRUSTEESHIP*, *supra* note __, at 56-57.

⁵⁰ *Id.* at 56-58.

only social revolution ever heard of in Asia.⁵¹” Whereas communism saw the development of state collective ownership as an advancement over both capitalism and traditional society, in Gandhi’s philosophy, returning the country to its pre-British glory and philosophy was a central, motivating idea.⁵²

Reviving village communities, and the structures of living that existed there was critical to Gandhi. In it, he saw the possible realization of his ethical and moral goals for Indian society, and perhaps most importantly a revival of Indian identity that would make the ethical component of his project more likely.⁵³ The logic for this move originated in his idea of self-rule, or *swadeshi*, where he sought to ensure that the Indian economy was internally self-sufficient, such that it would not need to depend on the outside world for its existence.⁵⁴ In this idea, Gandhi seemed to suggest that it was the absence of such reliance that had allowed the British to colonize India, and that unless India regained its self-reliance after their departure, the country continued to risk re-colonization and serial exploitation by market driven imperialist countries.⁵⁵ Markets and modernization were thus to him, regressive devices.

4. Property and Trusteeship

The last tenet of Gandhi’s economic ideas that is of relevance to our discussion of copyright is Gandhi’s concept of “trusteeship,” which he advocated as a substitute for the institution of private property ownership, as traditionally understood.⁵⁶ Building on his disavowal of markets, utilitarianism, self-interested behavior and modernity, Gandhi drew from communism the idea that the concentration of material wealth in the hands of a few was a recipe for social and economic exploitation. As some scholars have observed, Gandhi very likely developed the idea of trusteeship from his knowledge of the law of trusts and the notion of

⁵¹ Karl Marx, *The British Rule in India*, N.Y. DAILY TRIBUNE, June 10, 1853, at 125, 132.

⁵² Ishii, *supra* note __, at 302, 307-11.

⁵³ Mahatma Gandhi, *A Discussion with Maurice Frydman*, in 69 CWMG, *supra* note __, at 320, 321 (“[I]f the village perishes, India will perish too.”).

⁵⁴ See GANDHI, INDIAN HOME RULE, *supra* note __, at 173-74.

⁵⁵ Ishii, *supra* note __, at 302-03.

⁵⁶ See generally GANDHI, TRUSTEESHIP, *supra* note __; ARCHNA KAPOOR, GANDHI’S TRUSTEESHIP: CONCEPT AND RELEVANCE (1993); M.L. Dantwala, *The Trusteeship Formula*, in GANDHI AND ECONOMIC DEVELOPMENT 141 (B.P. Pandey ed., 1991); B.K. Roy Burman, *Gandhi’s Concept of Trusteeship: A Dimension of Socialist Humanism*, in GANDHI AND ECONOMIC DEVELOPMENT 171 (B.P. Pandey ed., 1991).

fiduciary obligations that trust law imposes on trustees.⁵⁷ Under his conception of trusteeship, property owners were to remain in possession of their wealth and assets, could use whatever is reasonably needed by them for their “personal need,” and then will act as trustees over the rest and use it for the benefit of society at large.⁵⁸ Property owners were thus to put a limit on their behavior that was motivated exclusively by their self-interest.⁵⁹ In this institution, we thus see elements of Gandhi’s other economic principles, most notably the idea of limiting one’s wants.

What is perhaps most interesting about Gandhi’s idea of trusteeship is the reality that Gandhi himself viewed it as more of a theory, or ideal, rather than as a workable movement or plan.⁶⁰ He routinely described it as a “legal fiction” or “abstraction,” but noted that “if we strive for it we shall be able to go further in realizing a state of equality on earth than by any other method.⁶¹” It was thus an aspirational ideal that was worthy of emphasis as a motivational principal.

In addition, it is also important to note that trusteeship did not entail the wholesale rejection of property, or indeed the renunciation of all wealth and possessions by the wealthy.⁶² Trusteeship represented a *form* of ownership, which cast affirmative, other-regarding, communal obligations on owners. Individuals in possession of wealth, or those engaged in the business of making wealth (i.e., businessmen) weren’t required to renounce their assets in favor of others. They were instead merely required to hold these assets—or at least some part of them—as custodians for society.⁶³

Summarizing trusteeship, Gandhi thus observed that “[i]t does not recognize any right of private ownership of property, except in as much as it may be permitted by society for its own welfare.⁶⁴” In this formulation, we

⁵⁷ See, e.g., DASGUPTA, *supra* note __, at 23; Geeta Abrol, *Gandhian Doctrine of Trusteeship and its Relevance to Modern Times*, in *GANDHIAN THOUGHT AND CONTEMPORARY SOCIETY* 147 (J.S. Mathur ed., 1974).

⁵⁸ GANDHI, TRUSTEESHIP, *supra* note __, at 72.

⁵⁹ *Id.* at 73-75.

⁶⁰ Gandhi’s book on the subject describes it as a “theory”. See generally *id.*

⁶¹ Mahatma Gandhi, *Interview to Nirmal Kumar Bose*, in 65 CWMG, *supra* note __, at 316, 318. He thus notes:

You may say that trusteeship is a legal fiction. But if people meditate over it constantly and try to act up to it, then life on earth would be governed far more by love than it is at present. Absolute trusteeship is an abstraction like Euclid’s definition of a point, and is equally unattainable.

⁶² GANDHI, TRUSTEESHIP, *supra* note __, at 94 (“Legal ownership in the transformed condition [of trusteeship] vests in the trustee, not in the State.”).

⁶³ *Id.* at 94-95.

⁶⁴ *Id.* at 102.

see three important analytical and conceptual moves. First, it isn't an absolute rejection of private property. Instead, it subjects the institution to a consequentialist purpose—social welfare. What is clearly rejected in this formulation is the idea of property as an individual's "despotic dominion."⁶⁵ Second and connectedly, by rendering the entire institution subject to social welfare as a litmus test, Gandhi is indirectly rejecting the idea that property rights originate in natural law or that they are naturally given and in some sense pre-state, an idea today associated with Locke.⁶⁶ Third, what Gandhi seems to be rejecting—in addition to an absolute conception of property—is also the idea of private ownership being a "right."⁶⁷ To Gandhi, the essentialism of rights was a dangerous phenomenon, because it distanced the entitlement from its correlative duties, which to him formed the basis for organizing and motivating behavior among social actors.⁶⁸ To the extent that private ownership was a valid institution to Gandhi, it revolved around the affirmative obligations cast on owners to look out for and act in the interest of those without wealth and assets, the central idea behind trusteeship.⁶⁹

B. Gandhi's Purported Rejection of Copyright

Putting these elements of Gandhi's socio-economic philosophy together, it is easy to see why the idea that he "opposed" copyright in its entirety seems plausible. Gandhi's writings on social welfare, utilitarianism, ethics, markets, and property rights seemed to undoubtedly question the

⁶⁵ An idea traced back to the English common law theorist William Blackstone. 2 WILLIAM BLACKSTONE, COMMENTARIES *2. It is of course debatable what exactly it meant, beyond being an interesting metaphor. See Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998).

⁶⁶ See generally JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980) (providing an extended discussion of Locke's theory of property).

⁶⁷ GANDHI, TRUSTEESHIP, *supra* note __, at 100 ("[R]ights that do not flow directly from duty well-performed, are not worth having."). To some, Gandhi is taken to have consciously avoided a theory of rights. See Ronald J. Terchek, *Gandhi and Moral Autonomy*, 13 GANDHI MARG 454 (1992). But see DASGUPTA, *supra* note __, at 45 (suggesting that Gandhi did have a conception of rights, but that they took second-place to duties).

⁶⁸ Mahatma Gandhi, *Presidential Address at Kathiawar Political Conference, Bhavanagar*, in 30 CWMG, *supra* note __, at 53, 68 ("The true source of rights is duty"); Mahatma Gandhi, *Talk with Workers of Rajkot Praja Parishad*, in 75 CWMG, *supra* note __, at 175, 176 ("[T]he right to perform one's duties is the only right that is worth living for and dying for."); Mahatma Gandhi, *Letter to Julian Huxley*, in 97 CWMG, *supra* note __, at 99 (expressing skepticism about the Universal Declaration of Human Rights, and noting that "[t]he very right to live accrues to us only when we do the duty of the citizenship of the world").

⁶⁹ See GANDHI, TRUSTEESHIP, *supra* note 102-03.

theoretical and practical bases of copyright law. Together with the growing emphasis on the public domain among scholars at the time that his works entered the public domain,⁷⁰ and the public perception that the copyright system served the interests of no more than a few groups of commercially powerful creators,⁷¹ Gandhi came to be idolized in the public mind as championing the anti-copyright movement well before its heyday. To scholars familiar with both Gandhi's economic philosophy and the basics of copyright law, this would have seemed largely unexceptional.

First, copyright law in most of the common law world—including British (and later, independent) India—is commonly understood as originating in utilitarianism.⁷² Copyright is justified in this understanding as an inducement for creativity. By providing authors and creators with a limited, market-based monopoly over their works—manifested in a set of exclusive rights that subsist for a fixed period of time—copyright is believed to incentivize the very production of such expression.⁷³ This production of expression, it is in turn believed, will contribute to “learning” and the “progress” of society. Indeed, the world's first copyright statute, the Statute of Anne, described itself as “[a]n Act for the [e]ncouragement of [l]earning,” an idea that finds mention in the first U.S. copyright statute as well.⁷⁴ The utilitarian logic underlying copyright is taken to manifest itself in the idea that more expressive creativity benefits society as a whole, regardless of *how* those benefits are ultimately distributed. Aggregate social welfare is thus the operating principle behind it. To the extent then that one adopts such an outlook towards copyright,⁷⁵ the institution unquestionably sits at odds with Gandhi's deep discomfort with utilitarianism and its facial agnosticism towards distributive and ethical questions.

⁷⁰ For an overview of this trend, and a critique of it see: Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1333-35 (2004).

⁷¹ See, e.g., LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (2005) (detailing “how big media uses technology and the law lock down culture and control creativity”).

⁷² See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576 (2009).

⁷³ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13 (2003).

⁷⁴ Statute of Anne, 8 Ann., c. 19 (1709) (Eng.) (preamble); Act of May 31, 1790, 1 Stat. 124.

⁷⁵ It is worth emphasizing that copyright's utilitarian justification is hardly axiomatic, despite its dominance in the scholarly literature and judicial opinions. Scholars have in recent times questioned its fundamental premise from a variety of approaches. See, e.g., MADHAVI SUNDEER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 3 (2012); Diane Leenheer Zimmermann, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN THE L. 29 (2011).

Second, copyright's idea of "inducing" creativity is indelibly premised on the twin principles of preference satisfaction and wealth-maximization. The operating belief underlying copyright's theory of incentives is that individual authors and creators are rational economic actors who are motivated in large measure, if not entirely, by the urge to maximize their own self-interest via the market.⁷⁶ Copyright law plays into that belief by fuelling the assumption that preferences can be satisfied without a pre-determined outer boundary. The urge to maximize their own personal welfare thus motivates creators to produce expressive work. Gandhi's ethical ideal of limiting one's preferences and wants thus stands in strong contrast to copyright's operating assumptions about individual behavior—that it relies on both as a positive and normative matter.

Third, as a market-based mechanism copyright was and is undoubtedly a modern institution. Given his focus on returning India to its traditional "Indian" ways by idealizing village communities and their collective practices, Gandhi might have—the argument goes—very likely seen copyright as largely irrelevant, and perhaps even incompatible with traditional, collective living. Whether empirically accurate or not, Gandhi took traditional values and actions to emphasize self-sufficiency, sharing, and spiritual/ethical motivation.⁷⁷ Copyright, which emerged in the industrial-era and in response to the mechanization of the printing industry,⁷⁸ would have, based on his abstract economic ideas, very likely seemed to him to be incompatible with his vision that the essence of India was to be found in its villages.

Fourth, copyright has always been structured as an institution of private ownership.⁷⁹ Regardless of whether copyright thinking ought to emphasize its nascent similarity to other real and personal property institutions, it remains a reality that copyright's structure of exclusive rights is modeled on the property's idea of exclusion. As discussed earlier, Gandhi saw private ownership as a necessary evil. He viewed it as an institution that couldn't be rejected, but one that at the same time didn't have to be encouraged. It was to him worthy of serious internal reform by altering the core ideas motivating its functioning—i.e., the idea of trusteeship. In light of these beliefs, and copyright's nature as an ownership interest, it is thus

⁷⁶ See Balganes, *supra* note __, at 1573.

⁷⁷ See generally M.K. GANDHI, VILLAGE SWARAJ (1962).

⁷⁸ See MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) (describing the origins of copyright and its relationship to the printing industry).

⁷⁹ *Id.* at 1 (noting how it emerged as a regime of "literary property").

easy to see why Gandhi's reluctant acceptance of private property might have translated into an opposition to the institution of copyright.

* * *

In short then, Gandhi's abstract economic philosophy contains innumerable strands that corroborate the belief that he rejected copyright as an institution. Yet, in so situating copyright within the skein of his overall economic ideas, what is all too easily forgotten is that the reality that Gandhi himself engaged the institution of copyright law over the course of his lifetime. During these engagements, we see emerge a picture that is very different from the one that a bare reliance on his abstract socio-economic thinking might have suggested.

II. GANDHI'S INTERACTIONS WITH COPYRIGHT LAW

Leaving Gandhi's abstract economic ideas to one side, and focusing instead on actual events during his lifetime, reveals that he came into contact with the copyright system on several occasions. During each of these instances, his interaction with copyright remained markedly different from what his abstract thinking might have suggested it would be. Besides diverging from his abstract thinking—that rejected utilitarianism and market-based mechanisms—Gandhi's views on copyright law also underwent a gradual transformation over time, as his engagement with the institution became from recurrent. This Part reconstructs both this divergence and transformation.

Gandhi's views on copyright, as described in the Part, are like his abstract philosophy, contained in his writing and correspondence that is scattered over a period of time. Yet, what distinguishes his views on copyright from other aspects of his philosophy is that these views were driven almost entirely by individual events and occurrences that forced him to confront many of copyright's actual costs and benefits. They were thus motivated by practical necessity, endowing them with a situational authenticity despite their episodic nature. In this sense then, his views on copyright are real and revealed, rather than merely philosophical and stated. Section II.A sets out the gradual transformation of his views over time, while II.B attempts to synthesize them.

A. *Three Strands of Thinking*

The reconstruction of Gandhi's views on copyright in this Section focuses on the period between 1926 and 1946—since it is during this time that Gandhi's writing and publishing brought him into close contact with the copyright system, and forced him to confront its possible interaction with the goals of the Indian freedom movement, which he was at the time fully immersed in. Gandhi's views on copyright law during this period reveal three related, but nonetheless distinct strands of thinking. The first, the strand of *personal rejection*, saw him building on the ideas and beliefs that motivated his socio-economic thinking to emphasize his outright rejection of the copyright system, just as the Navjivan Trust imputed to him in 2009. In the second, the strand of *reluctant engagement*, Gandhi's emphatic rejection begins to whittle away as he sees the possible benefits that engaging the copyright system might hold for him and his goals during the period. Finally in the third, the strand of *strategic deployment*, Gandhi embraced the copyright system. Yet he continued to disagree with many of its fundamental tenets and effects, and thus attempted to subvert them from inside the system rather than from the outside.

An important observation is in order before proceeding to an analysis of each of these strands. While the three strands described in this Section do in some sense represent a sequence, as temporal categories they remain far from watertight. Their episodic and situational nature by necessity allowed for a good deal of overlap, despite there being a general transformation over time. One could certainly characterize these overlaps as 'contradictions'. Yet, I argue that they are likely better understood as representing an evolution, albeit a non-linear one, in Gandhi's views. A contradiction, by its very nature, connotes a situation where a person makes inconsistent claims, with little effort to reconcile them. Gandhi by contrast fully recognized that he was changing his position on copyright over time. Not only does his writing reveal a deep discomfort with these changes, but Gandhi himself goes to great lengths to account for the change, and to explain them in evolutionary terms. To simplistically suggest that they were thus mere contradictions is to ignore the richness of this exercise in practical, situation-specific reasoning that Gandhi undertook to account for the evolution of his beliefs over time. Part III discusses the implications of this evolutionary reading in greater detail.

1. Strand One: Personal Rejection

Gandhi's earliest encounters with copyright conform to his views on utilitarianism and markets, discussed earlier. In it, we see a strong sense of discomfort with copyright's basic structure: of allowing authors (or copyright owners) to assert their exclusive rights in order to create a situation of artificial scarcity for the expression, which would in turn facilitate a market for such expressive works. The discomfort that we see in Gandhi though is hardly visceral or unreasoned, but instead suggests a rejection of copyright's goals because of the assumptions about behavior that it relies on, which Gandhi seemed to believe were inapplicable to him. This last point is particularly important, because while Gandhi remained uneasy about copyright early on, this unease never manifested itself in anything beyond a *personal* rejection of copyright in his works.⁸⁰ This personal rejection is to be contrasted with other instances, where Gandhi's rejection was in the form of an "opposition" to a law.⁸¹ In the latter set of situations, Gandhi questioned the very moral legitimacy of the law, and his opposition was directed at the repeal (or abolition) of the law altogether—under the idea of *lex iniusta non est lex*.⁸² This was far from being the case in his discomfort with copyright law.

The earliest evidence we have of Gandhi's interaction with copyright law comes from 1910, and his first published book: *Hind Swaraj*, which translates to "Indian Home Rule".⁸³ On the title page of the first edition of the book, the line "No Rights Reserved" features rather prominently.⁸⁴ It is crucial to note that Gandhi was yet to return to India at the time of its publication, and was deeply immersed in the Indian nationalist movement from South Africa. In recent work, Isabel Hofmeyr argues that Gandhi's decision to avoid asserting copyright in the book was a conscious one, aimed at ensuring that the book didn't become just another

⁸⁰ The idea of personal rejection emanates in large measure from Gandhi's overall philosophy of political action, to be found in his idea of *satyagraha*, or non-violent resistance. Central to *satyagraha* was the idea of self-sacrifice, which connects back to the idea of personal action forming a basis for others to follow suit. See M.K. GANDHI, *NON-VIOLENT RESISTANCE* 47 (1961).

⁸¹ This was a central component of *satyagraha*, where Gandhi advocated the mass, but non-violent disobedience of an immoral or illegitimate law. See GANDHI, *NON-VIOLENT RESISTANCE*, *supra* note ___, at iv. He developed this approach in South Africa for the first time, and employed it routinely during the Indian freedom movement. *Id.*

⁸² Translating to "unjust law is no law", a phrase commonly attributed to Saint Augustine. See Andrei Marmor, *The Nature of Law*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2011), <http://plato.stanford.edu/entries/lawphil-nature/>.

⁸³ See MOHANDAS K. GANDHI, *INDIAN HOME RULE* (1910)

⁸⁴ *Id.*

commodity.⁸⁵ It was instead motivated by his attempt to treat the production and consumption of books as a “continuous ethical community in which printers, authors, and readers become comrades.”⁸⁶ In the preface to the first edition, which he published independently in a newspaper, Gandhi notes that the book draws heavily from materials (“authorities”) that he had read in the past, and that he was “lay[ing] no claim to originality” in its content.⁸⁷ What this perhaps suggests then is that Gandhi’s decision to avoid asserting copyright may have also been motivated by his own sense of its authorial origins. Additionally, the fact that the Government of India, i.e., “His Majesty” at the time, had at the time found the book to be “seditious” and declared this edition (along with a series of other publications by the International Printing Press) to “have been forfeited,” may have prompted Gandhi to avoid asserting rights that would have had to originate in the Crown to begin with.⁸⁸

Gandhi’s first substantive interaction with the institution of copyright law appears to have been in 1926, by which time he had returned to India and was fully immersed in the freedom struggle.⁸⁹ A few years prior to this, Gandhi had commenced work on his autobiography, titled *The Story of My Experiments with Truth*. While Gandhi had intended for it to be eventually published as a book, he published installments of the autobiography in the journals that he ran: *Navjivan* and *Young India*.⁹⁰ The former published the chapters in Gujarati, Gandhi’s native language, and the one in which he initially wrote; while the latter published Gandhi’s own English translations of the Gujarati versions. By this time, Gandhi had risen in prominence in the Indian freedom movement, and was seen as its leader. Gandhi’s autobiography was thus hugely popular among readers, even prior to its completion.⁹¹

In order to popularize the message contained in these various installments, Gandhi readily announced that other newspapers were allowed

⁸⁵ See Isabel Hofmeyr, *Violent Texts, Vulnerable Readers: Hind Swaraj and its South African Audiences*, 23 *PUB. CULTURE* 285, 292 (2011).

⁸⁶ *Id.*

⁸⁷ Mohandas K. Gandhi, “*Hind Swaraj*”, in 10 *CWMG*, *supra* note __, at 245-46.

⁸⁸ Mohandas K. Gandhi, *Our Publications*, in 11 *CWMG*, *supra* note __, at 35-36. For a similar account, arguing that Gandhi’s rejection of copyright at this stage represented not just a rejection of the market, but of the “state as well,” see ISABEL HOFMEYR, *GANDHI’S PRINTING PRESS: EXPERIMENTS IN SLOW READING* 67 (2013).

⁸⁹ See RAJMOHAN GANDHI, *supra* note __, at 258.

⁹⁰ See Mahadev Desai, *Translator’s Preface*, in *GANDHI, AUTOBIOGRAPHY*, *supra* note __, at xxi (noting how the book appeared serially prior to its publication).

⁹¹ See, e.g., Letter from Mahadev Desai to S. Ganesan, in 34 *CWMG*, *supra* note __, at 331.

to reproduce the chapters in their entirety without any problem.⁹² As was to be expected, numerous English and local language newspapers began to do so, largely in order to raise their readership and circulation. Being commercially driven, most of these newspapers relied heavily on advertising revenue for their sustenance. As this practice (of reproducing his installments) began to gain prominence several of Gandhi's followers, most of who subscribed to his abstract socio-economic philosophy, began to find it problematic.⁹³ Gandhi's writing, they believed, was now being used by newspapers for palpably commercial, market-driven reasons, which was fundamentally opposed to Gandhi's philosophy. They thus called on Gandhi to "exercise the copyright" in his work and prevent commercially-motivated newspapers from reproducing installments of his autobiography.⁹⁴ Gandhi's response to this request is reflective of his discomfort with copyright. While acknowledging the reasons for the advice, Gandhi rejected it, and observed:

I have never yet copyright any of my writings....Writings in the journals which I have the privilege of editing must be common property. *Copyright is not a natural thing. It is a modern institution, perhaps desirable to a certain extent.* But I have no wish to inflate the circulation of *Young India* or *Navjivan* by forbidding newspapers to copy the chapters of the autobiography.⁹⁵

In this open letter, we see Gandhi's first direct observations on the institution of copyright. He observes that his decision to avoid copyrighting any of his prior work had indeed been a conscious one. Copyright is seen as a "modern" as opposed to natural institution, and given his known discomfort with modernity, the binary is being used in a largely pejorative sense. Yet, his discomfort with the institution seems nonetheless measured. Instead of questioning its desirability in the abstract, he seems to be suggesting in this passage that his rejection is a largely personal one, driven by his own values and beliefs. There remains a noticeable avoidance of abstract moral principle, stated in categorical form (for example, of the kind "copyright ought to be avoided"). In it we see a unique approach that Gandhi adopted in his actions, which philosopher Akeel Bilgrami describes as the rejection of "universalizability," the idea that if a person holds a

⁹² See Mohandas K. Gandhi, 'Exercise the Copyright', in 34 CWMG, *supra* note __, at 449-50.

⁹³ *Id.* at 449-50 (voicing an opinion on behalf of Gandhi's followers to who read Gandhi's writings in *Young India*).

⁹⁴ *Id.*

⁹⁵ *Id.* at 450 (emphasis supplied).

particular moral value, then he must think it applicable to others.⁹⁶ This rejection implies that Gandhi didn't believe the idea (or principle) to have relevance for others as an "imperative;" it was instead to motivate others through example.⁹⁷ Convincing by example was thus the causal mechanism that Gandhi envisaged for most of his principles, and his rejection of copyright was in that sense personal in structure, but nonetheless exemplary in function.

In this observation, Gandhi also hints at the possibility of his position changing, in his emphasis on "yet".⁹⁸ Also significant in this observation is his recognition that copyright's fundamental operating premise is the creation of an artificial scarcity through its framework of exclusivity. His refusal to assert copyright thus represents not just an unwillingness to utilize a modern, artificial institution, but additionally a recognition that if he were to invoke copyright law, he would be directly expanding the market for his own versions of the chapters, which he was equally uncomfortable with.

The 'personal' nature of Gandhi's rejection of copyright would remain an important baseline during the rest of his life, and appears as a constant refrain in his articulations on the topic. Even when he would later come to accept copyright for limited purposes and deploy it strategically, we see him referring back to this baseline continually, in order to emphasize his discomfort with such acceptance and to restrain it.⁹⁹ Gandhi seems to have adhered to the ideal of personal rejection as an abstract principle even after he embraced copyright for limited purposes following the publication of his autobiography. In relation to the newspaper articles that he continued to write, he thus continued to assert his personal rejection of copyright law. When approached by publishers seeking to translate his letters into other languages, he routinely replied that he "claim[ed] copyright for none of [his] publications", but insisted that the translation not depart from the original.¹⁰⁰ As we shall see, this latter point would eventually force Gandhi to embrace copyright for a limited purpose.

In adopting the baseline of rejection, albeit as a personal matter, it is important to appreciate that Gandhi's unwillingness to invoke copyright in his works wasn't because he was completely opposed to the idea of paying

⁹⁶ Akeel Bilgrami, *Gandhi, the Philosopher*, 38 *ECON. & POL. WEEKLY* 4159, 4161-62 (2003).

⁹⁷ *Id.* at 4162.

⁹⁸ Gandhi, *Exercise*, *supra* note __, at 450.

⁹⁹ See *infra* Section II.C and text accompanying notes __-__.

¹⁰⁰ See, e.g., Mohandas K. Gandhi, *Letter to Narandas Gandhi*, in 56 *CWMG*, *supra* note __, at 362-63.

for knowledge and information. This is another common misconception about Gandhi's views on copyright. While he was opposed to market mechanisms, and viewed copyright as an artificial, modern institution, Gandhi was nonetheless realistic about the fact that he wasn't beginning from a blank slate. In other words, he recognized that there were individuals in society who were wealthy, having made their money through the market. In speaking to these individuals, Gandhi went to great lengths to avoid alienating them completely by castigating their efforts as illegitimate and routinely emphasized that he wasn't asking them to abandon their wealth.¹⁰¹ His project for this segment of society was instead *redistributive*, and in working to this end he readily embraced payment mechanisms. This extended to paying for knowledge and information, when possible.

By 1933 Gandhi had set up three newspapers, collectively referred to as the *Harijan*, and had enlisted the help of a few commercially-oriented businessmen to produce vernacular editions of these newspapers so as to spread his message to parts of India unfamiliar with the languages that the original version—of *Harijan*—was published in.¹⁰² At this point, he seems to have been presented with the idea of making these versions available to the public for free, rather than for a nominal subscription amount. Responding to this idea, he noted:

The weekly journals and leaflets are part of the necessary propaganda chiefly among caste Hindus. Therefore, they should pay for it. Except up to a point, I do not believe in presenting the public with free literature on any subject. It may be ever so cheap, but never free. I believe in the old Sanskrit proverb, "Knowledge is for those who would know."¹⁰³

This is an important observation. His reference to caste Hindus is a reference to upper-caste Hindus, who in Gandhi's thinking were mostly socially and economically well-off, and therefore in no need of his support and charity. Free knowledge thus had its limits. Knowledge could be heavily subsidized, but did not have to be "free" at all times, and indeed not so when its recipients were both willing and able to pay for it, which the upper classes were. This position presents an obvious problem: what if the publishers (of the vernacular editions) were to price their versions beyond the reach of those in need of it, such as the few who communicated in these dialects? Once again, Gandhi seems to follow his limited acceptance of

¹⁰¹ See GANDHI, TRUSTEESHIP, *supra* note __, at

¹⁰² See Mohandas K. Gandhi, "Harijan" in the Vernaculars, in 59 CWMG, *supra* note __, at 377.

¹⁰³ *Id.*

prices for knowledge with a stark unwillingness to use copyright as a mechanism to control such behavior:

[T]hese are my personal views. I can only tender my advice to the organizations and organizers [i.e., the presses]. There is no copyright in *Harijan*. Enterprising vernacular newspapers will publish their own editions of *Harijan* I can prevent no one. I can only plead with everyone to follow the advice which I have tendered and which based on considerable experience.¹⁰⁴

Coupled with his willingness to allow newspapers to charge subscribers when they are able to pay, this rejection of copyright—if motivated exclusively by its structure as a market-mechanism—seems perplexing, and out of place. Their reconciliation, lies in recognizing that to Gandhi, copyright was problematic then not *just* because of its reliance on the market and self-interested behavior, but because it also operated as an artificial restriction on the flow of knowledge and information. To be sure, market prices too perform the same role in several contexts.¹⁰⁵ Yet, there appears to have been, for Gandhi, a fundamental freedom-inhibiting aspect to the institution of copyright that motivated his personal rejection of it. As a functional matter, he saw it as a duty-imposing system, one of “forbidding” the act of “copy[ing]” by others, which seems to have generated an intuitive unwillingness on his part to embrace it.¹⁰⁶

Gandhi’s acceptance of prices for knowledge and information, while nonetheless rejecting copyright—has parallels in the distinction between the ideals of *gratis* and *libre*, that is captured by the idea “free as in free speech; not as in free beer,” popularized by Richard Stallman, the founder of the Free Software Foundation.¹⁰⁷ The idea there of course being that “free” connotes a sense of positive liberty and the absence of restraints, rather than a sense of zero price. It would be too speculative to suggest that this is indeed what Gandhi was getting at in his observations about the *Harijan*, but at the very least, it reveals a nascent similarity to the exact same debate.

¹⁰⁴ *Id.* at 378.

¹⁰⁵ See generally Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012).

¹⁰⁶ See Gandhi, *Exercise*, *supra* note __, at 450. For a fuller, duty based account of copyright law as revolving around the duty not to copy, see Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012).

¹⁰⁷ For a discussion of the idea and its salience, see: Lawrence Lessig, *Free, as in Beer*, WIRED, Sep. 2006, at 6, <http://www.wired.com/wired/archive/14.09/posts.html?pg=6> (last visited Nov. 9, 2012).

In summary then, this strand of Gandhi's thinking saw him adopting the baseline of rejecting copyright in his works, but as a personal matter. He thereby remained consciously ambivalent about others finding some virtue and purpose in the institution, and perhaps sought to leave open the possibility that he himself might at some future point find *limited* reason to endorse the institution. This latter point is evidenced in his observation that "[t]empting offers [to copyright his writings] have come to me no doubt in connection the chapters of the autobiography...and I am likely to succumb to the temptation for the sake of the cause I stand for."¹⁰⁸

2. Strand Two: Reluctant Engagement

Around 1922, Gandhi came into contact with the well-known Rev. John Haynes Holmes, who had helped found the NAACP and the ACLU.¹⁰⁹ Holmes had read about Gandhi's activities in South Africa, and they soon began corresponding.¹¹⁰ Holmes at the time ran a weekly newspaper titled *Unity*, and soon sought permission from Gandhi to reproduce chapters of Gandhi's autobiography in it, as it appeared in *Young India*.¹¹¹ Shortly thereafter, it appears that Holmes cabled Gandhi offering to try and help get the autobiography published in the U.S.¹¹² With Gandhi's permission, Holmes began discussions with Macmillan Press in New York to bring out a U.S. edition of the autobiography.¹¹³ Gandhi at the time had few followers in the U.S., and Macmillan was understandably reluctant to invest in the project.¹¹⁴ As a precondition to their publishing the book, they thus demanded that Gandhi transfer to them all of his rights in the autobiography for both the U.S. and the U.K.¹¹⁵

It thus wouldn't have been enough for Gandhi to grant Macmillan permission to publish the autobiography. What Macmillan wanted was an outright assignment of all rights in the work. And in order to accomplish

¹⁰⁸ See Gandhi, *Exercise*, *supra* note __, at 450 (emphasis supplied).

¹⁰⁹ See JOHN HAYNES HOLMES, *MY GANDHI* (1953).

¹¹⁰ See John Haynes Holmes, *In London and Delhi*, in *REMINISCENCES OF GANDHI* 119 (Chandrashanker Shukla ed. 1951) ("From the moment I read this epic tale, Gandhi became the hero of my life, the savior of my soul.")

¹¹¹ *Id.*

¹¹² Mohandas K. Gandhi, *Letter to John Haynes Holmes*, in 35 CWMG, *supra* note __, at 280 ("[Y]our cable tempted me.")

¹¹³ See Mohandas K. Gandhi, *Letter to S. Ganesan*, in 34 CWMG, *supra* note __, at 331.

¹¹⁴ Holmes, *supra* note __, at 119 ("The publisher argued that Gandhi was not well enough known in this country to justify the printing of the original text of so extended a work.")

¹¹⁵ Mohandas K. Gandhi, *Letter to Emil Roniger*, in 35 CWMG, *supra* note __, at 348.

this assignment, Gandhi needed to assert and claim these rights—under copyright law—to begin with, contrary to his established rule of not asserting copyright in any of his works. Holmes eventually succeeded in persuading Gandhi to both assert copyright in his work for the first time and to transfer these rights to Macmillan.¹¹⁶ Two reasons appear to have influenced Gandhi's change in position. He thus notes in a letter to Holmes:

The idea of making anything out of my writings has been always repugnant to me. But your cable tempted me and I felt there might be no harm in getting money for the copyright and using it for the charkha propaganda or the uplift of the suppressed classes. And I felt that if the chapters were published by a house of known standing the message contained in the chapters might reach a wider public.¹¹⁷

First, we see Gandhi explaining his decision in distributive terms, i.e., that the monetary benefits from asserting and transferring these rights to the publisher could be employed for his social projects involving the betterment of the lower classes. What is implicit, and indeed salient in this observation though is that accepting this distributive element entailed embracing the core utilitarian basis of copyright law to begin with. Unlike a nominal assertion of copyright that is then coupled with a functional abandonment of rights—an approach that Gandhi would adopt later in his life¹¹⁸—his approach here reflected a full acceptance of copyright's utilitarian, market-driven idea. Except of course, that he intended to employ this market mechanism towards a morally justifiable end. Second, it appears that Gandhi believed that the freedom movement (and his involvement in it) would stand to benefit from having its message obtain external support and validation from readers outside of India, the "wider public". If this goal meant compromising on what was a purely personal rule, it seemed fine.

What is interesting about this turn in Gandhi's thinking about copyright though, is his willingness to compromise. To Gandhi, "human life" was nothing more than a "series of compromises" and he readily advocated the belief that compromising on honorable terms was a perfectly legitimate outcome, as long as in doing so, the actor never lost sight of the ultimate goal or purpose.¹¹⁹ Compromising on fundamental tenets, or moral ideals was however completely untenable. He thus observed in an unrelated

¹¹⁶ Gandhi, *Letter to John Haynes Holmes*, *supra* note __, at 281.

¹¹⁷ *Id.*

¹¹⁸ See *infra* Section II.A.3.

¹¹⁹ See K.S. BHARATHI, *THE SOCIAL PHILOSOPHY OF MAHATMA GANDHI* 107 (1991).

context involving his struggle against an unjust law in South Africa that “[c]ompromise means that both the parties make large concessions on all points except where a principle is involved.¹²⁰” Fundamental principles, ends, or essentials were thus never to be compromised on.

Gandhi’s actions vis-à-vis Macmillan and the publication of the autobiography reveals that his rejection of copyright—even in its personal form—wasn’t a matter of basic principle, but was rather a somewhat subordinate preference that he held. Had it been otherwise, i.e., a matter of moral principle, it is unlikely that he would have been willing to compromise on it at all. The rejection of the institution to him was a largely pragmatic position that he had taken, which he was willing to modify when the broader goal would be better served by its violation. His opposition to copyright was thus at best situational, rather than foundational in nature.

This isn’t of course to suggest that Gandhi underplayed the extent and significance of the compromise he was undertaking. In much of his correspondence about the autobiography around this time, we see him repeatedly noting how this assertion of the copyright and “[t]he idea of making money out of [his] writings even for a charitable purpose [wa]s quite foreign to [him]¹²¹,” and that he had “never before reserved copyright in any of [his] writings.¹²²” His emphasis was thus on the reality that at least at the time, he viewed the compromise as an exception to the rule, in the hope of reverting to the baseline of rejection soon after.

The episode involving the publication of his autobiography thus forced Gandhi to confront the precise nature of his objections to copyright. On doing so, he seems to have concluded that it wasn’t a fundamental moral opposition, thereby allowing him to assert rights in the work and deploy the benefits of copyright’s utilitarian apparatus towards his other goals: distributive (i.e., charitable), and nationalist (i.e., the freedom movement). He viewed this instance as an exception, and thus in other contexts, both around the same time and later, he continued to assert his baseline preference to rejecting copyright in his works as a personal matter.¹²³

3. Strand Three: Strategic Deployment

¹²⁰ MOHANDAS K. GANDHI, *SATYAGRAHA IN SOUTH AFRICA* __ (1954).

¹²¹ Gandhi, *Letter to Emil Roniger*, *supra* note __, at 348.

¹²² Mohandas K. Gandhi, *Letter to S.T. Sheppard*, in 39 CWMG, *supra* note __, at 38.

¹²³ See, e.g., Mohandas K. Gandhi, *Letter to M. Rebello & Sons*, in 52 CWMG, *supra* note __, at 218.

Gandhi's assertion of copyright in his autobiography and his transfer of publication rights to Macmillan did little to alter his adherence to his baseline of personally rejecting copyright even after the episode. He continued to avoid retaining copyright in his newspapers articles, and other published work for several years after. In the decade following the publication of the autobiography, Gandhi's involvement in the Indian freedom movement reached its peak, and saw him put several of his abstract ideas and principles into action, in challenging the British empire.¹²⁴ The single most prominent among them was his famous Salt march to Dandi, wherein he marched to the beach in Dandi with his followers and made salt from the sea-waters in defiance of an unfair salt tax that the British had imposed on the domestic production of salt in India to support the importation of salt from Britain.¹²⁵ In it, Gandhi was giving effect to the principles of civil disobedience and non-violent resistance that he had written about extensively before. The period between 1926 and 1940 thus saw Gandhi focus extensively on engaging the British empire through principled action and mass mobilization. The British, for their part, tried to fight back through a host of strategies, including by trying to discredit Gandhi among segments of Indian society that were wary of his commitments, such as the Muslim minority. In his opposition to the empire, Gandhi would find in copyright law, an unexpected ally.

As the freedom movement in India became a mass movement, it began looking to Gandhi for guidance, approval, and planning. During every instance of confrontation with the empire, the movement consciously sought Gandhi's advice, and Gandhi too saw himself as speaking to the masses in his every action and written word. His writing during this period is replete with commentary on important episodes on the struggle, all of which ended with strategic prescriptions for future engagement.¹²⁶ During this period, Gandhi used his newspaper columns and opinion pieces as the primary means of communicating with the freedom movement. Ensuring the accuracy and completeness of his message was critical, and his open permission to local newspapers to freely copy and translate his articles

¹²⁴ See RAJMOHAN GANDHI, Gandhi, *supra* note __, at __.

¹²⁵ For an overview of this event and historical writing about it, see: THOMAS WEBER, ON THE SALT MARCH: THE HISTORIOGRAPHY OF MAHATMA GANDHI'S MARCH TO DANDI (2009).

¹²⁶ See, e.g., Mohandas K. Gandhi, *Prohibition*, in 49 CWMG, *supra* note __, at 4; Mohandas K. Gandhi, *Message to Indians in the United Kingdom*, in 54 CWMG, *supra* note __, at 41; Mohandas K. Gandhi, *Congressmen Beware!*, in 74 CWMG, *supra* note __, at 2; Mohandas K. Gandhi, *Some Questions Answered*, in 74 CWMG, *supra* note __, at 297; Mohandas K. Gandhi, *My Advice to Noakhali Hindus*, 78 CWMG, *supra* note __, at 11.

without restrictions began to present problems. An episode in 1940 raised the salience of the issue for Gandhi.

During an exhibition in the city of Ajmer, members of the local congress (the party spear-heading the freedom struggle) decided to take advantage of the crowd gathered, to make a few speeches, and began by hoisting the Indian national flag on the ramparts of an old fort, where the exhibition was taking place.¹²⁷ The municipal (British-controlled) police issued the organizers a notice demanding that the flag be taken down right away, claiming that it offended “certain sections of the public,” since the fort where the flag was being flown was a monument to a Moghul (i.e., Muslim) ruler.¹²⁸ At the time, the nationalist freedom movement was viewed with deep suspicion by India’s Muslim minority, a suspicion that eventually resulted in the partition of India into two countries.¹²⁹ The British strategy was to play into this suspicion, and use it as a pretext on which to suppress the activities of the freedom struggle—as fomenting violence. As soon as the organizers of the meeting and the exhibition received the police commissioner’s message—that the flag had to be lowered—they contacted Gandhi on the telephone for his advice.¹³⁰ Instead of asking his followers to resist the police order, Gandhi asked them to comply with it, worrying that if the allegations were indeed true, it might spark avoidable sectarian violence.¹³¹

In a series of newspaper articles, Gandhi meticulously described the episode: first in palpably neutral terms,¹³² then as seen by the police commissioner (by reproducing the commissioner’s report),¹³³ and finally in his own terms, refuting the police commissioner’s findings and insinuations about the possibility of violence, which Gandhi had after investigating the matter on his own, characterized as false.¹³⁴ A few newspapers that were opposed to the nationalist movement (and perhaps controlled by the British) chose to selectively reproduce Gandhi’s writings on the episode. They

¹²⁷ Mohandas K. Gandhi, *Danger Signal*, in 78 CWMG, *supra* note __, at 150-51.

¹²⁸ Mohandas K. Gandhi, *The Ajmer Trouble*, in 78 CWMG, *supra* note __, at 185, 186.

¹²⁹ See generally Deepak Pandey, *Congress-Muslim League Relations 1937-39: ‘The Parting of the Ways’*, 12 MOD. ASIAN STUD. 629 (1978) (documenting the deterioration in relations between the parties representing the Indian nationalists and the Muslim minority, culminating in the “two nation” theory advocating for India’s partition).

¹³⁰ Gandhi, *Danger Signal*, *supra* note __, at 151.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Gandhi, *The Ajmer Trouble*, *supra* note __.

¹³⁴ Mohandas K. Gandhi, *Ajmer*, in 78 CWMG, *supra* note __, at 193-94.

translated and reproduced Gandhi's objective account, and the commissioner's reply, but refused to reproduce Gandhi's final refutation of the commissioner's account—thereby implying that Gandhi agreed with the commissioner's position.¹³⁵ This troubled several of Gandhi's followers. They argued that if Gandhi had indeed asserted copyright in his works, he could have prevented these "Anglo-Indian papers" from selectively reproducing his writing on the incident, thereby ensuring against the communication of the "untruth" or of "half-truths".¹³⁶

Connecting copyright to the idea of truth or to put the point more precisely, connecting the act of copying to the idea of falsehood or untruth, was an important move in the effort to get Gandhi to see the value in copyright. Gandhi's adherence to the truth as his guiding normative ideal was legendary,¹³⁷ and few things were likely to move him more than the belief that his failure to assert copyright was somehow resulting in the truth being compromised. By accusing him of being "a party to the spread of untruth"¹³⁸ indirectly, his supporters believed he could be swayed into exercising his copyright. Gandhi at first seems to have seen right through this strategy, and refused to alter his default position, observing:

The Ajmer illustration quoted by my correspondent is clinching. This matter of copyright has been often brought before me. But I have not the heart to copyright my articles....I must believe that in the end my self-denial must serve the cause of truth.¹³⁹

Yet, a few weeks later, Gandhi reversed his decision openly. Acknowledging the reversal, and its reasons, he observed:

It is strange that what I would not do in response to the advice of a correspondent I have to do almost immediately after the refusal though, I feel, for a very cogent reason. Since my main articles will henceforth be written in Gujarati, I would not like their unauthorized translations appearing in the Press. I have suffered much from mistranslations when I used to write profusely in Gujarati and had no time myself to produce simultaneous English translation. I have arranged this time for such translation in English and Hindustani. I would therefore ask editors and

¹³⁵ See Mohandas K. Gandhi, *Notes*, in 78 CWMG, *supra* note ___, at 317.

¹³⁶ *Id.* (reproducing letter from Satish Kalelkar, a follower).

¹³⁷ The very title of his autobiography is indicative of this. See GANDHI, *AUTOBIOGRAPHY*, *supra* note ___.

¹³⁸ See Mohandas K. Gandhi, *Notes*, in 78 CWMG, *supra* note ___, at 317

¹³⁹ *Id.* at 318.

publishers kindly to regard English and Hindustani translation rights as reserved. I have no doubt that my request will be respected.¹⁴⁰

While objectively speaking, Gandhi's observations do indicate a reversal in position in so far as they exhibit a willingness to accept the utility of copyright, it is nonetheless important to note Gandhi's injection of important nuances while doing so. First, the concern that he suggests motivated the reversal is different from that put forth by his supporters. The incomplete communication of Gandhi's views around the Ajmer episode was hardly an instance of "mistranslation". It was instead an instance of selective reproduction—something that Gandhi's selective reservation of translation rights was unlikely to guard against. Second, in contrast to the position advocated by his supporters, Gandhi wasn't asserting a full copyright in his newspaper articles. He was instead merely reserving the translation rights in the work, and specifically in relation to the two languages most commonly employed by the nationalist movement: English and Hindi.¹⁴¹ This point is analytically very interesting, since it suggests that Gandhi viewed copyright as a fundamentally divisible bundle of rights,¹⁴² and was willing to divide the bundle in ensuring that he retained only as much as was necessary for his specific concern (i.e., mistranslation) to be allayed. British copyright law, which was extended to India, granted authors a set of exclusive rights, with the translation right being one that was specifically enumerated.¹⁴³ Identifying the translation right and treating it as an independent right was something that only someone familiar with the law was likely to have come up with—especially since it wasn't at all suggested by any of Gandhi's supporters.

Third, the normative source of Gandhi's reservation of rights seems consciously ambivalent in his statement. Instead of hinting at the possibility of an infringement action or an analogous invocation of copyright's formal legal structure to enforce his reservation of rights, Gandhi is content to observe that his mere public assertion of these rights is likely to result in his wishes being respected. Once again, the approach he adopts is very personal. In appealing to the unique normative force his own statements and

¹⁴⁰ Mohandas K. Gandhi, 'Copyright', in 78 CWMG, *supra* note __, at 408-09.

¹⁴¹ *Id.* at 409.

¹⁴² Indeed it wasn't until the enactment of the 1976 Copyright Act, that copyright's bundle of rights came to be recognized as fundamentally divisible in the U.S. See Edward J. Martin, *Indivisibility of Copyright*, 27 ALB. L. REV. 257 (1963); Elliot Groffman, *Copyright Divisibility: Its Application and Effect*, 19 SANTA CLARA L. REV. 171 (1979).

¹⁴³ See Copyright Act of 1914 s. 1.

requests had on the Indian public, Gandhi was interlacing the formal legal structure of the institution involved, i.e., copyright, with an informal normativity that was unique to him and his position in the Indian national movement. And in so doing, Gandhi avoided having to interact with the political and legal machinery of the British, which he was resisting in numerous other contexts.¹⁴⁴

We see Gandhi willing to accept copyright for a limited purpose in this passage. What distinguishes his approach here from the one involving his autobiography is that here, his assertion of copyright isn't work-specific, and functions as a prospective change in approach. It thus wasn't just a contextual violation (or non-application) of the rule of personal rejection as it was in relation to the autobiography, but was instead a modification of the rule itself. Henceforth, Gandhi came to be seen as asserting a limited copyright—i.e., the translation right—in his Gujarati writing, modifying his baseline of personally rejecting copyright in its entirety.

Gandhi's change in position didn't go unnoticed by newspapers. Newspapers that published articles in English and Hindi worried that their inability to communicate Gandhi's message to their local readers would reduce their readership dramatically. One of them even wrote to Gandhi protesting his change in position, and arguing that his articles were "the property of the nation and therefore there could be no copyright in them".¹⁴⁵ Gandhi was thus forced to provide a more elaborate explanation for his reversal. Gandhi's response was telling:

This grievance appears on the face of it to be just. But it is forgotten that I have prohibited translation from Gujarati into all other languages. Experience had taught me that English translations of my articles written in any Indian languages were faulty, but it would not have been proper to confine the copyright to translations into English. All important Gujarati articles would be translated simultaneously into English and Hindustani and published almost at the same time. There is, therefore, no hardship involved, for there is no copyright in the translated articles which can be and are being reproduced.¹⁴⁶

In this instance, Gandhi's explanation appears to involve a clarification, an incremental modification of the original position, and an attempted compromise to placate the grievance, which he saw as legitimate.

¹⁴⁴ See MOHANDAS K. GANDHI, *THE LAW AND LAWYERS* 126 (1962).

¹⁴⁵ See Mohandas K. Gandhi, *Two Just Complaints*, in 79 CWMG, *supra* note ___, at 36.

¹⁴⁶ *Id.*

He clearly reiterates his reasons for the shift in position—alluding to the mistranslation of his views by certain newspapers—and appears steadfast in his basis for the shift in position. All the same, he seems to recognize that if his reservation of translation rights was only for English and Hindi translations, it would detrimentally affect newspapers published in these languages, while enabling those publishing in other Indian languages to compete on an unequal basis, and perhaps commit some of the mistakes he was seeking to restrict through his very reservation of rights. He thus reinterprets his prior reservation as extending to translations “into all other languages.”¹⁴⁷

Gandhi was thus acutely aware of the harm that his reservation of rights was likely to cause among newspapers. Nowhere does he answer the obvious question: why would it not have been “proper” to confine the copyright to translations into English alone? The answer seems to lie—judging from the overall tone and tenor of the response—in the unequal economic hardship this would cause English language newspapers alone. The principle of unfair competition thus seems to have implicitly informed Gandhi’s thinking here, and forced the modification in position.¹⁴⁸

The final, and perhaps most nuanced move that Gandhi’s response makes here is in its treatment of the translation right as a right involving an action rather than an artifact. We noted how Gandhi in asserting copyright in his Gujarati articles was clear in reserving no more than the rights to translate those works into other languages.¹⁴⁹ In the ordinary understanding, a copyright owner is given (and asserts) the translation right in order to produce a translation of the original work, and thereupon obtains (either automatically or through minimal effort) the same set of exclusive rights in the translation as well.¹⁵⁰ The exclusive right to create a translation that copyright grants authors of literary works is thus in teleological terms tied to the exclusive rights to (or in) the translation that the author seeks. Gandhi very consciously disentangled the two. All that he wanted to reserve to himself was the exclusive right to produce the first translation of his articles from Gujarati to other language. Once translated, he fell back on his baseline of rejecting copyright in the translated version, and allowed others

¹⁴⁷ *Id.*

¹⁴⁸ See generally Zechariah Chafee, Jr., *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).

¹⁴⁹ See Gandhi, “Copyright”, *supra* note __, at 409.

¹⁵⁰ Translation is today treated as an adaptation, or a derivative work under U.S. copyright law. See 17 U.S.C. § 101 (2005) (definition of “derivative work”). It is of course to be noted that the right to make a derivative work (i.e., a translation) doesn’t automatically result in the derivative work itself being granted copyright protection. See 17 U.S.C. § 103(b) (2005).

to copy it freely.¹⁵¹ Once again then, we see a masterful lawyerly unbundling of copyright's structure coupled with a narrow tailoring of the reservation to the problem that he sought to solve.

Once Gandhi encountered the problem with mistranslations and asserted a translation right as part of copyright, it appears to have influenced his broader approach to copyright in his other work as well. Recall that early on when he was producing the individual chapters of his autobiography and publishing them in newspapers, he openly granted permission to newspapers and other publishers to translate these chapters into other languages, and reproduce them even when done for commercial purposes.¹⁵² Yet, after he reserved the translation right in his Gujarati articles, he appears to have begun adopting the same approach in relation to requests to translate his autobiography into other Indian languages. Since he had been forced to assert copyright in the autobiography by Macmillan, and had ended up transferring to them the rights for the U.S. and the U.K., he still held the copyright in the book for other territories and languages. Instead of declaring that others were allowed to translate and reproduce his autobiography in local languages, we see him beginning to play somewhat of a gatekeeper role, just as he had for his Gujarati articles—all to prevent mistranslations.

Gandhi was, in the later part of his life, approached by numerous publishers who sought to translate his autobiography into vernacular languages, and this presented Gandhi with the question of going about choosing between different translators and publishers. In relation to his Gujarati newspaper articles, he had circumvented this problem by agreeing to translate the articles into English and Hindi himself.¹⁵³ Some of his followers had suggested setting up regional (or vernacular) boards to review different translations for authenticity before granting permission. Gandhi however saw an obvious problem with this.¹⁵⁴ Setting up different boards and reviewing translations obviously meant a great investment of time and effort. Additionally though, it meant signing off on the translation and approving it. This latter approach seemed problematic to Gandhi, for while he wanted to avoid mistranslations, he was nonetheless fully aware that

¹⁵¹ Gandhi, "Copyright", *supra* note __, at 409.

¹⁵² Gandhi, *Two Just Complaints*, *supra* note __, at 36.

¹⁵³ *Id.*

¹⁵⁴ See Mohandas K. Gandhi, *Letter to Jivanji D. Desai*, in 88 CWMG, *supra* note __, at 421 ("Anand Hingorani had suggested different Boards, so that the Tamil Board would device about the Tamil translation and the Malayalam Board would advise about the translation in that language.") (hereinafter Gandhi, *Letter to Desai-I*).

translating a work was itself an expressive act.¹⁵⁵ Giving him (or his board) control over this process seems to have raised for Gandhi the specter of censorship, which he was troubled by. Speaking of multiple translations and his approach to exercising his copyright, he thus observed:

There are several translations of Tolstoy's books in the same language. All of them are not up to the mark, and the titles of the books also have been translated differently. All of them sell, but the translation which is most faithful to the original, most painstaking and beautiful sells more than the other translations. The same has happened in the case of the Bible. The authorized version is there but there are many others in the field and their publication is not prohibited. Every translation has its own circle of readers.¹⁵⁶

Here we see him drawing on the experiences of Leo Tolstoy, with whom he had struck up a friendship through correspondence.¹⁵⁷ The principal idea here is that multiple translations can co-exist, even when they diverge from the original. Gandhi believed that readers—in the marketplace of ideas—would gravitate towards the translation that exhibited the greatest fidelity to the original version; but nonetheless saw virtue in allowing multiple versions to co-exist. He thus concluded against asserting a gatekeeper role in approving translations:

How should we know which of the two is really good? Or would it be advisable to stop other translations from being published? I do not see much benefit in that. Even when we decided to claim copyright, I did not go as far as that. This matter cannot be looked at from a purely legal point of view, nor from a purely financial one. We should look at it wholly from a moral and practical point of view.¹⁵⁸

His “moral” and “practical” beliefs—in contrast to his “legal” and “financial” ones—led him to allow multiple translations of the autobiography without any restrictions. On the face of things, this position appears to render his whole assertion of translation rights in the autobiography moot and meaningless. If he wasn't going to play a gatekeeper role in any way or form, why retain the translation right at all?

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* For an elaborate account of the relationship between the two see, MARTIN GREEN, *TOLSTOY AND GANDHI: MEN OF PEACE* 85-96 (1983).

¹⁵⁷ *Id.* at 85.

¹⁵⁸ Gandhi, *Letter to Desai-I*, *supra* note __, at 422.

Gandhi doesn't seem to answer that question here. In a follow up letter though, he explicates further to reveal why he had indeed reserved these rights and what he was hoping to do with it:

I have seen in English more translations than one of a good book. I don't find anything wrong in it. Our only aim in retaining the copyright can be to guard against possible misuse of the privilege. But if we have authorized one person, and then another public-spirited person who can do a better translation comes forward, why should we not give him the permission. This is my line of reasoning.¹⁵⁹

The references to misuse of the privilege and public-spirited, which operate as important qualifiers are somewhat cryptic here. Gandhi's true intent behind them however becomes apparent a few sentences later, when in the same letter he observes:

I have decided for the present to refuse permission for a Finnish translation, for the person's intention seems to be to make profit.¹⁶⁰

The misuse of the privilege that Gandhi was referring to was thus an attempt to profit from the translation, rather than spread its message. And indeed it was precisely in order to police a publisher's intention that he sees the virtue in retaining control over the translation rights to his autobiography. A profit-based motivation is to be contrasted, in this construction, with a public-spirited publisher.

What is fascinating in this exchange is less Gandhi's binary dichotomy and indeed its questionable workability, but rather the structural approach that Gandhi's embrace of copyright entails. In it, we see his steadfast denouncement of utilitarian, market-based behavior, coupled with a willingness to employ a market-based institution strategically, i.e., copyright, to subvert its core normative values. Copyright was thus being used not to further the profit motives of distributors, but to reject them. In the traditional understanding, an author negotiates with a publisher/distributor who is willing to publish the book in return for a share of the proceeds from sales of the book. The profit motivation brings the publisher to the author, and the parties' willingness to enter into an arrangement is dictated almost entirely by the monetary benefits each side is to obtain from it. Gandhi's approach had the logic the other way around. A

¹⁵⁹ Mohandas K. Gandhi, *Letter to Jivanji D. Desai*, in 89 CWMG, *supra* note ___, at 250.

¹⁶⁰ *Id.*

publisher was to approach him for permission to translate the work into another language, and the basis of the bargain was the publisher's ability to convince Gandhi that it wasn't committed to profit-maximization, but was instead equally (or perhaps more) interested in disseminating Gandhi's message as widely as possible. Copyright was thus being asserted not to allow for self-interested behavior, but instead to purge such self-interested actors from dealing with his autobiography (the "misuse of the privilege"), and to encourage public-spirited behavior in its place.¹⁶¹ It is of course unclear whether Gandhi had intended all along that his assertion of the translation right—i.e., of copyright—would be employed to this end, or whether this is something that he gravitated towards as he saw the concern with censorship diminish his potential role in approving the content of translations.

Gandhi's encounters with translations of his work in the last decade of his life thus saw him move from reluctantly embracing copyright as he had with Macmillan to a strategic use of its framework to further his role in the freedom struggle, and later to give effect to his commitment to non-utilitarian, and other-regarding behavior. Interestingly enough though, even when accepting copyright and deploying it strategically towards these limited ends, his engagement with it assumed a nuance and lawyerly attention to the details of the institution and its functioning, that are somewhat orthogonal to his abstract thinking in other areas, where he spoke in terms of generalities. Even when he saw the virtues of deploying copyright strategically and in a limited fashion, he always exhibited an acute awareness of the institution's costs, and sought to control for them through practical mechanisms. Whether these controls were successful or not is of course another issue.

B. Synthesizing the Strands

Putting the three dimensions of Gandhi's views on copyright law together does in fact produce a coherent and rational picture of his engagement with copyright. While Part III develops the theoretical side of this account—as representing a form of copyright pragmatism—more fully,¹⁶² this Section attempts to provide a brief explanatory synthesis of Gandhi's thinking on copyright law.

¹⁶¹ *Id.*

¹⁶² *See infra* Part III.

The first enduring feature of Gandhi's interaction with copyright law is no doubt his personal skepticism of the institution and its applicability to him and his writings. While he wasn't opposed to the institution as a whole, and indeed readily conceded its limited desirability even in the abstract, he seems to have operated all along under the steadfast belief that copyright's fundamental reliance on artificial scarcity, market-based distribution, and profit-driven approach to inducing expressive activity, were misaligned with the ways in which he wrote, published, and expected to have his writings reach the broader public. Much of this no doubt originated in his abstract thinking, wherein he opposed utilitarianism, self-interested behavior, and market-driven models;¹⁶³ yet it also likely drew in large part from the role that the act of "writing" performed in his mind. Writing, to Gandhi was largely an act of practical reasoning, and he thus seems to have adopted the view that copyright and its incentive structure were irrelevant to the latter, and thus by implication to the former as well.¹⁶⁴

While Gandhi's skepticism of copyright was in one sense "principled," it at the same time wasn't a skepticism that emanated from a belief that was fundamental enough to be beyond the realm of compromise. His rejection of copyright was thus a preference. This is important, because it allowed Gandhi to modify this preference circumstantially, and over time, whenever needed.

During the course of his engagement with copyright, Gandhi modified his baseline of personal rejection on two occasions, both in significantly different ways. The first was in relation to Macmillan's insistence that he assert his rights in order to give them the publication rights for the U.S. and U.K.¹⁶⁵ It appears as though Gandhi wasn't fully prepared for this eventuality, which is reflected in his continuing complaints about the change in position and in his failure to come up with a strategic compromise. This first engagement was thus in large measure involuntary.

Gandhi's voluntary modification of his personal baseline occurred during the height of the freedom struggle, when he worried that the integrity, authenticity, and completeness of his published messages were being compromised through copying. Here as we saw, he unbundled copyright's rights to assert no more than a limited first translation right, and

¹⁶³ See generally Part I.A, for a discussion of Gandhi's abstract thinking.

¹⁶⁴ For Gandhi's approach to writing, as a form of journalism see: S.N. BHATTACHARYA, MAHATMA GANDHI: THE JOURNALIST (1965); Laxmi Narain, *Mahatma Gandhi as a Journalist*, 42 JOURNALISM & MASS COMM. QUART. 267 (1965); Anju Chaudhary & Carter R. Bryan, *Mahatma Gandhi: Journalist and Freedom Propagandist*, 51 JOURNALISM & MASS COMM. QUART. 286 (1974).

¹⁶⁵ See *infra* text accompanying notes __-__.

even then sought to alleviate the effects of this assertion by producing translations expeditiously and thereafter renouncing all rights in the translations, once produced. It is during this modification that we see Gandhi fully explicating his concerns with copyright.

Perhaps the most astute modification that Gandhi made in his position on copyright was in his willingness to differentiate the legal institution from its underlying normative values. In the later part of his engagement with copyright, once he came to assert limited rights in his works, he began to see that his retention of rights could indeed be used to further the precise reasons why he had initially distanced himself from it. This was perhaps the most important modification in position that Gandhi made in his dealings with the institution, and speaks of a willingness to adopt a highly granular (indeed one might say, lawyerly) disaggregation of copyright law, its justifications, and its consequences. In this nuanced engagement, we see Gandhi juxtaposing copyright's basic framework of exclusivity against the ideas of freedom, free expression, access to information, unfair competition and censorship broadly understood. At each stage of engagement, he sought to trade his assertion of copyright off against the institution's negative effects, and alleviate them through practical solutions. His limited assertion of copyright was thus at each juncture accompanied by a set of additional principles and mechanisms wherein he sought to lower the costs that he saw the institution imposing on other socially beneficial activities.

From a theoretical point of view, Gandhi's shift in position on copyright occurred as he saw that it embodied a commitment to attribution and integrity within its overall utilitarian skein. His reservation of the first translation right after the Ajmer episode appears to mark the beginning of this realization. Most modern legal systems today treat these values as the substance of inalienable "moral rights,"¹⁶⁶ that are contrasted with copyright's other freely transferable economic rights. Yet at the time, neither Indian nor U.K. copyright law recognized the idea of moral rights, and focused entirely on its economic dimension.¹⁶⁷ Recognizing his inability to protect these values independent of the institution, Gandhi nonetheless invoked copyright's economic framework, but for moral rights-like purposes. Scholars have long noted how copyright's largely utilitarian, economic framework may be strategically used to serve the purposes of

¹⁶⁶ See generally MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW* (2011); ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 5 (2010).

¹⁶⁷ See Indian Copyright Act, No. 3 of 1914.

moral rights, i.e., attribution and integrity, even when the system doesn't recognize moral rights independently.¹⁶⁸ Gandhi's change in position serves as a prime example of precisely how this occurs and may be put into action, through a conscious unbundling and selective reservation of copyright's rights-framework.

There was in addition however, an important respect in which Gandhi's invocation of copyright's framework wasn't merely directed at replicating the working of moral rights, something that his final position came to reflect. This was the reality that copyright's basic framework (of exclusivity) could be deployed towards a wider range of non-economic ends beyond just attribution and integrity, extending to the *negation of economic motives*. Copyright's gatekeeper role, traditionally conceived of as a mechanism of revenue generation, was to Gandhi a mechanism for policing the motives of individuals who sought to copy or translate his work, and in the process ensure that those motivated by the goals that he considered illegitimate were excluded.

To summarize then, Gandhi's engagement with copyright reflected three characteristics: a skepticism, a non-foundational rejection, and a technical disaggregation of the institution and its different moving parts. Table 1 below summarizes Gandhi's evolution in thinking, represented in these three strands.

Table 1: The Evolution of Gandhi's Views on Copyright Law

	Rough Time Period	Central Features	Rights Asserted
Personal Rejection	1909-26 & 1928-40	<ul style="list-style-type: none"> • Personal preference to avoid • Recognition of some value in the institution • Allowance for future modification in position 	None
Reluctant Acceptance	1926-28	<ul style="list-style-type: none"> • Seen as a one-time compromise • Justified in distributive terms 	All rights in the one work: i.e., the autobiography

¹⁶⁸ For recent work in this vein see: Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

Strategic Deployment	1940-48	<ul style="list-style-type: none"> • Reservation of first translation right. • Abandonment of rights in actual translation • Use of rights to prevent further commercialization 	<p>First translation right (in newspaper articles)</p> <p>Extended to translation rights in autobiography</p>
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III. GANDHI AS A COPYRIGHT PRAGMATIST

Gandhi's actual views on copyright law are thus to be contrasted with much of his abstract philosophy, and what it might have predicted his position would be on copyright, a fundamentally market-based economic institution. This Part argues that Gandhi's approach to copyright law represents a distinctive form of engagement and interaction with the institution—*copyright pragmatism*—that entails recognizing copyright's nature as a legal institution, engaging it critically, and utilizing it contextually to realize a set of shifting normative goals and ideals that aren't all central to the institution and its functioning. Drawing on philosophical and legal pragmatism, forms of reasoning that insist on contextualized decision-making that pays close attention to both short- and long-term consequences, copyright pragmatism represents an important middle ground in the debates between copyright minimalists and expansionists. Discussions of copyright reform would do well to incorporate several of its important insights, many of which Gandhi seems to have recognized and incorporated into his own thinking decades ago.

This Part begins by examining the basic tenets of philosophical and legal pragmatism and describing their plausible connection to Gandhi's own approach to practical reasoning, which he self-characterized as "practical idealism." (III.A.) Using Gandhi's own views on copyright as a lens, it then moves to setting out what copyright pragmatism entails, its basic tenets, and what they involve during interactions with, or decision-making within, the copyright system. (III.B.)

A. *Gandhi's Pragmatic Philosophy of Action*

As we saw in Part I, Gandhi's writings no doubt reveal a set of abstract economic ideas and principles, which many today characterize as a

form of “Gandhian economics”.¹⁶⁹ Yet, the fact of the matter remains that if seen as abstract principles, their influence on Gandhi’s own actions remains largely inconsistent. His rejection of utilitarianism in the abstract thus seems to sit at odds with his embrace of copyright, however limited. The problem was hardly that Gandhi was a hypocrite who failed to practice what he preached. It was rather that Gandhi believed that his actions, and his reasoning behind them were far more representative of his views, than were his statements when de-contextualized and taken as abstract propositions. He is thus known to have famously noted: “My life is my message,¹⁷⁰” seemingly suggesting that if individuals were to seek guidance from him, they should look to his actions rather than his statements. Gandhi’s theory of action—what one may call his philosophy of action—provide a powerful and plausible explanation for his interaction with copyright law, and its various facets. It is this theory of action that this Section unbundles; it ought to therefore be seen as distinct and self-consciously superior to (though not inconsistent with) the abstract economic ideas that scholars draw from Gandhi’s writing, in accounting for Gandhi’s own actions. This Section argues that Gandhi’s theory of action was at base a form of philosophical pragmatism.

Pragmatism is today thought of as a school of philosophical thinking that is uniquely American in origin and approach.¹⁷¹ Attributed to the writings of Charles Peirce, William James, John Dewey, and later Oliver Wendell Holmes, Jr., pragmatism has in the last decade or so, seen a revival both as an approach to philosophy and as a method of legal reasoning and analysis.¹⁷² Gandhi’s own thinking—as a philosophy of action—reveals extremely close parallels to pragmatism, as developed in the U.S., a connection that has found surprisingly little discussion in the literature.¹⁷³ This Section attempts to unpack the functional similarity between pragmatism and Gandhi’s own approach, which he styled “practical

¹⁶⁹ See, e.g., J.C. KUMARAPPA, *GANDHIAN ECONOMIC THOUGHT* (1951); K. VASUDEVAN, *GANDHIAN ECONOMICS* (1967); DASGUPTA, *supra* note __.

¹⁷⁰ See Joseph Prabhu, *Gandhi, Empire, and a Culture of Peace*, in 1 *INDIAN ETHICS: CLASSICAL TRADITIONS AND CONTEMPORARY CHALLENGES* 395, 396 (Purushottama Bilimora et al eds. 2007).

¹⁷¹ For a recent overview of the origins of American pragmatism as a philosophical movement and its possible European influences, see M. GAIL HAMNER, *AMERICAN PRAGMATISM: A RELIGIOUS GENEALOGY* (2002). See also LOUIS MENAND, *PRAGMATISM: A READER* (1997).

¹⁷² See generally Morris Dickstein, *Pragmatism, Then and Now*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 1* (Morris Dickstein ed. 1998) (surveying this revival and compiling a set of essays by those involved in the revival).

¹⁷³ For what is perhaps the only account of this connection, see K. RAMAKRISHNA RAO, *GANDHI AND PRAGMATISM: AN INTERCULTURAL STUDY* (1968).

idealism” and then shows how this connection carries over to the realm of legal reasoning, seen in Gandhi’s engagement with copyright law.

1. Gandhi’s Practical Idealism as a Form of Philosophical Pragmatism

Much of the theoretical and philosophical literature on Gandhi tends to characterize him as a moral idealist, which sees him as an absolutist who adopted a moral critic of politics.¹⁷⁴ A recent turn in the political theory literature has begun to cast doubt on this characterization, arguing that Gandhi’s core beliefs—seen in his commitment to non-violence and truth—represent not just moral propositions, but a particular “practical orientation” towards politics which entailed a “contextual, consequentialist, and moral-psychological analysis” of the political world around him.¹⁷⁵

Gandhi characterized his own approach to politics and thinking as that of a “practical idealist”.¹⁷⁶ This seemingly oxymoronic phrase captures what was an essential tenet to his philosophy, namely, its means-orientation. Central to Gandhi was his emphasis on the means employed towards realizing any goal (the end), and he routinely observed that “means are after all everything.”¹⁷⁷ In contrast to plain (or moral) idealism, that emphasizes ends rather than means in its pursuit of absolute moral ideals, and thereby degenerates into a form of blatant instrumentalism, Gandhi focused on means, not to the exclusion of ends, but instead as intricately connected to the ends in question.¹⁷⁸ To him, means and ends were in a sense reflexive (or “convertible”) concepts, with the former capable of embodying (or even creating) the latter.¹⁷⁹ This in turn meant a strong focus on practical action over simple theorization and abstraction.¹⁸⁰ Gandhi’s political philosophy was thus in essence a philosophy of action.

¹⁷⁴ See, e.g., RAGHAVAN IYER, *THE MORAL AND POLITICAL THOUGHT OF MAHATMA GANDHI* 48 (1973) (observing how Gandhi would have “entirely agreed” with Kant’s views on morality and politics). For an elaboration and critique of this understanding, see Karuna Mantena, *Another Realism: The Politics of Gandhian Nonviolence*, 106 *AM. POL. SCI. REV.* 455, 456-57 (2012).

¹⁷⁵ See, e.g., Mantena, *supra* note __, at 457 (developing this analysis of Gandhi and noting its recent vintage). See also RONAND TERCHEK, *GANDHI: STRUGGLING FOR AUTONOMY* 232-34 (1998).

¹⁷⁶ Mohandas K. Gandhi, *The Doctrine of the Sword*, in 21 *CWMG*, *supra* note __, at 133, 134.

¹⁷⁷ Mohandas K. Gandhi, *An Appeal to the Nation*, in 28 *CWMG*, *supra* note __, at 307, 310.

¹⁷⁸ See Dennis Dalton, *Gandhi’s Originality*, in *GANDHI, FREEDOM, AND SELF-RULE* 63 (Anthony J. Parel ed. 2000). See also *GANDHI, HIND SWARAJ*, *supra* note __, at 81.

¹⁷⁹ Mohandas K. Gandhi, *Presidential Address at Belgaum Congress*, in 29 *CWMG*, *supra* note __, at 488, 497.

¹⁸⁰ See Mantena, *supra* note __, at 468.

At the same time though, Gandhi's approach embodied an important strategic dimension, which is perhaps responsible for its interpretation as a form of moral absolutism. In seeking to gain wide social acceptance for his ideas, Gandhi realized that he needed to articulate them using the ideas and concepts that were socially acceptable at the time.¹⁸¹ As one scholar thus notes, he therefore consciously chose to give his ideas a "transcendental look" that in turn provided them with a facial rigidity and absolutism.¹⁸² Yet, when one probes deeper into his thinking, one sees that he used these seemingly transcendental ideas and concepts rather loosely and contextually, which renders them palpably non-absolutist and non-transcendental in practice.

Gandhi's well-known commitment to "truth" formed the core organizing idea of his actions. Gandhi routinely described his conception of truth in overtly absolutist terms, often referring to it as his God, and as representing something unattainable.¹⁸³ At the same time though, he refused to define it with any sense of precision.¹⁸⁴ While at once characterizing truth as the "sovereign principle" and noting that it entailed "not only truthfulness in word, but truthfulness in thought also, and not only the relative truth of our conception, but the Absolute Truth," he also accepted the reality that this absolute truth was in some sense unattainable and that as a consequence individuals needed to be guided by their own conceptions of the "relative truth".¹⁸⁵ Truth was thus to Gandhi multi-faceted, and to be realized by each individual on his or her own. It thus of necessity entailed an element of fallibility. What this translated into in practice though, was the conversion of truth into a necessarily contingent ideal, whose content was determined contextually and indeed susceptible of modification over time. Truth thus had an evolutionary dimension to it, beyond being relativistic. To the untrained reader who takes Gandhi's conception of truth to be a simple absolutist one, this evolution might certainly come across as contradictory or inconsistent. Yet, to Gandhi, it was a seemingly perfectionist ideal, constitutively incomplete, and directly motivational. He thus observed, rather poignantly at one point:¹⁸⁶

¹⁸¹ See RAO, *supra* note __, at 4.

¹⁸² *Id.*

¹⁸³ Mantena, *supra* note __, at 463 ("Truth, for Gandhi, was absolute and universal; indeed it served as another name for God.").

¹⁸⁴ *Id.*

¹⁸⁵ GANDHI, AUTOBIOGRAPHY, *supra* note __, at xxvii-xxviii

¹⁸⁶ See Mohandas K. Gandhi, *Notes: Inconsistencies?*, in 61 CWMG, *supra* note __, at 22, 23-24.

I would like to say to the diligent reader of my writings and to others who are interested in them that I am not at all concerned with appearing to be consistent. In my search after Truth I have discarded many ideas and learnt many new things. Old as I am in age, I have no feeling that I have ceased to grow inwardly or that my growth will stop at the dissolution of the flesh. What I am concerned with is my readiness to obey the call of Truth, my God, from moment to moment, and therefore, when anybody finds any inconsistency between any two writings of mine, if he has still faith in my sanity, he would do well to choose the later of the two on the same subject.

This is a startlingly honest and self-reflective observation. Truth is explicitly rendered relational and contextual, and partakes of a teleological character. It also entails a strong commitment to an evolutionary incommensurability that allows an actor to view his or her past decisions with a sense of sympathy and detachment, a character-trait that is commonly described as “practical wisdom”.¹⁸⁷ Additionally, and perhaps most importantly, it treats truth as an experiential—rather than abstract, or theoretical—goal. This is in some ways precisely how Gandhi used what appeared to be morally absolute concepts, in the development of his uniquely practical philosophy of action.¹⁸⁸

The experiential and contextual nature of truth also highlights another important dimension to Gandhi’s thinking, and indeed one that pervaded the thinking of the early American pragmatist philosophers. This was the idea of “experimentation.”¹⁸⁹ Life and existence itself, were to Gandhi, mere “experiments in the practice of truth and non-violence.”¹⁹⁰ What Gandhi seems to be implying here is that truth to an individual can only be realized through observing outcomes and consequences involving principled action. Experiments were, to be sure, never credited with any finality, but they allowed one to reflect on the nature and situational embodiment of truth.¹⁹¹ In this, we see a strong parallel to John Dewey’s theory of experimentalism, and the idea as one scholar notes that “[k]nowledge arises only when the validity of reflective considerations is

¹⁸⁷ See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 84 (1993).

¹⁸⁸ See Bilgrami, *supra* note __ 4164 (discussing Gandhi’s idea of truth as an “experiential” and “not cognitive notion”).

¹⁸⁹ GANDHI, *AUTOBIOGRAPHY*, *supra* note __, at xxvii.

¹⁹⁰ Mohandas K. Gandhi, *Speech at Gandhi Seva Sangh Meeting-III*, in 68 CWMG, *supra* note __, at 259, 260.

¹⁹¹ RAO, *supra* note __, at 4 (quoting Gandhi’s original autobiography).

determined by trying them in action¹⁹².” Experimenting with the truth in order to realize it was thus to Gandhi, his life’s very existential mission, which explains the unique title he chose for this autobiography.¹⁹³

The originality of Gandhi’s philosophy of action thus lies in its creative (and conscious) conflation of means and ends, its subtle subversion of absolutist concepts by infusing them with contingent and experiential content, and its recognition of the infallibility of the human endeavor for truth, which in turn allows for a situational modification and revision of one’s judgments and ideas. This last point allowed Gandhi’s thinking to remain normatively pluralist, a reality that assumes significance for its extension to the realm of legal analysis, as we shall soon see.¹⁹⁴

Around the same time that Gandhi was developing his thinking within the context of the Indian independence movement, a school of thought was beginning to emerge in the U.S., that shared several of his core beliefs and ideas. “Pragmatism,” as it came to be called, emerged in the last quarter of the nineteenth century, principally in the works of Charles Sanders Peirce, William James, and John Dewey.¹⁹⁵ To the movement, as originally conceived, the central question was about reconciling scientific, empirically-driven thinking with beliefs and ideas that were motivated by morality and other *a priori* principles.¹⁹⁶ Pragmatism thus emerged as a mediating philosophy, and its central tenet—described by some as the “pragmatist maxim”—was to resolve the question and other similar questions of incommensurability, by looking principally at the practical consequences of each position.¹⁹⁷ This in turn meant specifying the conflict further contextually, and choosing among alternative practical outcomes once the context and its implications become clear. James thus described it as entailing an empiricist’s outlook, for its emphasis on actual consequences over abstract dogmas or principles.¹⁹⁸

Given its strong emphasis on practical consequences, pragmatism also came to develop a particularly nuanced conception of truth. Indeed, to

¹⁹² *Id.* at 82.

¹⁹³ GANDHI, AUTOBIOGRAPHY, *supra* note __ (titling the autobiography “The Story of My Experiments with Truth”).

¹⁹⁴ *See infra* Section III.A.2 below.

¹⁹⁵ Christopher Hookway, *Pragmatism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2010), <http://plato.stanford.edu/entries/pragmatism/> (last visited Nov. 15, 2012).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *See* WILLIAM JAMES, THE PRESENT DILEMMA IN PHILOSOPHY 9 (1907).

William James pragmatism was itself a theory about truth.¹⁹⁹ Since empirical verification was motivational to pragmatism, truth assumed a contingent character. James thus famously observed that ideas “become true in so far as they help us to get into satisfactory relation with other parts of our experience.²⁰⁰” In other words, truth was an experiential quality, and for a belief or process to be true, it thus had to conform to other verifiable sensible experiences for the individual advocating its truth.²⁰¹ To be sure, each of the founding pragmatist philosophers had different views on truth. Yet, the idea that is common to all of them is the recognition that truth is not an objectively ascertainable absolute—it is experiential, contingent, and therefore relative.

Despite its emphasis on consequences, it is important to note that pragmatism isn’t just another version of utilitarianism. Neither is it a purely consequentialist approach either, understood as approaches that evaluate an action exclusively by reference to their ends, abstractly construed.²⁰² Pragmatism instead looks to consequences of different kinds but isn’t bound to a particular normative conception of consequences such as utilitarianism. It thereby allows the very idea of consequences to derive content from empirical reality and experience, rather than an absolute normative or ethical vision. In this sense then, pragmatism is commonly seen as meta-ethically pluralist in outlook and approach.²⁰³

As a philosophy of action, pragmatism also came to emphasize the importance of experimentation in inquiry. The central idea in pragmatism, as noted earlier, was to understand how beliefs and ideas could be subjected to empirical validation in decision-making, and to this end, pragmatists developed complex approaches of “inquiry” to subject various abstract hypotheses to scrutiny in the real-world.²⁰⁴ Experimentation through such inquiry was thus critical to pragmatism. John Dewey, in fact went so far as to characterize his version of pragmatism as “experimentalism,”

¹⁹⁹ WILLIAM JAMES, *THE MEANING OF TRUTH* (1909).

²⁰⁰ JAMES, *PRESENT DILEMMA*, *supra* note __, at 34.

²⁰¹ RAO, *supra* note __, at 52-53.

²⁰² See Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 684 (2004) (“[D]espite the emphasis on consequences, legal pragmatism, is not a form of consequentialism.”).

²⁰³ See generally Cheryl Misak, *Pragmatism and Pluralism*, 41 TRANS. OF THE CHARLES J. PEIRCE SOC’Y 129 (2005).

²⁰⁴ See Hookway, *supra* note __.

emphasizing its application of the scientific outlook of inquiry to what are ordinarily thought of as theoretical or abstract beliefs.²⁰⁵

Pragmatists also routinely exhibited an underappreciated nuance in their discussion of means and ends, which as we noted was a highlight of Gandhi's practical idealism. Dewey for instance, developed a theory of "reciprocal determination" of means and ends under which the very "value of the end depends on the costs and benefits of the means."²⁰⁶ Unlike standard instrumentalism that takes an end as a static and looks exclusively to the means needed to arrive at the end, Dewey's pragmatism seems to emphasize a reflexive relationship between ends and means, wherein the means provide an avenue for assessing the legitimacy and value of the ends in question, forcing the end to be modified or amended when needed.²⁰⁷ In so doing, at least as a practical matter, it allows means to determine the content of the ends in question.

Gandhi's version of practical idealism thus reveals several important similarities to pragmatism as a broad philosophical movement. There appears to be little evidence of his having come into contact with the work of the pragmatists, or vice-versa, which makes the strong (and contemporaneous) parallelism between the two philosophies very intriguing.²⁰⁸ This is hardly to suggest that Gandhi's practical idealism was *just* another version of pragmatism. To the contrary, it remained fairly distinct, rooted as it was in the needs and circumstances of the India at the time. Yet, its core structure and ideals remained distinctively pragmatic in orientation, as the term has come to be understood in philosophy. Its use of truth as a contingent ideal, its emphasis on practical and experiential reasoning, its conscious means-orientation and conflation of means and ends, its rejection of utilitarianism while retaining a consequence-sensitive orientation, its reliance on experimentation to test the value and truth of

²⁰⁵ John Dewey, *From Absolutism to Experimentalism*, in CONTEMPORARY AMERICAN PHILOSOPHY: PERSONAL STATEMENTS 13 (Russell ed. 1930); Peter S. Hlebowitsh, *John Dewey and the Idea of Experimentalism*, 22 EDUC. & CULT. 73 (2006).

²⁰⁶ See Elizabeth Anderson, *Dewey's Moral Philosophy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. Fall 2012), <http://plato.stanford.edu/entries/dewey-moral/#3> (last visited Nov. 18, 2012).

²⁰⁷ *Id.*

²⁰⁸ While Rao was the first to notice the parallels between practical idealism and pragmatism, and to offer an intellectual account of these parallels, *see* Rao, *supra* note __, at ii, he is content to view his project as one of "comparative philosophy," and thereby eschew any historical analysis of how one might have influenced the other, *id.*, beyond identifying the similar "conditions" under which both philosophies were developed, *see id.* at ii, 201. Indeed Rao's ultimate project appears to finally rest on identifying the relevance of American pragmatism for India and Indian problems. *See* Rao, *supra* note __, at 203.

ideas, and most importantly its emphasis on action, all lend support to the idea that Gandhi's "practical idealism" was at base a means-focused form of pragmatic thinking.

This parallelism is however more than just intellectually interesting. Philosophical pragmatism, both at the time of its development, and more recently, has come to be translated into a somewhat unique approach to legal reasoning and analysis—referred to today as legal pragmatism.²⁰⁹ Indeed, there is some evidence that Charles Peirce, the founder of pragmatic philosophy was heavily influenced by a lawyer-friend;²¹⁰ and Oliver Wendell Holmes, Jr. was good friends with both Peirce and William James, and influenced their thinking.²¹¹ If we accept Gandhi's practical idealism as having clear pragmatic (in the philosophical sense) overtones, we should thus expect his engagement with the law and legal institutions (such as copyright) to exhibit features of legal pragmatism. And not surprisingly it indeed does.

2. Gandhi's Copyright Engagements as a Form of Legal Pragmatism

As a philosophy of action, the basic ideas of pragmatism found their way into the analysis of law and legal rules rather easily. When and how this occurred is a question that is open to some debate. Tom Grey thus argues that legal pragmatism—the application of pragmatic ideals to legal analysis—developed on its own, and is normatively justifiable as a "freestanding" form of legal analysis, i.e., independent of philosophical pragmatism, which had a discrete set of goals that were constructed within the specific context of narrow *philosophical* debates.²¹² Others however take a more ambivalent position. Richard Posner for instance, concedes the normative independence of legal pragmatism as a freestanding approach, yet emphasizes that philosophical and legal pragmatism did indeed "co-evolve" at the same time, and perhaps more importantly, among the same set of individuals.²¹³

²⁰⁹ See generally Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21 (1996).

²¹⁰ See Philip P. Wiener, *The Pragmatic Legal Philosophy of Nicholas St. John Green (1830-1876)*, 9 J. HIST. IDEAS 70, 70 (1948) (tracing the role that lawyers played in the founding philosophy of the original pragmatists).

²¹¹ See *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123, 1125 (1975) (describing their membership in the "Metaphysical Club").

²¹² See Thomas C. Grey, *Freestanding Legal Pragmatism*, in THE REVIVAL OF PRAGMATISM, *supra* note ___, at 254.

²¹³ RICHARD A. POSNER, HOW JUDGES THINK 232-33 (2008).

The co-evolution of philosophical and legal pragmatism, perhaps interestingly, tells us something about the influence of *legal thinking* on philosophical pragmatism. Historians of pragmatism have noted that the informal club where philosophical pragmatism began, the “Metaphysical Club,” had more lawyers in its active membership, than it did scholars and thinkers from other fields.²¹⁴ These “philosophical lawyers” didn’t just view their task to be the application of philosophical pragmatism to the study and analysis of law.²¹⁵ Instead, they used their unique world-view, which originated in their common understanding of the law as a dynamic body, “adaptable to changing social conditions,” and as embodying a “cumulative social product of practical decisions”, to influence the very development of philosophical pragmatism.²¹⁶ In other words, these lawyers’ unique approach to the questions of legal philosophy contributed to the very “genesis” of pragmatism as a philosophical movement. Foremost among these philosophically minded lawyers was Nicholas St. John Green, who influenced Peirce, Holmes and a host of others in the club through his unique way of thinking about questions in the area of legal philosophy.²¹⁷ Charles Sanders Peirce, considered to be the father of American pragmatism, himself described Green as the “grandfather of pragmatism”, and Green’s thinking played a very important role in shaping Holmes’s.²¹⁸ Indeed, the pervasiveness of this ‘lawyerly’ influence on the movement (pragmatism) is borne out in the fact that John Dewey, the prominent pragmatist philosopher ventured into addressing questions about the appropriate approach to legal analysis,²¹⁹ the normative vacuity of legal concepts,²²⁰ and the connection between legal analysis and other disciplines,²²¹ for legal audiences.

Even those committed to the freestanding nature of legal pragmatism such as Grey, readily concede the possibility that legal pragmatism—originating in the common law method of contextualized,

²¹⁴ See Wiener, *supra* note __, at 70. For more on the Metaphysical Club, see Philip P. Wiener, *Peirce’s Metaphysical Club and the Genesis of Pragmatism*, 7 J. HIST. IDEAS 218 (1946).

²¹⁵ See PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 152 (2d ed. 1972).

²¹⁶ *Id.* at 153.

²¹⁷ *Id.* at 152-71.

²¹⁸ 5 CHARLES SANDERS PEIRCE, *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* 12 (Charles Hartshorne & Paul Weiss eds. 1931-35); *id.* at 164-66.

²¹⁹ John Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924)

²²⁰ John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655 (1926).

²²¹ *Id.*

evolutionary rule development—may have played a role in the development of philosophical pragmatism.²²² The principal idea behind the freestanding move then, appears to be the recognition that the critique of philosophical formalism as a form of impractical “escapism” doesn’t on its own extend to legal formalism, which despite all else, is deeply practical when understood as an approach to adjudication.²²³ The freestanding point is thus largely irrelevant for our purposes, for it merely seeks to eliminate the idea that legal pragmatism is an off-shoot of philosophical pragmatism, but remains open (and perhaps endorses?) the idea that legal pragmatism influenced its philosophical counterpart.

Much like general pragmatism, legal pragmatism emphasizes a focus on the practical consequences of a rule or concept over its immanent structure.²²⁴ It is thus empiricist in outlook and orientation, except that the value of these consequences can be measured by a host of perspectives, which pragmatism can accommodate. It is in this sense “inclusive” as an approach, or anti-foundational in outlook.²²⁵ Understanding consequences also requires contextualization, and legal pragmatism thus also emphasizes the importance of thinking about legal concepts and ideas situationally, and never in the abstract.²²⁶ This doesn’t eliminate the possibility of generalization, it just emphasizes the importance of not allowing generalized abstractions to assume a metaphysical (or immanent) significance of their own, that then becomes normatively salient. Anti-foundationalism (or ethical pluralism), contextualization, and instrumentalism (in the consequence-focused sense) are thus today seen as the “essential” elements of legal pragmatism.²²⁷

Gandhi’s dealings with copyright law once again bear strong similarities to the pragmatic method. Yet here, it transcends pragmatism as a mere philosophical approach and exhibits a stark similarity to legal pragmatism. Gandhi certainly began with an attempt to disengage with copyright as a modern institution. All the same, the normative basis of the early disengagement wasn’t modernity as such. It was instead on deeper examination, the *effect* that his assertion of copyright might have had on the sales of newspapers that he operated. The “artificial” scarcity that would

²²² Grey, *supra* note __, at 256-57.

²²³ *Id.* at 259.

²²⁴ See Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. Cal. L. Rev. 1653, 1664 (1990).

²²⁵ Grey, *supra* note __, at 257-58; *id.* at 1660.

²²⁶ Grey, *supra* note __, at 258; Posner, *supra* note __, at 1661.

²²⁷ Posner, *supra* note __, at 1660.

have been copyright's most immediate consequence would have led people to buy *Navjivan* and *Young India* (newspapers that Gandhi ran) solely to read his articles, rather than because of the intrinsic worth of the newspapers' overall message and content, which Gandhi had hoped to spread. The consequence would have thus been an obscuring of readers' motives, which Gandhi sought to avoid. We may of course debate the desirability of this consequence from a host of perspectives, but the fact of the matter remains that Gandhi's target was the consequence. We see this consequence-sensitivity more starkly in his worry that maintaining the translation rights to his autobiography as an "exclusive" right would impede the development of independent translations, each with its own value.

With its focus on copyright's consequences, Gandhi's approach thus by necessity had to be contextual. In situations where the consequences he sought to avoid were unlikely to transpire, or were indeed capable of being allayed, his basic opposition to the institution too declined. This perhaps explains his reluctant acceptance of copyright in his autobiography (in relation to Macmillan), recognizing that it wouldn't produce the artificial scarcity that he worried about *in India*, but instead only in the West, where it would perhaps have been less problematic. Contextualization in legal pragmatism is thought to necessitate incremental modifications and changes in a rule/position, obviously as the context changes.²²⁸ Once again, Gandhi's nuanced separation of the right of first translation from any rights in the translation itself, and his willingness to undertake these first translations himself contemporaneously with his original writing, reflect both a situation-sensitivity and an incremental modification in position, both characteristic of pragmatic legal analysis.

Yet the question of course remains: to what extent was Gandhi's approach to copyright truly pluralistic, or anti-foundational in outlook? Even hardened utilitarians who accept the normative tenets of legal pragmatism, such as Richard Posner, are forced to concede that they have to abandon their single-minded devotion to wealth-maximization as the sole normative goals of legal analysis.²²⁹ Gandhi's basic rejection seems to have strong overtones of an anti-utilitarian world-view. Over time however, what his engagement with copyright certainly reveals is that while a rejection of core utilitarian beliefs represented his default outlook, it didn't form a

²²⁸ See Balganesch, *Pragmatic Incrementalism*, *supra* note __, at 1566.

²²⁹ See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 65 (2003) (advocating pragmatism, distinguishing pragmatism from utilitarianism and observing how collapsing the two can convert pragmatism into a dogmatic approach, which it isn't); POSNER, *HOW JUDGES THINK*, *supra* note __, at 248.

foundational philosophical position that Gandhi was unwilling to compromise on. When injected with clear distributive elements, Gandhi saw the downsides of utilitarianism being outweighed by their situational upside, as long as he remained conscious of (and maintained) the balance.

The commitment to anti-foundationalism certainly doesn't mean that legal pragmatists cannot stand for something. Indeed the famous observation that "if you don't stand for something, you'll fall for anything" is a concern that legal pragmatism takes seriously in avoiding the accusation that it promotes purely ad hoc decision-making.²³⁰ All the same, standing for something doesn't also mean an unreflective stubborn unwillingness to compromise. Truth, to Gandhi wasn't static, it was instead situational and in some sense represented "man's fallible groping for order," which was to the early pragmatists, the very idea of justice, requiring an "intelligent compromise" all along.²³¹ Gandhi's anti-utilitarian baseline was thus hardly a foundational idea, but a default. Indeed, given his willingness to treat truth as an anti-foundational idea—despite equating it to God—it would have been surprising if he had adhered to the baseline dogmatically. Situational, intelligent compromise was to him the essence of all decision-making, which in some sense is at the very heart of anti-foundationalism.

* * *

If Gandhi's practical idealism was thus a form of philosophical pragmatism, and his engagement with copyright law in essence a form of legal pragmatism—the question remains, of where these parallels came from. As noted earlier, some historical evidence suggests that American pragmatism as a philosophical movement, post-dated pragmatic legal analysis in the common law, and was likely influenced to some measure (if not significantly) by it. Even those committed to a freestanding version of legal pragmatism seem willing to accept this idea. In a similar vein, others note that the ideal of practical wisdom was one that the legal professionals historically aspired towards, since all legal reasoning is in essence practical reasoning, and wisdom in performing the latter thus correlates to heightened acumen in navigating the former.²³² Where then did Gandhi's pragmatic leanings come from? One may tentatively speculate that it was in his training as a common lawyer.

²³⁰ *Id.* at 59.

²³¹ WIENER, *supra* note __ at 153.

²³² See KRONMAN, *supra* note __, at 193; POSNER, HOW JUDGES THINK, *supra* note __, at 246.

What is often forgotten in almost all discussion of Gandhi's philosophical and political ideas is that he trained in England as a barrister, practiced law in South Africa where he developed his political strategies, before returning to India to join the freedom movement.²³³ While Gandhi later denounced the legal profession, he nonetheless acknowledged that his training in Roman law, and his reading of Justinian's *Institutes* helped him immensely in understanding South African law.²³⁴ He notes how he studied numerous basic common law subjects, the law of equity, and a variety of other areas for nearly a year before passing the examination and being called to the Bar in England.²³⁵ One may thus speculate that Gandhi's training as a common lawyer, and his acculturation in the common law method of case law study, influenced his practical idealism to a good degree, especially since his political advocacy in South Africa often intertwined with complex legal questions.²³⁶ Indeed, one noted historian even observes that Gandhi's legal activism in South Africa employed a form of "cautious incrementalism."²³⁷ The common law has for long been thought to embody an approach to practical reasoning that is acutely pragmatic and incremental, ideas that we see in his engagement with copyright law.²³⁸ Perhaps it was his training as a lawyer then, which influenced this core dimension of his philosophy of action.

This answer must of course remain tentative, given that Gandhi in his later life routinely denounced the legal profession, its moral and political corruption, and indeed at one point even sought to have lawyers removed from leadership positions in the freedom movement.²³⁹ Yet, his concern in this critique was more with the legal profession and its willing acceptance of the ethical values and norms as dictated by the colonial government. In thus concluding that Gandhi's training as a common lawyer must have had *some*, non-negligible influence in the development of his pragmatic philosophy and more specifically, in the development of his pragmatic approach to copyright law, I nonetheless leave for future work, a fuller exploration of Gandhi's vision for the legal profession and the normativity of the law that it embodies.

²³³ Sunit B. Kher, *Introduction*, in GANDHI, THE LAW AND LAWYERS, *supra* note __, at iii.

²³⁴ GANDHI, THE LAW AND LAWYERS, *supra* note __, at 12-13.

²³⁵ *Id.*

²³⁶ RAJMOHAN GANDHI, GANDHI, *supra* note __, at 60; Paul P. Power, *Gandhi in South Africa*, 7 J. MOD. AFRICAN STUD. 441 (1969).

²³⁷ RAMACHANDRA GUHA, WHY GANDHI MATTERS 3 (2011).

²³⁸ *See* Grey, *supra* note __, at 256.

²³⁹ *See generally* GANDHI, THE LAW AND LAWYERS, *supra* note __, at 130, 140, 210.

B. *Unpacking Copyright Pragmatism*

Gandhi's views on copyright law and his engagement with the institution over the course of his life were thus informed in large part by his pragmatic philosophy of action. Not only were they reasoned positions, but Gandhi was also able and willing to adapt them to changing circumstances contextually as and when needed, in truly incremental fashion. What is crucial to appreciate though is that in this pragmatic approach, Gandhi's position never degenerated into one of overt consequentialism, despite his deep sensitivity to the consequences of his every action. Additionally, Gandhi's views on copyright—and their transformation over time—evidence an acute early awareness of some of the most important structural, substantive and normative issues that have since come to be recognized as central to debates and discussions about copyright law.

Foremost among these is the idea that copyright, when deployed under certain circumstances, can indeed become a freedom-impeding mechanism. By constraining the expressive and communicative activities of others under the rubric of exclusivity, it runs the risk of producing large, immeasurable, medium and long-term harm, which Gandhi sought to anticipate and alleviate as best as he could. Scholars today recognize that copyright law is a centerpiece of the second “enclosure movement,” imposing undue burdens on speech, access, and creativity, all of which was central to Gandhi's skepticism.²⁴⁰ Second, Gandhi recognized that copyright's primary justification—of inducing creativity through rational self-interested behavior—may not hold true in numerous situations. To Gandhi, as a personal matter, this fundamental premise of the entire copyright system rang false, which produced his default baseline, previously discussed. Yet, Gandhi was astute enough to recognize that his position wasn't the only one tenable in society, which explains his masterful recognition of copyright's limited desirability in pockets. Over the last decade or so, copyright's core incentive rationale has in a similar vein been called into question and by most accounts shown to be less than universally true in both theory and practice.²⁴¹ Third, Gandhi over time seems to have

²⁴⁰ See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2002); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

²⁴¹ See, e.g., Diane Leenheer Zimmermann, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN THE L. 29 (2011); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1564 (2009); Sara K. Stadler, *Incentive and Expectation in Copyright*,

believed that he could infuse copyright law with normative ideals that may not be fundamental to the institution as originally conceived—such as distributive justice, and the prevention of commercial exploitation of a work when undesirable. In so doing, Gandhi came to treat the formal structure of copyright law as a means of solving the problem of incommensurability in a contextual manner, and effectively subverted its core utilitarian structure towards distinctively non-utilitarian goals.²⁴² Again, copyright scholars have begun suggesting this idea in the last decade or so. Lastly, Gandhi's engagement with copyright and his identification of its potential strengths and weaknesses seem to have taught him to approach the institution in a non-dogmatic manner, allowing him to modify and rationalize his position over time, as circumstances changed.

Gandhi's interactions with copyright law thus together represent a unique approach to thinking about the institution—best described as *copyright pragmatism*. Neither minimalist nor expansionist in outlook, copyright pragmatism represents a meaningful mechanism of engaging with the institution of copyright, by recognizing it for what it is and how it works, and acknowledging its clear desirability in certain situations. At the same time, drawing on pragmatism's unwillingness to accept objective abstractions as truth, it maintains a constant state of alertness about the perils and costs of the institution, and looks for reasoned compromises that can be sustained over time. It thus entails four inter-related features: (i) a fundamentally critical attitude towards copyright, (ii) an outcome-sensitive assessment of, and engagement, with the institution, (iii) an attempt to see the institution as capable of affirming plural normative ideals contextually during such engagement, and (iv) an allowance for a gradual modification of position over time and context, with experience. Each of these ideas is worth elaborating on.

1. Critical Orientation

Copyright pragmatism begins with a basically critical approach towards the institution of copyright. All the same, this critical orientation doesn't of necessity translate into forms of copyright skepticism, minimalism, or indeed nihilism. It originates instead in the recognition that

58 HASTINGS L.J. 433 (2006); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996).

²⁴² See Part II for a fuller discussion of Gandhi's subversive technique.

as a creation of the law,²⁴³ copyright remains an artificial institution in the sense that its functioning is premised on certain assumptions about human behavior, creativity, and social welfare, not all of which need hold true under all circumstances. This critical orientation also takes as a core attribute of the copyright system, the reality that its very existence and functioning produce various kinds of social costs or restrictions on freedom. While accepting these realities as a given, copyright pragmatism nonetheless recognizes there to be a limited, yet important role for the institution, in the domains where its core assumptions do indeed hold true and where the system's benefits outweigh its costs. This recognition in turn produces a form of compromise that allows the copyright pragmatist to accept the legitimacy of copyright as an institution, but with due caution. The compromise thus results in an outlook that is best characterized as "doubting" or *dubitante*, a term used where the actor is critical of a position but nonetheless willing to go along out of a sense of compromise.²⁴⁴

Copyright pragmatism's critical orientation towards copyright bears the imprint of a core element of pragmatist thinking known as "fallibilism"²⁴⁵, the philosophical idea that "there is no conclusive justification and no rational certainty for any of our beliefs or theses."²⁴⁶ Translated to the copyright context, fallibilism produces the recognition that the institution of copyright is a circumstantial necessity, but that its core assumptions are capable of being proven false with due empirical evidence in individual circumstances. Copyright's institutional structure is thus accepted, but treated as fundamentally defeasible. Indeed, it is copyright pragmatism's use of fallibilism that prevents it from collapsing into a form of skepticism that is characteristic of copyright minimalism (and copyright nihilism).

Whereas fallibilism begins with the idea that truths and beliefs are contextually falsifiable with evidence, it is routinely distinguished from

²⁴³ For a fuller elaboration of this idea, see Shyamkrishna Balganes, *The Normative Structure of Copyright Law*, in INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyamkrishna Balganes ed., forthcoming 2013).

²⁴⁴ The term "dubitante" originates in a form of opinion delivered by judges on panels, where they choose not to dissent from a majority opinion but nonetheless express their doubts as to the soundness of its reasoning. See Jason J. Czarnezki, *The Dubitante Opinion*, 39 AKRON L. REV. 1 (2006).

²⁴⁵ Fallibilism was a core part of Charles Peirce's philosophy of pragmatism. See Joseph Margolis, *Peirce's Fallibilism*, 34 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 535, 535 (1998) (describing it as one of the "linchpins" of Peirce's philosophy).

²⁴⁶ Stephen Hetherington, *Fallibilism*, in INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2005), <http://www.iep.utm.edu/fallibil/> (last visited Nov. 15, 2012).

skepticism (as a philosophical approach), which takes the extreme position of denying the very possibility of truth, knowledge, and belief.²⁴⁷ A skeptical outlook towards copyright would thus translate into a denial of the very possibility that any of its core assumptions (which it of course treats as truths) is knowable, which ought to translate into a rejection of its basic apparatus. Fallibilism goes nowhere near as far as this. It expresses doubt about the universality of copyright's core assumptions, but doesn't deny the possibility that they could indeed remain true in situations.²⁴⁸ It asks instead that the truth in these assumptions not be taken as a given, but instead be shown empirically.

2. Consequence-sensitivity

As a form of pragmatism, copyright pragmatism insists that the basis of one's engagement with the institution be measured entirely by the practical consequences that such engagement is likely to produce, and concomitantly, the possibility of minimizing their deleterious effects. Consequence-sensitivity remains different from consequentialism.²⁴⁹ Whereas in the latter, consequences motivate and dictate the very choice of means, in the former, practical consequences—as an experiential category—form a benchmark against which to assess one's actions and beliefs rather than motivating any *a priori* choice among them. Thus for instance, utilitarianism—the best-known form of consequentialism—insists that one's actions remain directed towards a *particular end*, namely maximizing overall utility.²⁵⁰ Given this end, it thus motivates actors to choose certain means to comport with the objective. Consequence-sensitivity on the other hand gives actors broad discretion in their choice of means, which it recognizes could be motivated by a variety of considerations, but nonetheless insists that in refining, validating, and

²⁴⁷ See Anthony Brueckner, *Fallibilism, Underdetermination, and Skepticism*, 71 PHIL. & PHENOM. RES. 384 (2005); Jonathan E. Adler, *Skepticism and Universalizability*, 78 J. PHIL. 143 (1981).

²⁴⁸ Indeed, scholars have argued that one of the characteristic features of Gandhi's philosophy of action was a commitment to fallibilism rather than skepticism, especially in relation to the idea of truth. See Bilgrami, *supra* note __, at 4160-61 (distinguishing Gandhi's fallibilism about truth, from Mill's skepticism about its very possibility). For a fuller discussion of the distinction, see Akeel Bilgrami, *Skepticism and Pragmatism*, in WITTGENSTEIN AND SKEPTICISM 49 (Dennis McManus ed. 2004).

²⁴⁹ POSNER, LAW, PRAGMATISM AND DEMOCRACY, *supra* note __, at 337.

²⁵⁰ Julia Driver, *The History of Utilitarianism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2009), <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=utilitarianism-history> (last visited Nov. 13, 2012).

understanding these means, the actor pay due regard to the effects that they are likely to produce when put into action. It thus emphasizes a form of reflexive interaction between the means and ends of any engagement.

This heightened consequence-sensitivity no doubt makes copyright pragmatism *instrumental* in orientation and outlook. Yet, the instrumentalism it produces is more complex and nuanced than what the banal understanding of the term ordinarily presupposes. For one, the nature of the consequences that the actor is to be sensitive to is in many ways left entirely up to the actor to determine (unlike other forms of consequentialism). Thus, the actor may choose to look to short-, medium-, or long-term consequences during the refinement of his or her means, and it says nothing of which of these is to be preferred or prioritized.

To the copyright pragmatist, consequence-sensitivity drives the precise nature and form of any engagement with copyright law. It thus emphasizes a constant alertness to the effects of one's actions, a position that flows automatically from the critical default that the actor begins from. The reflexivity of act and consequence in this understanding also forces the actor to change the nature of the engagement with copyright, or to supplement it with additional safeguards, when the consequences—likely or actual—are seen to be antagonistic to the ideals and values of the actor. A formulaic, mechanistic (or formal) acceptance of the institution is thus anathema to copyright pragmatism.

3. Normative Pluralism

As an approach that avoids dictating which consequences matter more, or indeed how those consequences are to be addressed, copyright pragmatism of necessity allows for multiple, seemingly incommensurable, values to be realized in the functioning of the copyright system.²⁵¹ All the same, this doesn't mean that it allows the actor to engage with copyright in a purely *ad hoc* fashion. Copyright pragmatism takes seriously the idea that the institution's very existence and structural apparatus reflect a basic compromise solution to a multiplicity of social values—utilitarian, distributive, deontic, and political—and that copyright is capable of affirming and instantiating these various ideas when needed. It does so contextually, through a form of practical reasoning that is embedded within the very architecture of the institution.

²⁵¹ For a recent account of pluralism in intellectual property law more generally see MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 23 (2012).

Indeed, it is this normative pluralism that allowed Gandhi to reluctantly accept copyright to affirm its utilitarian (i.e., market-oriented) goals during the negotiations with MacMillan, and later on use copyright to selectively undermine those very same utilitarian goals. What is critical in this affirmation though is that the institution of copyright come to be seen as distinctively legal in origin and structure, and therefore susceptible to forms of legal reasoning that in turn embody the virtues of practical reasoning, long known to be a mechanism of solving the problem of incommensurability between conflicting normative ideals.²⁵² Copyright pragmatism's normative pluralism thus entails a fundamental acceptance of the institution's *legal* origins, which makes the recourse to practical reasoning both possible and meaningful.

None of this of course means that a copyright pragmatist necessarily needs to be a legal positivist. The copyright pragmatist readily recognizes that copyright law originates in both source-based and content-based considerations, whereas positivism consciously excludes the latter.²⁵³ The additional move that the pragmatist makes then is to merely acknowledge the plurality of content-based considerations that motivate the institution's different moving parts. This certainly necessitates a basic familiarity with copyright's legal structure and its reliance basic legal concepts and principles, which in turn implies that copyright pragmatism is at base a theory that has it most appeal to those trained in the working of legal reasoning, i.e., lawyers. This isn't to suggest that non-lawyers can never be copyright pragmatists; just that the strengths of copyright pragmatism are best realized when deployed by those conversant with the ways and methods of legal argumentation as a form of practical reasoning.

4. Contextual modification

A commitment to value pluralism also implies a willingness to modify and adapt one's position on an issue circumstantially, as additional information (specific to the issue) becomes available. Indeed, this circumstantial updating and modification has remained a hallmark of the "common law method" of rule development, long known to be pragmatic in

²⁵² See, e.g., RUTH CHANG, *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (1997); HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1997); NOLA J. HEIDLEBAUGH, *JUDGMENT, RHETORIC, AND THE PROBLEM OF INCOMMENSURABILITY: RECALLING PRACTICAL WISDOM* (2001).

²⁵³ See Leslie Green, *Legal Positivism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2009), <http://plato.stanford.edu/entries/legal-positivism/> (last visited Nov. 22, 2012).

orientation.²⁵⁴ In a similar vein, copyright pragmatism requires actors to approach their engagement with copyright in a palpably non-dogmatic manner. This implies that in specific situations, when circumstances so necessitate, it might indeed require them to alter their beliefs about the institution. The compromise is however always a reasoned one—an attribute that is crucial to appreciate. Rather than simply allowing for the reversal of one's position on an issue relating to copyright and characterizing it as a compromise, copyright pragmatism requires that an actor reason his or her way through the decision, and provide a rational account for how and why the additional contextual information that is now available necessitates a modification in position. The compromise is thus meant to be fundamentally “deliberative.”

In this latter sense then, copyright pragmatism requires that a contextual modification of one's position on a copyright issue involve a reconciliatory engagement with the basis for one's prior positions. It entails what Kronman describes as the twin attributes of “sympathy” and “detachment,” wherein the actor is able to synthesize his or her former and present positions by recognizing them to be the result of constrained circumstances.²⁵⁵ It is precisely through this synthesis that the incommensurability of copyright's conflicting normative values can be addressed situationally. The copyright pragmatist might thus favor copyright's fundamental utilitarian idea in certain contexts, for example when it may be deployed towards palpable distributive goals, and might later choose to reject the utilitarian idea when the distributive concerns are overwhelming and at the same time incapable of being accommodated within their utilitarian counterparts. Each position comes to be seen as motivated by the peculiarities of the context rather than as an abstract commitment to one value (i.e., utilitarianism or distributive justice) over the other, where it might be seen as an inconsistency. The context of the choice, and the consequences each choice will likely produce, together dictate the position of the copyright pragmatist. When these twin variables change, so too does the copyright pragmatist's position.

CONCLUSION

²⁵⁴ See KRONMAN, *supra* note __, at 20-21.

²⁵⁵ *Id.* at 84.

Across the world, Gandhi is recognized in the public mind as a political visionary, principally for his views on non-violence and freedom. In this Essay, I have attempted to show that his status as a visionary thinker deserves extension well beyond the political domain, to a distinctively legal issue: copyright law.

Instead of adopting a position on the usefulness of copyright along the lines suggested by his abstract economic ideas, Gandhi's views on copyright were informed almost entirely by his unique philosophy of action—which he termed “practical idealism”. Distinctively pragmatic in orientation, and focused as it was on the context and consequences of his engagement with an institution, Gandhi's approach to copyright exhibits a nuance, practical wisdom, and masterful deployment of the institution on a reasoned basis. In interacting with the institution and working through its various moving parts, we see Gandhi intertwining his views on freedom, access to knowledge, censorship, and creative self-expression with his training as lawyer in the U.K., and his experience as a lawyer-activist in South Africa. Gandhi's attempt to achieve a measure of coherence (in approach) during these interactions remains a powerful example of the virtues inherent in practical reasoning as a mechanism of balancing incommensurable normative values situationally.

Gandhi's engagement with copyright law bears the indelible imprint of his training as a lawyer. Gandhi himself of course never once acknowledged the role his training and work as a lawyer played in developing his philosophy of action. Nonetheless, the undeniable link between philosophical and legal pragmatism as ways of thinking, together with the uncanny resemblance that Gandhi's own version of pragmatism bears to its American counterpart, suggests that it likely played an important, even if only subconscious role in the evolution of his philosophy of action.

In adopting a pragmatic approach to copyright law, and engaging with the institution in a situation-sensitive, analytical manner, Gandhi foreshadowed a unique approach to copyright law that I have described in this Essay as “copyright pragmatism.” Copyright pragmatism is today hardly unique or indeed rare, and is indeed an approach adopted by a large number of modern copyright scholars, lawyers, and activists. It is perhaps, as William James, said of pragmatism more generally, “a new term for some [established] ways of thinking²⁵⁶”. Yet, what makes Gandhi's

²⁵⁶ WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING: POPULAR LECTURES ON PHILOSOPHY (1910).

identification and development of the approach on his own unique and noteworthy is that he did it in an era, and under conditions, where the costs and harms of an over-expansive copyright regime were neither obvious nor salient in the public mind. Indeed, it wasn't until the year 1996 that scholars came to see copyright law as fraught with problems for access, free speech, and creative freedom, spawning the movement that is today known as "cultural environmentalism."²⁵⁷ Gandhi's recognition of the problem nearly eight decades before the movement is ample testament to his wisdom and foresight.

In addition, in his commitment to action rather than abstraction, Gandhi didn't just stop at identifying the problem. He produced remedies and solutions, which while personal to him, nonetheless sought to minimize the systemic harms and costs of the copyright system when he interacted with it. As his interactions with copyright became more frequent, he eventually developed approaches that were openly subversive, and engaged the system primarily to undermine its core goals and assumptions, while infusing it with others that were of direct relevance to him. The closest analogues one finds in modern copyright discourse to Gandhi's copyright pragmatism are the Open Source and Creative Commons licensing movements, both of which seek to unbundle copyright's bundle of rights, and use them strategically rather than under a one-size-fits-all rubric.

Open source licensing involves the assertion of copyright by a creator who then allows it to be used or copied under a mass market license that emphasizes among other things, the ideals of "unencumbered redistribution," the creator's right to be attributed, and the maintenance of the integrity of the work.²⁵⁸ Even though it views copyright as fundamentally freedom-impeding, the open source movement chooses to neutralize copyright's harms by asserting copyright in a work and then licensing it away under freedom-promoting conditions.²⁵⁹ It is perhaps no coincidence that founder of the open source movement characterized it as a form of "pragmatic idealism."²⁶⁰ In a largely similar vein, Creative Commons, which similarly employs creative licensing techniques to unbundle copyright's various entitlements, has been characterized by

²⁵⁷ James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997).

²⁵⁸ See Robert W. Gomuliewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 39 Hous. L. Rev. 179, 185-89 (1999).

²⁵⁹ *Id.* at 185-86.

²⁶⁰ RICHARD M. STALLMAN, *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* 129 (2d ed. 2010) (describing the "copyleft" movement as a form of pragmatic idealism).

scholars as subversive, minimalist, and as embracing a wide-range of normative ideologies;²⁶¹ indeed, ideas that one might perfectly associate with Gandhi's copyright pragmatism. Creative Commons emerged in 2001 as a response to the fragmented nature of the copyright debate that had been initiated a few years earlier.²⁶²

That Gandhi did in his interactions with copyright, what the "copyleft" and Creative Commons initiatives would do decades later, certainly doesn't diminish the novelty and importance of these later movements. It instead highlights the feasibility of copyright pragmatism emerging as a viable alternative to both copyright minimalism and fundamentalism, through similar incremental *legal* techniques that actively engage the copyright system, but seek to creatively infuse it with ideas, values, and ends otherwise alien to copyright's core apparatus. Discussions of copyright somewhat routinely ignore the legal origins of the institution, and the role it might play in alleviating many of copyright's basic problems by enabling actors to engage in a process of practical reasoning long. Gandhi's adventures with copyright law provide us with an inspiring example of how this might be fruitfully achieved.

²⁶¹ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 376 (2005).

²⁶² *Id.* at 378.