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## Gandhi and Copyright Pragmatism

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# Gandhi and Copyright Pragmatism

Shyamkrishna Balganesesh\*

*Mahatma Gandhi is revered the world over for his views on freedom and nonviolence—ideas that he deployed with great success during India’s freedom struggle. As a thinker, he is commonly considered to have been a moral idealist: anti-utilitarian in mindset and deeply skeptical of market mechanisms. Yet, when he engaged with copyright law—as a writer, editor, and publisher—he routinely abjured the idealism of his abstract thinking in favor of a lawyerly pragmatism. Characterized by a nuanced understanding of copyright law 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, emanating from his training in the common law, which has thus far been ignored. This Essay traces the development of Gandhi’s views on copyright to show how he anticipated several of the central debates that are the staple of today’s copyright wars, and developed an approach to dealing with copyright’s various problems—best described as “copyright pragmatism.” Revealing distinct similarities to both legal and philosophical pragmatism, copyright pragmatism critically engages with copyright as a legal institution on its own terms, examining its working contextually with an eye toward its various costs, benefits, and normative goals. 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*.<sup>1</sup>

## 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, on December 31, 2008.<sup>2</sup> Commonly regarded as the "Father of the

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

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 (Dec. 29, 2008), <http://www.livemint.com/Consumer/EnoGTzI92FV1pw5xtiHA70/Copyright-on-Gandhi8217s-work-set-to-expire-on-1-January.html>; Vikram Rautela,

Nation” in India,<sup>3</sup> Gandhi died in 1948, bequeathing the copyright in his works to a trust that he had helped establish, the Navjivan Trust.<sup>4</sup> A prolific writer, Gandhi had authored thousands of articles and several books, including an autobiography that has since been translated into several languages.<sup>5</sup> Under India’s existing copyright law, the copyright in his works was to subsist for a period of sixty years after his death.<sup>6</sup>

News that Gandhi’s works would fall into the public domain generated calls for extending the copyright in his works retroactively.<sup>7</sup> As the leader of the Indian freedom movement, whose philosophy had influenced numerous other social 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.<sup>8</sup> The United States had just succeeded in effecting a similar retroactive extension for Walt Disney’s copyright in Mickey Mouse,<sup>9</sup> and India itself had introduced a similar extension for Nobel Laureate Rabindranath Tagore’s works in 1991.<sup>10</sup> Yet, very shortly after the idea of extending the copyright in Gandhi’s works became public, the Navjivan Trust

*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* (1989) (noting that Gandhi is “often assumed to be the father of modern India”).

4. Mohandas Gandhi, *A Testament* (Feb. 19, 1940), in 77 *THE COLLECTED WORKS OF MAHATMA GANDHI* 348 (1999), available at <http://www.gandhiserve.org/e/cwmg/cwmg.htm> [hereinafter CWMG].

5. See generally CWMG, *supra* note 4 (compiling all of Gandhi’s written work in a series of multiple volumes).

6. The Copyright Act, No. 3 of 1914, § 3 (India) (confirming the application of Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 3 (Eng.)).

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/article/2007/01/29/us-india-gandhi-mandela-idUSDEL34219720070129> (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, *Commemorating Martin Luther King Jr.: Gandhi’s Influence on King*, SFGATE (Jan. 20, 2003), <http://www.sfgate.com/opinion/openforum/article/COMMEMORATING-MARTIN-LUTHER-KING-JR-Gandhi-s-2640319.php> (noting King’s belief that Gandhi influenced the former’s approach to social reform in the civil rights movement).

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

10. Debamitra Mitra, *‘Visva Bharati Has Been Clumsy with Copyright,’* TIMES OF INDIA (Dec. 29, 2001), [http://articles.timesofindia.indiatimes.com/2001-12-29/kolkata/27250783\\_1\\_visva-bharati-copyright-rabindranath](http://articles.timesofindia.indiatimes.com/2001-12-29/kolkata/27250783_1_visva-bharati-copyright-rabindranath); Debajyoti Chakraborty, *Extension Sought on Tagore’s Copyright*, TIMES OF INDIA (Dec. 8, 2001), [http://articles.timesofindia.indiatimes.com/2001-12-08/india/27229607\\_1\\_nobel-prize-tagore-copyright](http://articles.timesofindia.indiatimes.com/2001-12-08/india/27229607_1_nobel-prize-tagore-copyright).

announced that it would not seek such an extension of term, but would instead allow Gandhi's works to enter the public domain.<sup>11</sup> Some Gandhians claimed that Gandhi "never wanted copyright law," and that he was opposed to the institution.<sup>12</sup> Although ownership of Gandhi's copyrights was an enormous source of revenue for the Trust, it was willing to sacrifice this income in order to abide by Gandhi's own principles and beliefs.<sup>13</sup> While this development generated a good deal of interest in leading Indian newspapers at the time,<sup>14</sup> to those familiar with Gandhi's economic philosophy and views on the market, it seemed but logical.

Gandhi's beliefs on nonviolence, truth, and freedom are well known the world over and commonly revered. Less respected, 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.<sup>15</sup> 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 Jeremy Bentham's oft-quoted ideal of the "greatest happiness of the greatest number."<sup>16</sup> Simple utilitarianism, he believed, would provide insufficient protection for minorities and other disadvantaged groups within society, by treating them as mere numbers.<sup>17</sup>

Gandhi's philosophical opposition to market-oriented utilitarianism was at first thought to have informed his rejection of copyright. Indeed, this is also understood to have been true for his opposition to private ownership.<sup>18</sup> 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 large.<sup>19</sup> To those familiar with Gandhi's views on property, the claim that he rejected copyright cohered.

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11. *Gandhi Works To Go Public 60 Years After His Death*, *supra* note 7.

12. 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 Sabarmati Ashram Preservation and Memorial Trust).

13. Jahnvi 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](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. *See supra* note 13.

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

16. *Id.* at 1–2; *see also infra* text accompanying notes 30–37.

17. *See* M.K. GANDHI, SARVODAYA 4 (Bharatan Kumarappa ed., 1954) [hereinafter GANDHI, SARVODAYA].

18. M.K. GANDHI, MY THEORY OF TRUSTEESHIP 102 (Anand T. Hingorani ed., 1970) [hereinafter GANDHI, TRUSTEESHIP].

19. *Id.* at 43–45, 49–54.

However, the rhetoric about Gandhi's supposed "rejection" of copyright unfortunately portrayed him as a naïve idealist, who, despite being well intentioned and noble in motive, failed to fully appreciate the practical importance of copyright law in the production and dissemination of original expression. The Navjivan Trust's position portrayed Gandhi's views on the subject as saint-like and utopian, and while worthy of admiration, incapable of emulation in the real world.

In reality, however, nothing could be further 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 that he was a lawyer.<sup>20</sup> Trained in the English common law, Gandhi practiced in South African courts before returning to India.<sup>21</sup> Much of his political theory and strategy drew heavily from his legal training, and he readily merged law and politics in his early days as a lawyer in South Africa.<sup>22</sup>

Gandhi's engagement with copyright, a *legal institution*, was thus hardly visceral, or uninformed. An examination of his writings between 1926 and 1946 reveals that his engagement with the institution was characterized by a lawyerly pragmatism and nuance that is rarely ascribed to Gandhi today. While this engagement undoubtedly reveals a deep unease about the utility of copyright and its 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 it and then develop complex mechanisms of abandoning his rights, fragmenting them, or licensing them to the public for free. He even acknowledged the importance of copyright as a mechanism for attribution, and sought to segregate copyright's market-based aspects from its attributive ones. Toward the later part of his life, he also came to deploy 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.<sup>23</sup>

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20. For perhaps the first exhaustive and illuminating account of how Gandhi's training in and practice of law influenced him throughout his political career, see CHARLES DISALVO, M.K. GANDHI, ATTORNEY AT LAW: THE MAN BEFORE THE MAHATMA, at x (2012).

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

22. See MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 155–59 (Beacon Press 1993) (1957) [hereinafter GANDHI, AUTOBIOGRAPHY].

23. See *History*, CREATIVE COMMONS, <http://creativecommons.org/about/history> (last visited Sept. 3, 2013); see also Duncan Geere, *The History of Creative Commons*, WIRED (Dec. 13, 2011), <http://www.wired.co.uk/news/archive/2011-12/13/history-of-creative-commons>.

Gandhi's nuanced engagement with 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. Interestingly, not once in his discussion of copyright did 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. Gandhi's cautious engagement with, and contextual antipathy toward, copyright law thus hold several important lessons for today's debates about the proper scope of copyright law—debates that are routinely cast in overly simplistic and binary terms.

First, Gandhi's use of copyright law to realize goals that are antagonistic to copyright's dominant utilitarian understanding reveals how copyright's legal framework may be used to realize a plurality of normative goals. Value pluralism—the idea that there can be multiple, equally correct normative values that bear on a decision<sup>24</sup>—has been considered in recent times essential to discussions of copyright and intellectual property. Yet, scholars and activists have struggled to develop mechanisms and strategies to realize this pluralism in practice. Gandhi, on the other hand, developed a mechanism of his own to realize this pluralism. He chose to engage with the institution and its utilitarian framework despite his personal discomfort with its purported goals, only to circumvent those goals from within. Gandhi thus embraced the institution in its existing form and then deployed its legal machinery to suit his own purposes.

Second, Gandhi's engagement with copyright's legal structures reflects a practical approach to resolving conflicts between incommensurable ends. In the political sphere, Gandhi is commonly considered an "idealist." Yet, perhaps as a consequence of his legal training and despite his disdain for the legal profession as it existed, Gandhi's own dealings with copyright showcase a form of pragmatism characterized by a willingness to compromise when needed and a readiness to alter one's thinking when circumstances change. While it had its roots in the Indian freedom movement, Gandhi's thinking bears an uncanny resemblance to American pragmatism—a philosophical and legal movement that was beginning to take shape around the same time in the United States.

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.<sup>25</sup> Pragmatism took shape in the nineteenth century, principally through the writings of Oliver

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24. See Elinor Mason, *Value Pluralism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 29, 2011), <http://plato.stanford.edu/entries/value-pluralism>.

25. 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, 1564–65 (2010).

Wendell Holmes Jr., Charles Peirce, William James, and John Dewey. While there is no evidence that Gandhi and the nineteenth century American pragmatists ever interacted, the parallels in their thinking and approach are stark and revealing. This parallelism lays the groundwork for the development of a unique approach to engaging the copyright system—“copyright pragmatism.”

Copyright pragmatism emphasizes a healthy and constructive skepticism toward the institution, while concurrently recognizing important institutional goals and objectives. As a practical method, copyright pragmatism infuses copyright law with a plurality of normative ideals by relying on practical reasoning and situation sensitivity. As a way of thinking, 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—the dominant positions in today’s “copyright wars.”<sup>26</sup> In the process, copyright pragmatism enables the institution to continue functioning, while at the same time questioning the universalizability of its core values and premises.

This Essay reconstructs Gandhi’s views on copyright law to show how they sit somewhat oddly with his abstract philosophical views on markets, ethics, and property. It then shows how Gandhi’s engagement with copyright reveals a complex interplay of moral, political, ethical, and legal ideas, which the simplistic lore about his rejection of the institution fails to capture. This Essay thus sets the stage for a broader examination of Gandhi’s views on the normativity of law, and the unstated role he envisioned for legal reasoning and legal institutions in his overall worldview.

Part I begins by setting out Gandhi’s basic economic philosophy, and the simplistic view of copyright law that is commonly attributed to him. Focusing on his rejection of utilitarianism, markets, modernity, and ownership as autonomous ideals, this view assumes that Gandhi rejected copyright law as alien to his thinking and belief.

Part II discusses Gandhi’s actual engagement with copyright. It reconstructs Gandhi’s views on copyright law by focusing on his engagement with copyright between 1926 and 1946, when he wrote and published extensively. Here, we see three different strands of thinking 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—that of

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26. For recent discussion of these two positions in the copyright wars, see WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 1–41 (2009); 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. 81, 82 (2009); Neil Weinstock Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996); 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>.

rejecting the institution in its entirety. What is often missed, however, is that Gandhi's rejection of the institution was a deeply personal one, rather than one that he advocated 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," Gandhi willingly accepts copyright for, among others, market-driven and distributive purposes. In the third strand, that of "strategic deployment," Gandhi actively uses copyright law to further other normative ideals—truth, expressive diversity, and ensuring that market motives do not displace other non-market-based ideals.

Part III 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. 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 reveal a nuanced, incremental approach to the institution's costs and benefits, its fundamental problem of incommensurability, and its normativity as a "legal" institution. Lastly, Part III suggests that copyright pragmatism might hold important structural lessons for contemporary debates about the proper scope and purposes of copyright law.

## I.

### THE MYTH OF GANDHI AS A COPYRIGHT NIHILIST

The general perception of the failed attempt to extend the copyright in Gandhi's work is that Gandhi himself was opposed to copyright and rejected its utility altogether. Opposition to copyright is hardly new, though it has grown more significant in the last decade as the infamous "copyright wars" have entered the public spotlight.<sup>27</sup> Gandhi's supposed rejection of copyright seemingly allied 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 purported rejection of copyright actually complemented his views on the market, utilitarianism, property, and modernity.

#### *A. Gandhi's Economic Philosophy*

To fully explicate Gandhi's economic ideas with any measure of brevity is a challenge. Gandhi never developed his abstract philosophies—economic or otherwise—in a coherent and comprehensive manner, requiring scholars to piece them together from his writings over extended periods of time. Additionally, as many scholars have noted, Gandhi's economic thinking was

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27. See, e.g., PATRY, *supra* note 26.

drawn in large part from his spiritual, religious, ethical, and moral philosophy.<sup>28</sup> Consequently, cabining his economic ideas and studying them in isolation will likely render them both incomplete and on occasion incomprehensible. This Section provides a short overview of four ideas that were central to Gandhi's economic philosophy, which on their face suggest an oppositional stand toward copyright, and feed into the myth of Gandhi's copyright nihilism.

### *1. The Rejection of Utilitarianism*

Of the various aspects of Gandhi's economic thinking, his rejection of utilitarianism is perhaps the best known; it is commonly thought to have formed an organizing principle in his own economic thinking.<sup>29</sup> This is at best an incomplete account of how Gandhi developed his own economic philosophy, for, while he certainly rejected utilitarianism, his reasons for doing so were influenced by 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.<sup>30</sup>

Gandhi's objections to basic utilitarianism had two independent bases. First, given simple utilitarianism's exclusive focus on maximizing aggregate welfare or happiness, Gandhi was dissatisfied with its willful antipathy toward distributive questions.<sup>31</sup> Gandhi opposed the idea that for the benefit of a majority, a minority of society could have their interests and welfare altogether ignored.<sup>32</sup> Second, he viewed utilitarianism—to the extent that it was a normative theory for action—as morally and ethically vacuous. Speaking about utilitarianism as commonly understood, he observed how "happiness is supposed to mean only physical happiness and economic prosperity," which implied that "[i]f the laws of morality are broken in the conquest of this happiness, it does not matter very much."<sup>33</sup>

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

29. See Rivett, *supra* note 15, at 1–2.

30. See Letter from Mahatma Gandhi to Jal A.D. Naoroji (June 4, 1932), in 55 CWMG, *supra* note 4, at 481, 482.

31. DASGUPTA, *supra* note 28, at 8–9. It is crucial to emphasize here that Gandhi's discomfort with utilitarianism did not 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.

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

33. GANDHI, SARVODAYA, *supra* note 17, at 7.

Gandhi's objections to utilitarianism thus have a common origin: utilitarianism's willingness to distance individual and aggregate welfare from each other not just as a descriptive matter, but also as a normative principle. It certainly was not that Gandhi did not care about "welfare." To the contrary, Gandhi remained committed to the idea of welfare, insisting that it focus on how individuals motivate themselves, instead of attempting to aggregate their preferences in the abstract.

Gandhi's own idea of welfare is captured in his principle of *sarvodaya*, or the uplift (or welfare) of all.<sup>34</sup> The first operating idea of *sarvodaya* is the recognition that "the good of the individual is contained in the good of all."<sup>35</sup> Instead of viewing individual welfare as likely furthered by an aggregation of social welfare—a deductive approach—Gandhi's notion of welfare inductively treats collective social welfare as a central normative tenet of how the very idea of individual welfare ought to be conceptualized. Rather than taking welfare maximization as the simple attempt to aggregate (maximize) people's divergent preferences, Gandhi sought to inject substantive content into it, by connecting it to his ethical theory of behavior. To Gandhi, the failure to add normative content to the idea of "welfare" was 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" type of individual action that society cared about.<sup>36</sup> This, according to Gandhi, necessitated seeing individual and social welfare as intricately connected to each other.<sup>37</sup>

In summary, Gandhi did reject utilitarianism. Yet, he did not construct his own philosophy in opposition to it. His rejection of utilitarianism did not form the basis of his thinking about welfare, but was instead a consequence of his own philosophy rooted in a richer normative account of individual action and morality.

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34. *See id.*

35. GANDHI, *AUTOBIOGRAPHY*, *supra* note 22, at 299.

36. *See* DASGUPTA, *supra* note 28, at 10; UNTO TÄHTINEN, *THE CORE OF GANDHI'S PHILOSOPHY* 38–39 (1979).

37. Gandhi's objection to utilitarianism is in many ways similar to Bernard Williams's criticism of utilitarianism as a stand-alone philosophy. Like Gandhi, Williams also 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 complacent with its focus on particular states of affairs, and does not distinguish between specific actions that bring about those conditions, or 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 those actions produce. This is what Williams refers to as the value of "integrity." *Id.* at 108. Where Gandhi and Williams diverge, however, is in their orientation. Williams' objection to utilitarianism is largely a theoretical one, which explains why much of his criticism routinely translates into a criticism of all consequentialism. Gandhi's critique of utilitarianism, however, was practically motivated, which allowed him to embrace a consequentialist orientation in other contexts.

## 2. *Limiting Individual Preferences*

Gandhi's rejection of utilitarianism was a natural consequence of his moral vision of how individual behavior and action ought to be channeled in society. Gandhi's normative economic philosophy was deeply informed by his ethical vision of society and individual behavior therein.<sup>38</sup> This in turn produced two important characteristics. The first is 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 his ethical vision. Gandhi himself often observed that he did "not draw a sharp distinction between economics and ethics."<sup>39</sup>

The second feature, which also derives from Gandhi's ethical vision, is that although his economic account is rooted in an ethical one, the normative significance of the theory was only ever meant to be realized through internal and not external motivations. Gandhi, in other words, believed that adherence to the ethical and economic visions he advocated for would come about through individuals' self-realization of its virtues, and never in a top-down or coercive manner.<sup>40</sup> Accepting his normative precepts was thus a deeply personal act, and Gandhi believed that he could bring about this self-realization through example and elaboration—which perhaps accounts for why he continually reasoned publicly through his numerous, often contradictory, actions.<sup>41</sup>

One of the fundamental ways in which Gandhi's ethical vision informed his economic ideas involved his views on individual preferences and wants.<sup>42</sup> To Gandhi, conspicuous consumption was morally reprehensible. He argued that an individual's welfare is best achieved through limiting the wants and desires developed over time.<sup>43</sup> He believed that once the idea of "maximizing" one's desires enters the picture, it is 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,

38. See DASGUPTA, *supra* note 28, at 7; O.P. MISRA, *ECONOMIC THOUGHT OF GANDHI AND NEHRU: A COMPARATIVE ANALYSIS* 14 (1995).

39. Mahatma Gandhi, *The Great Sentinel*, in 24 CWMG, *supra* note 4, at 412, 415.

40. 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).

41. See 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).

42. See DASGUPTA, *supra* note 28, at 14; see also GUPTA, *supra* note 32, at 4–13.

43. See GANDHI, *TRUSTEESHIP*, *supra* note 18, at 8–9; see also MOHANDAS K. GANDHI, *INDIAN HOME RULE* 37 (Ganesh & Co. 1922) (1910) [hereinafter GANDHI, *INDIAN HOME RULE*]; Mahatma Gandhi, *Who Can Offer Satyagraha?*, in 9 CWMG, *supra* note 4, at 339, 342 ("Contentment is happiness.").

but rather the limitation of them.<sup>44</sup> Ajit Dasgupta, a leading scholar of Gandhi's economic ideas, observes that "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. . . . [I]t is from these that one's long-run happiness can be found, not just from obtaining what one likes at the moment."<sup>45</sup> To Gandhi, preference-satisfaction, the organizing ideal of utilitarianism, was a misguided idea. According to him, satisfaction necessitated an outer limit. As a result, Gandhi considered preference-limiting a virtue worthy of cultivation, and one that when realized would contribute to overall social welfare through the interplay of individual and collective well-being.

### 3. *Markets and Modernity*

Flowing directly from his rejection of utilitarianism and the idea of preference limitation, Gandhi's economic philosophy was fundamentally opposed to what he called "modern civilization,"<sup>46</sup> which was defined by industrialization, an exclusive focus on the material (as opposed to moral) advancement of society, and the unending multiplication of wants.<sup>47</sup> To Gandhi, the market and its forces were mechanisms that reinforced modern civilization. They were mechanisms of greed and selfishness, which while advancing material prosperity, always compromised the moral and ethical dimensions of social existence.<sup>48</sup> Market competition was thus considered one of the "most inhuman among the maxims laid down by modern economics."<sup>49</sup> As a result, Gandhi regarded Adam Smith's basic tenets as deeply "disturbing" and believed that society needed to "overcome" them.<sup>50</sup>

Gandhi's vitriolic attack on markets and modern civilization was largely in response to colonial rule that merged the political ideals of imperialism with capitalism's economic goals.<sup>51</sup> It might be assumed from this that Gandhi was sympathetic to the communist and socialist ideas of Marxism that were shaping up and gaining prominence in Russia. However, his merger of means and ends in action forced him to part ways with communism as a philosophy, to the

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44. See RONALD J. TERCHEK, *GANDHI: STRUGGLING FOR AUTONOMY* 51 n.18 (1998) (quoting and critiquing Gandhi's views on contentment).

45. DASGUPTA, *supra* note 28, at 15.

46. GANDHI, *INDIAN HOME RULE*, *supra* note 43, at 6, 39 ("This booklet is a severe condemnation of 'modern civilization.'"); see also RAJESHWAR PANDEY, *GANDHI AND MODERNISATION* 23 (1979).

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

48. *Id.* at 299; see also Mahatma Gandhi, *Speech at Muir College Economic Society, Allahabad*, in 15 *CWMG*, *supra* note 4, at 272, 277.

49. Mahatma Gandhi, *The Secret of It*, in 25 *CWMG*, *supra* note 4, at 12, 16.

50. Mahatma Gandhi, *Interview to Khadi Workers*, 64 *CWMG*, *supra* note 4, at 339, 339.

51. See Ishii, *supra* note 47, at 299–300.

extent that it relied on violence to achieve its goals.<sup>52</sup> Gandhi also believed that the traditional brand of normative communism was premised on the same beliefs about human behavior as market capitalism, namely that individuals were selfish, greedy, and consumption-driven.<sup>53</sup>

Gandhi's rejection of Marx's traditional communism was inevitable also because it portrayed Indian civilization prior to the advent of the British as barbaric and irrational. Writing about British rule in India, Karl Marx observed in 1853 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 only social revolution ever heard of in Asia."<sup>54</sup> Whereas communism saw the development of state collective ownership as an advancement over both capitalism and traditional society, Gandhi's philosophy was motivated by the idea of returning the country to its pre-British glory.<sup>55</sup>

Reviving village communities and the various social structures that existed therein was critical to Gandhi. He envisioned the 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.<sup>56</sup> Additionally, this move originated in Gandhi's 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.<sup>57</sup> Gandhi suggested that it was the absence of such self-reliance that had allowed the British to colonize India, and that unless India regained its self-reliance after the British's departure, the country continued to risk re-colonization and serial exploitation by market-driven imperialist countries.<sup>58</sup> To him, markets and modernization were thus regressive devices.

#### 4. Property and Trusteeship

The final tenet of relevance in Gandhi's economic philosophy is "trusteeship," which he advocated as a substitute for traditional private property ownership.<sup>59</sup> Building on his disavowal of markets, utilitarianism, self-

52. See GANDHI, TRUSTEESHIP, *supra* note 18, at 56–57.

53. *Id.* at 56–58.

54. Karl Marx, *The British Rule in India*, N.Y. DAILY TRIB., June 25, 1853, reprinted in 12 MARX & ENGELS COLLECTED WORKS 125, 132, available at <http://www.marxists.org/archive/marx/works/cw> (last visited Sept. 3, 2013).

55. See Ishii, *supra* note 47, at 302, 307–11.

56. Mahatma Gandhi, *A Discussion with Maurice Frydman*, in 69 CWMG, *supra* note 4, at 320, 321 ("[I]f the village perishes, India will perish too.").

57. See GANDHI, INDIAN HOME RULE, *supra* note 43, at 173–74.

58. See Ishii, *supra* note 47, at 302–03.

59. See generally GANDHI, TRUSTEESHIP, *supra* note 18; ARCHNA KAPOOR, GANDHI'S TRUSTEESHIP: CONCEPT AND RELEVANCE (1993); B.K. Roy Burman, *Gandhi's Concept of Trusteeship: A Dimension of Socialist Humanism*, in GANDHI AND ECONOMIC DEVELOPMENT 171

interested behavior, and modernity, Gandhi borrowed 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 developed the idea of trusteeship from his knowledge of the law of trusts and the notion of fiduciary obligations imposed by trust law.<sup>60</sup> Under his conception of trusteeship, property owners were to remain in possession of their wealth and assets, could use whatever was reasonably needed by them for their “personal need,” and then would act as trustees over the rest and use it for the benefit of society at large.<sup>61</sup> Thus, property owners were to limit their self-interested behavior.<sup>62</sup> In Gandhi’s idea of trusteeship, then, we see elements of his other economic principles, most importantly his idea of limiting personal wants.

What is perhaps most interesting about Gandhi’s idea of trusteeship is that Gandhi himself viewed it as more of a theory, or ideal, rather than as a workable movement or plan.<sup>63</sup> 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.”<sup>64</sup> Trusteeship was thus an aspirational ideal worthy of emphasis.

Interestingly though, trusteeship did not entail the wholesale rejection of property or the renunciation of all wealth.<sup>65</sup> Trusteeship was a *form* of ownership that imposed affirmative communal obligations on owners. Individuals in possession of wealth, or those engaged in the business of making wealth—like businessmen—were not required to renounce their assets in favor of others. Instead, they were required to hold these assets—or at least some part of them—as custodians for society.<sup>66</sup>

In summarizing trusteeship, Gandhi 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.”<sup>67</sup> In this formulation, we see three

(B.P. Pandey ed., 1991); M.L. Dantwala, *The Trusteeship Formula*, in GANDHI AND ECONOMIC DEVELOPMENT, *supra*.

60. See, e.g., DASGUPTA, *supra* note 28, at 23; Geeta Abrol, *Gandhian Doctrine of Trusteeship and Its Relevance to Modern Times*, in GANDHIAN THOUGHT AND CONTEMPORARY SOCIETY 145, 147 (J.S. Mathur ed., 1974).

61. GANDHI, TRUSTEESHIP, *supra* note 18, at 72.

62. *Id.* at 73–75.

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

64. Mahatma Gandhi, *Interview to Nirmal Kumar Bose*, in 65 CWMG, *supra* note 4, 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.

*Id.*

65. GANDHI, TRUSTEESHIP, *supra* note 18, at 94 (“Legal ownership in the transformed condition [of trusteeship] vests in the trustee, not in the State.”).

66. *Id.* at 94–95.

67. *Id.* at 102.

important analytical and conceptual moves. First, trusteeship is not an absolute rejection of private property. Instead, it subjects private ownership to a new consequentialist purpose: social welfare. What *is* rejected in this formulation is the idea of property as an individual's "despotic dominion."<sup>68</sup> Second and relatedly, by subjecting private property to social welfare, Gandhi indirectly rejects the idea that property rights originate in natural law or that they are naturally given, an idea today associated with Locke.<sup>69</sup> Third, what Gandhi rejects—in addition to the notion of "absolute property"—is the idea of private ownership as a "right."<sup>70</sup> To Gandhi, a sense of entitlement 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.<sup>71</sup> To the extent that Gandhi considered private ownership a valid institution, he saw it as revolving 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.<sup>72</sup>

### *B. Gandhi's Purported Rejection of Copyright*

In combining the elements of Gandhi's socio-economic philosophy, it is easy to assume that he "opposed" copyright in its entirety. His writings on social welfare, utilitarianism, ethics, markets, and property rights all questioned the 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<sup>73</sup> and the public perception that the copyright system served the interests of no more than a few groups of commercially powerful

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68. This is an idea traced back to the English common law theorist William Blackstone. 2 WILLIAM BLACKSTONE, COMMENTARIES 3 (Georgetown University 1922). It is debatable what exactly the idea meant—beyond being an interesting metaphor. See Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998).

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

70. GANDHI, TRUSTEESHIP, *supra* note 18, at 100 ("[R]ights that do not flow directly from duty well-performed, are not worth having."). To some, Gandhi consciously avoided a theory of rights. See Ronald J. Terchek, *Gandhi and Moral Autonomy*, 13 GANDHI MARG 454 (1992). But see DASGUPTA, *supra* note 28, at 45 (suggesting Gandhi's conception of rights took second place to duties).

71. Mahatma Gandhi, Presidential Address at Kathiawar Political Conference, Bhavanagar (Jan. 8, 1925), in 30 CWMG, *supra* note 4, at 53, 68 ("The true source of rights is duty."); Mahatma Gandhi, Talk with Workers of Rajkot Praja Parishad (Mar. 12, 1939), in 75 CWMG, *supra* note 4, at 175, 176 ("[T]he right to perform one's duties is the only right that is worth living for and dying for."); Letter from Mahatma Gandhi to Julian Huxley (circa Oct. 17, 1947), in 97 CWMG, *supra* note 4, 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").

72. See GANDHI, TRUSTEESHIP, *supra* note 18, at 102–03.

73. For an overview and critique of this trend, see Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1333–35 (2004).

creators,<sup>74</sup> 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 for several reasons.

First, copyright law in most of the common law world, including British India, is commonly understood as originating in utilitarianism.<sup>75</sup> Copyright is justified 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.<sup>76</sup> This production of expression, in turn, is thought to contribute to the “progress” of society.<sup>77</sup> Indeed, the world's first copyright statute, the Statute of Anne, described itself as “[a]n Act for the [e]ncouragement of [l]earning”<sup>78</sup>—an idea mentioned in the first U.S. copyright statute as well.<sup>79</sup> 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 copyright's utilitarian justification. To the extent then that one adopts such an outlook toward copyright,<sup>80</sup> the institution unquestionably sits at odds with Gandhi's deep discomfort with utilitarianism and its facial agnosticism toward distributive and ethical questions.

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, motivated by the desire to maximize their own self-interest via the market.<sup>81</sup> On its own, copyright law

74. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

75. See Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009); Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) (describing itself as “An Act for the Encouragement of Learning”); Lionel Bentley, *Copyright, Translations, and Relations Between Britain and India in the Nineteenth and Early Twentieth Centuries*, 82 CHL.-KENT L. REV. 1181, 1188 (2007) (hinting at the reliance on the same utilitarian rhetoric of “progress” and “advancement” in the creation of the Indian copyright regime in British India).

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

77. See U.S. CONST. art. I, § 8, cl. 8.

78. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

79. Act of May 31, 1790, 1 Stat. 124, 124.

80. It is worth emphasizing that copyright's utilitarian justification is hardly axiomatic, despite its dominance in the scholarly literature and judicial opinions. In recent times, scholars have questioned utilitarianism's fundamental premise. See, e.g., MADHAVI SUNDER, *FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE* 31 (2012) (arguing that intellectual property, including copyright, should “consider values beyond simply the value of incentivizing production”); Diane Leenheer Zimmermann, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011).

81. See Balganes, *supra* note 75, at 1573.

fuels the assumption that preferences can be satisfied without a predetermined outer boundary. The urge to maximize their own personal welfare is presumed to motivate creators to produce expressive work. Gandhi's ethical ideal of limiting one's preferences and desires, thus, stands in strong contrast to copyright's operating assumptions about individual behavior.

Third, as a market-based mechanism, copyright 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—seen copyright as largely irrelevant, and perhaps even incompatible with traditional, collective living. Whether empirically accurate or not, Gandhi emphasized self-sufficiency, sharing, and spiritual and ethical motivation through traditional values and actions.<sup>82</sup> Copyright, which emerged in the industrial era and in response to the mechanization of the printing industry,<sup>83</sup> might very likely—based on his abstract economic ideas—have seemed to Gandhi to be incompatible with his vision that the essence of India was to be found in its villages.

Finally, copyright has always been structured as an institution of private ownership.<sup>84</sup> Regardless of whether copyright thinking ought to emphasize its nascent similarity to other real and personal property institutions or not, it remains a reality that copyright's structure of exclusive rights is modeled on the property idea of exclusion. As discussed earlier, Gandhi saw private ownership as a necessary evil. He considered it an institution that could not be rejected, but one that at the same time did not need encouragement. To Gandhi, property was worthy of serious internal reform by altering the core ideas motivating its functioning—that is, the idea of trusteeship. In light of these beliefs, and copyright's nature as an ownership interest, it is thus easy to see why Gandhi's reluctant acceptance of private property might have translated into an opposition to the institution of copyright.

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In short, Gandhi's abstract economic philosophy contained numerous strands corroborating the belief that he rejected copyright as an institution. Yet, in situating copyright within the skein of his overall economic ideas, it is easily forgotten that Gandhi himself engaged copyright law over the course of his lifetime. Through these engagements emerges a picture very different from the one that a bare reliance on his abstract socioeconomic thinking might suggest.

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82. See generally M.K. GANDHI, *VILLAGE SWARAJ* (1962) (examining these values in the context of rural village life).

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

84. *Id.* at 1 (noting how copyright emerged as a regime of “literary property”).

## II.

## GANDHI'S INTERACTIONS WITH COPYRIGHT LAW

Gandhi came in contact with the copyright system several times during his lifetime. In each of these instances, his interaction with copyright remained markedly different from what his abstract thinking might have suggested it would be. In addition to diverging from his rejection of utilitarianism and market-based mechanisms, Gandhi's views on copyright law gradually transformed as his engagement with the institution became more frequent. This Part reconstructs this divergence and transformation.

Like his abstract philosophy, Gandhi's views on copyright are contained in his writing and correspondence scattered over an extended 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 that forced him to confront many of copyright's actual costs and benefits in practice. Gandhi's views on copyright were as a result motivated by practical necessity, which endowed 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. Part II.A sets out the gradual transformation of his views over time, while Part 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. During this time, Gandhi's writing and publishing brought him in close contact with the copyright system, and forced him to confront its relationship to the goals of the Indian freedom movement. Gandhi's views on copyright law during this period reveal three related strands of thinking. In the first, the strand of *personal rejection*, Gandhi built on the ideas and beliefs that motivated his socioeconomic 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 began to fade as he saw potential benefits for his goals by engaging the copyright system. Finally, in the third, the strand of *strategic deployment*, Gandhi embraced the copyright system but 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 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 the gradual changes in his position on copyright. In fact, his writing reveals a deep discomfort with these changes, and he went to great lengths to explain them in evolutionary terms. Hence, the suggestion that these were mere contradictions ignores the richness of the practical, situation-specific reasoning that Gandhi undertook in accounting for the evolution of his beliefs.

### *1. Strand One: Personal Rejection*

Gandhi's earliest encounters with copyright conform to his views on utilitarianism and markets, discussed earlier. In them, we see a strong sense of discomfort with copyright's basic structure of allowing authors—or copyright owners—to assert exclusive rights, creating a situation of artificial scarcity for the expression. Yet, Gandhi's discomfort 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.<sup>85</sup> This personal rejection can be contrasted with other instances, where Gandhi's rejection formed an “opposition” to a law.<sup>86</sup> In those instances, 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*.<sup>87</sup> This was not the case when it came to copyright law.

The earliest evidence of Gandhi's interaction with copyright law comes from 1910 and his first published book, *Hind Swaraj*, which translates to “Indian Home Rule.”<sup>88</sup> On the title page of the book's first edition, the line “No Rights Reserved” is featured rather prominently.<sup>89</sup> It is crucial to note that Gandhi had not yet returned to India at the time of the book's first publication, and was deeply immersed in the Indian nationalist movement from South

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85. The idea of personal rejection largely emanates from Gandhi's overall philosophy of political action, found in his idea of *satyagraha*, or nonviolent resistance. Central to *satyagraha* is the idea of self-sacrifice, which connects back to the idea of personal action forming a basis for others to follow. See M.K. GANDHI, *NON-VIOLENT RESISTANCE (SATYAGRAHA)* 47 (Schocken Books 1961) (1951).

86. This was a central component of *satyagraha*, where Gandhi advocated the mass, nonviolent disobedience of an immoral or illegitimate law. See *id.* at iv. He first developed this approach in South Africa, and employed it routinely during the Indian freedom movement. *Id.*

87. This translates to “unjust law is no law,” a phrase commonly attributed to Saint Augustine. See Andrei Marmor, *The Nature of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 25, 2011), <http://plato.stanford.edu/entries/lawphil-nature>.

88. See GANDHI, *INDIAN HOME RULE*, *supra* note 43.

89. *Id.*

Africa.<sup>90</sup> In recent work, Isabel Hofmeyr argues that Gandhi's decision not to assert copyright in the book was a conscious one aimed at ensuring that the book did not become just another commodity.<sup>91</sup> Instead, his decision was motivated by an attempt to treat the production and consumption of books as a "continuous ethical community in which printers, authors, and readers become comrades."<sup>92</sup> In the preface to the first edition, which he also published independently in a newspaper, Gandhi notes that the book draws heavily from materials that he had previously read in the past, and that he was "lay[ing] no claim to originality" in its content.<sup>93</sup> This suggests that Gandhi's decision to avoid asserting copyright may have been also motivated by his own sense of its authorial origins. Additionally, the fact that the Government of India, "His Majesty" at the time, had found the book "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 originating in the Crown.<sup>94</sup>

Gandhi's first substantive interaction with copyright law appears to have been in 1926, after he had returned to India and was immersed in the freedom struggle.<sup>95</sup> A few years prior to this, Gandhi had commenced work on his autobiography, titled *The Story of My Experiments with Truth*.<sup>96</sup> 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*.<sup>97</sup> The former, *Navjivan*, featured the chapters in Gujarati, Gandhi's native language, while the latter contained Gandhi's English translations of the Gujarati versions.<sup>98</sup> By this time, Gandhi's prominence in the Indian freedom movement had risen, and he was considered its leader.<sup>99</sup> Gandhi's autobiography was thus hugely popular among readers, even prior to its completion.<sup>100</sup>

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90. See DiSALVO, *supra* note 20, at 298–99.

91. See Isabel Hofmeyr, *Violent Texts, Vulnerable Readers: Hind Swaraj and Its South African Audiences*, 23 PUB. CULTURE 285, 292–93 (2011).

92. *Id.* at 293.

93. Mohandas K. Gandhi, "Hind Swaraj," in 10 CWMG, *supra* note 4, at 245, 246 [hereinafter Gandhi, *Hind Swaraj*].

94. Mohandas K. Gandhi, *Our Publications*, in 11 CWMG, *supra* note 4, at 35–36. For a similar account, arguing 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).

95. See RAJMOHAN GANDHI, GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE, *supra* note 21, at 258, 278–79 (describing the autobiography's popularity prior to its completion).

96. See GANDHI, AUTOBIOGRAPHY, *supra* note 22.

97. See Mahadev Desai, *Translator's Preface*, in GANDHI, AUTOBIOGRAPHY, *supra* note 22, at xi (noting the book's sequence before publication).

98. See GANDHI, AUTOBIOGRAPHY, *supra* note 22, at 473.

99. See RAJMOHAN GANDHI, GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE, *supra* note 21, at 258.

100. See, e.g., Letter from Mahadev Desai to S. Ganesan (Feb. 27, 1926), in 34 CWMG, *supra* note 4, at 331.

To popularize the message contained in these installments, Gandhi freely allowed other newspapers to reproduce the chapters without permission.<sup>101</sup> As expected, numerous English and local language newspapers did so—largely to raise their readership and circulation.<sup>102</sup> Commercially driven, most of these newspapers relied heavily on advertising revenue for their sustenance.

As the practice of reproducing Gandhi's installments gained prominence, several of his followers, many of whom subscribed to his abstract socio-economic philosophy, found it problematic.<sup>103</sup> Newspapers, they believed, were now using Gandhi's writing for palpably commercial reasons fundamentally opposed to Gandhi's philosophy.<sup>104</sup> Thus, they called on Gandhi to "exercise the copyright" in his work to prevent commercially motivated newspapers from reproducing installments of his autobiography.<sup>105</sup> Gandhi's response reflected his discomfort with copyright. While acknowledging the reasons for the advice, Gandhi rejected it, and observed,

I have never yet copyrighted 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.<sup>106</sup>

This letter contains Gandhi's first direct observations on copyright. In it, Gandhi acknowledges that his decision to reject copyrighting his prior work was a conscious one. He describes copyright as a "modern," as opposed to natural, institution—a pejorative distinction given his known discomfort with modernity. Yet, his discomfort with copyright was measured. Instead of questioning its desirability in the abstract, Gandhi suggests that his rejection is largely personal, 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 particular moral value, then he must think it applicable to others.<sup>107</sup> Gandhi thus did not believe the idea (or principle) to have relevance for others as an "imperative;" it was instead to motivate others

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101. See Mohandas K. Gandhi, 'Exercise the Copyright,' in 34 CWMG, *supra* note 4, at 449–50 [hereinafter Gandhi, *Exercise*].

102. *Id.*

103. *Id.* (voicing an opinion on behalf of Gandhi's followers to those who read Gandhi's writings in *Young India*).

104. *Id.*

105. *Id.*

106. *Id.* at 450 (emphasis added).

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

through example.<sup>108</sup> 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.

Additionally, by emphasizing “yet” in the letter, Gandhi acknowledged his position could change.<sup>109</sup> Also significant is his recognition that copyright’s fundamental operating premise is the creation of an artificial scarcity through exclusivity. Hence, Gandhi’s refusal to assert copyright represents not just an unwillingness to use a modern, artificial institution, but also a recognition that if he were to invoke copyright law, he would be directly expanding the market for his own versions of the chapters, an idea he was equally uncomfortable with.

The “personal” nature of Gandhi’s rejection of copyright remained an important baseline during his life, and was a constant refrain in his observations on the topic. Even when he would later 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 (limited) acceptance and to restrain it.<sup>110</sup> Gandhi continued to adhere to the ideal of personal rejection even after embracing copyright following publication of his autobiography. In relation to the newspaper articles that he continued to write, Gandhi continually asserted his personal rejection of copyright law. When approached by publishers seeking to translate his letters into other languages, Gandhi routinely “claim[ed] copyright for none of [his] publications,” while nevertheless insisting that the translation not depart from the original.<sup>111</sup> As we will see, this latter point eventually forced 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 was not because he completely rejected the idea of paying for knowledge and information—another common misconception about Gandhi’s views. While he was opposed to market mechanisms, and viewed copyright as an artificial, modern institution, Gandhi understood that he was not 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. Gandhi routinely emphasized that he was not asking them to abandon their wealth.<sup>112</sup> His project

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108. *Id.* at 4162.

109. Gandhi, *Exercise*, *supra* note 101, at 450; *see supra* text accompanying note 106.

110. *Id.*

111. *See, e.g.*, Letter from Mohandas K. Gandhi to Narandas Gandhi (Aug. 20/21, 1932), in 56 CWMG, *supra* note 4, at 361, 362–63.

112. *See* GANDHI, TRUSTEESHIP, *supra* note 18, at 72–73 (“The rich man will be left in possession of his wealth, of which he will use what he reasonably requires for his personal needs, and

for this segment of society was instead *redistributive*, and he readily embraced market payments in working to this end. This included paying for knowledge and information, where possible.

By 1933, Gandhi had set up three newspapers, collectively referred to as the *Harijan*, and had enlisted the help of businessmen to produce vernacular editions to spread his message to parts of India unfamiliar with the languages originally published in the *Harijan*.<sup>113</sup> Gandhi rejected making these versions available to the public for free, rather than for a nominal subscription amount. 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."<sup>114</sup>

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. Thus, to Gandhi, free knowledge had its limits. While he recognized that knowledge could be heavily subsidized, he nonetheless accepted that it did not have to always be free, especially when its recipients were both willing and able to pay for it. This position presented an obvious problem: what if the vernacular editions were priced beyond the reach of those who communicated in those dialects? Again, Gandhi combined his limited acceptance of knowledge-pricing with an unwillingness to use copyright as a mechanism to control 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 is based on considerable experience.<sup>115</sup>

Coupled with a willingness to allow newspapers to charge subscribers when there was an ability to pay, Gandhi's rejection of copyright—if motivated exclusively by its market structure—is perplexing and out of place. Their reconciliation lies in recognizing that to Gandhi, copyright was problematic not just because of its reliance on the market and self-interested behavior, but also because it operated as an artificial restriction on the flow of knowledge and

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will act as a trustee for the remainder to be used for the society."); see also *supra* notes 60–62 & 65–66 and accompanying text.

113. See Mohandas K. Gandhi, "*Harijan*" in the *Vernaculars*, in 59 CWMG, *supra* note 4, at 377.

114. *Id.*

115. *Id.* at 377–78

information. To be sure, market prices too perform the same role in several contexts.<sup>116</sup> 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.<sup>117</sup>

Gandhi’s tolerance for knowledge-pricing, while nonetheless concurrently rejecting copyright—has parallels in the distinction between the ideals of *libre* and *gratis*. This distinction is captured by the idea of “free . . . as in free speech, not as in free beer” popularized by Richard Stallman, the founder of the Free Software Foundation.<sup>118</sup> Hence, “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 distinction.

In summary, this strand of Gandhi’s thinking rejected copyright in his works for purely personal reasons. Gandhi thereby remained consciously ambivalent about others finding some virtue and purpose in copyright, and left open the possibility that he too might at some future point find *limited* reason to embrace the institution. This latter point is supported by his observation that “[t]empting offers [to copyright my writings] have come to me no doubt in connection with the chapters of the autobiography . . . and I am likely to succumb to the temptation for the sake of the cause I stand for.”<sup>119</sup>

## 2. Strand Two: Reluctant Engagement

Around 1922, Gandhi came in contact with the well-known Reverend John Haynes Holmes, who helped establish the NAACP and the ACLU.<sup>120</sup> Holmes had read about Gandhi’s activities in South Africa, and the two soon began corresponding.<sup>121</sup> At the time, Holmes ran a weekly newspaper titled

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116. See generally Amy Kapczynski, *The Cost of Price: Why and How To Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012) (arguing that “using price to guide scientific and cultural production . . . may have costs not only for efficiency, but also for distributive justice and informational privacy”).

117. See Gandhi, *Exercise*, *supra* note 101, at 450. For a fuller, duty-based account of copyright law as it revolved 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).

118. For a discussion on the idea and its salience, see Lawrence Lessig, *Free, as in Beer*, 14 WIRED, Sept. 2006, at 94 (internal quotation marks omitted), available at <http://www.wired.com/wired/archive/14.09/posts.html?pg=6> (last visited Sept. 3, 2013).

119. See Gandhi, *Exercise*, *supra* note 101, at 450 (emphasis added).

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

121. 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.”).

*Unity*, and asked Gandhi for permission to reproduce in it chapters from the latter's autobiography, as they appeared in *Young India*.<sup>122</sup> Shortly thereafter, it appears that Holmes cabled Gandhi, offering to try and help get the autobiography published in the United States.<sup>123</sup> With Gandhi's permission, Holmes began discussions with Macmillan Press in New York to bring out a U.S. edition of the autobiography.<sup>124</sup> Gandhi had few followers in the United States at the time, and Macmillan was understandably reluctant to invest in the project.<sup>125</sup> As a precondition to publishing the book, Macmillan Press demanded that Gandhi transfer to it all of his rights in the autobiography for both the United States and the United Kingdom.<sup>126</sup>

It would not have been enough for Gandhi to grant Macmillan mere permission to publish the autobiography. What Macmillan wanted was an outright assignment of all rights in the work. And in order to accomplish this assignment, Gandhi first needed to assert and claim them under copyright law, which ran afoul of his established refusal to copyright his written work. Holmes eventually persuaded Gandhi to assert copyright in his work and transfer those rights to Macmillan.<sup>127</sup> As noted in a letter to Holmes, two reasons influenced Gandhi's change in position:

The idea of making anything out of my writings has been always repugnant to me. But your cable tempted me and I felt that there might be no harm in my 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.<sup>128</sup>

Gandhi first explained his decision in distributive terms, noting that the monetary benefits from asserting and transferring rights to the publisher could fuel his social projects bettering the lower classes. Accepting this distributive view entailed embracing the core utilitarian basis of copyright law. Unlike a nominal assertion of copyright that is then coupled with a functional abandonment of rights—an approach that Gandhi later adopted<sup>129</sup>—this approach reflected a full acceptance of copyright's utilitarian and market-driven purpose. Nevertheless, Gandhi intended to use this market mechanism toward a morally justifiable end. Second, Gandhi believed that his involvement in the freedom movement would benefit from the external support and

122. *Id.*

123. See Letter from Mohandas K. Gandhi to John Haynes Holmes (May 28, 1926), in 35 CWMG, *supra* note 4, at 280, 281 [hereinafter Letter from Gandhi to Holmes] (responding to Holmes's offer).

124. See Letter from Mahadev Desai to S. Ganesan, *supra* note 100.

125. See Holmes, *supra* note 121, at 120 ("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.").

126. Letter from Gandhi to Holmes, *supra* note 123, at 281.

127. *Id.*

128. *Id.*

129. See *infra* Part II.A.3.

validation of outside readers. To him this goal justified compromising on what was a purely personal rule.

What is interesting about this turn in Gandhi's thinking about copyright, though, is his willingness to compromise. To him, life was nothing more than a "series of compromises," and he advocated the belief that compromising on honorable terms was a legitimate outcome as long as the actors never lost sight of their ultimate goals.<sup>130</sup> Compromising on basic principles or moral ideals, however, was untenable.<sup>131</sup>

Gandhi's actions vis-à-vis Macmillan and the publication of the autobiography reveal that his rejection of copyright—even in its personal form—was not a matter of basic principle, but instead a subordinate personal preference. Had it been instead a matter of moral principle, it is unlikely that Gandhi would have been willing to compromise. His rejection of the institution was largely pragmatic, and one that he was willing to modify when it served his broader goals. Thus, Gandhi's opposition to copyright was situational at best, rather than foundational in nature.

This is not to suggest that Gandhi underplayed the extent and significance of the compromise he was undertaking. In fact, much of his correspondence about the autobiography around this time repeatedly noted how "[t]he idea of making money out of [his] writings even for a charitable purpose [wa]s quite foreign to [him],"<sup>132</sup> and that he had "never before reserved copyright in any of [his] writings."<sup>133</sup> Gandhi thus viewed the compromise as an exception to the rule, hoping to soon revert to the baseline of rejection.

The episode involving the publication of his autobiography forced Gandhi to confront the precise nature of his objections to copyright. In doing so, he seems to have concluded that his objection was not a fundamental moral opposition, thereby allowing him to assert rights in the work and deploy the benefits of copyright's utilitarian apparatus toward his other goals: distributive (i.e., charitable), and nationalist (i.e., the freedom movement). He viewed this compromise as an exception, and thus in other contexts, both around the same time and later, he continued to assert his baseline preference of rejecting copyright in his works as a personal matter.<sup>134</sup>

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

131. M.K. GANDHI, *SATYAGRAHA IN SOUTH AFRICA* 245 (Valji Govindii Desai trans. 1954). Regarding his struggles against an unjust law in South Africa, Gandhi observed "[c]ompromise means that both the parties make large concessions on all points except where a principle is involved." *Id.* Hence, fundamental principles, ends, or essentials should not be compromised.

132. See Letter from Mohandas K. Gandhi to Emil Roniger (June 11, 1926), in 35 CWMG, *supra* note 4, at 348.

133. Letter from Mohandas K. Gandhi to S.T. Sheppard (June 11, 1927), in 39 CWMG, *supra* note 4, at 38.

134. See, e.g., Letter from Mohandas K. Gandhi to M. Rebello & Sons (May 31, 1931), in 52 CWMG, *supra* note 4, at 218 (explaining to the addressee—who wanted to use Gandhi's photo as a trademark—that he did not own a copyright on his portraits).

### 3. Strand Three: Strategic Deployment

Gandhi continued to avoid retaining copyright in his newspaper articles, and other published work for several years after the Macmillan episode. In the decade following the autobiography's publication, Gandhi's involvement in the Indian freedom movement reached its peak, and he put several of his abstract ideas and principles into action in challenging the British Empire.<sup>135</sup> 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.<sup>136</sup> Through the march, Gandhi gave effect to the principles of civil disobedience and nonviolent resistance he had previously written about.

During this period, Gandhi tirelessly focused on engaging the British Empire through principled action and mass mobilization. The British, for their part, fought back through a host of strategies, including by trying to discredit Gandhi among segments of Indian society wary of his positions—such as the Muslim minority.<sup>137</sup> In his opposition to the empire, Gandhi would find in copyright law an unexpected ally.

As the freedom struggle in India became a mass movement, it turned to Gandhi for guidance, approval, and planning. During every confrontation with the Empire, the movement sought Gandhi's advice, and Gandhi came to see himself as speaking to the masses through his actions and written words. Gandhi's writing during this period was replete with important episodes in the struggle, commentary which ended with strategic prescriptions for future engagement.<sup>138</sup> 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 soon began presenting 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 spearheading the freedom struggle—took advantage of the crowd gathered and

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135. See RAJMOHAN GANDHI, *GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE*, *supra* note 21, at 302–84.

136. 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* (2d ed. 2009).

137. See generally Irfan Habib, *Gandhi and the National Movement*, 23 *SOC. SCIENTIST* 3, 4–5 (1995) (observing how "British Government officials during the British period" often described Gandhi as a "very clever politician, a master of manipulation").

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

made a few speeches. The local congress members hoisted the Indian national flag on the ramparts of an old fort, where the exhibition was taking place.<sup>139</sup> The municipal—British-controlled—police issued the organizers a notice demanding that the flag be immediately taken down, claiming that it offended “certain sections of the public,” since the fort was a monument to a Moghul (i.e., Muslim) ruler.<sup>140</sup> At the time, India’s Muslim minority viewed the nationalist freedom movement with deep suspicion, a suspicion that eventually resulted in the partition of British India into two countries.<sup>141</sup> The British strategy was to play into this suspicion, and use it as a pretext to suppress the activities of the freedom struggle, which the British claimed was fomenting violence. As soon as the organizers of the meeting and the exhibition received the police commissioner’s demand to lower the flag, they telephoned Gandhi for his advice.<sup>142</sup> Instead of asking his followers to resist the police order, Gandhi asked them to comply, worrying that if the allegations were indeed true, it might spark sectarian violence.<sup>143</sup>

In a series of newspaper articles, Gandhi meticulously described the episode—first in palpably neutral terms,<sup>144</sup> then as interpreted by the police commissioner’s report,<sup>145</sup> and finally from his own perspective, refuting the police commissioner’s findings and insinuations about violence, which Gandhi had investigated and characterized as false.<sup>146</sup> 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 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 latter’s position.<sup>147</sup> This troubled several of Gandhi’s followers, who argued that if Gandhi had asserted copyright in his works, he could have prevented “Anglo-Indian papers” from selectively reproducing his writings, thereby preventing the communication of “untruth[s]” or of “half-truths.”<sup>148</sup>

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139. See Mohandas K. Gandhi, *Danger Signal*, in 78 CWMG, *supra* note 4, at 150, 150–51 [hereinafter Gandhi, *Danger Signal*].

140. See Mohandas K. Gandhi, *The Ajmer Trouble*, in 78 CWMG, *supra* note 4, at 185, 186 [hereinafter Gandhi, *Ajmer Trouble*].

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

142. See Gandhi, *Danger Signal*, *supra* note 139, at 151.

143. *Id.*

144. *Id.*

145. See Gandhi, *Ajmer Trouble*, *supra* note 140.

146. See Mohandas K. Gandhi, *Ajmer*, in 78 CWMG, *supra* note 4, at 193, 193–94.

147. See Mohandas K. Gandhi, *Notes*, in 78 CWMG, *supra* note 4, at 317 [hereinafter Gandhi, *Notes*].

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

Connecting copying to the creation of untruths was an important move in making Gandhi see the value in copyright. Given Gandhi's legendary adherence to the truth as his guiding normative ideal,<sup>149</sup> 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 indirectly accusing him of being "a party to the spread of untruth,"<sup>150</sup> 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 know that there is a financial loss. But as *Hirjian* is not published for profit I am content so long as there is no deficit. I must believe that in the end my self-denial must serve the cause of truth.<sup>151</sup>

Yet, a few weeks later, Gandhi publicly reversed his prior decision. 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 publishers kindly to regard English and Hindustani translation rights as reserved. I have no doubt that my request will be respected.<sup>152</sup>

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 Gandhi's limited reservation of translation rights was unlikely to guard against.

Second, in contrast to the position that his supporters advocated, Gandhi did not assert a full copyright in his newspaper articles. He was instead merely

149. The very title of his autobiography is indicative of this. See GANDHI, *AUTOBIOGRAPHY*, *supra* note 22.

150. See Gandhi, *Notes*, *supra* note 147, at 317.

151. *Id.* at 318.

152. Mohandas K. Gandhi, 'Copyright,' in 78 CWMG, *supra* note 4, at 408, 408–09 [hereinafter Gandhi, 'Copyright'].

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.<sup>153</sup> This point is analytically very interesting, because it suggests that Gandhi viewed copyright as a fundamentally divisible bundle of rights,<sup>154</sup> 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, including the translation right.<sup>155</sup> 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 was not 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 adopted was personal. In appealing to the unique normative force his own statements and requests had on the Indian public, Gandhi was interlacing the formal legal structure of the institution of copyright, with an informal normativity that was unique to him and his position in the Indian freedom movement. 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.<sup>156</sup>

We see Gandhi willing to accept copyright for a limited purpose in this passage. What distinguishes his approach here from that involving his autobiography is that here his assertion of copyright was not work-specific, and operated as a prospective change in approach. It thus was not just a contextual 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 began asserting a limited copyright—the translation right—in his Gujarati writing, modifying his baseline of personally rejecting copyright in its entirety.

Gandhi's change in position did not go unnoticed among newspapers. Newspapers that published articles in English and Hindi worried that their inability to communicate Gandhi's message to their local readers would reduce

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153. *Id.* at 409.

154. Indeed it was not until the enactment of the 1976 Copyright Act that copyright's bundle of rights became recognized as fundamentally divisible in the United States. *See* Elliot Groffman, *Divisibility of Copyright: Its Application and Effect*, 19 SANTA CLARA L. REV. 171 (1979); Edward J. Martin, *Indivisibility of Copyright*, 27 ALB. L. REV. 257 (1963).

155. *See* The Copyright Act, No. 3 of 1914 (India) (extending British copyright law to India, according to Copyright Act, 1911, 1 & 2 Geo. 5, c. 46 (Eng.)).

156. *See* M.K. GANDHI, THE LAW AND THE LAWYERS 126 (S.B. Kher ed., 1962) [hereinafter GANDHI, THE LAW AND THE LAWYERS].

their readership dramatically. One of them even wrote to Gandhi protesting the change in position, and arguing that the articles were “the property of the nation and therefore there could be no copyright in them.”<sup>157</sup> This forced Gandhi to provide a more elaborate explanation for his reversal in position:

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.<sup>158</sup>

Gandhi’s explanation involves a clarification, an incremental modification of his original position, and an attempted compromise to placate the grievance, which he saw as legitimate. He clearly reiterated his reasons for the shift in position—alluding to the mistranslation of his views by certain newspapers—and appeared steadfast in his basis for the shift in position. All the same, he recognized 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 to commit some of the misrepresentations that he was seeking to restrict through his very reservation of rights. He thus reinterpreted his prior reservation as extending to translations “into all other languages.”<sup>159</sup>

Gandhi was thus acutely aware of the harm that his reservation of rights was likely to cause among newspapers. Nowhere does he answer why it would have been improper to confine the copyright to translations into English alone. The answer lay, however, in the unequal economic hardship this would have caused English language newspapers. The principle of unfair competition thus implicitly informed Gandhi’s thinking, and forced his modification in position.<sup>160</sup>

The final and most nuanced move Gandhi’s response made was in its treatment of the translation right as relating to an action (i.e., translating), rather than to an artifact (i.e., the work). In asserting copyright in his Gujarati articles, Gandhi was clear about reserving no more than the rights to translate those works into other languages.<sup>161</sup> Ordinarily, a copyright owner asserts the translation right in order to produce a translation of the original work, and

157. See Mohandas K. Gandhi, *Two Just Complaints*, in 79 CWMG, *supra* note 4, at 36 [hereinafter Gandhi, *Two Just Complaints*].

158. *Id.*

159. *Id.*

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

161. See Gandhi, ‘Copyright,’ *supra* note 152, at 409.

thereupon obtains (either automatically or through minimal effort) the same set of exclusive rights in the translation as well.<sup>162</sup> The exclusive right granted by copyright to create a translation is thus tied to the exclusive rights in the translation itself.

Gandhi 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 languages. Once translated, he fell back on his baseline of rejecting copyright in the translated version, and allowed others to copy it freely.<sup>163</sup> Again, we see a masterful lawyerly unbundling of copyright's structure coupled with a narrow tailoring of the reservation to the problem Gandhi 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 earlier Gandhi openly granted permission to newspapers and other publishers to translate chapters of his autobiography into other languages and reproduce them even for commercial purposes.<sup>164</sup> Yet, after reserving the translation right in his Gujarati articles, Gandhi adopted the same approach for requests to translate his autobiography into other Indian languages. Since Gandhi had been forced by Macmillan to assert copyright in the autobiography, and had transferred to them the rights only for the United States and the United Kingdom, he still held the copyright for other territories and languages. Rather than allowing others to freely translate and reproduce his autobiography in local languages, Gandhi began to assert a gatekeeping role to prevent mistranslations, just as he had done for his Gujarati articles.

In the later part of his life, Gandhi was approached by numerous publishers who sought to translate his autobiography into vernacular languages and this presented Gandhi with the problem of choosing between different translators and publishers. Gandhi had circumvented this problem for his Gujarati newspaper articles by agreeing to translate the articles into English and Hindi himself.<sup>165</sup> Some of his followers suggested setting up regional, or vernacular, boards to review different translations for authenticity before granting permission.<sup>166</sup> Gandhi, however, saw an obvious problem with this.<sup>167</sup>

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162. Translation is today treated as an adaptation or a derivative work under U.S. copyright law. See 17 U.S.C. § 101 (2012) (definition of “derivative work”). It should be noted that the right to make a derivative work does not automatically result in granting copyright protection to the derivative work itself. See 17 U.S.C. § 103(b).

163. Gandhi, *‘Copyright,’ supra* note 152, at 409.

164. Gandhi, *Two Just Complaints, supra* note 157, at 36.

165. *Id.*

166. *Id.*

167. See Letter from Mohandas K. Gandhi to Jivanji D. Desai (Dec. 5, 1945), in 88 CWMG, *supra* note 4, at 421, 421 [hereinafter Letter from Gandhi to Desai] (“Anand Hingorani had suggested different Boards, so that the Tamil Board would decide about the Tamil translation and the Malayalam Board would advise about the translation in that language.”).

Setting up different boards and reviewing different translations obviously meant a great investment of time and effort. Additionally, it meant signing off on the translation and approving it. To Gandhi, this seemed problematic, for while he wanted to avoid mistranslations, he was nonetheless fully aware that translating a work was itself an expressive act.<sup>168</sup> Giving him or his board control over this process raised the specter of censorship for Gandhi. Regarding multiple translations and his approach to exercising his copyright, Gandhi 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.<sup>169</sup>

Here we see Gandhi drawing on the experiences of Leo Tolstoy, with whom he had struck a friendship through correspondence.<sup>170</sup> The principal idea expressed here is that multiple translations can coexist in the marketplace of ideas, even when these diverge from the original. Gandhi believed that readers would naturally gravitate toward the translation that was most faithful to the original version. Additionally, he saw virtue in allowing multiple versions to coexist. Thus, Gandhi decided against retaining 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.<sup>171</sup>

Gandhi's moral and practical beliefs—in contrast to his legal and financial views—led him to allow multiple translations of the autobiography without any restrictions. Facially, this position rendered moot and meaningless his entire assertion of translation rights in the autobiography. If he was not going to play a gatekeeper role in any way or form, why retain the translation right at all? Gandhi does not answer that question here. In a follow-up letter though, he explains why he had indeed reserved these rights and what he hoped to do with them:

168. *Id.*

169. *Id.* For an elaborate account of the relationship between Gandhi and Tolstoy, see MARTIN GREEN, *TOLSTOY AND GANDHI, MEN OF PEACE: A BIOGRAPHY* 85–96 (1983).

170. GREEN, *supra* note 169, at 85.

171. Letter from Gandhi to Desai, *supra* note 167, at 422.

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.<sup>172</sup>

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 in the same letter, where he observed, “I have decided for the present to refuse permission for a Finnish translation, for the person's intention seems to be to make profit.”<sup>173</sup>

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

What is fascinating in this exchange is less Gandhi's binary dichotomy and indeed its questionable workability, than the structural approach that Gandhi's embrace of copyright entails. In it, we see a steadfast denouncement of market-based behavior, coupled with a willingness to employ copyright—a market-based institution—to subvert the core normative values of utilitarianism. Gandhi thus used copyright not to further the profit motives of distributors, but to reject them.

Traditionally, an author negotiates with a publisher or distributor willing to publish the book in return for a share of the proceeds from sales. The profit motivation brings the author to the publisher, and the parties' willingness to enter into an arrangement is dictated almost entirely by monetary benefits. Gandhi's approach, however, reversed this logic. A publisher would now ask Gandhi for permission to translate his work into other languages, and the bargaining was to be driven by the publisher's ability to convince Gandhi that profit-maximization was not the publisher's only goal. Gandhi was thus asserting copyright not to allow for self-interested behavior, but instead to purge self-interested actors from dealing with his autobiography (the “misuse of the privilege”), and to encourage public-spirited behavior in its place.<sup>174</sup> It is unclear, however, whether Gandhi intended all along to employ the translation right to this end, or whether he gravitated toward this as his concerns with censorship diminished his role in approving translations.

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172. Letter from Mohandas K. Gandhi to Jivanji D. Desai (Jan. 16, 1946), in 89 CWMG, *supra* note 4, at 250, 250.

173. *Id.*

174. *Id.*

In the last decade of his life, Gandhi went from reluctantly embracing copyright—as he had with Macmillan—to strategically using 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. Even when he accepted copyright and deployed it strategically toward 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*

Combining 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 fully develops the theoretical side of this account,<sup>175</sup> this Section provides a brief explanatory synthesis of Gandhi’s thinking.

The first enduring feature of Gandhi’s interaction with copyright law is his personal skepticism of the institution. While not completely opposed to the institution, Gandhi believed that copyright’s fundamental reliance on artificial scarcity, market-based distribution, and profit-driven inducement of expressive activity was contrary to how he wrote, published, and wanted his writings to reach the broader public. Much of this originated in his abstract thinking, wherein he opposed utilitarianism, self-interested behavior, and market-driven models.<sup>176</sup> Yet it also likely drew in large part from the role that the act of “writing” performed for him. To Gandhi, writing was in large part an act of practical reasoning, rendering copyright and its incentive structure irrelevant.<sup>177</sup>

While Gandhi’s skepticism of copyright was in one sense “principled,” it at the same time was not 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.

Gandhi modified his personal rejection of copyright on two occasions, both in significantly different ways. The first was in relation to Macmillan’s

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175. See *infra* Part III.

176. For a discussion of Gandhi’s abstract thinking, see generally Part I.A, *supra*.

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

insistence that he assert his rights in order to give them publication rights for the United States and the United Kingdom.<sup>178</sup> It appears as though Gandhi was not 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. Notably, then, Gandhi's first modification was largely reactive.

In the second instance, which took place during the height of the freedom struggle, Gandhi voluntarily modified his personal preference when he worried that copying was compromising the integrity, authenticity, and completeness of his published messages. In response, he unbundled copyright's exclusive rights, and asserted a limited translation right. Even then, he 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 structure of the 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 very reasons why he had initially distanced himself from it, namely, his discomfort with utilitarianism and market goals. This was the most important modification in position that Gandhi made, and it speaks of his willingness to adopt a highly granular disaggregation of copyright law, its justifications, and its consequences. In this nuanced engagement, Gandhi juxtaposed 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.

Theoretically, 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 right to first translation after the Ajmer episode marked the beginning of this realization. Most modern legal systems today treat attribution and integrity as the substance of inalienable "moral rights,"<sup>179</sup> and contrast these with copyright's freely transferable economic

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178. See *supra* text accompanying notes 119–21.

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

rights.<sup>180</sup> Yet, during Gandhi's time, neither Indian nor U.K. copyright law recognized the idea of moral rights, focusing instead on copyright's economic dimension.<sup>181</sup>

Recognizing his inability to protect these values independent of the institution, Gandhi invoked copyright's economic framework for moral rights-like purposes. Scholars have long noted copyright's largely utilitarian, economic framework may be used to serve moral rights, even when the system does not independently recognize those rights.<sup>182</sup> Gandhi's change in position is a prime example of how this might occur.

There was, in addition, an important respect in which Gandhi's invocation of copyright's framework was not merely directed at replicating the working of moral rights. This was the reality that copyright's basic framework (of exclusivity) could be deployed toward a wider range of non-economic ends beyond just attribution and integrity, extending to the *negation of economic motives*. To Gandhi, copyright's gatekeeping role, traditionally conceived of as a revenue-generating mechanism, was a tool for policing the motives of individuals seeking to copy or translate his work.

In summary, Gandhi's engagement with copyright reflected three characteristics: skepticism, non-foundational rejection, and technical disaggregation of the institution's parts. Table 1 below summarizes Gandhi's evolution in thinking.

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180. SUNDARA RAJAN, *supra* note 179, at 14 (discussing the independence of copyright's moral and economic rights).

181. See The Copyright Act, No. 3 of 1914 (India).

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

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

	<i>Time Period</i>	<i>Central Features</i>	<i>Rights Asserted</i>
<i>Personal Rejection</i>	1909–26 & 1928–40	<ul style="list-style-type: none"> <li>• Personal preference to avoid</li> <li>• Recognition of some value in the institution</li> <li>• Allowance for future modification in position</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
<i>Reluctant Acceptance</i>	1926–28	<ul style="list-style-type: none"> <li>• Considered a one-time compromise</li> <li>• Justified in distributive terms</li> </ul>	<ul style="list-style-type: none"> <li>• All rights in his autobiography alone</li> </ul>
<i>Strategic Deployment</i>	1940–48	<ul style="list-style-type: none"> <li>• Reservation of right of first translation</li> <li>• Abandonment of rights in actual translation</li> <li>• Use of rights to prevent further commercialization</li> </ul>	<ul style="list-style-type: none"> <li>• Right of first translation in newspaper articles</li> <li>• Extended to translation rights in autobiography</li> </ul>

### 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 the implications that it might have had for his engagement with 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 are not 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 connection to Gandhi's own approach to practical reasoning—"practical idealism." Part III.A uses Gandhi's own views on copyright as a lens. Part III.B then sets out the basic tenets of copyright pragmatism and explores their working within the context of copyright decision making.

*A. Gandhi's Pragmatic Philosophy of Action*

As we saw in Part I, Gandhi's writings reveal a set of abstract economic ideas and principles, characterized by many today as a form of "Gandhian economics."<sup>183</sup> Yet, these abstract ideas and principles seem to have had little direct influence on Gandhi's own actions, as they related to copyright. 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. It was rather that Gandhi saw his actions, and his reasoning behind them, as more directly representative of his views than were his statements when decontextualized and taken as abstract propositions. Gandhi famously noted, "My life is my message"<sup>184</sup>—seemingly suggesting that individuals seeking guidance from him should heed his actions rather than his statements. Gandhi's theory of action—what one may call his philosophy of action—provides a powerful and plausible explanation for his interaction with copyright law and its various facets.

Gandhi's theory of action can 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. It is this theory of action that this Section unbundles.

Pragmatism is today thought of as a school of philosophical thinking uniquely American in origin and approach.<sup>185</sup> Attributed to the writings of Charles Peirce, William James, John Dewey, and Oliver Wendell Holmes, Jr., pragmatism has seen a revival in recent times, both as an approach to philosophy and as a method of legal reasoning and analysis.<sup>186</sup> Gandhi's own thinking—as a philosophy of action—reveals extremely close parallels to pragmatism, as developed in the United States, a connection that has found surprisingly little discussion in the literature. The first (and to date, only) systematic identification of this connection is found in the early work of the Indian philosopher Koneru Ramakrishna Rao.<sup>187</sup> Somewhat surprisingly, Rao's book has received very little attention in India and the United States. As a work

183. See, e.g., DASGUPTA, *supra* note 28; J.C. KUMARAPPA, *GANDHIAN ECONOMIC THOUGHT* (1951); K. VASUDEVAN, *GANDHIAN ECONOMICS* (1967).

184. See Joseph Prabhu, *Gandhi, Empire, and a Culture of Peace*, in 1 *INDIAN ETHICS: CLASSICAL TRADITIONS AND CONTEMPORARY CHALLENGES* 395, 395–96 (Purushottama Bilimoria et al. eds., 2007).

185. For a recent overview of the origins of American pragmatism as a philosophical movement and its European influences, see M. GAIL HAMNER, *AMERICAN PRAGMATISM: A RELIGIOUS GENEALOGY* (2003); see also *PRAGMATISM: A READER* (Louis Menand ed., 1997).

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

187. K. RAMAKRISHNA RAO, *GANDHI AND PRAGMATISM: AN INTERCULTURAL STUDY* (1968).

of comparative philosophy, Rao's book on the subject attempts to draw out the similarity between Gandhi's practical philosophy, which he identifies as "pragmatic," and the ideas of the early American pragmatists.<sup>188</sup> While Rao avoids tracing intellectual crosscurrents between the two approaches, he does an excellent job of pinpointing common themes and of suggesting that Indian philosophical approaches have much to gain from a direct engagement with American pragmatic methods.<sup>189</sup> This Section builds on Rao's early (and forgotten) identification of the connection between Gandhi's philosophy and American pragmatism, and extends it to Gandhi's legal thinking and lawyerly 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. In this view, he is seen as an absolutist who adopted a moral approach toward politics and expounded a unique view of political morality.<sup>190</sup> A recent turn in political theory has begun to cast doubt on this characterization, arguing that Gandhi's core beliefs—seen in his commitment to nonviolence and truth—represent not just moral propositions, but a particular "practical orientation" toward politics that entailed a "contextual, consequentialist, and moral-psychological analysis" of the political world around him.<sup>191</sup>

Gandhi characterized his own approach to politics and thinking as that of a "practical idealist."<sup>192</sup> This seemingly oxymoronic phrase captures an essential tenet of Gandhi's philosophy: means-orientation. Gandhi emphasized the means employed toward realizing any goal (the end), and he routinely observed, "means are after all everything."<sup>193</sup> In contrast to plain (or moral) idealism, which 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.<sup>194</sup> To Gandhi, however, means and ends were reflexive and intricately connected concepts.<sup>195</sup> This in turn meant a

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188. *Id.* at 6–7.

189. *Id.* at 200–03.

190. *See, e.g.*, RAGHAVAN N. IYER, *THE MORAL AND POLITICAL THOUGHT OF MAHATMA GANDHI* (1973). 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).

191. *See, e.g.*, Mantena, *supra* note 190, at 457; accord TERCHEK, *supra* note 44, at 232–34.

192. Mohandas K. Gandhi, *The Doctrine of the Sword*, in 21 *CWMG*, *supra* note 4, at 133, 134.

193. Mohandas K. Gandhi, *An Appeal to the Nation*, in 28 *CWMG*, *supra* note 4, at 307, 310.

194. *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 93, at 286–87.

195. Mohandas K. Gandhi, *Presidential Address at Belgaum Congress* (Dec. 26, 1924), in 29 *CWMG*, *supra* note 4, at 488, 497.

strong focus on practical action over simple theorization and abstraction.<sup>196</sup> In essence, Gandhi's political philosophy was a philosophy of action.

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.<sup>197</sup> As one scholar thus notes, Gandhi consciously chose to give his ideas a "transcendental look" that in turn provided them with a facial rigidity and absolutism.<sup>198</sup> 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.<sup>199</sup> At the same time though, he refused to define it with any sense of precision.<sup>200</sup> 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."<sup>201</sup> Truth was thus to Gandhi multi-faceted, and to be realized by each individual on his or her own. It thus entailed, of necessity, 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,

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

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196. See Mantena, *supra* note 190, at 468.

197. See RAO, *supra* note 187, at 4.

198. *Id.*

199. See Mantena, *supra* note 190, at 463 ("Truth, for Gandhi, was absolute and universal; indeed it served as another name for God.").

200. *Id.*

201. GANDHI, AUTOBIOGRAPHY, *supra* note 22, at xxvii-xxviii.

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.<sup>202</sup>

This was a startlingly honest and self-reflective observation. Gandhi seems to have viewed truth as explicitly relational and contextual, and to partake of a teleological character. This view also suggests 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.”<sup>203</sup> Additionally, and perhaps most importantly, Gandhi treated 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.<sup>204</sup>

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.”<sup>205</sup> To Gandhi, life, and existence itself, were mere “experiments in the practice of truth and nonviolence.”<sup>206</sup> 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.<sup>207</sup> 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 determined by trying them in action.”<sup>208</sup> 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 his autobiography.<sup>209</sup>

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,

202. See Mohandas K. Gandhi, *Notes: Inconsistencies?*, in 61 CWMG, *supra* note 4, at 22, 23–24.

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

204. See Bilgrami, *supra* note 107, at 4164 (describing Gandhi’s idea of truth not as a “cognitive notion,” but rather an “experiential notion”).

205. GANDHI, *AUTOBIOGRAPHY*, *supra* note 22, at xxvii.

206. Mohandas K. Gandhi, *Speech at Gandhi Seva Sangh Meeting-III*, in 68 CWMG, *supra* note 4, at 259, 260.

207. See RAO, *supra* note 187, at 4 (quoting Gandhi’s original autobiography).

208. *Id.* at 82.

209. GANDHI, *AUTOBIOGRAPHY*, *supra* note 22.

and its recognition of the fallibility 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 when extended to the realm of legal analysis.<sup>210</sup>

Around the same time that Gandhi was developing his thinking within the context of the Indian independence movement, a school of thought that shared several of his core beliefs and ideas was beginning to emerge in the United States. "Pragmatism," as it came to be called, arose in the last quarter of the nineteenth century, principally in the works of Charles Sanders Peirce, William James, and John Dewey.<sup>211</sup> The central question for pragmatism, as originally conceived, was about reconciling scientific, empirically driven thinking with beliefs and ideas that were motivated by morality and other *a priori* principles.<sup>212</sup> 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.<sup>213</sup> This meant specifying the conflict further contextually and choosing among alternative practical outcomes once the context and its implications became clear. William James thus described it as entailing an empiricist's outlook, for its emphasis on actual consequences over abstract dogmas or principles.<sup>214</sup>

Given its strong emphasis on practical consequences, pragmatism also developed a particularly nuanced conception of truth. Indeed, to James, pragmatism was itself a theory about truth.<sup>215</sup> 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."<sup>216</sup> In other words, truth was an experiential quality, and for a belief or process to be true, it had to conform to other verifiable sensible experiences for the individual advocating its truth.<sup>217</sup> To be sure, each of the founding pragmatist philosophers had different views on truth. Yet, common to all of them was the recognition that truth is not an objectively ascertainable absolute—it is experiential, contingent, and, therefore, relative.

210. *See infra* Part III.A.2.

211. Christopher Hookway, *Pragmatism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 16, 2008), <http://plato.stanford.edu/entries/pragmatism>.

212. *Id.*

213. *Id.*

214. William James, *The Present Dilemma in Philosophy*, in WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 3, 9 (1921).

215. WILLIAM JAMES, THE MEANING OF TRUTH: A SEQUEL TO PRAGMATISM (Greenwood Press 1968) (1909).

216. James, *supra* note 214, at 58 (emphasis omitted).

217. *See* RAO, *supra* note 187, at 52–53.

Despite its emphasis on consequences, it is important to note that pragmatism is not just another version of utilitarianism. Neither is it a purely consequentialist approach either—understood as an approach that evaluates an action exclusively by reference to its ends, abstractly construed.<sup>218</sup> Pragmatism instead looks to consequences of different kinds but is not 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 value pluralist in outlook and approach.<sup>219</sup>

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 methods of “inquiry” to subject various abstract hypotheses to scrutiny in the real world.<sup>220</sup> 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,” emphasizing its application of the scientific outlook of inquiry to what are ordinarily thought of as theoretical or abstract beliefs.<sup>221</sup>

Pragmatists also routinely exhibited an underappreciated nuance in their discussion of means and ends, which as 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.”<sup>222</sup> 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.<sup>223</sup> In so doing, at least as a practical matter, it pragmatically allows means to determine the content of the ends in question.

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218. 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.”).

219. See generally Cheryl Misak, *Pragmatism and Pluralism*, 41 TRANSACTIONS CHARLES J. PEIRCE SOC’Y 129 (2005) (examining the tension between pragmatism and deep pluralism).

220. See Hookway, *supra* note 211.

221. John Dewey, *From Absolutism to Experimentalism*, in 2 CONTEMPORARY AMERICAN PHILOSOPHY: PERSONAL STATEMENTS 13 (George P. Adams & Wm. Pepperell Montague eds., 1930); see also Peter S. Hlebowitsh, *John Dewey and the Idea of Experimentalism*, 22 EDUC. & CULTURE 73 (2006).

222. See Elizabeth Anderson, *Dewey’s Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 15, 2010), <http://plato.stanford.edu/entries/dewey-moral>.

223. *Id.*

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. This is hardly to suggest that Gandhi's practical idealism was *just* another version of pragmatism. To the contrary, it remained fairly distinct, rooted 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, emphasis on practical and experiential reasoning, conscious means-orientation and conflation of means and ends, rejection of utilitarianism while retaining a consequence-sensitive orientation, reliance on experimentation to test the value and truth of ideas, and most importantly, 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 been translated into a somewhat unique approach to legal reasoning and analysis—referred to today as legal pragmatism.<sup>224</sup> Indeed, there is some evidence that Charles Peirce, the founder of pragmatic philosophy, was heavily influenced by a lawyer-friend,<sup>225</sup> and Oliver Wendell Holmes Jr. was good friends with both Peirce and William James, and influenced their thinking. 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 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, that is, independent of philosophical pragmatism, which had a discrete set of goals that were constructed within the specific context of narrow

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224. See generally Thomas C. Grey, *Freestanding Legal Pragmatism*, in REVIVAL OF PRAGMATISM, *supra* note 186, at 254 (arguing that legal pragmatism and philosophical pragmatism can exist independently).

225. See Philip P. Wiener, *The Pragmatic Legal Philosophy of N. St. John Green (1830–76)*, 9 J. HIST. IDEAS 70, 70 (1948) (tracing lawyers' roles in the founding philosophy of the original pragmatists).

*philosophical* debates.<sup>226</sup> 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.<sup>227</sup>

The co-evolution of philosophical and legal pragmatism reveals 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.<sup>228</sup> These “philosophical lawyers” did not just view their task to be the application of philosophical pragmatism to the study and analysis of law.<sup>229</sup> Instead, they used their unique worldview, 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.<sup>230</sup> 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.<sup>231</sup> Charles 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.<sup>232</sup> Indeed, the pervasiveness of this “lawyerly” influence on the movement is borne out in the fact that John Dewey, the prominent pragmatist philosopher, ventured into addressing questions about the appropriate approach to legal analysis,<sup>233</sup> the normative vacuity of legal concepts,<sup>234</sup> and the connection between legal analysis and other disciplines<sup>235</sup> 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

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226. See Grey, *supra* note 224, at 254.

227. RICHARD A. POSNER, HOW JUDGES THINK 232–33 (2008).

228. See Wiener, *supra* note 225, 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).

229. See PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 152 (1972).

230. *Id.* at 153.

231. See *id.* at 164–66 (describing Green’s contributions to the overall philosophy of pragmatism).

232. 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 7–8 (Charles Hartshorne & Paul Weiss eds., 1931) (describing Green as the grandfather of pragmatism).

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

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

235. *Id.*

the common law method of contextualized, evolutionary rule development—may have played a role in the development of philosophical pragmatism.<sup>236</sup> As such, 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” does not on its own extend to legal formalism, which despite all else, is deeply practical when understood as an approach to adjudication.<sup>237</sup>

Much like philosophical pragmatism, legal pragmatism emphasizes a focus on the practical consequences of a rule or concept over its immanent structure.<sup>238</sup> It is 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.<sup>239</sup> 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.<sup>240</sup> This does not 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 become 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.<sup>241</sup>

As noted, Gandhi’s dealings with copyright law 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 from copyright as a modern institution. All the same, the normative basis of the early disengagement was not 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 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”

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236. Grey, *supra* note 224, at 256–57.

237. *Id.* at 259.

238. See Posner, *supra* note 25, at 1661.

239. Grey, *supra* note 224, at 257–58; Posner, *supra* note 25, at 1660.

240. Grey, *supra* note 224, at 258; Posner, *supra* note 25, at 1661.

241. See Posner, *supra* note 25, at 1660–61.

right would impede the development of independent translations, each with its own value.<sup>242</sup>

With its focus on consequences, Gandhi's approach to copyright was 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 declined as well. This perhaps explains his reluctant acceptance of copyright in his autobiography (in relation to Macmillan), recognizing that it would not 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.<sup>243</sup> 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 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 abandon their single-minded devotion to wealth-maximization as the sole normative goals of legal analysis.<sup>244</sup> Gandhi's basic rejection seems to have strong overtones of an anti-utilitarian worldview. Over time however, what his engagement with copyright certainly reveals is that while a rejection of core utilitarian beliefs represented his default outlook, it did not form a foundational philosophical position on which Gandhi was unwilling to compromise. 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 does not 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.<sup>245</sup> All the same, standing for something does not also mean an unreflective and stubborn unwillingness to compromise. Truth, to Gandhi, was not static; it was instead situational and in some sense represented "man's fallible groping for order," which was to the early

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242. See *supra* text accompanying notes 159–64.

243. See Balganes, *supra* note 25, at 1566.

244. See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 65 (2003) ("It is one thing to care about consequences, including consequences for utility (welfare), and another to be committed to a strategy of maximizing some class of consequences, a commitment that . . . can lead to just the kind of dogmatic absurdities that pragmatists are determined to avoid.")

245. See *id.* at 59 ("Legal pragmatism is not just a fancy term for ad hoc adjudication; it involves consideration of systemic and not just case-specific consequences.")

pragmatists the very idea of justice, requiring an “intelligent compromise” all along.<sup>246</sup> 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.

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If Gandhi’s practical idealism was a form of philosophical pragmatism and his engagement with copyright law in essence a form of legal pragmatism, the question remains: where did these parallels come from? As noted earlier, some historical evidence suggests that pragmatism, as a philosophical movement, postdated 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 professional historically aspired toward, since all legal reasoning is in essence practical reasoning, and wisdom in performing the latter thus correlates to heightened acumen in navigating the former.<sup>247</sup> Where then did Gandhi’s pragmatic leanings come from? One may tentatively speculate that it was in his training as a common lawyer.

What is often forgotten in almost all discussion of Gandhi’s philosophical and political ideas is that he trained in England as a barrister; he practiced law in South Africa, where he developed his political strategies, before returning to India to join the freedom movement.<sup>248</sup> 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.<sup>249</sup> He noted 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.<sup>250</sup> 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.<sup>251</sup> Indeed, one noted historian even observed that Gandhi’s legal activism in South Africa employed a form of

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246. See WIENER, *supra* note 229, at 153.

247. See KRONMAN, *supra* note 203, at 193; POSNER, *supra* note 227, at 246.

248. See S.B. Kher, *Introduction* to GANDHI, THE LAW AND THE LAWYERS, *supra* note 156, at iii.

249. See GANDHI, THE LAW AND THE LAWYERS, *supra* note 156, at 12–13.

250. *Id.*

251. See RAJMOHAN GANDHI, GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE, *supra* note 21, at 60; Paul F. Power, *Gandhi in South Africa*, 7 J. MOD. AFR. STUD. 441, 444–47 (1969).

“cautious incrementalism.”<sup>252</sup> 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 Gandhi’s engagement with copyright law.<sup>253</sup> 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.<sup>254</sup> Yet, his concern in this critique appears to have been more with the legal profession and its willing acceptance of the ethical values and norms as dictated by the colonial government. In 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.

### *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 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 that under certain circumstances, copyright can indeed impede freedom. 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 were central to Gandhi’s skepticism.<sup>255</sup>

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252. RAMACHANDRA GUHA, LSE IDEAS, WHY GANDHI MATTERS 3 (Oct. 2011).

253. See Grey, *supra* note 224, at 256.

254. See generally GANDHI, THE LAW AND THE LAWYERS, *supra* note 156, at 130, 140, 210.

255. See, e.g., LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment*

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 was not 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.<sup>256</sup>

Third, Gandhi over time seems to have 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 toward distinctively non-utilitarian goals.<sup>257</sup> Again, copyright scholars have begun suggesting this idea in the last decade or so.

Fourth and last, 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*. Drawing on pragmatism's unwillingness to accept objective abstractions as truth, copyright pragmatism 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. Accordingly, copyright pragmatism entails four inter-related features: (1) a fundamentally critical attitude toward copyright, (2) an outcome-sensitive assessment of, and engagement with, the institution, (3) an attempt to see the institution as capable of contextually affirming plural normative ideals, and (4) an allowance for a gradual modification of position. Each of these ideas is worth elaborating on.

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*Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003).

256. See, e.g., Balganesch, *supra* note 75; Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433 (2007); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Zimmermann, *supra* note 80.

257. For a fuller discussion of Gandhi's subversive technique, see Part II, *supra*.

### 1. Critical Orientation

Copyright pragmatism begins with a basically critical approach toward the institution of copyright. All the same, this critical orientation does not of necessity translate into forms of copyright skepticism, minimalism, or indeed nihilism. It originates instead in the recognition that as a creation of the law, 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.<sup>258</sup>

Copyright pragmatism's critical orientation toward copyright bears the imprint of a core element of pragmatist thinking known as "fallibilism,"<sup>259</sup> the philosophical idea that "there is no conclusive justification and no rational certainty for any of our beliefs or theses."<sup>260</sup> 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).<sup>261</sup>

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

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258. 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).

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

260. Stephen Hetherington, *Fallibilism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Oct. 10, 2005), <http://www.iep.utm.edu/fallibil>.

261. For an example of such skepticism in an extreme form, see Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY (Aug. 2, 1999), <http://pear.accu.uic.edu/ojs/index.php/fm/article/view/684/594>.

skepticism (as a philosophical approach), which takes the extreme position of denying the very possibility of truth, knowledge, and belief.<sup>262</sup> A skeptical outlook toward 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 does not deny the possibility that they could indeed remain true in situations.<sup>263</sup> It asks 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.<sup>264</sup> 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 toward a *particular end*, namely maximizing overall utility.<sup>265</sup> 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 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.

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

263. 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 107, at 4160–61 (distinguishing Gandhi's fallibilism about truth from Mill's skepticism about the possibility of truth). For a fuller discussion of the distinction, see Akeel Bilgrami, *Scepticism and Pragmatism*, in WITTGENSTEIN AND SCEPTICISM 49 (Denis McManus ed., 2004).

264. See POSNER, *supra* note 244, at 337. (“[P]ragmatism . . . is not consequentialist. . . . It has regard for consequences, because they are important to any practical decision, but it is not bound to a norm of consequentialism.”).

265. See Julia Driver, *The History of Utilitarianism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 16, 2009), <http://plato.stanford.edu/entries/utilitarianism-history> (“[Utilitarianism] is a form of consequentialism: the right action is understood entirely in terms of consequences produced.”).

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.<sup>266</sup> All the same, this does not 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.

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, to 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 comes 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

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266. For a recent account of pluralism in intellectual property law more generally, see SUNDER, *supra* note 80, at 23–44 (discussing the numerous values “[b]eyond incentives” served by copyright law).

ideals.<sup>267</sup> 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 implies that a copyright pragmatist 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.<sup>268</sup> 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 on basic legal concepts and principles, which in turn implies that copyright pragmatism is at base a theory that most appeals to those trained in legal reasoning, that is, lawyers. This is not 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 becomes available. Indeed, this circumstantial updating and modification has remained a hallmark of the "common law tradition" of rule development, long known to be pragmatic in orientation.<sup>269</sup> 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, copyright pragmatism requires that a contextual modification of one's position on a copyright issue involve a reconciliatory

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

268. See Leslie Green, *Legal Positivism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Aug. 10, 2009), <http://plato.stanford.edu/entries/legal-positivism>.

269. See KRONMAN, *supra* note 203, at 20–21.

engagement with the basis for one's prior positions. It entails what Anthony 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.<sup>270</sup> 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 toward 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 (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.

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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 thinking."<sup>271</sup> Yet, what makes Gandhi's 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 was not until 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."<sup>272</sup> 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 did not 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

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270. *Id.* at 84.

271. JAMES, *supra* note 214.

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

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, as described further below.

Open source licensing involves the assertion of copyright by a creator who then allows the work 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.<sup>273</sup> 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.<sup>274</sup> It is perhaps no coincidence that founder of the open source movement characterized it as a form of "pragmatic idealism."<sup>275</sup> In a largely similar vein, Creative Commons, which similarly employs creative licensing techniques to unbundle copyright's various entitlements, has been characterized by scholars as subversive, minimalist, and as embracing a wide range of normative ideologies<sup>276</sup>—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.<sup>277</sup>

That Gandhi did in his interactions with copyright what the open source licensing and Creative Commons initiatives would do decades later, certainly does not 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.

## CONCLUSION

Across the world, Gandhi is recognized in the public mind as a political visionary, principally for his views on nonviolence and freedom. In this Essay,

273. See Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV. 179, 185–89 (1999).

274. *Id.* at 185–86.

275. See RICHARD M. STALLMAN, *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* 129 (2d ed. 2010).

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

277. *Id.* at 378.

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 a lawyer in the United Kingdom, 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.

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. Gandhi's adventures with copyright law provide us with an inspiring example of how this might be fruitfully achieved.