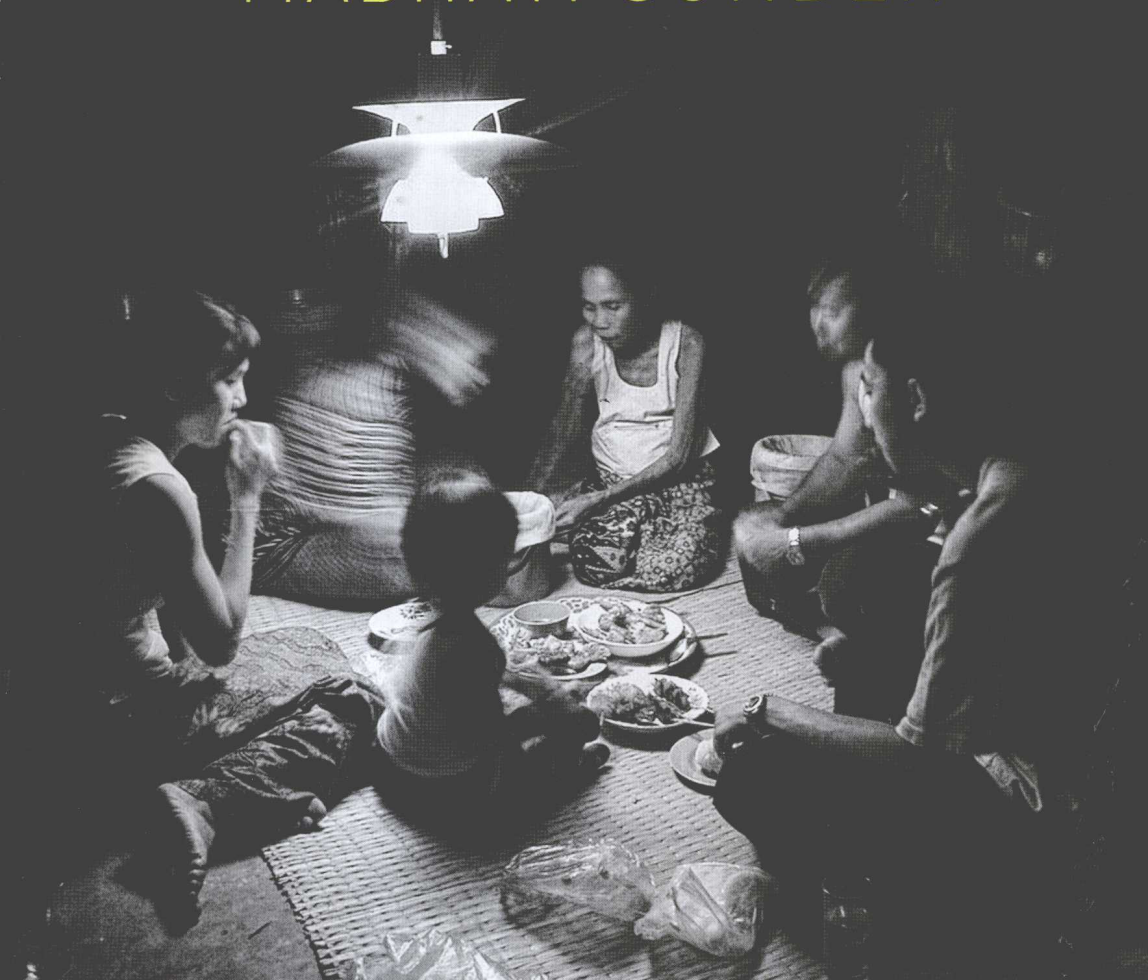
FROM GOODS TO A GOOD LIFE

Intellectual Property and Global Justice

MADHAVI SUNDER



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For Anoushka and Milan

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INTRODUCTION: CULTURE AND FREEDOM

FROM BARBIE TO HARRY POTTER, the Beatles to Beyoncé, Hollywood to Bollywood, and Viagra to life-saving AIDS medications, intellectual property now dominates our culture and rules our economy and welfare. Our children grow up in a world of copyrighted characters surrounded by trademarked goods. With the advent of the World Trade Organization and its legal obligations, intellectual property also increasingly affects people across the globe, from Brazil to Bangladesh. Yet the full cultural and economic consequences of intellectual property policies are often hidden. We focus instead on the fruits of innovation—more iPods, more bestsellers, more blockbuster drugs—without concern for what is being produced, by whom, and for whose benefit.

But make no mistake: intellectual property laws have profound effects on human capabilities, what Amartya Sen and Martha Nussbaum define as what people "are actually able to do and be."[1] The most obvious example is law's regulation of access to basic necessities, such as textbooks and essential medicines. But the connections run deeper still. Intellectual property incentivizes pharmaceutical companies to innovate drugs that *sell*—hence we are flooded with cures for erectile dysfunction and baldness, but still have no cure for the diseases that afflict millions of the poor, from malaria to tuberculosis, because these people are too poor to save their lives. Intellectual property laws affect our ability to think, learn, share, sing,

dance, tell stories, joke, borrow ideas, inspire and be inspired, reply, critique, and pay homage. In short, intellectual property laws do much more than "incentivize innovation," as the common perception goes. Intellectual property bears fundamentally on the basic activities that make for a full and joyful life. Furthermore, in a global Knowledge Economy, intellectual property distributes wealth and power and affects global justice.

Take the example of one Solomon Linda. A black migrant worker living in a squalid Johannesburg hostel in 1939, Linda composed a song based on his own childhood experiences protecting cattle from lions in the jungle. The song borrowed the syncopation of American jazz from across the Atlantic and mixed it with an a cappella melody to create what would become Africa's first recorded pop hit. Linda's song soon crossed the Atlantic and was reborn, first as "Wimoweh" and later as "The Lion Sleeps Tonight." It would go on to be recorded over 170 times, eventually finding its way into Disney's immensely popular film and Broadway production *The Lion King*. But while the song eventually produced millions of dollars for Disney and others, Linda died destitute, suffering from a curable kidney disease at the age of fifty-three. One of Linda's children died of malnutrition and another died of AIDS.

Linda's story illustrates how intellectual property laws have effects that extend well beyond incentives for creation. Law regulates recognition (or here, misrecognition) of the contributions of diverse people to our global culture, and distributes the material rewards of innovation. A misrecognition of Linda's contribution led to his inability to pay for food and drugs that could have saved his and his children's lives; conversely, recognizing Linda's cultural contribution would have given him the agency to provide for himself and his family. Intellectual property governs the flow of *free* culture, allowing Solomon to remix American jazz with his own South African music, and yet also raises issues of *fair* culture. Solomon's creation was left to the laws of the jungle, free to be exploited by Westerners with more knowledge and power. Finally, Linda's song reveals the power of culture as a vehicle for mutual understanding, shared meaning, and sociability. "The Lion Sleeps Tonight" is praised as a song "the whole world knows."[2]

This book highlights the broad social and economic dimensions of innovation and cultural exchange in a global context of sharp inequalities in power and knowledge. I argue that law must facilitate the ability of all

citizens, rich or poor, brown or white, man or woman, straight or gay, to participate in making knowledge of our world and to benefit materially from their cultural production. Democratic cultural production promotes not only economic development from market exchanges in a Knowledge Age, but also *human* development. Enhancing one's capacity to participate in cultural production and critique engenders autonomy and equality, learning, critical thinking, sharing, sociability, and mutual recognition and understanding. This book is a call for intellectual property law and legal decision makers to expressly recognize and contend with the plural values at stake in cultural production and exchange.

FROM GOODS TO A GOOD LIFE

In this book I will show that intellectual property laws shaped only by the narrow economic view that predominates today results in a crabbed understanding of culture and law's role in promoting culture. Current law takes as its mandate the production of more cultural goods, from R2D2 to iPads, to be exchanged in the global marketplace. To date, even the most trenchant critiques of the excesses of this law take this normative goal as given. The influential "public domain movement" led by scholars critiquing the exponential growth of intellectual property laws at the turn of the century focused their ire on the counterproductive effects of too much property on this ultimate goal—intellectual productivity. Too many property rights, they argued, will more likely stifle innovation than promote it.

But copyright and patent laws do more than incentivize the creation of more goods. They fundamentally affect human capabilities and the ability to live *a good life*. As we will see, the impact of these laws goes far beyond gross domestic product. At the start of the twenty-first century, the legal regime of intellectual property has insinuated itself more deeply into our lives and more deeply into the framework of international law than at any other period of time in history, affecting our ability to do a broad range of activities, including to create and contest culture and to produce and distribute life-saving drugs. Indeed, now that full compliance with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement is required in all but the world's very least developed countries, intellectual property has become literally a question of life or death.

Intellectual property's march into all corners of our lives and to the

most destitute corners of the world has paradoxically exposed the fragility of its economic foundations while amplifying its social and cultural effects. Global actors have responded to these effects. During the Doha Round of World Trade Organization (WTO) negotiations in 2001, the WTO declared that intellectual property, while important, should not stand in the way of "WTO members' right to protect public health and, in particular, to promote access to medicines for all."[3] The World Intellectual Property Organization (WIPO) responded to the dramatic social and economic effects of intellectual property on developing countries, in particular, by adopting in 2007 a "development agenda" that would reorient the organization's policymaking from promoting efficiency to "development." The WIPO pledged "to approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns," stating that intellectual property law and policy must be created and carried out in "a manner conducive to social and economic welfare."[4]

Despite these real-world changes, in the United States, intellectual property scholars insist on explaining this field only through the narrow lens of a particular economic vision. Giving evidence to Amartya Sen's observation that "[t]heories have lives of their own, quite defiantly of the phenomenal world that can be actually observed," by and large, American legal scholars continue to understand intellectual property solely as a tool to solve an economic "public goods" problem: nonrivalrous and nonexcludable goods such as music and scientific knowledge will be too easy to copy and share—and thus there will not be an incentive to create them in the first place—without a monopoly right in these creations for a limited period of time.[5]

But intellectual property today is more than simply a tool for incentivizing creative production. Intellectual property laws bear considerably on central features of human flourishing, from the developing world's access to food, textbooks, and essential medicines; to the ability of citizens everywhere to participate democratically in political and cultural discourse; to the capacity to earn a livelihood from one's intellectual contributions to our global culture. This book calls for a deeper understanding of intellectual property and its broader social, cultural, and economic effects, one that acknowledges that regulation of cultural production and exchange has a profound impact on human freedom.

In the pages that follow, I argue that we must recognize culture not just as *products,* but as critical *processes* of creative and social interaction that promote our humanity. Cultural participation is an end in itself and cultural participation has intrinsic value. Singing, dancing, and sharing stories together; utilizing our intellect to make new knowledge of the world—these are fundamentally what human freedom is *for.* At the same time, cultural participation is a critical *means* for fostering cultural change and exchange. Individuals take values, norms, images, and ideas from the world around them—near and far, past and present—and recast them to tell their own stories and remake culture. Yet a decade on into the twenty-first century, much of the cultural forms that are familiar and dear to us are in private hands, wrapped up as intellectual property in the form of copyrights (in books, music, art, and film), patents (in scientific innovation), and trademarks (in commercial brands). The law of intellectual property—what it allows; what it prevents; who makes the decisions; and crucially, who pays or receives the money—thus is central to our ability to talk back to or talk through our culture. Cultural exchanges cultivate humanity in other important ways. Exchanging stories and knowledge with one another both confers recognition on diverse others and fosters mutual understanding.

Today we readily understand how ownership of property in land is central to our ability to control our own destinies; at the same time, we regulate property relations to reflect the kinds of interactions we deem just. Modern property law "governs human interaction to ensure that people relate to each other with respect and dignity,"[6] for example, by implying into every leasehold a warranty of habitability, prohibiting racially restrictive covenants, and guaranteeing equal access to places of public accommodation. As Joseph Singer reminds us, real property law both reflects and shapes our free and democratic society.[7]

This book seeks to bring our attention to the increasingly important ways that intellectual property law frames a free and democratic society and just global social relations. As I will show, intellectual property laws that regulate the ability to produce, share, and enjoy culture are central to our ability to cultivate ourselves and our communities.

THREE VIEWS OF CULTURE

"Culture" is a word on everybody's lips in intellectual property scholarship. James Boyle has spurred a "cultural environmentalism" movement to counter the privatization of our intellectual heritage. Larry Lessig has warned that legal code and computer code together are morphing our once "free culture" into a "permission culture." Yochai Benkler has explored how commons-based methods of production "provide more opportunities for participating in the creation of culture." And Jack Balkin has said that interpreters of the First Amendment and intellectual property ought to be concerned with "cultural democracy." All of these scholars seek to protect our cultural commons and the processes of cultural innovation. Yet there is resistance in the academy to the elaboration of a cultural theory of intellectual property that would stand beside and help illuminate the dominant economic account of our law, and none of these theorists has offered such an account. This book takes up that task.

Before elaborating, I should briefly distinguish my view of culture from two common perceptions of culture: culture as tradition and culture as commodity. (I consider these distinctions in detail in Chapter 2.) For well over a century the dominant anthropological conception of culture was of static *tradition* handed down from above, rotely reproduced from generation to generation. Culture as tradition takes, in Michel Foucault's words, "the spectator's posture" toward the present—that of "the *flâneur,* the idle . . . satisfied to . . . build up a storehouse of memories."[8] But this view of culture has been rejected both positively and normatively by modern theorists from fields as wide-ranging as anthropology to philosophy.

The view of culture as *commodity* has particular resonance in intellectual property law. On the one hand, mass culture has a democratizing effect, increasing access to cultural works by the public. At the same time, however, architectures of commodity culture, from technology to law, have enforced autocratic cultural authority. As told in Jürgen Habermas's influential account *The Structural Transformation of the Public Sphere,* culture by the end of the twentieth century was transformed into static commodities handed down to the masses with little if any opportunity to meaningfully engage with the imposed culture. During the late twentieth century, social theorists from Habermas to Foucault came to focus on the constraints of culture on human freedom.

In short, neither the tradition nor commodity views of culture, which

conceive culture as something that is given and passively consumed, are fully in tune with modern Enlightenment values, which emphasize innovation as critical thinking and engagement, not mere passive enjoyment of goods handed down by others.

This book begins the project of developing a third theory of culture that would better reflect and shape a free and democratic society and the demands of global justice. Anthropology, cultural studies, philosophy, and development economics offer rich views of culture and its effects on human freedom and development. Notably these views are influencing, and are being influenced by, transnational actors working on intellectual property issues, from multilateral agencies such as WIPO, the WTO, and the World Health Organization (WHO) to a civil society movement for "Access to Knowledge." Yet they have not fully challenged the dominance of the single-minded economic account of this law at home in the United States.

The capabilities approach associated with Amartya Sen and Martha Nussbaum supplies the normative vision animating this book. I rely on both Nussbaum's elaboration of a list of central human capabilities that law should promote, as well as Sen's description of development as freedom, to elaborate the plural values at stake in modern intellectual property conflicts.

Today there is growing recognition that culture is a key component of human development. Surely this includes the production and just distribution of essential cultural goods, from medicines to biotechnology to educational materials, art, and literature. All of these are critical to enabling a fulfilling life, bearing direct relation to what Nussbaum identifies as "central human capabilities," from the capability to live "a human life of normal length," to "being able to use the senses, to imagine, think, and reason . . . in a 'truly human' way . . . cultivated by adequate education."[9] In adapting Nussbaum's capabilities approach to intellectual property law, I seek to elaborate the connections between the cultural sphere, intellectual property, and the expansion of human capabilities. Where traditional intellectual property scholarship focuses on knowledge products, a cultural approach takes a broader view of cultural freedom and equality as vital to promoting not only health and education, but also a whole host of central human capabilities, including:

- Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice (religious, literary, musical, and so forth)
- Supporting forms of human association that can be shown to be crucial in the development of emotions
- Being able to form a conception of the good and to engage in critical reflection about the planning of one's life
- Being able to engage in various forms of social interaction
- Being able to laugh, play, and enjoy recreational activities
- Being able to hold property, and having property rights on an equal basis with others
- In work, being able to work as a human being exercising practical reason, and to enter into meaningful relationships of mutual recognition with other workers.[10]

Margaret Jane Radin brought theories of human flourishing to bear on real property law (including Nussbaum's own theories), highlighting this law's role in promoting personhood. Today, Nussbaum and Sen's theory of human capabilities may usefully help us begin to reorient *intellectual property* law, as well.

In these pages, I suggest that culture is better understood by considering three central features: *participation, livelihood,* and *shared meaning.* This view of *culture as a participatory community* is more in line with the values of a free a democratic society and, as I shall argue, is the view of culture that modern intellectual property laws ought to promote.

Participation

What Foucault famously described as the "author-function" describes how power and knowledge are controlled by a select few. The juridical category of "author" serves to legitimate and insulate cultural authority from the proliferation of alternate meanings.[11] But today this vision of cultural authority is yielding to a more dialogic process, in which ordinary individuals wield the power and claim the authority to produce knowledge of the world, from journalism to music, art, and science. This democratization is taking place through a confluence of innovations, from blogs to customer reviews; to YouTube, MySpace, and peer-to-peer file sharing; to open-source collaboration. Participatory culture democratizes cultural

meaning-making: cultural meaning derives less exclusively from traditional authorities and more from the people themselves. And as examples from Ethiopia to India to South Africa in the proceeding pages illustrate, participatory culture extends well beyond the United States. More and more, individuals and communities around the world seek to engage in global processes of meaning-making.

Of course, the rise of participatory culture does not mean that we should reorient law to promote it. There are certainly normative benefits to stable cultural meaning and authority. Trademark law is built on this premise, reasoning that without stable meanings, marks would lose their ability to signal to consumers the source of the product. Copyright and patent, too, are premised on the notion that protecting authors and inventors produces better art and science. Indeed, in a recent book, *The Cult of the Amateur,* Andrew Keen suggests that by embracing cultural democracy we would be giving up on cultural quality.[12]

But while we have elaborated reasons for privileging stable cultural meanings, the case for cultural democracy—that is, dissent and change *within* culture—has been more elusive. This book begins to elaborate the benefits of democratic culture, a culture in which all people have the capacity to participate. I use the phrase *working through culture* to describe the myriad ways in which individuals exercise their human capabilities—from critical thinking to learning, sharing, playing, and engaging in meaningful work—*within* the cultural domain, and not just outside of it. The normative benefits of active engagement in rather than passive acceptance of culture are legion: from producing greater and more diverse cultural content, to fostering engaged democratic citizens, to promoting learning through emulation and pretend play, to engendering mutual recognition and understanding among diverse peoples. In addition, participatory culture has significant economic value, especially for marginalized communities historically left out of the processes of cultural production.

Livelihood

A twenty-first-century theory of culture cannot ignore the important issues of development and global justice. Culture plays a critical role in development, in particular in countries' ability to meet the U.N. Millennium Development Goals, which include the eradication of global poverty,

universal education, gender equality, child and maternal health, progress in fighting HIV/AIDS, and environmental sustainability.

To promote *development as freedom,* in Sen's words, intellectual property law should seek to enhance people's capacity to participate in cultural production and shared communities of meaning. Furthermore, we must recognize that cultural production is both an end and a means of development. Recognition of Australian aboriginal artists, African musicians, and Ethiopian farmers as producers of cultural meaning, for example, could potentially direct significant revenues into these countries. As Sen has written, "cultural liberty is important not only in the cultural sphere, but in the successes and failures in social, political, and economic spheres. The different dimensions of human life have strong interrelations."[13] Here, *working through culture* has yet another meaning. In the Knowledge Age, cultural work is a promising means of economic development. Concerns about the commodification of culture notwithstanding, working through culture can offer an antidote to alienation by providing recognition and remuneration for meaningful work.

Shared Meaning

Finally, growth and diversification in cultural production may promote mutual recognition and understanding across diverse cultures. As media scholars observe, the phenomenally popular new websites of the early part of this new century, from Facebook to YouTube to Flickr, are not necessarily about high-quality content but "social connections."[14] Shared meaning goes to the very heart of what makes culture tick; culture evokes communal responses to and affection for common musical and literary referents. The communal nature of the new Participation Age cannot be overstated. As President Obama stated in his Inaugural Address, today's electronic networks not only "feed our commerce," but also "bind us together."[15]

Put simply, a global culture in which all peoples have an opportunity to be creators is surely a means to economic development, but it is also much more. The cultural sphere of life encompasses those joys that make a human life truly worth living. As child psychologists observe, "When young children are free from illness, malnutrition, neglect, and abuse, they turn their considerable energies to play."[16] This is the crux of Sen's insight that economic development goals must go beyond raising GDP to ask what is required to ensure that people can live fulfilling lives.

Cultural exchanges are not merely monetary transactions involving static goods. Individuals make cultural goods to share with others parts of themselves—their history, their music, their stories. Cultural activity promotes self-development and mutual understanding, potentially realizing G. W. F. Hegel's twin goals of "individual self-realization and reciprocal recognition." Serious study of the processes of cultural production and exchange governed by modern intellectual property laws must recognize the special ways in which culture can promote mutual recognition and understanding. As John Dewey eloquently put it, "the art characteristic of a civilization is the means for entering sympathetically into the deepest elements in the experience of remote and foreign civilizations."[17] By pointing out the common human characteristics that bind us all, culture promotes shared meaning not only among those who look and think alike, but also among far-flung peoples.

BEYOND EFFICIENCY

Intellectual property scholars today focus on a single goal: efficiency. But in this book, I elaborate the connections between cultural production and plural values, from freedom to equality, democracy, development, and mutual recognition and understanding. Freedom to participate in cultural life stands at the very core of *liberty*. As Salman Rushdie has stated, "Those who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts."[18] Cultural liberty also has important implications for *equality*. The liberty to contest hegemonic discourses has particularly profound possibilities for women and other minorities who have not traditionally had power over the stories that dominate their lives. Drawing on the insights of Charles Taylor's "politics of recognition," I will show with various real-world examples how democratizing the capacity to make and contest culture can distribute power to shape meaning and enhance the capacity to contest hegemonic meanings—so long as copyright and trademark laws do not stand in the way.

Active engagement in the cultural sphere can also be a school for engendering the central traits of democratic citizenship, from *critical thinking* to *creativity* to *sharing* and *sociability*. I have already alluded to how democratic participation in making culture is linked to *economic develop-*

ment; I will also consider how recognizing diverse others as authors and inventors promotes *mutual recognition* and *mutual understanding.*

THE PUBLIC DOMAIN

This book affirms the important observation of scholars of the public domain that creativity is a social and reiterative process. I elaborate on their descriptive claims for a robust public domain by developing further the normative importance of cultural participation. Cultural sharing promotes our humanity.

At the same time, some public domain advocates may find discomforting my calls to democratize who we recognize as authors and inventors. In subsequent chapters, I argue that histories of colonialism and cultural and racial stereotypes have often led us to overlook the knowledge contributions of the poor. While I do not advocate for new sui generis intellectual property rights for indigenous peoples or the poor, I point out how poor people's knowledge—even when qualifying as novel and nonobvious, or as original and fixed—often gets freely appropriated by creators in the developed world because the works are presumed to be ancient or folk culture. I argue that a more democratic culture, that is, one in which more and more of the world's people are engaged in cultural production and exchange, requires first the simple recognition that each of us has a story to tell and knowledge to share.

THE LADY WITH A MOUSE

I write this book about culture and freedom at a moment of profound cultural change around the world. While culture has always been something invented rather than discovered, cultural reform until now has largely been the work of artists or an elite vanguard. Today the tools for authoring our own lives and creating our own communities are increasingly coming into the ordinary person's grasp, and on a truly global scale.

Immanuel Kant iterated his Enlightenment imperative "Sapere Aude!" (Think for oneself!)[19] long before the emergence of the Internet and the tools of digital technology known as "Web 2.0" dramatically enhanced our ability to rip, mix, and contest our given culture from the bottom up. By and large, late into the twentieth century, Enlightenment, where it emerged at all, had come mostly to the political sphere. The cultural sphere, in contrast, remained largely in the control of traditional