

# BOOK REVIEW

## INTELLECTUAL PROPERTY AND IMMORALITY: AGAINST PROTECTING HARMFUL CREATIONS OF THE MIND

—JYOTHSNA GURUMURTHY\*

**BOOK:** *Intellectual Property And Immorality: Against Protecting Harmful Creations of the Mind*

**AUTHOR:** *Ned Snow* **YEAR:** 2022 **FORMAT:** *Digital*  
**PUBLISHER:** *Oxford University Press*

### I. INTRODUCTION

The relationship between Law and Morality has been a long-standing debate in the legal discipline. Legal positivists like HLA Hart emphasise the separation between the law and morals, while natural law theorists argue that the strength of the law derives in most part from the influence of morals, and some higher order values. Although not a natural lawyer in the strictest sense, Dworkin is one of the legal theorists who advocates that legal reasoning draws from the circumstances – i.e., legal validity depends on moral considerations.<sup>1</sup>

The separation of law from morals is not necessarily a good or a bad thing – the law is inherently a social construct, and hence the role that morals and social values may have on its practical enforcement is something that is inarguably present – to what extent this influence is present, depends on the individual thinker and her ability to convince the reader/listener on the most appropriate role of the law, in a particular situation. Within this backdrop, Ned Snow's monograph on law and immorality engages the reader in a debate that is essential to the study and practice of the law. What is all the more attractive about this book, is that its author brings in the debate on morality and the law, into a highly codified and essentially positivistic area of law – intellectual property.

---

\* DPhil in Law Candidate, Faculty of Law, University of Oxford; BCL (Oxford 2020); BA LLB Hons (NALSAR 2019). I would like to acknowledge and thank Prof Dev Gangjee, Dr Poorna Mysoor and Mr Prashant Reddy, for their feedback and insights in helping me develop this review.

<sup>1</sup> 'The Nature of Law' (Stanford Encyclopedia of Philosophy, 22 August 2019) <<https://plato.stanford.edu/entries/lawphil-nature/>> accessed 18 April 2022.

The book's main argument is that harmful or immoral creations of the mind, or intellectual property works that are morally incorrect, must be denied the protection of the law. At the very outset, the author mentions that he is limiting the discussion to the dimensions of patent and copyright, as they rely on similar theoretical foundations. Other regimes like trademarks, trade secrets etc., are briefly considered in the latter part of the book, but the argument's main thrust relies on how the systems of patent and copyright are structured, to inherently allow for denials of protection, grounded in immorality.

## II. THE STRUCTURE

Set within American Jurisprudence on IP Law, this book can be broadly divided into three parts, which the author himself sets out in the introduction – *Part 1* forms the theoretical basis for this argument with *Chapters 2 and 3*. *Chapter 2* outlines the three broad theories that intellectual property law draws from – utilitarian, labour and autonomy/personhood. Each theory is explained, and focus is drawn towards moral values inherent in each theory, which support the argument that only morally worthy intellectual works must be granted legal protection. For example, the utilitarian theory of IP law suggests that IP is a tool that governments must use to intervene in the event of market failures. The chapter argues that the judgement regarding the value of a particular work, draws from whether the work in question is harmful to society. Harm under the incentive theory arises from the presence of a market failure – or, when there is an absence of an efficient level of production. Market failures occur when supply and demand are not in equilibrium. In the case of over production, the work does not need the incentive that IP provides, and hence protection is to be denied. Under production in some instances may be justified if the work is of a nature that must necessarily be publicly accessible, since IP as a tool takes away from the public-good characteristic of an intellectual work. In such instances as well, IP cannot have a significant role to play. The chapter argues that the denial of IP does not work to cure a market failure, but merely reflects a stance of non-interference. Given that IP is a legal intervention into a market failure situation, in the instance of a harmful creation, the law must not intervene, and must deny protection – leaving the situation as it is. Within this moral justification of denial that theories of IP law seem to provide, *Chapter 3* considers counter arguments to such denials of protection. The arguments against denying protection can be briefly summarised as follows: a) denying protection for harmful works will in fact increase their propagation, b) it is not the mandate of IP law to control moral issues, and c) the morality of a work cannot be a decision that a government actor can or must make – let the value of the work be left up to the free market. In responding to each of these arguments, *Chapter 3* makes for a convincing case for why the denial of IP does in fact effectively combat the problem that harmful intellectual works pose in society. In engaging with each counter argument and systematically breaking down the anatomy of each argument, the Chapter builds

up the strength of the claim that despite valid concerns that there are other avenues that can deal with morality in IP law, arguing that none of these approaches necessarily negate the concept of IP denials for harmful works.

*Part 2* of the book relates to how courts and the government must deal with the issue of IP denials. The first half of *Part 2* looks at the role of judicial actors. *Chapters 4, 5 and 6* explore the role of courts in the denial of IP. *Chapter 4* presents a broad introduction to the issue of enabling courts and judges to exercise their moral discretion. Arguing that courts' moral discretion should be limited to exceptional circumstances, the Chapter segues into a discussion on the role of courts in circumstances that involve unlawful activity which taints the intellectual work for which protection is sought. *Chapter 5* discusses the concept of unlawful conduct through the lens of the doctrine of unclean hands. This principle of equity is examined through examples of what would constitute unlawful conduct in the creative process, both in copyright and patents. While *Chapter 5* focuses on the theory, *Chapter 6* explores the judicial history on the doctrine of unclean hands. Much of the Chapter is devoted to the case of *Mitchell Bros. Film Group v Cinema Adult Theatre*,<sup>2</sup> arguing that had the court applied the doctrine of unclean hands within a correct framing (focusing on the unlawful conduct of a plaintiff), it would have arrived at a legally, and morally, valid decision. Similarly on the patent side, the Chapter emphasises that the doctrine of unclean hands continues to play an important role in judicial discretion, especially after the Federal Circuit's decision in *Gilead Sciences, Inc. v. Merck & Co.*<sup>3</sup>

The second half of *Part 2* examines the role of the Congress in IP denials, in *Chapters 7, 8 and 9*. *Chapter 7* introduces the constitutional *power* or limitation that the Intellectual Property Clause presents, and concludes that the Congress must necessarily grant IP protection only to those works that 'promote the Progress of Science and useful Arts'. This argument cleverly draws strength from the history of IP law as it explores the political situation that led to the adoption of the IP Clause in the US Constitution (in response to the English Crown's abuse of its monopoly conferring powers), while also favourably interpreting judicial history. *Chapter 8* further builds on this argument by explaining what sort of works fall outside the meaning of the above clause. The Chapter is an exercise in statutory interpretation, as each of the words – *Progress*, *Science*, *useful*, and *Arts* are explained and contextualised through case law and examples. The latter half of the chapter brings in, what I feel, is the most difficult theme in the book – actual categories of works (deceitful expression and pornography) that must be denied IP protection because they lie outside the purview of the IP Clause. *Chapter 9* finally concludes this section by questioning the circumstances in which Congress must deny IP protection. While *Chapters 7 and 8* focussed on the constitutional limitation against extending protection, *Chapter 9* looks at the

<sup>2</sup> *Mitchell Bros Film Group v Cinema Adult Theater* 604 F 2d 852 (5th Cir 1979).

<sup>3</sup> *Gilead Scis Inc v Merck & Co* 888 F 3d 1231 (Fed Cir 2018).

Congressional discretion to deny protection. The Chapter sets out a model based on principles that need to be considered for the exercise of this discretion to deny protection. Essentially, the model seeks to cover those works that might not be apparently outside the purview of the IP Clause, like in *Chapters 7 and 8*, but would still constitute harm to the society, and hence be immoral and unworthy of IP protection.

The book concludes with an extensive chapter on Free Speech and its counter arguments to the introduction of morality into IP. *Chapter 10* explores whether IP denials would be consistent with free speech principles. Interestingly, the conclusions vary for patent and copyright. Interpreting the First Amendment Right in the light of the intent of patent law, the Chapter concludes that Congress has broad discretion to engage in patent denials, but equally has limited discretion when engaging with moral denials in copyright claims. Lastly, *Chapter 11* ties the entire book together by categorising each chapter under relevant themes, and sums up the argument by briefly discussing and revisiting each prong that was established earlier.

### III. A CRITIQUE OF THE BOOK

#### A. UNDENIABLE STRENGTHS

The chapterisation of the book is quite helpful in breaking down the answer to the simple question that the author concludes his introductory chapter with – “*Should moral values define whether intellectual works are eligible for patent or copyright protection?*”. Importantly, he understands and acknowledges the uneasiness that moral discretion brings into the practice of the Law. In acknowledging the subjectivity of morality, he goes on to explain that this morality and value-based judgement is in fact inherent in the law (through the IP theories in *Chapter 2*). For instance, he mentions that the autonomy theory is essentially subjective in its moral dilemma of which actor to support. He agrees that denying IP would amount to denying personhood to the extent that intellectual works are an extension of a person’s personality. However, when one person’s creativity restricts another from manifesting their individual personality, the law cannot and must not condone the creator’s harm via the recognition of a property right. The denial of IP in such instances would in fact be in line with the overarching goal of the autonomy personhood theory. This sort of a loop in the argument – exploring the counter argument, accepting its validity, and presenting a rebuttal grounded in fact - is a helpful argumentative technique that the author has periodically (and effectively) used throughout the entire book.

Through IP denials, it is easy to fall into a trap of censorship – which is antithetical to the free speech guarantees that most constitutions safeguard. The author, in acknowledging this argument continues to advocate for IP denials. He

argues that even though the denial of a copyright might not actually cure the harm that results from an immoral work like a pornographic or obscene video (the other-laws argument mentioned in *Chapter 3*), yet, the government cannot reward immoral behaviour through the grant of an IP right, and hence, copyright should be denied. This counter argument does have some strength to it, and despite the free-speech concern, might appeal to some scholars.

Each chapter is well-structured in its individual segment of the overall argument. By drawing on judicial history and actual case law examples in support of his argument with respect to patent law, in *Chapter 4*, the author conveys the importance of structure in a convincing argument.

The author's response to the argument that morals change over time and hence IP is not suited to dealing with a such a dynamic field, is commendable. Drawing inspiration from trademark grants and subsequent denials when the marks become less distinctive in nature, the author argues that IP is also a dynamic field of law. The copyrightability of *Lady Chatterley's Lover* in the UK is a famous example within copyright jurisprudence of a work that was denied IP due to its offensive/obscene nature, but was eventually morally accepted.<sup>4</sup> Hence the dynamic nature of IP is quite evident in history.

An extremely helpful tool of argumentation that the author employs periodically – is signposting and revisiting controversial issues. Every chapter, and every section, begins with a short outline of what is to follow, and also ends with a brief summary of what was discussed. This tool reinforces the argument in the mind of the reader and makes for a very helpful way to actually engage with the content of the argument, at each stage. Moreover, the influence of the IP theories, as well as the debate on free speech, is constantly flagged whenever relevant, and either reminds the reader of the author's previous stance, or enables the reader to keep the current argument in mind, before reaching the final chapter on free speech and its relationship with IP denials. This tool was especially helpful in what I believe was a difficult chapter – *Chapter 6*. Copyright is especially a tough hurdle to cross when talking about unlawful acts in the creation process – because of the ease with which they can be argued to be remote.<sup>5</sup> However, I feel the author has efficiently tried to convince the reader of his stance, through his well-structured and cleverly signposted arguments in each section.

*Chapters 7 and 8* involve a lot of textualism and statutory interpretation, and in my humble opinion, can be assigned as standalone readings for law school

---

<sup>4</sup> Catherine Baksi, 'Lady Chatterley's Legal Case: How the Book Changed the Meaning of Obscene' *The Guardian* (1 August 2019) <<https://www.theguardian.com/law/2019/aug/01/lady-chatterleys-legal-case-how-the-book-changed-the-meaning-of-obscene>> accessed 18 April 2022.

<sup>5</sup> Dan Markel, 'Can Intellectual Property Law Regulate Behaviour? A 'Modest Proposal' for Weakening Unclean Hands' [April 2000] *Harvard Law Review* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=410933](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=410933)> accessed 18 April 2022.

seminars in these areas of jurisprudence. The author has examined the text, and judicial history with a high level of detail and has also presented it in an easily understandable manner.

There is a nice *in arguendo* that the author builds up in *Chapter 10*, in saying that denial of IP is not a speech issue with respect to patents, and even if it is an abridgement of speech in copyright, it may be morally justified in limited circumstances. The thrust of the chapter relies on convincing the reader that only viewpoint neutral discretions are legally valid and rational. Through the use of extensive examples, the author summarily provides a model by which one can arrive at a conclusion of whether a decision is viewpoint discretionary or neutral – and this is a helpful tool to decide whether an intellectual work in question is immoral, ‘legally’ or not. This model tries to differentiate between the content of speech, the effect of speech and the expression of speech. The last realm falls into the purview of copyright, and the author tries to infuse morals into it. A more detailed articulation of this model may be required to fully equip a reader to make their own decisions, but given the context of the chapter, the discussion is quite extensive, and highly appreciated.

## B. ARGUMENTS REQUIRING FURTHER THOUGHT

Though the book is written only with US law in mind, in the specific context in *Chapter 4*, where he draws on judicial history regarding moral discretion, I believe it might have been helpful to compare with other jurisdictions like those in civil law countries. EU Law in particular places a heavy reliance on the moral rights and related rights involved in an intellectual work.<sup>6</sup> Contrasting the difference in the value of precedent moreover, could have helped his argument. Moreover, international IP regimes like TRIPS<sup>7</sup> and supranational IP laws<sup>8</sup> in the EU, support a moral stance with respect to patentability. The US is a signatory to several international treaties on IP law, such as TRIPS and the Berne Convention,<sup>9</sup> amongst others. Drawing on the support of such international treaty obligations, would have strengthened the legitimacy of the argument. While the Berne Convention is silent on explicit provisions for copyright denial based on

<sup>6</sup> Justine Pila, ‘Copyright and Related Rights: Outlining a Case for European Morality/Public Policy Exclusion’ in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (2nd ed, 2017).

<sup>7</sup> Article 27.2, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (opened for signature on 15 December 1993, entered into force 1 January 1995) 1869 UNTS 299.

<sup>8</sup> Article 53(a), Convention on the Grant of European Patents (opened for signature 5 October 1973, entered into force 1 January 1977) 1065 UNTS 199; Article 7(f) Council Regulation (EC) No. 207/2009 of 26 February 2009 on the European Union trademark as amended by Regulation (EU) 2015/2424 [2015] OJ L 341/21; Article 4(f) of Directive (EU) 2015/2435 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks [2015] OJ L 336/1.

<sup>9</sup> Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, revised 24 July 1971) 828 UNTS 221 (Berne Convention).

immorality, authors like Justine Pila have advocated that such a stance (reading morality into a copyright decision) would in fact be consistent with fundamental rights and public policy guided by the EU Charter and generic EU law and policy.<sup>10</sup> There is thus cross-border support for Ned Snow's claim, and it might have helped build the strength of his argument, if he had referred briefly to the IP-morality trends in other jurisdictions.

While the book reminds the reader that moral discretion in the law is susceptible to subjectivity, *Chapter 5* poses slight confusion in its support for equitable doctrines that enable courts to decide on issues of public interest. The issue of subjectivity is inherent in cases that involve public interest, as well as cases that involve morality. An explanation of why this particular subjectivity is justified, might have clarified the argument. Moreover, the Chapter is also silent on already established tools to deny extension of IP rights. The doctrine of unclean hands might play a role here as well, and might be in line with the model that introduces morals into IP considerations, but the chapter does not discuss already established tools for an IP right that is currently valid but may not be extended further.

While *Chapters 7 and 8* are extremely well structured, they also discuss what I believe is the most controversial aspect of the argument. In actively listing out categories that fall outside the purview of IP protection, the author needs to satisfy a very high bar to rebut any criticism of subjectivity. It is not extremely clear to me, where and when morality in the law becomes unacceptable. While the author argues that patents may be granted for inventions that involve nicotine, but not for a system that supports evading taxes, the logic behind this distinction is not clearly explained. How his overall model applies to different kinds of moral conundrums of varying intensities, is thus left up to the reader to decide.

Most importantly, the author, in his argument supporting the denial of IP for pornography as a whole category, distinguishes it from science, describing pornography as merely evoking emotional thought and passion, and hence not necessarily promoting progress in *Science*. The author furthers his argument by mentioning that merely placing a pornographic segment adjacent to a work that promotes intelligent thought, does not further advancement in science. If a sex scene was crucial to the plot of the movie, only then would a pornographic segment be worthy of copyright, otherwise it would amount to 'just' pornography, and hence should be denied IP protection. The argument against pornography validly draws from the harmful effects of porn – which the author argues are not consequences of the specific content of a piece, but a statistically proven effect of increased porn consumption.<sup>11</sup> The author's argument, if I may summarise, is that

---

<sup>10</sup> Pila (n 6).

<sup>11</sup> Ann Bartow, 'Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography' [2008] 39 U Balt L F 75 <<http://digitalcommons.pace.edu/>

the harm that results from porn does not result from a specific viewpoint/content within a pornographic work. It is the overall harms that porn leads to - increase in sexual dissatisfaction, higher divorce rates, violence against women, and so on. While each of these harms are serious and must definitely be considered as factors affecting the decision to grant a copyright, I find it a little difficult to place a blanket ban on IP protection for pornography, based on this model.

At the outset, the criteria of intelligent thought required for a work to be protected under copyright, could very easily be refuted using the example of a senseless 'no-brainer' movie, that engages no objective intelligent thought. Different entertainment forms might fall short of protection requirements, if rational thought, intelligent analysis and engagement are adopted as evaluative criteria. Moreover, by requiring a pornographic video to be meaningfully embedded within a broader plot/storyline sort of invites an enquiry into *parts* of a work. This sort of analysis breaks up a work into smaller bits, each of which in its own right might be an intellectual creation worth of IP protection. What then, is a work, for the purpose of IP law?<sup>12</sup> A highly arousing 'item' song in a Bollywood movie might play absolutely no role towards furthering the plotline, but is a tool that many directors and producers use, to garner and increase viewership. Is such a tool to bait the public into consuming what is otherwise an acceptable work, something that negates the validity of IP in the work because of the presence of an ancillary yet obscene creative element? The same applies to romantic stories/movies that heavily feature sex scenes. Many of these movies could do without the showing of obscenity – the sex isn't integral to the development of the plot. In such cases, would the entire film be assessed as unworthy of protection, or would only that particular sex scene be denied IP? How does the court, or even a government actor like the Copyright Registrar engage in such an enquiry? Taking this argument further, what if the purpose of a pornographic video is education? Does intention in this case allow IP to be granted, or is a denial still advocated?

In this regard, the difference between prohibition on obscenity versus prohibition on pornography, is relevant. While a blanket prohibition on the category of pornography is a much larger restriction than obscenity restrictions, I personally feel the latter has a more reasonable nexus with free speech restrictions. Although the author of the book argues that the restriction on pornography is viewpoint neutral, yet, the slippery slope that value judgements on what constitutes

---

lawfaculty/893/> accessed 18 April 2022.

<sup>12</sup> This question follows from contested debate in EU jurisprudence, with the *Infopaq* decision of 2008, where the CJEU held that even parts of a work may amount to being a work in itself, if it sufficiently established the author's own intellectual creation. This breaking up of a work into smaller bits of works has influenced copyright jurisprudence in the EU and the UK. Whether the US would be prepared to deal with this sort of a model of copyrightability, is something that the author of this book might have to explore and consider in a separate piece. See Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' [2013] 4-34 IIC 44 <<https://link.springer.com/article/10.1007/s40319-012-0003-4>> accessed 18 April 2022.

pornography could slide down, pushes me to wonder whether the existing obscenity bars handle the situation in a more balanced manner. Obscenity requires the work to have no value, moreover – pornographic works, or pieces of works within bigger intellectual works, might have standalone value (as a creative choice, as a tool to increase viewership, for education, etc), even if they are ‘immoral’.

The author leaves these nuances slightly up in the air. Intuitively, I feel his model does not work for whole categories of works like pornography. Individual pornographic works (and an overwhelming majority of those) would not qualify for protection, under his model – based on the harmful effects they cause, the unlawful conduct involved in their filming, etc. But to deny protection in a blanket sense against an entire category without specifying clear guidelines for exceptions, could lead to messy litigation, and hence needs to be explored further. For instance, a woman might have consented to the violence leading up to a pornographic video. Is the harm of ‘no consent’ then a moral issue that would determine the immorality of the work in question? These questions need to be explored further before one can arrive at a categorical denial. In contrast, the category of deceitful expression being denied IP sits quite comfortably within fair use and other restrictions on free speech, and hence seems more acceptable for a categorical denial.

Since the monograph is limited to a discussion of US jurisprudence, certain inherent questions about immorality and the difficult decisions that might arise in a pluralistic country like India, need to be studied in detail before they can be situated within the author’s model. Literature that promotes segregation on casteist or religious lines and immoral inventions like sex toys<sup>13</sup> are additional examples that could inform this debate on IP and immorality.

#### IV. CONCLUSION

A monograph of this sort, more so one situated within a larger philosophical debate on law and morality, is a unique exercise. Although there have been several articles and authors taking stances on either side of the debate on IP and morality and the intersection,<sup>14</sup> to my knowledge, there have been no books that have specifically taken this particular stance and argued it with the detail that this book presents. The monograph thus contributes significantly to the literature in this area. This book is the only one of its kind, and that itself, makes it a must-read for anyone interested in the field of IP.

<sup>13</sup> Shamnad Basheer, ‘Sexual Pleasure is Immoral: So Says the Indian Patent Office’ (*SpicyIP*, 11 August 2018) <<https://spicyip.com/2018/08/sexual-pleasure-is-immoral-so-says-the-indian-patent-office.html>> accessed 12 May 2022.

<sup>14</sup> Christine Haight Farley, ‘A Research Framework on Intellectual Property and Morality’ in Irene Calboli and Maria Lilla Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (University Press Scholarship Online, September 2021) <<https://www.universitypressscholarship.com/view/10.1093/oso/9780198826743.001.0001/oso-9780198826743-chapter-50>> accessed 18 April 2022.