

FROM THE EDITOR'S DESK

We live in a shackled world. Our freedom and liberty are proscribed by rights conferred upon others. In most cases, such a notion is necessary – it operates on the Lockean argument that an individual must be allowed to reap rewards from the efforts the said individual invests in creating something. For instance, in its most elementary form, this idea prevents people from stealing bread since the creator of the bread is entitled to profit from the bread by the virtue of him/her having invested labour into creating the bread. This entitlement is treated as a legal right. To receive just deserts, the creator of a work must be allowed to benefit from his/her creations.

This, however, is an extremely deontological argument because it views justice from the lens of what is categorically fair detached from what the outcome of a measure would be. Taken to an extreme, this idea can have negative effects on society. As is seen through the battle over access to medicines and pharmaceutical patents, allowing creators to enjoy unlimited rights is not a very tenable argument if this results in the death of millions of patients who cannot afford medicines at the creators' prices. The deontological viewpoint fails to address issues that arise when society is gravely harmed by the creator reaping unrestricted benefits of the creation.

The justification for providing certain rights to creators is fortified by a more consequentialist argument. In intellectual property, this takes the form of the incentive theory which was first used by William Nordhaus while determining an appropriate term of protection for patents. This theory justifies the grant of monopoly rights to creators on the basis that such rights would enable creators to profit from their creations which, in turn, would incentivize them to create in the future.

In absence of such incentive, the theory argues, societal progress would be halted. If creations that are generally protected by intellectual property laws – such as original creative works, designs and novel inventions – are made publicly available, owners of intellectual property would be unable to obtain financial returns. Consequently, they would stop creating, and the world would be deprived of new literature, cinema, designs, technologies and even medicines.

Rapid technological progress has posed a severe challenge to this perception. The internet, for example, has created a plethora of avenues for enabling access in breach of rights of intellectual property owners. Piracy of movies, music, books and academic works has become rampant. In response, the creative industry has initiated lawsuits against access-enabling entities such as Napster, Megaupload, The Pirate Bay, Aaron Swartz, and Aaaarg. In many of these cases, the industry has even obtained favourable verdicts. Despite such extensive litigation, online piracy is still thriving. New-age technologies such as 3D printing will exacerbate this problem by allowing consumers to self-produce goods that are protected by intellectual property laws.

But what is even more significant is the change in mind-set caused by these technologies. Instead of the traditional creator-centric approach that has popularly been used for defending intellectual property rights, the discourse has now begun leaning towards users' right to access.

This change has, in part, been caused by the extreme polarization between the haves and the have-nots. Even though intellectual property has led to progress, its effects have failed to trickle down to the masses; instead they have coagulated with the owners of the intellectual property. Developing and Least Developed Countries have suffered health crises due to the unaffordability of patented medicines; universities and students have been deprived access to academic works that are locked behind paywalls; and inequality of bargaining power has meant that owners are able to charge arbitrary prices for their goods.

The growing frustration has led to a clarion call against the unbridled exploitation of monopolies by owners of intellectual property. This was apparent in the public furor against the Bills for the Stop Online Piracy Act and Protect Intellectual Property Act in the U.S. The dissatisfaction is also evident around the world, as supporters of the access movement are engaging in various defiant acts of civil disobedience.

Despite being prosecuted relentlessly, The Pirate Bay still manages to stay afloat for most part of the year, as do websites that enable access to literature such as Libgen and Aaarg. In India, the case between Oxford University Press and Rameshwari Photocopy led to the Delhi High Court broadly interpreting the fair dealing exception, in recognition of the fact that copyright laws can, at times, be disabling. Free trade agreements like the Trans Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP) are being vehemently opposed for containing many TRIPS Plus provisions that would adversely impact access to medicines.

Instead of being at loggerheads with access-activists, owners of intellectual property need to accept that the archaic principles that originally governed intellectual property can no longer exist. The advent of new technologies has created a user-centric world wherein the rights of creators and owners need to be balanced with the legitimate interests of users.

While the incentive theory still remains relevant, these incentives need to coexist with users being able to access goods protected by intellectual property with better ease. For instance, the frequent demonization of online piracy completely disregards the benefits that arise out of such piracy. Online piracy can prove advantageous for intellectual property owners because it considerably improves the popularity of the pirated material by making it accessible to large groups of people.

Shows like Game of Thrones and musical artists such as Coldplay have become renowned over the world partly because online piracy created an audience among people

who would otherwise not have, or would choose not to, access to this content through legal channels. This increased popularity allows intellectual property owners to profit in other tangible ways – such as through sale of merchandise, and an increased likelihood of people legally accessing content in the future. The latter includes purchasing CDs/DVDs, attending live events, and obtaining new releases through Netflix or other online distribution networks.

Professor Michael Geist of the University of Ottawa makes a similar case for piracy of books. He classifies potential purchasers into three categories. The first category includes librarians, universities and people working on digital issues who would buy books irrespective of whether an open access copy is available for free. The second group consists of readers who would have purchased the work if not for the open access version – this group, thus, represents a financial loss to the publisher. The third group includes people who would not have even been aware of the book but for open access platforms. People belonging to this group could decide to buy a copy of the book, or even buy future works because they enjoyed what they got through open access. As long as the number of people in group three exceeds those in group two, open access would benefit the publisher.

Emphasis, therefore, needs to be laid on finding avenues for mutual development. At its inception, intellectual property was seen as a device to promote progress for mankind. The Powers, however, have contorted this perception and have made intellectual property into a self-serving tool which promotes the interests of the owners at the expense of the users. With technology decentralising the ability to create and distribute, the time is now ripe for the Powers to take cognizance of this new reality. Intellectual property can only serve a meaningful purpose if it makes the world a better place instead of constricting it with shackles.

The *Journal of Intellectual Property Studies* is a step in that direction. By embracing ideals of open and free access, the *Journal* seeks to disseminate academic literature without financial, geographical or other restrictions. Equally important is the symbolism attached to this move – in the polemic between strong intellectual property rights and open access, the *Journal* is taking a pro-access stand. The need of the hour is to create a better access paradigm, one that balances the incentive to create with users' right to access works protected by intellectual property.

It is with this sacrosanct hope that we are launching this *Journal*.

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