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Substantiating Denial of Intellectual Property Protection for Immoral Works and Inventions: A Review of the Latest Book by Ned Snow

Enrico Bonadio & Tanvi Agarwal[1]

I. INTRODUCTION

"Intellectual property and immorality: Against protecting the harmful creations of the mind"[2] is an intriguing and comprehensive discussion on the debate regarding granting intellectual property ('IP') protection to creations which emerge as harmful or 'immoral' to society. Authored by Professor Ned Snow, the book indulges in the examination of the existing jurisprudence on the matter and puts forth the arguments against IP protection of immoral works and inventions. This justifies the fitting title chosen by the author for his book which concisely indicates his main line of argument. His exploration of this debate is a timely and welcome contribution which should be of interest to all IP scholars and lawyers, not only those specifically interested in assessing protectable subject matter which raise controversial ethical issues.

In the book Ned Snow has intensively engaged with the existing literature on the subject as proposed by academics, scholars and judges and has actively aimed to counter the opposing arguments. This is highlighted in the structure of the book which initially lays down the foundation and the theories underlying IP and immorality and progressively builds on his central argument against protection of immoral works and inventions. The book initially explores the three well-known theories which are used to justify the monopolies created by IP rights (utilitarian, labour and autonomy) and delves into the moral limitations of these theories. After laying the basis of his claims, the author proceeds to respond to three arguments against denying protection for IP. He argues that the 'propagation' argument (which contends that denial of protection may lead to further propagation of the work) fails to justify granting protection to discourage or penalise the production of certain works. The 'other-laws' argument (which states that other laws are more equipped to deal with the problems in question) – the author further notes - is based on a false premise that IP denial is meant to control immoral actions. The author then stresses that the 'laissez-faire' argument (which points out that the public should decide the moral values of intellectual outputs) reflects only a presumption subject to exceptions where the free market fails to account for negative externalities or destruction to others' lives, property, or autonomy. In light of the above, he concludes that government intervention is necessary to address such failures, and that the extent of moral discretion should be precisely identified.

However, the author is also cognisant of the idea that the moral view of creators about their works and inventions is more valuable than a moral view held by a judge or agency official. Therefore, the book reminds us that judges and agency officials should not exercise moral discretion in deciding whether to deny IP protection or not. This gap is reconciled in the book through suggesting that the courts should use equitable principles to deny enforcement of rights for works and inventions involving unlawful actions, and that the public interest is relevant in IP cases because these rights are given by the state. Indeed, the book remarks that the courts have the power to employ equitable principles to deny enforcement of rights for works and inventions that involve unlawful actions ('unclean hands' doctrine).

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[2] NED SNOW, INTELLECTUAL PROPERTY AND IMMORALITY: AGAINST PROTECTING THE HARMFUL CREATIONS OF THE MIND (Oxford University Press 2022).

More specifically, the book details the position of the law in the United States ('US') and further develops on the argument of denial of protection of certain immoral works and inventions by backing it with the constitutional limitations present in that country. The limitation arises from the Progress Provision in the US Constitution which bars the Congress from extending IP protection to subject matters of individual works and inventions that do not promote the progress of science or useful arts. In patent law, the author argues, inventions that necessarily fail to promote the progress of useful arts are those that pose a substantial harm to society, directly tied to the operation or performance of the invention and cannot be reasonably argued as necessary to justify social benefits. And in copyright law, expressions that necessarily fail to promote the progress of science are limited to deceitful expression and pornographic expression. Specifically, deceitful expression impedes the knowledge and learning of the public, and pornographic expression fails to impart intelligent thought that gives rise to knowledge and learning.

The book contends that the US Congress should consider and rely on the three IP theories to determine whether harm is present and outweighs potential benefits of recognition; and that moral restrictions on IP protection raise issues of free speech. As far as the latter is concerned, restrictions on copyright content – the author points out - are permissible if reasonable and viewpoint-neutral. Examples of viewpoint-neutral denials include denial for violent crime, trade secrets, malware, and deceitful/pornographic content. Examples of viewpoint-discriminatory denials include targeting live depictions of murder and crime-facilitating speech. The author finally notes that the free speech doctrine allows the US Congress broad discretion for moral exclusions on patent protection and limited discretion for moral exclusions on copyright protection.

Against this background, in this short comment we want to briefly analyse the arguments proposed by the author through the three major fields of IP law. The analysis is conducted through broadening the scope of jurisdiction from the US and drawing parallels from other prominent jurisdictions like that of the European Union ('EU') and the United Kingdom ('UK'). Part II of this article focuses on the denial of patent protection to immoral inventions, where our opinions are similar to the ones proposed by the author. Part III delves into a trademark analysis of denial of protection to controversial signs and Part IV deals with copyright law issues. This analysis, of course, does not detract from the much-deserved praise for Ned Snow's well-articulated and comprehensive book.

II. PATENTABILITY OF IMMORAL INVENTIONS

The first analysis we want to undertake is with respect to denying patent protection to inventions which are immoral and contrary to *ordre public*. Here, as mentioned, our views resonate with those of Ned Snow in making inventions of such nature unpatentable.

An initially glimpse of the book indicates how the author has tried to argue for denying patent protection to the immoral inventions in the US. This jurisdiction as opposed to the EU is marked by a lack of an explicit statutory provision to limit patent eligibility on moral and *ordre public* grounds.[3] Instead, the US Constitution includes the Progress Provision which gives IP protection "To promote the Progress of Science and Useful Arts".[4] Ned Snow undertakes an interpretation of the Progress Provision to argue that inventions which do not lead to the

[3] Margo A. Bagley, *Patent First, Ask Questions Later: Morality and biotechnology in patent law*, 45 WMLR 469 (2003).
[4] US CONST. art. 1, §8, cl.8.

'Progress of Useful Arts' should be denied patent protection. As contended in the book, the term 'Progress' can be interpreted as an indication of advancement or improvement or it can be given a contrary interpretation of physical movement or distribution of knowledge. First, Ned Snow proposes a broader interpretation of the term "Progress" which would account for social welfare and also align with theories of IP like the utilitarian, labor and autonomy theory. This implies that innovations which do not lead to societal improvements or advancements would be unpatentable in nature. Second, the power to determine whether an invention would be in alignment of social welfare or not would rest with the Congress instead of the court.

Ned Snow's discussion on the patentability of immoral inventions in light of the Progress Provision of the US plays a crucial role in kindling the debate on this issue. There has been a dearth of legislative debates on the question of granting patentability to inventions that seem immoral or unethical.[5] The government being an influential entity has the power to impact research and technology through mechanisms like that of the patent system. Granting a patent ensures secured protection for the invention alongside providing a financial incentive to the inventors to further invest resources and energy for the creation of works. The type of invention to which patent protection is granted could have the potential to shape the course of development that springs from it. Therefore, it is essential to re-ignite legislative debates and form a settled position with respect to immoral inventions. In such a scenario, Ned Snow's contribution to the existing literature should be applauded.

The book has extensively engaged in a discussion in the context of the jurisdiction of the US where there is no explicit provision denying patent on immoral grounds. We now want to extend the arguments to a jurisdiction like that of the EU which explicitly identify morality as a basis for denying patent protection.[6] This exercise helps derive the rationale and the means for such denial further assisting the arguments put forth by Ned Snow. For instance, a similar rationale for patent denial was adopted by the Court of Justice of the European Union ('CJEU') in the seminal case of *Brustle* v. *Greenpeace* ('Brustle').[7] The case revolved around inventions related to human embryonic stem cells and the exclusion of patentability on morality grounds. The EU Biotech Directive has an explicit provision in the form of Article 6(2) which provides a list of unpatentable inventions, including the use of human embryos for industrial and commercial purposes.[8] This list is further intended to guide the implementation and interpretation of the broader morality clause embedded in Article 6(1) which denies patent protection to inventions if their commercial exploitation is contrary to *ordre public* or morality.[9] The CJEU in *Brustle* adopted broad means of interpretations to the relevant provisions as well to the term 'human embryo'.[10] Specifically, it held that the creation of embryos just for the purpose of being destroyed would be inconsistent with the concept of morality. This decision indicates how patent law has incorporated moral principles to grant or deny patent protection to a certain type of innovation. This is similar to the approach taken by Ned Snow implying its applicability across borders.

Furthermore, there must be a mechanism to determine which innovations fail to satisfy the criteria of 'Progress' or *ordre public*. Ned Snow's book is cognisant of the same and lays down conditions that indicate a harmful invention for the purpose of denying patent protection in the US. It requires that the harm must be recognised as substantial in nature as well. Further, the harm must result directly from the invention where there is no scope for making a reasonable

[5] David O. Taylor, *Immoral Patents*, 90 MISS. L.J. 271 (2021).
[6] Convention on the Grant of European Patents, 5 October 1973, 1065 UNTS 199, art. 53(a).
[7] Oliver Brustle v. Greenpeace, eV (C-34/10) 1 C.M.L.R 41 (2012).
[8] Netherlands v European Parliament, (C-377/98) E.C.R. I-7079 (2001).
[9] Convention on the Grant of European Patents, 5 October 1973, 1065 UNTS 199, art. 6(1).
[10] BRUSTLE, *supra* note 7, at 35-36.

argument of potential benefits outweighing the harms. The latter principle was clearly not acknowledged on the other side of the Atlantic, in the well-known *Oncomouse* case, where the Technical Board of Appeal of the European Patent Office (EPO) carried out a cost/benefit analysis.[11] In that case the EPO examined the advantages associated with a genetically modified mouse which could produce a treatment for cancer compared with the associated costs with the same in the form of environmental risks and animal suffering. It thus undertook an utilitarian approach and eventually found that in that specific case the benefits outweighed the disadvantages of the invention.[12]

Lastly, to determine whether the mechanism has been fulfilled or not, Ned Snow's book explores the authority granted to the US Congress to exercise its patent power. The Congress is given this power in light of preventing the courts from exercising their moral discretion. Similarly, in Europe the task of invalidating a patent may exceed in some circumstances the expertise of the courts and patent offices which may lack knowledge in social values and mechanisms that ensure protection of ethical principles.[13] But this could be fixed by partnering patent examiners and judges with experts to be questioned about technical and moral issues.

III. TRADEMARK AND IMMORAL BRANDS

The second point we wish to remark is that Ned Snow's book lacks an analysis of the immorality of trademarks. Of course, we do not criticize this choice also considering the need to keep the book within a reasonable length. Such analysis is interesting even though in the US trademark monopolies are justified under the commerce clause of the Constitution and not the IP clause.[14]

Indeed, trademark regimes do not exist in a vacuum either and should not neglect aspects and concerns related to the exploitation of dangerous or unethical subject matter. In several jurisdictions trademark offices are given, during the registration procedures, the task of assessing and deciding whether the subject matter is morally unacceptable in nature.[15] We believe this is the right approach.

Ned Snow's views on trademarks can be inferred from his reference to seminal US trademark cases like *McGinley* in the context of free speech issues. This 1981 case involved a sign which included a photograph of a nude man and woman kissing in a position such as to expose the male genitalia.[16] The court considered whether the 'immoral' mark should be denied trademark registration as it would be in contradiction with the free speech rights of the creator. Regardless, the mark was held as being offensive to morality, decency, and propriety and shocked the moral sense of the community members resulting in denial of registration.[17] The court held that the denial of registration was not equivalent to an act of abridgment and that refusal of registration would not infringe upon the creator's First Amendment rights of free speech.[18] This indicates – we reckon - that Ned Snow would likely argue that signs that are immoral, offensive,

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[11] Enrico Bonadio, *Biotech patents and morality after Brustle*, 34(10) E.I.P.R. 437 (2012).
[12] Oncomouse, T-0315/03, 9(1)-(7), 13(2)(1)-13(2)(4) (2004).
[13] Antonina Bakardjieva Engelbrekt, *Institutional and Jurisdictional Aspects of Stem Cell Patenting in Europe (EC and EPO): Tensions and Prospects*, *in* EMBRYONIC STEM CELL PATENTS 258 (Aurora Plomer & Paul Torremans ed., 2009).
[14] The Trade-Mark Cases, 100 U.S. 82 (1879).
[15] Stephen R. Baird, *Moral intervention in the trademark arena: Banning the registration of scandalous and immoral trademarks*, 83 TRADEMARK REP 661, 675-76 (1993).
[16] *In re* McGinley, 660 F.2d 481, 482.
[17] *Id.* at 482.
[18] *Id.* at 484.

scandalous or disparage ethnic minorities or vulnerable people should be denied trademark protection.

However, these views on the registrability of immoral sings are opposite to the ones taken by the US Supreme Court courts in two more recent judgements. In the case of *Matal* v. *Tam* ('Matal'), the founder of a band tried to register their band's name of 'The Slants' as a trademark.[19] The entire controversy spun around the idea that the word indicated a racial slur and was seen as disparaging towards the people of Asian descent. The band's frontman filed a lawsuit in front of the United States Patent and Trademark Office ('USPTO') that had prevented the band from registering its name as a trademark by applying the Lanham Act; this statute prohibited the registration of any trademark that could disparage, disrepute or contempt others.[20] Finally, the US Supreme Court held that the Lanham Act's ban on the registration of disparaging trademarks was unconstitutional as it violated the First Amendment which guaranteed the freedom of speech. Justice Alito Jr. remarked that speech could not be banned on the grounds that it expressed ideas that were offensive in nature. He basically held that immoral trademarks cannot be denied protection as it would come in contravention with the right to speech which includes the right to commercial forms of expression.

A similar situation arose when the USPTO prevented a fashion company from registering the trademark 'FUCT' on the alleged perception of the mark as scandalous or immoral.[21] The line of reasoning of the USPTO was similar to the one adopted in *Matal*,. The Supreme Court confirmed that view and found that the ban on the registration of scandalous signs again violated the First Amendment's free speech rights and that the trademark should be registered as deciding the immorality of a trademark would be discriminating "on the basis of viewpoint" which should be avoided.

A related issue is the following. One may argue that trademark offices and judges should not be involved in the process of assessing the immorality of a sign. Rather, market forces should be the determining agent as signs which appear controversial in nature would lead to offending customers and subsequent refusal to buy the products or services.[22] This line of reasoning is in line with the decisions of the US Supreme Court in *Matal* and the FUCT case. However, the argument seems flawed as the very controversial nature of the marks could attract customers to buy the relevant product, especially in certain industries like fashion where to be rude and edgy may pay off in terms of increased customer base. In other words, the offensive nature of a brand may be perceived as a positive aspect of the entire commercial offer and drive customers' purchasing power.[23]

Therefore, as market forces are not an appropriate measure to determine the morality of a brand, to adjudge the same would require governmental intervention. An intervention by the government would be focused at neutralising any attempts made by commercial enterprises to gather consumer's attention by relying on morally unacceptable brands.[24] This would supress the reactions generated by market forces which might attract consumers to buy merchandise bearing a morally unacceptable sign. Yet, this line of reasoning is not shared by recent US case law, as we have just seen.

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[19] Matal v. Tam, 137 S.Ct. 1744 (2017).
[20] Lanham Act, 1946, §1052(a).
[21] Iancu v. Brunetti, 139 S.Ct. 2294 (2019).
[22] Jasmine Abdel- Khalik, *To live in In-'Fame'-Y: Reconceiving scandalous marks as analogous to famous marks*, 25 CARDOZO ARTS & ENT. L.J 173, 176 (2007).
[23] Enrico Bonadio, *Brands, Morality and Public Policy: Some reflections on the ban on registration of controversial trademarks*, 19(1) MARQ. INTELLECTUAL PROPERTY L. REV. 49, 50 (2015).
[24] Anne-Marie Cropley, *The registration of scandalous trademarks*, INTELLECTUAL PROPERTY FORUM 20 (2008).

Further, Ned Snow's book has explored the possibility of certain subject matter becoming immoral over time and therefore falling outside the ambit of copyright protection with the changing morals of the society. A similar analysis can be undertaken with respect to trademarks as what was considered morally unacceptable decades ago might be considered acceptable now due to change in social attitudes, and vice versa. For example, in the US case of *Old Glory Condom*, the USPTO Trademark Trial and Appeals Board remarked that marks that were once thought to be scandalous may now appear as humorous in nature.[25] Similarly, the US Court in *Mavety* warned to be cautious of the ever-changing social attitudes and sensitivities.[26] Thus, some racist terms or adjectives that had been used in the past for the black or Asian people such as "coloured" or "yellow" will now be seen as having racist connotations.[27] Hence, we believe that trademarks which have become morally unacceptable over the years must be kept out of the register. At the time of filing of the trademark, if they are identified as scandalous or in contravention to the principles of morality, they should be refused registration. And if the trademark has already been registered but over a period of time they become contrary to the principles of morality, their registration should be revoked.

IV. COPYRIGHTABILITY OF IMMORAL WORKS

In continuance of the discussion of immorality of works, this section of the article's critique follows Ned Snow's argument on controversial works. His book places comparatively more importance to copyright protection stating that a work must be denied copyright protection only when it is so inconsistent with the meaning of "the Progress of Science" that judges would not have to use their discretion to arrive to determine the immorality of a work. Ned Snow has arrived at this conclusion by analysing the segment of the Progress Provision which talks about copyright, that is again "the Progress of Science." He has reasoned that 'science' is representative of the knowledge and learning that flows from the examination of various subject matters, thereby making it a crucial aspect of copyright. Furthermore, copyright in itself is reflective of the requirement for creativity which instead of being derived from this segment of the Progress Provision, is drawn from the US Constitution's IP clause in general. Ned Snow has further proceeded to apply this analysis to different types of works to undertake an in-depth discussion to determine which works fall outside the purview of being consistent with "the Progress of Science." Thus, the question which we first and foremost wish to raise here is the differential treatment of immoral works in terms of the relative importance given to the discussion from similarly placed unethical inventions and trademarks arises.

This can be justified on the grounds that: *firstly*, copyright is a rather peculiar IP right which is different from trademark and patent rights. In fact, no copyright statutes in major jurisdictions of the world expressly refer to a morality requirement, as opposed to patent and trademark laws in several countries. This does not come as a surprise as copyright springs into action upon creation of the work, and it does not require a registration procedure carried out by a public body, as happens with patents and trademarks. There is therefore no official endorsement or control by the state vis-à-vis the content and the process of creation of the work at the very moment rights are granted.

Secondly, introducing a form of governmental control, as happens with trademarks and patents in many countries, may not be a wise policy as it is accepted that copyright regimes stimulate

[25] Old Glory Condom Corp., 26 U.S.P.Q. 2d 1219.
[26] Mavety Media Group, 33 F. 3d 1371.
[27] Regan Smith, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HAR C.R.-C.L.L. REV. 451, 480-81 (2007).

new creations and the vibrant exchanges of opinions, especially in the fields of the arts, literature and audio-visual material. And in such a scenario explicitly giving copyright offices and judges the power to refuse registration of a work they deem obscene may have chilling effects on the fundamental right to freedom of expression. Ned Snow's book has also been cognisant of the free speech related repercussions that could unleash in giving IP offices and judges the power to deny copyright protection for immoral works.

Said that, in the following sub-sections we explore the specific circumstances under which – we believe - copyright protection should be denied or granted. We refer to of peculiar situations like fake news and pornography, an analysis of which has also been conducted in Ned Snow's book. The application of the arguments proposed in his book is also here analysed with reference to illegally created graffiti.

Fake news

Ned Snow's book classifies fake news as a deceptive expression which fails to promote the progress of science. The author perceives the deceptiveness to be of such a nature that regardless of the fake news not causing any harm to the society or not even intending to cause the same in the first place would still be regarded as not contributing to the progress of science. Thus, Ned Snow contends that fake news should be denied copyright protection. He has further taken a step ahead to expatiate and explore the underlying reasons for denying copyright for this subject matter. He has reasoned that such denial is not undertaken to solve any problem. For instance, the denial of fake news is not intended to stop the dissemination of the news. Rather, the denial is reflective of the government's principle of not supporting works which are not justified in nature, regardless of the denial disincentivizing the production of the work. Thus, the underlying premise is that the law should not reward immoral behavior even if it practically does not lead to the culmination of the work.

We share such an opinion with the author but we also supplement the above by theorising the impact on disincentivising the creator of fake news. Presently, there has been no reported case of a creator of fake news relying on copyright protection, for instance to object to any form of exploitation or use of the work. But this does not rule out the possibility of copyright-based objections being made which might not have reached the courts retaining its confidentiality. Indeed, invoking copyright in these cases would aim to safeguard economic profits which may be associated with the production of the news. This is why the choice to forego copyright protection for fake news, which could be made by lawmakers or even courts as they establish their case law (especially in common law jurisdictions), may have a deterring effect. People who make fake news may be less likely to create and distribute such content in the first place if they are aware that they cannot in any way rely on copyright. Thus, the denial of copyright would have the potential to impact the financial incentives underlying the production of fake news. As mentioned, this type of news has the potential to generate significant revenue from advertising when the news goes viral on social media platforms and the users constantly engage and try to access the content. In order to mitigate this phenomenon, denying copyright protection may lead to interrupting the circle of transmission of the information and cause a disturbance in its business model. Subsequently, in the absence of financial motives, the creation and dissemination of fake news would be disincentivised. It has been interestingly remarked that, "if the work is unprotected it is more difficult to reap rewards from its distribution, which means that it is likely to be less widely distributed".[28]

[28] Norman Siebrasse, *A Property Rights Theory of the Limits of Copyright*, 51 U. TORONTO L.J. 1, 11 (2001).

Ned Snow's elucidation of various theories of IP particularly comes in handy in this segment as they support his argumentation of denying protection to fake news. Theories and principles of equity justify why works like fake news should not be protected. For instance, rejecting copyright protection for fake news binds in with the utilitarian theory of IP analysed by Ned Snow in his book and enshrined in the Progress Provision of the US Constitution.[29] This would also be the case of UK. The first ever copyright act in the world, the English 1710 Statute of Anne, is entitled "An Act for the *Encouragement* of Learning".[30] But certainly copyright law does not aim at "promoting" and "encouraging" fake news forming the grounds for its rightful denial. Even jurisdictions like continental European countries which do not explicitly embrace the utilitarian theory of IP, can justify the act of excluding copyright protection for fake news by relying on the fact that IP rights are natural rights. The basis for denial of copyright could be formulated on fairness-related grounds as one cannot reasonably claim copyright laws to protect the 'natural' right to mislead people and derive economic advantage out of such form of cheating.[31]

Furthermore, denying copyright protection for fake news in jurisdictions like US can be justified on other doctrines, as mentioned in the book. For example, the doctrine of estoppel as explored by Ned Snow in the context of denying enforcement of rights for works involving unlawful conduct can be applied to fake news. A series of US cases have explicitly or impliedly relied on this factual estoppel doctrine to hold fake facts as unprotectable.[32] Also, the inherent nature of immorality embedded in fake news can be relied on when invoking the 'unclean hands' doctrine. This is a type of equitable defence available which bars the plaintiff from obtaining any remedy from the defendant where the former has themselves acted in bad faith, unethically or illegally.[33]

Hence, Ned Snow has done a remarkable job in creating a strong case for denying copyright to fake news. He has holistically tied in this argument by understanding the nature of fake news and its contravention to theories and doctrines of IP. Indeed, fake news is of no benefit to society and has rather the potential to undermine the social, political and cultural fabric running through various organisations and communities of people. And as we have seen, denial of copyright in such a scenario would not only discourage such a behavior but also disincentivise any financial incentive covering the production of such news. In other words, it would discourage behavior that is immoral while upholding principles of equity and fairness.

Pornography

Ned Snow's approach to pornography is conspicuous. He has argued for denial of copyright protection to pornographic work on the basis that it is inconsistent with the meaning of "the Progress of Science". He has claimed that porn stimulates certain emotions in a human being rather than imparting knowledge to the society. This inconsistency with the meaning of 'science' implies that 'progress' would also not subsequently follow. Further, he has been consistent in this stance of not giving courts or other officers the licence to apply subjective metrics to determine the immorality of a work. While raising speculation over the possible subjective metrics that could be developed, Ned Snow has also addressed them by laying down certain conditions to be looked at to determine the immorality of the work. These include the

[29] US CONST. art. 1, §8, cl.8.
[30] The Statute of Anne, 1710.
[31] Nicola Lucchi, Enrico Bonadio & Oreste Pollicino, *Fake news and copyright*, 11 QUEEN MARY JOURNAL OF INTELLECTUAL PROPERTY (2021).
[32] Oxford Book Co. v. Coll. Entrance Book Co., 98 F.2d 688, 691 (2d Cir. 1938); Houts v. Universal City Studios, Inc., 603 F. Supp. 26, 31 (C.D. Cal. 1984).
[33] Holman v. Johnson, 1 Cowp 341(1775).

work posing a substantial and recognisable harm to the society, the harmful effect being directly related to the operation of the work and no reasonable argument of potential benefits outweighing the harm. This leads him to concluding that any pornographic work must be denied copyright protection.

Ned Snow has primarily evolved his argumentation by elaborating on the Progress Provision clause while indulging in the discussion for denial of protection to pornographic works. But the major contention against his case stems from Mitchell Bros. Film Group v. Cinema Adult Theatre ('Mitchell') where the plaintiff being the owner of the copyright of a porn movie sued the defendant for obtaining and exhibiting copies of the movie.[34] The court held that obscenity could not act as a defence to copyright infringement, thereby providing copyright protection to the pornographic film. However, Ned Snow has also tackled the Mitchell case by identifying the reasoning used in this case to be flawed. He has substantiated the three grounds provided in the Mitchell case to argue for copyright protection and has developed counter arguments to the same. His argumentative spirit has evolved a strong foundation for denial of protection to pornographic works.

However, the discussion pertaining to pornography is much more complex. One of the conditions laid down by Ned Snow which has to be kept in mind while determining the immorality of the work is to analyse the substantial and recognizable harm the work poses to the society. In terms of pornographic work, Ned Snow has elucidated the harm it can cause on both the consumption and production side. The latter involves concerns like exploitation of women. While the concerns are admittedly legitimate, we believe that there is a need to balance them against free speech concerns. The denial of copyright even for obscene matters has an impact on the right to freedom of speech and expression, producing a chilling effect. Therefore, the need to deny copyright for subject matters like pornography must be intricately balanced. It can be evaluated on the grounds of the gravity of the work alongside the evaluation of consent of the performers. While it is obviously admitted that pornography appears as disturbing to most people, as long as it is produced within the boundaries of the free and active consent of the performers and satisfies the limitations of the law, it must be regarded as a form of lawful speech.[35] This line can be further balanced on the idea that if consent is provided by a child, pornography in such situations must be denied protection. This is based on the rationale that a child cannot be regarded to give free consent and child pornography is an abhorrent crime. Hence, we do believe it should be denied protection under any circumstances.

Graffiti

The book has not explored the situation of illegally created graffiti, making it a suitable example to indulge in a discussion of how the arguments proposed in the book would span out with respect to this kind of work. It can be presumed following the line of reasoning proposed in the book that the author would argue for denying copyright protection to graffiti as it would be 'immoral' or against public policy to reward works which are illegally produced (namely, without the auhorisation of the owner of the surface upon which the piece is placed). This stance can be further supported by the "unclean hands doctrine" relied on in Snow's book as well as by a lower US court's decision to deny copyright to illegally placed street art.[36]

This scope of argument can also be stretched onto other jurisdictions like the UK. In the past, copyright has been denied by courts on content-related grounds when the works were

[34] Mitchell Bros. Film Group v. Cinema Adult Theatre, 604 F.2d 852 (5th Cir. 1979).
[35] Nicola Lucchi & Enrico Bonadio, *Copyright and pornography*, *in* NON-CONVENTIONAL COPYRIGHT - DO NEW AND ATYPICAL WORKS DESERVE PROTECTION? 431 (Edward Elgar ed., 2018).
[36] Villa v. Pearson Educ., Inc., WL 22922178 (N.D. Ill. Dec. 9, 2003).

immoral,[37] deceptive,[38] obscene[39] or injurious to the public.[40] While public policy grounds have emerged as established grounds for denial of copyright protection, the shape and manner of such denial continues to remain uncertain. Domestic courts have given a plethora of judgments ranging from where copyright did not subsist in the work[41] to it not being enforceable in court.[42] An interpretation of statutes like the CDPA indicates that it explicitly provides for copyright in specific categories of work but it does not exclude from protection works on grounds like public policy. However, §171(3) contains a saving in respect of any rule of law preventing or restricting copyright enforcement on public interest grounds.[43] The court in *Hyde Park Residence Ltd v Yelland* clarified the scope of this provision by stating that courts must not allow copyright for works which are immoral, scandalous or contrary to family life; or injurious to public life, public health and safety or the administration of justice.[44]

But should really illegal graffiti and street art be deprived of copyright? We believe it should not. We do reckon that the ways works are created should not attract a copyright related analysis.[45] That sounds logical. If I steal a pen which I then use to draw a wonderful piece of art, why should I be denied copyright protection or the relevant enforcement rights and tolerate that someone else copies and takes economic advantage of my work? That copyright protection should not be denied when artworks are illegally placed in the street is confirmed – we believe - by logical reasons and the concept of fairness. It would indeed be unfair to allow others to rely on the illegal nature of a street artwork to copy and exploit it for their own commercial purposes,[46] for example by using it in advertising messages or on fashion products. It seems to us this result would be absurd as it would legitimise free riding and blatant imitations.

V. CONCLUSION

As we have seen, immoral inventions, brands and works often raise controversial issues. Ned Snow's book "Intellectual property and immorality: Against protecting the harmful creations of the mind" emerges as a promise to contribute to the existing debate on this matter. In this important addition to the literature on immoral subject matter, Ned Snow answers questions including, (i) what is the aim behind providing IP protection; (ii) who should be in a position to determine the immorality of a certain subject matter; and (iii) whether the denial of IP protection on grounds of immorality has an impact on free speech.

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[37] Glyn v. Weston Feature Film Co, 1 Ch. 261 (1916).
[38] Wright v. Tallis, 1 C.B. 893 (1845); Slingsby v. Bradford Patent Truck and Trolley Co., W.N. 122 (1905).
[39] Stockdale v. Onwhyn, 5 B & C. 174 (1826); Fores v. Johnes, 4 Esp. 97 (1801, 1803, 1804).
[40] Southey v. Sherwood, 35 Eng. Rep. 1006. (Ch.) (1817); Sims, *The Denial of Copyright Protection on Public Policy Grounds*, E.I.P.R 189-198, 191 (2008).
[41] Walcot v. Walker, 7 Ves. 1 (1802).
[42] A. Bloom & Sons Ltd v. Black, M.C.C. 274 (1936-1945).
[43] Copyright, Designs and Patents Act, 1988, §171(3).
[44] Hyde Park Residence Ltd v. Yelland, 3 W.L.R. 215 Ch. 143 (2001).
[45] For an opposite opinion, see D Markel, *Can Intellectual Property Law Regulate Behaviour? A 'Modest Proposal' for Weakening Unclean Hands*, 113 Harv. Law Review 1503-1520 (2000) (suggesting adopting federal legislation that would invalidate a copyright registration if the author infringed criminal law while producing the work. Markel also proposes to inform authors registering their copyright with the Office that they may lose their exclusive rights in case it is found that they committed a criminal offence when creating the work, at p. 1511). This proposal does not seem convincing, though. We indeed wonder why we should treat violators of criminal law who are also artists worse (in terms of denying them copyright protection) than any other person who does not create anything.
[46] MA Smith, *Tagging the Lanham Act: Protecting Graffiti Art from Wilful Infringement*, 81 BROOK. L. REV. 834 (2016).

The book unearths the provisions and existing jurisprudence in the US while making a strong case for denial of IP protection to immoral inventions and works. In doing so it has recognised the need to also protect free speech and has backed up this and similar contrasting arguments by highlighting the conditions that need to be satisfied before the denial of IP protection. Parallels can be drawn to other jurisdictions like the UK and EU where the academic and judicial debate around IP protection of controversial matter is also lively. To conclude, the book has made a remarkable case for the law denying protection of controversial subject matters – a position which we broadly agree on, with some caveats related to some specific subject matter (i.e. pornography and illegal graffiti).