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Piracy and its Discontents

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Aaron Swartz, computer programmer, writer, archivist and internet activist, committed suicide on January 11, 2013, weeks before he was to go on trial over hacking allegations relating to the downloading of millions of academic papers from the online archive JSTOR, for free online access and distribution. A small section of publishers, copyrighters, journal archivists heave a sigh of relief and perhaps, even feel vindicated at this ironic twist of fate where his suicide becomes a metaphor, or an exemplar, for the nemesis that awaits "stealing", copying and circulation of copyrighted ideas.

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What was Aaron so passionately engaged in for the last few years of his young life? He was engaged in many interrelated things, such as supporting open library sites, liberating public records and architecting Creative Commons, in short passionately advocating for a culture of knowledge commons and free access. Aaron had become a well-known figure in Internet academic circles over the past few years.

Deeply critical of journal archives such as JSTOR (whose business model is based on charged access to its articles' archive, compensating the publishers but leaving the authors pretty much out of the loop of transactions), Swartz took his advocacy to its logical conclusion by surreptitiously attaching a laptop to MIT's computer network which allowed him to rapidly download an extraordinary volume of articles [4.8 million] from JSTOR. Prosecutors in the case claim Swartz acted with the intention of making the papers available on P2P file-sharing sites. In an earlier instance, in 2009, Swartz had downloaded 19 million pages of federal court documents from a government database system, acting on the belief that they should be made available free. Both his acts seemed motivated by some kind of moral sense rooted in the inherently non-exclusive nature of the world of knowledge,

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but one which had been shackled by copyrights and patents that conferred on its holders, monopoly of use, licensing and dissemination.

Aaron Swartz was arrested on a variety of charges on July 19, 2011. He was charged with wire fraud, computer fraud, unlawfully obtaining information from a protected computer, and recklessly damaging a protected computer, related to downloading roughly 4 million journal articles from JSTOR. The charges could have resulted in up to 35 years in prison and a $1 million fine. Lawrence Lessig, one of the founder members of the Creative Commons, a friend and a mentor to Aaron, writes: “From the beginning, the government worked as hard as it could to characterise what Aaron did in the most extreme and absurd way. The ‘property’ Aaron had ‘stolen’, we were told, was worth ‘millions of dollars’ - with the hint, and then the suggestion, that his aim must have been to profit from his crime”.

Underlying the charges pressed against Aaron is an equation of copyright infringement with property “theft” and/or “piracy”, both colloquial terms for copyright infringement. Copyright infringements today are considered a form of theft. Judging by the quantum of punishment that Aaron was facing --35 years in prison and a $ 1 million fine-- these infringements were assumed to pose a grave danger to society. Examples of crimes for which a person could receive such a harsh sentence could include murder, severe child abuse, drug dealing, high treason, human trafficking, terror related activities and certain aggravated cases of burglary resulting in death or grievous bodily harm. Copyright infringements clearly cause neither! At best they are benign, done for personal use and circulation; at worst they bring loss of revenue as Aaron’s downloads would have brought to JSTOR.

What underlies the collapse of moral distinctions between a theft that deprives an owner of the use of stolen object and an infringement that makes more copies of the same, leaving the owner completely free to use and transfer? This is a distinction that, till not so long ago, was part of jurisprudential analyses. In the case of *Dowling v. United States* (1958) the US Supreme Court concluded that the National Stolen Property Act did not extend to items which infringed copyright. Dowling had been charged with “extensive bootleg record operation involving the manufacture and distribution by mail of recordings of vocal performances by Elvis Presley”. The Court, however, found it pertinent to hold that, "the infringer of a copyright does not assume physical control over the copyright nor wholly deprive its owner of its use. Infringement implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud".

This case is not illustrative of contemporary jurisprudential wisdom in US, or even globally. Rather, it is instructive of a distinction that *can potentially* come to bear upon jurisprudence on copyrights. The distinction lies in the nature of the ‘things’: ideas are not like tables or televisions that deplete or exhaust with use! Explaining the distinction, Thomas Jefferson, in 1813, stated evocatively: “If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea. . . . Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of

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it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."This is an intuitively powerful distinction, one which informs the common sense of the people in their everyday conduct but one which is increasingly ignored by contemporary jurisprudence.

The business of academic publishing today rests on a unique business model where the universities and authors that creat this academic content for free must pay to read it! The UC San Diego Libraries report states that 65 per cent of their total budget goes towards getting access to JSTOR and other databases. To get access to the Arts and Sciences collection at JSTOR -- one of the many databases and collections of information-- university libraries must pay a one time charge of $45,000 and then $8,500 every year after that. In another report, "in recent months, publishers of scientific journals have been accused by academics for locking the work produced by their peers, and funded largely by taxpayers, behind paywalls and charging UK universities around £200m a year for access".

"Costs for academic journals have persistently escalated over the past 20 years. From 1986-2005, serial expenditures for the member libraries of the Association of Research Libraries have increased 302 per cent while the number of serial items purchased has increased only 1.9% on average per year". A big reason for this is "the movement of for-profit publishers into the academic journal market and subsequent consolidation of publishers has resulted in a highly concentrated industry". In 2010, for example, online journal publishing giant Elsevier's operating profit margin was 36 per cent (£724m on revenues of £2bn). UK Competition Report and RMA Annual Studies estimate that the operating profit margins for Elsevier in the Science and Medical segment are extraordinarily high, "more than 8 times that of the margin for the larger industry". Elsevier, Springer and Wiley, who have bought up many of their competitors , have created a stranglehold on the market.

There are clearly large economic stakes at work here. Infringements of copyrights, especially of the volume and audacity that Aaron Swartz attempted, would have the potential to create huge revenue losses for journal archives and other such copyrighted databases. The primary imperative here is thus financial; copyrights help to secure profits at margins of monopoly prices for the property holder. Clearly, the imperatives have little to do with moral criteria of desert or labour theory that entitles the creator to be rewarded for the exercise of his creative labour. It can also be argued that the model of academic publishing shows little connection with fostering innovation and research, for those being compensated through the monopolisation of the market and end use are not the authors but the publishers!

Legal instruments should rest on the foundational principles of fairness and justice. Given the context of the publishing industry, and the location of the author within it, what kinds of rules are then justified to secure the entitlements of the publishing industry. A copyright is a monopoly right given to authors of "original works" such as books, articles, movies, songs,

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computer programs and so on. Under existing practices, and in the present case of the publishing industry, a copyright is usually transferred to a publisher, who then enters into various licensing agreements that control the downstream use and dissemination of information. However, since the publisher is not the "author" or the "creator"whose creative potential needs to be incentivised, it is possible to devise an alternative economic model. Here, I suggest that an identical set of copyright rules could have developed with tort labels rather than property labels. That is, copyright and patent infringement need not be treated as a species of theft or conversion, but could instead be treated as "business torts," akin to unfair competition or trademark infringement. These labels define the interest people come to have and the exclusionary implications that attach themselves to these interests.

Property rules are more rigid and formal. A tort is not necessarily an illegal act, but one that causes harm and that obligates the harm doer to undo the harm through some form of compensation. The law allows anyone who is harmed to recover their loss. A person who appropriates another's property is a "thief" or a "pirate". No comparable term of censure attaches to a tortfeasor who interferes with prospective profits.

It can be surmised then, that introduction of the property label into copyright, and the use of the concomitant use of term "piracy" to denote infringement, was not accidental. One can argue, the move of using a property/piracy terminology is therefore, meant to seize the rhetorical advantage not otherwise available to the author or the publisher. In other words the principle of fair use does not necessarily translate into copyright. It can well be another kind of protective and remunerative claim.