I

Creativity, Pluralism, and Fictitious Narratives

Understanding IP Law through Karl Polanyi

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Patent law has been built around the mental activity of invention and copyright upon that of aesthetic creation. In both cases it has been the commercial investors – the factory owners and the book sellers – behind these legal figureheads – the inventors and authors – who have driven the campaigns to rid markets of direct imitators.[1]

I.I INTRODUCING THE CHAPTER'S AIM

In the 2021 best-seller *Exponential*,[2] Azhar explores social evils that will invariably result from exponential technological leaps such as excessive resource extraction, destabilization of social, economic and political institutions, and the dramatic rise of corporate power in societal and economic terms. Like Polanyi, he fixes the industrial revolution as the point of genesis of current social problems. And, akin to the Polanyian 'double movement', Azhar suggests that a dystopian world is not inevitable if we accept the vital importance of institutional norms – such as the rule of law or international intellectual property (IP) agreements – in protecting the social and economic fabric of humanity. Reform, he argues, should lie in forging new customs and norms based on collective ownership and commonality principles such as interoperability. Or even in instituting a global data body which creates 'a consistent approach towards artificial intelligence, citizens' data and intellectual property'.[3] This chapter is a simpler narrative which nevertheless suggests, as Azhar does, that the solution to IP conundrums lies in the recognition that global IP norms are vital and that their reformation must be in accordance with societal motivations.

Purists argue that the sole beneficiaries of IP law should be those individuals or companies that are responsible for outputs resulting from identifiable human-led creativity. Progressives would counter with a vision of post-anthropocentric creativity mixed with human labour and capital investment. It would be argued in the latter camp that IP rights should vest in communal groupings, legal persons and corporations, non-creative collaborators, virtual and geographical entities, non-humans, non-sentient and AI-based machines. For over a century, jurists have debated as to whether IP rights should be extended to this or that output such as photographs, smells, computer programs, indigenous knowledge, products of data aggregation, personalities,

[1] WR Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (OUP 2004) 42.

[2] A Azhar, *Exponential: How Accelerating Technology Is Leaving Us behind and What to Do about It* (Random House 2021.

[3] Azhar, *Exponential* 187; also see 79–83, 249–57. Azhar does not directly cite Polanyi, except by reference to James Boyle's reference to Polanyi's *The Great Transformation* as a precursor to a discussion on IP enclosures.

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virtual objects, natural and organic materials including medicines, plants, wine, 'creative' algorithms and genes. No doubt, fresh conundrums will continue to arise. What is surprising is the continuing and bifurcating discourse landscape: 'IP law protects and rewards creativity' versus 'IP law protects investment'. This collective angst then tumbles into the perennial conundrum of 'what is IP law' and identifying the right justification to rationalize the different subspecies of rights. From my perspective, legal protection of some sorts has extended, over a quintennial period, to all types of intangible *res* for various rationales. It should be entirely unsurprising that IP law has been accorded to various beneficiaries for various types of products and services, emanating from various motives. Corporate entities, sole and collective inventors and authors, social or trade communities and local groups will labour and manufacture for a variety of needs from creative impulses to ensuring livelihoods, to market demands, to rent-seeking behaviour.

However, value could, and still does, attach to any intangible *res*. IP law indiscriminately and simultaneously protected all sorts of *res* emanating from creative and entrepreneurial labour as well as from capital investment. This is precisely how and why this species of law was constructed. And continued attempts to discuss or adjudicate IP law, policy and reform through strict conceptual silos, such as sole author/inventor, creativity, labour and investment, are doomed narratives. Instead, I invite readers to appreciate that early modern rules in *sensu lato* were about mixed motivations of reward, investment, recognition, competition, honour, public interest and more. The implicit suggestion in this chapter is that the root cause of continuing legal conundrums today is the failure to appreciate the pattern set out by two related socio-legal mappings: (i) motivations for early rules in relation to creative and entrepreneurial labour and products in Europe, and (ii) the extent to which current IP norms and laws evolved to absorb such myriad motivations over 500 years.

For conceptual guidance, I employ Karl Polanyi's theory on the commodification of labour, including investment-backed labour, into tradeable, fictitious commodities. Law and property were viewed as vital institutional tools which disembedded the economy from societal considerations. Polanyi's motivation ethos (discussed below) is effective in synthesizing the different mapping points to create a *pointilliste* landscape which, in turn, shows why IP law only makes juridical sense if it is viewed as a pluralistic concept. Furthermore, to locate and socio-legally map motivations, I employ three questions which may not necessarily be answered here, but serve to steer the landscaping exercise:

(i) Can we identify a set of clear and repeated motivations for early IP rules, privileges, entitlements and laws?
(ii) Do different motives attach to the different rationales for current IP law?
(iii) Were such IP laws continuously recalibrated to protect creative or derivative outputs emanating from labour and/or capital?

Section I.I maps out the pluralistic dynamics which flow when employing Karl Polanyi's vision of society and market systems. I do not set out to prove that Polanyi is factually accurate, but to distil his key concepts. Section I.II applies Polanyi's concepts to map the literature on the genesis and institution of IP-type rules in Europe from the fifteenth century. The legal landscaping focuses on the diverse motivations underpinning early rules in relation to different IP *res*. Section I.III shows why the legal mapping, based on Polanyi's motivation ethos, concludes that IP must be a pluralist notion and, as such, is being constantly reconstructed based on varying values and interests. The chapter concludes by exploring how a pluralist concept of IP can further embed Polanyi's 'counter-movement' concept as a means of preventing dire societal consequences.

I.II POLANYI'S *THE GREAT TRANSFORMATION*

Why Polanyi? In reviewing the historical transformation of humanity from a feudal society to a market society, Polanyi contends that history records an economy that was, and should be, embedded in non-economic institutions and social relations.[4] A 2016 survey as to the ten most important twentieth-century writings by economists placed Polanyi's *The Great Transformation* second only to Keynes's *General Theory of Employment, Interest and Money*.[5] But Polanyi's book remains influential also in the fields of anthropology, economic archaeology, and economic sociology and law.[6] Cotula, for example, employs the Polanyian perspective to examine 'land grabs' and international investment law as it highlights the commodification of land and labour.[7] Ebner claims that 'Karl Polanyi remains a most influential proponent of an institutionalist perspective in the social sciences, combining socio-economic analysis with a normative drive for social reform'.[8] And I find a theoretical companion in Peukert who urges that a Polanyian perspective of IP law will ensure that 'market-based transactions coexist with non-market modes of accessing and sharing information so that authors, inventors, and other entrepreneurs have as many options as possible at hand, and all members of society possess adequate possibilities to acquire knowledge'.[9]

Polanyi's theoretical critique of the capitalist society, distilled in *The Great Transformation*,[10] declaims the reductionist practice of consolidating land and human labour as an exchange value whereby what has no price appears to have no value in society. His thesis is that the self-regulating market economy is pernicious because it assumes that all actions and behaviours in everyday life are led by motives of gain.[11] This is shown through his focus of land, labour and money as constituting 'fictitious commodities'. Though the commodity concept is not new (having been part of classical economic theory from Adam Smith to Karl Marx),[12] Polanyi's novel approach was to distinguish between genuine and *fictitious* commodities and to link the commodification process to his 'double movement' theory. The narrative in *The Great Transformation* ends optimistically with Polanyi's assertion that capitalism fails in its impossible utopian goal of totally disembedding societal considerations. A wholly self-regulating market

[4] See discussion below.

[5] Schumpeter's *Capitalism, Socialism and Democracy* and Galbraith's *The Affluent Society* were placed at third and fourth positions, respectively – see Kari Polanyi Levitt, 'The Return of Karl Polanyi: From the Bennington Lectures to Our Present Age of Transformation' in R Desai and K Polanyi Levitt (eds) *Karl Polanyi and Twenty-First-Century Capitalism* (Manchester University Press 2020) 22 (hereafter Desai and Levitt).

[6] M Hudson, 'Debt, Land and Money: From Polanyi to the New Economic Archaeology' in Desai and Levitt 61–77; for legal scholarship, see A Perry-Kessaris, 'Reading the Story of Law and Embeddedness through a Community Lens: A Polanyi-Meets-Cotterell Economic Sociology of Law?' (2011) 62(3) Northern Ireland Legal Quarterly 401, and the essays in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart 2010).

[7] Lorenzo Cotula, 'The New Enclosures? Polanyi, International Investment Law and the Global Land Rush' (2013) 34 (9) Third World Quarterly 1605.

[8] A Ebner, 'Transnational Markets and the Polanyi Problem' in Joerges and Falke, *Globalisation and the Potential of Law in Transnational Markets*.

[9] Alexander Peukert, 'Fictitious Commodities: A Theory of Intellectual Property Inspired by Karl Polanyi's "Great Transformation"' (2019) 29 Fordham Intellectual Property, Media and Entertainment Law Journal 1151, 1200.

[10] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944); this chapter refers to the edition by Beacon Press 2001, with a new foreword by Joseph E. Stiglitz) – hereinafter referred to as 'Polanyi'.

[11] Polanyi 31. Polanyi defines the market economy as implying 'a self-regulating system of markets; in slightly more technical terms, it is an economy directed by market prices and nothing but market prices', 46.

[12] N Sammond, 'Commodities, Commodity Fetishism, and Commodification' in *The Blackwell Encyclopedia of Sociology* (George Ritzer ed., Blackwell 2007) 607–12.

just cannot exist as it will annihilate human and society. Instead, there is a dynamic counter-movement against reducing the planet and humanity into value-laden commodities. And law and property are key characters in his narrative.

I.II.A Technology and Disembeddedness

In reviewing the historical transformation of humanity from a feudal society to a market society, Polanyi contends that history records an economy that was, and should be, embedded in non-economic institutions and social relations.[13] Polanyi sets out a pre-industrial revolution English landscape whereby economic activities were regulated through determined state intervention, including craft guild regulations and feudal privileges, as opposed to self-regulating markets.[14] Adopting an Aristotelian approach to what constituted 'good society', Polanyi pointed to 2,000-year-old norms and traditions that ensured provision for everyone, where markets and monies were mere accessories to an otherwise self-sufficient household and where production was for use.[15] His account of such traditions, from tribal to mercantilist societies, including laws and regulations (which can now be appreciated as codifications of community responsibility and different motivations), maps economic activities that were not automatically framed by motives to maximize utility profit or other acquisitive motives.[16] Economic activities, such as manufacture, exchange, distribution and consumption of goods and services, were subordinated to non-market means of social integration. Such activities were by-products of social relationships framed by non-economic institutions and which reflected societal interests, collective conventions (including kinship) and shared norms.

The industrial revolution, on the other hand, wrought profound changes on the way human societies existed. Conceding that it did herald an era of technological progress which undoubtedly led to miraculous improvements in the tools of production, Polanyi also describes how, with the advent of technology, non-profit motivations and communitarian traditions were swept away by an ethos which demanded production for gain: people moved from fields, farms and workshops into factories with deplorable working conditions, greater working hours and looser regulatory oversight.

Although technology is not necessarily the sole cause of the bifurcation between society and the economy, it is clear that Polanyi views machines and technology as an essential feature of the causative chain which led to the *great transformation* of human society: from regulated to self-regulating markets; from the embedded society to a disembedded society; from a holistic human and natural world to one where capitalist theorists and entrepreneurs demanded an institutional separation of this embedded society into economic and political spheres.

[13] It is disputed as to whether Polanyi himself placed such a great significance on the concept of embeddedness since he used the term sparingly in *The Great Transformation* – see chapter 6, and 135. Nevertheless, his use of the concept of embeddedness has been continuously discussed within economic, political and sociological circles with the most popular explanation being that the concept refers to either actors' social networks or to social institutions. See M Beckert, 'The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology' in C Hann and K Hart (eds), *Market and Society: The Great Transformation Today* (CUP 2009) 38–55.

[14] Polanyi 56, 68–69, 73. This is not to state that there were no self-regulated competing markets at all; some markets were non-competitive (functioning as barter and trade activities), but other markets were competitive (in the instance of local or village markets, 63).

[15] Polanyi 56.

[16] Polanyi 56.

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I.II.B Labour and Investment as Fictitious Commodities

Polanyi viewed a commodity as something that has been produced for sale on a market. Nature, society and humanity were commodified and entered the market as land, money and labour – entirely fictitious commodities that could be bought and sold freely on the market.[17] This account explains not only why the new artificial commodities were to become the main mechanism for sourcing goods and services, especially through technology, but also why there is a change of motivations on the part of the members of society: the motive of subsistence, or State interest, was substituted to that of gain.[18]

Polanyi was particularly scathing as to the commodification of humans and went so far as to equate the creation of a labour market to 'an act of vivisection performed on the body of society'.[19] As Stiglitz accurately notes, part of Polanyi's argument is based on morality: namely, it is simply wrong to treat nature and human beings as objects which are priced by the market. This violates societal norms on human dignity and sacred principles.[20] Indeed, Polanyi's warnings on the eventuality and consequences of global land commodification will appeal to the environmentalists and Greta Thunbergs among us today, though they must have presented a startling, if not mad, vision in 1941:

> The mobilization of the produce of the land was extended from the neighbouring countryside to tropical and subtropical regions – the industrial-agricultural division of labor was applied to the planet. As a result, peoples of distant zones were drawn into the vortex of change the origins of which were obscure to them, while the European nations became dependent for their everyday activities upon a not yet ensured integration of the life of mankind. With free trade the new and tremendous hazards of planetary interdependence sprang into being.[21]

It is also within this angst-ridden discourse that we find an explanation as to why capital investments occupy a central role in economic development. The 'invention of elaborate and therefore specific machinery and plant' called for 'long-term investment with corresponding risks'.[22] This, in turn, called for safeguards to all elements of supply, namely labour, land and money. Otherwise, investment into the production is simply 'too risky to be undertaken both from the point of view of the merchant who stakes his money and of the community as a whole which comes to depend upon continuous production for incomes, employment and provisions'.[23] Thus, in a self-regulated commercial society, such supply could only be ensured if such elements were commodified artificially and organized for sale on the market.

Law is viewed as a vital institutional tool in *The Great Transformation*. It transforms land and labour (including investment-backed labour) into tradeable, fictitious commodities, thus enabling disembeddedness. Detrimental laws included rules that abolished Elizabethan legislation on minimum wages (likened to 'a right to live'), or rules that disassembled privileges and laws in

[17] Polanyi 75. 'Labor is only another name for a human activity which goes with life itself, which in its turn is not produced for sale but for entirely different reasons, nor can that activity be detached from the rest of life, be stored or mobilized; land is only another name for nature, which is not produced by man; actual money, finally, is merely a token of purchasing power which, as a rule, is not produced at all, but comes into being through the mechanism of banking or state finance. None of them is produced for sale. The commodity description of labor, land, and money is entirely fictitious'; also see 42–43, 45.

[18] Polanyi 43–44.

[19] Polanyi 132.

[20] Stiglitz's Foreword in Polanyi xxv.

[21] Polanyi 190.

[22] Polanyi 78.

[23] Polanyi 43.

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England and France, which had previously restricted land enclosures but now allowed unregulated enclosures or that accelerated the commodification of land and labour.[24] All such rules, Polanyi asserted, were due to the eagerness of entrepreneurs to purchase not just more land but also human labour, which was now unleashed into an unregulated marketplace to be dealt with as a commodity 'which must find its price in the market'.[25] And for the proper functioning of the market system, property rights are seminal as it is 'the legal aspect . . . of capitalism': 'While the actual content of property rights might undergo redefinition at the hands of legislation, assurance of formal continuity is essential to the functioning of the market system.'[26]

I.II.C Counter-Movements

However, such a self-regulating market cannot exist infinitely as it will annihilate humankind and society. When land, labour and money are transformed into fictitious commodities, and when the market economy becomes too exploitative, society reacts with counter-movements which are a reaction against the 'dislocation which attacked the fabric of society, and, which would have destroyed the very organization that the market called into being'.[27]

At this point, there is an institutional re-assertion of regulation, laws, policies and measures to check the actions of the market in relation to labour, land and money. These would also morph with the establishment of rules to protect the liberty and rights of human beings, and to guarantee the continued existence of man and nature.[28] This shift from first disembedding to then (re)embedding is Polanyi's 'double movement' concept. The notion of a continuous dialectical tension between moving towards commodifying everything within society, and the counter-movement away from markets towards social protection or social goals is also espoused by other economists and sociologists: Hayek, for instance, adopts this 'double movement' notion, albeit coming to an opposing conclusion, namely, that market liberalism expands humanity and life.[29]

As stated above, legal reform is a key agent in enabling and intervening in both types of movements: first to facilitate the creation of new fictitious commodities and the securing of investment; second to rein-in market forces and to adjust the more pernicious effects of a completely unregulated/self-regulated market economy.[30] We return to the value of employing the counter-movement concept in relation to IP reform in Section I.IV.

I.II.D IP as a Motivations Landscape: Labour, Creativity and Investment

In Peukert's examination of Polanyi's theory as applied to IP, he argues that there is no correlation between property rights and technological progress.[31] This is true to a certain extent

[24] Polanyi 82–86, 122.
[25] Polanyi 122.
[26] Polanyi 178 and 243; see also Peukert 1161.
[27] Polanyi 3–4, 136.
[28] Polanyi 71–80. See also chapter 7's discussion of the 'Speenhamland Law' which Polanyi construes to have been such a social measure which introduces a minimum wage and a 'right to live'. See also Peukert 1189–1190, 'The countermovements Polanyi studies are self-protective measures of society at large against the destructive effects of the fictitious commodification of labor and land. Their purpose is to re-embed these commodities and the respective markets into society and the environment, with the ultimate aim to guarantee the continued existence of man and nature.'
[29] FA Hayek, *The Fatal Conceit: The Errors of Socialism* (University of Chicago 1988) 134.
[30] Cotula 1609.
[31] Peukert 1163

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if we are seeking to situate the current IP legal system in the past, and if we use Polanyi to discover 'property'. I do not. Instead, we are on a hunt as to whether early motivations for rules on certain types of *res* were transformed into the nineteenth-century framework of national and international IP laws. By using the Polanyian concept of an embedded society as it existed prior to the Industrial Revolution, we encounter specific rules which affected the production and exploitation of things, labours, industries and cultures. Employing the Polanyian measure of 'motivation' as to what constitutes an embedded society, we encounter similar mixed motivations for pre-modern quasi-IP rules, that is, individual, societal, communitarian, State and market motivations. And this exploration of mixed motivations within an embedded society does explain to a certain extent why IP is a contested concept without a uniform inherent meaning even before the commodification wave instilled by the reform of IP law in the nineteenth and twentieth centuries.

I.II.E Early Modern Era

The genesis of modern IP rules derives from a recognizable corpus of legal instruments within Western society in the last five centuries. This is not to say that these initiatives were the earliest exemplars of IP conventions and rules. Wengrow's archaeological insights on fourth millennium BC Mesopotamia indicate the development of commodity marks, seals and labels in relation to *terroir* and standardization – thereby signalling the existence of value-added things and labour in relation to mass consumption products.[32] Roman publishers operated a quasi-unfair competition regime whereby their investments were protected from misappropriation.[33] Shao's seminal scholarship on Chinese legal history indicate early trademark regulations during the Han Dynasty (206 BC–AD 220), and a well-established authorial rights system by the Ming Dynasty (1368–1644).[34] Long has argued that it is 'clear that within medieval cities the attitude developed that craft processes constituted intangible property with commercial value subject to conditions of ownership'.[35] Ford's recent scholarship casts new light on the links between the Carolingian encouragement of Christian learnings, the legal immunities for monasteries and the eventual Venetian rules on inventions.[36] And there are now attempts to uncover early Islamic understandings on property in intellectual labour.[37]

Although it has been argued that the Venetian regulations were cross-cultural hybrids aimed specifically to encourage and protect skills and technologies from the Eastern Mediterranean, Eurasia and the Islamic Empire, the Venetian (and other European) privileges and regulations in the early modern era do stand, nevertheless, as stark examples of pre-IP rules.[38] Peukert deals

[32] D Wengrow, 'Prehistories of Commodity Branding' (2008) 49(1) Current Anthropology 7, 9–11.

[33] FA Mumby, *Publishing and Bookselling: A History from the Earliest Times to the Present Day* (4th ed. Jonathan Cape 1956) 15–17; F Reichmann, 'The Book Trade at the Time of the Roman Empire' (1938) 8(1) The Library Quarterly 42, 43.

[34] K Shao, 'Alien to Copyright?: A Reconsideration of the Chinese Historical Episodes of Copyright' (2005) 4 Intellectual Property Quarterly 400–31; K. Shao, 'The Promotion of Learning in Chinese History: To Discover the Lost Soul of Modern Copyright' (2010) 24(1) Columbia Journal of Asian Law 63–85; K Shao, 'Look at My Sign: Trademarks in China from Antiquity to the Early Modern Times' (2005) 87 Journal of the Patent and Trademark Office Society 654.

[35] P Long, 'Invention, Authorship, Intellectual Property and the Origin of Patents: Notes Toward a Conceptual History' (1991) 32(4) Technology and Culture 846, 876.

[36] Laura R Ford, *The Intellectual Property of Nations* (CUP 2021) ch. 6.

[37] M El Said, 'Rethinking the Foundations of Intellectual Property: Applying Islamic Principles on Selected Contemporary IP Challenges' in P Drahos, G Ghidini and H Ullrich (eds) *Kritika: Essays on Intellectual Property* (Edward Elgar 2015) 94–130.

[38] LR Bradford, 'Inventing Patents: A Story of Legal and Technical Transfer' (2015) 118 West Virginia Law Review 267.

with these early privileges quickly as they do not qualify in his quest for property or commodification.[39] It is true that these early regulations had no uniform regional or state policy as to what would constitute the nature of the right or *res* protected.[40] Nonetheless, IP jurists and scholars will detect familiar language in these instruments as they reflect the mixed motivations of authorities, creators and investors including compulsory licensing, incentivization, unjust enrichment and the protection of investment/labour/honour.

For example, the general Venetian State laws of 1453 and 1474 gave temporary monopolies to importers and inventors of innovations while personal privileges were granted for all sorts of artisanal and technological processes and products.[41] Scholarship, as pointed out above, claims that State privileges and guild practices in this period were tools for harnessing and regulating foreign technologies as well as censoring domestic printing. However, it is also accepted that such privileges and practices (in the forms of municipal favour [*gratiae*] or exceptions to law [*priva lex*]) worked to secure and protect the investment, and in some cases, acted as positive entitlements or licences to practice trades to foster domestic competition with the then dominant Venetian trade guilds.[42]

The Venetian 1474 Statute, for example, incorporated several policies reflecting individual and communitarian needs. The law enumerated defensive mechanisms to prevent misappropriation of the machine as well as the technical manuals and trade secrets attached thereof.[43] It incorporated rhetorical language as to the protection of the inventor's honour. And public interest is ensured with the linking of the regulation to the promotion of competition and the incentivization of more technology, as well as to the express provision allowing government use.[44]

The pattern of encountering mixed motivations which include protecting investment of capital, reward and recognition of labour, and public or societal benefits continue as we shift timelines and jurisdictions. Ginsburg's study on sixteenth-century Vatican printing privileges, for instance, show that these were granted on the bases of investment (for the labour and expense invested in producing work), incentivization and reward (to the author or printer for ensuring

[39] Peukert, 1163 ('Windmills, mining technologies, and the printing press were not immediately regulated by freely transferable property rights but for a long time by privileges.')

[40] J Kostylo, 'From Gunpowder to Print: The Common Origins of Copyright and Patent' in R Deazley, M Kretschmer and L Bently (eds) *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 21–50 <https://books.openedition.org/obp/1062?lang=en> (all references hereafter are to numbered paragraphs) 2–6; see also O Bracha, 'The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care' (2004) 38 Loyola of Los Angeles Law Review 177. For copyright-like privileges, see A J Mann, '"A Mongrel of Early Modern Copyright": Scotland in European Perspective' in R Deazley, M Kretschmer and L Bently (eds) *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010).

[41] Including one for introducing a Byzantine device into Venice (1416 privilege to Petri), another for the art of printing in Venice for five years (1469 privilege to Johannes of Speyer), and most famously, the 1486 privilege to Marc Antonius Sabellico for the author's right to choose a printer, and to prevent reprinting. See G Dutfield and U Suthersanen, *Dutfield and Suthersanen on Global Intellectual Property Law* (2nd edn, Edward Elgar 2020) 81; G Mandich, 'Venetian Patents (1450–1550)' (1948) 30 Journal of the Patent and Trademark Office Society 166; J Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (University of Chicago Press 2002) 71; cf G Mandich, 'Venetian Origins of Inventor's Rights' (1960) 42 Journal of the Patent and Trademark Office Society 378; E W Hulme, 'The History of the Patent System under the Prerogative and at Common Law' (1896) 12 Law Quarterly Review 141; and Terrell on the Law of Patents (19th edn, Sweet & Maxwell) para 1–07 et seq.

[42] C May and S Sell, *Intellectual Property: A Critical History* (Lynne Rienner 2005); J Kostylo, 'From Gunpowder to Print: The Common Origins of Copyright and Patent' (n 12); T Sichelman and S O'Connor, 'Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic' (2012) 49 San Diego Law Review 1267.

[43] Kostylo 45.

[44] Translations differ. G Mandich and FD Prager, 'Venetian Patents 1450–1550' (1948) 30(3) Journal of the Patent Office Society 166, 176–77; cf. J Kostylo (2008) 'Commentary on the Venetian Statute on Industrial Brevets (1474)' in *Primary Sources on Copyright (1450–1900)* eds L Bently and M Kretschmer <www.copyrighthistory.org>. Also see J Phillips, 'The English Patent as a Reward for Invention: The Importation of an Idea' (1982) 3(10) Journal of Legal History 71.

the accuracy of the work), fair competition (as the privileges forbade unfair or unjust enrichment of another's fruits), and public interest. She further suggests that these privileges show nascent concepts of derivative works, first publication rights and the French *droit de divulgation*.[45] The 1479 Episcopal Privilege, granted by the Bishop of Würzburg to three printers for the printing of the Bishop's breviary book, controlled several aspects of the tangible and the intangible *res* including (i) defensive mechanisms such as censorship, and sanctions for the theft of the printers' goods and chattels involved in the manufacture of the books, and (ii) positive mechanisms such as the exclusive right to print, and to use the Bishop's coat of arms as a proto-trademark designating the origin of the book.[46] Both the papal and bishopric privileges espoused public interest rationales: the former was to ensure the dissemination of accurate religious tracts and to enhance the likelihood of the creation of future beneficial works with some petitions pursuing future rights for translation; the latter was to enable a market structure which protected the printing investment by preventing competition (e.g., the emergence of derivative and new versions of the book).

Identical motivations, namely investment, labour and public interest arose within early English laws and jurisprudence. In the 1602 *Case of Monopolies*, the court's biblical basis was not merely against anti-competitive monopolies but also on the traditional principle of ensuring protected labour for the welfare of the commonwealth.[47] The 1624 English Statute of Monopolies juxtaposes patents against the competing public interests of state welfare and regulated competition.[48] The element of public interest was further seen in later English patents which incorporated compulsory working and revocation clauses.[49] Many motivations were further rooted to emerging Renaissance and common law doctrines on humanism, equity and culture instancing these examples: the moral interests of inventors, the economic concerns of investors and the wider societal benefits (such as consumer protection against counterfeiting and deceit) were treated as having complementary values; notions of dignity and conscience were assumed to be inherent in some types of labour by English equity courts which eschewed utilitarian bases to adopt deontologically biased notions of 'good conscience'.[50] These show, perhaps, the validity of Polanyi's theoretical idea of an embedded society. The example that encapsulates Polanyi's idea that laws, as institutional regulators, were vital in upholding an embedded society with its pluralist concerns was Brunelleschi's application for a privilege on a newly improved cargo boat. The application for a monopoly was claimed on the

[45] JC Ginsburg, 'Proto-Property in Literary and Artistic Works: Sixteenth-Century Papal Printing Privileges' in I Alexander and H Tomas Gomez-Arostegui, *The History of Copyright Law: A Handbook of Contemporary Research* (Edward Elgar 2015).

[46] F Kawohl, (2008) 'Commentary on the Privilege Granted by the Bishop of Würzburg (1479)' in *Primary Sources on Copyright (1450–1900)* eds L Bently and M Kretschmer <www.copyrighthistory.org>; E Armstrong, *Before Copyright: The French Book-Privilege 1498–1526* (CUP 1990).

[47] 'No man shall take the nether or the upper millstone to pledge: for he taketh a man's life to pledge' (Deut. 24:6); it is reported that Edmund Coke concluded that the scripture showed that 'a man's trade is accounted his life, because it maintaineth his life; and therefore, the monopolist that taketh away a man's trade, taketh away his life and therefore is so much the more odious'. See Darcy v Allen, 77 Eng. Rep 1620 (K.B. 1603) (known also as the Case of Monopolies), discussed in B Malament, 'The Economic Liberalism of Sir Edward Coke' (1967) 76 Yale Law Journal 1321, 1343–44.

[48] Statute of Monopolies, 1624, 21 Jam. 1, c. 3 (Eng.). Early decisions are: Davenant v Hurdis, Moore 576, 72 Eng. Rep. 769 (K.B. 1599) (known also as the Merchant Tailor's Case); Cloth Workers of Ipswich 78 Eng. Rep. 147 (K.B. 1615) – for a synopsis, see Terrell on the Law of Patents (n 10) paras 1–11 to 1–22. Also note Malament, ibid 'The Economic Liberalism of Sir Edward Coke' (1967) 1345 et seq.

[49] Bracha 12–13.

[50] H Macqueen, 'The War of the Booksellers: Natural Law, Equity, and Literary Property in Eighteenth-Century Scotland' (2014) The Journal of Legal History, 35(3) 231–57; A Hudson, 'Equity, Confidentiality and the Nature of Property' in H Howe and J Griffiths (eds) *Concepts of Property in Intellectual Property Law* (CUP 2013) 94–115.

grounds of intellect, industry, invention, fear of theft of the 'fruit of his genius and skill', a desire to 'disclose' his knowledge and a need to incentivize further 'higher pursuits'.[51]

So, when do we see the transformation of privileges into Polanyian fictitious commodities? Is it true, as Polanyi asserts, that property is the institutional tool whereby labour is transformed into commodities? In Peukert's view, what eventually led to the commodification of activities and artefacts into IP is the technological advances from the mid-eighteenth century which made it clear that 'publishers, authors and inventors require property right that enables them to recoup their sunk investments in the first prototype'. His eighteenth-century examples are the transformations which occurred in the German book trade (switching from a barter in books model to a sale of their productions model), and the French revolutionary decrees of 1791/1793.[52] Peukert further notes that 'the evaluation of works and inventions became more and more detached from arguments of traditional aesthetics and public benefits. In the end, the only relevant value remaining was the market-conception of value: every use value, however motivated or characterized, has to translate into an exchange value.'[53] Peukert declares that the 'history of IP from the nineteenth to the 21st century is replete with examples of this Polanyian logic of commodification'.[54] I agree and based on Peukert's analysis, I extrapolate his observations to map out several global consequences which, in turn, frame our current IP norms in the next section.

Nevertheless, I would also argue that one cannot easily ignore the earlier system of privileges and rules which granted not only manufacturing, printing, publication and quasi-trademark rights but also rights of importation into the territory which show to some extent Polanyian concepts of why an embedded society reflected pluralist motivations. First, at least in Europe, this ad hoc system reflected the main concerns of the ruling elites, that is, to attempt a balance between censorship, regulation of technologies, barriers to market entry and an ethos of 'good values' or *ordre public*. Creators appeared as beneficiaries in early rules, but it was not until the early eighteenth century when they were regarded (at least rhetorically) as primary stakeholders, rather than secondary or even minor stakeholders in the world of technologies and arts. Second, there were no boundaries as to the themes for which petitions were granted though from the eighteenth century onwards, IP concepts, rules and rationales appeared. But such concepts were cross-hybridized versions which grew from a corpus of medieval European legal institutions that protected both creator and investor, mental labour and private investment, in widely marketable objects.

I.II.F Res *Becomes Fictious Commodities*

First, Peukert is indeed right to locate the eighteenth century as being the approximate start of discourses on works and inventions as 'labour'. Hegel, for instance, refers to 'mental aptitudes, erudition, artistic skill [. . .], inventions' as mental activities which constituted 'mental property' the moment they became expressed and alienated and subsequently 'put into the category of 'things'. Hegel is fully cognizant of the role of property and the law in relation to mental labour: it is 'the primary means of advancing the sciences and arts' so as to guarantee scientists and artists against theft, and to enable them to benefit in a similar way that property is used to advance trade and

[51] Kostylo 41–42

[52] Peukert 1161–65. Part of this supposition arises from Immanuel Kant's essay 'On the Wrongfulness of Unauthorized Publication of Books (1785) – see Dutfield and Suthersanen, 45–47.

[53] Peukert 1165.

[54] Peukert 1167.

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industry against robbery. Ever sensible of balance, Hegel can also be read as arguably justifying the rights of users to appropriate others' mental property to create derivative works.[55] Bently and Sherman also note, in relation to British IP law, the importance of the notion of 'mental labour' as the basis of property rights in the eighteenth century especially as there was no law of copyright, patents, designs or trademarks. Used to distinguish such labour from manual labour, the term 'mental labour' formed a common link between different forms of mental or intellectual activities and know-how and may have been wide enough to encompass personality.[56]

Second, there is an abundance of literature on the subsequent transformations in national law and policy from the nineteenth century onwards whereby 'mental labour' which is embedded within physical objects (for example, recipe books or manufactured objects) is extended to cover ancillary outputs in the form of confidential information, trade indicia, and know-how (to name a few). These were slowly wrenched away from their physical manifestations, as if that is all there was, and aggregated with the incorporeal part of the 'thing'. The latter existed thus as discrete value-laden commodities which were, in time, recognized by courts and legislators as intangible *res*. Peukert points to the dis-embeddedness of signs, for example, from medieval guild practices to stand-alone accessories attached to commodities traded on the competitive market. I would add that the expansion of trademark protection to three-dimensional shapes has been complemented by expansive justificatory rhetoric while simultaneously dealing with the possible anti-competitive effects of IP protection of shapes.[57] Indeed, the function of trademark law in the EU has clearly extended beyond origin to communication, investment and advertising.[58]

Unsurprisingly, the first international patent and copyright conventions absorbed the then dominant national positions on the nature and ambit of intangible property, ambiguous as they were.[59] One notes the origins of the French wine appellation system which grew around concerns as to genericide of place names (a cultural value), consumer protection as to fraud and product origin (a traditional trademark function), and rent seeking (a very modern trademark rationale for the protection of investment).[60] These concerns were subsequently embedded in later eras so that the

[55] GWF. Hegel, *Philosophy of Right* (TM Knox trs and ed, Clarendon Press 1967) §43, §69.

[56] L Bently and B Sherman, *The Making of Modern Intellectual Property Law* (CUP 1999) 2–3, 15–18.

[57] For the problem of shape protection under trade dress, passing off, design, copyright, unfair competition and trademark laws, see A Kur, 'Unité De L'Art is Here to Stay: Cofemel and its Consequences', Max Planck Institute for Innovation and Competition Research Paper No. 19-16; U Suthersanen and M Mimler, 'An Autonomous EU Functionality Doctrine for Shape Exclusions' [2020] GRUR International 567; I Simon, 'Technical Functionality in European Trade Mark Law' (2021) 137 Law Quarterly Review 113–40; J Reichman, 'Legal Hybrids between the Patent and Copyright Paradigms' (1994) Columbia Law Review 94, 2432.

[58] See U Suthersanen, 'The European Court of Justice in Philips v Remington: Trade Marks and Market Freedom' (2003) 7 Intellectual Property Quarterly 257; WM Landes and RA Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press/Harvard University Press 2003) chapter 7; A Kur, 'TradeMarks Function, and Don't They? CJEU Jurisprudence and Unfair Competition Principles' (2014) 45 International Review of intellectual Property and Competition Law 434; Art 3, EU Trade Marks Directive 2015/2436/EU; Art 4, Community Trade Marks Regulation (EC) No 207/2009; L'Oreal v Bellure [2010] RPC 1 (wherein the CJEU arguably extended the trademark protection to brand value); for a critique of L'Oreal v Bellure, see, for instance: D Gangjee and R Burrell, 'Because You're Worth It: L'Oreal and the Prohibition on Free Riding' (2010) 2 Modern Law Review 282–304; and L McDonagh, 'From Brand Performance to Consumer Performativity: Assessing European Trademark Law after the Rise of Anthropological Marketing' (2015) 4 Journal of Law and Society 611–36.

[59] It has been argued that the Paris Convention 1883 on industrial property and the Berne Convention 1886 on copyright followed the quantitative, incentive-based, approach which had moulded national IP laws. See R Dreyfuss and S Frankel, 'From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property' (2015) 36 Michigan Journal of International Law 557, 561.

[60] A Stanziani, 'French Collective Wine Branding in the Nineteenth–Twentieth Centuries' in D Gangjee (ed) *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar 2016) 13–45.

protected or regulated *res* would not only include tangible artefacts and human labour but natural phenomena (including scientific, medical principles and discoveries), and geographical culture (as in *terroir* in regulating beer and wine in Germany and France).[61]

Thus, in the true Polanyian spirit, the commodification process within the nascent international IP regime extended not just to labour but products of the land with which labour was arguably mixed.[62] This was a logical extension of the 'let's commodify all' spirit. This may clarify the extent of the term 'industrial property' as used in the earlier texts of the Paris Convention. The term successfully captured industrial and agricultural extractive outputs including wines, grain, fruit, cattle and mineral waters; by 1925, the provision extended to include tobacco leaf, and by 1934, to such staples as beer and flour.[63] All these outputs would be successfully repurposed under different IP sub-constructs, that is. patents, industrial designs, trademarks, appellations of origin, etc.[64] Since the 1970s, the type of intangible *res* which has been categorized as IP has accelerated: patent protection has extended to computer programs, medicines, biotechnological inventions, life forms and business methods.[65] A similar phenomenon occurred under the Berne Convention 1883,[66] while national and regional laws continued to press for expanded subject matter: from photographs, to films to press publications, and to controlling dissemination of works on all sorts of media and platforms.[67]

Perhaps the most notable example of Polanyi's concerns as to the vagaries of market-led regulation is how the principle of unfair competition was harnessed to secure fictitious commodities trading in the open market. The principle of unfair competition is principled on the notion that in accordance with 'fair practices', a competitive market will comprise actors which conform to certain types of acceptable market behaviour. And yet Art.10*bis* of the Paris

[61] The 1791 French law was in relation to 'Useful Discoveries, and to the Means of ensuring the Property thereof'. See F Savignon, 'The French Revolution and Patents' (1989) Industrial Property 391–400. Also see D Gangjee, 'From Geography to History: Geographical Indications and the Reputational Link' in I Calboli and W Ng-Loy (eds) *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific* (CUP 2017) 44 et seq (for the absorption of early branding regulations into trademark and geographical indication laws); Kostylo, 42–44 (for the privileges sought for medical and technical manuscripts in fifteenth- and sixteenth-century Venice, in contrast to the usual practice of secrecy) and A Pottage and B Sherman, 'On the Prehistory of Intellectual Property' (arguing that early notions were focused on material embodiments of the intangible) in *Concepts of Property in Intellectual Property Law* op cit 13–15.

[62] This recalls Locke's labour-based justification of property which has been challenged by many, the most notable being Nozick's parable as to whether a person standing on a beach emptying a can of tomato juice into the ocean can claim ownership based on the mixing of his thing with another. Ownership claims based on mixing labour with *terroir* (as in geographical indication rights in food and wine) can become slightly absurd when the mixed labour is imported. Of note was the French Government's intervention to prop the legitimacy of the French wine brand ex post la crise du vin caused by the phylloxera ravage of the French vineyards and the subsequent questionable re-plantation of cultivated hybrid vines from the USA and North Africa into French *terroir*. For challenges to Locke, see J Waldron, 'Two Worries about Mixing One's Labor' (1983) 33 Philosophical Quarterly. 37; and R Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 174–75. For the French saga, see D Gangjee, *Relocating the Law of Geographical Indications* (CUP 2012) chapter 3.

[63] Convention of Paris for the Protection of Industrial Property: Final Protocol of 20 March 1883; Act of The Hague of 6 November 1925; Act of London of 2 June 1934. Also see the Law of 28 July 1824 (prohibiting use of place names except by authorized wine producers), Law of 1857 (on marks); Law of 11 January 1892.

[64] Art 1, Paris Convention (Act of Stockholm 1967).

[65] The extent of expansion is still a sovereign matter although the TRIPS Agreement, and other international instruments set a minimum framework of obligations.

[66] The Convention begun with all expressions and fixations of speech and text, performances, music, images, dance and expanded into industrial design and photographs – Art 2, Berne Convention. See Dutfield and Suthersanen op cit 55.

[67] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886; Trade-Related Aspects of Intellectual Property (TRIPS) Agreement, 15 April 1994; Copyright in the Digital Single Market Directive (EU) 2019/790.

Convention on Industrial Property can be read as converting workable competition rules (i.e., fair practices) into a positive entitlement for IP proprietors.[68] Thus, the historical and current legislative narratives as to why we need *sui generis* database rights, plant variety rights, geographical indications, sound recording rights and pharmaceutical test data exclusivity manifest as confused and extensive discussions on whether 'entitlements' were justified at all within copyright or patent or trademark or unfair competition laws.[69]

I.II.G Rationales, Typology and Lexicon: More Fictitious Narratives

The third point is that, as all sorts of labour and objects became qualified as tradeable commodities, Procrustean solutions were adopted in order to accommodate the expanding *res* either by accretion (which involves re-purposing an existing category to encompass new commodities) or emulation (whereby new *res* is brought within the law by creating new rights which emulate existing rights and rationales).[70] Not only was mental labour and its ancillary outputs commodified into tradeable assets and captured by existing legal constructs (such as copyright, patents and trademarks), but the typology and legal lexicon of IP law burgeoned, with ever growing and contradictory rationales.[71]

The dynamism of rationales and discourses in the past two hundred years – when the *res* to be regulated and protected expands beyond traditional justifications of reward, compensation, incentivization, dignity or honour – is not new. Burrell and Kelly show that justifications in

[68] Art 10bis, Paris Convention for the Protection of Industrial Property, 14 July 1967 (1971) (preventing 'any act of competition contrary to honest practices in industrial or commercial matters').

[69] See for example, D Gangjee, 'From Geography to History: Geographical Indications and the Reputational Link' op cit 59; O Bracha and PR Goold, 'Copyright Accidents' (2016) 96(3) Boston University Law Review 1025 (on the view that copyright is closely related to tort under US law); and Art 39(3) TRIPS Agreement.

[70] WR Cornish, 'The International Relations of Intellectual Property' (1993) 52(1) Cambridge Law Journal 46, 54–5.

[71] For economic rationalizations of IP rights: F Maclup, 'An Economic Review of the Patent System, Subcomm. On Patents, Trademarks, and Copyrights, Senate Comm'. On the Judiciary, 85th Cong (Study No 15) (often cited for Machlup's wry summary: 'If we did not have a patent system, it would be irresponsible on the basis of our present knowledge of its economic consequences to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible based on our present knowledge to recommend abolishing it' 45–46); R Merges, 'Intellectual Property Rights and the New Institutional Economics' (2000) 53 Vanderbilt Law Review 1857, 1877; AB Jaffe and J Lerner, *Innovation and Its Discontents: How our Broken Patent System Is Endangering Innovation and Progress, and What to Do about It* (Princeton University Press 2004) (accepting the economic incentives for the patent system but criticizing legislative and institutional reforms as being contrary); U Suthersanen, G Dutfield and KB Chow, *Innovation without Patents: Harnessing the Creative Spirit in a Diverse World* (Edward Elgar 2007) 3–69 (arguing from a mixed economics and development platform); Sir A Plant, *The New Commerce in Ideas and Intellectual Property* (Athlone 1953); HL Macqueen, 'Law and Economics, David Hume and Intellectual Property' in *Argument Amongst Friends: Twenty-Five Years of Sceptical Enquiry* (Nick Kuenssberg ed, David Hume Institute, Edinburgh 2010) 9–14.

For social and philosophical rationalizations: A Chander and M Sunder, 'Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice' (2007) 40(3) UC Davis Law Review 563; H van den Belt, 'Robert Merton, Intellectual Property and Open Science: A Sociological History for our Times' in *The Commodification of Academic Research: Science and the Modern University* (Hans Radder ed, University of Pittsburgh Press 2010).

For mixed rationalizations (including cultural, distributive justice, ethics and development): W Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed) *New Essays in the Legal and Political Theory of Property* (CUP 2000) 168–99 (American scholars tend to adopt Fisher's four justifications for intellectual property law: (i) utilitarian / economic; (ii) Lockean/labour dessert; (iii) personhood/personality; (iv) promotion of cultural development); S Parthasarathy, *Patent Politics: Life Forms, Markets and the Public Interest in the United States and Europe* (Chicago University Press 2017) (intriguing exploration on how culture, history, politics and ideology shape the way the public interest is framed and is translated into national or regional intellectual property policies, rules and institutions); and R Merges, *Justifying Intellectual Property* (Harvard University Press 2011).

nineteenth-century patent law had to include 'public access' as this would allow patent law to underwrite the investment costs incurred in harnessing foreign technologies:

> the law could treat the importer and the inventor as equally deserving – the benefit to the British public, who would gain access to an invention for the first time, was the same in either case. Such equivalence would have been much more difficult to justify had patent law ultimately been centred on a narrative of creativity, genius, and a natural right to property.[72]

The perplexing purposes of patent law have also been criticized by Adcock and Beyleveld. They question the need for 'inventiveness' as a criterion of protection if the purpose of patent law is to protect investment. And in their view, the purpose has slowly been transformed from reward and natural right to unjust enrichment to incentivization of investment:

> Thus, if the purpose of patent law is taken to be this, there should be no need to fictionalise certain discoveries as inventions because discoveries should be patentable. But conversely, if the law insists on inventiveness as a condition for protection, then the rationale cannot simply be the need to create incentives for investment.[73]

The accretion/emulation approach was adopted so that copyright law could expand to accommodate soulless productions, devoid of human author or persona. The emulation method produced *sui generis* IP regimes which mix a dizzying array of concepts borrowed from copyright, patent or trademark laws. National design laws reflect an ambivalence in rationales when one examines the different national and international criteria: eye appeal, pattern, shape, configuration, form, model, ornamental, functional, original, commonplace, individual character, and novelty.[74] If financially dictated labour could not be labelled as creative authored works, international law was adjusted to include sound recordings and broadcasts and integrated circuit layouts, and to set out new rights.[75] We know that jurists and legislators theorized deeply on new rationales, rules and categories ('neighbouring rights', 'related rights', or even *sui generis* rights) to stretch protection to computer programs,[76] sound recordings,[77] photographs/films[78], computer-generated works and now AI-derived inventions, music and art.[79]

[72] R Burrell and C Kelly, 'Parliamentary Rewards and the Evolution of the Patent System' (2015) 74(3) Cambridge Law Journal 423, 441.

[73] MD Adcock and D Beyleveld, 'Purposive Interpretation and the Regulation of Technology: Legal Constructs, Legal Fictions, and the Rule of Law' (2007) 8(4) Medical Law International 305, 316.

[74] U Suthersanen, 'Cross-border Copyright Protection in Europe' in H Hartwig, *Research Handbook in Design Law* (Edward Elgar 2021) 482, 506.

[75] Peukert highlights how the logical amplification of commodification results in further fictitious rights whenever technologies change: if one reproduction technology replaces another, IPRs are expanded to accommodate the new technology though the justification is often couched in economic or market-biased language; namely, we need new rights to stem the loss of income or to prevent the dilution of a trade name in new markets: Peukert 1172. See TRIPS Agreement, arts 1(3) and 2 enumerating the different conventions absorbed into WTO rules.

[76] See, for instance, the early debate in P Samuelson et al. (1994) 'A Manifesto Concerning the Legal Protection of Computer Programs' Columbia Law Review 94, 2308, and P Samuelson, 'The Strange Odyssey of Software Interfaces as Intellectual property' in M Biagioli, P Jaszi and M Woodmansee (eds) *Making and Unmaking Intellectual Property: Creative Production in Legal And Cultural Perspective* (University of Chicago Press 2011).

[77] R Fleischer, 'Protecting the Musicians and/or the Record Industry? On the History of "Neighbouring Rights" and the Role of Fascist Italy' (2015) 5 Queen Mary Journal of Intellectual Property 327, 336.

[78] B Edelman, *Ownership of the Image* (Routledge & Kegan Paul 1979) 44–7; J Gaines, *Contested Culture: The Image, the Voice, the Law* (University of North Carolina Press 1991) 46; and *Burrow-Giles v Sarony* (111 US 53, 1884).

[79] For representative cases related to AI authorship and inventorship, see, for instance, *Shenzhen Tencent v Yinxun* ('Dreamwriter' case, recognizing an article generated by an AI program as a literary work under copyright law); RAGHAV (recognizing an AI painting app as a co-author in a copyrighted work); and DABUS (South African Patent Office issued a patent to an AI tool as patent inventor). The cases are available from: WM Schuster, 'Artificial Intelligence and Patent Ownership' (2018) 75 Washington & Lee Law Review 1945; E Bonadio and L McDonagh,

As in the early modern era, the rules for new commodities embraced a variety of motivations which underpinned such works or underpinned rationales for property rights – banal, subsistence, educational, creative, competitive, trade indicia, investment or state welfare. The different thresholds may also suggest that the rationales for subaltern IP rights were ill-thought out and emanated not so much from protecting the labourer or their creativity but the sunk investment by manufacturers of 'industrial' commodities.

I.III REIMAGINING IP AS A PLURALIST NARRATIVE

I.III.A Returning to Basics

Cornish, in his first textbook edition, defined IP law as the 'branch of the law which protects some of the finer manifestations of human achievement'; he cynically added in a later edition that 'it also shields much that is trivial and ephemeral'.[80] Bently and Sherman suggest that intellectual property law 'regulates the creation, use and exploitation of mental or creative labour'.[81] Vaver argues that the phrase 'intellectual property' starts 'from the premise that ideas are free as the air – a common resource for all to use as they can and wish. It then proceeds systematically to undermine that principle.'[82] Spence's view is that an IP right is 'a right: (i) that can be treated as property; (ii) to control particular uses; (iii) of a specified type of intangible asset'.[83] Dutfield and Suthersanen push the boundaries slightly further to propose that IP is 'a type of property regime whereby creators and entrepreneurs are granted a right, the nature of which is entirely dependent on the nature of the creation on the one hand, and the legal classification of the creation on the other'.[84]

If we turn to stipulative definitions as laid down in international laws, we encounter divergent representations of IP as a legal collective noun for the classifications of artefacts and activities. In its most turgid and tautologous form, the WTO–TRIPs Agreement uses the term 'intellectual property' to refer 'to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II',[85] namely copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and the protection of undisclosed information. And evidently nothing more.

The WIPO Convention, on the other hand, theoretically embraces every conceivable labour output of man and industry with an open list of IP as including the rights relating to 'literary, artistic and scientific works, performances relating to artists, phonograms and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks, commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic

'Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity' (2020) 2 Intellectual Property Quarterly 112–37 and B.Zhou, 'Artificial Intelligence and Copyright Protection: Judicial Practice in Chinese Courts' <www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/conversation_ip_ai/pdf/ms_china_1_en.pdf>.

[80] In an earlier edition, WR Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Marks* (5th edn, Sweet & Maxwell 2003) 3.

[81] In an earlier edition, L Bently and B Sherman, *Intellectual Property Law* (2nd edn, OUP 2004) 1.

[82] D Vaver, *Intellectual Property Law* (Irwin Law 2011) 1.

[83] M Spence, *The Concept of Intellectual Property* (OUP 2007) 12–13.

[84] G Dutfield and U Suthersanen, *Dutfield and Suthersanen on Global Intellectual Property Law* (2nd edn, Edward Elgar 2020) 14.

[85] TRIPS Agreement 1994, art 1(2).

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fields'.[86] On the other hand, the Universal Declaration of Human Rights states that *everyone* has a right to *interests* resulting from 'any scientific, literary or artistic production of which he is the author'. Besides reflecting a gender bias, the provision also reflects the literature which situates IP law within a rights-based discourse.[87]

Turning next to theoreticians, we encounter Harris's view of IP law as constituting trespassory rules which restricts uses of the ideational entity thereby preserving 'to an individual or group of individuals an open-ended set of use-privileges and powers of control and transmission characteristic of ownership interests over tangible items'.[88] Drahos explains IP within his own socio-political justificatory context: 'We shall say that intellectual property rights are rule-governed privileges that regulate the ownership and exploitation of abstract objects in many fields of human activity.'[89] Thus far, we encounter current notions of IP law as being concerned with human achievement or activity, intangible (or abstract) objects (or assets), mental or creative labour, creators and perhaps entrepreneurs. So, does the law grant rights in intangible objects or does it accord privileges to control certain uses or activities *ad rem*? Both Drahos and Spence veer towards the latter perspective. The former dramatically inflates IP rights as 'liberty-intruding privileges of a special kind' which 'promote factionalism and dangerous levels of private power'.[90] The latter argues that the right does not vest in the intangible asset per se, but rather focuses on the ownership of the asset as a gateway to control of usage – the object of an IP right is the legal right itself.[91] Pila's lexical account of IP skirts close to this view of IP as a 'type of property conferring temporary exclusionary rights in respect of the objects it exists to protect'. However, she also concedes that one cannot understand the function of the law as a right without a detailed exploration of the nature and individuation of the subject matter protected: 'however widely or narrowly the scope of IP protection is cast, its primary reference point remains the individual subject matter to which the property rights attach, conceived as a subject matter of relevant (protectable) type'.[92] George's theoretical approach adopts a similar approach in exploring the definition of IP, but to no avail, as she concludes IP is symbolically important but an essentially contested concept without an inherent meaning; instead her suggested approach is to reconstitute a metaphysical notion of IP based on society's internalization process.[93]

Okediji notes the success of the commodification of mental labour and investment in relation to the rebranding of 'IP goods' on the global trading market as investment assets. She also notes, affirming the Polanyian cautionary narratives, that when IP is cast as an investment, the focus shifts from 'a conditional grant to incentivize creativity and innovation to a guaranteed right justified by reference to the amount of capital committed, the expenses incurred, the profits anticipated, and the

[86] WIPO Convention 1967, art 2(viii)

[87] UDHR 1948, art 27(2). In this I disagree with Pila's view of the provision as supporting a conception of IP subject matter as artifacts – see Pila, *The Subject Matter of Intellectual Property* (2017) 64–65. Her view is perhaps more supported by the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, art 2 – where the tangible and intangible aspects of heritage and property are intertwined. See also Protocol 1 of the European Convention on Human Rights, art 1; Charter of the Fundamental Rights of the EU, 2000, art 17(2) (intellectual property clarified as a human right); Dutfield and Suthersanen, op cit, 328–48 (for the literature on IP as a human right).

[88] JW Harris, *Property and Justice* (OUP 1996) 44; see also ch. 8.

[89] P Drahos, A *Philosophy of Intellectual Property* (ANU eText 2016) 7.

[90] Drahos 7.

[91] Spence 13; Drahos, 7.

[92] J Pila, *The Subject Matter of Intellectual Property* (OUP 2017) ch. 1.

[93] A George, *Constructing Intellectual Property* (CUP 2012) 31–136.

risk assumed'.[94] Such consequentialist platforms are also part of the current narratives for EU IP laws: the need for copyright to 'protect and stimulate the development and marketing of new products and services'; the desirability for trademark law to promote 'the development of economic activities'; and the need for the patent system to 'encourage research into and production of biotechnological medicines'.[95] Okediji further argues that to prevent this consequential shift in IP function, state intervention is essential as it incorporates other state obligations, for example: 'the protection of fundamental freedoms, national security, environmental or public health needs could be compromised'.[96]

I.III.B (Intellectual) Property as a Pluralist Concept

Dagan's wider treatise on property urges that we adopt a more pluralist notion of property which not only allows 'the coexistence of a diverse set of social institutions', but also allows for differing emphases depending on whether the property type arises from a more utilitarian basis (then the emphasis is on investment and economic success) or from a more social basis (then the emphasis may be on active participants and social cohesion). Indeed, he forbids any liberal thinker to adopt a 'one size fits all' understanding of property as '[s]uch a straitjacket is not only misleading but also unfortunate because property's structural pluralism enables diverse forms of the good to flourish'.[97]

And there is an increasing tide of scholarship advocating such a pluralistic concept in relation to IP law. For example, Merges argues for an IP model which comprises 'a commitment to individual ownership as a primary right, respect for third-party interests that conflict with this right, and, from the philosophy of John Rawls, an acceptance of redistributive policies intended to remedy the structural hardships caused by individual property rights'.[98]

An earlier work by Resnik expresses a similar approach by exposing six bases of IP rights: Locke's libertarian property theory, utilitarianism (relying on Mill and the US Constitution), Hegel's theories on self-expression and freedom, privacy, egalitarianism including Marxist notions of distributive justice, and finally Rawls's 'reasonable' pluralistic conception of justice.[99] A pluralistic approach provides 'the best account of IP', he declares, as it acknowledges the disparate types of IP with inherently different values. More importantly, Resnik points to Rawl's supra-factor as to why a pluralistic account of IP is vital: modern democratic societies are pluralistic, reflecting different ethnic and cultural backgrounds which encompass different moral, philosophical and religious beliefs.[100] This accords with David Hume's view that there is nothing natural about property rights as

[94] RL Okediji, 'When Is Intellectual Property an Investment?' in C Geiger (ed) *Research Handbook on Intellectual Property and Investment Law* (Edward Elgar 2020) 94, 101–02. See also R Dreyfuss and S Frankel, 'From Incentive to Commodity to Asset: How International Law Is Reconceptualising Intellectual Property' 36 Michigan Journal of International Law (2015) 557; H Ruse-Khan, 'Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation' (2014) – a working paper available at <SSRN: http://ssrn.com/abstract=2463711>

[95] Recital (2), EU Directive 2001/29/EC on copyright in the information society; Recitals (3) and (5), Regulation (EU) 2017/2001 on Community trademark; Recitals (16)–(18), EC Directive 98/44 EC on the legal protection of biotechnical inventions, respectively.

[96] RL Okediji, 'When Is Intellectual Property an Investment?' in C Geiger (ed) *Research Handbook on Intellectual Property and Investment Law* (Edward Elgar 2020) 94, 101–02.

[97] H Dagan, *A Liberal Theory of Property* (CUP 2021) 22, 85.

[98] RP Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 5, 13; for a rather critical review of Merges's theory, see J Pila, 'Pluralism, Principles and Proportionality in Intellectual Property' (2014) 34 Oxford Journal of Legal Studies 181.

[99] D Resnik, 'A Pluralistic Account of Intellectual Property' (2003) 46 Journal of Business Ethics 319.

[100] Resnik, ibid 331, relying on principles drawn from J Rawls, *A Theory of Justice* (Harvard University Press 1971), and J Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001).

they are merely historically accepted societal practices that arises and derives its significance out of the scarcity of the object in question.[101] This chapter joins the body of scholarship that advocates that pluralism is structurally inherent and necessary for any IP right to be understood.[102]

The smorgasbord of definitions clearly evidences the implausibility of uncovering a single, uniform rationale or meaning of IP. And what the law has done – if the motivation landscape is to be believed – is to assiduously follow the varied stakeholder interests. IP law is a beast wearing a palimpsest of the many narratives and rules that have been re-written and re-purposed throughout the centuries to its current state. We should not be too flustered about the continuous expansion of protected subject matter, or the continuous lack of coherent rationales as to why something is or should be considered 'IP'. What the tangled circularity of explanations does is emphasize that the law is a dynamic construct reflecting the socio-economic interests and values of specific periods and peoples.

My suggestion is that we need to accept that IP – as a property right or as an entitlement – is a socio-legal fiction. In which case, the false dichotomy between 'property as a thing' and 'property as a bundle of normative relationships concerning the use of the thing' should be dismissed especially as justifications for IP are nebulous. Instead, I assume that property rights can attach to any tangible and intangible object conceptually as the law creates any *res* or thing, whether corporeal or not, through the notion of property rights. An IP right – as a property right – should be considered to be an individual property object or 'thing' or '*res*' to which a person's use-rights are attached.[103]

With this understanding of what constitutes IP, we can continue to argue whether the law protects human creativity, capital, cultural geography or heritage. But should we?

I.IV 'DOUBLE MOVEMENT': OUR NARRATIVE FOR IP REFORM

We may, instead, wish to focus more resolutely on the institutional and societal demands for IP law to be continuously re-structured and re-evaluated to not only allow for expansion (to cover both creative and investment-led works) but also to allow for creative re-use, for access to essential public goods, for cultural or educational use, and so on. There is some movement towards this type of reasoning though I feel the debate is still distracted by the creativity–investment bifurcation. Geiger, for example, rightly argues that we should look to re-constitutionalizing IP law within fundamental freedoms. And yet he embraces the fiction of 'IP is only about creativity' narrative:

> Providing for a constitutional clause that is capable of demonstrating, by its wording and use, that intellectual property is intrinsically linked to the interests of society would also bring IP

[101] D Hume, *A Treatise of Human Nature [1739]* (LA Selby–Bigge and PH Nidditch eds, Clarendon Press 1978) 488; HL MacQueen, 'Law and Economics: David Hume and Intellectual Property' in N Kuenssberg (ed) *Argument Amongst Friends: Twenty-Five Years of Sceptical Enquiry* (David Hume Institute 2010) 9–14.

[102] See, for instance, D Gervais, 'TRIPS Pluralism' (2021) World Trade Review 1–22; S Frankel (ed) *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019); O Bracha and T Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 Berkeley Technology Law Journal 229, 245–46.

[103] A Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar 2011) 10–12, relying on Roman law, Jeremy Bentham and Lord Kames for this perspective. The literature on IP as property is vast; for a collection of essays which usefully catalogues the literature and arguments for and against protecting mental and intellectual labours through property rights and even within equity, see H Howe and J Griffiths (eds) *Concepts of Property in Intellectual Property Law* (CUP 2013). In exploring property, the following American authors offer intriguing perspectives: H Demsetz, 'Towards a Theory of Property Rights' (1967) 57 American Economic Review 347; G Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 Harvard Law Review 1089 (1972); S Munzer and K Raustiala, 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 Cardozo Arts & Entertainment Law Journal 37.

> rights closer to people [. . .] Investments are needed and are important in the creative ecosystem. But in IP, investments are not protected as such, only indirectly: an exclusive right is granted as a counterpart to the enrichment of society with a new creative output, right which then can be exploited to recoup the investments made to allow the creative process. If the investment (however substantial) does not lead to a creative output, no IP is granted.[104]

The problem with this type of romantic and purist reasoning is that it guillotines the law from origins and society: from its European socio-historical origins which covered multifarious motivations; and from the harsh socio-economic reality of how a capitalist and technology-driven society will invariably gobble and commoditize any intangible *res*. And we have accepted these legal fictions before – 'computer programs are a literary work' springs to mind. So, why not continue?

In my opinion, Polanyi's *The Great Transformation* predicted the consequences of global commodification and fictional narratives, especially if we recall his passage on the environmental consequences of land commodification. He would have supported the call for greater state intervention through his final concept – the 'double movement'. His argument, after all, is that societies are constituted by two opposing movements: the expansion of the scope of the market, and the protective 'double-movement' to resist the disembodiment of the economy. Polanyi's theory is robust and realistic enough to suggest that markets are a vital aspect of our society – and different types of market embeddedness occurs at different historical movements, with some types of embedded market societies fostering innovation at all costs, with other markets tempering this with socialist and humanist/global concerns.[105] The debate on whether vaccinations for pandemics should constitute global public goods with no IP rights attached or with waivers attached is the prime 2021 example.[106]

If we accept IP as a pluralistic doctrinal concept, then we have to accept that the law as it stands is a product of many motivational bases including: labour, reward, dignity, public welfare, control of competition, direct protection of investments and innovation.[107] In this way, we can see why IP constitutes not just patent, copyright and trademark laws but also serves as the bases for rights and entitlements in relation to: personality, resale royalties, plant variety, utility model, neighbouring, derivative, topography, geographical indications, indigenous and traditional knowledge, database, technological measures and trade secrets. And it follows that we have seen and will continue to witness counter-movements occurring within the law.

Here are a few examples of how we can gauge such counter-movements within IP law which seek to re-embed IP *res* within societal control, and thus form a bases for legal reform.

I.IV.A Humanist, Communitarian and Stakeholder Aspects

The argument, that IP is a natural and exclusive property right subsisting in human-based intellectual creations, was an obvious one historically to displace other competing notions of privilege, monopoly, investment and the prevailing patronage systems. Aligned with this ethos is

[104] C Geiger, 'Intellectual Property and Investment Protection: A Misleading Equation' (14 November 2021) <SSRN: https://ssrn.com/abstract=3958320 or http://dx.doi.org/10.2139/ssrn.3958320>

[105] Peukert finds Polanyi inapplicable to IP law as the latter's primary aim 'is not to control market forces but to integrate innovative and entrepreneurial activity into the market system', Peukert 1190.

[106] See for example, WHO, 'WHO SAGE values framework for the allocation and prioritization of COVID-19 vaccination' 14 September 2020 <https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoVSAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf?sequence=1&isAllowed=y>

[107] See note 86.

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the romantic rhetoric of authors and inventors pursuing an egotistical agenda by advocating individual rights in valuable intangibles arising from the natural and just result of the creator's persona or her individual labour.[108] And indeed, not every eighteenth-century jurist or reformer blindly strove to transform mental labours, investment-led activities or intellectual knowledge or skills into commodities detached from the object's motivation, the creator or the community. Eighteenth-century jurists such as Lord Mansfield or Le Chapelier advocated a rather pluralistic perspective of property rights for creative mental labour justified either on the principle of rewarding or incentivizing labour or on the more humanist principle of a person's right to property, personality and dignity – but definitely a property right to be countered by public interests![109]

An ancillary dimension is most, if not all, justifications holds that IP rights should be curtailed – by duration, by third party rights of use, by competition and by public or global interest. Examples of such doctrines within IP laws include: copyright law's fair use or fair dealing, patent law's compulsory licensing or research use, trademark law's exclusion of generic marks. These exceptions or limitations are often posthumous recognition of societal rights overlooked by industry. The same balance is found in arts. 7 and 8 of the TRIPS Agreement which, on the one hand, espouses a utilitarian view of IPRs (Intellectual Property Rights) and states that IPRs are private rights. The agreement also structures the understanding of IP law, on the other hand, in terms of social goals. This is in tandem with the movement we see of equating IP as a human right, though not without controversy.[110]

Thus, recognizing IPRs as investment-driven property does not entirely deprive IP law of its welfare and social contours; it still should be acknowledged whether we adopt a utilitarian or more human rights perspective. Okediji, Geiger, et al. are right from a Polanyian perspective in insisting for greater state intervention to make counter-movements if we avoid the creativity–investment bifurcation.[111]

I.IV.B Technology, Environment and Health as Public Goods

Technology has systematically made inroads into our societal and economic relations which in turn has led to law reform within IP law. It is argued that our interaction with peoples, governments and companies from interactive experiences to grocery orders to medical

[108] M Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author' (1984) 17 Eighteenth-Century Studies 425.

[109] Lord Mansfield in *Sayre v Moore* (1785) – 'we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded'; the full case is discussed in *Cary v Longman* 1 East 359 (reprinted in 102 Eng. Rep. 138 (1378–1865)). The French advocate of copyright law, Le Chapelier, noted that once the author had disclosed the work to the public, 'when the work is in the hands of everyone, when all educated men know it and have imbued it with happy memories, it seems that since then, the writer has affiliated the public with his property, or rather has fully transmitted his property to the public', in Le Chapelier's Report (1791), Primary Sources on Copyright (1450–1900), eds L Bently and M Kretschmer, <www.copyrighthistory.org>. The US Supreme Court in *Sony Corp. v Universal City Studios* 464 US 417 (1984) (citing *United States v Paramount Pictures, Inc* 334 US 131 (1948): 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. [. . .] The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.'

[110] Art 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, and art 27(2) of the Universal Declaration on Human Rights. See Dutfield and Suthersanen on Global Intellectual Property Law, op cit 337, 343 discussing IP as a human right.

[111] See discussion in notes 00 and 00.

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appointments works through the vast profusion of networks enabled by machine-learning algorithms: 'Our education and healthcare is increasingly delivered through AI-enabled technologies. Our manufactured products, be they household conveniences or houses, will soon be produced by 3D printers.'[112]

And all this can be further harnessed by the fact that previous local and regional trade networks have evolved into our current 'just in time' global supply chains.[113] On the other hand, farmers worry as to their rights to knowledge, seeds and repair,[114] consumers worry about their right to 'own' digital music and e-books,[115] scholars and citizens are concerned as to the increasing costs of accessing academic publishing especially in science and technology,[116] religious and environmental groups view patented plants and green technologies as abhorrent to morality and social welfare,[117] societies are concerned as to world trade rules which countenance the commoditization of drugs and vaccines;[118] and we wonder as to infiltration of AI-enabled technologies in all aspects of human living.[119]

Okediji's fear revolves around the idea that we are in danger of reducing the IP *res* to one simple category, namely the capital risked or invested. In such a scenario, we would have lost all other functions of IP as housed in current justifications. This view accords with those which argue that our current crises (in public health or educational or technology) have been brought about by our governments who have delegated responsibility for the 'public interest' to corporations in the specific area of producing goods and services; and in return corporations have the right to make profit by any means whatsoever.[120] The latter argument is certainly prevalent in writings of those who interrogate whether pharmaceutical companies, as non-state actors, should be held accountable in tandem with governments, for fulfilling public health obligations.[121]

Once again, all these concerns represent the nascence of counter-movements within health, trade, environmental and technological fora which will hopefully form the bases for legal reform, thereby re-embedding IP *res* within a holistic societal control.

[112] A Azhar, *Exponential: How Accelerating Technology Is Leaving Us Behind and What to Do about It* (Random House/Penguin 2021) 88.

[113] Azhar, ibid 43–44, 62–66.

[114] *Bowman v Monsanto Co* 133 S.Ct. 1761 (2013) (Sup Ct (US)); Australian Productivity Commission Inquiry Report, Right to Repair, No 97, 29 October 2021; K Wiens, 'We Can't Let John Deere Destroy the Very Idea of Ownership, Wired, 04.21.2015.

[115] Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (CUP 2018) 92–165 (chap 4).

[116] M Skladany, *Copyright's Arc* (CUP 2020) 24–64 (chap 2); Dutfield and Suthersanen, op cit 349–71 (chap 12).

[117] O Tur-Sinai, 'Patents and Climate Change: A Skeptic's View' (2018) 48 Environmental Law 211 (sceptical about whether there is any correlation between the need for environmentally sound technologies, and the core rationales of patent law, namely incentivization and reward).

[118] See for example 'A Patent Waiver on Covid Vaccines Is Right and Fair', Editorial, Nature 593, 478 (2021) *doi:* <https://doi.org/10.1038/d41586–021-01242-1>; S Thambisetty, A McMahon, L McDonagh, HY Kang and G Dutfield, 'The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to end the COVID-19 Pandemic' (24 May 2021). LSE Legal Studies Working Paper No 06/2021 <http://dx.doi.org/10.2139/ssrn.3851737>.

[119] Ana Correia and Irina Reyes, 'AI Research and Innovation: Europe Paving Its Own Way', European Commission, 16 November 2020 <https://ec.europa.eu/info/publications/ai-research-and-innovation-europe-paving-its-own-way_en>.

[120] S. Mansell, *Capitalism, Corporations and the Social Contract: A Critique of Stakeholder Theory (Business, Value Creation, and Society)*, (CUP, 2013) 46–47.

[121] J Tasioulas, 'The Minimum Core of the Human Right to Health', World Bank, 2017 <https://openknowledge.worldbank.org/handle/10986/29143> License: CC BY 3.0 IGO; H Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (OUP 2008) chapters 3 and 4.

I.IV.C Lines for Analyses for Reform?

Polanyi's suggestions are that things should be re-embedded within society. His caution is simple: irrespective of what is being protected, the property aspect of IP law should be restrained for society and humanity. We all know of the various writings and policies which try to ensure a balanced IP law.[122]

I leave it to others to suggest what specific reforms are needed to counter the relentless push and commodification of IP *res*, acknowledging that 'investment', 'labour' and 'creative' will remain uneasy companions within the IP narrative. Nevertheless, I offer this list to gently prod the reader to either declaim my choices (some of which have been espoused by others) or to add their wish list:

- An international agreement to curtail the durations of protection and/or to introduce registration to copyright systems.
- An international public interest rule within all Preambles or Objectives to state 'An equitable or fair mandatory remuneration is ensured for all human creators.'
- An international public interest rule mandating access to IP *res* for users exercising their own fundamental rights (to education, science and culture, health, self-development, freedom of expression, etc.) OR: Re-classification of limitations and exceptions within IP laws as constitutional rights or as fundamental rights of others vis-à-vis the rights to health, etc.
- Introducing the notion of 'essential' or 'staple' IP *res* (akin to essential goods doctrine within competition law) with a legal presumption of reasonable pricing or compulsory licensing.
- A UNESCO–WIPO Register of declared public domain (as with orphan works in EU).
- Exploratory studies on the viability of environmentally derived 'rights' in relation to repair, farmers, exhaustion doctrine and reverse engineering for innovations which impact agriculture and food security.

I.V CONCLUSION: THE POLANYIAN VISION

The journey in this chapter focused at locating a set of clear and repeated motivations underpinning early European rules in relation to IP *res*. It was envisaged that a legal mapping would reveal a landscape that holds the key in determining whether IP law was and is continually being re-calibrated to fulfil two functions. First, did different motives attach to the different rationales under current IP law to protect subaltern IP rights? Second, did the different motives accommodate creative, entrepreneurial and investment-led labour and investment? And does Polanyian theory help?

First, over a quintennial period, rights and privileges grounded in property, tort and criminal laws have vested in all sorts of beneficiaries in relation to all types of intangible subject matters under various rationales. Second, the literature review mapping the genesis and institution of IP-type rules shows prototype IP laws emerging from fifteenth-century European states extending

[122] J Reda, 'Legislative Perspective on the Development of the EU Copyright Law', in C Geiger (ed) *The Intellectual Property System in a Time of Change: European and International Perspectives* (LexisNexis 2016); R Giblin and K Weatherall, *What If We Could Reimagine Copyright?* (ANU Press 2017); M Biagioli, 'Weighing Intellectual Property: Can We Balance the Social Costs and Benefits of Patenting?' (2019) 57(1) History of Science 140–63.

entitlements or privileges to sole individuals, collective groups and corporate entities comprising inventors, authors, importers, entrepreneurs and localized groups. These stakeholders represented a pluralist agenda ranging over cultural, societal, trade and other interests. Polanyi's vision of an embedded society arguably explains this pattern, at least in Europe. Third, the pattern then grows in the last 150 years or so to embrace *things*: namely labour per se, or land-related labour or product-related labour were turned into commodities. Finally, these commodities were recognized at some points as property in order to protect labourers (or creators) and to protect the capital invested that operated simultaneously in the manufacture and distribution of these commodities.

From this, we should appreciate that:

- The *thing* in IP law has varied from mental or intellectual labour to skills acquired, to confidential secrets, to know-how and techniques, and to personal dignity and reputation;
- the motivations behind IP law vary from public interest to dignity to reward to securing investments.
- From the nineteenth century, with the increased participation of corporations in the organizing, underwriting and financing of many aspects involved in generating and harnessing technologies and industries, IP law began to adopt a distinctively industry-driven character in terms of the nature and scope of rights.
- The push to commoditize discrete *things* led to ingenious justifications, criteria and language which is betrayed in the discombobulated nature of IP law today.
- Current discourses on whether to push the *thing* in IP law to outputs manifested without clear creative or human spirit are unsurprising given the landscape as sketched within this chapter. Existing criteria such as human authors and inventors, inventiveness, and personality can be viewed as fictional means to persuade society to harness innovation and creativity via property rights. Existing categories of *sui generis* rights, however, indicate another major consideration namely the protection of investments.

At a fundamental level, Polanyi's theory offers insights as to how to use motivations as a means of gauging laws in terms of market and society. One can appreciate the fact that all motivations which constitute the typology, lexicon and ethos of current IP law straddles several historical and justificatory bases. Polanyi's explanations and warnings of an unregulated market is tempered by his invocations of the 'double movement' whereby we can stem all the ills that will arise from universal commoditization of every intangible output. How we should counter-reform will become more urgent and relevant as this new century of ours accelerates. Perhaps a simple Polanyian step towards such a consistent approach would be to ask purists and progressives to consider together the following statement as a universal rule of law: 'The current pluralistic IP regime should declare human CREATORS to be recognized in line with the International Bill of Rights and be accordingly entitled to a perpetual right of recognition and remuneration.'