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.1 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.

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.

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.

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

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.