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The Threefold Fictitiousness of Intellectual Property

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Abstract: According to the standard account, IPRs allocate objects to owners, just like ownership allocates real property. In this paper, I explain that this simplistic paradigm operates on the basis of three fictions: The first – truly Polanyian – fiction concerns IP subject matter that was originally not produced for sale but created for other purposes, e.g. private pleasure. The second fiction is that IP is treated as a marketable good whereas much IP, in particular works and signs, are embedded in communication. Finally, IP is a fictitious concept in that we speak of works, inventions, and other IP objects as of tangible commodities, where in fact IP objects only exist insofar and because we speak and regulate as if they exist as abstract "goods" of value.

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1 To Annette Kur, the contributors to this Festschrift, and many other academics around the globe, intellectual property (IP) is a topic fascinating enough to merit livelong attention. In this paper – dedicated to Annette as a sign of deep gratitude and admiration for all her support and inspiration during my academic life – I claim that the fascination displayed by IP cannot be reduced to its economic and political significance or a peculiar predisposition of IP academics, such as a particular interest in innovation, the arts, or market communication. Instead, I suggest that IP is a theoretically, doctrinally (→ coherence) and practically fascinating, eminently dynamic (→ transition) body of law because it constitutes, as has often been remarked in passing, a "fiction",[1] and fictions are, in and beyond the law, powerful and stimulating imaginations.[2]

2 With the claim that IP constitutes a fiction, I obviously do not deny that IP rights (IPRs), IP laws and the subject matter of these rights and laws exist. They all form part of social reality, but in a way that is much more complex than the standard account suggests, according to which IPRs allocate objects to owners, just like ownership allocates real property.[3] This simplistic paradigm operates on the basis of three fictions that establish the impression that there are IP objects that one can own like a piece of cake or land:

Information not produced for sale

3 The first fiction concerns IP subject matter that was originally not produced for sale but created for other purposes. Karl Polanyi coined those commodities "fictitious" in contrast to "real" commodities. His examples for "fictitious" commodities were labor, land, and

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[1] Michel Foucault, The Essential Foucault 377, 382 (Paul Rabinow & Nikolas Rose eds., 2003) („fiction of the work"); James E. Penner, Idea of Property 118 et seq. (1992) ("idiotic fiction that intellectual property constitutes property in ideas (patents) or expressions"; „in general it does no harm to speak of rights in ideas, or in manuscripts, or in marks, any more than it does to refer to one's rights in one's labour."); Peter Drahos, A Philosophy of Intellectual Property 67, 111, 151-56, 211 (1996); Hugh Breakey*, Properties of copyright, in* Concepts of Property 137, 152 et seq. (Helena R. Howe & Jonathan Griffiths eds., 2013); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 Chi.-Kent L. Rev. 725 (1993)*;* Brad Sherman & Lionel Bently, The Making of Modern Intellectual Property Law 28 (1999); Alain Pottage & Brad Sherman, Figures of Invention 4, 7 (2010) ("Intangibility is a figment.").

[2] The contribution is based in part on Alexander Peukert, *Fictitious commodities. A theory of intellectual property inspired by Karl Polanyi's "Great Transformation"*, 29 Fordham Intellectual Property, Media & Entertainment Law Journal 1151 (2019).

[3] For a recent example see CJEU Case C-310/17, ECLI:EU:C:2018:899 paras 32-46 – Levola Hengelo.

money. In his classic study "The Great Transformation", he explains that and how those goods became to be treated *as if* they had been produced for sale, although they were either not produced at all (like land) or, if so, were not produced for sale (like labor).[4]

4 IPRs also apply to works, inventions, signs etc. that were brought about in non-market contexts and without the perspective of commercialization. Grace periods in patent law are precisely meant to allow for such a transformation.[5] Copyright comes into existence automatically and therefore covers each and every artefact displaying a modicum of creativity, including countless works created for pleasure in completely private settings. If these works retain their non-commercial social status, their copyright protection does not attain relevance. Thanks to the Internet, however, works created in private nowadays often see the light of day and sometimes even spark great commercial success. Such a move from fan fiction to best seller in itself reorganizes the communicative context from non-commercial to commercial.[6] More visible and contested transformations concern academia and the artistic field. These spheres operate separately from the market on the basis of autonomous logics of truth and aesthetics and respective allocations of reputational gains and losses among academics and artists. If genuine academic writings and artworks originally created for their own sake ("l'art pour l'art") are later marketed as products up for sale, their perception and evaluation change fundamentally. They are not valued anymore according to their truth, depth of thought, or aesthetic originality but rather according to their market success. Depending upon its frequency, such commodification can exhibit systemic effects that tend to supplant an open and reciprocal "republic of science" and

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[4] Karl Polanyi, The Great Transformation – The Political and Economic Origins of Our Time 75-76 (2001) ("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.").

[5] 35 U.S.C. § 102(b)(1) (2018). More restrictive Art. 55(b) EPC (six months grace period for displays of the invention at an international exhibition).

[6] Except perhaps in the view of literary critics; Liz Bury, *Fifty shades of pay: erotica yarn sends EL James to top spot in earnings list*, The Guardian (Aug. 14, 2013), https://www.theguardian.com/books/2013/aug/14/el-james-highest-earning-author.

an equally autonomous artistic field with profit-oriented transactions.[7] In the area of trademark law, finally, ex-post-commodification of non-commercial signs concerns artworks in the public domain and cultural icons that are later used as signs indicating the origin of a good or service.[8] The European Free Trade Association (EFTA) Court recently confirmed that, in general, trademark protection is available and legitimate in such cases, unless there is a genuine and sufficiently serious threat of "misappropriation or desecration" of the respective work, in which case a trademark registration may be refused on the basis of the public policy/morality exception.[9]

Commodifying communication

5 In quantitative terms, these instances of ex-post-commodification do not, however, justify labeling IP as "fictitious" across the board. Much, if not most, IP subject matter is originally produced for sale under conditions of the market and thus presents a real capitalist commodity in Polanyian terms.[10] Suffice it to mention patented medicines and other technologies invented within private companies for commercial gain, proprietary software, entertainment products, phonograms, broadcasting signals, databases and other products protected by rights related to copyright, industrial designs, and signs created for use as trade marks. Industrial property law is even confined to the commercial context. Private uses of patented inventions, protected designs, trademarks, etc. are beyond the scope of these IPRs.[11] Copyright does extend to the

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[7] Academia: Michael Polanyi, *The Republic of Science: Its Political and Economic Theory*, 38 Minerva 1 (2000); Alexander Peukert, *Das Verhältnis zwischen Urheberrecht und Wissenschaft: Auf die Perspektive kommt es an!,* 4 J. Intell. Prop. Info. Tech. Elec. Comm. 142 para. 1 (2013); Academic Capitalism in the Age of Globalization (Brendan Cantwell & Ilkka Kauppinen eds., 2014). Art: Pierre Bourdieu, Rules of Art: Genesis and Structure of the Literary Field (Susan Emanuel trans., 1996); Martin Senftleben, *Copyright, creators and society's need for autonomous art – the blessing and curse of monetary incentives, in* What if we could reimagine copyright? 20, 48 (Rebecca Giblin & Kimberlee Weatherall eds., 2017).

[8] Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1 (2008); Martin Senftleben, *Free signs and free use: How to offer room for freedom of expression within the trademark system, in* Research handbook on Human Rights and Intellectual Property 354, 357 et seq. (Christophe Geiger ed., 2015).

[9] Case E-5/16, Municipality of Oslo, para. 102 (EFTA Court 2017). For U.S. law see 15 U.S.C. §1052(a) (2016) and Matal v. Tam, 137 S.Ct. 1744 (2017).

[10] Bob Jessop, *Knowledge as a Fictitious Commodity: Insights and Limits of Polanyian Analysis', in* Reading Karl Polanyi for the 21st Century. Market Economy as a Political Project 115, 118-119 (Ayşe Buğra & Kaan Ağartan eds., 2007).

[11] *Cf.* Patentgesetz [PatG] [German Patent Act], Dec. 16, 1980, BGBl. I at 1, § 11(1); Community Design Regulation 6/2002, art. 20(1)(a), 2002 O.J. (L 3) 1, 6 (EU).

private sphere but often in the weaker form of a right to remuneration (liability rule).[12] Thus, many, if not most, IPRs institutionalize markets for original commodities.

6 This statement is, however, premature because it fails to recognize the peculiar communicative character of all inventions, works, and signs, irrespective of whether they have been created for non-commercial or commercial purposes. Communication is generally defined as a process in which one person imparts something that she knows to another.[13] The creation and further use of inventions, works, and trademarks always involves such acts of communication. To bring about a new technical solution, a creative expression, or a distinctive sign, firstly requires an immense amount of personal knowledge on the part of a novice innovator that has to be acquired by learning about existing technologies, works, brands, etc.[14] Secondly, and more importantly, the result of this preparatory act of communication is itself an artefact that communicates something. Most notably, texts, but all other categories of copyrightable works too, express information, be it a scientific theory, a story, or another visually or aurally perceivable "idea."[15] Immanuel Kant therefore characterized printed matter as a dynamic speech of the author (opera) and not as an objective thing (opus).[16] The German Federal Constitutional Court also finds that a published work will "serve as a link to an artistic dialogue."[17] The same can be said of patentable inventions. For inventions are neither to be equated with a machine or other "dead" artefacts nor with a "relation between a person and an object."[18] Instead, inventions teach a person having ordinary skill in the art (PHOSITA) how to solve a particular problem by making use of

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[12] *Cf.* Parliament and Council Directive 2001/29, art. 5(2)(b), 2001 O.J. (L 167) 1.
[13] Case C-273/00, Sieckmann v. Deutsches Patent- und Markenamt, Opinion of AG Colomer, 2002 E.C.R. I-11737, paras. 19-20; Niklas Luhmann, Die Gesellschaft der Gesellschaft 81 et seq. (1998).
[14] *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) ("advances, once part of our shared knowledge, define a new threshold from which innovation starts once more"); see also dissenting opinions in *Laboratory Corp. v. Metabolite*, 548 U.S. 124 (2006) (Breyer, J., Stevens, J., & Souter, J., dissenting).
[15] Art. 9(2) TRIPS Agreement.
[16] Immanuel Kant, *On the Unlawfulness of Reprinting (1785),* Primary Sources on Copyright, http://www.copyrighthistory.org/record/d_1785 (last visited Oct. 30, 2018); Abraham Drassinower, What's Wrong with Copying? 8, 16, 113 (2015).
[17] BVerfG May 31, 2016, NJW 2016, 2247 para. 87 – Metall auf Metall (English version available at: http://www.bverfg.de/e/rs20160531_1bvr158513en.html, my emphasis).
[18] *Contra* Drassinower, *supra* note 16, at 64-65.

natural resources and the laws of nature.[19] In other words, an invention communicates technical information (the message) from a sender (the inventor) to a recipient (the PHOSITA). Trademarks, finally, also "convey a message."[20] It is their very function to inform the public about the origin of a product and to create an attractive image.

7 Thus, works, inventions, and trademarks are not static commodities produced for consumption but elements of dynamic communicative processes. They are derived from the state of the art and further conveyed to the public, whose members in turn rely on them as the basis for further innovation, creative expression, and competition. To treat IP as if it is a marketable good is fictitious because such commoditization ignores IP's embeddedness in communication. What is more, the communicative significance of a given work, invention, or trademark for the public – and thus its use and, eventually, its exchange value – is not produced by the IPR holder. All that an author, inventor, or trademark owner can do is to impart her artistic, technical, or marketing message to the public and hope that some recipients will receive, understand, and find interest in it. Only in this case is the communication complete and a use value created. A book unread, a technical teaching ignored, or a trademark not perceived is worth just the paper on which it is printed. IP only enters the picture if there is an active recipient. The moment when an IP communication is successfully completed is, however, not only the moment when use and exchange value is created but also the moment in which a work or other IP subject matter becomes "common intellectual and cultural property."[21] This common property and sometimes even the meaning of a work or trademark is created by members of the public.[22] It thus cannot be attributed to the author, inventor, or other IPR holder alone. The contrary rule of IPR ownership is thus based on a fiction.

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[19] BGH Mar. 03, 1969, GRUR 1969, 672 (673) – Rote Taube; BGH Jun. 30, 2015, GRUR 2015, 983 para. 27 - Flugzeugzustand (Erfindung als „Lehre zum planmäßigen Handeln unter Einsatz beherrschbarer Naturkräfte zur Erreichung eines kausal übersehbaren Erfolgs"); BGH Sep. 27, 2016, GRUR 2017, 261, para. 21 – Rezeptortyrosinkinase II („Lehre zum technischen Handeln").

[20] Matal v. Tam, 137 S. Ct. 1744, 1752 (2017) („trademarks often consist[ed] of catchy phrases that convey a message").

[21] BVerfG May 31, 2016, NJW 2016, 2247 para. 87 – Metall auf Metall (English version available at: http://www.bverfg.de/e/rs20160531_1bvr158513en.html, my emphasis).

[22] Regarding the consumer understanding of a trademark see Dev Saif Gangjee, *Property in Brands,* LSE Law, Soc'y and Econ. Working Papers, Jun. 13, 2013, at 1, 19, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249765 (unpaid labor of consumers).

Commodifying artefacts and actions of non-owners

8 One could still try to defend IP as a standard or "real" commodity in Polanyian terms by pointing to IP subject matter that does not communicate anything. For example, the rights "related" to copyright such as the rights of phonogram and film producers and of broadcasters do not attach to a message that a sender imparts to a recipient but to the medium or channel employed for the transmission of a piece of information, namely to fixations of sounds and moving images, and to broadcasting signals.[23] If a phonogram, a film carrier, or a broadcasting signal produced for the entertainment market is not a "real" commodity, what else will qualify for this category? In addition, both this and other IP subject matter, including works, inventions, and trademarks, have for a long time been signified and regulated as "goods" that can be owned and traded on markets.[24] Is this absolutely dominant practice not proof enough of the ontological adequacy of IP commodification?[25]

9 Well, not if one takes into account that mainstream IP theory itself characterizes IPRs as legal institutions creating "artificial scarcity" of otherwise "public goods."[26] For to treat

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[23] *See* Art. 14 TRIPS Agreement, WPPT, BTAP. Another example of this materialist approach concerns plant variety rights that attach to a "plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one of the said characteristics and considered as a unit with regard to its suitability for being propagated unchanged" (International Convention for the Protection of New Varieties of Plants (UPOV), art. 1(vi), Mar. 19, 1991, 815 U.N.T.S. 89); Alexander Peukert, Kritik der Ontologie des Immaterialgüterrechts 68 et seq. (2018).

[24] This is true even for critical observers. See, for example, Drahos, *supra* note 1, at 156 et seq., 212; Jessop, *supra* note 24, at 120 ("non-rival good"). *But see* Ugo Pagano, *The crisis of intellectual monopoly capitalism*, 38 Cambridge J.Econ. 1413 (2014) ("Knowledge is not an object defined in a limited physical space. The same item of knowledge can be encoded in multiple languages, using many different objects existing in a potentially infinite number of places. For this reason, the full-blown private ownership of knowledge means a global monopoly that limits the liberty of many individuals in multiple locations.").

[25] In this sense Reinold Schmücker, Was ist Kunst? Eine Grundlegung 267 (2014); Maria E. Reicher, *Wie aus Gedanken Dinge werden. Eine Philosophie der Artefakte*, 61 Deutsche Zeitschrift für Philosophie 219, 227 et. seq. (2013); Andrew Chin, *The Ontological Function of the Patent Document*, 74 U. Pitt. L. Rev. 263 (2012).

[26] Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 460 (2015) („In effect, the point of IP laws is to take a public good that is naturally nonrivalrous and make it artificially scarce, allowing the owner to control how many copies of the good can be made and at what price.").

public goods as if they were private commodities and to execute this transformation by legal means is exactly the kind of fictitiousness Polanyi had in mind.[27]

10 Yet even this observation does not exhaust the problem. The continued talk about "public" goods that, through a legal measure, miraculously turn into "private" goods neglects and obscures a transformation at a deeper level, namely the level of how we collectively conceive of reality and regulate human interaction accordingly. The worldview I allude to here is the view that IP "goods," like works, inventions, brands etc. exist as distinct objects and that these "goods" can be allocated to certain owners in exclusion of all others. The respective ontology assumes that IP objects exist as abstract objects (types) independently from their instantiations (tokens) in books, products, digital files, and other physical or mental manifestations.[28]

11 I have shown elsewhere in detail[29] that this ontology is implausible because the existence of allegedly abstract IP is always dependent upon the existence of at least one physical or mental "embodiment." The dominant paradigm is also untenable from a legal perspective because law can legitimately only regulate behavior that relates to brute facts that humans are able to control. Abstract types exactly defy such control. I also show that the idea of the abstract IP object was the result of a quite recent historical process, in which signifiers like "the" book, work, or invention changed their meaning. Instead of referencing many distinct but sufficiently similar artefacts and actions, they henceforth signified abstract IP objects. Whereas early modern privileges and still the first British patent and copyright statutes regulated exclusive rights to print a

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[27] MAURIZIO BORGHI, Writing Practises in the Privilege- and Intellectual Property-Systems 3-4 (2003), Social science research network working series papers, https://case.edu/affil/sce/authorship/Borghi.pdf ("No law of the market can convert an idea, or a poem, or a creation, into a scarce item … ideas … are not naturally commodities, but they are nonetheless treated as if they were commodities … No natural law of the market (no 'invisible hand') is capable of producing this fiction by itself. The fiction must be established as such."); Jessop, *supra* note 15, at 120 ("knowledge is collectively produced and is not inherently scarce … it is made artificially scarce and access thereto depends on payment of rent"); Pagano*, supra* note 24*,* at 1414 ("commons were turned into exclusive private property").

[28] *See* Art. 2(1) Berne Convention; 17 U.S.C. § 101 (1976) („embodied"); Code de la propriété intellectuelle art. L111-3 (Fr.) ("La propriété incorporelle définie par l'article L. 111-1 est indépendante de la propriété de l'objet matériel."); Michael J. Madison, *The End of the Work As We Know It*, 19 J. Intell. Prop. L. 325, 333 (2012) („The work subject to copyright is solely and purely an intangible thing."); on designs and signs Art. 15-16, 26(1) TRIPS Agreement.

[29] Peukert, *supra* note 23; on information as an object see Paul Duguid, *The Aging of Information*: *From*

book or work a machine, today's paradigm was only implemented in full by the French Revolutionary Acts of 1791 and 1793, which granted exclusive property rights in "ouvrages," "idée nouvelle," and "découvertes industrielle." Since then, we have treated books, machines, other items with physical existence, and public performances as secondary "embodiments" of a primary, abstract "intellectual property." The transformation at stake here concerns the dominant perception of the world. An idealized world of abstract objects superseded a realistic focus on artefacts and actions having brute, measurable existence. This fundamental shift occurred solely in our language and thinking. The brute facts of artefacts and actions (books, machines, performances) retained their physical existence. But they were signified and conceived of differently: not as artefacts and actions whose use or occurrence was regulated, but as exemplars of an IP object that belonged to someone else. This bizarre abstraction is fictitious in the sense that we speak of works, inventions, and other IP objects as of tangible commodities, where in fact IP objects only exist insofar and because we speak and regulate *as if* they exist as abstract "things" of value. In other words, IP objects only exist in our linguistic practice and collective imagination.[30]

12 From a legal realist perspective, IPRs are exclusive rights to prevent or authorize the reproduction and further use of certain Master Artefacts.[31] And the only reason for the "wild"[32] conceptual move from privileges to act to modern IPRs in abstract objects was the commodity function of IP. The emerging market for books and other innovative yet easily reproducible products required property rights in distinct abstract objects that represented the input of authors and inventors.[33]

Particular to Particulate, 76 J. Hist. Ideas 347 (2015).

[30] loci classici for this legal (realist) approach: *Ross*, 58 Tidsskrift for Rettsvitenskap, 321 (1945); Richard Rudner, *The Ontological Status of the Esthetic Object*, 10 Philosophy and Phenomenological Research 380 (1950).

[31] Art. 11, 16, 26, 28 TRIPS Agreement (Members shall provide right holders with exclusive rights to "prevent", "prohibit" or "authorize" certain conduct); Peukert (supra n 23) at 49 et seq.; from the perspective of economics Michele Boldrin & David K. Levine, *Intellectual Property and the Efficient Allocation of Social Surplus from Creation*, 2 Review of Economic Research on Copyright Issues 45 (2005).

[32] Millar v. Taylor, [1769] 4 Burrow 2303, 2357 (Yates, J.); *see* Sherman & Bently, *supra* note 1, at 19 et seq.

[33] Millar v. Taylor, [1769] 4 Burrow 2303, 2357 (Yates, J.).

Concluding remarks

13 In order to understand the striking dynamic and intellectual fascination of IP, it is necessary to pose and tackle the ontological question in what way the subject matter of IPRs exists. Proponents of commodification assume that IP presents an object, which in principle lends itself to propertization like land and other goods, whereas their opponents perceive IP as an integral part of communication and thus society. According to the latter view, IP falls into Polanyi's category of fictitious commodities. I agree with this qualification because IPRs in part attach to information that was not produced for sale, they partition communication into commodified pieces, and they are based on the obscure fiction of the abstract IP object. The theoretical and normative implications following from this ontological analysis[34] are far-reaching and eventually confirm the observation with which this article started: IP is a fascinating area of study to which Annette Kur will hopefully continue to contribute for many years to come.

[34] See Peukert (supra n 2).