XX

The Philosophical Foundations of Investment-Driven IP: On Reason, Faith and Pluralism

Patrick Goold

XX.I Introduction

It seems, once again, that intellectual property law is shifting beneath our feet. As Robert Merges put it a decade ago, if IP were a city, then the old city centre is today 'surrounded by new buildings and new neighbourhoods, knots of urban growth, budding in every direction, far off into the distance'.[1] That old city centre was built during the nineteenth-century age of possessive individualism.[2] Ideologies of the romantic author and sole inventor helped erect the city's foundational principle that one deserves ownership in the products of mental labour.[3] Yet, in the early twentieth century, US Supreme Court Justice Louis Brandeis could still write that 'the general rule of law is, that the noblest of human production – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use'.[4] A century later, that general rule rings less true.[5] Investment-driven rights, and investment-driven extensions to old rights, have helped expand the city's boundaries. What started out as a small cadre of related rights, *sui generis* rights, and quasi-

---

[1] Robert P Merges, Justifying Intellectual Property (Harvard University Press 2011) 1.

[2] Oren Bracha, Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790–1909 (Cambridge University Press 2017).

[3] ibid.

[4] *International News Service v Associated Press*, 248 US 215, 250 (1918) (USA). Bracha (n. 2) 1.

[5] Bracha (n 2) 1.

IP rights now contribute to an urban sprawl of new neighbourhoods spreading as far as the eye can see. New denizens – the trivially creative and insignificantly innovative goods explored in this volume – now are protected inside the city's walls. What was the city of Intellectual Property has become the city of Investment Property.

This concluding chapter takes a step back from doctrinal detail and evaluates the philosophical foundations underpinning investment-driven IP. Broadly, two different kinds of arguments are provided in support of property rights in intangibles resulting from investment: (1) granting property rights in intangibles will lead to good consequences for society; and (2) investors are naturally entitled to own, or deserve to own, the outcomes of their investments. The first argument is consequentialist in character; the second is non-consequentialist. The two arguments are sometimes deployed in combination. For example, we protect the 'investment function' of trade marks, as discussed in Lord Justice Arnold's chapter, not only because doing so will potentially encourage businesses to develop goodwill, but also because businesses may plausibly have a right to own their goodwill.[6] Yet, other cases of investment-driven IP often rest more squarely on one, or the other, argument.

Section XX.II of this chapter articulates and evaluates the consequentialist argument; Section XX.III does the same for the non-consequentialist one. While the former argument is familiar to IP lawyers already, the latter shows signs of novelty. Yet as we will see, the soundness of both arguments is contested. Section XX.IV concludes by reflecting on what the growth of investment-driven IP in the face of such obstacles tells us about the place of IP law in the twenty-first century. In doing so, the chapter not only pulls together various themes found dispersed across the chapters in this collection, but also expands upon the role of faith, reason, and pluralism in IP in the twenty-first century.

[6] Richard Arnold, 'The Investment Function of Trade Marks', infra Chapter 15.

XX.II Consequentialist Argument

Some elements of investment-driven IP are rooted in consequentialist political philosophy. As explained by Karapapa, the recently created *sui generis* press publishers' right was a response to the 'newspaper crisis'.[7] Due to increasing consumption of news content online, press publishers have faced declining revenues, and the result has been a slow steady decline in circulation of printed newspapers. By increasing the bargaining power of publishers, vis-à-vis online service providers, the *sui generis* press publishers' right seeks to rectify this situation and support the production of culturally and political important information. A similar story is found in Bonadio, McDonagh, and Dinev, which explains how the UK legislative grant of copyright for computer-generated works was implemented to encourage the investment needed for the development of computer-based creativity.[8] Likewise, Kim explains how the exclusivity afforded to pharmaceutical test data is a product of the need to protect innovation incentives.[9] Meanwhile, other chapters highlight how investment-driven IP is used to encourage investment into the distribution, rather than development, of older intangibles. As Masiyakurima explains, the rights given to publishers of previously unpublished works might provide an inducement to publish valuable old works which, without such a right, may become lost in the sands of time.[10] And as highlighted by Johnson, some of the older and more traditional IP rights – in this case the British design right – started off life as a bait for investment.[11] In some cases, such as

---

[7] Stavroula Karapapa, 'The Press Publishers' Right under EU Law: Rewarding Investment through Intellectual Property', infra Chapter 9.

[8] Enrico Bonadio, Luke McDonagh, Plamen Dinev, 'Copyright in Works Created by Artificial Intelligence between Creativity and Investments', infra Chapter 4.

[9] Daria Kim, 'Test Data Exclusivity: An Elusive Pursuit to Strike a Balance Between Affordable Drugs and Protection of Returns on Investment', infra Chapter 3.

[10] Patrick Masiyakurima, 'Copyright Protection of Previously Unpublished Works' infra Chapter 13.

[11] Phillip Johnson, 'Design Right: From Investment to Creativity for "Industrial Copyright"', infra Chapter 19.

that of the Nigerian film industry, the drive for a thriving market of intellectual goods has displaced long-held cultural practices.[12]

In all these cases, legislators and judges are implored by businesses and other agents to grant them new, or more powerful, IP rights. And, when considering those claims, lawmakers are frequently swayed by the following argument:

P_1: A marginal increase in the production and dissemination of intangibles will be good for society.

P_2: A marginal increase in the production and dissemination of intangibles will occur only if the state awards property rights to those who invest in the production and dissemination of such intangibles.

C: Awarding property rights to persons who invest in the production and dissemination of intangibles will be good for society.

There is, of course, an unstated premise here that the state ought to act to bring about good consequences. While that is a debatable proposition as a matter of political philosophy,[13] it has not generally been disputed by the contributors to this volume. However, the explicit premises of this argument enjoy far less support. The fundamental problem with the argument is that it teems with assumptions, all of which are far from self-evidently true.

At first blush, P_1 seems entirely plausible. Who would not think that life is better without more life-saving pharmaceuticals, more investigative journalism, and well-preserved works of cultural importance? In the language of modern welfare economics, a marginal increase in the production of these goods will more fully satisfy consumer preferences and improve the well-being (or welfare) of

---

[12] Ayoyemi Lawal-Arowolo, 'Copyright Protection of Investments in Cinematographic Works in Nollywood: The Clog in the Wheel of Creativity and Originality', infra Chapter 14.

[13] Cf Jermey Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) and John Locke, *Two Treatises of Government* (1689).

the world.[14] Alternatively, some with classical utilitarian leanings might say that more intangibles will increase pleasure in society;[15] others still might argue that such a marginal increase will help society to achieve various desirable political and social desiderata (such as the promotion of free expression and democracy).[16] But whatever one's philosophical leanings, there is broad agreement that, in relation to intangibles, more is better. To be sure, there are diminishing marginal returns to everything in life, and perhaps yet another Indiana Jones movie will add only a modest sum to the stock of human happiness. No matter! Generally speaking, IP lawyers agree that increasing productivity and dissemination is a good thing to do.

But is increasing productivity ultimately worth the cost? Alas, achieving this end comes with a price tag. If the increase in production can only be achieved through awarding IP rights to creators, then society must spend resources on the administration and enforcement of those newly granted IP rights. Intellectual property offices will need to receive and examine registration requests, lawyers will be required to draft transfer and licensing documents, and judges will preside over expensive litigation. This problem persists even if society decides to increase production through non-IP means. If society decides to increase marginal production of intangible goods through government subsidies, for example, then society will need to resource administrative agencies to oversee and implement the subsidy scheme. And then there are opportunity costs to consider: if individuals in society spend more time on intellectual goods production, then they will spend less time on other areas of economic production.[17] If IP rights or non-IP policy measures increase the incentives to be a novelist, for

---

[14] Oren Bracha and Talha Syed, 'Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited' (2014) 92 Texas Law Review 1840, 1848–58.

[15] See generally John Bronsteen, Christopher Buccafusco, and Jonathan S Masur, Happiness and the Law (University of Chicago Press 2015).

[16] Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 Berkeley Technology Law Journal 239.

[17] Glynn S Lunney Jr, 'Reexamining Copyright's Incentive-Access Paradigm' (1996) 49 Vanderbilt Law Review 483.

example, then those rights and measures will necessarily draw labour away from production in ancillary markets, for example, creative writing teaching. And so, the question is not simply: 'is increasing productivity a good thing?' The question should be: 'is the increased productivity a good thing overall when we consider the costs required to bring about that reality?' Of course, more pharmaceuticals, more investigative journalism, and more cultural preservation is good in a narrow sense. But as Kim's chapter on data exclusivity perfectly illustrates, frequently we have reason to doubt the game is worth the candle.[18]

Nevertheless, let's put aside our questions about P_1 for the time being. Assume that an increased intangible production is genuinely a good thing and worth the costs. What then of P_2? Is it true that such a marginal increase can be accomplished by granting IP rights? If, for example, we think society would indeed be better with a few more newspapers in circulation, will granting them additional IP rights, such as the press publishers right, achieve that end? There is, of course, an economic story behind this claim. By granting producers exclusivity, the law enables firms to restrict output and increase prices above marginal cost. In turn, this will result in the producer enjoying super-normal profits and encourage new entrants into the market with closely related products in a form of monopolistic competition that ultimately boosts overall supply.[19] The dynamic benefits of increased incentives to create may in the long run outweigh the unfortunate short-term effect that some consumers will no longer be able to enjoy the good (a form of static allocative inefficiency flowing from supra-competitive prices).[20] In this sense, investment-driven intangible goods are no different from the creative, original, and innovative goods that, we say, characterise intellectual property.

---

[18] Kim (n 9).

[19] Bracha and Syed (n 14). Christopher S Yoo, 'Copyright and Product Differentiation' (2004) 79 New York University Law Review 212; Michael B Abramowicz, 'An Industrial Organization Approach to Copyright Law' (2004) 46 William & Mary Law Review 35.

[20] Bracha and Syed (n 14).

Sadly however, this is simply not the full story. While property rights create the prospect of super-normal profits and gives firms incentives to enter the market, they also simultaneously create barriers to entry. The production of new intangible goods is a cumulative process. It is through tinkering and adapting the software, business methods, and medicines of the past that we ultimately produce new software, business methods, and medicines. Granting new or stronger IP rights to the owners of yesterday's intangibles means subjecting the production of future intangibles to a range of new licensing requirements. These new costs make entry into the market harder. And whether granting new or stronger IP rights in any given instance will indeed lead to an increase in production of intangibles is debatable. And so theoretically, it is rarely clear whether granting investment-driven IP rights will ultimately result in increased productivity.

Ultimately, whether the incentives brought about by new IP rights will be stronger or weaker than the barriers to entry IP rights create is an empirical question. And, as commentators in this volume have frequently pointed out, the empirical evidence needed to decide the matter is frequently lacking. One of the most common concerns expressed by our contributors is how little evidence exists to support P_2. To illustrate, Masiyakurima argues that there is 'no evidence' proving that the increasing the term of protection to sound recordings resulted in greater levels of dissemination;[21] meanwhile Karapapa argues there is 'no hard evidence' that the press publishers right will result in the hoped-for increase in rights clearance and enforcement in the press publishing industry.[22] And not only is the empirical evidence frequently unavailable, but frequently such evidence cuts in the opposite direction. For example, as argued by Matulionyte, the historical introduction of copyright in respect to typographical editions had a limited, if any, positive impact on the promotion of book

[21] Masiyakurima (n 10) at 00.

[22] Karapapa (n 7) at 00.

publishing in Australia.[23] And, outside of this volume, Eckhard Höffner has argued that the lack of copyright protection in pre-unification Germany was the cause of a flourishing book trade that outstripped the productivity seen in England during the eighteenth century.[24]

And lastly, even if we assume that awarding a sector with new IP rights will marginally increase productivity, and that marginal increase is worth the cost, it is clearly false to say that such a result can 'only' be achieved through the grant of property rights. At various points in history, economists – from Arnold Plant[25] to Fritz Machlup[26] and Stephen Breyer[27] – a range of non-property mechanisms can be relied upon to generate such a marginal increase. Those mechanisms include the producer's lead-time in the market, their ability to use contracts to ensure exclusivity, and non-property policy mechanisms such as government subsidies and prizes. Mike Meurer in this volume continues in that tradition.[28] Meurer argues that new innovations in cloud computing and artificial intelligence mean that business methods are increasingly opaque and inimitable to outsiders; and thus, a marginal increase in production of novel business methods may well occur without the incentive offered by patent rights – trade secret protection would be sufficient. And as Kim perceptively explains, it is simply not enough for IP rights to be justified based on a cost–benefit analysis, but that 'cost–benefit ration should be more favourable relative to other policy options'.[29] Once again, frequently the much needed evidence on which to decide is simply not available.

---

[23] Rita Matulionyte, 'Copyright in Published Editions: What Lessons does it Teach Us?', infra Chapter 10.

[24] Eckhard Höffner, Geschichte und Wesen des Urheberrechts (Verlag Europäische Wirtschaft 2, edn 2011).

[25] Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 Economica 167.

[26] Fritz Machlup, 'An Economic Review of the Patent System' (US Government Printing Office 1958).

[27] Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 Harvard Law Review 281.

[28] Michael J Meurer, 'Bilski and the Information Age a Decade Later', infra Chapter 7.

[29] Kim (n 9) at 00.

All of this does not permit us to conclude that the argument offered in favour of investment-driven IP rights is beyond doubt unsound. As the chapters in this volume show, every claim made in support of investment-driven IP rights requires unique analysis and evaluation on the merits of the evidence presented. The consequentialist argument may be more persuasive in some sectors than in others. It is certainly plausible, for example, that some form of narrow protection for AI-produced goods will be good for society overall. But in all too many cases, the argument falls quite short of persuading this (relatively) neutral observer. And I am in good company in this respect. Given the clear rebuttals, both IP-supporters and IP-critics are inclined today to view this type of argument with suspicion.[30] The most one can say is that it might provide some form of justification for some IP rights in some situations.

XX.III Non-consequentialist Argument

But investment-driven IP is not justified only through appeal to consequences. In several instances, supporters of investment-driven IP claim that some other non-consequentialist values are at stake. While the arguments are commonly expressed in vague terms, supporters of investment-driven IP argue that investors deserve to own products that result from their investments, or that they are naturally entitled to such ownership, or that ownership is simply fair.

Illustrative of such non-consequentialist argument is the protection offered to creators of well-known trade marks. As explored by Fhima, the Court of Justice of the European Union (CJEU) is frequently less concerned about the consequences of such protection, and more squarely focused on 'moral censure' of the junior user[31] – a censure that oozes from the terminology employed to describe

---

[30] Merges (n 1) 1–31. Mark A Lemley, 'Faith-Based Intellectual Property' (2015) 62 UCLA Law Review 1328.

[31] Ilanah Fhima, 'The Protection of Well-Known Trade Marks as a Way to Protect Investment?' infra Chapter 16.

such uses, including 'parasitism',[32] 'clear exploitation',[33] and 'free riding'.[34] Likewise, as explained by Scaria and Jhavar, ambush marketers at large sporting events are often criticised for 'stealing the limelight' from authorised sponsors.[35] In a related vein, protection for geographical indications, as explored by Zappalaglio, is in part justified by a moral intuition that that local communities deserve some sort of control over, and recognition for, intangibles that are related to their collective culture.[36] And, perhaps most surprisingly of all, consider the Database Directive explored by Sganga.[37] One might think that such a right was introduced to incentivise the production of databases. But upon scouring the text of the legislation and the preceding green papers, one discovers an interesting omission: the words 'incentive', 'market failure', 'welfare', or 'balance' make hardly any appearance.[38] The absence of overtly outcome-related terminology is unusual and strange if the legislation rested primarily on consequentialist reasoning. Of course, the EU's immediate motivation was to harmonise the laws of Member States for the sake of the internal market. But that does not explain why harmonising upwards, providing more protection to creators, was the right way to achieve harmonisation. What reason could there be if incentives and markets were not the primary concerns?

Interestingly, these non-consequentialist arguments are not simple repeats of standard labour-based or personality-based arguments for IP protection. Labour arguments claim that it is natural (or

---

[32] Case C-487/07, *L'Oréal SA v Bellure* NV ECLI:EU:C:2009:378 (CJEU) [41].

[33] ibid.

[34] ibid.

[35] Arul George Scaria and Varsha Jhavar, 'Ambush Marketing and Protection of Investments', infra Chapter 17.

[36] Andrea Zappalaglio, 'EU Geographical Indications and the Protection of Producers and Their Investments', infra Chapter 18.

[37] Caterina Sganga, '*Sui Generis* Protection of Non-Creative Databases', infra Chapter 2.

[38] Directive 96/9/EC of 11 March 1996 on the legal protection of databases, 11 March 1996, OJ L 77/20, 27 March 1996; European Commission, Green Paper 'Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action', COM (88) 172 final, ch. 6; European Commission, Working Programme of the Commission in the Field of Copyright and Neighbouring Rights. Follow-up to the Green Paper, COM (90) 584, pp. 18 et seq.

perhaps morally right or fair) that one owns the products of one's *labour*;[39] personality arguments claim the same in relation to the products that flow from one's *person*.[40] But that is not typically the type of argument we find in relation to investment-driven IP. The Database Directive, for example, does not provide rights to databases which are the product of substantial *labour*, but instead to those databases which result from substantial *investment*.[41] The type of claim made is that investors should be entitled to the products of their investments, as the following argument suggests:

P1: Persons deserve (or are otherwise entitled) to own the products of their investments.

P2: Intangible goods are the product of investments.

C: Persons deserve (or are otherwise entitled) to own the intangible goods produced through their investments.

Unlike the situation confronted in the last section, the minor premise in this argument seems relatively clear. However, I suspect that scholars will be less convinced about P_1. It is not immediately clear that we deserve to own the products of our investments. While many of us would agree that the individuals and businesses deservedly own their private wealth – although perhaps subject to certain limits – it is not self-evident that those same individuals should own intangible products produced through the investment of their wealth. There seems to be a missing step – an unstated premise – linking ownership of wealth to ownership of intangibles resulting from investment of wealth. What could that missing step be?

One option is to appeal to the notion of 'consent'. Unlike his justification for private property arising out of the state of nature, John Locke's justification for money rests on the idea of mutual

---

[39] See eg, Peter Drahos, A Philosophy of Intellectual Property (Routledge 1996) 41–72.

[40] ibid 73–94.

[41] Directive 96/9/EC of 11 March 1996 on the legal protection of databases, 11 March 1996, article 7.

consent.[42] As a society, we have entered a mutual compact that bits of yellow metal have value and that individuals may privately own such valuable materials far in excess of our individual needs.[43] But who has consented to the claim that one owns the intangible outcomes resulting from one's investment of wealth? This situation seems distinguishable from other types of investment. If you invest in my business, you arguably deserve to own part of the profits of my business on the grounds that we have both consented to this outcome. Alternatively, if you and I place a bet, you may be entitled to the winnings and some of my wealth, again on the grounds that I have consented to that outcome. But have I consented to investment-driven IP? After all, your ownership of intangible products affects me: your ability to stop non-confusing uses of signs and symbols, or your ability to control who uses databases, limits my liberty to use such goods. While I might plausibly have consented to your private wealth, I have not explicitly consented to your ownership over the intangible products of that wealth's investment. I doubt that I have even impliedly consented to your ownership of such products. And, if I have not consented to your ownership of investment-driven IP, how can I be bound by it?

I think the most we can say is that legislators have consented on my behalf to investment-driven IP as part of a democratic process. But this in turn leads to questions about the legitimacy of our representative democracy, particularly in the face of criticisms posed by supporters of direct democracy. In 1911, Robert Michels proposed the theory of the 'iron law of oligarchy', which argues that all representative democracies descend into oligarchy eventually, regardless of how democratic they initially are.[44] And, after reading Hazel Moir's efforts to better understand the pharmaceutical

---

[42] John Locke, 'Two Treatises of Government (1690)' in The Works of John Locke (London 1823) Part II: V 115–36.

[43] ibid 125–26.

[44] Robert Michels, Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy (Eden & Ceder Paul trans, Hearst's International Library 1915).

industry's lobbying efforts in relation to evergreening patents,[45] or Enrico Bonadio's history of the protection for phonograms,[46] one might speculate to what extent Michels's prophecy can be seen at work today within IP legislation.

Furthermore, even assuming the investor has some legitimate claim over the outcomes of their investments, why is the claim proprietary in nature? Let us assume that someone who invests their money into building a brand or producing a database deserves *something*. Why do we assume that something must be a right to exclusive use? As Thomas Jefferson opined long ago, some find it implausible that one can 'naturally' own intangibles when the law of nature has made such goods free for public use and defiant of private ownership.[47] But that does not necessarily mean the creator is entitled to nothing at all. It is arguably 'natural' that the creator enjoys some form of financial income from the products of their investment, perhaps in the form of compulsory licensing revenue. And equally it is arguably 'natural' that the creator deserves to be recognised for their contribution to the world. But the idea that they naturally deserve *exclusivity* is another and far more ambitious claim to make.

Lastly, it is not clear whether standard labour-based or personality-based arguments fare any better. The Database Directive indicates that investment may be of 'human, technical, or financial resources'.[48] Perhaps the reference to 'human … resources' is better understood as meaning that substantial labour, or alternatively some element of human personality, is required to produce the products, and for this reason the resulting products should be protected. But if this is true, why are

---

[45] Hazel Moir, 'Pharmaceutical Patents and Evergreening', infra Chapter 8.

[46] Enrico Bonadio, 'Protecting Sound Recordings between Investments and Creativity', infra Chapter 11.

[47] Thomas Jefferson, 'Letter to Isaac McPherson (13 August 1813)' in The Writings of Thomas Jefferson (Albert Ellery Bergh ed, 1907) vol 13, 326.

[48] Directive 96/9/EC of 11 March 1996 on the legal protection of databases, 11 March 1996, preamble (7).

new investment-driven IP rights necessary at all? Standard IP rights already provided an avenue for protection for intangible products which result from labour and personality. Databases which are original – and result from the author's skill and labour or their own intellectual creativity – receive copyright protection, as do original photographs and articles printed by press publishers, and the original works produced by an author using a machine-learning programme.[49] In all these cases, why do we need new or expanded IP rights to protect the author's labour or personality? If such intangibles flow from substantial labour or personality, then surely regular IP rights that protect original and innovative goods would provide sufficient protection, and there would be no need to create new rights to protect minimally creative and minimally innovative activities?

XX.IV Conclusion

That the city of Investment Property rests on shaky philosophical foundations is perhaps unsurprising (perhaps even obvious). For centuries, philosophers and economists have expressed scepticism about the existence of IP law. From Jefferson's begrudging acceptance of the 'embarrassment' of patents,[50] to Stephen Breyer's conclusion that the case for copyright in books is an 'uneasy' one,[51] IP thinkers have long expressed concern that IP rights unjustifiably limit liberty and hinder, rather than aid, progress. Not everyone, of course, is so minded. But based on the arguments and counter arguments alone, I doubt anyone can reasonably conclude there is a strong case for extending IP rights further. And yet we do – constantly. Perhaps the surprising part of investment-driven IP is that it exists at all, in face of the objections. What could account for such growth of investment-driven IP? Of course, lobbying efforts are likely to provide part of the answer. But the presence of interest groups does not entirely

[49] See Patrick R Goold, 'The Curious Case of Computer Generated Works under the Copyright, Designs and Patents Act 1988' (2021) 2 Intellectual Property Quarterly 119.

[50] Jefferson (n 46).

[51] Breyer (n 27).

explain why lawmakers are so receptive to the arguments of lobbyists. It borders on ad hominem to say that all lawmakers simply agree to the demands made by the group with the deepest pockets.

One possible explanation for the drive to ever increased IP protection is to be found in the concept of 'faith'. Mark Lemley has polemically argued that our society's support for ever-expanding IP rights is evidence that our IP policy is today based on 'faith' rather than 'reason'.[52] Perhaps then investment-driven IP results from this strange form of unarticulated IP religion. When faced with claims for increased IP rights, and the evidence before them is, as Merges once said, 'maddeningly inconclusive'[53], perhaps lawmakers simply put their 'faith' in the idea that IP is good, as one might put faith in God when confronted with Epicurus's riddle.

Yet, this does not strike me as an entirely accurate description of the lawmakers thinking process in relation to investment-driven IP. Very few lawmakers say their decision to extend IP rights is based on faith. In other contentious areas of the political arena, lawmakers openly (often with great pride) explain that their decisions stem from their faith or their religion. But only rarely is this language used by lawmakers or scholars in relation to IP. Instead, the language adopted is usually that of reason. Faced with inconclusive evidence, lawmakers are more likely to explain that their decision is a judgement call regarding what is best for society based on the evidence before them. Not everyone will agree with that judgement call, of course, but that is simply the nature of judgement calls, and the life of someone who is employed to make society's hard decisions. The fact that we make different judgement calls, and have different interpretations of the evidence, does not mean that one party has abandoned reason entirely.

Perhaps then another possibility is that lawmakers are willing to accept pluralist justifications for investment-driven IP. That is, while no single argument justifies investment-driven IP, together the arguments add up to some form of justification. Such IP pluralism draws on the idea of pluralism in

---

[52] Lemley (30).

[53] Merges (n 1) at 3.

political philosophy, and has been growing in popularity since the publication of Merges, *Justifying IP*.[54] Pluralists in political philosophy argue that while there is no knock-down reason for citizens to obey state law, most of us have some good reason for doing so (e.g., we have made a social contract, or we have enjoyed the benefits of the state); overall society is a patchwork with most of us owing duties of political obedience, albeit for different reasons.[55] And in this volume, Uma Suthersanen takes up the pluralist mantle in IP.[56] Some property rights in intangibles are justified by labour arguments, others by utility arguments, others by personality arguments, but overall, we should not be too flustered about the 'continuous lack of coherent rationales'.[57]

But this cannot be right either. Why would multiple unsound arguments for investment-driven IP add up to a sound one? If the consequentialist argument for investment-driven IP rights is not a good argument, and the non-consequentialist argument is also not a good argument, then by what magic do they become a better argument when deployed in tandem?[58] This is akin to saying that if 1 + 1 = 3, and 2 + 2 = 5, then 1 + 1 + 2 + 2 = 8. In this regard, contemporary IP pluralism and political pluralism are quite different. Political pluralism is a persuasive theory of political obligation only to the extent that most citizens have at least one good reason for obeying the state. If all of us have at least one good reason for obedience, then we do all broadly share a similar duty of political obedience, albeit for different reasons. But political pluralism does not provide a successful argument for obedience if most of us do not meet the minimum 'one good reason' condition. In that case, most of us

---

[54] Merges (n 1).

[55] Uma Suthersanen, 'Creativity, Pluralism, and Fictitious Narratives: Understanding IP Law through Karl Polanyi' infra Chapter 1.

[56] ibid at 00.

[57] John Rawls, Political Liberalism (Columbia University Press 1993), cf Jonathan Wolff, 'Pluralistic Models of Political Obligation' (1995) 56 Philosophica 7; **<<AU: please complete this sentence>>**

[58] In political philosophy see John Simmons, 'The Particularity Problem' (2007) 7 APA Newsletter on Philosophy and Law 18, n 17.

would simply not have a duty of obedience to the state; no amount of appeal to 'pluralism' can change that conclusion. And that is the situation we face with investment-driven IP: in too many cases, there is not at least one convincing reason for it.

I think a more plausible explanation is that lawmakers are operating under the influence of a long-standing argument known as the 'if value, then right' argument (as Wendy Gordon identified thirty years ago).[59] This argument was given its first major analysis by Felix Cohen in his famous 1935 article 'Transcendental Nonsense and the Functional Approach'.[60] Legal theorists and philosophers consider this paper to be one of the cornerstones of the Legal Realist movement; yet it is comparatively less well known within IP communities. In 1927, Frank Schecter published his well-known argument that a sign used in commerce does much more than identify the goods origin, and instead helps advertise and sell the good to consumers.[61] Schecter concluded that trade mark law should protect this advertising function of the sign. Subsequently, Felix Cohen summarised this argument as the follows: 'One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc. has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property.'[62] My sense is that this argument continues to exert influence on IP lawmakers today. Databases, software, good business ideas are genuinely valuable – and not just in the sense that they can be bought and traded (which is circular reasoning at its finest), but in the sense that they add value to our lives. And there is frequently an

---

[59] Wendy J Gordon 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia Law Review 149.

[60] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809.

[61] Frank Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 Harvard Law Review 813.

[62] Cohen (n 60) at 815.

impulse that things of value should be protected by property.[63] After all, many things in our increasingly privatised market economies that are valuable are protected by property. Indeed, the impulse emerges even in this volume.

But things of value are not always property and nor should they be. The best things in life are free, as the saying goes. A compliment from a friend is valuable; it is not property. The smell of coffee is valuable; it is not property. People are valuable; they are not property. Things which are valuable are not automatically subject to property rights. Things which are valuable can become property if there are compelling reasons to make them so. But so far, the consequentialist and non-consensual reasons for providing IP rights in intangible products fall short of being compelling.

[63] Gordon (n 59).