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REVIEW ARTICLE

Intellectual Property Absurdism or: How I Learned to Stop Worrying and Love IP

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Enrico Bonadio and Aislinn O'Connell, **Intellectual Property Excesses: Exploring the Boundaries of IP Protection**, Oxford: Hart Publishing, 2022, 336 pp, hb £81.00, pb £40.49

INTRODUCTION

Hans Christian Anderson's folktale, 'The Emperor's New Clothes', provides a timeless example of absurdity.[1] The tale concerns an emperor who is fond of fine clothes. One day, two men posing as weavers come to town. The men offer to make the emperor a suit from the most beautiful material. But there is a catch: the suit will be invisible to the stupid and incompetent. When eventually presented with the 'suit', the emperor praises the men for their craftsmanship, although he cannot see anything. Keen to show off his new finery, the emperor parades through the town. It is only when a child cries out 'the emperor has nothing at all on!' does he realise the mistake. But rather than admit his error, the emperor decides that 'the procession must go on'. And so, in full knowledge of his nakedness, the emperor continues the parade in his underwear.

For Enrico Bonadio and Aislinn O'Connell, intellectual property (IP) is also absurd. *Intellectual Property Excesses: Exploring the Boundaries of IP Protection* (*Intellectual Property Excesses*), edited by Bonadio and O'Connell, argues that contemporary IP is 'excessive' and that such excess is 'absurd'.[2] To that end, each chapter discusses one example of excess that pushes IP to the 'limits of

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1 Originally published in Hans Christian Anderson, *Eventyr, fortalte for Børn. Første Samling.* (Denmark: C. A. Reitzel, 1837). Modern editions include Hans Christian Anderson, *The Emperor's New Clothes* (New York, NY: Houghton Mifflin Harcourt, 2014).

2 Enrico Bonadio and Aislinn O'Connell, 'Introduction' in Enrico Bonadio and Aislinn O'Connell, *Intellectual Property Excesses: Exploring the Boundaries of IP Protection* (Oxford: Hart Publishing, 2022). 'Absurdity' can also be found in various contributed chapters. See for example Giancarlo Frosio, 'Copyright Term Extension: Good Morning to You Productions v

absurdity'.[3] 'From individuals being sued for hundreds of thousands of dollars for sharing music … to football fans being arrested at stadiums for wearing the "wrong" outfits',[4] the editors find no shortage of instances of excess protection. Nevertheless, the point of the book is not to attack IP. As the editors explain, *Intellectual Property Excesses* is not 'against IP', but rather an attempt to 'save IP'.[5] By shining a light on the absurd outcomes of overprotection, the editors do not wish to discredit IP or see it abolished, but hope to encourage a less excessive, more restrained, IP policy. After all, as the editors explain, they 'love IP' and are merely worried about the direction it sometimes takes.[6]

However, the book contains a noticeable omission: the concept of 'absurdity' is neither defined nor explained. While the concept of 'excess' is admirably clear – IP is excessive when it grants stronger property rights in intangibles than can be normatively justified[7] – what makes that excess *absurd* remains implicit. Yet, absurdity need not be so mysterious. In his essay, 'The Absurd', Thomas Nagel describes absurdity as a 'conscious discrepancy between pretension or aspiration and reality'.[8] The absurdity in 'The Emperor's New Clothes', for example, arises from the conflict between the emperor's vain desire to appear dressed in fine cloth and the reality of his nakedness. Drawing on Nagel's conception of absurdity, this review article asks: why is excess IP absurd? In answering this question, the article supports the central argument of *Intellectual Property Excesses* while also reflecting on what such absurdity reveals about IP law and IP lawyers.

The article argues that excessive IP is absurd, although that is also not where IP's absurdity ends. It introduces three examples of IP's excesses: retroactive copyright term extensions as illustrated by the case of *Happy Birthday to You*, patents on Covid-19 vaccines; and Marvel and DC Comic's trade mark on the word 'SUPERHERO' (the second section). Such excessive protection is absurd because it brings our aspiration that IP should promote social welfare and protect individual rights into conflict with a more ignoble reality (third section). Believing in the value of contemporary IP law today involves, like the emperor in the 'Emperor's New Clothes', ignoring uncomfortable truths. Alas, adopting a more measured IP policy will not free us entirely from absurdity. It is economically and philosophically questionable whether any private ownership of intangibles is normatively valuable. While excesses are certainly absurd, it is

Warner/Chappell Music' *ibid*, 30; Amran Gebru, 'Biopiracy as an Abuse of the Patent System' *ibid*, 113; Aislinn O'Connell, 'Copyright and Related Rights in Intimate Images: Chrissy Chambers and Other Victim-Survivors' *ibid*, 108; Enrico Bonadio and Maglia Cortardi, 'Patent Trolls and their Excesses: *Blackbird Tech v Cloudflare*' *ibid*, 179. The book uses the terms 'excess' and 'excessive' interchangeably, and so will this review essay.

3 Bonadio and O'Connell, 'Introduction' *ibid*, 2.

4 *ibid*, 1.

5 *ibid*.

6 *ibid*.

7 *ibid* (describing excesses as examples of 'unreasonable' or 'untenable' protection).

8 Thomas Nagel, 'The Absurd' (1971) 68 *The Journal of Philosophy* 716, 718. This review essay adopts the following definition of pretension: 'Noun. An allegation or assertion the truth of which is not proved or admitted, *esp.* an unfounded or false one, or one put forward to deceive or serve as an excuse; (hence) an excuse, a pretext; a pretence.' *Oxford English Dictionary* (Last Revised 2007) at https://www.oed.com/dictionary/pretension_n1?tab=meaning_and_use#28248365 [https://perma.cc/6CVC-N7NU]. The term also has connotations of inflated self-importance.

also absurd that so many of us – present author included – 'love' IP in the face of existential doubts about the law's ultimate justification (the fourth and fifth sections).

EXCESSES

It is possible to read *Intellectual Property Excesses* as a book only about the problems of excess protection. One could ignore the word 'absurd' when it arises, and interpret the editors and contributors as merely pointing out situations of excessive protection. However, to do so would miss one of the most intriguing aspects of the book. To claim that IP contains examples of overprotection is routine, almost cliché.[9] But arguing that contemporary IP is absurdly excessive is more ambitious and worthy of further reflection.

Formally, Bonadio and O'Connell's argument runs as follows: contemporary IP is excessive, excessive IP is absurd, therefore, contemporary IP is absurd. This section considers the premise that contemporary IP is excessive. It provides three examples of excess found in *Intellectual Property Excesses*. The examples chosen are representative of the book and should be interesting to a general audience.

This section's analysis is detailed for two reasons. First, if the examples do not sufficiently evidence the claim that contemporary IP is excessive, then Bonadio and O'Connell's argument falls at the first hurdle, and the question of absurd excess simply does not arise. Second, while the section draws on arguments contained in *Intellectual Property Excesses*, it also refines those arguments in an essential respect. By emphasising the probabilistic character of IP's excess, this section supports the editors' overall project, and sets a solid foundation for locating IP's absurdity in the following sections.

Retroactive copyright term extensions and *Happy Birthday to You*

Original works created today will typically be protected by copyright for the life of the author plus a further 70 years.[10] The contemporary copyright term was established, in both the USA and the EU, in 1990s legislation.[11] But that is not

9 See for example Jason Mazzone, *Copyfraud and Other Abuses of Intellectual Property* (Redwood City, CA: Stanford University Press, 2011) cited in *Intellectual Property Excesses* n 2 above, 'Introduction', 2. Glynn Lunney, *Copyright's Excess: Money and Music in the US Recording Industry* (Cambridge and New York, NY: CUP, 2018). James Bessen and Michael Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovation at Risk* (Oxford and Princeton, NJ: Princeton University Press, 2008).

10 Copyright, Designs and Patents Act 1988 (CDPA 1988), s 12(2).

11 Copyright Term Extension Act 1998 (CETA 1998), 17 USC § 302(a) (US). Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, Art 1 (EU) (Term Directive EU), replaced by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, Art 1 (EU). CDPA 1988 amended by The Duration of Copyright and Rights in Performances Regulations 1995 S.I. 1995/3297, reg 5(1).

all the legislation accomplished. The legislation also retroactively extended the copyright term for works already in existence.[12] In the USA, one of the works affected was *Happy Birthday to You*[13] (*HBTY*). And in Chapter 1 of *Intellectual Property Excesses*, Giancarlo Frosio argues that such retroactive term extensions are the epitome of excess.[14] To illustrate, Frosio explains how term extensions have created the absurd situation in which a song that began life in 1893 is today potentially still not in the public domain.

In American copyright parlance, *Happy Birthday to You* is a 'derivative work'.[15] A derivative work is a work that combines both old and original elements. The song's melody was created in 1893 when sisters Mildred and Patty Hill wrote and published a song called *Good Morning to You* (*GMTY*).[16] In the 1910s, the *HBTY* song began to appear in various texts. The *HBTY* song used the same melody as *GMTY* but with different lyrics. It is not known who wrote the lyrics or who combined those lyrics with the *GMTY* melody. As a derivative work, copyright can exist in *HBTY* that is separate and independent from copyright in any of its pre-existing parts.[17] Thus, even though the melody for copyright in *GMTY* expired in 1949, it is still possible under American law for copyright to exist in the original combination of melody and lyrics; or what we know today as *HBTY*.[18]

Whether copyright exists in *HBTY* today is a complicated question requiring some knowledge of twentieth century US copyright law. In brief, copyright in *HBTY* supposedly began in 1935 when the Clayton F. Summy Company published sheet music for *HBTY*. The company claimed it was authorised to do so by Jessica Hill (sister to Mildred and Patty and successor in title to Mildred).[19] If this was indeed the first authorised publication of *HBTY*, and if the publication complied with the relevant procedural formalities, then copyright in *HBTY* was granted in 1935. According to the Copyright Act 1909, those rights would last initially for 28 years and could be renewed for a further 28 years.[20] Assuming that the copyright was appropriately renewed in 1962, then copyright in the work ought to have expired in 1991. However, in 1976, the term of copyright was extended such that copyright could be renewed for 47 years.[21] Thus, in 1976, the law changed such that copyright in *HBTY* was set to expire in 2010. Finally, in 1998, the copyright term was again lengthened, meaning that

12 CETA 1998 amending 17 USC § 302(a) (applying new term to all works created 'on or after January 1, 1978'). Term Directive EU, Art 10(2) as interpreted in Case C-169/15 *Montis Design BV* v *Goossens Meubelen BV* EU:C:2016:790 at [34]-[35]. The Duration of Copyright and Rights in Performances Regulations 1995, s 17 ('extended copyright').

13 The potential that CETA 1998 would extend copyright in *Happy Birthday to You* until 2030 was highlighted in *Eldred* v *Ashcroft* 537 U.S. 186 (2003), 262 per Breyer J, dissenting.

14 Frosio, n 2 above.

15 17 U.S. Code § 101 ('derivative work') (US).

16 The factual background is contained in Frosio, n 2 above, 12-13 and in Robert Brauneis, 'Copyright and the World's Most Popular Song' (2009) 56 J Copyright Soc'y USA 335, 341-365.

17 17 U.S. Code § 103(b).

18 Brauneis, n 16 above, 366-367.

19 *ibid*, 369. Frosio, n 2 above, 13.

20 Copyright Act of 1909, s 23 (US).

21 Copyright Act of 1976 amending 17 USC §304.

all works in existence were granted an additional 20 years of protection.[22] The result was that any copyright in *HBTY* was extended until 2030.

For simplification purposes, two important peripheral points must be bracketed. First, this section puts aside questions surrounding the initial validity and renewal of copyright in *HBTY*. In a famous piece of historical research, Robert Brauneis argued that the 1935 publication probably failed to comply with the necessary procedural formalities.[23] Brauneis further argued that the renewal in 1962 was equally non-compliant.[24] If such claims are true, then copyright in the song either never existed or ended in 1962. Second, questions about the ownership of the song are also avoided. For many years, Warner/Chappell Music asserted copyright in *HBTY*. In 2015, the Southern District of New York concluded this was false.[25] The court did not decide whether copyright existed in the song or not. But it did conclude that Warner/Chappell Music is not the relevant owner of the song if copyright does exist therein. Putting both these points to one side will best illustrate Frosio's concern, namely, that if copyright existed in *HBTY* and was appropriately renewed, then the term extensions that it will have undergone were excessive.[26]

Why, then, are term extensions excessive? Frosio answers this in utilitarian-welfarist terms. According to this view, copyright should only exist in original works to the extent that it promotes net social welfare.[27] The starting point from this perspective is that copyright has negative effects on welfare because it limits 'access': exclusive ownership partly insulates the owner from competition creating market power (or, more colloquially, a monopoly) and thereby enabling the owner to raise prices and restrict sales to those willing and able to pay a supra-competitive price; the result is that some would-be consumers – including some consumers-*cum*-producers who intend to use the material in subsequent creative works – are priced out of the market and must go without.[28] On the other hand, copyright also has positive welfare effects because it increases 'incentives': the potential to earn super-normal profits (or 'monopoly profits') incentivises authors to create original works and enter the market.[29] To promote welfare, therefore, copyright should theoretically only be granted to those works that would not be created under a free market and would only be as strong as necessary to induce creation. However, in a world where information costs prohibit tailoring copyright on such a granular level, the policy tool operates more

22 CETA 1998 amending 17 USC § 302(a) (US).
23 Brauneis, n 16 above.
24 *ibid*.
25 *Rupa Marya, et al* v *Warner/Chappell Music, Inc*, et al, 116 U.S.P.Q.2d 1563 (CD Cal 2015) (case no CV 13-4460-GHK MRWx) (US).
26 Frosio, n 2 above, 22 also makes an ancillary point that the length of copyright and retroactive term extensions makes uncovering a work's copyright status considerably more difficult.
27 See William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property* (London and Cambridge, MA: Harvard University Press, 2003) 37-71. Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence Sensitive Theories of Copyright' (2014) 29 Berkeley Technology L J 229, 237-244. Welfare in this context is synonymous with preference satisfaction.
28 Bracha and Syed, *ibid*. A variant on the standard economic theory of copyright based on a monopolistic competition model is provided in Christopher S. Yoo, 'Copyright and Product Differentiation' (2004) 79 New York University L Rev 212 and Michael Abramowicz, 'An Industrial Organization Approach to Copyright Law' (2004) 46 William and Mary L Rev 33.
29 Bracha and Syed, *ibid*.

crudely: copyright is granted to all original works, but is limited in various ways, including its length. In this way, lawmakers try to balance copyright's competing effects and leave society in a better position than it would be without copyright.

From this perspective, term extensions are excessive because the welfare implications are very likely a net negative.[30] To illustrate, consider *HBTY*. The first term extension in *HBTY* occurred in 1976. At this point, the date on which copyright in *HBTY* was due to expire changed from 1991 to 2010. The decision resulted in continued supra-competitive pricing for a further 19 years, and accordingly, 19 years of additional lost access. On the other hand, the extension clearly did not increase the incentives to create *HBTY* because the work was already created; no law can incentivise persons to do something they already have done, as Frosio ably argues. The same is true of the second term extension that occurred in 1998 and for all other works affected by the retroactive term extension.

Of course, that retroactive term extensions do not result in greater incentives to create works already in existence is obvious. Accordingly, those who advocate for retroactive term extensions must offer alternative, more ambitious, explanations about their positive welfare effects. These explanations have come to be known as '*ex post*' arguments for copyright and were particularly well deployed in the 1998 US copyright term extension.

The *ex post* arguments for copyright extension are evaluated briefly in *Intellectual Property Excesses*.[31] Broadly, the arguments fall into three types.[32] First, it is claimed that the extended monopoly will give owners an incentive to keep old works in commercial circulation. This is particularly relevant in the case of old books which, publishers claim, may become unprofitable to print once the monopoly has ended. Copyright is therefore a tool to prevent the work from being underused. Second, and in some tension with the first argument, is the claim that once they fall into the public domain, the works will be overused and lose their value: once *HBTY* can be used by anyone, we will all, supposedly, become so sick of hearing it that the song will lose its value, diminishing any positive welfare that can be generated by consumption. And finally, it is claimed that uncontrolled use of the works may result in 'tarnishment'. That is, poor quality and inappropriate versions of the works will proliferate which will in turn negatively affect our perceptions of the original, once again, diminishing the positive welfare that can be generated by listening to the original.

However, the *ex post* arguments for term extensions are empirically speculative. The underuse hypothesis has, to many, been falsified by four empirical studies. Two of the four studies were completed by Paul Heald. Heald's first study measured the market for best-selling books that fell out of copyright be-

30 Frosio, n 2 above, 18-22.

31 Frosio, *ibid*, 23. Mark A. Lemley, 'Ex Ante Versus Ex Post Justifications for Intellectual Property' (2004) 71 University of Chicago L Rev 129.

32 Christopher Buccafusco and Paul J. Heald, 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension' (2013) 28 Berkeley Technology L J 1, cited in Frosio, *ibid*, n 85. The underuse and overuse arguments are also discussed in Lemley, *ibid*.

tween 1985 and 1997.[33] Heald's second study tracked how public domain songs were exploited in movies.[34] In both studies, Heald concluded that the works were more likely to be used following the end of copyright: the number of in-print public domain works was higher than the number of in-print copyrighted works, and public domain songs were exploited in movies at a rate equal to that of copyrighted songs. Similarly, Tim Brooks studied the rate at which old vinyl audio recordings of popular music were converted into digital format.[35] Brooks concluded that public domain works were more likely to be converted into digital format.

The overuse and tarnishment hypotheses have been subject to less empirical testing. However, in 2012, Christopher Buccafusco and Paul Heald together studied the market for audiobooks. The authors concluded that there was 'almost no evidence' for any of the three *ex post* arguments.[36] Public domain works were more likely to be converted into audiobook format, *contra* the underuse hypothesis. Furthermore, the price charged for audiobooks of public domain works and for copyrighted works was comparable, suggesting that the increased usage of the works had not significantly diminished the positive welfare that consumers gained by consuming the public domain works, *contra* the overuse hypothesis. The authors also studied consumers' judgements about the quality of the audiobooks. In doing so, they found that consumers did not perceive any difference in the quality of audiobooks of copyrighted works when compared with the quality of audiobooks of public domain books, *contra* the tarnishment hypothesis. And while consumers did perceive amateur recordings of public domain books as often poor quality, there was no evidence that such perceptions affected their perception of, or willingness to pay for, the original underlying work. Overall, therefore, the claim that the negative effects of term extension are outweighed by the positive effects flowing from preventing underuse, overuse, or tarnishment, is questionable.

In short, such retroactive term extensions are probably excessive. Of course, there is no knock-down irrefutable argument that proves term extensions are clearly and unambiguously bad for welfare, although, at times, one is envisioned by *Intellectual Property Excesses*.[37] Scholars who have empirically studied the *ex post* arguments so far have cautiously highlighted the limitations of their data.[38] Illustratively, Buccafucso and Heald explain that they 'do not and cannot claim to have established all the precise effects of works falling into the public domain'.[39] And perhaps upon further empirical testing, society will

33 Paul J. Heald, 'Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain and Copyrighted Fiction Bestsellers' (2008) 92 Minnesota L Rev 1031, cited in Frosio, *ibid*, n 77.

34 Paul J. Heald, 'Does the Song Remain the Same? An Empirical Study of Bestselling Musical Compositions (1913-32) and Their Use in Cinema (1968-2007)' (2009) 60 Case Western University L Rev 1.

35 Tim Brooks, *Survey of Reissues of US Recordings* (Washington, DC: Library of Congress, National Recording Press 2005) 7-8.

36 Buccafusco and Heald, n 32 above.

37 See Frosio, n 2 above, 23 (finding 'no reason to believe' the *ex post* arguments).

38 Buccafusco and Heald, n 32 above, 28-29.

39 *ibid*, 28. cf Frosio, n 2 above, 23.

find some more evidence to support the *ex post* arguments for copyright.[40] We can conclude, however, that given our current state of knowledge about the production and trade of original works, little evidence supports the claim that retroactive extensions of copyright are a net positive for social welfare. If copyright continues to exist in *HBTY* today, society is *probably* worse off than it could have been had the work fallen into the public domain.

Patents on Covid-19 vaccines

In Chapter 8, Caroline Ncube introduces three case studies in which access to medicines in South Africa has been restricted by IP rights.[41] This section considers one of those case studies concerning patents on Covid-19 vaccines.

South Africa is a member of the World Trade Organization (WTO) and a signatory to the Agreement on Trade-Related Aspects of IP (TRIPS).[42] TRIPS imposes obligations on member states to provide 'minimum standards' of IP protection. When Covid-19 was declared a pandemic in 2020, attention quickly turned to the impact of the TRIPS minimum standards obligations on access to life-saving treatments in less wealthy countries. To ensure access to such treatments, South Africa and India submitted a 'waiver' proposal to the WTO in October 2020.[43] That proposal recommended that many of the minimum standards of IP protection imposed by TRIPS, should be 'waived' insofar as they applied to the 'prevention, containment or treatment' of Covid-19. The proposal recommended that the waiver should initially last for one year. If accepted, the waiver would permit all WTO member states to use the technology without the need to first seek the permission of, or to compensate, the technology developers. Subsequently, in May 2021, South Africa and India submitted a broader revised proposal.[44]

While the waiver proposal was supported by many less developed countries, notable academics, and the Director General of the World Health Organisation,[45] it was opposed by the European Union, the US, and their respective

40 At time of writing an important, but not yet peer reviewed, study to this effect has emerged. See Stan J Liebowitz, 'Have we misunderstood copyright's consequences' (27 August 2023) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4547458 [https://perma.cc/T5TH-2RUF].

41 Caroline Ncube, 'Limiting Access to Life-Saving Medications: Three South African Case Studies' in *Intellectual Property Excesses* n 2 above.

42 Agreement on Trade-Related Aspects of Intellectual Property 1994 (TRIPS).

43 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19. Communication from India and South Africa' (2 Oct 2020) IP/C/W/669.

44 Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 Revised Decision Text IP/C/W/669/Rev.1 (covering all 'health technologies' relating to Covid-19 and lasting three years).

45 'Academic Open Letter in Support of the TRIPS Intellectual Property Waiver Proposal' (13 July 2021) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885568 [https://perma.cc/RU5F-LGTL]. Tedros Adhanom Ghebreyesus, 'A "me first" approach to vaccination won't defeat Covid' *The Guardian* 5 May 2021 at https://www.theguardian.com/commentisfree/2021/mar/05/vaccination-covid-vaccines-rich-nations [https://perma.cc/8D42-P2R9] (agreeing with South Africa that we must 'pull out all the stops', although also suggesting that com-

pharmaceutical producers.[46] The Pharmaceutical Research and Manufacturers of America (PhRMA), for example, argued that the 'proposal will do nothing to address the production and distribution challenges for making COVID-19 vaccines globally available. If anything the proposals threaten to undermine the ability to respond to another pandemic, and will inevitably affect IP discussions in countries around the world.'[47]

Ultimately, the waiver proposal was not adopted. Instead, in June 2022, the WTO Ministerial Conference adopted a far less significant package of measures designed to facilitate access to the relevant technologies.[48] In IP terminology, a 'compulsory license' is a license granted by the state, rather than the relevant IP owner, permitting the use of the intangible good. Article 31 of TRIPS allows member states to grant compulsory licenses under certain conditions including, for example, the requirement that the licensee pay the IP owner 'adequate remuneration'. In response to the waiver proposal, the Ministerial Conference confirmed that, in relation to Covid-19 vaccines, all developing country member states could issue compulsory licenses on Covid-19 vaccines subject to certain clarifications and amendments. For example, the Conference confirmed that compulsory licenses could be awarded even in cases where the licensee has not first attempted to receive the IP owner's permission.[49]

The Ministerial Conference decision resulted in the reaction one would expect. The Peoples' Vaccine Alliance decried the failure to pass a 'meaningful waiver' and accused 'rich countries [of] doing pharmaceutical companies' bidding for them'.[50] On the opposite side of the divide, the EU Commission stated that the text 'maintains, in our common interest, a functioning intellec-

panies will receive royalties). See also Siva Thambisetty and others, 'Addressing Vaccine Inequity During the Covid-19 Pandemic: The TRIPS Intellectual Property Waiver Proposal and Beyond' (2022) 81 CLJ 384.

46 'UK Statements during the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) Council from 13-14 October 2021' (GOV.UK, World news story, 14 October 2021) at https://www.gov.uk/government/news/wto-trips-council-october-2021-uk-statements [https://perma.cc/M56P-3HT5]. See also Ellen t'Hoen, 'The EU Proposed Covid Waivers of Certain TRIPS Rules are Mostly Meaningless' *Medicines Law & Policy* 14 October 2021 at https://medicineslawandpolicy.org/2021/10/the-eu-proposed-covid-waivers-of-certain-trips-rules-are-mostly-meaningless/ [https://perma.cc/EG33-MJBY]. See also Reto M. Hilty and others, 'Covid-19 and the Role of Intellectual Property: Position Statement of the Max Planck Institute for Innovation and Competition of 7 May 2021' (Max Planck Institute for Innovation & Competition Research Paper No 21-13, 20 May 2021) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841549 [https://perma.cc/86P5-Q644].

47 Pharmaceutical Research and Manufacturers of America (PhRMA), '2021 Special 301 Submission' 14 (Office of United States Trade Representative, 29 January 2021) at www.regulations.gov/comment/USTR-2020-0041-0039 [https://perma.cc/7KBK-PACK], cited in Ncube, n 41 above, 175.

48 Ministerial Decision on the TRIPS Agreement, adopted on 17 June 2022 WT/MIN(22)/30 WT/L/1141 (WTO, 22 June 2022) at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/30.pdf&Open=True (last visited 28 August 2023) (Ministerial Decision). This decision is evaluated in in Peter K. Yu, 'The COVID-19 TRIPS Waiver and the WTO Ministerial Decision' in Jens Schovsbo (ed), *IPR in Times of Crisis: Lessons Learned from the COVID-19 Pandemic* (Cheltenham, and Northampton, MA: Edward Elgar Publishing, forthcoming).

49 Ministerial Decision, *ibid*.

50 Reported in Amalie Holmgaard Mersh, 'WTO ministerial conference delivers TRIPS waiver to criticism' *Euractiv* 17 June 2022 at https://www.euractiv.com/section/health-

tual property framework, with incentives for investment, research and transfer of technology, which are indispensable for the development of new vaccines and medicines [and] also for strengthening the production capacity of African countries'.[51] Meanwhile, the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) reacted with 'deep disappointment' about the 'dangerous signal' sent to companies concerning the weakening of patent rights.[52]

Why, then, was the failure to pass a temporary waiver on IP obligations – and instead to encourage compulsory licensing – an example of excess? In answering this question three caveats are required. First, this section confines the discussion to patents in exclusion of other IP rights, and to vaccines as opposed to all Covid treatments and diagnostics. This confining is not only for sake of simplicity but also because the issue of patents as they related to the vaccine was, arguably, what most captured public attention. Second, Ncube's chapter was written prior to the 2022 Ministerial Conference. Given Ncube's scepticism about opposition to the waiver proposal, I interpret that they would also find in the Ministerial Conference decision to be an example of excessive protection. Third, while supportive of Ncube's argument, this section presents that argument in different language.

There are two reasons one might call the failure to waive patent obligations excessive: social welfare and rights. First, there was a reasonably strong argument that an obligation to maintain patent minimum standards during the worst years of the pandemic was harmful for welfare. From a utilitarian-welfarist perspective, the patent monopoly limits access in much the same way as copyright. The ability to exclude other producers from the market provides insulation from competition resulting in market power.[53] With market power, producers can restrict output and increase prices, maximising profit and resulting in some would-be consumers (and some consumers-*cum*-producers who wish to develop and improve the invention) being priced out of the market.[54] Indeed, that patents restrict access compared to a free market remains true even under a system of compulsory licensing: limiting access to those who can afford to

consumers/news/wto-ministerial-conference-delivers-trips-waiver-to-criticism/ [https://perma.cc/354X-JG3Z].

51 Reported in Amalie Holmgaard Mersh, 'EU defends IP waiver compromise amid pressure on India, South Africa to reject it' *Euractiv* 14 April 2022 at https://www.euractiv.com/section/health-consumers/news/eu-defends-ip-waiver-compromise-amid-pressure-on-india-south-africa-to-reject-it/ [https://perma.cc/6HT4-NGRF].

52 Reported in Mersh, n 50 above.

53 Landes and Posner, n 27 above, 294–326. The standard economic model presented therein, and in this section, assumes a market between producers and end consumers. A more complex model assumes a market between producers, governments acting as intermediary consumers, and end consumers. The standard model is the starting point in the economic analysis of pharmaceutical patents on the assumption that government demand within a more complex model is a proxy for end consumer demand. Even within the standard model, the role of governments in addressing market failures via subsidies can be accommodated (see n 64 below). Illustratively, Moderna charged between US $14.70 to US $23.50 per dose to EU nations, while the AstraZeneca vaccine was altruistically distributed 'at cost' and at a price of less than US $3 per vaccination. See Donald W. Light, 'The costs of coronavirus vaccines and their pricing' (2021) 114 *Journal of the Royal Society of Medicine* 502.

54 *ibid*.

'adequately' remunerate the patent holder still limits access to those who are willing and able to pay the adequate remuneration.[55] Although, to the extent that adequate remuneration is below the monopoly price, the negative effect on welfare is mitigated.

In the context of Covid-19, there were reasons to believe that the negative welfare effects of lost access were particularly high. Inability to access the vaccine was not only a matter of life and death, but also risked prolonging the pandemic. Vaccines provide the archetypal example of positive consumption externalities.[56] Vaccinating one person is not only good for that person's private wellbeing, but also good for the wellbeing of other unvaccinated people in society because the newly vaccinated individual is less likely to transmit the disease in the future. Furthermore, vaccinating one person also has positive benefits for other, already vaccinated, people in society by reducing the probability of new variants emerging and infecting those already vaccinated against old variants.[57] The result is the positive effect on society's welfare from vaccination is much higher than the positive effect on any individual's private welfare.[58] Correspondingly, when one individual loses vaccine access, that is not only bad for their private welfare, but has much broader negative social welfare effects. Accordingly, one might, like Ncube does, conclude that lost access wrought a 'devastating human cost' on those countries which failed to access the vaccines.[59]

Of course, limited access to the vaccines was not solely the result of patents. Non-patent market conditions also limit access. As indicated by the statement of PhRMA above, consumers' ability to access the vaccine was also limited by factors such as production capacity limits and inadequate distribution networks in lower income countries. To many, addressing the 'devastating human cost' of Covid required policies to alleviate *both* the patent and non-patent limits on access, and not merely one or the other.[60] The TRIPS waiver was designed to address the patent limitations, while a separate set of policy measures – such as training physicians and identifying countries with additional manufacturing capacities[61] – were potentially helpful tools to address non-patent access limits. Accordingly, South Africa and India's argument was not that a waiver

55 Christiano Antonelli, 'Toward non-exclusive intellectual property rights' in Christiano Antonelli and Albert N. Link, *Routledge Handbook of the Economics of Knowledge* (Abingdon: Routledge, 2015) 218-221. See also William Fisher, 'The Economics of Compulsory Licensing' (25 January 2013) at https://cyber.harvard.edu/people/tfisher/IP/Cls.pdf [https://perma.cc/YZ3B-QLZC].

56 Joan Costa-Font and others, 'The Social Value of a SARS-CoV-2 Vaccine: Willingness to Pay Estimates from Four Western Countries' IZA DP No 14475 (IZA Institute of Labour Economics Discussion Paper Series, June 2012) at https://docs.iza.org/dp14475.pdf [https://perma.cc/3NAD-BXTD]. See also Joan Costa-Font and others, 'Social vs market value: how much is a COVID-19 vaccine worth?' *LSE Blogs* 28 June 2021 at https://blogs.lse.ac.uk/businessreview/2021/06/28/social-vs-market-value-how-much-is-a-covid-19-vaccine-worth/ [https://perma.cc/S7NN-FSKH].

57 Costa-Font and others, 'The Social Value of a SARS-CoV-2 Vaccine' *ibid*.

58 *ibid*.

59 Ncube, n 41 above, 175.

60 This argument does not appear in Ncube, *ibid*.

61 See for example Sanjana Mukherjee and others, 'Expanding global vaccine manufacturing capacity: Strategic prioritization in small countries' (2023) 3 *PLOS Global Public Health*.

would solve all access problems, but instead that the amount of additional access gained by alleviating the patent limitations on access was sufficiently high so to outweigh the corresponding costs of such a policy intervention. While it was certainly important not to overestimate the scale of the patent limitations on access, pointing to non-patent limitations in response to South Africa and India's proposal often revealed a misunderstanding of the argument.

Nevertheless, the welfare loss caused by patent limitations on access could potentially be justified if the patent monopoly has offsetting positive effects on welfare. The primary positive effect is that the prospect of monopoly profits incentivises entrants to the market with new inventions.[62] This is particularly true in industries, like the pharmaceutical industry, where the fixed costs of research and development of new inventions are very high and likely cannot be recovered in a free market. As highlighted by the statements of the EU Commission, the concern for future incentives provided the key argument against waiving the patent obligations in relation to vaccines. When PhRMA argued the waiver would harm the ability to respond to future pandemics, their claim was based on the concern for lost incentives.

One should not, however, overestimate the importance of patents in incentivising the production of new vaccines. Patents are a helpful policy tool for incentivising invention where the market functions well, assuming property rights are first established. But they provide a less helpful policy tool in markets that display symptoms of market failure even after property rights are established. The market for vaccines provides a well-known example of the latter kind of market. As noted above, consumption of vaccines comes with positive welfare externalities.[63] Because consumers are less willing to pay for vaccinations than is socially optimal, the profits that producers make on selling vaccinations are correspondingly lower than they should be. As the profits are suboptimal, private actors do not face the right market signals to encourage them into the market. To rectify this problem, governments subsidise research into vaccines.[64] This was especially noticeable in relation to the technology underlying the Covid-19 vaccines where the global public sector spent €93 billion in subsidies.[65] This included US $10 billion provided by the US government to NIH-Moderna and US $445 million from the German government to BioNTech.[66] The theory is that a combination of the patent monopoly and government subsidy will encourage a more-or-less optimal supply of vaccines in the future.

62 Landes and Posner, n 27 above. This argument is evaluated only briefly in Ncube, n 42 above. Other claimed welfare benefits include disclosure of information, see Fritz Machlup and Edith Penrose, 'The Patent Crisis in the Nineteenth Century' (1950) 10 *The Journal of Economic History* 1, 25-26; efficient coordination of innovation, see Edmund W. Kitch, 'The Nature and Function of the Patent System' (1977) 20 J L & Econ 265; and international technology transfer, see Bronwyn H. Hall 'Does patent protection help or hinder technology transfer' in Sanghoon Anh, Bronwyn H. Hall, and Keun Lee (eds), *Intellectual Property for Economic Development* (Cheltenham: Edward Elgar, 2014).

63 Costa-Font and others, 'The Social Value of a SARS-CoV-2 Vaccine' n 56 above.

64 See generally Matthew Goodkin-Gold and others, 'Optimal Vaccine Subsidies for Endemic and Epidemic Diseases' (2022) 84 *International Journal of Industrial Organization* 1. Ncube, n 42 above, 175 (noting 'significant public funds' in Covid vaccine production).

65 Thambisetty and others, n 45 above, 391.

66 *ibid*, 392.

In the eyes of some, the combination of the patent monopoly plus government subsidy enabled the vaccine producers to enjoy profits far exceeding the level needed to encourage optimal vaccine supply. At the time that governments subsidised the underlying vaccine development, it was not envisioned how profitable the subsequent technology would become. But by May 2021, the share prices of Moderna and BioNTech had soared partly because of the expected profitability of the vaccine.[67] The People's Vaccine Alliance estimated BioNTech's 2021 pre-tax profit as US $14.7 billion and Moderna's as US $10 billion.[68] The magnitude of such profits struck many as windfall payment, rather than a necessary tool for recovering high production costs. The key welfarist argument made in support of the temporary waiver, therefore, was that some reduction in profit accompanying the waiver of patent obligations would not be so detrimental as to jeopardise optimal vaccine production in the future. To some, the welfare benefit associated with expanding access in a time-limited way exceeded the speculative cost of suboptimal vaccine development in the future.

There is also a second, non-welfarist reason why the failure to waive patent obligations might be excessive. Although Ncube does not use it, Ronald Dworkin famously coined the phrase 'rights are trumps'.[69] Liberal democracies are built on the idea that some rights – for example, freedom of speech, the right to life etc – 'trump' other concerns, such as considerations of social welfare. And to some, including Ncube, individuals during the pandemic had a right to access life-saving medicines, including the Covid vaccines.[70] If so, this right could not simply be waived away by the claim that welfare would be higher in the future if incentives are maintained. Put at its crudest: individuals had a right to access the vaccines even if that resulted in lost incentives, and lost welfare, in the future. Having said that, it is probable that Ncube, like many others who championed the right to access Covid vaccines, holds a less dramatic version of the 'rights as trumps' argument. That more qualified argument is not entirely impervious to the importance of consequences, but instead claims the right to access the vaccines trumped the rather speculative claim that a waiver would harm future incentives for vaccine development; if the consequences were more clearly negative, rights perhaps would not provide a sufficiently strong trump card.

Overall, the Covid-19 waiver shares important features with retroactive copyright term extensions. Once again, there is no knock-down argument proving the failure to grant a waiver to be excessive, although that conclusion might at

67 Reported in Hanna Ziady, 'Covid vaccine profits mint 9 new pharma billionaires' *CNN Business* 21 May 2021 at https://edition.cnn.com/2021/05/21/business/covid-vaccine-billionaires/index.html [https://perma.cc/8W3K-B5TT].

68 Rohit Malpani and Alex Maitland, 'Dose of Reality: How rich countries and pharmaceutical corporations are breaking their vaccine promises' (21 October 2021) at https://webassets.oxfamamerica.org/media/documents/A_Dose_of_Reality-Briefing_Note_kOW1yUs.pdf [https://perma.cc/W7RZ-9PQ2].

69 Ronald Dworkin, 'Rights as trumps' in Jeremey Waldron (ed), *Theories of Rights* (Oxford: OUP, 1985).

70 Ncube, n 41 above, 175.

times be suggested by *Intellectual Property Excesses*.[71] Both the claim that patent rights are necessary to ensure effective future pandemic response, and the claim that they are not, involve a significant amount of empirical speculation about a complex and uncertain future. Nonetheless, the weight of the evidence favoured the waiver. Given what we know about the effects of monopolies on access, how the vaccines were funded, the levels of profits vaccine patent owners subsequently earned, and how liberal states value individual rights, it is probable that maintaining patents on Covid-19 vaccines during the worst years of the pandemic was excessive.

Marvel and DC Comic's 'SUPERHERO' trade mark

In 1966, a Halloween costume manufacturer successfully applied for a US trade mark on the word 'SUPERHERO'.[72] In 1983, that trade mark was transferred jointly to the comic book companies, Marvel and DC Comics.[73] And, as Mitchell Adams explains in Chapter 11, Marvel and DC have subsequently continued to expand their trade mark portfolio.[74] Since 1983, the companies have jointly filed 181 trade mark applications across 27 countries relating to the term 'SUPERHERO' and variants thereon, such as 'SUPERVILLAIN'.[75] The trade marks apply to a vast array of products including costumes, toys, entertainment services and comic book publications.

As is common in the field of trade marks, Adams adopts a utilitarian-welfarist normative baseline. This utilitarian-welfarist perspective, however, is different to that encountered in copyright and patents.[76] Unlike those latter rights, trade marks do not create monopolies on goods. The Coca-Cola Company's ownership, for example, of the words 'COCA-COLA' does not prevent other businesses from also selling cola. Instead, trade marks create monopolistic competition.[77] In a competitive market, producers try to differentiate their products from those of their competitors. If successful, the producer gains market power: even if the producer increases the price of the good, some loyal consumers will continue to pay that higher price rather than switching to an alternative. Once again, some other consumers cannot afford to pay the supra-competitive price and a certain amount of welfare is lost.

71 See Ncube, *ibid*, 'The issue is boiled down to pharma's economic interests without due consideration of human rights and the investment of public funds'.
72 US trademark number 72243225, filed on 12 April 1966 (registered on 14 March 1967).
73 Mitchell Adams, 'The Not-So-Friendly Neighbourhood Super-Hero®' in *Intellectual Property Excesses* n 2 above, 227.
74 *ibid*, 228-229.
75 *ibid*.
76 Nicolas Economides, 'The Economics of Trademarks' (1988) 78 *Trademark Reporter* 523, 532-533. Landes and Posner, n 27 above, 172-174.
77 Edward Chamberlin, *The Theory of Monopolistic Competition* (Cambridge, MA: Harvard University Press, 1933) 56-70. Glynn S. Lunney Jr, 'Trademark Monopolies' (1999) 48 Emory L J 367. David Besanko and others, 'The Logit Model of Monopolistic Competition: Brand Diversity' (1990) 38 *Journal of Industrial Economics* 397.

The positive welfare effects of trade marks are also different from those of copyright and patents. Signs play a vital role within a market economy as 'badges of origin'.[78] When someone sees the sign 'COCA-COLA' on a bottle of cola, they know the bottle must originate from the Coca-Cola Company. Relying on signs would be difficult in a world without trade mark protection in which all producers could use the words 'COCA-COLA' on their cola.[79] For this reason, it is almost universally believed that the positive welfare effects of protecting signs as badges of origin outweigh the corresponding negative effects of monopolistic competition. While the claim that copyright and patents are a net positive for welfare remains speculative, the analogous claim with respect to trade marks is more likely sound: the benefits of trade marks are clear and apparent every time we enter a supermarket.

In some cases, however, the net welfare effects of trade marks can be negative. One such case occurs when trade marks are granted over signs that describe the nature of the underlying goods or services.[80] This is illustrated by the case of the SUPERHERO trade mark. While it is very easy to produce cola without using the word 'COCA-COLA', it is not easy to produce a superhero comic book without using 'SUPERHERO'. 'SUPERHERO' is not merely a sign indicating origin, but also conveys important information about the nature of the underlying goods, ie, that this is a comic book about superheroes. If Marvel and DC Comics can prevent other comic book producers from using this term, they will restrict the ability of other producers to effectively compete in the market. As such, the trade mark can go further than facilitate product differentiation and monopolistic competition, and produce a level of market power more akin to that of a monopoly.

Nonetheless, the negative welfare consequences of granting trade marks over descriptive terms may still be outweighed by the positive effects in certain scenarios. If a term like SUPERHERO functions as a badge of origin – that is, if it has acquired a 'distinctive character' in the minds of consumers over time – then it might nevertheless promote net welfare to prevent other sellers from using this term. The positive welfare effects of preserving the word's origin-indicating properties may be sufficiently strong as to outweigh the negative effect resulting from reduced competition.[81]

However, as argued by Adams, it is debatable whether the SUPERHERO term has acquired a distinctive character.[82] When a consumer walks into a comic book store, and they see the word 'SUPERHERO' on a product, do they think to themselves 'this comic book must be produced by Marvel or DC Comics (or at least, in association with those companies)?'[83] Of course, the answer is plausibly yes. But equally one can imagine many consumers viewing the word as merely indicating something about the content of the book, regardless of who produced it. If the latter is generally true of the average consumer in the

78 Landes and Posner, n 27 above, 166-168.
79 *ibid* (on search costs).
80 Trade Mark Act 1994 (TMA 1994), s 3(1)(c). Landes and Posner, *ibid*, 189.
81 TMA 1994, s 3(1). Landes and Posner, *ibid*, 189.
82 Adams, n 73 above, 230-234.
83 TMA 1994, s 10(2).

sector, then the term is not functioning as a badge of origin, and ownership has negative effects on competition with very little off-setting benefit.

Of course, there is again no knock-down proof that the 'SUPERHERO' trade mark is bad for welfare, despite some strong language in *Intellectual Property Excesses*.[84] It is at least plausible that the term functions as a badge of origin. After all, in many of their applications, Marvel and DC Comics will have been required to provide evidence of acquired distinctiveness. Without access to that evidence, it is hard to entirely rule out the possibility that there are some positive welfare effects of ownership. Nevertheless, the well-understood problems with granting trade marks on descriptive terms, coupled with the merely speculative claim that the term has become distinctive, amounts to a reasonably strong case that this trade mark, and others like it, are probably bad for welfare.

ABSURDITY OF EXCESS

There are many occasions in life when we act excessively. We might drink too much at a party or drive above the speed limit. Such excess is not obviously 'absurd'. And, without more, there is no reason to think retroactive copyright extensions, Covid-19 vaccine patents, and SUPERHERO trade marks, are any different. And yet, there is something more to these examples: something which renders them not merely excessive, but absurdly so.

Nagel was not the first philosopher to write about absurdity. Absurdity is an important concept within existentialist philosophy generally (that is, the philosophy that explores the meaning and value of human existence or life).[85] Within existentialist literature, philosophers from Søren Kierkegaard to Jean-Paul Sartre have asked whether human life is absurd.[86] And, while the precise nature of absurdity is contested, almost all agree that if life is absurd, then the source of that absurdity lies in some sort of conflict. The existentialist perhaps most associated with absurdism, Albert Camus, argued that the absurdity of human existence arises out of a conflict between two things: the human desire that our existence has meaning (or significance or value), and our apparent lack of meaning; or as Camus beautifully put it in *The Myth of Sisyphus*: '[t]he absurd is born of this confrontation between the human need and the unreasonable silence of the world.'[87]

While Camus is perhaps most associated with the philosophy of absurdism, it is Nagel's work that proves more illuminating when it comes to locating the absurdity of excessive IP protection. As stated in the introduction, absurdity in Nagel's view arises from a conflict between pretension or aspiration and reality.

84 Adams, n 73 above, 222 (calling the Superhero trade mark 'unjustified' and 'objectionable').

85 See Charles Guigon, *The Existentialists: Critical Essays on Kierkegaard, Nietzsche, Heidegger, and Sartre* (Lanham, MD: Rowman & Littlefield Publishers, 2004).

86 See for example Søren Kierkegaard, *The Journals of Søren Kierkegaard* (1834-1854) (New York, NY: OUP, Alexander Dru (Eng tr), 1938) 22, 160, 458-459. Jean-Paul Sartre, *Existentialism is a Humanism* (1946) (New Haven, CT: Yale University Press, Carol Macomber (Eng tr), 2007).

87 Albert Camus, *The Myth of Sisyphus and Other Essays* (1942) (London: Penguin, Justin O'Brien (Eng tr), 2005) 115.

Examples of absurdity include when 'someone gives a complicated speech in support of a motion that has already been passed; a notorious criminal is made president of a major philanthropic foundation; you declare your love over the telephone to a recorded announcement; as you are being knighted, your pants fall down'.[88] Less prosaically, this understanding of absurdity throws light on why life might be absurd. Life's absurdity, in Nagel's view, is the product of 'the collision between the seriousness with which we take our lives and the perpetual possibility of regarding everything about which we are serious as arbitrary, or open to doubt.'[89] We toil away at work for tens of hours a week, we seek prestige and esteem, we pour energy into our appearances, and all the while we semi-consciously ignore our nagging doubts about whether any of our efforts really matter. Thus, contra Camus, absurdity does not arise out of a conflict between humankind and the world, but a conflict internal to the human psyche.

With that conception in place, what is absurd about excessive IP? In answering this question, it is helpful to begin with two potential, but ultimately wrong, answers. One answer is that a conflict exists between reality and the pretensions of IP owners. One might accuse IP owners of supporting strong IP rights, not because they think such rights defensible, but because they seek private financial gain. For example, when PhRMA argued against granting a patent waiver, they asserted that maintaining strong patents was in our collective interest because strong patents incentivise vaccine invention.[90] More cynically, however, one might find in this statement a mere pretence enabling pharmaceutical companies to continue enjoying monopoly profits. One might find absurdity, therefore, in the fact that IP owners maintain such claims while also realising that such claims are false.

Nevertheless, this answer does not pinpoint the heart of the absurdity. It is far from certain that IP owners are pretending that strong IP rights are defensible. As explained above, copyright term extensions, patents of Covid vaccines, and the SUPERHERO trade mark are probably excessive. But that claim is not unambiguously true. There remains enough empirical uncertainty to enable some IP owners to genuinely believe that robust property rights are good for the world: PhRMA may well see the TRIPS waiver as a danger to future pandemic preparedness; Marvel and DC Comics might truly view the SUPERHERO as distinctive. Moreover, to the extent that IP owners knowingly maintain falsehoods, they are merely *lying*. In that case, IP owners are much like the weavers in *The Emperor's New Clothes*: they are exploiting the gullible through deceit. That does not, however, feel intuitively absurd. Rent seeking is a rational behaviour.

A second plausible answer concerns lawmakers. Perhaps the conflict arises between reality and the pretensions of legislators and judges. When creating excessive IP protections, lawmakers justify their actions by appealing to the need to maintain incentives or protect the rights of creators. For example, the EU

88 *ibid*.
89 Nagel, n 8 above, 718. See also Jeffery Gordon, 'Nagel or Camus on the Absurd?' (1984) 45 *Philosophy and Phenomenological Research* 15.
90 PhRMA, n 47 above.

Commission praised the Ministerial Conference decision on Covid vaccines for effectively maintaining incentives for future pharmaceutical research, development, and technological transfer.[91] In 1998, when the USA last extended the term of copyright for existing works, there was no shortage of Congress members who did so based on questionable *ex post* arguments.[92] Perhaps, then, absurdity arises because the very same lawmakers know, or at least have good reasons to believe, that their statements are untrue.

While this answer is more plausible, it is still not quite right. Just like IP owners, there is perhaps sufficient empirical uncertainty to allow lawmakers to truly believe that strong IP rights are not excessive. Lawmakers are often not subject matter experts and can be easily influenced by well-organised lobbying groups.[93] Far from absurd, the beliefs of lawmakers are often simply *mistaken*. Lawmakers are much like the emperor in *The Emperor's New Clothes* before the child alerts the crowd to his nakedness. Given the epistemic uncertainties presented by IP law and policy, lawmakers, much like the emperor, can be led astray by actors seeking private gain. And so, if excessive IP is absurd, the absurdity must exist on a broader social level that transcends the beliefs and acts of individual IP owners and lawmakers.

The reason contemporary IP is not merely excessive, but absurdly so, is that excess conflicts with our aspirations for, and pretensions about, the IP system. Intellectual property is grounded in an institutionalised belief that property in intangibles is good for society's welfare and/or necessary to secure individual rights. This belief in IP's normative value is not merely held on an individual level, but plays a justificatory role within the foundational sources of IP law. The EU's Information Society Directive, for example, claims a 'high level of protection' helps to 'ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.'[94] The first international copyright treaty, the Berne Convention, was animated by a grandiose 'desire to protect … the rights of authors in their literary and artistic works'.[95] Supreme Courts around the world floridly declare that patents encourage 'innovation, advancement, and things which add

91 Mersh, n 50 above.

92 Buccafusco and Heald, n 32 above, 7-9.

93 See for example Robert P. Merges, 'One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000' (2000) 88 California L Rev 2187. Ben Adamson, 'IP in the Corridors of Power: A study of lobbying, its impact on the development of intellectual property law, and the implications for the meaning of democracy' (PhD Dissertation, University of Manchester, 2017) at https://pure.manchester.ac.uk/ws/portalfiles/portal/67402639/FULL_TEXT.PDF [https://perma.cc/9ANG-P5A4].

94 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive), recital 9.

95 The Berne Convention for the Protection of Literary and Artistic Works 1886 preamble. While the Berne Convention also sought to solve practical problems associated with international trade, its focus on authorial rights was heavily steeped in the French tradition of viewing authorial rights as pre-political. See Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: CUP, 2009) 41-77.

to the sum of useful knowledge'[96] and the 'dedication' of said inventions to the public.[97]

Excess is absurd, therefore, because it brings belief into conflict with reality. Given the world as it is presented in *Intellectual Property Excesses*, it is hard to see the justificatory statements at the heart of IP law without detecting a large amount of aspiration or inflated pretension. The reality is that contemporary IP is not a system that simply promotes welfare and respects individual rights – much as we might desire it to –, but one that probably harms welfare and undercuts individual rights. The editors and contributors point to 16 examples where this is arguably true, and one envisions more chapters could have been added, perhaps for example on dilution protection in trade mark law or the 'absurd maze' that is British design law.[98] Accordingly, truly believing in the value of contemporary IP law today is akin to the emperor declaring that 'the procession must go on' after being made aware of his lack of clothes; by now society ought to be far more suspicious of IP's pretensions about promoting welfare and protecting rights.

Nor does the absence of irrefutable proof of excess significantly lessen the absurdity. I imagine that even the emperor had some reason to doubt the child's claims about his lack of clothes: who is this child and how could he possibly know what my advisors do not? Likewise, maybe there is some plausible value in retroactively extending copyright in old works. Granting the Covid-19 waiver might conceivably harm future pandemic preparedness. The important point is simply that the evidence makes these claims probably, not definitely, untrue. We are absurd because we believe in the value of IP in defiance of probabilities, not certainties. And this, in short, is why Bonadio and O'Connell are right.

ABSURDITY OF LOVE

In pointing out the absurdity of IP's excesses, *Intellectual Property Excesses* provides one of the most important and thoughtful critical assessments of contemporary IP law. However, IP's absurdity does not end with excess. There is another, deeper, and more intractable absurdity to be found in *Intellectual Property Excesses*: the absurdity of loving IP.

What do IP lawyers mean when they express 'love' for IP? Of all the things one could love – family, nature, music, etc – how could anyone love property rights? Of course, someone might love IP rights for private gain. Paul Heald's recently published book, *Copy this Book!*, opens with the candid vignette: 'I love copyright. As a writer, I enjoy the exclusive rights granted to me by Congress and am motivated by the profit that copyright seeks to guarantee me'.[99] But love for profit is not what Bonadio and O'Connell have in mind. Nor do IP lawyers

96 *Graham* v *John Deere Co* 383 US 1 (1966) 6 (US).
97 *Regeneron Pharmaceuticals Inc* v *Kymab Ltd* [2018] EWCA Civ 671 at [23].
98 William R. Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property* (London: Thomson, 7th ed, 2010) 632.
99 Paul J. Heald, *Copy This Book! What Data Tells Us about Copyright and the Public Good* (Stanford, CA: Stanford University Press, 2020) preface ix.

simply love creativity and innovation; many love creativity and innovation and do not love private ownership of creative and innovative goods. And yet, love for IP is not unique but widely shared. A recent article by Peter Groves begins: '[IP lawyers] share a passion, however, unlikely it might appear to less happy individuals, for IP law. We might, of course, be acutely aware of its shortcomings, but (as with all the best passions) this does not detract from our feelings: indeed, it might even intensify them.'[100]

When lawyers profess 'love' for IP, I understand them to be expressing belief and faith in the good that IP can do. The editors' love, for example, is based on the aspiration that, even if contemporary IP law does not manage it, what we might call a 'non-excessive' IP system could be a force for good in the world. To that end, the editors envision the possibility of, and advocate for, a 'fair IP regime, protecting the rights of IP holders but allowing for circumstances in which the interests of rights holders are balanced against the interests of the public, government, right holders' competitors, consumers and other stakeholders'.[101] This sort of IP will, they argue, 'encourage innovation and creativity without penalising legitimate uses of protected works by subjects other than IP owners or the promotion of public interests.'[102] It is this faith, belief, and hope that makes us love IP and wish to save it from the haters.

Rationally, however, loving IP is unwarranted. It is economically and philosophically questionable whether any system of private ownership of intangibles would be normatively valuable. To illustrate, consider briefly the claims that a moderate IP policy will promote welfare or secure individual rights.[103]

According to the utilitarian argument, the benefits IP rights provide by generating incentives for creativity and innovation outweigh the costs associated with lost access and, overall, society is better off in a world with IP rights than without them.[104] Surprisingly, however, there is little evidence backing up that claim. In 1958, when asked by the US Congress to evaluate the economic effects of the patent system, Fritz Machlup came to the 'ambivalent conclusion' that the evidence did not support getting rid of the patent system, but equally if the country had no patent system, the evidence would not support adopting one.[105] In a similar vein, the soon-to-be Justice, Stephen Breyer found the economic case for copyright to be an 'uneasy' one.[106] More recently, the prob-

100 Peter Groves, 'Love, passion and … IP: when a copyright work goes too far' (2020) 15 *Journal of Intellectual Property Law & Practice* 926.

101 Bonadio and O'Connell, 'Introduction' in *Intellectual Property Excesses* n 2 above, 2.

102 *ibid*.

103 Personality based arguments are not discussed here due to their historical lack of influence in the Anglo-American system of property in intangibles. But see Mala Chatterjee, 'Personhood Theories of Authorial Rights' (draft on file with author).

104 Landes and Posner, n 27 above, 37-71 and 294-326.

105 Fritz Machlup, 'An Economic Review of the Patent System' Study of the Subcomittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary United States Senate. S Res 236. Study No 15 (1958) 80. See also Arnold Plant, 'The Economic Theory Concerning Patents for Inventions' (1934) 1 *Economica* 30. George L. Priest, 'What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung' in John Palmer (ed), *Research in Law and Economics* vol 8 (Connecticut, CT and London: JAI Press Inc, 1986) 19.

106 Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programmes' (1970) 84 Harv L Rev 281. See also Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 *Economica* 167.

lem was expressed lucidly by Robert Merges when he wrote: 'In my research, I have become convinced that with our current tools we will never identify the "optimal number" of patented, copyrighted, and trademarked works. Every time I play the archaeologist and go looking for the utilitarian footings of the field, I come up empty. Try as I might, I simply cannot justify our current IP system on the basis of verifiable data showing that people are better off with IP law than they would be without it.'[107]

Of course, there is also little data showing a moderate or 'non-excessive' IP system to be bad for net welfare. The problem is instead an epistemological one: we just do not know whether IP is good for welfare or not. As Mark Lemley writes: it's 'complicated'.[108]

What then of rights? Even if IP has ambivalent consequences, one might still justify property on the grounds that ownership of works and inventions is somehow 'natural'. But the idea that persons have a natural right to ownership of their works and inventions is an odd one, as Thomas Jefferson pointed out 300 years ago.[109] Creative works and inventions are public goods.[110] By their very nature they are non-rivalrous. Like fire, or the air we breathe, when they are made available to the world, they have a natural tendency to spread far and wide. There is something highly *unnatural* about privatising something which, by nature, has been made public.

Of course, many IP lawyers respond to the public goods nature of intangibles by appealing to the Lockean theory of property.[111] Persons naturally own their bodies and their labour.[112] According to the Lockean theory, when a person mixes their labour with something unowned, the ownership of their labour extends over and attaches to the previously unowned thing.[113] To illustrate, using labour (something owned) to remove an apple from a tree in a commons (something unowned), results in something that becomes owned, ie the picked apple. Similarly, when the Walt Disney Company mixed their intellectual labour (something owned) with the plot of Shakespeare's *Hamlet*

107 Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA and London: Harvard University Press, 2011) 3.

108 Mark A. Lemley, 'Faith-Based Intellectual Property' (2016) 62 UCLA L Rev 1328, 1334. To some, like Lemley, the evidence is now sufficiently strong to falsify the hypothesis that IP rights in general promote welfare.

109 Thomas Jefferson, Letter to Isaac McPherson (13 August 1813) in Andrew A. Lipscomb and Albert Ellery Bergh (eds), *The Writings of Thomas Jefferson* vol 1 (Washington, DC: Thomas Jefferson Memorial Association, 1905) 333-334.

110 Bracha and Syed, n 27 above. Landes and Posner, n 27 above, 37-71 and 294-326.

111 See for example Merges, n 107 above, 48-55. Mala Chatterjee, 'Lockean Copyright versus Lockean Property' (2020) 12 *Journal of Legal Analysis* 136. Adam D. Moore, 'A Lockean Theory of Intellectual Property Revisited' (2012) 49 San Diego L Rev 1069; Wendy Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 Yale LJ 1533. A slightly different take on Lockean theory, where property is not a natural right, but rather a useful tool to protect some ethical entitlement can be found in Kenneth E. Himma, 'Toward a Lockean Moral Justification of Legal Protection of Intellectual Property' (2012) 49 San Diego L Rev 1105.

112 John Locke, *Two Treatises of Government* (1690) reprinted in *The Works of John Locke* (London: Thomas Tegg et al, 1823) 115-126.

113 *ibid*.

(something unowned), the resulting creation – the 1994 film *The Lion King* – was something Disney naturally owned.[114]

However, the objections to that Lockean argument are many. The chief one is that the conclusion is not logically dictated by the premises. If a person owns their labour, and they use that labour to create something new, it does not necessarily follow that they own the new thing. This was famously illustrated by Nozick's tomato juice example.[115] If one mixes tomato juice with the ocean, then it is possible that ownership of the juice transfers into ownership of the ocean. However, it is equally possible that the process works in reverse and the non-ownership of the ocean transfers into non-ownership of the juice. Put less abstractly, when you mix your juice into the ocean, you do not thereby own the ocean, you have merely thrown away your juice! And likewise, Disney's labour in transforming *Hamlet* into *The Lion King* might result in ownership of the latter. Equally however, it is also possible that Disney simply threw away their time and effort like one who throws juice into the ocean. Of course, it might be true nevertheless that Disney naturally owns *The Lion King*, but the Locke-derived argument does not provide a philosophically valid reason to believe they do.[116]

The point is not that IP rights are unjustifiable, but that we have important *doubts* about their justifiability. Nor is the point that legal regulation of intangibles is an inherently bad idea. The point is specifically that granting *property* over intangibles is of questionable value. As argued above, there is a strong case that granting businesses some rights in relation to signs is normatively justifiable. What is in doubt, however, is whether *ownership* of said signs is similarly defensible.[117] Likewise many feel an intuitive ethical impulse that creators deserve something – maybe recognition and/or financial compensation of some form. But whether creators deserve property remains a source of angst.[118] And yet, property is exactly what the major IP statutes confer on owners: the Copyright, Designs and Patents Act 1988,[119] the Patent Act 1977,[120] the Registered Design Act 1949,[121] the Trade Mark Act 1994,[122] all declare rights in intangibles to be 'property'.[123]

114 See comments of *The Lion King* co-directors Roger Allers and Rob Minkoff in 'Roundtable Interview: The Lion King' (Blue-ray.com, 28 September 2011) at https://www.blu-ray.com/news/?id=7433 [https://perma.cc/37TV-LKQF]. See also Samantha Vincety, 'The Lion King's Surprising Connections to Hamlet' *Oprah Daily* 19 July 2019 at https://www.oprahdaily.com/entertainment/tv-movies/a28376309/the-lion-king-hamlet-comparison/ [https://perma.cc/428V-HMEH].

115 Robert Nozick, *Anarchy, State, Utopia* (New York, NY: Basic Books 1974) 136. See also Jeremy Waldron, 'Two Worries about Mixing One's Labour' (1983) 33 *Philosophical Quarterly* 37.

116 Patrick R. Goold, 'Intellectual Property's Faith-Based Empiricism' (2022) 25 *Green Bag*.

117 See for example Mark A. Lemley, 'The Modern Lanham Act and the Death of Common Sense' (1999) 105 Yale L J 1687.

118 See for example Mark A Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 Texas L Rev 1031.

119 Copyright, Designs and Patents Act 1988, s (1)(1). See also Information Society Directive, n 96 above, recital 9.

120 Patent Act 1977, s 30(1).

121 Registered Design Act 1949, s 15A.

122 Trade Mark Act 1994, s 2(1).

123 With non-proprietary rights playing a more marginal role. See for example CDPA 1988, Ch IV (separating moral rights from copyright).

It is the conflict between our aspirations and our doubts that makes loving IP absurd. Even stripped of its worst excesses, a moderate IP system would still be a system of property. Private ownership of intangibles is the conceptual core of IP; it is the idea of property that connects all of the various IP rights together, and has been since the nineteenth century.[124] The unvarnished reality is that we do not know whether any such system of property in intangibles would be, or even could be, good for welfare or rights. And yet, this is a system that many IP lawyers love and vigorously defend. This aspiration or pretension in the face of a more uncomfortable reality is absurd.

And so, loving IP is absurd in the same way that life might be absurd. In Nagel's view, life is not absurd because we believe it to be meaningful, all the while knowing that it is not. Instead, absurdity arises from the discrepancy between how serious we pretend our lives to be and the nagging existential doubt that it is all meaningless. In both life and IP law, it is our capacity to semi-consciously put doubts to one side to continue holding our questionable beliefs that renders those very beliefs absurd.

RESOLVING AND ACCEPTING ABSURDITY

When someone finds themself in an absurd situation, Nagel writes, they will 'usually attempt to change it, by modifying [their] aspirations, or by trying to bring reality into better accord with them, or by removing [themself] from the absurd situation altogether.'[125] And, when it comes to absurdity of IP's excesses, altering reality is a sensible way forward. IP law should simply not be excessive: copyright in old works probably should not be extended, patents should probably be waived temporarily during a serious pandemic, trade marks should usually not be granted over descriptive terms. The reality of IP would thereby better accord with our aspirations for the IP system.

Altering reality, however, will not resolve the absurdity of loving IP. Given its dubious normative foundations, one might advocate abolition of IP rights entirely. If IP disappears, so too might the absurdity that accompanies loving IP. Indeed, it is precisely from those sort of abolitionist claims that Bonadio and O'Connell wish to save IP. Yet, that radical abolitionist conclusion would be rash. We have doubts about the value of IP, but we do not know it to be definitively bad either. Much like Machlup concluded 70 years ago, the evidence does not support giving up on IP altogether.[126] If we did abolish IP, we would merely debate whether we ought to reinstate it.

If altering reality is not possible, is modifying our aspirations any better? One might think, for example, that we could resolve the absurdity of love by simply not loving IP. We could strip the foundational texts of all references to incentives

124 Lionel Bently and Bradley Sherman, *The Making of Modern Intellectual Property Law: The British Experience 1760-1911* (Cambridge: CUP, 1999). Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909* (New York, NY: CUP, 2016).

125 Nagel, n 8 above, 718.

126 Machlup, n 105 above.

and rights and leave only the doctrine without any normative grounding. We could simply stop hoping that the IP system could ever live up to its promises.

However, we cannot so easily modify our aspirations for the IP system. The law must have some form of normative justification. Realistically, the doctrine cannot exist without some appeal to welfare or rights. Furthermore, the proper running of the IP system requires the skill and effort of thousands of diligent IP lawyers. Intellectual property lawyers give faithful advice to clients, advocate with passion, and resolve highly complex disputes. It is doubtful that IP lawyers could carry out these serious activities without some belief that doing so is a worthy and helpful pursuit. And so, unlike the absurdity of excess, the absurdity of loving IP is likely with us to stay.

Nevertheless, perhaps there is an important difference between the two absurdities. Unlike excess, perhaps we need not view the absurdity of loving IP as a problem in need of solution. Given its persistence, our response to the conflict between doubt and aspirations should not be despair, but as Nagel advocated in relation to life, a resigned irony. Confronted with claims about the importance of IP in protecting creators' rights, or promoting the public interest, we should give a shrug of the shoulders and adopt a knowing smile. To rebel against that absurdity is an act of Sisyphean futility. We should instead feel the absurdity and enjoy it as one enjoys a farce, not a tragedy. At least, that's what I do. And perhaps most absurdly of all, and despite my doubts, I too love IP.