A Law and Political Economy of Intellectual Property

Oren Bracha* & Talha Syed**

Introduction

Theories of intellectual property (IP) tend to come in two varieties: "normative" theories that concern themselves with evaluating the extent to which IP rights are (or are not) justified, and "positive" theories that focus on explaining the origins or effects of such rights. Yet the distinction between these is far from airtight, as a positive analysis of effects is germane to many normative theories, while, from the other side, an explanation of effects leads almost ineluctably to the question of how best to evaluate them. Thus, it is no surprise that the most prominent theory of IP, economic analysis, straddles the normative/positive divide, seeking simultaneously to explain and to evaluate the role of such rights in improving social welfare (usually conceived in terms of wealth maximization).

This Essay seeks to introduce an alternative explanatory and evaluative framework for the analysis of IP to that of economic analysis: law and political economy (LPE). Our aims are three-fold: first, to delineate the central ways that an LPE explanatory framework differs from that of law and economics; second, to distill the core insights of that LPE approach for the analysis of modern IP rights in both its explanatory and evaluative aspects; and third, to point to key revisionary implications of such an analysis in terms of how such rights should (and should not) be shaped.

Our central argument is that an LPE analysis emphasizes two fundamental points regarding the operation of modern IP rights. First, from a justificatory point of view, no plausible first-order normative case exists for the key feature of modern IP, namely the conferral of exclusionary rights over nonrival informational goods. Rather, the case for such rights lies in second-order institutional considerations of harnessing market price signals to channel the rate and direction of innovative activity. Second, however, and from an explanatory point of view, this institutional mechanism has an in-built expansionary tendency that exerts distortionary pressures on both the substantive protection afforded by IP regimes and on the conceptual modes of doctrinal analysis deployed within them. These distortions *disembed* IP by

*William C. Conner Chair in Law, The University of Texas School of Law.

**Lecturer, University of California, Berkeley Law. We thank the symposium participants, and in particular Glynn Lunney, David Simon, Patrick Goold, and Bob Bone for valuable feedback and Yochai Benkler, Fengyang Zhao, Akshat Agarwal, and Terry Fisher for written comments on an earlier draft.

unmooring its doctrines from any plausible social aims. This pair of insights leads in turn to three sets of revisionary implications, which may be usefully placed under the umbrella heading of "putting markets in their place." First, doctrinal analysis internal to IP regimes needs to vigilantly safeguard against a "rights creep" that is the legal correlate of an economic logic of ceaseless commodification. Second, substantive analysis of IP policies needs to embed market considerations (of maximizing exchange-value) within non-market values (such as those of democratic equality's concern with equitable access to conditions of individual and social self-determination). Finally, IP protection itself needs to be embedded within non-market-based forms of innovation and cultural policy.

We do not wish to overstate the originality of our argument in any of its discrete parts. Each of the two components of our central argument concerning IP—namely, the lack of a strong first-order justification for exclusionary rights and the expansionary logic of such rights—have, at least in part, been previously articulated in the IP literature. Our aim here is, first, to bring out their force more clearly—and in particular to draw out their implications for the doctrinal, substantive, and institutional analysis of IP and alternative innovation polices, which we believe have not been fully appreciated. Second, our aim is to integrate these discrete points with an overall LPE framework, one that might orient analyses going forward. In respect of that framework, we emphasize ours is *one* view of an LPE analysis, which we offer here for critical and constructive appraisal by others.

Our discussion proceeds as follows. Part I sets out a distinctive framework of LPE analysis in contrast to that of law and economics and draws out its implications for understanding modern IP. Part II then develops the claim that the key feature of IP—exclusionary rights over information goods—finds its most persuasive warrant not in first-order normative considerations but in second-order institutional ones of hitching the rate and direction of innovative activity to market price signals. Yet modern—*capitalist*—markets contain an inherent expansionary drive that exerts distortionary pressures on both the amount of protection provided by IP regimes and the way it is provided. Part III details these distortionary pressures. Part IV then identifies conceptual and substantive bulwarks against them, as well as a third set of distinct safeguards: institutionally embedding both IP and markets within non-market-based forms of innovation and cultural policy.

I. An LPE Approach to IP

Law and political economy, as an emerging movement in legal academia,[1] is concerned not so much with the interaction between the legal and political-economic spheres as with their *inter-relation*. Its focus, that is, is on how "law" and "political economy"—each understood *both* as academic disciplines or modes of social analysis *and* as institutional realities or arenas of social life—can, do, and should mutually inform or shape one another. But how should each be conceived to begin with? Here we set out, in brief compass, *our* specific conceptions of the two fields and their inter-relation.[2]

By "political economy" we mean the term in neither of its two typical senses. A first sense, more mainstream, refers to the viewing of "polities" through the lens of "economics"—that is, to applying the tools of neoclassical economic analysis, developed for markets, now to government.[3] A second sense, more heterodox, refers to something like the reverse: the viewing of "economies" through the lens of "politics"—specifically, to using "power" concepts in the analysis of markets.[4] To be sure, the two perspectives may be made to converge, or at least overlap, such as in cases where economic agents' pursuit of political leverage insulates them from market competition, to result in their enjoying "rents" in one (mainstream) vocabulary and, in another (more heterodox) one, "power."[5] Still, the orienting frameworks of the two views—their starting points and governing premises—remain divergent: rational actors and tendencies toward competitive equilibrium for the mainstream versus diversely motivated agents and tendencies toward accumulative (dis)advantages for the heterodox.

What matters at present, however, is that the approach to political economy being advanced here is based on a critique of the premises

1. *See generally Law and Political Economy*, THE LAW AND POLITICAL ECONOMY PROJECT, https://lpeproject.org/ [https://perma.cc/676J-8QW6] (advocating for law and political economy as a movement responding to neoliberal currents of legal scholarship and policy of the last several decades).

2. Given the wide array of scholars and activists who may identify with LPE, be it as a loose network or even "school" of thought, it is important to emphasize that what follows is *not* meant as an accurate description of the writings or views of any specific set of participants. Rather, it is a *conceptualization* of what *we* take to be particularly significant substantive claims, offered for the consideration of others.

3. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 4–7 (1962).

4. *See, e.g.*, CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL–ECONOMIC SYSTEMS 108 (1977).

5. *See, e.g.*, Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus*: *Contested Exchange and the Revival of Political Economy*, 7 J. ECON. PERSPS., Winter 1993, at 83 (integrating "the neoclassical paradigm" with "the rich insights of the older conception of political economy" to analyze economic dynamics in terms of both rents and power).

underlying *both* of the foregoing views. These views are united by their starting point in an abstract, transhistorical object of analysis: the "economy" for the mainstream, and "political economy" for the heterodox. By contrast, on the present view, the starting point of analysis is a concrete, historically-specific notion of… capitalism.[6] To bring out the significance of this difference requires a brief excursus on the historical development of these views.

"Political economy" was, of course, the classical label for the field that later became known as "economics" *simpliciter* after the marginalist revolution of the 1870s. That revolution involved not only a shift from a labor to a (marginal) utility theory of (exchange)-value but, more deeply, a fundamental "problem shift": away from the study of "growth and distribution," per the classical political economy of Smith and Ricardo,[7] to a "science" of "efficiency in allocation."[8] When this latter became mainstreamed as "neoclassical economics" in the postwar period, heterodox figures seeking to retain a link to the classical concerns of the field—namely, the national ("political") management of resources ("*oikos*")—retained the label "political economy" for their work.[9] Meanwhile, figures of a more radical bent, who root their own approach in Marx's extension of the classicals' labor-based surplus analysis,[10] may be usefully grouped under the label of "critical political economy."

For neoclassical economics, then, the object of analysis is "the rational allocation of scarce resources" with its basic units of analysis being

6. As such, our point of departure would also apply to a third possible approach, which integrates the previous two to study how "politics" and "economics," as so abstractly conceived, interact.

7. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell, A.S. Skinner & W.B. Todd eds., 1981) (1776) (inquiring into "the nature and causes of the wealth of nations"); DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 5 (3d ed., 1821) ("To determine the laws which regulate this distribution [of '[t]he produce of the earth'], is the principal problem in Political Economy.").

8. *See* LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 16 (2d ed., 1937) ("Economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses."); LUIGI L. PASINETTI, LECTURES ON THE THEORY OF PRODUCTION 24 (1977) ("Marginal economic analysis, which has dominated formal economic thinking since 1870, marked a radical change of interests with respect to Classical economics. […] [T]he Marginalists left aside the phenomenon of production and began to study the rational behavior of a single consumer.").

9. *See* Kurt W. Rothschild, *Political Economy or Economics? Some Terminological and Normative Considerations*, 5 EUROPEAN J. POL. ECON. 1, 2 (1989) (tracing how, by mid-20th century, "the term 'economics' more and more displaced the old 'political economy'" with the latter term either falling "into complete disuse" or "reserved for the description of classical, Marxian, and some other 'unorthodox' theories").

10. For a leading illustration of such an approach, though not going by the name of "critical political economy," *see* ANWAR SHAIKH, CAPITALISM: COMPETITION, CRISES, CONFLICT 4–7 (2016) (contrasting neoclassical and heterodox economics with an approach having "its roots in the method of Smith, Ricardo, and particularly of Marx").

individualist or *subjective* factors of utility. For classical political economy, by contrast, the object of analysis is "the growth and distribution of surplus" with its basic units of analysis being *materialist* or *objective* factors of labor and resources. Finally, for critical political economy, the classical surplus-based analysis of growth, distribution, and classes is refined and radicalized into a labor theory of surplus-value, profits, and exploitation.

Yet, on an emerging alternative view, which we join here, Marx's project was less a "critical political economy" than a *critique of* political economy.[11] On this account, Marx's aim was less to join classical political economy in its analysis of a naturalized—transhistorical, materialist—field of inquiry than to denaturalize the field itself, by delimiting its *historically-specific* conditions of possibility,[12] in terms of the *social relations* of capitalism that constitute its proper object of inquiry. Marx showed, first, that what the emerging discipline of political economy confronted as its new-found objects of analysis—the "spontaneous" ordering of "invisible hand" effects leading to a spiraling "wealth of nations"[13]—it falsely naturalized with transhistorical emphases on individualist factors, such as Smith's human nature to "truck, barter, and exchange,"[14] or materialist ones of Malthusian-Ricardian population dynamics and soil fertility.[15] He then showed that what actually accounted for these emergent phenomena was the historically-specific—not transhistorically determined nor "contingent"—socio-political institutionalization of social relations of generalized commodity production, whereby all economic agents are subjected to market-dependence by virtue

11. *See generally* Michael Heinrich, *"Capital" after MEGA: Discontinuities, Interruptions, and New Beginnings*, 3 CRISIS & CRITIQUE, Nov. 2016, at 93 (describing discontinuities in the development of Marx's approach to political economy); Riccardo Bellofiore, *The Multiple Meanings of Marx's Value Theory*, 69 MONTHLY REV., Apr. 2018, at 31 (discussing distinct meanings of Marx's value theory); MOISHE POSTONE, TIME, LABOR, AND SOCIAL DOMINATION (2003) (discussing distinct interpretations of Marx's critical theory); Patrick Murray, *Critical Theory and the Critique of Political Economy: From Critical Political Economy to the Critique of Political Economy*, *in* THE SAGE HANDBOOK OF FRANKFURT SCHOOL CRITICAL THEORY 764 (Beverley Best, Werner Bonefield & Chris O'Kane, eds. 2018) (discussing the distinction between "critical political economy" versus "critique of political economy" views of Marx's theory).

12. As such, it was a critique in the Kantian sense of delimiting the conditions of possibility of the object of critique.

13. *See* SMITH, *supra* note 7, at 456 (discussing the "invisible hand").

14. *See id.* at 25 ("The division of labour, from which so many advantages are derived is […the] consequence of a certain propensity in human nature […] to truck, barter, and exchange one thing for another.").

15. *See* 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 173–74, 649, 861 (Ben Fowkes trans., 1976) (1867) (advancing general critiques of Smithian and Malthusian-Ricardian theories).

of being "free in the double sense"—that is, free of both extra-economic forms of exploitation and the means of subsistence.[16]

Marx's *critique of political economy*, then, was a denaturalizing mode of analysis, one that soldered an *explanation* of a phenomenon with its *critique*. The explanation served to provide an unprecedented account of an unparalleled explosion of productivity in modernity.[17] The critique was two-fold. First, it showed how something that was social and historical was falsely imputed to asocial or transhistorical givens: specifically, how the historically-specific social relations and dynamics of capitalism were naturalized by the eternal categories of classical political economy. Second, it was a critique of the relations and dynamics of capitalism themselves. This involves, as Diane Elson has acutely put it, a shift from a "labor theory of value" to a *value theory of labor*.[18] Instead of an ill-fated quantitative analysis of the "material content" of value in labor, we have a penetrating qualitative analysis of the *social form* taken by labor (and utility) under capitalist social relations—that is, of how human powers and needs are shaped by "generalized markets" and thereby subjected to *impersonal* imperatives of ceaseless expansion of exchange-value for its own sake.[19] The result? A systematic alienation of social agency, as human needs and powers as well

16. *See id.* at 272–73, 874–75 (providing the Marxian explanation of the socio-historical basis of capitalist dynamics). This line of analysis has been most fully developed by the economic historian Robert Brenner, whose socio-historical investigations into "economic development" and critique of rival Smithian and Malthusian-Ricardian accounts have set the terms for a worldwide debate among historians, economists, and sociologists. *See generally* THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE (T.H. Aston & C.H.E. Philpin, eds., 1985) (facilitating a debate between scholars on Brenner's views on economic development and Smithian and Malthusian-Ricardian views). *See also* PEASANTS INTO FARMERS? THE TRANSFORMATION OF RURAL ECONOMY AND SOCIETY IN THE LOW COUNTRIES (MIDDLE AGES–19TH CENTURY) IN LIGHT OF THE BRENNER DEBATE 13, 26 (Peter Hoppenbrouwers & Jan Luiten van Zanden eds., 2001) (discussing Brenner's contribution to the ongoing debate on socio-economic development). Brenner's work deeply informs the "institutional" turn in mainstream economic history that was recently awarded the Nobel Prize in Economics. *See* Daron Acemoglu, Simon Johnson & James A. Robinson, *Institutions as a Fundamental Cause of Long-Run Growth*, *in* 1 HANDBOOK OF ECONOMIC GROWTH 388–96 (Philippe Aghion & Steven N. Durlauf eds., 2005).

17. Consider the following assessment in a leading history of modern technological growth: "With the single exception of Karl Marx, nobody of much importance in the eighteenth or nineteenth century fully grasped the revolutionary economic potential of capitalism. Many writers predicted a 'steady state' economy. As Joseph Schumpeter once described the leading analysts from the Victorian period, 'They were all stagnationists.'" CREATING MODERN CAPITALISM: HOW ENTREPRENEURS, COMPANIES, AND COUNTRIES TRIUMPHED IN THREE INDUSTRIAL REVOLUTIONS 10 (Thomas McCraw ed., 1997) (citing JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 571 (Elizabeth Boody Schumpeter ed., 1954)). *See also* sources cited, *supra* note 16.

18. Diane Elson, *The Value Theory of Labor*, *in* VALUE: THE REPRESENTATION OF LABOUR IN CAPITALISM 115, 123 (Diane Elson ed., 1979).

19. *See generally* SØREN MAU, MUTE COMPULSION: A MARXIST THEORY OF THE ECONOMIC POWER OF CAPITAL (2023) (analyzing the impersonal domination distinctive of capitalist relations).

as human relations and the Earth are subject to ever-more extensive and intensive instrumental quantification.[20]

Consider, by contrast, the central theme of most strands of critical political economy: an emphasis on the presence of "power" in capitalism as a corrective to mainstream blind spots. From Robert Hale's emphasis on the role of law in (and hence partial state authorship of) market outcomes,[21] to Bowles' and Gintis' analysis of "short-side power" in non-clearing markets,[22] and through to CLS, critical race, and feminist analyses of the role of class, racial, and gender asymmetries,[23] the consistent drumbeat of critical analysis has been an insistence on the persistence of *vertical* relations of power or asymmetry as a central feature of capitalist economies. Indeed, this focus on vertical distortions of markets may be traced back to classical political economy itself, most obviously to Adam Smith's attack on mercantilist rent-seeking and monopolist collusions, but even more significantly to Ricardo's analysis of property-based rents, which served as the model for Hale.[24] In fact, it is often thought that Marx's own contribution was simply to take over and extend the Ricardian analysis into a general class-based analysis of power in capitalism.[25]

Mainstream or neoclassical economists, in reply, have been quick to point to the pervasive prevalence of "competition" in markets as a counteracting force that tends to dissipate all such vertical power. Indeed, it is precisely this leveling or *horizontal* effect of markets that has been heralded, from Smith on, as the signal virtue of markets—namely, how forces of supply and demand tend to eliminate any local or temporary forms of asymmetrical advantage.[26] And so the debate within these terms has largely proceeded on two fronts: first, as a positive matter, whether critics can

20. By "alienation of social agency" we mean the transfer of control over matters that are properly the object of human interests and purposeful decision-making, to impersonal forces beyond human reach. Specifically here, it refers to how the logic of ceaseless expansion of exchange-value for its own sake, driven by generalized market dependence, is a dynamic wholly out-of-social-control, being neither driven by nor accountable to any plausible human or social purposes.

21. Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 493–94 (1923).

22. Bowles & Gintis, *supra* note 5, at 90–91.

23. Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUDS. F. 327, 329–32, 341–45 (1991).

24. 2 SMITH, *supra* note 7, at 660–62; 3 RICARDO, *supra* note 7, at 68–69; BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 50–51 (1998).

25. For a critique of this "Neo-Ricardian" understanding of Marxian analysis, see Bob Rowthorn, *Neo-Classicism, Neo-Ricardianism, and Marxism*, I/86 NEW LEFT REV. 63, 75–76, 83–84 (1974). For an illustration of it, see Duncan Kennedy, Law Distributes 1: Ricardo, Marx, CLS 1–8 (Feb. 24, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3813439 [https://perma.cc/QR2T-4XEH].

26. 1 SMITH, *supra* note 7, at 73–5 (analyzing how market competition serves both to regulate the quantities of commodities and to ensure their prices gravitate around their "natural" level).

persuasively show persistent and large-scale, rather than merely episodic and localized, forms of power in markets; and second, as a prescriptive matter, whether there exist in any case viable policy solutions (besides antitrust) for such ills, solutions not so hobbled by informational and capture deficits of the state as to make the solution worse than the problem (the neoliberal view).

Left out of this framework of debate, however, are the central themes of Marx and Polanyi. The "distinguishing feature of Marx's analysis of capitalism is not a class-based account of power, nor an overlooking of competition," but, rather, "precisely the point that capitalism consists of an *inextricable coupling of such 'vertical' and 'horizontal relations.'*"[27] What marks out capitalism is that it is neither "class" *simpliciter* nor "markets" *simpliciter*, but, rather, a system of "generalized markets" whereby the separation of all economic agents from noncommodified access to various means of life institutes a system of generalized competition that, in turn, invariably generates class differentiation.[28] And corresponding to this explanatory framework is the programmatic one advanced by Polanyi: If the problem lies not just with "power" or "markets" *simpliciter*, but also with "generalized markets," then the solution lies not with merely decentralizing power or regulating markets, but also with "socializing markets"—structurally transforming them by institutionally "embedding" them within decommodified social relations reflecting political judgments of the affected interests and values.[29]

In sum, we may distinguish between three traditions of political economy (and their critique). A first, "Smithian" (Hayekian, Coasean) tradition, analyzes markets in individualist terms, with a focus on allocation and its efficiency. A second, "Ricardian" (Keynesian, Sraffian) one, analyzes markets in state terms with a focus on distribution and its equity. Finally, a third "Marxian" (Veblenian, Polanyian) tradition, analyzes markets as social relations with a focus on production and its shaping of persons and substantive outcomes. In contrast to either neoclassical economics and its focus on *individualist* factors, or classical and critical political economy's focus on *materialist* factors, the critique of political economy focuses on the *historically-specific social relations* of capitalism—i.e., generalized market dependence—and analyzes their dynamics of unparalleled, alienated

27. Talha Syed, *The Vertical and the Horizontal in Capitalism*, LAW & POL. ECON. PROJECT (forthcoming) (2021) (emphasis added), https://lpeproject.org/wp-content/uploads/2021/02/Syed_The-Vertical-and-Horizontal-in-Capitalism.pdf [https://perma.cc/62UC-5BRM].

28. For an account of how such dynamics generate racialized class relations and articulate with gender subordination, by way of super-exploitation within and outside the commodity form, see Yochai Benkler & Talha Syed, *Reconstructing Class Analysis*, 4 J.L. & POL. ECON., 731, 731–33 (2024) (seeking to integrate Marxian-Polanyian analysis with insights from Black Radical and feminist socialist traditions).

29. *See generally* Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (1944) (advancing the concept of "embeddedness" in economic analysis).

productivity and exploitation hidden behind a veil of formal equality and competitive opportunity.[30]

How does this analysis relate to that of modern law? Involved is a two-fold shift in orientation, toward an analysis of distinctive forms of social relations with respect to distinctive subject matters. The first shift is to understand modern law as a particular subset of social relations: those *structured as rights*. By "rights" we do not mean here any particular normative justifications for legal claims, be they doctrinal, political-moral, or constitutional.[31] Rather, we mean the specific *institutional structure* taken by modern legal claims, which seek to secure the protection of interests by way of "Hohfeldian" correlative entitlement/disentitlement pairs, whereby the conferral of a benefit ("entitlement") on one corresponds to the imposing of a burden ("disentitlement") on another.[32] As such, rights do not refer to the needs, interests, or attributes of a person conceived unilaterally, nor to person–thing relations but, rather, to bilateral person–person relations.[33] *Rights*, in other words, *are social relations.*[34] Moreover, social relations structured as rights have a distinctive *competing-interests structure*, deriving from the correlative entitlement/disentitlement pairs.[35] Consequently, when determining which among a pair of competing interests should be protected, we must take care not to conflate the analysis for a *distinct pair of competing interests.*[36] We must take care, that is, to "unbundle" rights into distinct

30. Benkler & Syed, *supra* note 28, at 733–39, 741–42 (developing the contrast between these theories and the historically-specific social relations and dynamics of capitalism).

31. And we specifically do not mean to exclude "policy" based (as opposed to "principled") justifications for legal rights, as somehow debarred from legal argument.

32. See Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 30 (1913); Anna di Robilant & Talha Syed, Property's Building Blocks: Hohfeld in Europe and Beyond, in WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECTED PERSONAL PAPERS, AND ORIGINAL COMMENTARIES 223, 226–34 (Henry Smith et al. eds., 2022).

33. Hohfeld, *supra* note 32, at 20–28 (devoting eight pages "to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being").

34. Talha Syed, Legal Realism and CLS from an LPE Perspective 34 (Oct. 13, 2023) (unpublished manuscript) (on file with Berkeley Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4601701 (driving home that "[p]roperty rights only exist in the presence of other persons. There is no such thing as property on a desert island. Indeed, in such a situation there are no rights at all, since all *rights simply are social relations*.").

35. di Robilant & Syed, *supra* note 32 at 228–29 (setting out the distinctive "competing-interests structure" of legal social relations); Syed, *id.* at 35 (elaborating on that distinctive structure).

36. di Robilant & Syed, *supra* note 32 at 232–33 (showing how the competing-interests structure is the basis for disaggregating "rights" into distinct sets of entitlement/disentitlement pairs).

possible types of entitlements.[37] These entitlement-types comprise the basic building blocks of the possible architectures of various legal fields, and thereby furnish key tools for careful legal analysis and institutional design.[38]

What marks out different fields of law from one another, in turn, are the distinctive *subject matters* regarding which they shape social relations via the conferral of rights. This goes to the second important shift in orientation: the need for careful specification of the distinctive subject matters addressed by different legal fields and for systematic explanatory and evaluative analysis of the social dynamics and normative concerns they pose.[39] In the case of property, this requires careful analysis of the distinctive *resources* regulated by property law—i.e., the distinct *objects* over which they confer possible sets of rights.[40]

Bringing the two points together, in the case of *intellectual* property, requires careful analysis of the distinct types of interests that may pertain to *intangible* resources, so as to ensure that the protection of one type of interest via one type of entitlement is not conflated with that of distinct possible other types of interests and entitlements. We turn to this next.

II. The Case for IP

A. The Absent Normative Case for IP

What justifies exclusionary rights over the intangible resources of information goods? Once we take seriously the distinctive *object* of property in IP, a surprising conclusion emerges: There is no plausible first-order normative justification for such rights. And this proposition holds across all the key normative theories of IP, notwithstanding the otherwise fundamental differences between them.

The reason why a right to exclude finds no foothold across the entire spectrum of normative theories is rooted in a distinctive feature of information as an intangible resource: its nonrivalry, whereby its use by one

37. Hohfeld, *supra* note 32, at 28 ("One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that relations may be reduced to 'rights' and 'duties,' and that these latter categories are therefore adequate for the purpose analyzing even the most complex legal interests . . . ").

38. di Robilant & Syed, *supra* note 32, at 252–57 (setting out the architectural building blocks of all property forms).

39. *See* Syed, *supra* note 34 at 45–46 (making the case for clear specification of the distinctive subject matters of different legal fields, and illustrating with the examples of property law as about social relations regarding resources, aiming to ensure adequate production and distribution, the tort law of accidents as about social relations regarding risk, to ensure adequate prevention and compensation, and antitrust law as about social relations regarding market structure, weighing the benefits of decentralized competition against those of integrated coordination).

40. *See* di Robilant & Syed, *supra* note 32 at 248–52 (defending and developing the claim that the distinctive subject matter of property law should be seen to be *resources* rather either "things" or "anything and everything").

does not subtract from its like use by others.[41] This dramatically affects how human interests with respect to informational goods interact with one another—specifically, use-interests in such goods *do not compete* with each other. There could be no reason to protect an interest to use information from interferences by others when there could be no such interferences. The direct purpose of the right to exclude—to prevent others from using a resource—is precisely to protect a person's interest in their own use free from interference by others. I get to exclude you from using my land because your use is likely to interfere with my own. It follows that whatever the reason for which a specific normative theory aims to protect an owner's interest in using resources—and whatever *other* interests such a theory aims to protect, be it fair compensation or social recognition—when the resource is information, there is no *direct* need for, and therefore no rationale for, a right to exclude others to protect such interests. Property as a mechanism of "governance" is precisely about the need to prioritize among competing uses and to vest a rights-holder with the authority to choose between conflicting use alternatives via a right to exclude.[42] Where there is no rivalry, this need evaporates. No rivalry means no need for governance and therefore no intrinsic or direct justification for property.[43]

The striking extent to which the above conclusion follows from the interaction between the distinctive features of information resources and the human interests implicated becomes apparent when examining how the conclusion remains intact across the range of rival normative theories.

Consider first the most influential of the normative theories for IP rights: welfarism.[44] The key problem this theory aims to address is rooted in

41. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 9 (2d ed. 1996) (discussing the concept of nonrivalry of goods); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 615 (Nat'l Bureau of Econ. Rsch. ed., 1962) (describing the issue of rivalry with respect to the commodification of information goods).

42. Oren Bracha, *Give Us Back Our Tragedy: Nonrivalry in Intellectual Property Law and Policy*, 19 THEORETICAL INQUIRIES IN L. 633, 638 (2018) [hereinafter Bracha, *Give Us Back Our Tragedy*]. We purposefully decline to adopt a distinction between governance and a right to exclude. In our view, a right to exclude simply *is* one possible form of governing the use of resources. *Cf.* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUDS. S453, S454–55 (2002) (distinguishing between governance and exclusion strategies of managing the use of resources).

43. Bracha, *Give Us Back Our Tragedy*, *supra* note 42, at 641.

44. *See* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 169 (Stephen R. Munzer ed., 2001) (discussing utilitarian theories of IP that aim to maximize net social welfare by stimulating creation and providing for widespread enjoyment of the product).

nonexcludability and cost gaps.[45] Information, once used openly, is a resource from whose use it may be very hard to exclude others.[46] Moreover, the costs of generating an information good are often considerably more than the costs of replication.[47] In tandem, these two features raise the concern that producers may only be able to internalize a small fraction of the social value of their creation, leaving them unable to recoup their cost of generation.[48] The result? Many potential producers may refrain from the act of producing despite the social value of the information outweighing its production costs.[49]

Two often overlooked aspects of this familiar account merit highlighting. First, the policy problem has nothing to do with uses by others interfering with the ability of the producer (or anyone else) to directly use or enjoy the information itself. Rather, the concern is solely about the very distinct interest of the producer in adequate compensation by extracting enough of the information's use-value from others. Second, even with respect to the compensation interest, welfarist theory offers no support for full internalization by producers of the social value of information.[50] It justifies only enough compensation for producers to recoup their risk-adjusted, capitalized costs.

The upshot? Welfarist theories provide no direct justification for excluding others from use of the information. There is no *static* concern of conflicting uses and thus no need for governance, meaning a mechanism for managing competing uses.[51] The only interest is in compensation adequate to ensure appropriate *dynamic* incentives to produce.[52] Furthermore, there is no interest in full internalization by producers. Whatever merit full-internalization arguments may have with respect to other resources, it is

45 . Oren Bracha & Talha Syed, *Beyond the Incentive–Access Paradigm? Product Differentiation and Copyright Revisited*, 92 TEXAS L. REV. 1841, 1849 (2014) [hereinafter Bracha & Syed, *Beyond the Incentive–Access Paradigm*].

46. *See* Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900, 1909 (2013) (explaining the potential difficulty of excluding others from information when selling that information).

47. Bracha & Syed, *Beyond the Incentive–Access Paradigm*, *supra* note 45, at 1849.

48. *Id.*

49. *Id.*

50. Mark Lemley, *Property, Intellectual Property and Free Riding*, 83 TEXAS L. REV. 1031, 1032 (2005); Bracha, *Give Us Back Our Tragedy*, *supra* note 42, at 648; *see* Mark Lemley & Brett Frischmann, *Spillovers*, 107 COLUM. L. REV. 257, 296 (2007) (arguing that full internalization of the benefits of an invention is neither necessary nor desirable).

51. Bracha, *Give Us Back Our Tragedy*, *supra* note 42, at 647.

52. *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1209–10 (1996) (arguing that there is no economic purpose in copyright law beyond that which is necessary to stimulate creative engagement).

grounded solely in static governance concerns.[53] In sum, welfarist theories only justify an interest in delimited compensation, not unlimited exclusion.

To be sure, this analysis is not universally accepted. So called "*ex post*" theories of IP insist that there *are* static concerns with respect to information.[54] They insist, that is, that there are difficulties of conflicting uses of existing information that require governance. The fundamental point here is that such theories are attempts to "reintegrate" IP "with the general theory of property rights."[55] This character of the enterprise exposes the high analytical and ideological stakes of the debate between production-based (*ex ante*) and use-based (*ex post*) theories of IP.[56] The latter, far from being a mere supplemental account, are in fact a last-ditch attempt to show that the same justifications that can be "offered in support of exclusive ownership of anything of value—say, for instance, forty acres of land"—are as applicable to information resources.[57] The reintegration is done precisely by trying to reintroduce rivalry to information with the aim of restoring a justification for governance via exclusion where the most that can be justified is adequate compensation.[58] The last-ditch attempt proves to be a desperate one. Upon examination, *ex post* theories turn out to be either mired in analytical confusion or premised on dubious empirical and normative assumptions.[59]

Consider next labor/desert theories of IP.[60] The heart of all such theories is the claim that those who invest labor in creating valuable resources deserve a fair share of its fruits.[61] The key is specifying what those fruits are. There

53. Allegedly, for rival resources, an owner may have to fully internalize the social benefits (and costs) of the uses of a resource to ensure prioritization of uses that properly reflects the overall social costs/benefits. However, when the need for governance disappears, so does the auxiliary means of full internalization. Bracha, *Give Us Back Our Tragedy*, *supra* note 42, at 648–49.

54. *See* Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130–32 (2004) (discussing "ex post" theories of IP).

55. Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 265 (1977).

56. *See* Bracha, *Give Us Back Our Tragedy*, *supra* note 42, at 650–53 (describing the concept of nonrivalry as "troubling" to the existence of a "unified theory of property rights grounded in the logic of a tragedy of the commons," and summarizing the "decades-long" effort to reframe IP as consistent with general property theory via *ex post* arguments).

57. Kitch, *supra* note 55, at 275.

58. *See* WILLIAM M. LANDES & RICHARD L. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 13–14 (2003) (arguing that "[t]he possibility that such [IP] rights may also confer static benefits, eliminating congestion externalities comparable to those of the common pasture . . . has been neglected because of the widely held belief that intellectual property, not being physical, cannot be worn out, crowded, or otherwise impaired by additional uses").

59. Bracha, *Give Us Back Our Tragedy*, *supra* note 42, at 658.

60. *See, e.g.*, Fisher, *supra* note 44, at 170–71 (discussing labor theory of IP). *See generally, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–330 (1988) (discussing a Lockean justification of IP ownership as it relates to labor).

61. Fisher, *supra* note 44, at 170. This leaves open, of course, what constitutes a fair share of the social value of a creation.

are two distinctive kinds of value involved: the value to creators of their own use of the resource created and the exchange-value or price extracted from others for their use of the resource. With rival resources, both values are implicated. If Uriah planted and nurtured a tree, David's unauthorized appropriation of its fruits deprives Uriah of both the direct use of the fruits and the chance of being compensated for their value to others. By contrast, nonrival resources such as information do not involve the former harm. If Uriah invented a method for increasing the yield of fruit trees, David's unauthorized use of the method does not deprive Uriah of using the method himself or disrupt his ability to enjoy its use value. The appropriation only involves disrupting Uriah's ability to be compensated for the value of the method for others. As Edwin Hettinger puts it, a "person's right to exclude others from . . . using a physical object can be justified when such exclusion is necessary for this person's own . . . unhindered use," which is not the case with nonrival information.[62] Nonrivalry means precisely that creators are not hindered in their own use by others and thus need no right to exclude. All that remains is a right to fair compensation for the value of uses by others, whatever its apt extent.

What about personality theories of IP?[63] The starting point for these is the claim of a strong personal connection between creators and their work.[64] Creative works, the argument runs, are central channels through which persons externalize in a concrete form—and thereby "actualize" or realize—their individuality or personality.[65] This creator/creation dynamic gives rise to a strong personal interest on the part of creators to be shielded from disruptive interferences by others.[66] The focus here on a non-pecuniary personal interest is widely assumed to support a particularly strong right to exclude.[67] Specifically, personality theory is assumed to issue in a broad right of integrity that, in its scope, allows creators to exclude others beyond what

62. Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 35 (1989); *see also* Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 167 (Stephen R. Munzer ed., 2001) (arguing that there is no Lockean justification for a property right to exclude in nonrival intellectual resources).

63. *See, e.g.*, Fisher, *supra* note 44, at 171–72 (discussing personality theories of IP); Hughes, *supra* note 58, at 330–37 (introducing a Hegelian justification of IP centering on a personal connection to external resources).

64. David A. Simon, *Copyright's Missing Personality*, HOUS. L. REV. (forthcoming 2025) (manuscript at 4) ("[Personality theorists argue] that authors invest all or part of their personality in a work when they create it.").

65. *See* Hughes, *supra* note 60, at 337–38 (describing the process of externalization of self through creation).

66. *See id.* at 338, 350 (discussing the Hegelian need to restrict alienation to preserve the expressionistic quality of a work).

67. *See id.* at 349–50 (describing how non-economic recognition provides a Hegelian right to exclude).

is justified by any other theory.[68] This broad right is allegedly necessary to protect creators' personal interests of self-realization by preventing the mutilation or distortion of the meaning of their creative works.[69]

Yet, upon closer scrutiny, the claim that personality theories justify a broad integrity-based right to exclude crumbles. Two propositions lie at the heart of these theories. First, that one crucial way in which people concretize, realize, and develop their individuality is through interaction with external objects.[70] Second, that this process of shaping individuality is social: The process unfolds through a dialectical interaction between the self and others—individuals come to know and shape their personality through recognition from others.[71] And what does this social recognition require in cases where personality is realized through interaction with objects? Both that others refrain from disrupting the process of self-realization and that they acknowledge the resulting products as the individual's own. When the relevant object is a rival resource, a right to exclude is necessary to obtain both of these goals. Conflicting uses by others would disrupt an individual's control over their realization project. In a dovetailing fashion, acknowledging an individual's control over the objects also recognizes the personal project embedded in such objects as their own. Jill's power to exclude Jack from her residential home allows her to shape it as she sees fit, while Jack's accession to this power expresses a recognition that the personal interest associated with the home is indeed Jill's.

Not so when the object through which the personality project is pursued is a nonrival good. A realization project pursued through a nonrival resource does not require a right to exclude *either* for preventing interference *or* for ensuring acknowledgment. To be in charge of his masterpiece project, Leonardo may need to exclude others from the canvas on which he paints, but he does not need to exclude others from using the resulting intellectual creation.[72] Others can create their own versions of Leonardo's work without disrupting his project or not acknowledging it as his own. All that is required to ensure both non-disruption and acknowledgment is that Leonardo be

68. *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 37–45 (1994) (describing the right of attribution as "the central tenet of moral rights jurisprudence" and surveying its broad coverage).

69. David Simon, *Copyright, Moral Rights, and the Social Self*, 35 YALE J.L. & HUMANS. 754, 779–80 (2024).

70. Hughes, *supra* note 60, at 330.

71. Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 32–34 (Amy Gutmann ed., 1994).

72. We hasten to add that the "intellectual creation" here does not mean a particular physical artifact (such as a painting or other work of "aura"), but, rather, the intangible expressive work that underlies, and is embodied or fixed in, a given physical form.

associated with his own creative project and not with versions that are not his own.

Some may object that in the absence of an exclusionary right of integrity, the creator might lose control of the public meaning of the work, and that perhaps even his own version may be tainted by connotations from an unauthorized or distorted version by others. But to jump from this possibility to the conclusion that a right to exclude is warranted is to misunderstand the legitimate interests of individuals in the social process of self-realization. Personal self-realization through interaction with others entails no guarantee of the outcome of the social process. To protect a person's ability to participate in that process is not to secure them an insurance policy. The justifiable purpose of the right is to shield the process of social recognition from distortions due to attributing the meaning-making project of one person to another. It is *not* to prevent others from pursuing *their own* self-realization projects via the same creative materials, or to give a privileged individual control over the social meaning of such expressive works. It is about a communicative right of (semantic) attribution, not an exclusionary right of (resource) control.

Finally, democratic theories of IP furnish no further rationale for a right to exclude. Such theories—whether they focus on individual and collective self-determination or equitable access to dimensions of human flourishing—are best understood as consequence-sensitive.[73] Thus, the distinct concerns of these theories still revolve around the production/use dynamic of nonrival information resources. Consequently, as with welfarist theories, democratic theories' concern for robust support of productive activity can only support a right of adequate compensation, not exclusion. And the same applies to any commitments such theories burnish for fair compensation or recognition—these will, at most, dovetail with the above conclusions drawn from labor and personality theories. Indeed, the concerns distinctive to such theories—centering on widening access to the conditions of active engagement in meaning-making processes—all point in the other direction.

B. The Actual Institutional Case for IP

If none of the main normative IP theories provide direct support for exclusionary rights over information goods, is there any justification for IP? Yes, but it resides in second-order institutional considerations. Many decades ago, Kenneth Arrow identified the central policy question posed by the production of information as one of how social resources should be allocated

73. *See* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 234–35, 245–47 (2014) (discussing the consequence-sensitive structure of democratic theories of copyright) [hereinafter Bracha & Syed, *Beyond Efficiency*].

among competing ways to produce information.[74] Arrow's answer was that for a variety of reasons—principal among them the unnecessary restrictions on access imposed by property rights in information, which is both nonrival and serves as input for further output—the preferable mechanism is not markets but rather "the government or some other agency not governed by profit-and-loss-criteria[.]"[75] Seven years later, Harold Demsetz published the definitive reply to Arrow, insisting that the only way to answer the question is with comparative-institutional analysis. In what came to be known as the "signal" theory, Demsetz argued that the decentralized signals of market demand transmitted through property-based prices so outperform a centralized system in shaping the rate and direction of information production that these comparative channeling benefits outweigh any comparative access costs of such rights.[76] Being essentially a Hayekian argument, Demsetz's case for IP was rooted in the informational and incentive virtues of decentralized, budget-sensitive market actors over centralized social planners.[77] That is, widely dispersed market actors—pulled by profit and pushed by competition—will be better able to identify which ends are most socially valuable to satisfy, search out which means for realizing those ends are most technologically feasible to pursue, and explore the relevant ends and means in a more cost-disciplined manner than highly concentrated, cost-insulated government actors.

Three aspects of this price-signal justification of IP merit emphasis. First, the justification is wholly instrumental. It does not provide any intrinsic normative reason why a legitimate human interest requires a right to exclude from information goods. It merely counsels, on second-order grounds of institutional design, that the information required for achieving first-order goals is best generated by market prices which operate on a right to exclude. Second, it follows that signal theory is fully parasitic on some other normative rationale. Contrary to what is sometimes stated, signal theory is not an alternative normative theory of IP.[78] Being merely a second-order design principle, it must rely on one of the other theories to supply substantive aims. Among other things, this means that evaluating the adequacy of the information generated by market prices depends on one's

74. Arrow, *supra* note 41, at 609.

75. *Id.* at 617, 623.

76. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1–2 (1969) (distinguishing between Arrow's nirvana approach and his own comparative institutional approach to information interests and rights).

77. *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520 (1945) (describing the problem of how to allocate the use of resources in society as "a problem of the utilization of knowledge not given to anyone in its totality").

78. Fisher, *supra* note 44, at 169–70 (describing signal theory as one of three alternative approaches under economic theory of IP).

underlying normative theory.[79] Third, even if a right to exclude is chosen as a matter of institutional design, that right must be shaped to track the purposes of the underlying first-order normative theory. This includes mitigating any adverse effects created by the institutional form of property itself.[80] Given that none of the underlying theories support full-internalization by creators, signal theory still requires limiting the property right's scope and duration in normatively relevant ways.

III. The Trouble with IP

As an institutional strategy for harnessing market price signals, IP rights come with several well-known substantive drawbacks. First, exclusionary rights and the price markup that they entail come with unnecessary restrictions on access to nonrival informational goods both for consumers today[81] and, in contexts of cumulative innovation, follow-on innovators of tomorrow's information goods.[82] Second, when the rights are stronger than needed to generate the good, the "rents" they hold out may incur wastefully duplicative innovation races.[83] Third, such rights may also create distortions by attracting investment away from other socially beneficial pursuits whose private rate of return is lower than what the rights provide.[84] The fourth and perhaps most important adverse effect is one that is only dimly understood: IP rights create a constant pressure to expand IP rights. This institutional form—namely, market-based property rights—is endogenous to and shaped by the social relations—namely, generalized markets—that it purports to

79. *See generally* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012) (analyzing various downsides of IP and its dependence on price signals with respect to various normative commitments).

80. *See infra* text accompanying notes 79–82.

81. *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700–02 (1988); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 497–98 (1996).

82. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEXAS L. REV. 989, 996–99 (1997).

83. *See, e.g.*, Douglas A. Smith & Donald G. McFetridge, *Patents, Prospects, and Economic Surplus: A Comment*, 23 J.L. & ECON. 197, 198 (1980); Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 307–10 (1992).

84. *See* Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 ECONOMICA 30, 46 (1934) (critiquing a patent system that "divert[s] the attention of inventors from what may well be the most fruitful field for further innovation"); Lunney, *supra* note 81, at 494–98 (noting that overbroad copyright protection may "stifle certain types of creative endeavors altogether"); Glynn S. Lunney, Jr., *Copyright's Price Discrimination Panacea*, 21 HARV. J.L. & TECH. 387, 425–33 (2008) (illustrating distortions in the allocation of fixed inputs and resultant negative welfare consequences resulting from price discrimination when one industry is monopolistic and the other is imperfectly competitive); Kapczynski & Syed, *supra* note 46, at 1942 ("[P]atents will drive innovative effort and investments away from an optimally efficient allocation providing the greatest net social value and instead toward information goods that may provide lower net social value but higher private value owing to lower costs or barriers to effective excludability.").

harness for its purposes. This expansionary dynamic results in two troubling aspects: substantively, unmooring legal regimes from any plausible underlying social purposes and conceptually, deforming the analytical structure of particular doctrines.

The most striking feature of modern IP since its emergence roughly four centuries ago has been expansion.[85] The process has not been linear. There have been periods of some local ebb and flow, and the details have varied by context and subfield. However, when taking a long—or even mid-range—view, the historical pattern is clear enough: IP rights, once created, have expanded tremendously.

The central dimensions of this expansionary process, in broad outline, have been as follows. First, the subject matter coverage of IP rights has exploded. Through a combination of statutory amendments and judicial development, an increasing array of information goods has been swept under the umbrella of various, often multiple, property rights.[86] Second, the scope of the rights has ballooned: The valuable activities from which others can be excluded has proliferated and the degree of proximity between protected and newly created information required to infringe the rights has shrunk.[87] Third, the limited duration of some IP rights has been extended—in the case of copyright, dramatically so.[88] Fourth, IP's basic unit of protection has been subjected to fragmentation and recombination. In some areas, the objects of protection—the *res* to which the rights apply and which serve as the basic

85. *See, e.g.*, William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, *in* 1 INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW 72, 73 (David Vaver ed., 2006) (observing with respect to IP that "[w]ith rare exceptions, the set of entitlements created by each of the doctrines has grown steadily and dramatically from the eighteenth century to the present"); Lionel Bently, *R. v The Author: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 3 (2008) ("There is a now huge body of academic scholarship. . . bemoaning the seemingly inexorable expansion of copyright."). *See generally* OREN BRACHA, OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909 (surveying the growth of U.S. patent and copyright law during the long nineteenth century) [hereinafter BRACHA, OWNING IDEAS]; Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed., 2008) (surveying the development and consistent expansion of copyright law); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008) (likening the expansion of copyright to the "billowing white goo" from cult movies that threatens to cover everything).

86. *See* BRACHA, OWNING IDEAS, *supra* note 85, at 115–23, 261–64, 272–73, 288–90; 296–97 (documenting the history of expanding copyright and patent law in the United States); Fisher, *supra* note 85, at 74–75 (providing examples of the gradual extension of patent law to "an increasingly wide array of inventions").

87. *See* BRACHA, OWNING IDEAS, *supra* note 85, at 187, 261 (summarizing the discussion of the historical trend toward liberalization of IP rights); Fisher, *supra* note 85, at 75–76 (noting the expansion in scope of patent and trademark law).

88. Fisher, *supra* note 85, at 73; Bently, *supra* note 85, at 8.

unit of analysis of the field—have come to be understood in an increasingly malleable and manipulable way.[89]

These various dimensions of expansion converge into one trend: the increased ability to owners, empowered by the right to exclude, to extract the social value of information. Wherever some use-value for information exists, IP rights seem to have a remarkable propensity to creep in—whether across time, degrees of similarity, subject matter, or units of protection—and turn it into exchange-value extractable by the owner. IP has never conferred a right to internalize the full social value of information, but there is a strong gravitational force constantly pulling in that direction.

What accounts for this pattern of expansion? The main culprit is precisely the market-based institutional form of IP. The social relations of generalized markets have distinctive features and dynamics.[90] Perhaps the most fundamental is the ceaseless, ever-expanding pursuit of exchange-value ("profit maximization"). The basic dynamic of market-dependent relations is generating exchange-value for the sake of more exchange-value. Once we use IP rights to harness markets for their informational function, the rights themselves become embroiled in these dynamics. As soon as information, commodified through property rights, is exchanged for a market price, the profit-maximization dynamic extends to it. The market imperative is to extract every drop of exchange-value of the information from every possible source of demand. What facilitates the value extraction is the right to exclude. Thus, IP rights are endogenous to the market relations they employ as an institutional device.

Combine the market's imperative of full extraction of value with the need for exclusionary rights to facilitate such extraction, and what you get is a persistent pressure on lawmakers, whether legislative or judicial, to expand the reach of IP rights: that is, a constant grasping to capture sources of the social value of the information, both old and new, through propertization.[91]

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89. *See, e.g.*, Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 576–78 (2005); Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1106–10 (2017); Oren Bracha & Talha Syed, Copyright's Atom: The Expressive Work as the Basic Unit of Analysis 5 (Jan. 2024) (unpublished manuscript) (on file with the authors) [hereinafter Bracha & Syed, *Copyright's Atom*].

90. *See supra* text accompanying notes 18–20.

91. We outline here a general theory of the dynamic relation between market-based IP rights and the shaping of these rights. To be sure, to substantiate this outline one would have to develop a richer account of the exact social transmission mechanisms that connect existing rights to the process of their expansion. It is not hard, however, to see the structure of such an account. Its heart would be that the profit extraction generated by IP forms the basis for exerting effective influence on law-making institutions—whether legislative, judicial, or otherwise—to expand IP rights that enable further extraction of profit. *See, e.g.*, Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 569–70 (2000) (describing the "political economy" that "is responsible for an

The process is not absolute or monotonic. Resistance and variation occur. Yet, once IP rights exist, the constant is an ever-present gravitational pull to expand them to capture further sources of value.

The pressure to expand IP works to disembed such rights from any underlying substantive purposes. That is, it works to sever the rights from any underpinning normative support and corrode the institutional features that maintain this connection.[92] Recall that none of the normative theories of IP provides either a direct rationale for a right to exclude or a justification for full-internalization of value.[93] Moreover, each of those theories requires balancing mechanisms to guard against adverse effects of exclusion.[94] The gravitational pull of profit maximization, however, is precisely toward full internalization, and the corresponding expansion of rights whittles away institutional safeguards that limit the rights. The precise point at which a net social deficit is reached is hard to pinpoint. However, the inherent dynamics of expansion toward full internalization create an ever-present threat. It is impossible to determine, for example, whether the "optimal" duration for copyright is seven, ten, or perhaps twenty-eight years. Yet, it is also hard to deny that the length to which the current term has mushroomed—in the vicinity of a century—has decimated any substantive purpose of a limited-term.[95] Similar observations apply, with a strength that varies by context, to the other dimensions of expansion. Thus, the IP institutional form contains the seeds of its own undermining.

Part of the above analysis is hardly news. Scholarship in the vein of public-choice and interest-group politics analyzes how the growth of IP has been marked by lawmakers, mainly legislatures, responding to "rent-seeking" lobbying.[96] The more sophisticated variants of institutional

extensive enclosure movement that has pushed our intellectual property law toward ever-increasing centralization").

92. For a recent argument in this vein, see Akshat Agrawal, *Resolving Copyright's Distortionary Effects*, 38 BERKELEY TECH. L.J. 1207, 1240 (2023) (analyzing how "[m]ajor players in global entertainment and media industries . . . influence the nature of cultural products that are disseminated based on potential of appropriating net surplus value through exclusionary rights" which undermines the law's purposes of diversity of cultural creation and broad opportunity to participate in such creation and access it).

93. *See supra* subpart II(A).

94. *See supra* text accompanying notes 81–84.

95. *See, e.g.*, Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at *3, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 (concluding with respect to the most recent copyright term extension that "it is highly unlikely that the economic benefits from copyright extension . . . outweigh the additional costs"); Netanel, *supra* note 85, at 26 (observing that "natural rights theory supports considerable limits on copyright's scope and duration").

96. *See, e.g.*, Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 862 (1987) (describing the legislative process leading to the 1976 Copyright Act as "a series of interrelated and dependent compromises among industries with differing interests in

economics recognize the endogeneity of property rights with respect to the economic relations and interests they structure.[97] How, then, is an LPE theoretical perspective different from these accounts, and what does it add to them? It is different by virtue of containing two distinctive features related to the close connection between IP rights and markets: a crisp understanding of a historically-specific set of social relations (generalized markets) as the engine driving this process and an elaboration of the ideological dynamics that sustain it.

LPE offers an alternative to the two existing frames for understanding the politics of IP: interest-group politics and historical constructivism. The twin foundations of the interest-group politics framework are atomistic individualism and an assumption about human nature. This outlook analyzes the shaping of IP rights by reference to the actions of individuals who, being by nature *homo economicus*, strive to maximize their material self-interest.[98] Meanwhile, the main alternative—historical constructivism—reduces the process that shapes IP rights to a long list of contingencies. These contingencies include a mélange of "factors" such as the vagaries of politics, technological developments, and reigning political ideologies.[99] It thereby abandons the project of explanation and settles for thick description.[100] LPE rejects both transhistorical explanations and historical descriptivism. Instead, its main explanatory focus is on a set of historically-specific social relations—here, generalized market-dependence. LPE diagnoses IP's expansionary drive as rooted in the distinctive dynamics of these relations: profit maximization that results in disembedding rights from any plausible social purposes. And it identifies the IP institutional form as particularly prone to be embroiled in these dynamics precisely because it is market-based.

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copyright"); Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857, 1867–74 (2000) (discussing "rent-seeking" and IP); Eli Dourado & Alex Tabarrok, *Public Choice Perspectives on Intellectual Property*, 163 PUB. CHOICE 129, 129–38 (2015) (surveying the literature that applies to IP the "Virginia School" method of "subjecting politics to the same analysis as markets").

97. Ron Harris, *The Encounters of Economic and Legal History*, 21 L. & HIST. REV. 297, 307–08, 312–15 (2003) (discussing the "Endogenization of Institutions" by the New Institutional Economics and demonstrating the concept with historical studies of property rights).

98. *See* Gary J. Miller, *The Impact of Economics on Contemporary Political Science*, 35 J. ECON. LIT. 1173, 1181 (1997) (explaining that "economics transformed the discipline of political science by proposing to explain fundamental political acts . . . as the acts of self-interested, rational actors").

99. *See* Fisher, *supra* note 85, at 78 (answering the question of "What produced the dramatic expansion of intellectual-property rights?" with: "No single force was responsible. Rather, a host of factors—some of them economic, some ideological, some political, and some peculiar to the sphere of the law.").

100. *See* Oren Bracha, *The History of Intellectual Property as The History of Capitalism*, 71 CASE. RES. L. REV. 547, 570–71 (2020) (criticizing the constructivist element in New History of Capitalism scholarship as causing the "basic driving force of historically explaining capitalism to unravel").

But even accepting LPE's explanatory frame, one may still wonder whether there is anything distinctive about the property form. Arguably, at least within the historically-specific social relations of generalized markets, any governmentally provided mechanism for ensuring just and sufficient compensation to producers of information—whether subsidies, prizes, or anything else—is likely to attract pressure from those who stand to gain and therefore trigger the same expansionary process. This argument may be true to some extent.[101] However, property is distinctive not only because of its direct reliance on the market, but also because of the ideological dynamics generated by this close association. The flow of this dynamic is from the enacted social reality of market relations → "spontaneous" consciousness (an immediate or raw experience) and then from such consciousness → "ideology" (more reflective, articulated conceptual structures).

For each of the three genuine interests of information producers—recouping production costs, fair compensation, and recognition—there is a strand leading from market relations to an ideology of full internalization of value. For welfarist theories, concerned with adequate support of producers, the starting point of the process is the market logic of profit generation for its own sake, which leads to the consciousness of profit maximization as necessary and natural. From here it is only a short leap to ideology: taking it for granted that welfare maximization requires full internalization of value by producers of information, notwithstanding the fact that there is no warrant for this assumption with respect to nonrival resources.[102] The same process may apply to labor desert theories, concerned with fair compensation, but here there is also an additional and distinct layer. Markets are based on exchange of commodities for value, which generates the fetishism of commodities: the experience that the market value of commodities is attributable not to the social relations of producing these commodities but to inherent traits of the objects themselves.[103] From here it is only a short leap to the ideological assumption that he who, through labor, creates an informational object is responsible for generating its full social value and is therefore entitled to it. Perhaps most interesting is the ideological process that recasts the interest of recognition, the focus of personality theories, into an interest in excluding others. This consists of combining the two other paths—from commodity exchange and profit maximization—and applying them in a loose conceptual fashion to a creator's personal interest. One arm of this pincer maneuver transforms the creator's personal interest into a trait of the information good itself, as captured by the familiar contention that authors

101. But only to an extent: where alternative innovation policies do not center on market-driven innovators (e.g., academic or artistic grants), market-driven forces are less operative.

102. *See supra* text accompanying notes 46–53.

103. *See* MARX, *supra* note 15, at 163–77 (discussing "The Fetishism of the Commodity and Its Secret").

invest their personality in their works.[104] The second arm loosely follows the logic of full internalization to give rise to the assumption that protecting this personal interest requires absolute control of the information good. The ironic result is that a *personal* interest in recognition assumes the shape of a market right to exclude.

The market imperative of full exchange-value internalization and its accompanying expansionist drive, set in motion by IP rights, tends to disembed these rights from any underlying substantive rationales. Simultaneously, the same process generates ideological forms that purport to ground full internalization in these very same rationales.

IV. Conclusion: Putting Markets in their Place

As an institutional form, IP undermines itself. It harnesses the market and thereby sets in motion a dynamic of disembedment by uprooting the legal regime from any substantive purpose other than profit maximization and by disintegrating the concepts that embody such purposes. What is to be done? The explanatory analysis offered above leads directly to its own set of prescriptions. Where market relations disembed, proper institutional design must re-embed—in three distinct ways.

First, IP must be embedded *substantively* in purposes other than profit maximization for its own sake. Our own view is that these purposes should be anchored in values of democratic equality pertaining to wide equitable access for all to the prerequisites of individual and social self-determination.[105] However, whatever one's substantive commitments, they must be concretized through firm and clear doctrinal vehicles that securely moor the regime to its underlying purposes. These should include adamantly adhered-to principles of restricted subject matter, discrete units of protection, delimited scope, and other fundamentals—not localized, shape-shifting policy "balances" that produce an increasingly frictionless terrain of ad hoc, "multi-factor" tests ripe for the systematic tilting by repeat players.

This directly leads to the second point: IP must be embedded *conceptually*. It must be based on coherent concepts whose institutional forms track the underlying purposes. The integrity of these concepts should be maintained by refining their development in the application to concrete cases, rather than using whatever haphazard doctrinal tool is at hand to reach

104. *See* Simon, *supra* note 64 (manuscript at 4) (identifying as two fundamental elements of all personality theories of IP the propositions that: "authors invest all or part of their personality in a work when they create it" and this generates "a special, unbreakable bond or relation between the author and her work that deserves protection").

105. *See* Bracha & Syed, *Beyond Efficiency*, *supra* note 73, at 234–35 (discussing democratic and distributive theories of copyright).

the desired result.[106] In the absence of such conceptual integrity, IP law is left prone to error and ripe for manipulation under constant pressures motivated by the drive to capture market value.

Third, IP must be embedded *globally*. The expansionary dynamic of IP generates an imperialist logic: Property—the legal form of market commodification—increasingly becomes our only alternative for dealing with questions of social information policy. The result: an impoverished institutional repertoire and a blinkered institutional imagination. This imperialist hold of IP on our institutional horizons should be broken by embedding it within other non-property and less market-oriented legal regimes. This is true not only with respect to innovation policies but even more so with respect to the broader array of concerns and interests implicated by information policy more generally.

To briefly demonstrate, consider one context rapidly becoming more salient by the day. The rise of Generative AI (GenAI) in the field of cultural production is sending shock waves throughout the system in the form of both individual claims and social policy concerns.[107] The primary response to date has been a deluge of copyright infringement claims against GenAI producers.[108] In part, the drive behind the lawsuit frenzy is the familiar one: Copyrighted works are essential for training GenAI systems, and the emergence of a new lucrative source of demand fuels a goldrush to capture this value through the extension of propertization.[109] But there is another motivating force here. GenAI creates in its wake a litany of cultural policy concerns including the loss of livelihoods, diminishing opportunities for experiencing the inherent value of creative activity, dwindling sources of paradigm-breaking innovation, and corrosive effects on the plurality of creative output.[110] Sweeping claims of copyright liability are mobilized as a weapon to battle these threats.

The upshot of both drives is an assortment of highly unorthodox copyright claims whose common denominator is an attempt to catch in the net of infringement various valuable uses of works that lie outside

106. A prime example: the over-reliance in copyright on the fair use doctrine and its increasing vagaries to address concerns better handled at the front end by properly delimiting protected subject matter and the scope of the reproduction and derivative works rights.

107. *See* Oren Bracha, Generative AI's Two Information Goods 2, 11–14 (Jan. 27, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5115424 [hereinafter, Bracha, Generative AI] (describing how the growing use of generative AI has raised large-scale social policy concerns and individual claims of copyright harm).

108. *Id.* at 2.

109. *See id.* at 14 (explaining how generative AI uses are trained with copyrighted materials).

110. *Id.* at 12.

copyright's apt domain of "expression."[111] If successful, the result of such arguments will be further corruption of copyright's substantive and conceptual integrity. At the same time, the sought-after expansion of copyright liability is unlikely to address the broader policy concerns.[112] Copyright, being focused on redressing discrete individual harms through a market mechanism, is institutionally inadequate as a remedy to threats that are socially systematic and to pursue normative concerns that second-guess market outcomes.[113]

The appropriate response to the GenAI storm is to insist on *embedding* both copyright and cultural policy more generally. The antidote for the corrosive effects of the expansionary drive triggered by this storm, on both the substantive and conceptual fronts, is to clearly articulate and firmly hold fast to copyright's core principles, primarily those of subject matter and secondarily those of scope.[114] Addressing unorthodox infringement arguments with firm application of subject matter principles—not the vagaries of the fair use defense which is the main terrain on which litigation battles are presently being fought—will substantively restrict copyright to where it belongs and make it more resistant to disintegrative pressures on the conceptual front. As for the futile attempt to address extra-market concerns through market mechanisms, the grip of copyright on our institutional imagination must be loosened by embedding the field within other non-proprietary regimes. The remedy for cultural policy concerns should be sought in various publicly sponsored and designed measures to re-channel the wealth created by GenAI markets to support opportunities and interests that these markets, when left to their own devices, undermine.

The social relations of capitalism—generalized market-dependence—propel unprecedented, and yet alienated, productivity and exploitation hidden behind the veil of formal equality. As a key tool of modern innovation policy, IP law both enables and deepens these dynamics: By propertizing information to harness market price signals, IP in turn unleashes a search for ever-more expansive commodification of this nonrival good. We need to retain the rational kernel of this law—of ensuring adequate and fair recompense and recognition for the generation of information goods, in the

111. *See* Oren Bracha, *The Work of Copyright in the Age of Machine Production*, 38 HARV. J.L. & TECH. 171, 176 (2024) [hereinafter Bracha, *The Work of Copyright*] (describing unorthodox copyright infringement arguments made in disputes over GenAI use of copyrighted works).

112. BJ Ard, *Copyright's Latent Space: Generative AI and the Limits of Fair Use*, 110 CORNELL L. REV. (forthcoming 2025) (manuscript at 59) (on file with the author) (observing that "[c]opyright provides a remarkably limited toolkit for dealing with problems of AI").

113. Bracha, Generative AI, *supra* note 107, at 22.

114. *See* Bracha, *The Work of Copyright*, *supra* note 111 (manuscript at 4) (asserting that copyright-based challenges to GenAI have been inappropriately applied with regard to the framing of scope and subject matter).

service of securing equitable access to the conditions of personal and social self-determination—while delinking it from dynamics spiraling out of social control. Doing so requires securely fastening IP doctrine to its underlying substantive purposes, while also embedding innovation policy in general to conscious social ends.