A COMPARATIVE CASE AGAINST CRIMINALIZING IP INFRINGEMENTS IN THE UK AND CHINA

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ABSTRACT

In this Article, it is argued comparatively that across the world intellectual property rights have been expanded to the point of absurdity. Beyond lengthy monopoly protections being backed up with prison sentences of up to ten years in both China and the UK, these monopolies have been extended in the UK to cover vague concepts such as publicity rights and performance rights. It is argued that due to the incredible lobbying power of Western multinational corporations, China was railroaded into enacting Western-style offenses in order to join the WTO. It is submitted that numerous economic studies have shown that intellectual property monopolies are inefficient and harm the information commons. The harm caused to consumers by inflated prices for medicines and trademarked goods has to be balanced against the right to have an intellectual property monopoly. We aim to demonstrate comparatively that criminal law is not needed to enforce anti-competitive behavior and to facilitate rentiership, and given the communitarian ideals underlying Chinese society it ought not to have enacted intellectual property offenses. Both the UK and China ought to consider repealing these offenses or at least scaling them back.

TABLE OF CONTENTS

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I. INTRODUCTION

Our analysandum is the normativity of using the criminal law to protect intellectual property rights. We examine this in the context of Western-style intellectual property laws being forced upon many states including China to enable them to participate in the World Trade Organization ("WTO"). These intellectual property protections had a devastating effect on the equitable distribution of vaccines during the 2020-2021 Covid pandemic. More generally, they lead to anti-competitive monopolies and the economic rewards of intellectual creation being distributed inequitably to a few major controllers of intellectual property. If these laws distort markets due to monopoly protections,[1] rather than protect the proportionate efforts of those imbedded in the market economy, and thus lack normativity, then a communitarian-oriented state like China ought not to have transplanted them wholesale.[2] We will examine whether there was a strong normative case for

1 Intellectual property monopolies distort markets in the same way that bailouts do. *See* Philipp Bagus, Juan R. Julian & Miguel A. Neira, *A Free Market Bailout Alternative?*, 37 EUR. J.L. ECON. 405 (2014). Also, powerful lobbying skews the process in favor of corporations. *See* SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003).

2 Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J. 1693, 1694 (2008). Stiglitz, a recipient of the Nobel Memorial Prize in Economic Sciences and former senior vice president and chief economist of the World Bank, said of his work on TRIPS: "We had become concerned that TRIPS might make access to knowledge more difficult—and thus make closing the knowledge gap, and development more generally, more difficult. We also worried about the effects of TRIPS on access to life-saving medicines; TRIPS attempted (successfully) to restrict access to generic medicines, putting these drugs out of the

China resisting pressure[3] to implement these laws wholesale. It shall be submitted that there was no need for China to enact criminal offenses other than for infringements of moral rights. Almost identical intellectual property laws have been adopted throughout the world without governments questioning whether in their current form, they provide a balanced approach when weighing the interests of consumers and users of the information commons[4] against those who benefit from intellectual property monopolies.

A sufficient starting point for anyone analyzing the criminalization of intellectual property infringements in twenty-first century China is to look at the offenses it has transplanted since its accession to the WTO. China has transplanted Western concepts of intellectual property and Western-style legal protections.[5] Intellectual property law is an area where the laws in most jurisdictions are similar—whether they be civil law jurisdictions or common law jurisdictions.[6] We need to consider the theory behind intellectual property offenses to understand whether we need offenses and what kind of offenses and punishment we need. We need to understand what harm, if any, is prevented by intellectual property offenses.

A. *Overview*

Because intellectual property offenses in England and China criminalize roughly the same conduct, little can be gained from conducting a mechanical comparison of the *actus rei* and *mentes reae* of the various offenses. The aim will not be to analyze the mechanics of the individual offenses. The aim of this Article is to conduct a general analysis of the normative case against intellectual property offenses and how this supports decriminalization. It will be submitted that the harmfulness of intellectual property monopolies is such that they

financial reach of most in developing countries. The World Bank has an annual report called the World Development Report, which highlights a key development issue every year."

3 *Id.* at 1717. Stiglitz points out that America uses its economic might to pressure developing nations to enforce its monopolistic intellectual property laws for the benefit of U.S. corporations.

4 A. J. Van der Walt & M. Du Bois, *The Importance of the Commons in the Context of Intellectual Property*, 24 STELLENBOSCH L. REV. 31 (2013).

5 Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045 (2018).

6 Gregory N. Mandel, Kristina R. Olson & Anne A. Fast, *Debunking Intellectual Property Myths: Cross-Cultural Experiments on Perceptions of Property*, 2020 B.Y.U. L. REV. 219 (2020).

ought not to be protected by either criminal law or civil law. In Part II of this Article, the discussion starts by setting the historical scene and the current context. Part III will outline the core intellectual property concepts and analyze them in the context of the case for decriminalization. Some English and Chinese offenses carry prison sentences of up to ten years. In the United Kingdom, these offenses have never been used against corporations, but instead are usually used against some individual selling fake goods in a local market. It appears corporate offenders are dealt with through civil litigation even though their infringements can involve millions of dollars, while the seller of fake T-shirts at the local market will be sent to prison.

Part IV explores the harmfulness of intellectual property and the justifications that have been put forward to support having intellectual property monopolies. Categorizing intellectual property as worthy of criminal law protection requires some sort of normative explanation to give it credibility. The usual claim that is put forward is that any infringement sets back the economic interests of the monopoly holder.[7] This assumes that the monopoly holder has a normative right to the monopoly income. The primary normative justification put forward to justify a right to monopoly income from intellectual property protections is the utilitarian claim that it benefits society. This is sometimes supplemented with a Lockean labor-desert justification.[8] In the case of trademarks, often no economic harm is caused at all because the fake trademarked good is sold as a cheap copy and is not competing in the luxury market but rather is simply in the copy market. Those defending criminalizing cheap copies argue that it is unjust to let the copier free ride off the marketing work of the trademark holder. Nonetheless, free riding by selling in a manifest counterfeit market rather than the genuine luxury market does not satisfy the harm principle because it does not cause any economic loss to the monopoly holder. These themes will be explored in Part IV of this disquisition.

The abovementioned themes are contextualized against the fact that China is a communitarian society[9] with a socialist market

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7 Gordon Hull, *Clearing the Rubbish: Locke, The Waste Proviso, and the Moral Justification of Intellectual Property*, 23 PUB. AFFS. Q. 67 (2009).

8 Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHICAGO-KENT L. REV. 609, 626-28 (1993).

9 Some use the oxymoronic term "communitarian capitalism," but the Confucian form of communitarianism is about good citizenship and what each owes the other in society. *Cf.* T.M. SCANLON, WHAT WE OWE EACH OTHER (2000); Thomas Janoski, *Citizenship in China: A Comparison of Rights with the East and West*, 19 J. CHINA POL. SCI. 365-85 (2014).

economy where the government is far better shielded from the power of corporate lobbying and thus better able to resist corporate pressure to incessantly extend the reach and duration of intellectual property monopolies.[10] Nonetheless, it has to be acknowledged that the "inequality is good" ideology is taking hold in China, too. "China's inequality levels used to be close to Nordic countries and are now approaching US levels."[11] Chinese corporations have applied for more patents in the last three years than have U.S. corporations, and thus there is a danger that Chinese corporations will start adopting the powerful lobbying methods that have worked so effectively in America. Corporate America's lobbying power has resulted in intellectual property monopolies being pushed onto other countries via the coercive TRIPS Agreement.[12] This has led to unfair criminalization at a high cost to consumers and to innovators attempting to benefit from the information commons. It is hardly surprising that corporations lobby hard in America because "IP accounted for 41% of domestic economic activity, or output, in 2019."[13] Economists and lawyers have shown that if intellectual property protections were to be removed, the same GDP would be produced with the wealth being distributed competitively both for the benefit of intellectual users of the information commons and for the benefit of consumers.[14] What is worrying is that both in the United Kingdom ("UK") and China there are offenses that have maximum sentences of ten years imprisonment. It will be argued that using very long prison sentences to protect monopoly "rent-seeking"

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10 Philip Luther-Davies, Kasia Julia Doniec, Joseph P. Lavallee, Lawrence P. King & G. William Domhoff, *Corporate Political Power and US Foreign Policy, 1981–2002: The Role of The Policy-Planning Network*, 51 THEORY & SOC'Y 629 (2022); Alex Acs & Cary Coglianese, *Influence by Intimidation: Business Lobbying in the Regulatory Process*, J.L., ECON., & ORG. (2022).

11 Thomas Piketty, Li Yang & Gabriel Zucman, *Capital Accumulation, Private Property, and Rising Inequality in China, 1978–2015*, 109 AM. ECON. REV. 2469 (2019).

12 Daniele Archibugi & Andrea Filippetti, *The Globalization of Intellectual Property Rights: Four Learned Lessons and Four Theses*, 1 GLOBAL POL'Y 137-49 (2010) ("A club of US multinational corporations played a major role in getting the TRIPS Agreement, providing one of the most important lessons on how business power shapes international politics.").

13 *See* U.S. PAT. & TRADEMARK OFF., INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: THIRD EDITION (2019).

14 MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY, 1-80 (2008); Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 977-79 (2012).

activities by large corporations is anathema to fair criminalization and fair punishment principles.[15]

II. HISTORICAL AND COMPARATIVE CONTEXT

While intellectual property has a long history[16] and is a subject that has exercised theorists for centuries,[17] criminal law protection of intellectual property came relatively late in the history of English criminal law. It came even later in the history of Chinese criminal law, but highly innovative technology was common in ancient China.[18] Movable type for printing books and paper money was used first in China from 1040 onwards.[19] The early Chinese presses used both ceramic and wooden movable type.[20] In the 12th century China moved to the use of bronze metal type for printing, but it did not protect innovation or copyright as an economic or property right until the 20th century. The idea of protecting copyright can be traced back to ancient Jewish law.[21] Patent-type protection of inventions emerged in the

15 Dennis J. Baker, *Constitutionalizing the Harm Principle*, 27 CRIM. JUST. ETHICS 3 (2008); DENNIS J. BAKER, THE RIGHT NOT TO BE CRIMINALIZED (2011).

16 Frank D. Prager, *A History of Intellectual Property From 1545 to 1787*, 26 J. PAT. OFF. SOC'Y 711 (1944); Ben McEniery, *Patent Eligibility and Physicality in the Early History of Patent Law and Practice*, 38 U. ARK. LITTLE ROCK L. REV. 175 (2016).

17 IMMANUEL KANT, ESSAYS AND TREATISES ON MORAL, POLITICAL AND VARIOUS PHILOSOPHICAL SUBJECTS (1798); G. W. F. HEGEL & STEPHEN HOULGATE, OUTLINES OF THE PHILOSOPHY OF RIGHT 59 (T.M. Knox trans., 2008).

18 WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION, ch. 1 (1995).

19 Xuan Zhao & Wolfgang Drechsler, *Wang Anshi's Economic Reforms: Proto-Keynesian Economic Policy in Song Dynasty China*, 42 CAMBRIDGE J. ECON. 1239 (2018).

20 These were invented by Bi Sheng (990-1051), *see* Jixing Pan, *On the Origin of Movable Metal-Type Technique*, 43 CHINESE SCI. BULL. 1681 (1998). A few centuries later in Germany, around 1440, Gutenberg invented a movable type press. The oldest surviving movable type printed book is Jikji. *See* Hak Soo Park & Eui Pak Yoon, *Early Movable Metal Types Produced by Lost-Wax Casting*, 15 METALS & MATERIALS INT'L 155 (2009).

21 NEIL WEINSTOCK NETANEL, FROM MAIMONIDES TO MICROSOFT: THE JEWISH LAW OF COPYRIGHT SINCE THE BIRTH OF PRINT (2016); Samuel J. Petuchowski, *Toward a Conceptual Basis for the Protection of Literary Product in a Post-Printing Era: Precedents in Jewish Law*, 3 U. BALT. INTELL. PROP. L.J. 47, 64 (1994); William Patry, *The Role, or Not, of Ethics and Morality in Copyright Law*, 37 OHIO N.U. L. REV. 445, 451 (2011) ("Rabbi Bleich observed that the '[e]arliest references to [copyright] in rabbinic literature focus upon ascription of authorship rather than upon proprietary rights and the concern expressed is for recognition of intellectual prowess rather than protection of pecuniary interests.'").

Venetian Republic[22] and the Republic of Florence in the early part of the fifteenth century.[23] Some researchers have traced the concept of intellectual property back as far as ancient Greece.[24] Bugbee has argued that intellectual property was not taken seriously in early times because intellectual effort was deemed no different to any other kind of labor.[25]

By the late Middle Ages, the likes of Leonardo Da Vinci[26] emerged, and at this time creators started to demand legal protections for intellectual property.[27] Many of these laws were also aimed at regulating markets and standards.[28] In English law, early patents were merely licenses granting trading monopolies and thus were aimed at censorship and market control,[29] not at protecting intellectual property.[30] Likewise, the focus in some of the ancient Chinese laws was on censorship.[31] In England patent protection that focused specifically on "invention and originality" was left to the varies of judicial discretion

22 Stefania Fusco, *Lessons from the Past: The Venetian Republic's Tailoring of Patent Protection to the Characteristics of the Invention*, 17 NW. J. TECH. & INTELL. PROP. 301 (2020).

23 Prager, *supra* note 16, at 711, 715, 717, 720; Pamela O. Long, *Invention, Authorship, "Intellectual Property," and the Origin of Patents: Notes Toward a Conceptual History*, 32 TECH. & CULTURE SPECIAL ISSUE: PAT. & INVENTION 846, 851, 879 (1991).

24 Marianina Olcott, *Ancient and Modern Notions of Plagiarism: A Study of Concepts of Intellectual Property in Classical Greece*, 49 J. COPYRIGHT SOC'Y U.S.A. 1047, 1048 (2002); Ellen Gredley & Spyros Maniatis, *Parody: A Fatal Attraction? Part 1: The Nature of Parody and its Treatment in Copyright*, 19 EUR. INTELL. PROP. REV. 339 (1997).

25 "Although by no means absent during this period, technological and literary creativity commanded little prestige or even general interest . . . ." BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 14 (1968).

26 FRANCIS C. MOON, THE MACHINES OF LEONARDO DA VINCI AND FRANZ REULEAUX: KINEMATICS OF MACHINES FROM THE RENAISSANCE TO THE 20TH CENTURY (2007).

27 *Id.*

28 Adam S. Greenberg, *The Ancient Lineage of Trade-Marks*, 33 J. PAT. OFF. SOC'Y 876, 882 (1951).

29 Eventually, censorship was statutorily provided for. *See* Licensing of the Press Act 1662 (Eng.); Printers and Binders Act 1534 (Eng.). The Stationers' Company was given exclusive control of printing books in England in return for it carrying out appropriate censorship. *See* Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265, 277 (1975).

30 The Company of Stationers v. Partridge (1712) 88 Eng. Rep. 647; Stationers' Company v. Carnan (1775) 96 Eng. Rep. 590; Leo Kirschbaum, *Author's Copyright in England before 1640*, 40 PAPERS BIBLIOGRAPHICAL SOC'Y AM. 43, 45-53 (1946).

31 *See* ALFORD, *supra* note 18, at 15 (discussing ancient Chinese censorship), 16 (giving some examples of early Chinese trademarks).

prior to 1852.[32] A great deal of literature (Chaucer through to Brontë) and invention (Newton's reflecting telescope through to Bain's chemical telegraph) predate 1852 and thus were not incentivized by intellectual property monopolies.[33] While patents have a long history, patent misuse has never been criminalized in the United Kingdom. The law in the United Kingdom criminalizes copyright infringements, infringements of performance rights, and trademark infringements, but it does not concern itself with patent misuse or the misuse of trade secrets.[34] In contrast, China criminalizes trade secret misuse.[35] If the criminal law is invoked, an offender could find themselves serving a lengthy custodial sentence.[36] If the offense is perpetrated by a corporate body, the director, manager, secretary, or another similar officer will be liable if it can be established that the infringement was done with their consent or connivance.[37]

China, a country of great innovation for millennia, did not have intellectual property offenses.[38] Chinese culture was geared towards a Confucian model of communitarianism that seems to have used such

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32 *See* Patent Law Amendment Act 1852, (1852) § XXV (Eng.) (this act moved the focus from trade monopolies to innovation); *cf.* Copyright Act 1710, (1710) (Eng.). For the earlier position on patents, see H.I. DUTTON, THE PATENT SYSTEM AND INVENTIVE ACTIVITY: DURING THE INDUSTRIAL REVOLUTION 1750-1852 (1984); RICHARD GODSON, PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT: ILLUSTRATED BY NOTES OF THE PRINCIPAL CASES; WITH AN ABSTRACT OF THE LAWS IN FORCE IN FOREIGN COUNTRIES 17-200 (1840).

33 *Learning English Timeline*, BRITISH LIBR., https://www.bl.uk/learning/langlit/evolvingenglish/accessvers/index.html [https://perma.cc/2V3C-2F65] (last visited Feb. 2, 2023); A.A. Mills & P. J. Turvey, *Newton's Telescope, an Examination of the Reflecting Telescope Attributed to Sir Isaac Newton in the Possession of the Royal Society*, 33 ROYAL SOC'Y J. HIST. SCI. (1979); *Bain, The Inventor of the Chemical Telegraph*, SCI. AMERICAN (Apr. 30, 1853), https://www.scientificamerican.com/article/bain-the-inventor-of-the-chemical-t/ [https://perma.cc/SDK6-ZVJA].

34 Neville Cordell & Beverley Potts, *Copyright Litigation in the UK: Overview*, ALLEN & OVERY (Aug. 1, 2022), https://uk.practicallaw.thomsonreuters.com/w-011-3729?transitionType=Default&contextData=(sc.Default) [https://perma.cc/AW9F-3EDN].

35 Criminal P.R.C. Laws (Order No. 83, 1997) Art. 213, 216 (China); 18 U.S. Code § 1832 (the United States also criminalizes trade secret misuse).

36 R. v. Carter [1992] 1 S.C. R. 938; R. v. Kirkwood [2006] 2 Cr. App. R. (S.) 39; R. v. Passley [2004] 1 Cr. App. R. (S.) 70; *cf.* R. v. Clements [2019] EWCA Crim 2253.

37 *See* Copyright, Designs and Patents Act 1988, (1988) § 110 (UK); Thames Hudson Ltd. v. Design and Artists Copyright Society Ltd. and Others [1995] F.S.R. 153; *see also* Bo Wang, *Complicity Liability: English and Chinese Approaches Compared*, 8 J. INT'L & COMPAR. L. 175, 177 (2021).

38 NOEL JOSEPH TERENCE MONTGOMERY NEEDHAM, SCIENCE AND CIVILISATION IN CHINA 5 (1954).

property for the benefit of the community with the creator merely receiving moral rather than economic credit. Laotse, an older contemporary of Confucius, wrote: "To love one's fellowmen and benefit all is called humanity. To regard things as belonging in common is called great. Not to distinguish oneself by conspicuous behavior is called width of character."[39] Monopolistic and exclusionary intellectual property rights are an anathema to communitarianism, *a fortiori* to a socialist market economy.[40] Many scholars have speculated about the reasons for the absence of legal recognition of intellectual property in China before the 20th century, but the historical evidence is too patchy to make strong theoretical and empirical claims about the absence of intellectual property laws in China. The fact that China's social system was communitarian is likely to provide the best explanation for the benefits of invention being shared by the community.

The impetus for China transplanting Western concepts of intellectual property into its law was its desire to join the WTO.[41] There have been more patent applications in China in the 2020s than in the United States, and Chinese businesses are keen to tap into the rivers of gold provided by intellectual property monopolies.[42] The current context is that China has emerged as an innovation economy and has developed many global brands.[43] Most of the enforcement will be through private law with large corporations keen to protect the monopoly income provided by intellectual property. The impetus for

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39 Frank D. Phager, *The Early Growth and Influence of Intellectual Property*, 34 J. PAT. OFF. SOC'Y 106, 111 n.9 (1952) (noting that those who were inventive with silk production were rewarded a prize); *see also* ERNST ZIMINERMAN, CHINESISCHES PORZELLAN 23 (1913); Hu Weixi, *On Confucian Communitarianism*, 2 FRONTIERS PHIL. CHINA 475, 476 (2007). LIN YUTANG, THE WISDOM OF LAOTSE 80 (trans. 1948).

40 *See generally* Julian Lamont, *Pareto Efficiency, Egalitarianism, and Difference Principles*, 20 SOC. THEORY & PRAC. 311 (1994); C. Saratchand, *A Theoretical Consideration of the Socialist Market Economy*, 12 INT'L CRITICAL THOUGHT 287, 298 (2022).

41 Yu, *supra* note 5, at 1047.

42 Ulrich Schmoch & Birgit Gehrke, *China's Technological Performance as Reflected in Patents*, 127 SCIENTOMETRICS 299 (2022); Hong-Wen Tsai, Hui-Chung Che & Bo Bai, *Longer Patent Life Representing Higher Value? A Study on China Stock Market and China Patents*, 9 BULL. APPLIED ECON. 115, 116 (2022); JINLING HUA, BISMARK ADU GYAMFI & RAJIB SHAW, CONSIDERATIONS FOR A POST-COVID-19 TECHNOLOGY AND INNOVATION ECOSYSTEM IN CHINA 145-62 (2022).

43 Michael Rowe & Kleanthes Yannakou, *Innovation and Technology in China*, *in* CONTEMPORARY STRATEGIC CHINESE AMERICAN BUSINESS NEGOTIATIONS AND MARKET ENTRY 437-51(2023); Craig S. Smith, *Baidu and Geely Will Mass-Produce an Autonomous EV: The Chinese Tech Giants Aim for a Fully Self-driving Car*, 60 IEEE SPECTRUM 36-37 (2023).

intellectual property protections in China going forward is likely to be intense lobbying from giant Chinese corporations. Chinese law contains a range of similar offenses to those found in English law, but England does not use criminal offenses to protect trade secrets and patents.[44]

In the United Kingdom intellectual property infringements were not criminalized prior to the 1860s.[45] The early private law remedies for copyright infringements were aimed more at protecting publishers rather than the original creator of the intellectual property.[46] In the Elizabethan era, it was physical possession of the original manuscript itself that gave the author control, but once it was sold to the publisher they acquired all the copyright and licensing rights.[47] The notion of moral rights had not been developed, but Milton was aware of the concept when he expounded:

> [H]ow can a man teach with authority, which is the life of teaching, how can he be a doctor in his book, as he ought to be, or else had better be silent, whereas all he teaches, all he delivers, is but under the tuition, under the correction of his patriarchal licenser, to blot or alter what precisely accords not with the hidebound humour which he calls his judgment?[48]

In this early period, the publisher acquired the right to copy and print the manuscript simply by purchasing the physical manuscript from the author because the author of the manuscript had no copyright in their work to assign.[49] Copyright arose in the work only after it was sold to a publisher who had a royal grant to operate as a publisher.[50] It was only these authorized publishers that had legal protection under *The Statute of Anne 1709*.[51] The *Statute of Anne 1709* was passed to

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44 DENNIS J. BAKER, GLANVILLE WILLIAMS & DENNIS BAKER TREATISE OF CRIMINAL LAW 2118 (2021).

45 *See* Adams v. Batley (1887) 18 Q.B.D. 625 at 627-28. However, private law protections go back to the Statute of Anne 1710. *See* Miller v. Taylor (1769) 98 Eng. Rep. 201. *cf*. Donaldson v. Becket (1774) 2 Brown's Parl. Cases (2d ed.) 129.

46 R. C. Bald, *Early Copyright Litigation and Its Bibliographical Interest*, 36 PAPERS OF THE BIBLIOGRAPHICAL SOC'Y AM. 81, 83 (1942).

47 GODSON, *supra* note 32, at 301-20; WALTER A. COPINGER & J.M. EASTON, THE LAW OF COPYRIGHT, IN WORKS OF LITERATURE, ART, ARCHITECTURE, PHOTOGRAPHY, MUSIC AND THE DRAMA 99-120 (1915); W. S. Holdsworth, *History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 1027-28 (1920).

48 JOHN MILTON, AREOPAGITICA 21 (Jebb ed. 1644).

49 Kirschbaum, *supra* note 30, at 51.

50 *Id.*

51 *Id.*

protect the publishers (stationers), not to protect the creators of the original works.[52] Presently publishers still play a dominant role, but they now have to obtain the copyright or a license from the creator to use it. Nonetheless, oppressive contracts do exist in areas where the profits are low and where the author is compelled to publish, such as in academia.[53]

By the beginning of the twentieth century, the criminal offense found in Section 1 of the *Musical Copyright Act 1906 (UK)* was being used to protect sheet music. This was soon supplemented with a range of provisions in the now repealed *Copyright Act 1911 (UK)*.[54] The penalties in the early period were limited to fines and forfeitures of the offending material.[55] Civil damages also were available.[56] The *Copyright, Designs and Patents Act 1988 (UK)* reformed completely the statutory law concerning copyright and was later buttressed with the *Trade Marks Act 1994 (UK)*. Between them, these acts criminalize copyright misuse, the misuse of performance rights, and the misuse of trademarks. In the UK, personality or publicity rights are not currently protected by the criminal law. Designs remain protected by the offenses in the *Registered Designs Act 1949 (UK)*. As far as illicit recording in cinemas is concerned, the *Copyright, Designs and Patents Act 1988* criminalizes commercial acts of illicit recording, not private acts for private use.[57]

From the 1980s onwards China started to enact Western-style intellectual property offenses. Nonetheless, it has only been in the twenty-first century that intellectual laws have had any great influence in China.[58] It was indirect pressure from U.S. corporations that encouraged China to enact intellectual property offenses.[59] The United States

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52 The equitable remedies sought were injunctions and they were sought in the Court of Chancery. Bald, *supra* note 46, at 89.

53 William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996); Rita Matulionyte, *Empowering Authors Via Fairer Copyright Contract Law*, 42 UNSW L.J. 681 (2019).

54 COURTNEY STANHOPE KENNY, OUTLINES OF CRIMINAL LAW 24 (1913).

55 Isabella Alexander, *Criminalizing Copyright: A Story of Publishers, Pirates and Pieces of Eight*, 66 CAMBRIDGE L.J. 625 (2007).

56 Chris Reed, *Why Must You Be Mean to Me? Crime and the Online Persona*, 13 NEW CRIM. L. REV. 485, 507 (2010).

57 For a full explanation of the *actus reus* and *mens rea* elements of the English offenses, see BAKER, *supra* note 44, ch. 41.

58 Haiyan Liu, *The Policy and Targets of Criminal Enforcement of Intellectual Property Rights in China and the United States*, 24 WASH. INT'L L.J. 137 (2015).

59 *Id.*

in its development stage engaged in widespread intellectual property theft, but it complained vociferously when China acted similarly a century later[60]:

> The U.S. used high import tariffs, government subsidies, assistance for skilled workers to migrate out of Britain (which was illegal according to British law), and industrial espionage (using only naked eyes of course) to jump-start the manufacturing industry in the U.S. The biographies of Alexander Hamilton also detailed how he directly intervened in 'obtaining' industrial technologies from Britain, and how the US Patent and Trademark Office (USPTO) knowingly granted patents to those who 'copied' the technology from Britain.[61]

Like the United States, China is past the age of using intellectual knowledge and ideas without permission. China's market size means it has been able to do deals to obtain intellectual property directly through licenses in exchange for a share of the Chinese market. It also has obtained intellectual property through trade and foreign investment in technology companies. Additionally, Chinese firms and universities engage in international research collaborations. Coupled with this, China's highly skilled workforce has increased significantly as Ph.D. graduates from the world's top science universities enter its workforce.[62] China is not merely manufacturing basics anymore but is

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60 "In the 18th and early 19th centuries, the UK was the leading country and the US striving to catch up. In the late 18th century, England duly criminalized the export of textile machinery and the emigration of textile mechanics. But one Samuel Slater emigrated covertly in 1789, to start a modern textile industry in the US (the 'technology' industry of the era). Other British ideas crossed the Atlantic, notably railways, just as Chinese ideas had come to Europe centuries earlier. . . . Since its accession to the World Trade Organization in 2001, China's trade policies are less protectionist than those of the US in the 19th century. It has also made an effort to implement its WTO obligations on intellectual property." Martin Wolf, *The Fight to Halt the Theft of Ideas is Hopeless*, LONDON: FIN. TIMES (Nov. 19, 2019), https://www.ft.com/content/d592af00-0a29-11ea-b2d6-9bf4d1957a67 [https://perma.cc/B9TC-BV2R].

61 Shaomin Li & Ilan Alon, *China's Intellectual Property Rights Provocation: A Political Economy View*, 3 J. INT'L BUS. 60 (2020); FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY (1979).

62 Scott Rozelle, Yiran Xia, Dimitris Friesen, Bronson Vanderjack & Nourya Cohen, *Moving Beyond Lewis: Employment and Wage Trends in China's High- and Low-Skilled Industries and the Emergence of an Era of Polarization*, 62 COMPAR. ECON. STUD. 555, 555-89 (2020); Chu-Chi Kuo, Joseph Z. Shyu & Kun Ding, *Industrial Revitalization via Industry 4.0–A Comparative Policy Analysis among China, Germany and the USA*, 1 GLOB. TRANSITIONS 3, 3-14 (2019).

the world's leading advanced manufacturer.[63] It has become a major innovator and creator of intellectual property. When it joined the WTO in 2001, it did not have a university in the top 1000 in the world, but it now has two in the top 20 and dozens in the top 500.[64] The World Intellectual Property Organization ("WIPO"), which is the international overseer for patents, reported that China had filed 68,720 patent applications in 2020 while the United States filed only 59,230.[65] Reuters reported that: "[t]he rate of increase was higher for China with a 16.1% year-on-year increase versus 3% for the United States. China first knocked the United States from the top spot in 2019."[66] It is submitted that in light of these changes that the focus in China as far as criminalization is concerned shall be similar to that in the United States. Going forward, the pressure to criminalize unauthorized intellectual property use will come from domestic corporations and lobbyists within China. The lion's share of intellectual property issues in China will continue to be private law disputes between large corporations. The criminal law will play a limited role. Even after countries become major creators of intellectual property (rather than mere users of foreign intellectual property), there will be piracy in areas where they lack expertise.[67]

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63 Ling Li, *China's Manufacturing Locus in 2025: With a Comparison of "Made-in-China 2025" and "Industry 4.0"*, 135 TECH. FORECASTING & SOC. CHANGE 66 (2018).

64 Loet Leydesdorff, Caroline S. Wagner & Lin Zhang, *Are University Rankings Statistically Significant? A Comparison among Chinese Universities and with the USA,* 6 J. DATA & INFO. SCI. 67, 67-95 (2021).

65 Emma Farge, *China Extends Lead Over U.S. In Global Patent Filings, U.N. Says*, REUTERS (Mar. 2, 2021, 4:07 AM), https://www.reuters.com/article/us-un-patents/china-extends-lead-over-u-s-in-global-patents-filings-u-n-says-idUSKCN2AU0TM [https://perma.cc/4GW6-LMHB].

66 *Id.*

67 *See* Yukon Huang & Jeremy Smith, *China's Record on Intellectual Property Rights is Getting Better and Better*, FOREIGN POL'Y (Oct. 16, 2019, 9:52 PM), https://foreignpolicy.com/2019/10/16/china-intellectual-property-theft-progress/ [tps://perma.cc/QH2J-XPRQ] ("For instance, by the early 20th century, the United States had fallen well behind Germany in the key chemical industry. Determined to 'dislodge the hostile Hun within our gates,' the 1917 Trading With the Enemy Act granted a wartime exception to the Chace Act to permit the confiscation and sale of all enemy-owned patents to U.S. firms.").

III. A CRITIQUE AND EXPLANATION OF THE BASIC FORMS OF INTELLECTUAL PROPERTY

The effort-desert justification[68] for intellectual property rights is premised on the idea that an intellectual creator ought to be rewarded for their "intellectual" effort, but intellectual property laws have been extended to cover "labor" *simpliciter* and identity/personality. Intellectual property rights derive their economic value from the existence of the legal right itself. Intellectual property rights also cover moral rights, but most of the litigation concerns economic interests.[69] Intellectual property rights are capital assets in that they can produce income without additional intellectual creation after the original creation comes into existence. Intellectual property rights are "choices in action," which are enforced by civil litigation. They are not possessory rights. If the infringement is covered by an offense, then a prosecution can be brought. These personal rights do not mean that the intellectual creation itself cannot be deemed to be a form of property—the positive law can deem whatever it likes as property.[70] Trying to fit intellectual property within the standard theories of property is not necessary[71] because its existence depends on a legal fiction. In this sense, the

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68 *A Law of Intellectual Property*, 9 W. JURIST 265, 267 (1875) ("There remains the one and true resource, namely, to admit the right of intellectual property; to acknowledge that the brain-worker has as much right to the produce of his brains as the hand-worker has to the produce of his hands; to enact a law protecting scientific inventions of a non-mechanical kind; and, without creating injurious and unnecessary monopolies, to impose on everyone, using for profit the discovery of another, the duty of paying a proper royalty to the inventor."); *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* JOHN LOCKE, LOCKE: POLITICAL ESSAYS 330, 333 (Mark Goldie ed., 1997) (Often the deserving reward for intellectual effort justification is linked to Locke, but Locke's concern was with tangible property and he had little to say on the concept of intellectual property. Locke's arguments concerning intellectual works were limited to arguing against licensing monopolies because such monopolies artificially inflated consumer prices.).

69 Adams Outdoor Advert., Ltd. v. City of Madison, 294 Wis. 2d, 441, 475 (2006). *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

70 H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 L.Q.R. 37 (1954); BENEDICTUS DE SPINOZA, THE POLITICAL WORKS: THE TRACTATUS THEOLOGICO-POLITICUS IN PART AND THE TRACTATUS POLITICUS IN FULL (A. G. Wernham ed., 1958); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 8-9 (2002).

71 *See* J. W. Harris, *Who Owns My Body*, 16 OXFORD J. LEGAL STUD. 55, 56 (1996) (a convenient and compendious overview of traditional property theories).

intellectual "property and the law are born and must die together."[72] In the context of trademarks, Cohen argued:

> One who by the ingenuity of his advertising or the quality of his product has induced consumer responsiveness to a particular name, symbol, form of packaging, etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property. . . . The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected. If commercial exploitation of the word 'Palmolive' is not restricted to a single firm, the word will be of no more economic value to any particular firm than a convenient size, shape, mode of packing, or manner of advertising, common in the trade. . . . The circularity of legal reasoning in the whole field of unfair competition is veiled by the 'thingification' of *property*. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights*.[73]

Cohen's thesis that intellectual property rights derive economic value from the legal right itself is well exemplified by examples such as personality/publicity rights[74] and performance rights.[75] Gold has value not because it is protected by the law of theft, but because it is a finite resource that has relative social appeal.[76] Albertus Magnus' Philosopher's Stone does not exist and thus gold cannot be replicated and sold over and over by the same person—it cannot be possessed and

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72 JOHN BOWRING, THE WORKS OF JEREMY BENTHAM 307 (1838).

73 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

74 Carol J. Greer, *International Personality Rights and Holographic Portrayals*, 27 IND. INT'L & COMPAR. L. REV. 247 (2017). ("The right of personality is an umbrella of human rights for dignity, privacy, and self-determination exemplified in the European Convention on Human Rights and certain aspects of German and French law. . . . The U.S. does not acknowledge the right of personality per se, but does recognize a legal patchwork of defeasible state law rights of publicity and privacy tort claims, such as misappropriation, false light, defamation, and others.").

75 Copyright, Designs and Patents Act 1988, § 198(1A) (Eng.) provides: "(1A) A person ('P') who infringes a performer's making available right in a recording commits an offence if P—(a) knows or has reason to believe that P is infringing the right, and (b) either—(i) intends to make a gain for P or another person, or (ii) knows or has reason to believe that infringing the right will cause loss to the owner of the right, or expose the owner of the right to a risk of loss."

76 Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

used by millions at once in the way intellectual property can be. If it could be, it would have no more economic value than seawater.[77] Touchscreen technology is used by billions of people each day even though its original inventor (or at least the person who was the first link in the chain of invention) was never paid a cent for his intellectual creation.[78] The economic magic of intellectual property is that it can be replicated over and over for use and sale with little cost.

Intellectual property is non-physical property and thus is simply an economic right to protect a potential stream of financial income. The income comes from the monopoly protection itself, but the monopoly itself (trademark, copyright, patent, etc.) is an asset that can be sold. The bulk of the value of that asset rests simply on it being a legally protected monopoly. Beyond that, intellectual property law protects moral rights.[79] Article 6bis of the Berne Convention provides: "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[80]

A. *Copyright*

In the United Kingdom, copyright law is set out in Part I of the *Copyright, Designs and Patents Act 1988*. Copyright does not require registration to have an effect; it is an automatic right. The difference between patents, registered designs, and trademarks is that they have to be registered to gain legal protection in the United Kingdom.[81] Copyright comes into effect instantly upon a work being expressed on paper, film, a sound recording, or in some other digital mode. It might be as simple as painting or drawing a picture.[82] Copyright cannot be

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77 *Philosopher's Stone*, BRITANNICA, https://www.britannica.com/topic/philosophers-stone [https://perma.cc/F7V6-RCJV] (last visited Jan. 20, 2023).

78 Johnson first published a paper on touchscreen technology in 1965. *See* Eric A. Johnson, *Touch Display - A Novel Input/Output Device for Computers*, 1 ELECS. LETTERS 219 (1965).

79 *See* Copyright, Designs, and Patents Act 1988, c. 3 (Eng.).

80 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (revised at Paris July 24, 1971) 1161 U.N.T.S. 3.

81 *How Copyright Protects Your Work*, GOV.UK, https://www.gov.uk/copyright [https://perma.cc/6BF6-SPGK] (last visited Jan. 20, 2023).

82 For the U.K., see Copyright, Designs, and Patents Act 1988, c. 1-4 (Eng.); for China, see Copyright Law of the People's Republic of China (promulgated by Standing Comm. Natl'l People's Cong. Sept. 7, 1990, effective Oct. 27, 2001) (China); for the United States, see 17 U.S.C.A. § 106 (West).

used to protect a name,[83] phrase, or a title,[84] but these may be registrable[85] as a trademark.[86] Copyright provides the creator of germane works the right to preclude others from copying or exploiting the work.[87] It does not protect the ideas themselves,[88] but it protects them when they are expressed.[89] Copyright protection aims to protect original works of authorship that have been put into any tangible form. Making copies of "abstract ideas" and publishing them might constitute plagiarism, but it will not constitute an infringement of copyright.[90] In both the United Kingdom and China the works covered include music, literary works, scholarship, art, graphic design including architectural designs, and cinematographic works. Software is also covered, but crypto assets are conceptually distinct from intellectual property.[91]

Article 217 of the *Criminal Code of the People's Republic of China 1997* criminalizes infringements of copyright.[92] The Chinese offense found in Article 217 differs from the English offense found in Section 107 of the *Copyright Designs and Patents Act 1988 (UK)* because it narrowly tailors the offense to cover copyright infringements that are motivated by profit.[93] Subsection 107(1) of *Copyright Designs and Patents Act 1988 (UK)* targets commercial use, while 107(2) deals with the making or possessing of equipment for copying.[94] Subsection 107(2A) of the of *Copyright Designs and Patents Act 1988 (UK)* sets

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83 Exxon Corp v. Exxon Ins. Consultants Int'l (1981) 3 All ER 241 (UK).

84 Dick v. Yates (1881) 18 Ch D 76 (UK).

85 Patents Act 1977 § 32 (UK).

86 Trade Marks Act 1994 § 2 (UK).

87 Temple Island Collections Ltd v. New English Teas Ltd [2012] EWPCC 1 (Eng.).

88 *Id.*

89 Andrew Beckerman-Rodau, *Patent Eligible Subject Matter: Protecting the Public Domain*, 72 BAYLOR L. REV. 233, 235 (2020).

90 It is often said that Fidentinus was the world's first plagiarist, but that is obviously not true. He was an early example of a plagiarist, and his conduct gave rise to the debate that lead to intellectual property offenses. Plagiarism sometimes occurs when a rouge journal editor or referee blocks a paper and then tries to publish ideas from it as their own. This differs from stealing an idea which could result in a civil action. Andrew Beckerman-Rodau, *Are Ideas Within the Traditional Definition of Property: A Jurisprudential Analysis* 47 ARK. L. REV. 603, 603 (1994); David E. Shipley & Jeffrey S. Hay, *Protecting Research: Copyright, Common-Law Alternatives, and Federal Preemption*, 63 N.C. L. REV. 125 (1984).

91 BAKER, *supra* note 44, ch. 41, ¶ 44.14.

92 Criminal Code of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., July 1, 1979, revised Mar. 14, 1997) art. 217.

93 Copyright, Designs, and Patents Act 1988 (UK).

94 *Id.* § 107(1-2).

out the requisite fault, but it also states that the defendant need not make an actual profit.[95] It is enough that the defendant subjectively believed the infringement might cause the copyright holder a loss.[96] The maximum sentence for a conviction under Subsection 107(2A) of the *Copyright Designs and Patents Act 1988 (UK)* is imprisonment for a term not exceeding ten years.[97] The *actus reus* for the Chinese offense is much narrower in that it requires that an actual profit be made from the copyright infringement.[98] It expressly holds that only large profits obtained through copyright infringements will result in a prison sentence.[99] In China the standard sentence seems to be a maximum of three years of imprisonment, but in serious cases, the sentence can be up to ten years of imprisonment.[100] The Chinese copyright offense requires subjective fault. Articles 14(1) and 15(1) of the *Criminal Code of the People's Republic of China 1997* make a distinction between intention, subjective recklessness, and objective recklessness.[101] The Chinese copyright offenses require a subjective mental state for liability to follow an infringement.[102]

Subsections (1) to (6) of Article 217 of the Chinese copyright offense outline the ways in which the infringement for profit might be perpetrated.[103] Subsection 217(6) of the Chinese offense does not criminalize copyright infringements *per se*, but it criminalizes those who disrupt the technical measures put in place to protect copyright material. The Chinese offense does not target infringements of moral rights unless the infringement is aimed at making an economic gain and the defendant succeeds in making such a gain. Article 10 of the *Copyright Law of the People's Republic of China* does cover moral rights, but those rights will only be protected by the offense in Article 217 of the *Criminal Code of the People's Republic of China 1997* when economic harm has been caused and when the defendant has subjective fault concerning that economic harm. Arguably, the English offense is wide enough to criminalize infringements of moral rights as seen in Subsection 107(1)(e) which provides that: "(1) A person

95 *Id.* § 107(2A).

96 *Id.*

97 *Id.*

98 Copyright Law of the People's Republic of China (promulgated by Standing Comm. Natl'l People's Cong. Sept. 7, 1990, effective Oct. 27, 2001) (China).

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

commits an offence who, without the licence of the copyright owner—distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright."[104] Thus, if the defendant puts her own name on V's lecture notes and distributes them to all defendant's students to gain esteem, this might be held to "affect prejudicially the owner of the copyright."[105] Since defendant makes no economic gain and does not act for the purpose of making an economic gain, defendant's infringement of V's moral rights would not be a crime in China. Even though it might technically be brought within the purview of the English offense, it is doubtful a charge would be brought in the United Kingdom when moral rights alone have been prejudiced.

B. *Performance Rights*

Performance rights are statutorily protected through Sections 182 to 202 of the *Copyright, Designs and Patents Act 1988*. Chinese law also extends to mere "performances."[106] The Chinese offense found in Article 217 only protects performance rights as copyright and only when the defendant acts for an economic motive and in fact profits from the infringement.[107] A conviction under Section 198 of *Copyright, Designs and Patents Act 1988 (UK)* concerning illicit recordings of performances can result in a 10 year prison sentence.[108] Performance rights are economic rights that aim to pay a person for labor expended in a live performance.[109] They allow the right holder to capitalize their labor so that it can generate income for up to 50 years after their live performance. Most performances have a short shelf life, but a few lucky performers are marketed in such a way as to make their

104 Copyright, Designs, and Patents Act 1988 (UK).

105 Copyright Law of the People's Republic of China (promulgated by Standing Comm. Natl'l People's Cong. Sept. 7, 1990, effective Oct. 27, 2001) (China).

106 *Id.*

107 Articles 38 to 41 of the *Chinese Copyright Law* recognise performance rights, but the criminal offense only applies to infringements that cause economic harm and only when the defendant has sufficient *mens rea*.

108 Copyright, Designs, and Patents Act 1988, § 108 (UK).

109 Peter Groves, *"It used to be like that - now it goes like this": Rights in Performances Under the Copyright, Designs and Patents Act 1988*, 1 ENT. L.R. 202 (1990); Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society*, 21 HARV. J.L. & TECH. 233 (2007); Deming Liu, *The Beijing Treaty on Audiovisual Performances and its Impact on the Future of Performers' Rights under English Law*, 37 EURO. INTELL. PROP. REV. 81 (2015).

performance a sellable bit of entertainment for long periods after the work was done.

It is the economic rights concerning the digital recordings of these performances that are protected. Digitally recorded entertainment can be sold over and over as long as the marketers behind the performer can continue to manipulate and influence consumers into buying it. A newsreader has to turn up nightly to earn their salary, but a person performing in a live concert, etc. will get a share of the ticket sales for the event in question plus economic income from performance rights, which allows them to benefit from recordings of it. If people were allowed to record the live performance, then that would reduce the sales of the studio-produced recordings. There also would be lost sales if those attending the live performance recorded and posted it online.

Performance rights can be used in tandem with copyright to earn income. Performance rights are usually used to ensure that others do not engage in "bootlegging" a performance (i.e., record a live performance without authorization). Hence, if a person recorded the performance from online and sold it, that would be a breach of copyright, not of performance rights. These non-proprietary rights are buttressed with moral rights as provided for in Subsections 205C to 205F of the *Copyright, Designs and Patents Act 1988 (UK).*[110] Such rights cover live performances and broadcasts of live performances, but moral rights in performances do not cover performances in films.

This is an odd way to protect rewards for labor because such rights are not used to increase the income of laborers in other industries beyond the entertainment industry.[111] Some entertainers will be paid nothing, some a reasonable sum, and others grossly disproportionate sums. The same sort of marketing, manipulation, and selection that is used to give trademarks value is used to give certain performances value. If a performer sings a song that has been written for them and is paid half the value of the ticket sales on the night in

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110 Copyright, Designs, and Patents Act 1988, § 205(C-F) (UK).

111 Jennings v. Stephens [1936] Ch. 469 (Eng.). "Despite this, there has always been a reluctance to class a performance as a copyright work and many arguments have been put forward over the years to justify a refusal to provide protection (whether by copyright or otherwise) for performers. One argument raised was the ephemeral nature of a performance. Another was that, particularly in large scale performances, the number of performers would make it impractical. From the current perspective neither of these arguments seems particularly convincing and, indeed, as set out below, the position has now been reached whereby protection for performances is in many respects similar to that provided to copyright works." NICHOLAS CADDICK, GWILYM HARBOTTLE & UMA SUTHERSANEN, COPINGER AND SKONE JAMES ON COPYRIGHT ¶ 12-01 (2016).

question, it is difficult to see why the criminal law should be used to enforce their right to be paid over and over for that same work for fifty years. This way of distributing income to entertainers is rather crude as it means some will be paid too little while others are paid well beyond what they deserve in proportion to their labor input.

A top math professor earns little more than the salary of a London tube driver even though their performance in a lecture involves real intellectual input.[112] There are performance rights in a live academic lecture—but they have little economic value because complex knowledge has a low direct value in a market economy. Singing itself is a form of laboring that does not involve intellectual creation (the writer of the song does the intellectual part, while the singer does the labor), but it is protected by performance rights.[113] Singing involves no more intellectual creation than does skillfully constructing a dry-stone wall. This is not a modern problem, "Vitruvius lamented the honors bestowed on athletes, while authors were ignored."[114] Creating a treatise or touchscreen technology requires substantial intellectual effort and original thinking, unlike the randomness of being the subject of publicity/personality rights[115] or performance rights.[116] Arguably, performance rights could be applied to any industry. One can imagine a society where bricklaying or sheep shearing is treated as a spectator sport with world bricklaying and sheep shearing championships.[117] The market value for such contests would have to be created by manipulating consumers into believing that such sports are highly

112 Josh Loeb & Eleanor Brad, *Vet Salaries Are Falling Behind Others*, 185 VETERINARY REC. 355 (2019).

113 *See Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, WORLD INTELL. PROP. ORG. (1961), https://www.wipo.int/treaties/en/ip/rome/ [https://perma.cc/HV87-WBCU]. *See also* Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1 (2019).

114 Long, *supra* note 23, at 856.

115 Many reality stars are average people chosen randomly as a matter of luck. Celebrities are created in the same way corporations create trademarks—they are a marketing tool created to manipulate consumers into purchasing goods or viewing specific entertainment instead of alternative entertainment.

116 *See* Copyright, Designs and Patents Act 1988, c. 48, § 19 (UK).

117 Justin Walker, *Kentucky Native Named "World's Best Bricklayer" After Winning National Competition*, WTVQ (Jan. 23, 2022), https://www.wtvq.com/kentucky-native-named-worlds-best-bricklayer-after-winning-national-competition/ [https://perma.cc/NHZ5-C233]; Rhys Gregory, *Brecon Man Attempts to Break Sheep Shearing Record*, WALES 247 (Aug. 15, 2022), https://www.wales247.co.uk/brecon-man-attempts-to-break-sheep-shearing-record [https://perma.cc/7278-WQXY].

entertaining. Humans could easily be socialized into valuing bricklaying over football as a sport.[118] Intellectual property rights have been stretched to cover labor *simpliciter* in that it covers performances, and these performances become a capital asset producing income due to the legal protection itself.[119]

The celebrity might argue they deserve performance rights and copyright because each time a person listens to their song that person gets an ephemeral benefit.[120] Nonetheless, that can be said of many things. The laborers who built the Sydney Opera House have not been paid royalties for decades based on tourists enjoying viewing the building they built and having photos in front of it. One aspect of performance rights (and more so copyright) is that every time a person watches a performance (or in the case of copyright, reads a book or watches a film) they get an ephemeral benefit and should pay for it, but the same can be said of great architecture walked past in London, Shanghai, Rome, New York, Florence and so on.[121] The laborers who built these entertaining and inspiring buildings are not paid every time a person walks past and enjoys them. The architect is not even paid a royalty for their intellectual creation based on how many view the building.[122] Royalties allow people to be paid over and over for the same work and often without any correlation to past effort or skill—

118 G.P. BAKER & P.M.S. HACKER, LANGUAGE, SENSE & NONSENSE A CRITICAL INVESTIGATION INTO MODERN THEORIES OF LANGUAGE 257 (1984) ("Normative behavior, viewed externally, in ignorance of the norms which *inform* it, may seem altogether unintelligible. A story is told of a Chinese mandarin passing through the foreign legation's compound in Peking. Seeing two of the European staff playing an energetic game of tennis, he stopped to watch. Bemused, he turned to a player and said, 'If it is, for some obscure reason, necessary to hit this little ball back and forth thus, would it not be possible to get the servants to do it?'").

119 Irvine v. Talksport Ltd [2002] EWHC (Ch) 367, [2002] 1 WLR 2355 (Eng.).

120 Robert Young, *Egalitarianism and Personal Desert*, 102 ETHICS 319, 325 (1992) ("So, despite the rhetoric of corporate executives, agents for sports stars, entertainers, and the like, it is not true that such people or their clients *deserve* the rewards of 'executive share plan' arrangements or lucrative returns from endorsements (which frequently far outstrip official salaries). Under present arrangements they may be entitled to these things, but to say that they deserve their high incomes presupposes that the relativities are in accord with the appropriate desert-basis (e.g., vastly greater effort, marginal product etc.). That the presupposition is false [is shown below]. . . .").

121 *Guidance Performers' Rights,* GOV.UK, https://www.gov.uk/government/publications/performers-rights/performers-rights [https://perma.cc/VWR7-CRSH] (last visited Feb. 2, 2023).

122 Meikle v. Maufe [1941] 3 All ER 144 (She can stop others from using her designs but is not paid a royalty on the basis that others view the finished bridge, tower, building, garden, and so on, which normally sits in a public place or is a public place.).

thus a performer or a movie script writer can be paid fifty years later while they sleep, shower, and eat for work done decades before.[123]

Certain voice patterns are marketed and pushed in our society, and this creates celebrities who are able to earn income through performance rights.[124] It is difficult to present a strong case for performance rights lasting for fifty years and being protected through the use of the criminal law as opposed to private law remedies. If the criminal law is not even used to protect a person from unfair dismissal for rejecting a manager's sexual demand,[125] then why should it be used to ensure a person is paid for fifty years for the same work? Performances rights allow great wealth to be distributed to a small minority of entertainers for relatively unskilled work such as kicking a football or singing a song written by another and thus is akin to a private tax on entertainment.[126] Lots of marketing manipulation is used to steer consumers to a few brand-name entertainers and a few forms of entertainment.[127] This sort of property device works crudely as an employment income distribution device.

If a blockbuster film can be produced for £1 per view with all those who produced and distributed it earning at least the annual salary of a neurosurgeon for the years spend producing the film, then is there any utility in pricing the film at £10 per view so that a select few in the production process might earn 100 times the annual salary of a neurosurgeon? Actors are often paid 1,000 times more than many of the people (camerapersons, producers, etc.) who put a film together. Acting is not a highly skilled job: it can be done extremely well by a

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123 A recent example of a fluke windfall was that of Kate Bush when one of her old songs went to number one, not due to effort and desert on her part, but due to the producers of a TV hit program "Stranger Things" using it in the program. *See* Ellie Henman, *BUSH BANK Kate Bush Will Rake in £1m After Running Up That Hill Hits No1 37 Years After Original Release*, THE SUN (June 21, 2022), https://www.thesun.co.uk/tvandshowbiz/18948869/kate-bush-earns-million-song-stranger-things/ [https://perma.cc/YVB2-BP5T].

124 Richard B. Hoffman, *The Right of Publicity-Heirs' Right, Advertisers' Windfall, or Courts' Nightmare*, 31 DEPAUL L. REV. 1, 1, 10 (1981).

125 Such a matter is left to contract law. *See* BAKER, *supra* note 44, at 106.

126 *See*, *e.g.*, *China Caps Film Stars' Pay Over 'Money Worship and Tax Evasion'*, BBC (June 28, 2018), https://www.bbc.com/news/world-asia-china-44641582 [https://perma.cc/ET6M-MJ4Z].

127 *See* Siobhan Hegarty, *Why Celebrities Earn So Much Money — And What It Says About Our Society*, ABC (June 18, 2019), https://www.abc.net.au/everyday/why-celebrities-make-so-much-money/11209894 [https://perma.cc/2H29-GBJE].

three-year-old.[128] No three-year-old is capable of performing neurosurgery or performing the functions of a professor of physics. Much of the distortion in reward here is achieved through the use of intellectual property rights. It is not clear that the criminal law has a role to play given the harm to consumers who are paying a premium for their entertainment.

C. *Publicity Rights*

Celebrity endorsements are economically harmful to consumers and socially manipulative in that they get consumers to buy what they do not necessarily need or to buy an overpriced alternative.[129] The cost of celebrity endorsements is added to the price of the good or service even though it adds no value to the product. Consequently, celebrity endorsements ought to be banned and not receive intellectual property protection via personality/publicity rights. The protection of personality rights is to ensure the protection of commercial income that does not correlate with desert and effort. Personality rights (i.e., the right of publicity)[130] are those rights that allow an individual or corporation to control the commercial use of a person's identity and any imagery or identifiers concerning it.[131] They are generally considered property rights, rather than personal rights, and so the validity of rights of publicity may survive the death of the individual to varying degrees, depending on the jurisdiction.

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128 *See* Geoff Lealand, *Shirley Temple: Child Star*, *in* THE ROUTLEDGE COMPANION TO GLOBAL POPULAR CULTURE 356 (Toby Miller ed. 2014).

129 Mwendwa Mildred Zipporah & Hellen K. Mberia, *The Effects of Celebrity Endorsement in Advertisements*, 3 INT'L J. ACAD. RSCH. ECON. & MGMT. SCI. 178, 183 (2014).

130 *See*, *e.g.*, *Las Vegas Chapels Told to Stop Holding Elvis-Themed Weddings by Licensing Company*, ABC (June 3, 2022, 1:22 AM), https://www.abc.net.au/news/2022-06-03/licensing-company-tells-las-vegas-chapels-to-stop-elvis-weddings/101124626 [https://perma.cc/W948-T8BN].

131 Robert C. Post & Jennifer. E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 108 (2020). *Cf.* Inter Lotto (UK) Ltd v. Camelot Group Plc [2003] EWHC (Ch) 1256 (Eng.) (holding that in the UK the only remedy for a celebrity to protect their likeness is the law of passing off, unless trademark infringement or data protection issues are involved). *See also* Case T-795/17, Carlos Moreira v. EUIPO, ECLI: EU:T:2019:329 (May 14, 2019) (the European Union intellectual property standard holding that trademark infringement of a celebrity name can be evidenced in the dishonest intentions of the trademark applicant); Henderson v. Radio Corp Pty Ltd [1960] 60 SR(NSW) 576 (Austl.) (the Australian approach to passing off similarly concerns a breach of confidence).

A stark case on point has been the exploitation of Einstein's identity by a corporation that inherited his intellectual property rights.[132] Albert Einstein died in 1955, and his intellectual property rights, excluding personality rights which did not exist in law in 1955, eventually passed to the Hebrew University of Jerusalem.[133] While most people might agree that a university obtaining funding is a worthy thing, some might think exploiting Einstein's identity for income is not worthy of legal protection. Einstein's will/testament made no mention of personality rights, name, or likeness rights because such rights did not exist at the time of his death. Nonetheless, it has been reported that:

> From 2006 to 2017, [Einstein] featured every year in Forbes' list of the 10 highest-earning historic figures – 'dead celebrities' in the publication's rather diminishing term – bringing in an average of $12.5m a year in licensing fees for the Hebrew University, which is the top-ranking university in Israel. A conservative estimate puts Einstein's post-mortem earnings for the university to date at $250m.[134]

Conceptually these rights have nothing to do with intellectual creation. Einstein's identity and image were not intellectual creations; his theory of special relativity was an intellectual breakthrough of great magnitude. It is impossible to reconcile this sort of private taxation that does not rest on intellectual effort, investment, or skill with the utility and desert justifications for protecting intellectual property.

D. *Patents*

When a patent for an invention is granted by the state to inventors, it gives the inventors a monopoly for twenty years, which means they can prevent others from making, using, selling, or importing the invention without consent. The patent makes the invention intellectual property, and this can be licensed or sold. Sections 1 to 6 of the *Patent*

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132 Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 878 F. Supp. 2d 1021 (C.D. Cal. 2012), *vacated,* No. CV-10-3790-AB (JCX), 2015 WL 9653154 (C.D. Cal. Jan. 12, 2015). *See also* Ind. Code § 32-36-1-8(a) (2021), Okla. Stat. tit. 21 §839.2 (examples of U.S. states in which publicity rights expire only 100 years after the death of the celebrity).

133 Simon Parkin, *Who Owns Einstein? The Battle for The World's Most Famous Face*, THE GUARDIAN (May 17, 2022), https://www.theguardian.com/media/2022/may/17/who-owns-einstein-the-battle-for-the-worlds-most-famous-face [https://perma.cc/U4HG-8TMK]. Michael Paterniti, *Driving Mr. Albert*, HARPER'S MAG. (Feb. 17, 1997), https://harpers.org/archive/1997/10/driving-mr-albert/ [https://perma.cc/7LPK-YSY9].

134 Parkin, *supra* note 133, ¶ 5.

Act 1977 (UK) sets out the conditions that must be met for an invention to be patentable. Article 216 of the *Criminal Code of the People's Republic of China 1997* goes further than the law of the United Kingdom in that it makes it an offense to counterfeit a patent.[135] There is no doubt some inventions have economic value as intellectual property—many have sold for £100 million plus. Is the value in the invention or in the monopoly? Most of the economic value of such information comes from the monopoly rights the patent provides. The patented information is worth less if everyone can use it for free. Patents are territorial, and thus a UK patent does not provide the holder with rights outside the UK, but it can be used to prevent others from importing the patented articles into the territory covered by the patent.[136] It is important to keep in mind that it is not a crime to infringe another's patent rights in the UK.[137] In China it has been made an offense. Article 216 of the *Criminal Code of the People's Republic of China 1997* provides: "[w]hoever counterfeits other people's patents, and when the circumstances are serious, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine." It is interesting that China has made this a crime without lobbying pressure to do so. It is not a crime in the United States, so it is puzzling that it has been criminalized in China. For the Chinese offense to be made out, the defendant must act with subjective fault, but unlike the copyright offenses, there is no need to demonstrate that the defendant's ulterior intention was to make a profit or that the defendant in fact made a profit. It is the act of counterfeiting the patent itself that matters.

E. *Trade Secrets*

In the United Kingdom the misuse of trade secrets has not been criminalized.[138] Trade secrets date back to at least the 15th century.[139] Guilds restricted their members from revealing the secrets of their craft and also banned certain trade techniques from being exported.[140]

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135 Patent Act 1977, c. 37 (UK). *Id.* at pt. 3, § 109-113 (there are some fraud offenses concerning patents, but these offenses do not criminalize infringement *per se*).

136 *Id.* at pt. 1, § 60 (defining patent infringement territorially).

137 BAKER, *supra* note 44, § 41.

138 *Id.* § 31.33.

139 Long, *supra* note 23, at 873.

140 *Id.* (quoting Monticolo & Besta, 2:66, chap. VII) ("The commune of Venice considered that the craft knowledge of the glassmakers of Murano was communal property to be used for the benefit of Venice and the guild. By means of lucrative

U.S. common law jurisprudence defines a trade secret as information that relates to the "whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes."[141] In the United Kingdom, misusing confidential information that has economic value due to its confidentiality will be treated as a misuse of confidential information, and this will give rise to various private law remedies (an injunction, an account of profits, an award of damages, or a declaration).[142] Professor Bone has argued that "trade secret law is not essential to the protection of intellectual property; in fact, most of its benefits are better achieved through contract."[143] Some theorists point out that while trade secrets need not be conceptualized as property to warrant protection, they deserve protection in private law as a matter of commercial fairness.[144] Trade secret theft usually involves a dishonest breach of contract (i.e., breach of a duty of confidentiality by an employee) and thus could be caught by the offense of fraud by abuse of position.[145] This Article takes the view that trade secrets are conceptually different from

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sales, Venetian glass products spread across Europe, but the export of the craft itself was strictly forbidden. Glassworkers were prohibited from plying their craft outside of Venice. Guild capitularies of 1271 specified that 'anyone of the aforementioned art who will have gone outside Venice for the occasion of practicing the said art' will pay a fine, and that further the '*gastaldus* must not accept the oath [of guild membership] from men who will have gone out beyond Venice with the reason of this art without the permission of the justices.'").

141 Beardmore v. Jacobsen, 131 F. Supp. 3d 656, 669 (S.D. Tex. 2015) (quoting TEX. PENAL CODE ANN. §31.05 (West 2015)). *See generally* Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1377 (2018); Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 3 (2007).

142 Saltman Engineering Co. v. Campbell Engineering Co. [1963] 3 All ER 413 (AC); Kerry Ingredients (UK) Ltd. v. Bakkavor Group Ltd. [2016] EWHC (Ch) 2448.

143 Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 246-47 (1998). *See id.* at 245. ("[T]rade secret law is merely a collection of other legal norms—contract, fraud, and the like—united only by the fact that they are used to protect secret information.").

144 Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFFS. 247, 255 (1991).

145 Fraud Act 2006, § 4(1) (UK) states: "[a] person is in breach of [fraud by abuse of position] if he: (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (b) dishonestly abuses that position, and (c) intends, by means of the abuse of that position— (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss."

intellectual property as they do not aim to provide monopoly protection, and takes the view there is a general case for criminalizing misuse of trade secrets as a privacy invasion and as a data wrong.[146] It is submitted that the marginal advantage provided by a trade secret is not sufficient to hinder fair competition or to create a monopoly.

Article 219 of the *Criminal Code of the People's Republic of China 1997* creates an offense with a maximum prison sentence of seven years.[147] It applies where defendants cause "significant losses to persons having the rights to the commercial secrets" when the defendants:

> (1) acquire a rightful owner's commercial secrets via theft, lure by promise of gain, threat, or other improper means;
>
> (2) disclose, use, or allow others to use a rightful owner's commercial secrets which are acquired through the aforementioned means;
>
> (3) disclose, use, or allow others to use, in violation of the agreement with the rightful owner or the rightful owner's request of keeping the commercial secrets, the commercial secrets he is holding.[148]

The offense in Article 219 of the *Criminal Code of the People's Republic of China 1997* requires subjective fault, but it only applies where significant losses have been brought about for the victim due to the trade secret theft.[149] Trade secrets, unlike patents and trademarks, cannot be registered in the United Kingdom. Unlike China and the United States,[150] the United Kingdom does not criminalize the theft of trade secrets.[151] Nonetheless, this sort of theft would normally be achieved by means of computer hacking and thus could be prosecuted as a computer misuse or data protection offense. The defendant would most likely be charged under Section 2 of the *Computer Misuse Act 1990 (UK)*. Authorized access during employment would normally permit an employee to access trade secrets. The conduct in a case such

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146 *See* BAKER, *supra* note 44, at 87-96 (discussing the criminalization of privacy invasions).

147 Criminal Code of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., July 1, 1979, revised Mar. 14, 1997) art. 219.

148 *Id.*

149 *Id.*

150 18 U.S.C. §§ 1831-37.

151 BAKER, *supra* note 44, ¶ 31.30. *See also* The Trade Secrets (Enforcement, etc.) Regulations of 2018, SI 2018/597 (Eng.) (creating civil liability for theft of trade secrets, but not criminal liability).

as *United States v. Hanjuan Jin*,[152] if perpetrated in the United Kingdom, might not come within the purview of the *Computer Misuse Act 1990 (UK)*.[153] In that case, the defendant accessed her employer's computer to download trade secrets without consent. Compare *United States v. O'Rourke*,[154] where it appears the defendant was not authorized to access the computer. If the trade secret is not stored on a computer, then in the United Kingdom there is no crime to apply unless the conduct involves fraud by abuse of position. If a wrongdoer enters a building and photocopies paper records of a trade secret, that is not a crime in the United Kingdom unless it involves fraud by abuse of position. Trespassing remains largely un-criminalized in the United Kingdom,[155] and thus a rival corporation sending a spy to dishonestly copy a rival corporation's trade secret is not criminal conduct. Section 4 of the *Fraud Act 2006 (UK)* only applies when the defendant abuses an existing "position of trust," and thus it would not apply to industrial espionage perpetrated by a rival corporation.[156] A rival corporation is not in a position of trust.

F. *Trademarks*

Trademarks emerged first in ancient China, then Egypt, and thereafter Italy.[157] Trademarks in modern English law are protected independently of more technical designs.[158] A trademark *simpliciter* is any sign or symbol that allows customers to distinguish a producer from its competitors.[159] Registered trademarks have included a name,

152 United States v. Hanjuan Jin, 733 F.3d 718, 719-20 (7th Cir. 2013).

153 *See* Computer Misuse Act 1990, c. 18, §§ 1-2, (Eng.) (creating criminal liability for intentional facilitation of unauthorized access to data stored on a computer).

154 United States v. O'Rourke, 417 F. Supp. 3d 996, 1000 (N.D. Ill. 2019).

155 BAKER, *supra* note 44, 1959-67.

156 Fraud Act 2006, c. 35, § 4 (UK).

157 Greenberg, *supra* note 28, at 877-79. *See also id.* at 878. ("The earliest evidence of the use of trade-marks is found on Chinese pottery of the period of the Chinese Emperor Hoang-To. It is recorded in the official records of the remote Chinese Empire of about 2698 B.C. that the art of making pottery was discovered at that time.").

158 Registered Designs Act 1949, 12, 13, 14 Geo. 6 c. 88, § 1C (UK).

159 Trademark Act 1994 §§ 1-2. *See* Lionel Bently, *The Making of Modern Trade Marks Law: The Construction of the Legal Concept of Trade Mark (1860–80)*, *in* LIONEL BENTLY, JANE C. GINSBURG & JENNIFER DAVIS, TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE (2008).

logo, designs, numerals and letters, domain names, and shapes.[160] Even smells and sounds have been trademarked.[161] Trademarks do not have to be registered, but an unregistered mark will be protected only under the common law protection provided for in the tort law action of "passing off"[162] unless there is also a copyright infringement.[163] A registered trademark gives the holder of the trademark a statutory monopoly to use that mark in the United Kingdom.[164] Trademarks are subject to numerous civil law tests to limit anti-competitive practices.[165] In a nutshell a trademark needs to be distinctive for the goods and services that its aiming to trademark.[166] Trademarks will not have legal effect if they are deceptive or registered in bad faith.[167] As for China, the *Criminal Code of the People's Republic of China 1997* provides:

> Article 213 – Whoever, without the permission of the owner of a registered trademark, uses a trademark identical with the registered trademark on the same kind of goods or services shall, if the circumstances are serious, be sentenced to imprisonment … if the circumstances are especially serious, be sentenced to imprisonment of not less than three years . . . .
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> Article 214 – Whoever knowingly sells goods on which a false registered trademark is used shall, if the amount of illegal income is relatively large or there is any other serious circumstance, be sentenced to imprisonment . . . .

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160 JAMES MELLOR, DAVID LLEWELYN, THOMAS MOODY-STUART, DAVID KEELING & IONA BERKELEY, KERLY'S LAW OF TRADE MARKS AND TRADE NAMES Ch. 1 (15th ed., 2011).

161 Reckitt & Colman Prods. Ltd. v. Borden Inc. [1990] RPC 341.

162 Pinterest, Inc. v. Premium Int. Ltd. [2015] EWHC 738; Reckitt & Colman Prods. Ltd. v. Borden Inc. [1990] 1 All ER 873; Perry v. Truefitt [1844] 49 ER 887; General Elec. Co. v. General Elec. Co. [1972] 2 All E.R. 507; Tomatin Distillery Co. v. Tomatin Trading Co. [2021] CSOH 100.

163 Reckitt & Colman Products Ltd v. Borden Inc [1990] 1 W.L.R. 491 (UK); Stone v. Wenman [2021] EWHC 2546 (UK).

164 Trademark Act 1994, § 2.

165 *See* Paris Convention for the Protection of Industrial Property, arts. 10bis, 10ter, Mar. 20, 1883, 828 U.N.T.S. 305 (as amended on September 28, 1979). The Paris Convention only has influence to the extent the relevant country has replicated its protections in their domestic laws. Otherwise, state-on-state legal action is required to enforce the Convention.

166 Case T-112/1, Mondelez UK Holdings v. European Union Intell. Prop. Off., EU:T:2016:735, ¶¶ 9-10 (Dec. 15, 2016).

167 Case C-2/00, Hölterhoff v. Freiesleben, 2002 E.C.R. I-04187; Intercontex v. Schmidt [1988] F.S.R. 575; Imperial Chemical Industries v. Berk Pharmaceuticals [1981] F.S.R. 1.

> Article 215 – Forging or manufacturing without authority or selling or manufacturing without authority other's registered trademarks or identifications shall, for cases of a serious nature, be punished with imprisonment or criminal detention, or restriction for less than three years, with a fine . . . .[168]

The offenses in Articles 213, 214, and 215 all require subjective fault, but none of them require the defendant to act with the ulterior intention of making a profit. Nor do any of these offenses require the defendant to make a profit. Article 214 does require an actual sale to be made, but that is all. Article 213 criminalizes misuse of the trademark *per se*. Compare these offenses with the offense found in Section 92 of the *Trademark Act 1994 (UK)*, which carries a maximum sentence of imprisonment for a term not exceeding ten years. Both countries criminalize not only trademark misuse, but preparatory conduct such as where the defendant "(a) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) has such an article in his possession, custody or control in the course of a business . . . ."[169] The English law also provides defenses. Subsections 92(4) and (5) of the *Trademark Act 1994* provides:

> A person does not commit an offence under this section unless—(a) the goods are goods in respect of which the trade mark is registered, or (b) the trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark.
>
> It is a defense for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.[170]

The traditional justification for regulating trademark misuse was that it protected the reputation of the producer and ensured that the product was from its reputed producer.[171] In England the practice of

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168 Criminal Code of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., July 1, 1979, revised Mar. 14, 1997).

169 Trademarks Act 1994, c. 26, § 92(3)(a-b) (UK). *Cf.* Criminal Code of the People's Republic of China at art. 219.

170 Trademarks Act 1994, c. 26, § 92(4-5) (UK).

171 Diamond, *supra* note 29, at 234. ("Guild marks also were used to enforce control of the industry, especially territorial trade barriers. Goods appearing on the market outside the approved distribution area could be recognized by their markings.

hallmarking gold started around the year 1300.[172] In medieval England the trademark was a quality assurance stamp,[173] not a marketing device deriving commercial value from socially manipulative marketing campaigns involving celebrities and so on.[174] In ancient times, an expert artisan worried about their trademark being misused to stamp inferior counterfeit goods because that had the potential to destroy their reputation and cost them sales. The trademark worked as a two-way protection since it was a way of tracing substandard goods back to the person who made them to ensure that if they cheated on quality or quantity, they would be traceable. Hence, it did not merely aim to protect the trademark holder's reputation.[175] The quality assurance rationale can be achieved through the use of labelling and packaging laws and thus has no relationship with any claim for protecting the economic income generated from trademarks.[176] A labelling and packaging offense is appropriate, as consumers have a right to know the origin, quality, and quantity of the goods they are purchasing. A consumer has a right to know if what they are buying is real honey or if the diamond they are purchasing is of the clarity, color, and flawlessness as claimed by its rating against the GIA scale. They also have the right to know whether a luxury handbag is genuine or fake. Labelling in this context is simply about protecting consumers from false representations about the quality, origin, and nature of the product they are

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Abuses of these territorial restrictions led to early common-law concepts of unlawful restraint of trade.").

172 Gerald Ruston, *On the Origin of Trademarks*, 45 TRADEMARK REP. 127, 142-44 (1955) ("In England these ends were achieved by a *Statute of Edward 1st in 1300*, which laid down that only members of the Goldsmiths' Company might work gold. All gold plate before sale had to be brought to the local Hall of the Company, where 'sayers' (assayers) 'put it to the touch.' . . . In 1492 Henry VIIIth applied similar provisions to silver work.").

173 Greenberg, *supra* note 28, at 882. ("20 different guilds which were required by statute to display a trade-mark on the guild product. Such guilds included goldbeaters, goldsmiths, armorers, potters, clock makers, stationers, braziers, cabinet makers, engravers, printers, cutlers, tanners, coopers, bakers, brewers, bottle makers, pewterers, shoemakers, weavers, fullers, hatmakers, blacksmiths, founders.").

174 Diamond, *supra* note 29, at 280. ("In sixteenth century England placing a false trademark on cloth or gold or silver was treated the same as counterfeiting money. The penalty was death.").

175 That was the original purpose of trademarks, *see* Phager, *supra* note 39, at 129. For fair labelling laws, see Consumer Protection from Unfair Trading Regulations 2008 (UK).

176 *See e.g.*, The Food Labelling Regulations 1996 (UK); General Product Safety Regulations 2005 (UK); The Footwear (Indication of Composition) Labelling Regulations 1995 (UK).

purchasing.[177] False representations that risk exposing others to a financial loss are criminalized under the *Fraud Act 2006 (UK)*.[178]

Consumers are not harmed if a trademark copier makes it clear that the trademarked items are copies. The defendant could make a fake handbag but discreetly put a label inside the bag stating it is a cheap copy. In such cases, the only purpose of the trademark can be to prevent enrichment from freeriding on the trademark, but freeriding does not setback the financial interests of the trademark holder. Unjust enrichment occurs when a party benefits at the "expense" of another. The legal maxim is that: nobody can be made rich at the "expense" of another (*nemo locupletari potest aliena iactura or nemo locupletari debet cum aliena iactura*). The problem is that freeriding is not at the *expense* of another because it does not cause them an economic loss. A person selling fake handbags that are labelled inside as cheap copies does not eat into the sales of the genuine item because the fake is not an equal alternative. Fakes are purchased by customers who do not have the money to buy the real product, and the genuine product is purchased by those who do have the money and who will only settle for the genuine product. Those who use trademarks on cheap copies are enriched, but this causes no injustice to the trademark holder.[179]

In the 1930s Cohen observed:

> There was once a theory that the law of trade marks and tradenames was an attempt to protect the consumer against the 'passing off' of inferior goods under misleading labels. Increasingly the courts have departed from any such theory and have come to view this branch of law as a protection of property rights in divers economically valuable sale devices. In practice, injunctive relief is being extended today to realms where no actual danger of confusion to the consumer is present, and this extension has been vigorously supported and encouraged by leading writers in the field.[180]

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177 *See e.g.*, Henry's Bullfrog Bees v. Sunland Trading, Inc., 2022 U.S. Dist. LEXIS 34056 (E.D. Cal. 2022) (where the "defendants engaged in a 'worldwide conspiracy to defraud the United States honey market' by 'flooding' the market with 'fake' honey"). *See also* Samuel I. Becher & Jessica C. Lai, *In Consumer Protection We Trust? Re-Thinking the Legal Framework for Country of Origin Cases*, 55 SAN DIEGO L. REV. 539, 556 (2018).

178 The offense found in sections 1 and 2 of the *Fraud Act 2006 (UK)* could catch certain false representations or the tort of passing off might be invoked.

179 Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1043 (2005).

180 Cohen, *supra* note 73, at 814.

Any damage done to the trademark holder from others using its trademark has to be counterbalanced against the harm done to consumers by allowing these manipulative marketing devices to be used to brainwash consumers into paying more for goods. The modern context is that counterfeit luxury goods are usually not associated with the genuine trademarked good: consumers usually know by the price and the circumstances in which they buy the counterfeit goods that they are buying a product that is fake. Genuine Vacheron Constantin watches are not sold at car boot sales and nor are Hermès handbags. Those buying such items for next to nothing in markets, rather than directly from the manufacturers' own retail shops, know they are buying a cheap counterfeit. If those who buy counterfeit goods would never be able to buy the real thing, then the trademark holder does not lose any sales from them buying a counterfeit. If those who normally purchase such items would only settle for the real thing, then the trademark holder loses no sales.[181] As long as the consumer has full knowledge of the fact that the good they are buying is a fake, then there is no case for criminalizing those who freeride on the marketing device created by others to manipulate consumers.

The main normative challenge for the trademark holder is to demonstrate harm. The trademark holder is essentially asserting that they have created a device to inflate the price of certain goods at the expense of consumers and that the harm they are causing to those consumers has to be protected since it ensures greater profits for them. Is an offense carrying a ten-year jail sentence justified to protect excessive rent-seeking from multinational corporations? The degree of any harm is an empirical question that needs empirical investigation to verify, but it seems plausible to assert that the value added by trademarks often has to do with the trademark itself, not the quality of the item. Using supermodels and celebrities to create a brand has nothing to do with quality.[182] Often the value of the brand is fictitious in that it allows for pricing that does not correlate with quality (first-tier watches

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181 Arghavan Nia & Judith Lynne Zaichkowsky, *Do Counterfeits Devalue the Ownership of Luxury Brands*, 9 J. PROD. & BRAND MGMT. 485 (2000) (discussing how research shows that those who want genuine brand -names do not buy counterfeit goods).

182 *See* Patti M. Valkenburg & Moniek Buijzen, *Identifying Determinants of Young Children's Brand Awareness: Television, Parents, And Peers*, 26 J. APPLIED DEVELOPMENTAL PSYCH. 456 (2005) (discussing how using brands to manipulate consumers is particularly acute when children are manipulated); *see generally* FRANK TRENTMANN, EMPIRE OF THINGS: HOW WE BECAME A WORLD OF CONSUMERS, FROM THE FIFTEENTH CENTURY TO THE TWENTY-FIRST (2016).

vary considerably in price, but the quality of one high-end watch is similar to that of the next), but more to do with marketing. The rationale for trademark protection in the twenty-first century is purely to protect commercial interests and large corporations are *unlikely* to litigate to protect consumers.[183] They litigate to protect their commercial interests and have successfully had trademark protection extended further and further.[184]

Trademarking is a form of manipulation that can be psychologically harmful[185] and leads to consumers blindly accepting inflated prices.[186] It can also cause underage consumers to engage in harmful conduct such as smoking and drinking alcohol.[187] Market prices do not just depend on scarcity, need, desire, and want. There is no high demand for bottles of seawater since no one needs it, desires it, wants it, and it is not scarce, but there is high demand for smartphones as they are desired, wanted, needed (needed as a necessity for many jobs), and are not unlimited in plentifulness in the way that seawater is.[188] However, a piece of dead cow or crocodile stitched into a handbag is not needed any more than a canvas alternative, and handbags are hardly scarce—so the idea of brand-name, trademark, and social manipulation via media campaigns to convey a message of scarcity in relation to luxury handbags, artificially adds disproportionate value where there is little extra value in substance.[189] The careful workmanship and quality will add some value to a luxury item, but the bulk of the value

183 *See generally* Robert E. Carter & David J. Curry, *Transparent Pricing: Theory, Tests, and Implications for Marketing Practice*, 38 J. ACAD. MKTG. SCI. 759 (2010).

184 Michael S. Mireles, *Aesthetic Functionality*, 21 TEX. INTELL. PROP. L.J. 155, 157 (2013).

185 Wiktor Razmus & Paweł Fortuna, *Someone Like Me: The Role of Consumer Brand Engagement and Social Identification in the Perception of Luxury Brand Users*, 21 J. CONSUMER BEHAV. 1190, 1198 (2022); *see generally* Xueli Zhu, Yaoguo Geng, Yilin Pan & Liping Shi, *Conspicuous Consumption in Chinese Young Adults: The Role of Dark Tetrad and Gender*, CURRENT PSYCH. (2022).

186 LUC BOLTANSKI & ARNAUD ESQUERRE, ENRICHMENT: A CRITIQUE OF COMMODITIES (2020).

187 *See* Andrew Edgecliffe-Johnson, *Juul Labs to Pay $438.5mn to Settle Underage Vaping Investigation by US States*, FIN. TIMES (Sept. 6, 2022), https://www.ft.com/content/1c5a5217-3d5b-4ec1-b002-b6714acb38e5 [https://perma.cc/RKZ8-MSH6].

188 Harris, *supra* note 71, at 56 ("Social wealth' comprises all those things and services as to which there is a greater potential total demand than there is a supply.").

189 George E. Newman, Gil Diesendruck & Paul Bloom, *Celebrity Contagion and The Value of Objects*, 38 J. CONSUMER RSCH. 215 (2011); Dipayan Biswas, Abhijit Biswas & Neel Das, *The Differential Effects of Celebrity and Expert Endorsements on Consumer Risk Perceptions: The Role of Consumer Knowledge, Perceived Congruency, and Product Technology Orientation*, 35 J. ADVERT. 17 (2006).

is added through trademarking and manipulative advertising.[190] It cannot cost $10,000 to make a small leather handbag if an exact copy can be made for $250.[191] If the luxury handbag was sold at a reasonable price based on quality, rather than the inflated price created by the branding (trademark) campaign, then there would be no demand to support a counterfeit market. The trademark itself creates the demand for the counterfeit good.

For hundreds of years scholars have looked at the idea of misleading consumers with confusing trademarks.[192] But nearly all modern criminal cases have not involved confusion, they have instead hinged on patently obvious counterfeiting where the consumer knew by the price and the circumstances of their purchase that they were purchasing counterfeit goods.[193] Nonetheless, there are products such as trademarked t-shirts that are not sufficiently high end to avoid confusion.[194] Thus, it is this part of the market that needs consumer "labelling" laws applied, not laws creating trademark monopolies. A consumer will know that a genuine Hermès handbag will not be on sale in a local market, but they might believe that a trademarked t-shirt could be sold at such a venue. One way to limit the scope of liability and prevent overcriminalization would be to require proof that consumers were in fact deceived. Such an offense would be consumer oriented rather than commerce oriented.

G. *Design Rights*

U.S. patent design protection only protects shapes, whereas the English law of design rights overlaps with trademarks in that they protect logos and also protect the shape of a design, its texture, its parts,

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190 Edward S. Rogers, *Account of Some Psychological Experiments on the Subject of Trade-Mark Infringement*, 18 MICH. L. REV. 75 (1919-1920) (where the experiment concerned Coca-Cola v. Chero-Cola).

191 The copies are so good that science is being used to detect them. *See* Jianbiao Peng, Beiji Zou, Xiaoyu He & Chengzhang Zhu, *Hybrid Attention Network with Appraiser-Guided Loss for Counterfeit Luxury Handbag Detection*, 8 COMPLEX INTELLIGENT SYS. 2371 (2022).

192 Phager, *supra* note 39, at 129; Greenberg, *supra* note 28, at 883 (internal citation omitted) ("[A]ny person who is in the least acquainted with the books of our production cannot fail to observe that this is an impudent fraud; for the head of the dolphin is turned to the left, whereas that of our is well known to be turned to the right.").

193 BAKER, *supra* note 44.

194 *See* R. v. Blenkiron [2022] EWCA Crim 669.

and its shading.[195] China does not have specific design offenses.[196] Trademarks relate to goodwill and branding that has been established, so they differ from designs in that sense. Many products will have their design protected,[197] their trademark protected,[198] and also be subject to a utility patent.[199] For example, the design of an iPhone would be protected by design rights, the Apple logo[200] on it by a trademark, and its mechanisms/technology by a patent.

IV. THE INJUSTICE OF CRIMINALIZING NON-CONSENSUAL INTELLECTUAL PROPERTY USE

An amalgam of deontological and consequentialist justifications has been put forward to rationalize intellectual property rights. Deontological justifications usually aim to defend intellectual property as something that the creator or owner has a "right" to have and control. The deontological justification usually rests on desert or dignity/personality claims.[201] Meanwhile, consequentialist claims cut both ways and supply not only justifications for intellectual property rights but also justifications against such rights. An amalgam of the desert and utility justifications for recognizing intellectual property rights is that such rights allow the creator to receive a deserved reward for their intellectual effort while incentivizing the creator to continue to strive for new creations. The core consequentialist claim put forward to justify intellectual property is that it is a necessity for incentivizing intellectual effort and investment in research and innovation.

The utilitarian justification, put in its simplest form, holds that society benefits from innovation because it increases the overall wealth of society. This sort of simplistic utilitarian analysis does not factor in how the increased wealth ought to be distributed. It also does

195 *See generally* JOHN SYKES, INTELLECTUAL PROPERTY IN DESIGNS (2014).

196 Xu Sun, Xiaosong Zhou, Qingfeng Wang, Pinyan Tang, Effie Lai-Chong Law & Sue Cobb, *Understanding Attitudes Towards Intellectual Property from the Perspective of Design Professionals*, 21 ELEC. COM. RSCH. 521 (2021).

197 Samsung Electronics (UK) Ltd v. Apple Inc [2012] EWHC 1882; Bayerische Motoren Werke AG v. Round & Metal Ltd. [2012] EWHC 2099.

198 Lego Juris A/S v. Mega Brands Inc [2007] E.T.M.R. 11.

199 Patents Act 1977 (protects patented technology if the relevant tests are satisfied).

200 Cesar J. Ramirez-Montes, *Trade Marking the Look and Feel of Business Environments in Europe*, 25 COLUM. J. EUR. L. 75, 88 (2019).

201 *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 331 (1988) (explaining that the European justification for intellectual property is based on ideas of dignity or personality).

not factor in that the same amount of wealth or even greater wealth could be created by sharing intellectual knowledge from the beginning.[202] Incentive optimality surely would be reached at the point where all the contributing creators have received reasonable, proportionate, and deserved/earned incentivizing rewards.[203] Incentivizing optimality would be reached well in advance of the point where the monopoly facilitates excessive rent-seeking. The main criticism of intellectual property monopolies has been that they hinder the common use of valuable knowledge by pricing others out of the knowledge market and that it leads to unfair wealth distribution by facilitating what economists call "rent-seeking." The nature of rent-seeking is summed up succinctly in the following passage:

> The 'profit share' is implicitly the opportunity cost of rent-seeking on society; it is income neither distributed to labor for work, nor to the future productive potential of the economy, but captured by the most wealthy and powerful segments of society for the purposes of furthering their wealth and power.[204]

Utilitarian justifications cannot explain the utility of allowing excessive and disproportionate rent-seeking. If a firm is able to reap high commercial profits from within its own jurisdiction, then there is no utility in also awarding it a monopoly in other jurisdictions.[205] For example, there is no utility in using copyright to protect U.S. films played in Chinese cinemas because the U.S. market alone provides a sufficient economic incentive for producing such films. There is no utility

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202 BOLDRIN & LEVINE, *supra* note 14, at 998.

203 David Weissman, *Zone Morality*, 44 METAPHILOSOPHY 589, 600 (2013) ("The utilitarians' distribution principle (the greatest good for the greatest number) evokes the possibility of a Leibnizian solution to social conflict and inequality; it promotes well-being for all by directing us to create the civic harmony of persons and systems satisfied by an equitable distribution of goods and services.").

204 Lachlan Carey & Amn Nasir, *Something for Nothing? How Growing Rent-seeking is at the Heart of America's Economic Troubles*, J. PUB. & INT'L AFFS. (May 28, 2019), https://jpia.princeton.edu/news/something-nothing-how-growing-rent-seeking-heart-americas-economic-troubles [https://perma.cc/P9FN-UYLX].

205 Heinz Feldmann, Steven M. Jones, Kathleen M. Daddario-DiCaprio, Joan B. Geisbert, Ute Ströher, Allen Grolla, Mike Bray, Elizabeth A. Fritz, Lisa Fernando, Friederike Feldmann, Lisa E. Hensley & Thomas W. Geisbert, *Effective Post-Exposure Treatment of Ebola Infection*, 3 PLOS PATHOGENS e2 (2007) (Of course, there could be rare cases where the product is made for a foreign country and has no use in the country where it is created as was the case with the Ebola vaccine. The pioneering creators of the vaccine were John Rose of Yale University and Heinz Feldmann of Philipps-University Marburg in Germany, but the vaccine was never used in Germany or the USA, it was used in West Africa.).

in granting seventy-year intellectual property monopolies if a two-year monopoly is a sufficient incentive for stimulating intellectual creation. Once a company has obtained proportionate and deserved (incentivizing) profits, there is no utility in letting it obtain additional profits at the cost of fair competition. It is difficult to reconcile monopolies that allow for excessive rent-seeking with the ideas of reciprocity and community that are central to communitarianism. Chinese Communitarianism supports intellectual resources being publicly useable for the common good.[206] In the context of communitarianism, imagine the following knowledge being used without restriction for the common good:

> The expiration of a patent protecting its blockbuster antidepressant Prozac in 2001 resulted in a loss of almost 70 per cent of its market and $2.4 billion in annual U.S. sales. This effect of generic competition is beneficial for society, as it reduces the financial pressure on healthcare budgets and increases the accessibility of drugs.[207]

Generic competition also would have reduced the prices of Covid vaccines significantly:

> If companies primarily only need to recover their manufacturing costs, along with a reasonable profit that is acceptable to both sellers and buyers, then the question is what should a fair vaccine price be? AstraZeneca has said it is selling its Oxford-based vaccine without profit during the global pandemic, but its inter-country price per dose varies – $2.15 in Europe, $3–4 in the USA and $5.25 in South Africa – and the lack so far of any independent verification of cost raises the question of the veracity of its claim. According to a BMJ report in January 2021, Moderna and Pfizer were charging more affluent nations and the EU for their mRNA vaccines with prices ranging from $14.70 to $23.50 a dose. Do their costs of developing and manufacturing vaccines, net of

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206 "Once claims of need have been met, we should like our property system to assign goods in rough proportion to individual desert . . . . Equity therefore demands that rights over these resources be divided between the community and the immediate user, the community using its residual rights to ensure equal access for newcomers and to prevent existing users from enjoying monopolistic advantage." David Miller, *Justice and Property*, 22 RATIO 1, 12-13 (1980); *see also* Ya Lan Chang, *Communitarianism, Properly Understood*, 35 CANADIAN J.L. & JURIS. 117 (2022).

207 Olga Gurgula, *Strategic Patenting by Pharmaceutical Companies – Should Competition Law Intervene?* 51 IIC – INT'L R. INTELL. PROP. & COMPETITION L. 1062 (2020).

> public subsidies, justify these prices, or are the companies just 'making a killing' as a recent BMJ commentary put it?[208]

The criminal law ought not to be used to ensure that a corporation earns 1,000% profit rather than 100% profit. Stiglitz expounds:

> The problem is that intellectual property rights circumscribe the use of knowledge and thus, almost necessarily, cause inefficiency. Not only does intellectual property create a distortion by restricting the use of knowledge, but it also does something even worse: it creates monopoly power. Monopoly leads not just to inequities but also to major distortions of resource allocations; limiting monopoly power and its abuses is the focus of anti-trust policy. There is a quandary. We not only tolerate this distortion and inefficiency by restricting the use of knowledge, which creates monopoly power, but we sanction it: it is part of our legal framework because we hope it will promote innovation.[209]

Distortion results not only from an unfair distribution of the rewards of intellectual creation but also from rent-seeking being the main criterion for choosing what intellectual creations to fund. Most corporations choose to develop areas that are likely to produce high-profit margins.[210] Under the current intellectual property system there is little incentive for corporations to invest in important research that cannot be monetized to the maximum. Marginal profits are not what shareholders and rent-seeking executives aim for. It is true that many inventions and copyrighted materials are financial flops that never take off, but that can be said of any product whether it be tangible or intangible and that is a normal cost of doing business. Criminal offenses creating intellectual property monopolies cannot be justified on the grounds that many patents and copyrighted materials fail to generate a profit.

The problem with relying on intellectual property monopolies to incentivize investment in innovation is that a corporation is more likely to invest in a cure for male pattern baldness, due to the size of the potential market for that product, rather than a cure for some

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208 Donald W. Light & Joel Lexchin, *The Costs of Coronavirus Vaccines and Their Pricing*, 114(11) J. ROYAL SOC'Y MED. 502 (2021).

209 Stiglitz, *supra* note 2, at 1700, 1704.

210 For example, "[t]he [Covid-19] vaccine brought in $3.5 billion in revenue in [its first] year, nearly a quarter of its total revenue, Pfizer reported." Rebecca Robbins & Peter S. Goodman, *Pfizer Reaps Hundreds of Millions in Profits from Covid Vaccine*, N.Y. TIMES (May 4, 2021), https://www.nytimes.com/2021/05/04/business/pfizer-covid-vaccine-profits.html [https://perma.cc/A3UT-WZ9F].

serious illness that only affects a few people.[211] University researchers would have equal motivation to dedicate time to either project. The academics who formulated the Covid vaccines were not primarily incentivized by money,[212] but rather they were incentivized by a desire to get the science to work. The academics who developed the Astra-Zeneca Covid vaccine demanded that it be sold at cost during the pandemic. The predominant thing incentivizing them was scientific curiosity and communitarianism ideals, not profit.[213] Inducements can come from non-financial incentives. For example, it has been reported that "[t]he biggest information product in the world – Wikipedia – is made by volunteers for free, abolishing the encyclopedia business and depriving the advertising industry of an estimated $3bn a year in revenue."[214]

Other examples of major tech being developed outside the legal protection of intellectual property laws include free software services such as Mozilla Firefox, Apache, and Linux. The consequentialist model holds that intellectual property protections allow innovators to create more wealth for everyone, but even if that were true it would not provide any deontological guidance about how to fairly distribute

211 Dirk Czarnitzki & Cindy Lopes-Bento, *Innovation Subsidies: Does the Funding Source Matter for Innovation Intensity and Performance? Empirical Evidence from Germany*, 21 INDUS. & INNOVATION 380 (2014).

212 Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 26 (S.D.N.Y. 1992) ("In an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure.").

213 One can find plenty of examples of the best research coming from universities rather than from capital-protecting incentives and of taxpayers having to fund the private sector to incentivize it. "[P]ublic funding to corporations has directly or indirectly financed all phases of vaccine research, development, testing and manufacturing, including the development of the innovations on which the RNA platform (mRNA) and other vaccines are based. Billions in funding from taxpayers, multiple branches of the United States (USA) government, from the European Union (EU) and countries such as Germany, has been so extensive that there is little investment or sunk costs for corporations to recover . . . ." Light & Lexchin, *supra* note 208.

214 Paul Mason, *The End of Capitalism Has Begun*, THE GUARDIAN (July 17, 2015, 6:00 AM), https://www.theguardian.com/books/2015/jul/17/postcapitalism-end-of-capitalism-begun [https://perma.cc/YXN4-5HG2]. *See also* Stiglitz, *supra* note 2, at 1697 ("Look at the basic idea underlying the computer, Alan Turing's 'Turing Machine': it was not protected by the patent system. Ideas like asymmetric information are not covered by intellectual property. Another example of important innovations not driven by IPR is the open source movement, which has been particularly successful in software.").

that wealth to prevent inequality and waste.[215] A great deal of wealth is wasted in the intellectual property monopoly system because often more is spent on advertising campaigns to promote trademarked goods and legal campaigns to maintain the monopoly than on research itself.[216] The monopoly provided by intellectual property law is a device that is used to ensure that the wealth created is not distributed fairly. Notwithstanding the cornucopia of justificatory and disjustificatory arguments for intellectual property, no economist has put forward a sound economic theory that supports intellectual property. *Per contra*, many leading economists (including at least two winners of the Nobel Prize in Economic Sciences)[217] have demonstrated the disutility of intellectual property monopolies. Boldrin and Levine expound:

> There is little doubt that providing a monopoly as a reward for innovation increases the incentive to innovate. There is equally little doubt that granting a monopoly for any reason has the many ill consequences we associate with monopoly power—the most important and overlooked of which is the strong incentive of a government-granted monopolist to engage in further political rent seeking to preserve and expand its monopoly or, for those who do not yet have a monopoly, to try to obtain one. These effects are at least to some extent offsetting: while the positive impact of patents is the straightforward partial equilibrium effect of increasing the profits of the successful innovator to the monopolistic level, the negative one is the subtler general equilibrium effect of reducing everybody else's ability to compete while increasing for everyone the incentive to engage in socially wasteful lobbying efforts.[218]

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215 Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV., PAPERS & PROC. 347, 354-59 (1967); Michelle Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 MOD. L. REV. 6 (2013).

216 Stiglitz, *supra* note 2, at 1713 ("The drug companies spend more money on advertising and marketing than they do on research. Moreover, the directions in which they allocate their research budget do not accord well with broader social objectives: they spend more money on lifestyle drugs, such as for hair regrowth, than they do on lifesaving drugs. So, there is a lot of what you might call 'leakage' in this particular tax system: It is an inefficient tax in failing to deliver the revenue into the important areas of research, where it should go."). *See also* Joseph P. Liu, *Fair Use, Notice Failure, and the Limits of Copyright as Property*, 96 B.U. L. REV. 833, 833 (2016).

217 Stiglitz, *supra* note 2; *see also*, Paul Krugman, *Profits Without Production*, N.Y. TIMES (June 20, 2013), https://www.nytimes.com/2013/06/21/opinion/krugman-profits-without-production.html [https://perma.cc/T73Z-MDTW].

218 Michael Boldrin & David K. Levine, *The Case Against Patents*, 27 J. ECON. PERSPS. 3, 7 (2013).

Deontological constraints based on desert could apply to rent-seeking,[219] but an easier solution is to force the rent-seeker to compete in the open market by removing the monopoly protections. Increasing competition itself would lead to a far fairer distribution of the economic output of intellectual creations. Competition would lead to better distribution than the current system of monopoly. Intellectual property monopolies and data monopolies are an anathema to fair competition. Data mining and data monopolies are now major rent-seeking mechanisms.[220] Mining goods is not a new phenomenon, but traditionally mining involves the miner having to obtain a license to mine.[221] There is a difference in mining gold or iron ore with a government license to mining data that belongs to individuals without their consent.[222] Intellectual property monopolies have helped certain players establish data monopolies and thus monopolize the online advertising and search engine markets.[223] Laissez-faire capitalism leaves all matters to the competitive market to determine and thus does not support government intervention by way of state-sponsored intellectual property monopolies.[224] Such monopolies not only reduce the fair distribution of the economic output of intellectual creations but create a non-competitive market for the end product thereby artificially inflating consumer prices.

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219 Salary ratios (i.e., limit CEO and senior management salary to 20 times that of the lowest paid employee—with rungs along the salary ladder based on skill and experience) could better calibrate the distribution of income within a corporation. On the problem of inequality in distribution and its causes, see Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421 (2020); Barney Hartman-Glaser, Hanno Lustig & Mindy Z. Xiaolan, *Capital Share Dynamics When Firms Insure Workers*, 74 J. FIN. 1707 (2019).

220 Francis Fukuyama, Barak Richman & Ashish Goel, *How to Save Democracy from Technology: Ending Big Tech's Information Monopoly*, FOREIGN AFFS. (Jan/Feb, 2021), https://www.foreignaffairs.com/articles/united-states/2020-11-24/fukuyama-how-save-democracy-technology [https://perma.cc/8BLJ-B9A2]; Peter Seth Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 147 (2016).

221 Emma Dawson, *If Australia's Resources were Taxed the way Norway's are, We Could Secure the Future of our Schools*, THE GUARDIAN (Feb. 23, 2020), https://www.theguardian.com/commentisfree/2020/feb/24/if-australias-resources-were-taxed-the-way-norways-are-we-could-secure-the-future-of-our-schools [https://perma.cc/8BG2-UJ3W].

222 Kai Hao Yang, *Selling Consumer Data for Profit: Optimal Market-Segmentation Design and its Consequences*, 112 AM. ECON. REV. 1364 (2022).

223 Daniel Gervais, Martin L. Holmes, Paul W. Kruse, Glenn Perdue & Caprice Roberts, *Is Profiting from the Online Use of Another Property Unjust - The Use of Brand Names as Paid Search Keywords*, 53 IDEA 131 (2013).

224 DAVID MILLER, MARKET, STATE, AND COMMUNITY ch. 6 (1990).

A. *Desert and the Distribution of Intellectual Property Wealth*

The Lockean approach assumes that intellectual property rights are deserved by creators or anyone who purchased the intellectual property with money earned through deserved means.[225] At the outset it is worth noting that Locke's labor theory does not factor in the windfall nature of certain copyrightable material. A biography written by a ghostwriter for a very average celebrity can produce income that has no relationship with skill and effort, while the efforts of a great intellectual who has written an important economics monograph might have a very limited audience and thus produce a financial reward that does not match the skill and effort expended to produce it.

The reality is that the most commercially valuable intellectual property (i.e., vaccines, touchscreens, etc. are normally the result of a combination of dozens of inventions and inventive steps in a long chain process) is the work of thousands of people over decades. Lord Stanley spoke against patent protections in 1868 because principally he doubted that it would be possible to limit any rewards in proportion to the effort expended.[226] How to distribute economic output is a vexed question.[227] Some argue that fair distribution can be achieved through taxation, while others argue that the economic income needs to be fairly distributed in advance of taxation.[228] There is little evidence that intellectual property laws reward proportionate desert based on intellectual creation.[229] For example, the wealth accumulated by

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225 Desert and distribution are a wider problem that cannot be explored in this essay. *See e.g.*, Heather Milne, *Desert, Effort and Equality*, 3 J. APPLIED PHIL. 235 (1986); David B. Annis & Cecil E. Bohanon, *Desert and Property Rights*, 26 J. VALUE INQUIRY 537 (1992); Jonathan Adler, *Luckless Desert is Different Desert*, 96 MIND 247 (1987); Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, PRINCETON UNIV. PRESS (1970).

226 Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century* 10 J. ECON. HIST. 1, 20 (1950).

227 A notable work that stimulated great debate in this area was JOHN RAWLS, A THEORY OF JUSTICE (HARV. UNIV. PRESS 1971); JOHN RAWLS, THE LAW OF PEOPLES (HARV. UNIV. PRESS 1999). Rawls' theory proceeded on two premises (it put forward a method concerning decision making "behind the veil of ignorance"—that method does not look so fanciful in the age of artificial intelligence as clearly a well formulated algorithm could operate behind a veil of ignorance. The algorithm in the "original position" might apply something akin to Rawls' second principle of justice concerning equality. *See* DENNIS J. BAKER & PAUL H. ROBINSON, ARTIFICIAL INTELLIGENCE AND THE LAW: CYBERCRIME AND CRIMINAL LIABILITY ch. 1 (2021).

228 THOMAS PIKETTY, THE ECONOMICS OF INEQUALITY (2015).

229 Jeff Parsons, *It Takes Elon Musk 1 Minute 47 Seconds To Earn An Average UK Annual Salary*, THE METRO (Nov. 18, 2021), https://metro.co.uk/2021/11/18/it-

businesspersons such as Jobs and Musk[230] rests on intellectual and data monopolies, not on intellectual creation.[231] Tesla is rightly named after the inventor Nikola Tesla, but electric vehicles were in commercial operation in London in 1906.[232]

It has been reported that Facebook was not created by Zuckerberg.[233] It is also well known that Bill Gates's fortune was made from intellectual property rights starting from an intellectual creation his business partner purchased from another.[234] It was Gates's business partner Paul Allen who purchased Dirty Operating System ("QDOS") written by Tim Paterson, and it was also Allen who came up with the name "Micro-Soft."[235] Gates's wealth and power are undeserved and disproportionate to any brain work from him personally or any brain work or effort possible from any single human being.[236] After all, the

takes-elon-musk-1m-47secs-to-earn-an-average-uk-annual-salary-15622824/ [https://perma.cc/K6DR-PX8A].

230 Jobs was a marketing visionary who anticipated the sorts of tech products that might appeal to consumers, but he was not a computer scientist and relied on others to invent and make the products work. PATRICIA LAKIN, STEVE JOBS: THINKING DIFFERENTLY (2015). Similarly, Musk is not an inventor but is masterful at identifying areas to generate consumer excitement and demand. CJ Werleman, *The Media Needs to Stop Pretending that Elon Musk is a Wise Sage Rather than a Grifter*, THE BYLINE TIMES (May 11, 2020), https://bylinetimes.com/2020/05/11/the-media-needs-to-stop-pretending-elon-mask-is-a-wise-sage-rather-than-a-grifter/ [https://perma.cc/29DM-5BXG].

231 ROBERT B. REICH, THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT (2020).

232 The first electric bus service in London in 1907 was between London's Victoria Station and Liverpool Street. There were twenty of these battery-powered buses operated by The London Electrobus Company. Mick Hamer, *All Aboard!*, *in* NEW SCIENTIST, 35-37 (2017). Unlike electric cars, these were not rent-seeking data harvesters.

233 Christopher Tao, *Exchanging Shares to Settle A Lawsuit: Should a Confidentiality Agreement Bar Evidence of Securities Fraud?*, 14 CARDOZO J. CONFLICT RESOL. 973, 974 (2013).

234 QDOS (Quick and Dirty Disk Operating System), 86-DOS (a command-line operating system) was developed by Tim Paterson at SCP (Seattle Computer Products). Gerald O'Regan, *MS/DOS Operating System*, *in* THE INNOVATION IN COMPUTING COMPANION: A COMPENDIUM OF SELECT, PIVOTAL INTENTIONS 201-04 (2018). *See also* Stiglitz, *supra* note 2, at 1702 ("The courts and regulators in the United States, in the European Union, and in South Korea have all ruled against Microsoft. There is little disagreement about the fact that Microsoft has engaged in abusive, anticompetitive practices. The only debate is what to do about it; because Microsoft has so much monopoly power and has obtained such a dominant position, it is not easy to figure out how to deal with the problem.").

235 Shane Greenstein, *The Long Arc Behind Bill Gates' Wealth*, 28(1) IEEE MICRO 4 (2008).

236 The lack of empirical evidence is not a new problem. *See* Murray Rothbard, *Monopoly and Competition*, *in* MAN, ECONOMY, AND STATE WITH POWER AND MARKET 658-59 (1962).

desert theory rests on personal effort and advocates for "the absolute and indefeasible right which every brain-worker has to the produce of his brain, just as the hand-worker has to the produce of his hands."[237] Often research is funded by public money, not by private investors. As Hayes points out in relation to the iPhone:

> A brief analysis of these research breakthroughs reveals a research web of over 400,000 publications since Apple first published their phone patent in 1997. Add the factor of supporting researchers, funders, universities and companies behind them, and the contributing network is simply awe-inspiring. And we've barely scratched the surface. There are countless other research breakthroughs without which the iPhone would not be possible. Some well-known, others less so. Both GPS and Siri had their origins with the U.S. military, while the complex algorithms that enable digitization were initially conceived to detect nuclear testing. All had research at their core.
>
> The iPhone is an era-defining technology. Era-defining technologies do not come from the rare brilliance of one person or organization, but layer upon layer of innovation and decade upon decade of research, with thousands of individuals and organizations standing on each other's shoulders and peering that bit further into the future. In our age of seemingly insurmountable global challenges, we must not only remember this but be inspired by it.[238]

It is a very complex problem trying to determine the labor desert back through a long intellectual chain of creations. It is perhaps impossible to come up with a proper formula for determining who ought to receive what in such a chain of creation.[239] The brain work of an academic would not produce a viable living in a royalty system, while the scriptwriter of an average film might reap the life salary of a math professor for a single year of writing. Should it be valued on how much

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237 *A Law of Intellectual Property*, 9 W. JURIST 265, 270 (1875).

238 Matthew Hayes, *Who Invented The iPhone?: It All Depends On What You Mean By "Invented"*, *in* AMERICAN SCIENTIFIC (2018).

239 *Id.* ("[T]here were hundreds of research breakthroughs and innovations without which the iPhone would not even be possible. Each was the result of countless researchers, universities, funders, governments and private companies layering one innovation on top of another . . . . One Apple patent on touch-screen technology cites over 200 scientific peer-reviewed articles, published by a range of academic societies, commercial publishers and university presses. These authors did not work alone. Most were part of a research group. Many were awarded a grant for their research. Each had their article independently evaluated by at least one external academic in the peer-review process that sits at the core of academic research.").

IQ is used in the production process or on the potential audience size for the material produced? There is no current imputation formula that allows for fair imputation of economic output in exact proportion to labor input that takes place by many actors over decades. The simple way to make progress is to remove intellectual property monopolies and let competition in an open market do the work. Obviously, that will not result in a fair distribution of the economic output in proportion to the effort put in by the various creators over many decades, but it would achieve greater fairness than the current model which facilitates rent-seeking. Rent-seeking has no link whatsoever with desert.

Even those who support the Lockean justification for intellectual property would have to acknowledge that he caveated against the sort of waste that would result from rent-seeking.[240] "According to [Locke's] reasoning, creators deserve exclusive intellectual property rights in their creations, but should not be granted such rights if or when doing so would unduly restrict the size and richness of the commons[241] or would 'waste' ideas."[242] Excessive intellectual property wealth in the hands of a few results in a wasteful allocation of a valuable resource.[243]

Patent disputes usually involve large corporations rather than individuals and are primarily about protecting rent-seeking[244] and profit margins.[245] This has already been seen in the profiteering that took

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240 Miller, *supra* note 206, at 5.

241 *Forest Charter*, *in* 1 STATUTES OF THE REALM, *Chatters of Liberties,* nos. 10 & 12 at ch. 17 (Record Commission *1810-2B,* Nicholas Robinson trans., 2013) (commons in the tangible sense of property was protected by the *Charter of the Forest 1217*).

242 *See* Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 462 (2013); *cf.* the personality justification for protecting intellectual property rights. "[P]ersonality theory has also been used to support an argument for heightened protection of intellectual property beyond that given to other forms of property - such as the Continental 'moral' right of artists in their creations." Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 453 (2006).

243 Joseph E. Stiglitz, *Knowledge as a Global Public Good*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 308, 308-25 (Inge Kaul *et al*., eds., 1999); GUY STANDING, PLUNDER OF THE COMMONS: A MANIFESTO FOR SHARING PUBLIC WEALTH (2019).

244 Ari Levy & Lori Konish, *The Five Biggest Tech Companies Now Make Up 17.5% of the S&P 500 — Here's How to Protect Yourself*, CNBC (Jan. 28, 2020, 4:00 PM), https://www.cnbc.com/2020/01/28/sp-500-dominated-by-apple-microsoft-alphabet-amazon-facebook.html [https://perma.cc/BX6F-JB6M].

245 *See* Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J. LAW & ECON. 525 (2001).

place during the pandemic of 2020.[246] The removal of intellectual property protections would have made vaccines far cheaper for taxpayers.[247] The ability to price goods at a monopoly premium is akin to being able to levy a private tax, and it distorts the market and puts disproportionate wealth into the hands of a few.[248] The latest monopoly that is helping create enormous wealth is exclusive control over large amount of data.[249] "There is no apparent limitation on the level of private tax that may be collected, and no concept of progressive taxation such as might ordinarily be adopted by a government taxing authority. Moreover, there is no restriction on what uses may be made of the tax."[250]

B. *Harm to the Interests of the Monopoly Holder*

The harm principle is widely acknowledged as providing some guidance as to when it is fair to invoke the criminal law to deter wrongs. The prevailing modern development of that theory is that by Feinberg. Feinberg made the following observation in relation to economic harm:

> The law of burglary protects not only the pauper who would be ruined by the theft of his welfare check, but also the millionaire for whom a thousand-dollar bill has less utility than a penny has for a child. . . . Moreover, the invasion of any person's financial interests threatens the general security of

246 GERMÁN VELÁSQUEZ, *Intellectual Property and Access to Medicines and Vaccines*, *in* VACCINES, MEDICINES AND COVID-19: HOW CAN WHO BE GIVEN A STRONGER VOICE 73-92 (2022).

247 Stiglitz rightly points out that the social value in inventions is simply that corporation X brought it out at a certain point in time, even though the same thing would have been invented by another in the near future. The social value is getting the invention in 2022, rather than in 2025, etc. *See* Stiglitz, *supra* note 2, at 1707. Even Einstein's theory would have been coined by another by now. The same can be said of novels/movies, many of them are similar and the stories, plots, and themes reproduce with only shades of differences.

248 Gregory Day, *Competition and Piracy*, 32 BERKELEY TECH. L.J. 775, 789 (2017) ("In fact, intellectual property rights encourage patent and copyright holders to engage in anticompetitive behaviors that would ordinarily violate antitrust laws."). Stiglitz also refers to it as a tax. *See* Stiglitz, *supra* note 2, at 1713.

249 Fukuyama, Richman & Goel, *supra* note 221.

250 *See* Frederick M. Abbott, *Rethinking Patents: From 'Intellectual Property' To 'Private Taxation Scheme'*, *in* KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY 1-2 (Peter Drahos, Gustavo Ghidini & Hanns Ullrich ed., 2015).

> property, and the orderliness and predictability of financial affairs in which everyone has an interest, however small.[251]

It is not difficult to satisfy the harm principle threshold for justifying criminalization if the focus is just on the economic loss caused by those who infringe intellectual property rights.[252] In the law of theft, the property need only have a trivial value to be described as property for the purposes of theft.[253] However, *ex ante* criminalization decisions do not merely examine the potential harm that might be caused by infringing a legally created intellectual property right. *Ex ante* criminalization decisions have to examine the normativity of the economic right that is being proposed for criminal law protection. It has been argued above that, normatively, when a corporation or individual is distributed grossly disproportionate income from monopoly protections, that is wrongful rent-seeking because it results from uncompetitive behavior and harms the information commons.[254] It is also wrongful in that it results in inflated and unfair consumer prices.

If the state deems something to be property and deems that certain people are entitled to have a grossly disproportionate share of the wealth of a nation,[255] then the criminal law has to apply uniformly to protect their property interests as well as those of a nearly penniless person. But this is not talking about protecting property that has been accumulated, rather it is about having laws including criminal laws that allow a few to accumulate grossly disproportionate wealth from unfair competition. The issue is whether the criminal law ought to be used to protect against unfair competition and thus facilitate anti-competitive rent-seeking. Obviously, if the positive law allows a person to lawfully accumulate a billion dollars from an intellectual property monopoly, the law of theft would have to protect their fortune. The focus is on whether the holder of the monopoly is "wrongfully" harmed by not allowing them to have a monopoly to start with. Being denied a monopoly certainly would set back the economic interests[256] of the

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251 JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW § 7 (Oxford Univ. Press 1984).

252 DENNIS J. BAKER, THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW'S AUTHORITY (Ashgate 2011).

253 BAKER, *supra* note 44, at 1606.

254 BOLDRIN & LEVINE, *supra* note 14.

255 Compare the mining oligarchs in Australia to the system in Norway where natural resources are managed for the benefit of the country rather than a few private families.

256 Often freeriding and unjust enrichment are raised as justifications for intellectual property monopolies such as trademarks, but these do not concern a set-back of

putative monopoly holder, but not in a wrongful way. The harm principle requires any harmdoing to also be morally wrong.

Is a commercial enterprise wronged by being forced to operate in a competitive intellectual property market?[257] It can be seen that there is no normative case for holding that the removal of intellectual property monopolies would wrong those who benefit from them. An inter-subjective analysis of intellectual property monopolies[258] supports the normative claim that they result in unfair rent-seeking and harmful anti-competitive conduct.[259] *Per contra*, moral rights apropos intellectual property ought to be protected because it is only right that historic records are accurate and that inventions, original books, and peer-reviewed research in articles, monographs, and treatises are appropriately attributed to the creator of those intellectual works. It is also right that such works not be altered and distorted. Perhaps the criminal law has a role to play where the protection is limited to protecting moral rights, but it does not have any role to play in facilitating market domination and excessive rent-seeking activities.[260]

There are non-economic harm justifications for protecting moral rights. The mental harm caused by plagiarism might be serious even when there is no financial harm.[261] A professor who writes a major treatise will not want to see others claiming authorship of their work. Therefore, there is a case for using the criminal law to protect moral rights. Moral rights ought to be protected indefinitely, to keep historic records as accurate as possible for future generations.[262] There is a need to use the criminal law to protect moral rights because civil litigation is too expensive and out of the reach of many in low-income professions such as academe.[263] As noted above, it is very unlikely that

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interests to the monopoly holder, but an advancement of the economic interest of the infringer. Hence they do not cause harm but simply give the infringer an advantage.

257 ADAM BRANDENBURGER & BARRY NALEBUFF, CO-OPETITION (1996).

258 Christine M. Korsgaard, *The Reasons We Can Share: An Attack on the Distinction between Agent-Relative and Agent Neutral Values*, 10 SOC. PHIL. & POL'Y 24 (1993); Dennis J. Baker, *The Impossibility of a Critically Objective Criminal Law*, 56 MCGILL L.J. 349 (2011).

259 The human genome project was protected by intellectual property law thereby causing great harm to the 50 million Americas without health insurance. *See* Stiglitz, *supra* note 2, at 1708.

260 Alan Devlin, *Patent Law's Parsimony Principle*, 25 BERKELEY TECH. L.J. 1693 (2010).

261 JOHN FEINBERG, HARM TO OTHERS (1984).

262 Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67 (2007).

263 BAKER, *supra* note 44, at 101-08.

the copyright offenses in Article 217 of the *Criminal Code of the People's Republic of China 1997* and Section 107 of the *Copyright, Designs and Patents Act 1988 (UK)* criminalize abuses of moral rights because the Chinese offense targets infringements that are done with the ulterior intention of seeking a profit, while the United Kingdom offense primarily targets infringements done in the course of business. The only exception seems to be Subsection 107(1)(e) of the *Copyright, Designs and Patents Act 1988 (UK)*, which targets conduct other than in the course of business that affects "prejudicially the owner of the copyright."[264] The offense in Subsection 107(1)(e) requires an act of "distribution," so it is not likely to do much to protect moral rights.

C. *Harm to Consumers*

Given consumers are harmed by the culture of consumerism and trademarking and inflated prices due to lengthy patent protections, intellectual property monopolies are harmful. Trademarked scarves are priced between $500 and $1,175, but they are no more than a rectangle of silk with a nice pattern on it. The cost to make it, removing the cost of the celebrity endorsements, etc., is not going to be more than it costs to make a generic brand with the same quality silk and stitching on its edges. The demand for such items is created through marketing manipulation. If the quality of a trademarked good and a generic good is equal and each as aesthetically pleasing as the other, then there is no objective reason for a consumer to choose to pay tenfold for the trademarked good. Nonetheless, subjective reasons can be supplanted into the mind of the consumer.

Advertising and trademarks are used to convince consumers that the trademarked good is the best option. There is no reason not to have consumer labelling laws to ensure that consumers get the product they believe they are paying for. If a person wants a genuine scarf from a certain maker, then labelling laws ought to ensure that is what that person gets. While these consumer protections would have the indirect effect of protecting trademarks, their aim would not be to protect the streams of income generated by trademarks. In cases where the counterfeit good is clearly presented as a counterfeit good, the consumer offense would not be made out. Beyond the marketing manipulation involved in trademarking, there is the exorbitant cost added to

264 Copyright, Designs and Patents Act 1988, § 107(e).

necessities, such as medicines as a result of patent monopolies.[265] Consumers are harmed when they have to forgo necessary medicines because they are unaffordable due to patent monopolies.

V. CONCLUSION

On all measures, across the world intellectual property rights have been expanded to the point of absurdity. Beyond lengthy monopoly protections being backed up with prison sentences of up to ten years, these monopolies have been extended to cover vague concepts such as publicity rights and performance rights. Publicity rights need to be resisted at all costs in the UK and China. We gave the example of Einstein's image being exploited through publicity rights even though his image involved no intellectual input from either him or those using it to make millions of dollars annually from it. Due to the incredible lobbying power of corporations, China felt compelled to enact not only civil laws protecting intellectual property rent-seeking but also criminal offenses. Numerous economic studies have shown that intellectual property monopolies are inefficient and harm the information commons. It was submitted above that criminalization decisions depend on an *ex ante* balancing of harms. The harm caused to consumers by inflated prices for medicines and trademarked goods has to be balanced against the right to have an intellectual property monopoly. Likewise, the harm to the commons has to be balanced against the right of a few to hold an intellectual property monopoly on knowledge. Twenty-year patent monopolies and seventy-year copyright monopolies are disproportionate and harm consumers and other users of the information commons. It ought to be the intellectual monopoly that is criminalized, not those who seek to erode such monopolies by using information for the benefit of society. The criminal law is not needed to enforce anti-competitive behavior and to facilitate rentiership.[266]

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265 Kuankuan Tian & Qing Zeng, *Viewing the Consumerism of China's Today's Society with Marxist Consumption—-Take Loan Consumption as an Example*, 7 ASIAN J. SOC. SCI. STUD. 85 (2022); David A. Hyman & Charles Silver, *Why Are We Being Overcharged for Pharmaceuticals? What Should We Do About It?*, 39 J. LEGAL MED. 137 (2019); Lars-Kristofer N. Peterson & John W. Devlin, *Vasopressin: The Impact of Predatory Patents on a Captive ICU Marketplace*, 50 CRITICAL CARE MED. 711 (2022).

266 Kean Birch & D. T. Cochrane, *Big Tech: Four Emerging Rorms of Digital Rentiership*, 31 SCI. AS CULTURE 44 (2022) ("Big Tech's novelty is the insertion of digital platforms as an intermediary between existing products/services and users

It is submitted that patent infringement is not conduct that is apt for criminalization, and China need not have enacted any intellectual property offenses. China ought to consider repealing the offenses it enacted and reconsider the regulation of intellectual property in light of its communitarian and socialist market economy ideals. China would benefit by returning to a more communitarian model and avoiding falling into the Western "inequality is good" trap. One area where the criminal law should be used is to protect non-economic rights such as moral rights concerning author attribution and accuracy of content. It was submitted that civil litigation is not affordable for most citizens in the UK and China (America differs in its no-win no-fee system) and that the criminal law is an apt solution for protecting moral rights.[267] It was also argued that the current offenses in both the UK and China do not adequately protect moral rights *per se*. Furthermore, it was submitted that trade secrets are conceptually distinct from intellectual property and that trade secret theft is worthy of criminalization. Trade secret theft involves serious breaches of privacy and confidentiality, and that alone is worthy of criminalization.[268] Coupled with that, a trade secret gives the intellectual creator a reasonable head start without creating a monopoly. We take the view that maintaining an offense against the theft of trade secrets is sufficient to give innovators a head start and that beyond that the criminal law has no role to play. Take the Covid vaccines, the developers had been developing vaccines for many years and thus had a natural head start on any other entrant. Less complex ideas will not rest on such a long research gestation period but also will not have involved very significant financial investment. This sort of research is best funded through competitive research grants and research collaborations between universities and industry.

It has been argued that all laws creating intellectual property monopolies should be repealed. This seems the only practical solution because increased taxes such as windfall taxes on excessive rent-seeking will be evaded by multinational corporations. Also, taxing the windfall from intellectual property monopolies will result in even higher consumer prices since the tax will be passed on to consumers. This leaves the problem of how to get some reward back to intellectual creators. As was demonstrated above, rarely does the reward distribute

(e.g. Uber), creating a new multi-sided ecosystem of exchange from which the digital intermediary can demand both a toll and masses of data.").

267 BAKER, *supra* note 44, at 101-08.

268 Xiaoxiao Wang & Dennis J. Baker, *Criminalizing Privacy in The Digital Age: The Reasonable Expectation of Not Being Digitally Monitored*, 86 J. CRIM. L. 3 (2021).

fairly to inventors through the long chain of invention. Similarly, entertaining work that does not require a great deal of intellectual input can produce millions (i.e., reality TV programs), while a physics monograph concerning fundamental particles such as electrons and quarks would likely have little commercial value. That is why most creation needs to come from salaried work. The most valuable creation will normally arise from employment where the creators are paid for their work. The entertainment industry needs a major overhaul to move it from a rent-seeking model to a salaried-based model where the entertainers are paid from the takings from live performances.

Economists have presented various models for better distributing the economic output of intellectual creation while maintaining some incentive for investment. It is beyond our expertise to analyze those economic models here. Our more modest proposal has simply been to present a comparative case against criminalization and *a fortiori* against intellectual property monopolies *per se*. It is submitted that a corporation does not need an intellectual property monopoly beyond a year of it starting to make a profit, and thus if monopolies are to stay, they should be exceedingly short and not backed up with criminal law sanctions. In areas such as trademarks, it was submitted that these are a manipulative marketing ploy and thus ought not to be protected by the criminal law. The appropriate solution is to have labelling and packaging laws so that those who sell cheap copies are required to disclose to the consumer that the item is a copy. Labelling and packaging offenses would protect consumers, not rentiership. Trademarks will remain a highly effective marketing tactic even without legal protection.