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Property abandoned: Rights, wrongs and forgetting Durkheim

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I. INTRODUCTION

In exploring the regulation of global crises in the neo-liberal age a lawyer is inevitably drawn to re-imagining property. Located in neo-liberal exchange markets, law as an agent of scarcity, and property as fictitious commodities are enmeshed in a consideration of how property has dis-embedded from the social and law has been commodified as a force for dis-embedding.[2] The *big picture* for the analysis to follow is viewed from the context of dis-embedding markets in exchange economies, and the manner in which property relationships, exclusionist commodification and neo-liberal legal agency perpetuate deep market power asymmetries that in turn represent and maintain economic inequality and social fragmentation. However, it is the vision of enabling access and not perpetuating right protections which positions property in this analysis as the process and the prize of a collective conscience in transit.[3]

For the under-30s world-wide the distorted claims of royalty holders, shielded behind the myth of protecting creativity, have been trampled by the open access movement. Nailing Spotify to the cross of archaeon copyright imagery will do little more for law and its bandit commodifiers than to force the transformed collective conscience back to the anarchy of

[1] This essay owes much from M. Findlay, *Law's Regulatory Relevance: Property, Power and Exchange Markets*, Cheltenham, Edward Elgar (2017), in particular chaps 1, 3 and 7.

[2] In this respect, drawing on Pashukanis I am advancing Marxist general theories on law as form. I accept that law is a powerful commodifying agent but add to this the notion of legal agency as bought and sold within exchange markets to ensure exclusionist property rights and artificial property valuing through scarcity.

[3] J.E. Stake, 'The Property "Instinct"' (2004), *Articles by Maurer Faculty*, 222, available at: https://www.repository.law.indiana.edu/facpub/222.

epidemic downloading. The internet is the muscle behind collective conscience transition that Durkheim could never have foretold. But IP lawyers ignore law as a social fact to their peril. The quiver of property rights enforcement is full with the blunt arrows of theft. Against the networked arsenal of free, unauthorised access, law risks degenerating into the materialist history of property rights protection in ages past when mundane grass-roots resistance was without the power of internet community.

Individual rights rhetoric tends to diminish the relationship between law and the community. In this regard, Durkheim's usage of law as the index of social solidarity is timely. Durkheim was concerned with understanding the nature and sources of social solidarity and cohesion, particularly in the context of modern industrial societies.[4] However, solidarity is understood as a moral phenomenon which cannot be measured, and empirical understandings of it required an externally observable indicator.[5] Durkheim employed *law* as a reflection of shared sentiments and values.[6] On this view, when a *conscience collective* is formed, it is bound by law because law is a manifestation of community values and is crucial in safeguarding them. If law disconnects from shared sentiments and values to such a degree that it sets up mechanical rather than organic boundaries to the collective conscience, then that conscience in transit breaks out beyond legal constriction and challenges its role as a social fact.

The following critique of neo-liberalism indicts Durkheim's concept of law: as liberalism tends to be individualistic and fails to appreciate the role of community,[7] law, as it is now, becomes unable to align the individual's with the community's interests. Individualist rights assertions such as through exclusionist IP regimes, ignore Durkheim's representation of individuals are social beings whose thoughts and behaviours are nurtured by the community.[8] For Durkheim to constitute *law*, IP rights must be expressions of inclusive social consensus. In an exchange market context,

[4] By solidarity, Durkheim means the 'moral phenomenon' that is a 'social fact' of social coexistence, of 'the general integration of society'. See A. Barron, J.E. Penner, D. Schiff, R. Nobles (eds) *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, Oxford: Oxford University Press (2005), at 265.

[5] Ibid., at 266.

[6] Ibid. Law then becomes a crucial empirical indicator of social solidarity.

[7] B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press (2004), at 84.

[8] Ibid.

IP rights delay market entry, significantly increasing the access cost through commodified admission.

For the purposes of re-invigorating law's regulatory relevance in such market contexts and property arrangements, it is necessary to interrogate the use of the law in transforming market economies into market communities, with property as a heuristic device. That line of analysis currently reveals the manner in which law assists in making access to property scarce, facilitates the commodification of property and is a force for the dis-embedding of commodity economies within which property as monetary profit is essential.

Resistance to these market suspensions is growing.[9] For instance, online information sharing marks a shift away from the neo-liberal commodification of information and knowledge by challenging the exclusive property frameworks that the law creates and protects through IP frames. If law can assist in market re-embedding then as an extension of the social, markets become a more responsive mode for equitable and access-based relationships between law, property and contesting collective consciences.[10] Regressive law on the other hand has imperilled its social good and its regulatory relevance through guarding market barriers protecting over-valued property, long removed from deeper social valuing.

The necessity of undermining the fictional concepts of exclusionist commodification on which the *pre-internet* models of demand and supply rely is the counter-narrative of unauthorised information down-loading. A new community of information users is opening up *new space* for engaging with property valuing through a different economic model where the concept of scarcity is diminished,[11] one in which property valuation is not merely the cash price at sale, operating on a paradigm that is above and beyond the reach of the conventional law (such as theft

[9] Suspension is employed as an analytical device to explain how institutions of persuasion change social imagination in ways where disbelief in some of the negative features of neo-liberal economic arrangements replaces more socially bonded expectations for fairness and equity.

[10] E. Durkheim, *The Rules of Sociological Method and Selected Texts on Sociology and its Method*, New York: Free Press (1982).

[11] A. Cavanagh, *Sociology in the Age of the Internet*, London: Open University Press (2007), at 73. R. Mansell, *Imagining the Internet, Communication, Innovation and Governance*, Oxford: Oxford University Press (2012).

and intellectual property). This new space does not interact with traditional legal institutions (such as adversarial litigation). Instead, it runs on its own rules when it comes to accessing and valuing the benefit of property.[12]

If law is to function as a regulatory facilitator of new property arrangements it needs to demonstrate its capacity to highlight the pitfalls and failings of currently commodified law and property relations in old market space by tracing the contours of exclusion that neo-liberal law has regressively endorsed. This reflexivity will enable repositioned law to counter any invasion of exclusionist property arrangements in new social space, and protect in an orderly transition, communal valuing of property through wider and more equitable access.

To provide a stronger role for property as a force for market re-embedding I envisage property not necessarily as a *thing*, or as a *right*, or even as a relationship for social or cultural identity. Property exists as a broad social relationship on a continuum which ranges from general good to delineated and individualised benefit. It is at the same time a mechanism for impoverishment and for great wealth generation. It moves from a socially embedded phenomenon, to a dis-embedded fictitious commodity, although as I explain later this may not be a simple unidirectional phenomenon. In today's market economies, property has become essentially a product of law, but in its original form is not dependent on legal legitimacy. Above all else, the form that property will take along this continuum is crucially influenced by seismic shifts in social, economic and political consciences at particular historical epochs.[13]

The appreciation of property which emerges out of the massive shift in collective consciousness regarding, for instance, access to internet knowledge, and the nature of property in the information economy itself, while it could be seen as *new* relative to exclusionist *copyright-style* property, is in fact *original in form*. *Original* in the sense that it has returned to more socially embedded (and in that sense no longer fictional) property arrangements – original in that it can be seen as property pre-dating law's intervention to set inclusive/exclusive delineations of access and usage – original in that it is not linked to either state or market incentives that artificially commodify and value – original in that neither rights to ownership nor possession are prevailing environmental determinants

[12] P. Himanen, *The Hacker Ethic and the Spirit of the Information Age*, New York: Random House (2010).

[13] Such as the invention and proliferation of the internet.

which give it form. Through such an understanding of property as social relations its pervasive immorality (linked to impoverishment of the many) is dissipated, thereby rehabilitating original property from Proudhon's abolitionist necessity.

II. PROPERTY AS THE PROBLEM?

Lawyers in their dealings with property *rights* as justiciable arrangements[14] claim that they separate property from political considerations. Proudhon scoffed at such unsupportable justifications for the law/ property nexus. Instead he proposed to disentangle three legal traditions that had merged into the genitive which came to classify the nature of property as selective wealth. Property, possession and prescription merged into a simpler understanding of possession by right of proscription. In this sense was revealed another important feature of property away from its origins in social location; the activity of law to prescribe possession and ownership into limited rights for commodity benefit. Otherwise than to face Proudhon's abolitionist demands due to its immorality and injustice, the property/law nexus as the mechanism for alienable distinction (particularly under any discriminatory rights discourse) needs to be radically repositioned from maintaining the inclusion/ exclusion barrier to access and use.

Proudhon spent much energy in *What is Property* challenging conservative interpretations of the origins of property. These included theories of occupancy, theories of possession as the cause of property, and the derivation of property from labour. In conceptualising original property to accord with Proudhonian thinking, such approaches need to be interrogated and dismissed. Proudhon attacked original occupancy as deriving rights from historical accident. The argument that possession was the product of some positive law that made some distinction between real and theoretical possession, was for Proudhon equally a product of blind coincidence. This is an important understanding when turned in the direction of IP protection and claims to the possession of intangible knowledge through some legally legitimated individualised right. Because of what Proudhon came to understand as the irreversibly socialised forms of production, capital and human equality, property as some causal product of labour was no more than the acceptance of the

[14] Discussed more fully in E.B. Pashukanis, *The General Theory of Law and Marxism*, in H. Babb (transl. and ed.) *Soviet Legal Philosophy*, Cambridge Mass: Harvard University Press (1951).

inherent inequalities of a labour force which could never naturally result in just and free benefits to property. Commending this view, our search for what is original and morally defensible property cannot be satisfied by a definition which suggests the natural product of labour as its source, ignoring claims arising from possession, or as the inevitable outcome of occupancy.

Unconvinced by any intellectual justification that did not require concessions to bourgeois inequity, Proudhon concluded that property was impossible and nothing, being derived economically from nothing, and destroying productivity in its exclusivity and power to dis-embed. Property is theft because it deprives men of the legitimate product of their labour. It is 'homicide' because it deprives men of their limited heritage (the earth), and it is tyrannical in how it negates equality and conspires with political forces to institutionalise injustice.

Proudhon declared property is theft but not so possession. There can be a revised role for law in democratised possession (through wider and freer access) being a dynamic, more equal and truly liberal use of and access to property as a resource for a general good. Achieving property as a social bond rather than a dis-embedding commodity has powerful ramifications for the determination and attainment of social good. However, property, being a seductive and successful wealth generator, can slip back into exclusionist arrangements even in more equitable market conditions unless strong normative and procedural frames such as law can establish and maintain clear requirements of obligation and duty which promote rather than pervert social good. This is a realistic and indeed a historically legitimate role for law which preceded its complicity in dis-embedded capitalist market economies.[15]

III. DISENTANGLING POSSESSION FROM PROPERTY IS THE ANSWER?

Through a commodity-based delineation of property (rather than as wider social forms and obligations), the wealth and power at the heart of the current global economic model are generated and maintained. However, this conceptualisation of the law/property nexus is both challenging, and being profoundly challenged by, the emerging market conditions such as those prevailing in the information economy that operates within the

[15] Such as in G. Hughes, 'Communitarianism and Law and Order', 16(49) *Critical Social Policy* 17–41 (1996).

counter-narrative that 'possession is for all, property is for none'.[16] The market conditions enabling the information economy are such that individuals can gain access to new forms of intangible (intellectual) *property*, in a form of transient possession which is of itself returning the commodification of property to more original and diversified, communal sources of wealth generation through avenues of internet-based mass access previously unavailable by the exclusionist transaction of property benefits. The very nature of this information property (unlike land and other forms of tangible property, or even conventional choses in action) cannot be easily materially delineated. In turn, law as a legitimator of property as wealth is becoming less able to unquestionably practice ring fencing, and is being called on by a community counter-narrative to eschew its function for determining inclusion and exclusion. It says 'law simply cannot be the bully that determines what is yours and mine – what is private and what is not'.

Through the current assault on IP commodification,[17] the property/wealth synergy has come full circle. Markets alienate and control/restrict property thereby changing its form and accessibility. The law overlays this process with a mask of proprietary rights. Yet the intangible and inherently ethereal nature of what has been termed by law *intellectual property* confounds the alienability history, and we now see active resistance both to the law's determination of knowledge and information as saleable products, and to law's enforcement of ownership rights. This cycle can be seen as three stages of embedding/dis-embedding/reembedding property from (and back to) social good, a process in which law plays a significant role.[18] Following Polanyi, property has become artificial, fictitious in form due to its capitalist transition.

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[16] P. Proudhon, D.R. Kelley, B.G. Smith (eds), *What is Property*, Cambridge: Cambridge University Press (1994), at 35.

[17] B. Coriat, O. Weinstein, 'Intellectual Property Rights Regimes, Firms and the Commodification of Knowledge', *CPLE Research Paper No. 17/2009.* D. Troutt, 'Portrait of the Trademark as Black Man: Intellectual Property, Commodification and Redemption', 38(4) *Davis Law Review* 1141–208 (2004– 05). A. Kapczynski, 'Intellectual Property's Leviathan', 77(4) *Law and Contemporary Problems*: 131–45 (2014).

[18] I take the Polanyi proposition concerning double movement to involve a market shift from the social to the fictitious, met by a reaction from state instrumentalities or the market itself to compensate for the negative consequences of the dis-embedding process, and outside and beyond this a counter movement to radically reposition the market and its stakeholders.

The dis-embedding process against which *new law*[19] needs to respond through ordering freer pathways of access is the commodification of information. The double-movement (which Polanyi suggests as a necessary reaction to the negative consequence of dis-embedding) is through more accessible legal processes and institutions to challenge law's current role in the commodification market. The counter-movement is the exploitation of already-available internet information irrespective of the legal struggle over rights.

Beyond Proudhon, *new law* grows from an acceptance that the contemporary commodification of property cannot stand. In support of this assertion, I will later explore how a counter-narrative on property, a new community consensus about access and enjoyment, and some profound dispersals of market power facilitating this and benefitting from it, are revealing the original (or some may say *truer*) nature of property in an environment where territory and time no longer offer shape to property markets.

Facing and ineffectively resisting a wave of community consensus demanding unfettered access to information and its uses, law is being forced away from treating the issue of *access* as the point of wealth generation (access being what sets the perimeters of wealth and power prior to the valuation of the *thing* accessed). Seen in this light, law is no longer ineffably capable of benefitting the few against the many, when the structure of society is now experiencing more equitable market conditions where the contested conscience[20] is strong.

As a note of caution here, it would be misguided to assume, and misdirected to conclude that the collective conscience which is behind unauthorised access to internet information is united in its motivation and a singular attack on exclusive private property rights at large. Individuals within this conscience download for different reasons and with often different priorities. In addition, while unauthorised downloading may have been morally and legally neutralised within the contested conscience, many of those comprising its dynamic would alternately support

[19] The use of 'new' here should not be paralleled with 'original' in terms of property. 'New law' is not a claim back to some form of pastoral socially-located law. Marxist theorists, for instance, would argue that bourgeois law is always antipathetic to social good. My notion of *new law* is new in its transformation from commodity to community connection as a communal resource.

[20] It is important here to remember that many collective consciences can make up a living society. Some of these contest with each other for influence over their transition and eventual reformulation. Therefore, it is not only within a particular collective conscience that one should search for the sources of change.

and expect law to prescribe other exclusionist property arrangements in fictitious markets of land, labour and money.

IV. COMPETING COLLECTIVE CONSCIENCE

Being a social fact, law provides the boundaries within which the collective conscience formulates and strains to break free.[21] Strong and weaker formulations of the collective conscience represent different and often contesting social perspectives that influence, and are influenced by law which is in turn dependent on the tension emerging out of this interaction.

If law is essentially a social artefact, often torn from its moorings in the social, then law's force for social change will be dulled the more it operates as a commodity in the abstractions of marketing fictitious economies.

> The complex project of what might be called embedded law creation cannot, for example, rely – as economic analysis of law often does – on abstract models of self-interested rational calculation as a satisfactory basis for understanding the environments to be regulated. Such models are inadequate substitutes for enquiring into real understandings of regulated populations. The process of regulating, even for primarily economic relations, has to take account of varied types of motivations that are supports of social relations of community. These include not only instrumental cost-benefit calculations, but also emotional allegiances, rejections and resistances; as well as reliance on habit, customs, traditions and attractions of the familiar, and also adherence to fundamental beliefs and ultimate values accepted for their own sake.[22]

Essentially consistent with Durkheim's qualitative measure of 'normality', one crucial comparative degree is the extent to which community consensus divides over the normal and the pathological, how these evolve and where they intersect.

If normality does not inhere in the things (social facts) themselves, if on the contrary it is a characteristic which we impose on them externally

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[21] Durkheim, *supra*, note 10.

[22] R. Cotterrell, 'Transitional Networks of Community and International Economic Law' in A. Perry-Kessaris (ed.) *Socio-legal Approaches to International Economic Law: Text, Context, Subtext*, Oxford: Routledge (2013), 133–49, at 142–3.

or for whatever reason refuse to do so, this salutary state of dependence on things is lost.[23]

In the information economy, for instance, these may include the prosecution of individual downloaders, suing major internet storage providers, bullying modified shared access arrangements between agents and users, and overseeing industry self-regulation through policing of access by internet providers. The flaws in each of these approaches will be identified in order to preface our later speculation on how law can adapt to facilitate rather than retard the possibilities of a more open information environment.

The following critical review of law's failings in facilitating the move to a new world order is not limited to some idealistic communitarian compatibility mode. That said we can see the practice of law being left in the wake of evolving property arrangements and non-law processes for their negotiation and transaction. The relationship between law and a broader communitarian consensus, if it was ever in place, is now in market economies so distant as to be aspirational. Thus where can law move in order to shape change for the majority rather than resist it for the benefit of the cashed-up few?

V. REGULATORY REFLECTIONS – NEW CONSCIENCE COLLECTIVE

Cotterrell advocates the use of legal communities as a 'means of organising or making sense of the complexity of social or historical experience'.[24] In his designated *community of beliefs*, individuals relate to one another on the basis of their shared beliefs or values, all of which are held without ulterior motive.[25] Translating this to the collective conscience of internet communities regarding unauthorised downloading, it is behaviour viewed neither as immoral nor illegal. The shared beliefs and values challenging exclusionist property rights gel this grass-roots community and as such a shift in legal regulation increasing the freedom of access to information is the only way that law's regulatory relevance can be returned in its eyes. If

[23] Durkheim, *supra*, note 10, at 104: 'For sociology really to be a science of things the generality of phenomena must be taken as the criterion of their normality.'

[24] R. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, London: LexisNexis UK, (2nd ed. 2003).

[25] Ibid.

so, then law becomes the social fact that Durkheim envisaged as defining rather than degrading to boundaries of this collective conscience.

Pitted against this community of belief are two distinct but related instrumental communities comprising agents/MNCs, unlikely to cooperate on matters which affect their short-term revenue streams, and creators, already disempowered by royalty holders and open for incorporation into the community of belief if in so doing the values they seek (such as access to their work) are enhanced.

In his seminal essay 'Rules for the Distinction of the Normal from the Pathological', [26] Emile Durkheim advanced the following analytical approach when understanding the nature of social facts such as law and property:

> Having established by observation that the fact is general, we will trace back the conditions which determined this general character in the past, and interrogate whether these conditions still pertain in the present, or on the contrary, have changed.

As a social fact law has performed an essential role in the commodification of private property which is vital to a capitalist economic model. In that sense both law and property may be *normal* but only if certain market conditions prevail such that they satisfy a dominant social consensus about each and both.

Durkheim is also useful to this analysis for the manner in which he theorises social order and its dynamics. It could be argued that the relationship between contract law and commercial obligations, for instance, establishes, if in sometimes very discriminatory ways, market arrangements which are predictable and therefore orderly. Currently, however, we are witnessing a generation of information consumers who are flouting conventional property access arrangements and thereby revealing law's impotence to hold back this wave of change, and protect the limited property rights which IP law sets out to confirm. Durkheim not only offered a way of understanding the different forms of market order in property arrangements, but more importantly for us, a way to appreciate transition.

In his distinction between the normal and the pathological, Durkheim was presenting a parable of change agency. A social fact in the context of the evolution of societies requires that the boundaries of any social conscience are not impervious to the influence of contested consciousness. Durkheim determined under certain social conditions that challenges from

[26] Durkheim, supra, note 10, Chapter III, in particular at 95.

within the *conscience collective* can push the boundaries of any counter-veiling conscience.

In his crime/penalty example, Durkheim anticipated that a certain level of crime is normal in society so that the strength of the collective conscience can be tested and re-affirmed. On rare occasions crime can be a functional agent of change, forcing the boundaries of the collective consciousness to shift and change through challenging law's regulatory resilience. In this analysis, the download generation is acting in ways which might otherwise be deemed criminal to test pre-existing property rights and deny the law's role in retaining them.

> [N]ot only do law and morality vary from one social type to another, but they even change within the same type if the conditions of collective existence are modified.[27] Yet for these transformations to be made possible the collective sentiments at the basis of morality[28] should not prove unyielding to change and consequently should only be moderately intense. If they are too strong they would no longer be malleable.[29]

The internet community's collective conscience around uncommodified information access has adapted the 'morality' of individual property rights protections by lessening the commercial valuation of access, and weakening the enforcement potential of criminalisation through mass resistance. For instance, it is now more than unlikely, for example that through employing the conventions of copyright, and exercising the sanctions of theft, law can hold back the tide of unauthorised information access and protect limited and exclusive private property or licence *rights*. It is also no longer certain, if it ever was, that the law can distinctively discriminate between legitimate and illegitimate market relationships.

If unauthorised information access is to be criminalised and *coded* as theft, then its functional dimension should not be ignored, so labelled or not: '[c]rime itself may play a useful part in this evolution. Not only does it imply that the way to necessary changes remains open, but in certain cases it also directly prepares for these changes.'[30] Where does this leave

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[27] Durkheim suggested that a diversity of social consciences may result out of variations in immediate physical environments, hereditary antecedents, and social influences (note added by the author).

[28] See Durkheim, *supra*, note 10, at 102 (note added by the author).

[29] Ibid., at 101.

[30] Ibid., at 102.

law? Should law shift its commitments away from the benefit of a few greedy royalty-rights holders, towards the benefit of universal access?

VI. RE-CREATING FAIR ACCESS FOR USERS – NEW LAW AND SOCIAL GOOD

Copyright law's disconnection, both from its original justifications as well as from current internet community consciences, can in no small part be attributed to its utilisation by the creators' agents (i.e., the copyright marketers) to protect their economic interests. Observed in relation to access, the agents were once able to justify the inflated value of their sold goods on the grounds that they were the ones that facilitated and enabled creation and access, and without their efforts the creation would not have been disseminated. The revolution in technologised production and access brought about by the internet, means agents are largely stripped of that justification. In response, agents have hunkered down, and engaged in attempts to fortify their economic position[31]
through the promotion of heavier legal sanctions.[32]

Copyright has traditionally been framed as an ownership right, because this narrative supports the commodification, artificial scarcity and disproportionate pricing of IP and its protection through legal agency in the market. However, the reality is that the ownership narrative is inconsistent with the non-excludable and non-rivalrous nature of IP.[33] Intellectual

[31] C. Buccafuso, S. Masur, 'Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law', 87 *Southern California Law Review* 275–334 (2004), notes that the availability of criminal sanctions for copyright infringement has expanded dramatically over the last century, driven in large part by lobbying from the Recording Industry Association of America and the Motion Picture Association of America.

[32] In this regard, I advance the novel argument that theft 'is a fictitious determinant of property relations, and of property itself'. By levelling the accusation of theft against an unauthorised downloader, the exclusive agent emphasises and explains the unauthorised download as a breach of a legally endorsed relationship of agency, ownership and property, resulting in an illegitimate devaluation of the benefits derived from that relationship. In doing so, the exclusive agent and not the copyright holder confirms the value of the commodified property (i.e., his commercial control of his copyright). See Findlay, *supra*, note 1 at 44 et passim.

[33] F. Kreiken, D. Koepsel, 'Coase and Copyright', *Journal of Law, Technology and Policy* 1–44 at 7–8 (2013). A non-rival good is one that can be used by one person without affecting any other person's ability to use that same object. A non-

property differs from traditional property as more than one person can use and enjoy a work without affecting another person's ability to do same, and the licensees' tangible rights remain unaffected.

The user's *right* (or better conceived as fair and open opportunity) to access is supported by Singer's view that property needs to be understood apart from notions of *exclusive* ownership, and reframed in the context of social relations.[34] For Singer, any assertion of *property rights* in a social context, entails reciprocal obligations towards others.[35] At a societal level, the law of (intellectual) property is thus a mechanism which serves the purposes of regulating social relations vis-à-vis property, rather than protecting and promoting exclusionist rights.[36] These views of a social concept of property support the development of a market for IP as a communal space premised on inclusivity rather than exclusivity.[37]

Along with an enhanced role for law in protecting and promoting greater fair, open access there is a resultant responsibility (in Singer's thinking) to 'value a *creator right*'. Employing a right's discourse consistent with pre-existing legal terminology, payments under *creatorright*s are morally justified against users' rights to fair, open access, reflected in the values of the access-oriented collective conscience that creators should be directly compensated for access to their creations, and that creators should be accorded the right to determine the responsible level of remuneration.[38]

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excludable good is one to which it is not possible to deny others access (e.g., radio frequency).

[34] J. Singer, *Entitlement: The Paradoxes of Property* New Haven: Yale University Press (2000). Note that Singer is not fundamentally opposed to notions of *ownership* in property. In his discussion of the case involving the excessive withdrawal of water in Friendswood, he is merely arguing that any assertion of 'ownership' over (public) property such as water must duly recognise that other persons may also have corresponding rights over the same subject matter.

[35] Singer, ibid., at 42, where he says that '[c]ivil rights laws promote the free flow of property without regard to race, religion or sex. But to do so, they must impose *obligations on business owners* to deal with anyone who comes through the door'. This shows how he views 'property owners' as being obligated to meet social needs to some extent.

[36] Ibid., see chap. 1 in general.

[37] Findlay, *supra*, note 1, at 228 et passim.

[38] D. Schwender, 'Reducing Unauthorized Digital Downloading of Music by Obtaining Voluntary Compliance with Copyright Law through the Removal of Corporate Power in the Recording Industry', 34 T. Jefferson L. Rev. 225–302 at 268 (2012). The authors here cite empirical research in several countries showing that consumers believe in paying for creative works, if the payments go towards the creators. In Canada, 91% of consumers believed in the protection of creators, while 91% in the UK, and 80% of the French believe that creators should be fairly

Thus, the *creatoright* regime, requiring fair payments direct to creators is expected to see high levels of compliance in terms of collective sentiments.[39]

The traditional copyright framework fails both the *right to fair, open access* and the reciprocal *creator right* by preferring the interposition of the agent between the creator and user, with rent-seeking reliant on an exclusionist exclusive license right. The internet market opportunity for users and creators to transact directly means that monetary value does not have to be the only medium of exchange, e.g., creators may choose to allow free access because they expect to gain goodwill, publicity, or propagation of their ideas.

The new exigencies offered through the information economy to return law to a more communal utility are just some of the forces for its transition. It is my argument that where property is very broadly conceived as social relationships, and the collective conscience concerning rights versus access vigorously contests commodification and demands social access, then law can find an important role in regulating for, rather than resisting property's re-embedding. Law can work towards facilities, processes, relationships and outcomes wherein parties undertake equivalent and reciprocal obligations to one another, and each reserve unto themselves a measure of rights, liberty, authority, and eventually property that is currently conceded through vulnerable and dependent property inequalities.

If law is to resume its Durkheimian potential as a reflection of settled or transitional collective consciences, then one needs to question how its regulatory focus must move from commodification to more communitarian property engagement. New law as a community resource can umpire the tensions which will inevitably arise during the transition from property rights as money earners to property access as the realisation of the contested community conscience.

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remunerated. 84% of Norwegians believe that creators should be entitled to decide the level of remuneration for their production.

[39] T.R. Tyler, Why People Obey the Law? Yale University Press: New Haven and London (1990). The author argued that 'the effectiveness of intellectual property law is … heavily dependent on gaining voluntary cooperation with law' at 24. Here, I argue that given the alignment of the proposed legal regime and existing sentiments on fair remuneration, contradictions plaguing property rights and equitable access, if any, is minimised.

Durkheim expressed this differently, but to broadly similar effect, by suggesting that law that has no firm ties to the moral bases of social life has lost its soul and can even seem a dead letter.[40]

VII. LAW AS A CHANGE AGENT?

For those who would argue that the practice of law is essentially an individualist project, I would reply that in such an evaluation resides a reason for law's current market idiosyncrasy. With the commodification of law as a dis-embedding market technology the link between law and social duty has been lost. The commodification of law is accompanied by a diminution and devaluing of one of law's most primitive functions: to ensure that social duty is respected. In relation to exclusionist property rights, law has crucially delimited those who can claim duty and expect its enforcement. Law as a process redirected back to a broader base of duty and obligation promoting *good* for the social as much as the individual, can enable much wider opportunities for inclusion in the conciliation and mediation of interests beyond the protection of private property rights. If we are to take this assertion into the realm of *social facts* rather than dogmatic anticipation it is necessary to theorise law as a social change agent.

How law becomes a willing party to change when it is notoriously reactionary in its regulatory function, is a practical challenge for new law in action. A criticism of the Durkheimian approach to collective conscience formation and transition is the absence of specifics about what stimulates a mass move from one consciousness to another, particularly where such occurs quickly, spontaneously and in the face of other strong deterrent regulation. How did the downloading generation come to be? What is its new moral compass? How does it view the nature of property with which it is dealing? How is it understood by those responsible for attempting to regulate its behaviour? Law as a contemporary control agent over the information economy operates within diverse community consensus: information exclusivity and universal access. But it is not enough to say that law's role is to constantly mollify competing market pre-dispositions.

> The practical dilemma (between what might be seen by some as pathological and some as normal) is avoided if what is desirable is declared to be what is healthy, and if the state of health is something definite, inherent in things, for at the same time the extent of our effort is given and defined. There is no longer need to pursue desperately an end which recedes as we move forward; we need

[40] Cotterrell, *supra*, note 22, at 142.

> only to work steadily and persistently to maintain the normal state, to re-establish it if it is disturbed, and to rediscover the conditions of normality if they happen to change.[41]

This invocation, if directed toward more equitable and socially sustainable property arrangements will infuse law as a regulator with its own normality and search out the practical relevance of its prevailing principles which protect general good rather than promote individualised wealth creation.

VIII. RADICALLY RETHINKING LAW AND PROPERTY

The inextricable connection between law and property, particularly in common law traditions, is all about commodification. Wealth in the feudal form was land and land was certified and alienated through law. In the shift to capitalist/mercantile economic frames, the enclosure of common land and the concurrent restrictions on access and use determined land value and the market in its transaction. Whether it is land, moveable property, financial instruments or futures, property claims its value through designating inclusion or exclusion from access and use and law acts as the commercial discriminator.

As noted already, all this is changing in the information age. The valuation of property is no longer essentially the product of inclusion/exclusion barriers, legal or otherwise. The notion of 'real' property is essentially dependent on temporal and spatial location, as are the laws of states and territories which determine the market value. In the ephemeral internet context, access to knowledge is no longer critically dependent on law's capacity to include or exclude use. In fact, the value in knowledge through internet information is more likely to be enhanced through its wider dissemination. Even where this is not so simple, the capacity for law to exclude/include access to internet information has so diminished that the barriers are sufficiently porous, and the collective conscience concerning freedom of access is so firm, that the battle to value information as property through legal containment is lost.

Law as a device for commodifying property value in terms of exclusionist market pricing, discriminates market power and magnifies individualist wealth creation through initiating and maintaining property arrangements which depend on enforcement rather than trust and consensus. Law transformed back to communal utility (facilitating orderly

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[41] Durkheim, *supra*, note 10, at 104.

information access) rather than as an exclusionist market commodity (enforcing property rights), on the other hand, permits market positioning based on more just configurations of power. In this way new law acts as a driver and not a distinguisher of market freedom. New law is motivated by its own normative constitution which reflects the perennial principles of justice and fairness. That normative constitution is returned to its purpose in promoting fluid social good, and thereby acting as communal resource.[42]

New law impacts on other legal sub-systems which operate within *fictitious* paradigms such as *property rights* and treasure and extol mechanical rather than organic concepts of access, possession and ownership. The essential transformation of old and new law is a journey from facilitative *wrongs* rather than just propogating illusory and masking *expressive rights*. Paradoxically, pre-existing legal frames have employed the influence of similar normative constitutions as that of new law, to defeat social good.

IX. 'SEEKING SIMILARITY, APPRECIATING DIFFERENCE'[43]

Within market economies, law as a force for social good becomes dis-embedded, and understanding how this happens when property is being re-configured as a social fact, enables critical and realistic projections on where law needs to head if it is to assist property in its transformation toward social wealth beyond economy.

> A critical Polanyian perspective has thus, first, to de-construct the Hayekian way of embedding even the law (and its inherent normativity) in economic rationales, and, secondly, to reconstruct law as a social institution which also reflects the rationales and values of other social spheres.[44]

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[42] A. Perry-Kessaris, 'Reading the Story of Law and Embeddedness Through a Community Lens: A Polanyi-meets-Cotterrell Economic Sociology of Law?' 62 *Northern Ireland Legal Quarterly* 401–13 (2011).

[43] R. Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities', in A. Harding and E. Orucu (eds) *Community as a Legal Concept: Comparative Law in the 21st Century*, London: Kluwer Law International (2002), 35–54.

[44] S. Frerichs, 'Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law', in C. Joerges and J. Falke (eds), *Karl*

The difficulty we face in seeing law as part of the problem as well as the possible solution for property's disenfranchisement outside social good, rests in the way, at the same time, that law can compound and expose the discourse of commodification which is at the heart of dis-embedding dynamics. The answer to this difficulty is to envisage new law and original property embraced in a somewhat unpredictable dynamic stimulated by seismic shifts in contested collective consciences.

> Economists pretend that the economy is an autonomous 'self-regulating' set of relationships. Lawyers collaborate by dressing humans and nature as 'fictitious commodities', Labour and Land, and present them as having been produced for the sole purpose of being sold. But off-stage lurks reality in which the action and reaction remain embedded in society and society always protect(s) itself against the perils inherent in a self-regulating market system[45] ... (law's capacity to act as a communal as opposed to a commodified resource) expressed the acceptable extensions of markets in respect of genuine commodities within economic networks of community; and maintained spaces for the co-ordination of inter-network values and interests in which the counter-moving restricting, checking, and resisting of markets duly took place.[46]

The internet is a frame for communication between communities at the level of what Cotterrell identifies as the instrumental, economic, traditional, affective and belief-based. Cotterrell pitches against this, law's aspiration towards something more than '... the society of morally unconnected, rights-possessing individual that liberal philosophy tends to pre-suppose'.[47] And the communitarian counter-vision for law does not presuppose some mechanical consensus, or imply an absence of conflict. There will always be in dynamic societies, some contested collective conscience. Law's role in the facilitation and evolution of contestation is to create gateways and maintain pathways where participation in responsible contestation can occur.

> It is primarily in law's capacity to act as a communal resource that the hope of those who would counter-move resides. The values and interests that

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Polanyi: Globalisation and the Potential of Law in Transnational Markets, Oxford: Hart Publishing (2011), 65–84, at 81.

[45] K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Boston: Beacon Press (2001), at 80.

[46] Perry-Kessaris, *supra*, note 42, at 411.

[47] R. Cotterrell, 'Community as a Legal Concept? Some Uses of a Law-andcommunity Approach in Legal Theory', in *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Aldershot: Ashgate (2006), at 18.

> underpin actions and inter-actions (individualistic or communal) in one type of social action or interactions (instrumental, affective, belief or traditional) may be in direct conflict with the values and interests underpinning other actions and interactions. Such conflicts are the beating heart and meaningful soul of embeddedness, and they can be made more productive, or less destructive, when law acts as a communal resource.[48]

I endorse Perry-Kessaris' observation that a community lens highlights the distinction between two of law's many faces, both of which are starkly revealed in the struggle over the internet information economy:

- One which is directed towards supporting the ad hoc actions and interactions of wealth-seeking individuals.
- The other determined to support those relatively stable and trusting interactions on which social bonds rest and community networks rely.

As far as property arrangements and law's conventional involvement are concerned, it is easy to see law as only interested in the protection and promotion of individualised rights and interests. Such an analytical cul de sac is distinctly a-historical and takes as a given notions of property which are alienated, class-dependent, and exclusively commodified. To confine the face of law to such an individualist, economic and market-oriented profile would deny what I argue for as its exciting transformative potential. The challenge lies for those who would gaze on another face of law – one which is engaged, networked and interested in social good – to enunciate law as a communal resource.

Difficulties are presented in an argument favouring law as a communal resource when the strong counter-narrative of IP is in its death throes. The champions of IP rights encase the debate about law's role in the information economy only in terms of individualist economic rights and their priority, or in seeking the safer harbour of contract law. Such economic discourse is incapable of accommodating non-economic values and interests; an analytical myopia which almost saw the discipline relegated to irrelevance in failing to explain or predict when it is the failure of the market (rather than market failure) which is at issue.

> At best (economics relegates other interests) to a non-speaking cameo role; at worst it writes them out of the story entirely. One problem is that money has long been the go-to numeraire – measure of value – for economists because of

[48] Perry-Kessaris, *supra*, note 42, at 410.

> the genuine confidence that everything of value has a price and money is the most efficient signal of those prices ... In the language of community, the 'fragmentary' judgement of economics is worrying because it is an economic (type) and an individualistic (pattern) story in which the speaking roles are given to those engaged in economic interactions, and the script is composed entirely of monologues. So it blinds us to the reality that all actors are engaged in multiple, diverse and complex patterns of social action and interaction.[49]

Law as a communal resource needs first to be repositioned outside the discourse of individualist, commodified property rights. It is unlikely that even at the level of discourse alone, this will be anything but a painful transformation. Rather, as is currently the case, law as a commodity[50]operating the province of IP protection, will tensely coexist with law as a communal resource to open up the social good in information economies. By adopting Proudhon's approach to the impossibility of property, and Pashukanis' conviction concerning the withering away of bourgeois law as only a commodifying form,[51] the communal resource reading of law will grow to dominate understandings of law's regulatory utility and as such will replace law as an exclusionist market commodity, marketing exclusionist property arrangements. Charting this transformation will require a belief in law's normative resilience, and confidence that the alternative collective conscience will not be so disenchanted with law as the pimp of property, to withhold trust in its transformative, communal potential.

Returning law to a reflection of shared moral sentiments and values may not be possible beyond Durkheimian dreaming. What is distinctly viable, and with property radically re-interpreted, perhaps inevitable, is to position law as the external locator of transecting moralities shaping collective consciences in their change phase. In this understanding, law modifies disorderly transition and tests the resilience of new social imaginations.

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[49] Ibid., at 406–7.

[50] As a commodity law has become an object of exchange, an exchange value. As a communal resource law is a social fact servicing more original market forms where property is a social relationship valued for its sustainability. Law in communal terms is valued through its use. Law as a commodity only has value in how it can be exchanged for other commodities such as the wealth produced through the scarcity of property.

[51] E. Pashukanis, 'The General Theory of Law and Marxism' in P. Beirne and R. Sharlet (eds), Pashukanis: *Selected Writings on Marxism and Law*, London & New York: Academic Press (1980).