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# Intellectual Property and the Question of the Archive

*Jose Bellido**

*'The archive is the ultimate rabbit hole'*[1]

## I. Introduction

Classified documents, patent files, disclosures, trademark records, originals, copies, collection agencies, registries, bureaucracies, proceedings, intangible properties, and access (or not)—the stuff of intellectual property (IP) is deeply connected to the institution of the archive. From family to corporate archives, from local to national and diplomatic offices, the trajectories of the intangible can be traced through such paper trails and holdings. The question—'What is the point of copyright history?'—was the subject of an academic conference some years ago.[2] The answer to that question was that the point of copyright history, which could be extended to IP history, is 'evidently' archival. The archive—often the product of time-consuming, painstaking, frustrating, expensive, and unassuming labour—with all its literal and metaphorical potential, is full of contingencies and hazards, a repository of hopes and documents frequently leaving a mark or scar on the subject. Not recommended for those in a rush, the archive is a slow and deliberate medium, requiring one to wait for the rare opportunity to capture the 'phantom' of IP.[3] Such an intimate link to a nebulous subject matter situated between the past and the future initially made its custodians, the archivists, wary of copyright law.[4] While the digital environment transformed earlier fears into risk assessments, the

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[1] Kate Crawford, *Asking the Oracle*, *in* Astro Noise 133 (Laura Poitras ed., 2016).

[2] What Is the Point of Copyright History? Reflections on *copyright at common law in 1774* by H. Tomás Gómez-Arostegui (Ronan Deazley & Elena Cooper eds., 2016).

[3] 'In a sense much of the history of intellectual property can be seen as one of the law attempting to contain and restrict the intangible—to capture the phantom.' *See* Lionel Bently & Brad Sherman, The Making of Modern Intellectual Property Law: The British Experience, 1760–1911 59 (1999).

[4] John Baylis Post, *Copyright Mentality and the Archivist*, 8 J. Soc'y Archivists 17–22 (1986).

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relationship between the archive and IP history remains crucial as it goes beyond specific terms and conditions.

One of the most interesting things about archival research is not what has been found here or there but how IP scholars have approached the question of the archive in different ways. Socio-legal, economic, cultural, anthropological, and legal historians have all dipped into archival records with diverse assumptions about IP—empirical, theoretical, or otherwise. While some immediately found archival challenges to their epistemic endeavours, others continued the search, blurring disciplinary boundaries and becoming less concerned about orthodoxy and convention than in how and to what extent different archival orders determine our historical research. This chapter explores how these varying approaches culminated in remarkable projects undertaken by different scholars in the history of IP. It highlights not just the importance of such undertakings but also their inherent limitations. The constraints of those projects are not seen as negative features but as a reflection of the elasticity of the archival function and its connection to the history of IP law; and this chapter considers both the ways of conducting archival research and the questions that might arise from such work.

## II. Primary Sources

Perhaps the most significant accomplishment in archival research concerning the history of IP was a digital copyright resource launched in March 2008—an archive carefully nourished by legal academics with what they considered primary sources on copyright, from the invention of the printing press to the Berne Convention (1886) and beyond.[5] Arranged chronologically, and initially by jurisdiction, its enduring character, browsing capabilities, enhancements and upgrades have made it increasingly attractive, quickly converting the resource into a go-to point of reference for copyright scholars. According to some commentators, the resource is changing the writing of copyright's history[6]—and indeed its influence can be observed in many contemporary publications.[7] In part, its success derives from the robust assemblage of material whose relevance has been explored and explained by a group of academics, including myself, providing a filter of expertise and credibility. What is uncertain, however, is the unintended ways in which the digital power of the resource might impact current and future scholarly research. The

[5] The project was funded by the UK Arts and Humanities Research Council. *See* Primary Sources on Copyright (1450–1900) (Lionel Bently & Martin Kretschmer eds.), available at http://www.copyrighthistory.org/ (last visited 27 April 2020).

[6] Stina Teilmann-Lock, The Object of Copyright: A Conceptual History of Originals and Copies in Literature, Art and Design ix (2015).

[7] *See* Peter Baldwin, The Copyright Wars: Three Centuries of Trans-Atlantic Battle 411 (2014); Mark Rose, Authors In Court: Scenes from the Theater of Copyright 192 (2016).

resource is both appealing and problematic, not just from the standpoint of document selection per se or the linear history it might suggest but, just as important, from the archival perspective or, as Derrida calls it, the 'archive fever' of the endeavour.[8] As some have suggested, it provides a service 'for those seeking insight into copyright history but without time or resources to immerse themselves in the physical archives'.[9] As such, it represents a single archive created out of a multiplicity of archives. Indeed, a publication introducing the archive was tellingly entitled *The History of Copyright History*.[10] Rather than focusing on how the digital nature of sources presents new challenges for historical research,[11] the problem addressed here is that the recursive nature of the digital archive runs the risk of producing a self-referential tool to future historians. Although some unintended consequences might be avoided if the digital archive is considered as a point of departure or reflection and not an end in itself, the reference to 'meta-history' in the introduction accompanying the archive still appears to fall into a teleological trap.

The digital resource epitomizes a contemporary trend in scholarship that relies on archival research as a way of making IP history.[12] This scholarship has experienced a period of growth in the last two decades, not only because the increasing online availability of indexes and inventories has made the problem of locating archival holdings relatively easier, but also because an ethos of solidarity and collegiality among a number of scholars has enabled newcomers to navigate not only archives and research tools but also material which is sometimes barely legible. Although some of us, fascinated with 'origin' stories, could not resist the positivist temptation to accumulate documentary evidence or nit-pick about sources, the new approach to IP history stimulated the discipline in different ways. First, it helped to shift the initial discussion of the subject matter from the realm of justification to genealogical enquiry. Second, it caused scholars to become more sensitive to the particularity of details, legal forms, and historical contingencies. Third, by abandoning abstractions, it enabled comparisons to be made (this was particularly important since IP scholarship had previously shown a tendency to produce

[8] Jacques Derrida, Archive Fever: A Freudian Impression 9 (1996).

[9] Isabella Alexander & H. Tomás Gómez-Arostegui, *Introduction*, *in* Research Handbook on the History of Copyright Law 1 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016).

[10] Martin Kretschmer, Lionel Bently & Ronan Deazley, *The History of Copyright History*, *in* Privilege and Property: Essays on the History of Copyright 1–20 (Martin Kretschmer, Lionel Bently & Ronan Deazley eds., 2010).

[11] There is an interesting discussion of the role of 'context' for the interpretation of historical sources and the impact of internet in IP scholarship in Isabella Alexander, *The Challenges of Intellectual Property Legal History Research*, *in* Interconnected Intellectual Property: Essays in Honour of Sam Ricketson 182 (Graeme W. Austin et al. eds., 2020).

[12] *See* H. Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. Cal. L. Rev. 1197 (2008); Ronan Deazley, On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775) (2004); Katie Scott, *Art and Industry: A Contradictory Union. Authors, Rights and Copyrights During the Consulat*, 13 J. Design Hist. 1–21 (2000); Sean Bottomley, *Patent Cases in the Court of Chancery, 1714–58*, 35 J. Legal Hist. 271 (2014); Elena Cooper, *R. v. Johnstone*, *in* Landmark Cases in Intellectual Property Law 317–44 (Jose Bellido ed., 2017).

controversial statements that flattened out 'the nuances and subtleties of different legal cultures').[13] Finally, it expanded the boundaries of the discipline and changed the ways in which IP scholars looked back at certain events or footnotes in IP history. Above all, and despite its shortcomings, the digital resource is a significant achievement in the history of copyright law. It spurs reflection and further thought.

Another archival project worth mentioning here is the Stationers' Register Online project, which aims at making the Registers of the Stationers' Company of London fully accessible and searchable.[14] This is again a major scholarly resource for copyright and book historians because of the pivotal role of the register in the history of copyright.[15] Although the company archive has been digitized, a counter-intuitive aspect is that it requires a subscription to be accessed, a feature that compels us to think more—and more imaginatively—about the importance, in terms of public function, of paywall-free archives. In any case, it would be interesting and important if similar projects were to be carried out in other areas of IP law such as trademarks, designs, and patents.

## III. Things and Persons

Not only did the 2008 project make noteworthy material from the history of copyright accessible, it had a more subtle impact. It moved away from the traditional approach to the history of copyright, to one that helped situate events in a multilayered landscape. Instead of following the familiar outline established in the Statute of Anne (1709–1710), the Battle of the Booksellers (1769–1774), and the Berne Convention (1886), it employed new ways of seeing and mapping the history of the subject, highlighting and distinguishing other events and linking those to other jurisdictions. By positioning the traditional outline in the context of other controversies, laws, and pamphlets, the archive helped us to visualize the richness of copyright history. One facet of the project that facilitated such connectivity was its reliance on documents as primary sources. Documents were not only selected, translated, and commented upon; they were indexed or codified in different ways. The cross-referencing of documents, thematically and alphabetically, contributed to the production of an elastic resource. And the new additions to the project have not only served to accumulate material but also to revisit concepts upon which the archive was arranged.[16] Although the documentary impulse could be

[13] Bently & Sherman, supra note 3, at 217.

[14] For the technical background, *see* James Cummings & Pip Willcox, *Stationers' Register Online: A Case Study of a Byte-Reduced TEI Schema for Digitization (tei_corset)*, 6 J. Text Encoding Initiative 1–13 (2013). The resource has been edited by Giles Bergel and Ian Gadd and is available at https://stationersregister.online/.

[15] *See* Lyman Ray Patterson, Copyright in Historical Perspective 28 (1968); Rebecca Schoff Curtin, *The Transactional Origins of Authors' Copyright*, 40 Colum. J. L. & Arts 175 (2016).

[16] Martin Kretschmer, Lionel Bently & Ronan Deazley, *The History of Copyright History (Revisited)*, 5 WIPO J. 44 (2013).

said to evidence a scientific concern for method and objectivity in a field increasingly charged with popular arguments for and against, it nevertheless evidenced the limits and constraints of the archival–historical junction. The most important limitation of the digital resource was the way in which people and things—as opposed to documents—were easily discarded, or at least not directly considered as primary sources. While the hierarchy of sources between documents and persons arguably elicited a legal, rather than a historical, regime of evidence largely due to the passage of time, the challenge of expanding the IP archive to other types of sources has been taken up in other, smaller-scale projects. For example, CIPIL's more recent Virtual Museum of Intellectual Property was created to collect 'images of materials that have been at the heart of many of the key intellectual property cases of the twentieth century'.[17] As the name—'museum' rather than 'archive'—suggests, there is an explicit emphasis on the display of artefacts. Although the influence of the resource is limited, often being restricted to the educational context, the seemingly banal gesture of creating a digital resource sought to shift IP law's textual archive into a visual register.

Similarly, a recently published book, *A history of Intellectual Property in 50 Objects*, has explored a different way of presenting a history of IP law.[18] Instead of looking directly at documents, doctrine, or laws, the book privileged images and short extracts explaining the relevance of 'objects' to IP history. The difference between the museum and this quirky book is that the museum focused on legal evidence while the book embraced a wider, cultural understanding of IP history. Although the appeal of the latter approach might be derived from an interesting confusion between laws and norms in the qualification of objects, one could argue that for a crossover between an academic publication and a richly illustrated coffee-table book, that was an essential requirement. In other words, the blurring distinction between the legal and the cultural was important because it helped to position the book between the office and the library, making it a book for everyone, a pleasurable read for both the neophyte and the expert. If the question of the archive is also a question of access, the book has succeeded in bridging the gap between researcher and readership. This is remarkable because it follows the logic of the selection of 'objects' according to their significance as cultural icons in the context of IP disputes, strategies, or controversies. Although the book dips into the history of IP law, its most attractive aspect, at least from a consumer perspective, is surely the combination of lavish production and an affordable price which is increasingly rare in law books. Precisely for that reason, the rights clearance process for images

[17] The project by the Centre for Intellectual Property and Information Law (University of Cambridge) is supported by funding from the Herchel Smith Bequest. *See* Centre for Intellectual Property & Information Law, *Virtual Museum,* https://www.cipil.law.cam.ac.uk/virtual-museum (last visited 27 April 2020).

[18] Claudy Op den Kamp & Dan Hunter, *Introduction: Of People, Places, and Parlance*, *in* A History of Intellectual Property in 50 Objects 6 (Claudy Op den Kamp & Dan Hunter eds., 2019).

(not objects) used in the book, its funding, and the criteria for selection, required a more detailed explanation of how the book was produced, being part and parcel of the history of the subject and its relationship to the archive function.[19] Indeed, perhaps the establishment of cultural icons, or the management of difficult rights clearance processes, flow naturally from legal and marketing considerations. The result, in any event, is a volume spot-on in terms of IP history, and it stands as a successful archive of cultural achievement.

Another experiment that has moved away from privileging documents as primary historical sources is an oral history of IP currently in process of completion.[20] The project was prompted by a desire to open up a new arena of research, lending an archival recording function to the recollections of IP barristers, judges, activists, academics, solicitors, and civil servants. As a kind of counterpoint to earlier projects, the idea was neither to attempt to develop Socio-legal analyses nor to produce conclusions, empirical or otherwise. Rather, the impulse was to enhance law's archive by documenting what is often undocumented, by recording voices otherwise lost. Although the project has the potential to elucidate the value of secondary sources in IP history, it primarily represents an effort to invert the law's archive, making it sensitive to other ways of doing history. While the collection echoes similar oral history collections tracing the emergence of biotechnology and computer science, as an ongoing oral repository trying to elicit what might be relevant for legal history, the archive tries to problematize the historical connection between writing and the law.[21] The audio recordings contain a great deal of self-disclosure by interviewees, and the subjective and the personal unsettle our fetish for documents and objects in IP history. The resource provides intriguing raw material—living sources offering nuanced glimpses of professional cultures, unexpected rivalries, anecdotes, and gossip. Instead of searching for historical accuracy or tracing cultural achievements, the oral history aims to preserve and expose live recollections, personal memories, and experiences of worlds inhabited and soon to be lost. Although conversations could and sometimes did focus on important IP events and landmark cases, the recordings become increasingly interesting as the conversation shifts to more quotidian aspects of the law. Interestingly, the juxtaposition of recollections evidenced the frailty of memory. Although the reliability of interviews as historical sources is not on a par with other material, the medium of the archive offers the possibility of introducing 'sources' or leads into IP historical research. And these pointers not only serve to question our own orthodoxy but

[19] This is particularly interesting since one of the editors had been working on the notion of archive and defined it as a 'mediator' of the past; *see* Claudy Op Den Kamp, The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen 14 (2018).

[20] The project 'Oral Histories of Intellectual Property' was funded by the AHRC-CREATe. *See* University of Cambridge Centre for Intellectual Property & Information Law, http://iporalhistory.co.uk/ (last visited 27 April 2020).

[21] Cornelia Vismann, Files: Law and Media Technology ix (2008).

potentially constitute a springboard for histories to be written in the future. In a sense, the archival function enables lives to be converted into documents, subjects into objects. While by no means a comprehensive collection, this oral history of IP is arguably a documenting enterprise the significance of which will develop in the coming decades.

## IV. Offices and Beyond

Since a very specific type of archive, the state archive, gave rise to IP offices, scholarly work that pays attention to the records produced by these institutions is particularly interesting.[22] It has not always been the case that historians have extensively investigated these types of archival records. In 1960, Nathan Reingold lamented how 'the records of the United States Patent Office remain largely unexplored by historians of technology'.[23] Although trademark and patent records have been exploited by historians during the decades since,[24] the administrative records of the office itself have not received sufficient attention, at least by legal historians. Nevertheless, the digitization of patent and trademark official records in some jurisdictions has prompted a series of projects with considerable scholarly potential.[25] One field of research fruitfully using the tools and products of these digital forays is economic and business history.[26] Although most studies have tended to consider the resources as valuable for measuring industrialization processes, technological progress, or innovation patterns, some scholars have begun to use them as a way of assessing the other side of the equation—that is, what they define as the patent or trademark 'system'.[27] In so doing, they have created specific databases, datasets,

[22] Amanda Scardamaglia, Colonial Australian Trademark Law (2015); Wendelin Brühwiler, Zeichenform Und Warenverkehr. Eine Formatgeschichte Der Marke, 1840–1891 (2020); Jose Bellido & Hyo Yoon Kang, *In Search of a Trade Mark: Search Practices and Bureaucratic Poetics*, 25 Griffiths L. Rev. 147–71 (2016).

[23] Nathan Reingold, *US Patent Office Records as Sources for the History of Invention and Technological Property*, 1 Tech. & Culture 156 (1960).

[24] *See* Kenneth Lee Sokoloff, *Inventive Activity in Early Industrial America: Evidence from Patent Records, 1790–1846*, 48 J. Econ. Hist. 813–50 (1988); B. Zorina Khan, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records 1790–1895*, 56 J. Econ. Hist. 356–88 (1996); Kenneth Lee Sokoloff & B. Zorina Khan, *The Democratization of Invention During Early Industrialization: Evidence from the United States 1790–1846*, 50 J. Econ. Hist 363–78 (1990). *See also* Christopher Beauchamp, Invented by Law: Alexander Graham Bell and the Patent that Changed America (2015).

[25] *See* Patricio Sáiz, Francisco Cayón, Luis Blázquez & Francisco Llorens (dirs.) *Base de datos de solicitudes de patentes (España, 1878–1939)* (2000–2008); Stuart Graham et al., *The USPTO Trademark Case Files Dataset: Descriptions, Lessons, and Insights*, 22 J. Econ. & Mgmt. Strategy 669–705 (2013).

[26] Paul Duguid, Teresa Da Silva & John Mercer, *Reading Registrations: An Overview of 100 years of Trademark Registrations in France, the United Kingdom, and the United States*, *in* Trademarks, Brands and Competitiveness 9–30 (Teresa Da Silva & Paul Duguid eds., 2010).

[27] Patricio Sáiz & Rafael Amengual, *Knowledge Disclosure, Patent Management, and the Four-Stroke Engine Business* (Universidad Autónoma de Madrid Working Papers in Economic History, Paper No. 2016/02 (Spain)).

and applications to filter information for particular enquiries, such as analysing patent agency work or the nationality of trademark and patent applicants.

Another group of academics using the resources are legal scholars, mainly from law and economics schools, interested in empirical studies of IP law.[28] Irrespective of whether one agrees with their fundamental premises and methodologies, their capacity to generate debate over the role and function of IP law has been remarkable. This is significant because, as has recently been noted, '[n]o single master narrative can account for the extraordinarily broad range of issues, positions, participants, and proposals that make up the conversations and disputes about IP, or for their intensity'.[29] Despite the insight provided by these studies at the normative level, their focus is not on archival records as such, but on their testimonial capacity; more specifically, on the ability of these records to offer what is referred to as patent or trademark 'data'. In this sense, the studies have developed a new relationship with the archive. But it is remarkable how the empirical, 'realist', fact-centred analysis of law that shapes these studies often erases the materiality of the archival record. Unlike digital resources aiming to preserve archival records in their context, these datasets and databases made up of old records are often tailored to respond to scholarly questions. While this transformation of records into data promises a great deal for this thread of scholarship—aesthetically and in terms of knowledge—it has an inherent datedness.[30] It may seem ironic to note that the transfer of archival records from patent offices to datasets throws up the perennial question: At what cost?

Looking at patent and trademark records as such, that is, archival material residing in an office or repository, it is noticeable how datasets tend to eclipse the procedures and operations behind the records.[31] Such erasure is problematic not only because patent records, as Carolyn Cooper observes, 'should not be taken at face value',[32] but also because the act of patenting (or registering trademarks) was historically 'one huge filing problem'.[33] Patent and trademark offices were central to

[28] While the economic analysis of law emerged as the dominant methodology for IP research in North America, other methodological routes have been suggested. Since methods constitute the ties that bind communities together, an interesting counterpoint for IP scholarship might come from interventions and experiments in comparative law as they cut across jurisdictions; *See* Irene Calboli, *A Call for Strengthening the Role of Comparative Legal Analysis in the United States*, 90 St. John L. Rev. 609–38 (2017).

[29] Mario Biagioli, Peter Jaszi & Martha Woodmansee, *Introduction*, *in* Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspectives 9 (Mario Biagioli, Peter Jaszi & Martha Woodmansee eds., 2011).

[30] *See* Eva Hemmungs Wirtén, *How Patents Became Documents, or Dreaming of Technoscientific Order, 1895–1937*, 75 J. Documentation 577 (2019).

[31] For an early study of the problems of these records, *see* Henry C. Thomson, The Trade-Mark File of the US Patent Office: Its Vital Defects and Their Correction (1922); *see also* L.W. Mida, *Needles in the Patent Office Search Stack*, 4 J. Pat. Off. Soc'y 553–57 (1922).

[32] Carolyn C. Cooper, *Making Inventions Patent*, 32 Tech. & Culture 842 (1991).

[33] Victor del Rio, *The Archive of Ideas*, *in* 2 Culturas De Archivo 254 (Jorge Blasco and Nuria Enguita eds., 2005).

the administration of those acts. By examining, classifying, and processing applications and specifications they certified the legal status of the items they recorded. While some office routines can be traced in the literature aiming to explain to the public how patent offices worked, it has been traditionally difficult to access the administrative records of those institutions. Although events such as fires, wars, and office relocations have contributed to the disappearance of records, the difficulty of accessing the surviving records has been one of the enduring features of these institutions, from national offices to the European Patent Office and the European Union Intellectual Property Office.[34] This might not reflect an intentional closing-off within institutional structures but a shift in the postal structure of their archiving function when becoming digital.[35] Records are now being produced digitally, notified electronically, and archived almost in real-time; and the ways in which these institutions fulfil their public service obligation have also changed. The offices are, and indeed perceive themselves to be, producers of legally significant records aimed at serving a very specific section of the public—one interested in holding or opposing an IP right. By the same token, they find it difficult to see themselves as worthy of the kind of attention that represents any departure from the rather narrow public and stakeholder interests to which they owe their existence. In other words, it is challenging for them to appreciate public interests beyond the applicant or stakeholder, and to subject themselves to historical or ethnographic observation by another type of public—primarily, the academic. Even when they engage in academic collaboration, it is often to produce studies directed at specific constituencies and policy-makers.

The archival power of these offices has been characterized by the central remit of certification, constructing a past and a present for the IP right granted or registered. If the researcher is to follow the trajectories of the intangible as a matter of historical interest, he or she might need to shift their attention from public records to corporate archives, patent and trademark agencies' records, and trade association repositories.[36] Although the survival of such disparate business records depends on a variety of factors, the fact that IP rights have been seen as records of legal, historical, and marketing importance has made them candidates for special preservation. As the commercial and the legal are intimately interwoven, corporate archives offer an opportunity to study specific archiving techniques as between the realms of law and business; and an appreciation of how corporate management has had an impact on the ways in which records related to IP were made, classified

[34] An interesting reference to the records that survived in the English Patent Office can be found in JOHN HEWISH, ROOMS NEAR CHANCERY LANE: THE PATENT OFFICE UNDER THE COMMISSIONERS, 1852–1883 vii–viii (2000).

[35] WOLFGANG ERNST, STIRRINGS IN THE ARCHIVE: ORDER FROM DISORDER 53 (2015).

[36] It was not uncommon for patent agencies to keep 'secret archives' for inventors who lacked the financial means to file an application for a patent or did not want to apply for a patent. *See* MUNN & CO., PATENT & TRADE MARKS 8 (1924).

and filed within a company. An interesting, and hitherto under-researched, field for historians of IP is how record-keeping impulses and habits of different corporations shifted throughout the twentieth century in terms of establishing and managing intangible property.[37] The organization of these internal archival apparatuses and their channels of communication to marketing and sales departments within the company might contribute to a different history of IP which would not simply look at doctrine (legal rules) or landmark developments (cases). Rather, it would emphasize practical necessities and the need to master information about registrations, filings, and oppositions in order to protect what the company perceives as its rights.[38] One of the challenges specific to these archives is its location, which often necessitates additional searches to track company records through mergers and acquisitions documentation, deposits, and local archives. Sometimes it seems that nobody knows anything of the archives' existence, and that it depends somewhat on chance, whether the researcher finds where the collection has been stored. Surprisingly, if the company has ceased trading it might be easier to gain access, as companies still trading sometimes find academic enquiries odd for various reasons—they may be met with a rejection letter on the grounds of lack of suitable space for the research or the impossibility of providing information for reasons of commercial sensitivity.[39] Herein lies one of the curiosities of archival research in IP in the context of a rise in corporate interest in this field of law: ironically, historical research is often trapped between the law and the archive, between the currency of rights and the literature on their historical emergence.

## V. Conclusion

The question of the archive and its relation to IP history has been approached differently by scholars, not only reflecting their personal research interests and agendas but also their diverse takes on the relationship between law and history. While some describe their work as having been influenced by different archives,[40] others recall their archival encounters as the key to helping bring '[trademark] registrations to life'.[41] What seems to unite these remarks is an overall sense of gratitude towards

[37] *See* Bell Telephone Laboratories, Inc., An Introduction to Patents 18–34 (1956).

[38] For a preliminary incursion into some of these issues, *see* Jose Bellido, *Toward a History of Trade Mark Watching*, 2 Intell. Prop. Q. 130–51 (2015).

[39] As Monika Dommann observes, 'sometimes it is a matter of sheer luck. Many archives (such as those of collecting societies and record manufacturers) never existed in the first place; have been lost, forgotten, destroyed; or are inaccessible' in Monika Dommann, Authors and Apparatus: A Media History of Copyright 12 (2019).

[40] Michael Birnhack, Colonial Copyright: Intellectual Property in Mandate Palestine 20 (2012).

[41] Scardamaglia, *supra* note 22, at 127.

archivists and those who helped with the tracking down of sources.[42] Seduced by the archival function, IP scholars have even started recording their own conversations on history.[43] With that said, most archival work in IP scholarship still attempts to embody the ideal of positivism, that is, 'merely to show what actually happened'.[44] The problem with such an approach is that it obscures the archival function, representing the archive as a neutral and uncontentious historical tool. Even the most meticulous contextualization tends to ignore how its condition of possibility is conjured up in previously deposited archival productions. More to the point, this unquestioned historiographical manoeuvre often serves to fix a past, which is otherwise indeterminate. Precisely because of the capacity to open or close historical junctures, the archive remains significant not just as a repository of the past but as an enabling device to trace the coming into being of different explanatory narratives of IP law.[45] Therefore, archival research allows us to problematize our taken-for-granted assumptions and the narratives that guide them.[46] In so doing, the archive stands not only as a historical resource but as a way to reflect on the shifting operations of IP law and its different histories. It also makes us aware of the contingency of historically significant IP milestones—for example, how there was 'nothing inevitable about the success of the Berne Convention, nor about the shape that it should necessarily take into the future'.[47] For, as has been recently noted, the archive 'is not simply a repository of the past. It is also the principle of formation of the past, the present and the future'.[48]

[42] Joris Mercelis, Beyond Bakelite: Leo Baekeland and the Business of Science and Invention ix (2020); Stathis Arapostathis & Graeme Gooday, Patently Contestable: Electrical Technologies and Inventor Identities on Trial in Britain xiv (2013); Elena Cooper, Art and Modern Copyright: The Contested Image xi (2018).

[43] Cooper & Deazley, *supra* note 2, at 60–81.

[44] Ernst, *supra* note 35, at 26.

[45] Brad Sherman, *Remembering and Forgetting: The Birth of Modern Copyright Law*, 10 J. Intell. Prop. 1 (1995); *see also*, *supra* note 3, at 205–20.

[46] As Alain Pottage and Brad Sherman note: '[I]t is not easy to explain how an assumption came into being, especially when that assumption still governs what can be said about the phenomenon in question.' *See* Alain Pottage & Brad Sherman, Figures of Invention: A History of Modern Patent Law 7 (2010).

[47] Lionel Bently & Brad Sherman, *Great Britain and the Signing of the Berne Convention*, 48 J. Copyright Soc'y U.S.A. 340 (2001).

[48] Paolo Palladino, Plants, Patients, and the Historian: (Re)Membering in the Age of Genetic Engineering 7 (2002).