Canadian Journal of Law & Jurisprudence XXXVIII No.1 February 2025, 232-255

 doi: 10.1017/cjlj.2024.26

A Ritual Approach to Patent Law

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Abstract

This article applies van Gennep's structure of the ritual to the patent application process, arguing that information undergoes several ontological transformations on the way to patentability. The second half of the article applies Turner's focus on the liminal space. From this perspective, the 'pure possibility' of the liminal space is essential to patent law, because it helps negotiate between strong boundaries (as a form of property) and the almost improvisational way in which general rules are applied to specific patents. Taken together, these two approaches provide a more nuanced understanding of how patent law comes into existence and how the patents themselves operate as distinct social and cultural artefacts. The analysis does not intend to replace the economic understanding of patent law, but instead seeks to reflect more completely how it actually functions.

Keywords: *ritual; liminal space; transition; patent law; intellectual property*

1. Introduction

Since the Agreement on Trade-Related Aspects of Intellectual Property Rights (*TRIPS Agreement*), patent law has firmly become an important aspect of international trade regulation.[1] Patent law has been an essential tool of both national and international economic strategies before this, but it was with the *TRIPS Agreement* that it—and intellectual property more generally—took on a much more mainstream character. Patent law has been presented as a tool of recovery in times of crisis,[2] an essential part of encouraging investment by multinational

1. See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, being Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994 (entered into force 1 January 1995) [*TRIPS Agreement*]. This particularly affects projects under the World Intellectual Property Organization (WIPO) Development Agenda that have persistently emphasised the economic or business role of patent rights. For a full summary of projects in this area, see WIPO, "Work Undertaken Under Development Agenda Projects" (last accessed 27 November 2024), online: *WIPO* www.wipo.int/ip-development/en/agenda/work_undertaken.html.
2. The European Patent Office (EPO) emphasises the role of patent law in addressing the COVID-19 pandemic: see "Fighting Coronavirus" (last accessed 27 November 2024), online: *European Patent Office* www.epo.org/en/news-events/in-focus/fighting-coronavirus.

actors,[3] and the foundation of technological development.[4] Crucially, these perspectives are found not only in the academic literature but have become prominent within government.[5] Yet this emphasis on the economic dimensions of patent law works to obscure a more nuanced understanding of *how* patent law works and the way it transforms information. This has been somewhat implied by literature that deals with increasing specialisation within patent law, but there is a more fundamental ontological process occurring that facilitates or enables this shift in legal status and effect.[6] How exactly does information *become* a patent? Patent scholars have already discussed how patents are something more than "passive encodings" of information, but how does this shift actually occur?[7] Which processes contribute to this ontological, rather than simply semantic, isolation and specialisation of patentable information?

This article reconstructs the patent process through the lens of ritual and ritual space. In doing so, it is not only a suggestion that patent law encompasses non-economic abstract elements, but that it can be read in a way that decentres the economic overemphasis that characterises patent law in popular discourse. The article draws from van Gennep's key work on *rites de passage* as a type of ritual and the later focus on the liminal space by Turner. Applying these different perspectives, the article presents an understanding of patent law that reveals a kind of mediated or filtered understanding of reality. Information or knowledge does not simply become patentable in an abstract sense through a change in formal legal title, but instead undergoes an ontological transformation that is facilitated by the distinct phases of the patent application. Key to this ritual understanding of patent law is that the patent office processes do not simply represent technical steps in patentability, but that they operate in a context-dependent and distinct space that supports the transition of information between states of being. This broader approach renders the economic role of patent law as only a single element of a more multifaceted legal object.

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3. See Ludan Wu, Dylan Sutherland & John R Anderson, "Are emerging market MNEs more attracted towards better patent enforcement regimes when undertaking greenfield R&D-focused FDI?" (2023) 30:2 Transnational Corporations 1 at 18, 20. Though obviously the role of intellectual property more generally in encouraging Foreign Direct Investment (FDI) is contested: see Peter Beattie, "The (intellectual property law and) economics of innocent fraud: the IP & development debate" (2007) 38:1 Intl Rev Intellectual Property & Competition L 6 at 28.

4. See Bryan Mercurio, "WTO Waiver from Intellectual Property Protection for COVID-19 Vaccines and Treatments: A Critical Review" (2021) 62 Va J Intl L Online at 16-17.

5. The UK's Innovation Strategy 2023 is one example of this. There is a section on 'Safeguarding Intellectual Property' and another that describes the new Patent Box tax incentive which provides tax relief on profit generated from the exploitation of patents and other qualifying products. Throughout the document, the role of patents (and intellectual property more generally) in the economic growth of business and international trade is prominent. See *UK Innovation Strategy: Leading the Future by Creating It* (Policy paper) (UK: Department for Science, Innovation & Technology, updated 14 November 2023), online: www.gov.uk/government/publications/uk-innovation-strategy-leading-the-future-by-creating-it/uk-innovation-strategy-leading-the-future-by-creating-it-accessible-webpage.

6. See generally Sapna Kumar, "Patent Court Specialization" (2019) 104:5 Iowa L Rev 2511.

7. Michelle Gittelman, "A Note on the Value of Patents as Indicators of Innovation: Implications for Management Research" (2008) 22:3 Academy Management Perspectives 21 at 21.

https://doi.org/10.1017/cjlj.2024.26 Published online by Cambridge University Press

Given the abstract focus of the article and the attempt to reach beyond a single national context, there are some fundamental assumptions made which necessarily frame (or perhaps constrain) this ritual approach. The first is that it centres on the grant of a patent and its subsequent reconstruction through infringement or invalidation proceedings. Though these features are present in all jurisdictions that I have so far encountered, specific procedures—in particular, on post- and pre-grant opposition—can differ significantly. The article therefore represents a simplified understanding of these procedures with the recognition that the way in which patents proceed through the distinct ritual phases could be impacted quite profoundly by local conditions.

Section 2 explores the work of van Gennep and applies a more structuralist perspective to patent law—shifting through the distinct phases of the *rites de passage* and how patent law mirrors these steps. This analysis also reveals a complexity in van Gennep's categorisations of *rites de passage*, particularly in how the margin and aggregation phases can be visualised outside of a biological or body-centred context. Aggregation in patent law is revealed to be made up of multiple overlapping and recursive *aggregations* rather than a singular moment.

Section 3 turns to the more specific concerns of Turner and the liminal space of the ritual. Though certainly not a conventional application of ritual theory, patent law provides a particular clarity in the negotiation between margins, boundaries, and centres that emphasise the movement or transition in state which is key to a patent's legal status. Patents are bounded objects, not only in terms of their legitimate technical delineation in text, but also in their lifespan, the specialist contexts in which their scope is determined, and the contextually inflected processes through which their boundaries can be shifted or otherwise adjusted.[8] Finally, a short conclusion is provided in Section 4.

2. Connecting *rites de passage* and patent law

2.1 Separation

2.1.1 Rites de passage

The identification of three stages in rituals appears early on in van Gennep's *The Rites of Passage*, at the same time as a more granular understanding of how they emerge in practice.[9] '*Rites de passage*' are rituals in which the subject is in transition, usually in social status, and have been commonly identified in the context of puberty rites or marriage ceremonies. The subject is transformed through the operation of three distinct ritual phases, emphasising an ontological change rather than a more superficial change in title or role. The subject is first isolated or

8 On the 'boundedness' of legal artefacts, see Pierre Schlag, *The Enchantment of Reason* (Duke University Press, 1998) at 98ff.

9. See Arnold van Gennep, *The Rites of Passage*, translated by Monika B Vizedom & Gabrielle L Caffee (University of Chicago Press, 1960) at 11.

https://doi.org/10.1017/cjlj.2024.26 Published online by Cambridge University Press

separated from their existing social status and environment, they enter an indeterminate liminal space in which they have lost their pre-existing state but not yet achieved another, and then they are incorporated back into society but with their new social class or status.[10] So while all rites of passage would in principle include separation, transition, and incorporation, van Gennep points out that these are not always present to the same extent in a ritual instance.

Yet patent law appears to demonstrate quite an equal presence of these three stages, as information undergoes a series of ontological states on the way to being a patent. In terms of subject matter, patent law certainly breaks from the typical application of ritual study (and also van Gennep's *The Rites of Passage* specifically). Turner, however, emphasises very early in "Betwixt and Between" the flexibility with which ritual and ritual space can be deployed.[11] There is a recognition that ritual is not simply confined to specific, culturally defined, life events. Rather, ritual is a fundamental element of essentially any transition that marks the transformation from one state to another.[12] The moment of application for a patent, or the discovery of an inventive technical solution, could be read as a similar process of transformation that marks the progress between states. Yet it is in Turner's discussion of the more sociological dimension of ritual and its instances that relate most directly to patent law. He argues that *rites de passage* do not simply mark the progress *between* recognised states, but can also be found when a subject achieves a *new* state.[13] Approached from this perspective, patent law can then be seen to explicitly deal with the changing (legal) state of information. Technical information is transformed through the patent application process and transitions linearly (though not necessarily smoothly) from non-protection, some legal reach, to full enforceability. The patent grant that results is not simply a transition to an ascribed state in the traditional ritual sense, but is instead an elevation of the information to a new status that would appear similar to Turner's status examples.

2.1.2 The first stage: separation

As van Gennep's first phase of a rite of passage, the process of separation is also a central element of patent law and provides the initial framing of the ontological dimension of patentability.[14] It is not surprising given the original focus on initiation rites that the separation, in a more traditional ritual context, has a strong physical basis.[15] For van Gennep and later scholars, the separation is at once physical and metaphysical—isolating the body of the initiate (crucially, alongside

10. *Ibid.*
11. See Victor W Turner, "Betwixt and Between: The Liminal Period in *Rites de Passage*" in William A Lessa & Evon Z Vogt, eds, *Reader in Comparative Religion: An Anthropological Approach*, 4th ed (Harper & Row, 1979) 234.
12. *Ibid.*
13. Highlighting specifically non-secular transitions, "whether this be a political office or membership of an exclusive club or secret society." *Ibid* at 235.
14. See van Gennep, *supra* note 9 at 11.
15. *Ibid* at 41, 43.

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other initiates) with a corresponding social or psychic isolation.[16] A would-be patent would at first appear to be a strictly metaphysical separation in which technical information becomes subjected to linguistic boundaries. In doing so, the information of the would-be patent is isolated, set alongside the prior art and commons as a distinct entity. Crucially, this connects with some of the most fundamental elements and processes in the patent office. A key aspect of the patent application that is used to guide the patent examiner assessment—though the actual extent of required material differs depending on jurisdiction—is prior art.[17] 'Prior art' refers to all publicly known material and essentially acts as the technical context in which the new invention sits, demonstrating the way in which the application reaches beyond what is already known. For the patent office, the concept of prior art is a technical requirement that enables the examiner to easily understand where the invention is positioned. The invitation (or requirement) for the applicant to essentially produce a synthesis of the prior art relevant to the invention frames the technical contribution of the application under consideration. And yet it isn't just a technical or mechanical requirement of the patent office's formal process: The applicant is enacting a separation between their own claim and what has been claimed before, isolating it from the undistinguished mass of public knowledge, and constituting a contextualised 'prior art *other*' specifically for the application.

Yet this separation also has a physical dimension because the patent specification which is submitted in the application is an important legal artefact. The metaphysical isolation of the information is confirmed by the physical document, with the physical representation of that separation carrying the legal weight of the information. Grace or priority periods are a common feature of patent law, present in the *Paris Convention*, and indicate, if not a direct physical form in the specification, at least a sense of physical *effect*.[18] Focusing on *rites de passage* as ontological transitions demonstrates how the patent application remains incomplete in its transformation and yet its status as a 'patent application' already has some legal impact. Crucially, this effect is not simply abstract but produces an important relationship to other, independent, instances of property. In this inchoate form, a patent application can be interpreted in a variety of ways related to infringement or enablement,[19]

16. *Ibid.*
17. One example is in the US with the 'duty of candor' which applies to a variety of different areas, but specifically on prior art that is submitted in support of a patent application. The deliberate omission of relevant prior art could be grounds for the patent to be invalidated. See generally Adam B Jaffe & Gaétan de Rassenfosse, "Patent Citation Data in Social Science Research: Overview and Best Practices" in Ben Depoorter, Peter Menell & David Schwartz, eds, *Research Handbook on the Economics of Intellectual Property, Volume 2: Analytical Methods* (Edward Elgar, 2019) ch 2.
18. See *Paris Convention for the Protection of Industrial Property (1883)*, 20 March 1883, 25 US Stat 1372, Treaty Series 379 at art IV [*Paris Convention*].
19. Where the claimed invention could be interpreted from when the patent application was filed, the time it was allegedly infringed, or the patent was issued: see Mark A Lemley, "The Changing Meaning of Patent Claim Terms" (2005) 104:1 Mich L Rev 101 at 118.

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protection of claims of novelty,[20] and safeguarding of the priority of a subsequent patent application elsewhere.[21] This hazy status or impact of the would-be patent is reflected in many other discussions in the context of ritual, in which the ritual is constructed as a suspension or a break "from the everyday."[22] For patents and patent applications, this suspension takes on an almost concrete force, as it clearly establishes a time before—and after—the patent application. This forcibly changes our interpretation of other patent criteria (such as novelty or inventiveness) and produces a distinct legal space which supports further transformation.

2.2 Marge, margins, and the liminal space

2.2.1 Transition in ritual space

The second stage van Gennep highlights in *The Rites of Passage* are the liminal, or transitional, rites.[23] Though he identifies several different contexts in which liminal rites function—ranging from the reception of strangers, childbirth, and priesthood[24]—the underlying purpose of these rites is to act as a *preparation* for the rites of incorporation.[25] Key to the liminal stage or threshold stage is its indeterminacy, producing a space in which the existing class (social, cultural, legal) is succeeded not by a new state but with something more amorphous and lacking in security or certainty. Turner, though this is discussed more completely later, argues that the liminal space of transitional rites is a space in which the past is left behind (or otherwise suspended) while a future has not yet been realised.[26] McCusker in particular contextualises the importance of Turner's "instant of pure potentiality" that produces an environment "in which many options and outcomes, positive and negative, become possible."[27]

Patents reflect the tensions in both the marginal phase itself and the broader sense of existence *between* specific and identifiable ontological states inherent to the ritual process. The liminal stage in a patent application presents an environment in which the patent application is defined by its uncertainty. The information's existing class is left behind, but it has not yet been replaced with another and reincorporated. At the point of application, information has been elevated beyond common knowledge and afforded some legal impact, though it lacks

20. On the important role of priority and the distinction between first to invent and first to file, see Mark A Lemley & Colleen V Chien, "Are the U.S. Patent Priority Rules Really Necessary?" (2003) 54:5 Hastings LJ 1299 at 1299, 1300.
21. Such as a subsequent international application through the Patent Cooperation Treaty (PCT). See *Patent Cooperation Treaty (PCT)*, 19 June 1970, TRT/PCT/001, online: *WIPO* www.wipo.int/wipolex/en/text/288637 at art 8.
22. Stephan Feuchtwang, "Ritual and Memory" in Susannah Radstone & Bill Schwarz, eds, *Memory: Histories, Theories, Debates* (Fordham University Press, 2010) 281 at 281.
23. See van Gennep, *supra* note 9 at 11.
24. *Ibid* at 27, 29.
25. *Ibid* at 21.
26. See Turner, *supra* note 11 at 235.
27. Sean McCusker, *Pedagogy of the Clown: Clowning Principles in Education* (Springer, 2023) at 127.

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the full weight of a granted patent. Crucially, as discussed by McCusker, one of the key aspects of the liminal process is that not only has the aggregation or reintegration not occurred, but there is also no guarantee that it *will* be achieved.[28] This uncertainty, in transitional rites generally and in patent law more specifically, is driven by the amorphous quality that the liminal stage brings. The dynamism of this stage is produced by the force of reconfiguration and not necessarily towards a successful reintegration. Once filed, the patent application obviously has no guarantee as to a successful conclusion. There is also a corresponding uncertainty as to the precise form that the claimed information will take when or if the patent application is successful.

2.2.2 Intangible subjects of a transition

By its very nature, information which is the subject of a patent operates at the margin of knowledge. This is often presented as the technological "frontier"[29] (which also retains a physical connotation as border or margin) where, to be eligible for a patent, the information must be new and non-obvious to those skilled in the art.[30] This sense of frontier as both a physical and somewhat spiritual or magical space appears throughout van Gennep's work and the literature more generally.[31] The margin in patent law is profoundly connected to how the information is separated in a ritual sense. The act of putting together a patent application and specification is necessarily both a separation *from* what is known and accepted, as well as an assertion that this information represents a new boundary or margin of innovation and somehow exists beyond our current understanding.

Yet patent law also demonstrates something more profound about the character of margins or boundaries in a subject's ontological state. Boundaries—whether they are in a traditional ritual context or in patent law—are never concrete. This is often implied in ritual literature, wherein the stages of a ritual always have a somewhat fluid quality that has raised discussions over ritual type vs. ritual instance and the effect of variation or improvisation on the overall character of the ritual.[32] The boundaries of the patent are essentially adjusted by the application of patent guidelines. Claims that cross categories and embody multiple independent claims are an example of this because, with some broad exceptions, they do not necessarily imply the patentability of a process claim from a product

28. *Ibid.*

29. Matthew Fisher, "Enablement and Written Description" in Ruth L Okediji & Margo A Bagley, eds, *Patent Law in Global Perspective* (Oxford University Press, 2014) 243 at 282. Though patent law can sometimes work to capture this frontier through broad patents, often the system fails at safeguarding the early years of a technology in the patent system.

30. An example of this structure can be found in the EPO examination guidelines, but these are generally representative of approaches internationally: see "Patentability Requirements" in *Guidelines for Examination in the European Patent Office, March 2024 edition* (entered into force 1 March 2024), online: *European Patent Office* www.epo.org/en/legal/guidelines-epc at Part G, Ch I-1 [*EPO Guidelines*].

31. Frequently describing gates, portals, and boundaries: see van Gennep, *supra* note 9 at 17.

32. See Carl Seaquist, "Ritual Individuation and Ritual Change" (2009) 21:3 Method & Theory in the Study of Religion 340 at 344.

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claim.[33] The application of general principles or a general framework in a specific instance, whether in a patent or ritual proper context, necessarily takes on an almost improvisational character that explores the distinction as the patent office and examiner see it. This is unavoidable in a patent context, because the information under consideration *should* challenge the margins and boundaries of existing knowledge.

The 'improvisation' that is enabled within this transitional space also extends beyond the patent office and into courts, with legal disputes over validity or infringement.[34] In both contexts, the margins and boundaries of the patent can be reconfigured to arrive at a patent that nevertheless retains a rigid and impactful quality with a relatively stable delineation. The looking back at a patent in a dispute context can involve the precise claims of the patent being adjusted, the scope of the patent reinterpreted, or the entire patent being invalidated. All of these demonstrate that the actors, through a more creative or improvisational perspective on margins in patent law, are involved in a reconfiguration of the relationship between the information being claimed, its boundaries, and its very separation from the undifferentiated whole body of knowledge. This dynamic relationship is occurring in a more ad hoc way than would first appear from the more formalised character of patent law. Yet this certainly does not discount the important formal aspect of law in the patent office. Mechanisms in which there is significant national autonomy to their precise design—the existence and dynamic of pre- and post-grant opposition is one clear example—are produced through legal provisions.[35] Each aspect of the design, implementation, and practice of these formal legal provisions complicates the interactive nature when they are given form in individual disputes. Opposition again appears to be a particularly illustrative example of the diversity here. Opposition proceedings in some jurisdictions can take place when the patent is published but not yet granted (pending),[36] while others only allow for post-grant challenges to its validity (and some which have switched between them).[37] And even when these systems adopt similar

33. See "Independent claims containing a reference to another claim or features from a claim of another category" in *EPO Guidelines*, *supra* note 30 at Part F, Ch V-3.8.

34. Alexander specifically challenges Turner's formalist approach to ritual, suggesting that "[t]his cannot account for the many occasions when ritual involves spontaneity and improvisation." Bobby C Alexander, "Turner's Definition of Ritual Reconsidered: Grotowski's Experimental Theatre as Secular Rituals of 'Spiritual' Healing" (1991) 3:1 Method & Theory in the Study of Religion 62 at 67-68.

35. Important because the *TRIPS Agreement*, though it outlines several requirements as to the overview and review of decisions made when a patent is challenged, does not expressly regulate the precise form or design of these provisions: see *TRIPS Agreement*, *supra* note 1 at art 62(4), art 62(5).

36. Though one example of challenging a pending patent is the UK, which officially is not a system of opposition but provides for a broad right of 'any person (including the proprietor of the patent)' to challenge the patent on a variety of grounds (including that it is not a patentable invention, specification does not sufficiently disclose the invention, or that the specification does not match the scope of claims in the patent application): *Patents Act 1977* (UK), s 72 (1)(a)-(e).

37. Such as Japan which, in the patent reform of 1996, replaced the system of pre-grant opposition with one of post-grant opposition.

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structures, there is significant variance in who has standing to challenge validity—whether there must be an interest, or whether the legislation provides a broad right of challenge to anyone.[38] Formal provisions that provide for these mechanisms contribute to patent law's regulatory or technical appearance, while in practice, validity and the determination of validity necessarily take on a somewhat fluid character.

2.3 Aggregation and incorporation

2.3.1 Reincorporation of the ritual subject

Patent law presents some specific insights into van Gennep's final interpretation of ritual transition, particularly because it embodies the multiplicity of incorporation. Incorporation or *agrégation* is the final point of ritual time that confirms the reintegration of the neophyte, in their new ontological state, within the normative order.[39] Central to these rites of integration or aggregation is a sense that the individual re-enters broader society, but with their new class and status. The context in which they operate is not necessarily changed by this re-entry, though there is certainly some impact on the character of this general or public space because of the presence (entry/re-entry) of a transformed individual. This broader sense of re-entry is also present in many of the rites of incorporation and, as with the general presence of portals or markers of space, features formal entrances or a consecration of different parts of a home.[40]

Van Gennep's original work presents an immediately physical way of understanding aggregation or incorporation because it focused predominantly on societal interactions. Here, rites of transition are concluded with an often physical representation of joining—where a marriage ceremony is concluded with a binding or tying of the participants, an "exchange of handclasps," a sharing of food.[41] Each of these elements resolves the tension inherent to the transition in state and reflects something more of a reincorporation of the subject within the non-ritual space. Throughout the process of integration is a constant negotiation between external and internal that determines, in each moment, where the ritual subject is positioned on this spectrum. So, while van Gennep and later anthropological work has focused on human subjects being integrated, fundamental to this process in any context is how these rites facilitate movement along a spectrum of recognised state. There appears to be no reason why aggregation rites could

38. With both a general right for pre-grant opposition and an interested party requirement for post-grant opposition, see Sandeep Kanak Rathod, "Patent Oppositions in India" in Carlos M Correa & Reto M Hilty, eds, *Access to Medicines and Vaccines: Implementing Flexibilities Under Intellectual Property Law* (Springer, 2022) 151 at 159; *The Patents Act, 1970* (India), s 25(1).

39. See van Gennep, *supra* note 9 at 11.

40. Portals appear throughout van Gennep's work, and highlight how "[a] rite of spatial passage has become a rite of spiritual passage. The act of passing no longer accomplishes the passage; a personified power insures it through spiritual means." *Ibid* at 22 [footnote removed]. See also *ibid* at 17, 20.

41. *Ibid* at 28. See also *ibid* at 24, 32.

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not apply to a non-human or non-physical subject, precisely because the aggregation is a transformation in social state (insider/outsider) and not necessarily or solely a *physical* reintegration.

Van Gennep confirms this in references to the landmark work of Layard, presenting connection between communities or individuals as something which can be achieved even without physical contact.[42] Pronouncements take on a particular quality in rites of incorporation, where van Gennep describes a more multifunctional deployment.[43] What is important in van Gennep's approach to this type of incorporation is the recognition that these interactions provide "at least a temporary bond."[44] This sense of provisional connection with the world and an introduction of the subject back into the broader group also have parallels in the way patent specifications are handled. Just as rites of incorporation are used as a way of "launch[ing] the child into the world," the publishing of the successful patent in the patent gazette is a way of dissolving the contextual time-space of the patent application and reincorporating it within broader society.[45] There is also a familiar sense of naming the patented information—a pronouncement—which is sanctioned by an authoritative actor (the state via the patent office) and indicates both the change in legal and social status of the information and confirms its re-entry in general society as a complete artefact.[46]

2.3.2 Recursive and repeated incorporations

Yet patent law demonstrates that this reintegration of the subject with the pre-existing normative structures does not simply end with the conclusion of a specific ritual instance or the grant of the patent. Rather, the process of reintegration occurs reflexively and across many different contexts that stretch beyond the strict boundaries of the ritual. And yet these reflexive integrations are mirrored by the potentially expansive lifespan of the patent. This article has focused predominantly on the process within the patent office as information changes in legal state. From a broader perspective, the conclusion of the ritual space and the successful reintegration of the patent, with its new legal status, is simply the beginning of a much larger cycle. Many patents are granted and produce limited economic value for their owners, while only a small number of successfully granted patents will ever be litigated. Litigation, just as with opposition procedures and the risk of invalidation proceedings, represents the way in which the legal status of the patent can suddenly be brought into question. A patent may proceed for its entire lifespan without challenge or change, in which case the expiration of the patent would flow directly (if not immediately) from its reintegration. Litigation of a patent may be rare, but it wrenches the patent back into a

42. See van Gennep, *supra* note 9 at 32, citing A H Layard, *Nineveh and Babylon: Second Expedition to Assyria, 1848-51* (Murray, 1861) at 317ff.
43. *Ibid* at 33.
44. *Ibid* at 32.
45. *Ibid* at 54 [footnote removed] (describing the rites of the Yao people).
46. *Ibid* at 38-39.

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liminal space in which the quality, character, and substance of the application are brought into question and subject again to considerations of separation and integration.

The underlying information of a patent undergoes aggregation in several ways, both in the narrow lifecycle considered here of an initial application, and in a challenge made through litigation later. The first is at the conclusion of the patent process in which the information emerges, legally distinct and protected, in its new form as property and becomes a part of 'patents' broadly considered. It re-joins the public world (that is, outside the specific confines of the patent processes) as publicly available information that nevertheless retains a distinctiveness and a legally enforceable character. Crucially, the grant of a patent also envisages its own end. The information then experiences a further ontological transformation in which the patent *again* becomes public, but this time as part of the commons and divested (broadly) of its legal weight. In this form, the information forms the prior art for other applications, and so retains—not as a patent but as a state of information—an influence on the future transformations of would-be patents.

This sense of expiration of a patent also mirrors many of the conventional ritual features that emphasise both a representation and a blurring of distinctions between life and death.[47] The end of a patent term is perhaps the clearest example of a 'death' in legal terms in a conventional ritual context, yet this life/death continuum is often only one of many different binaries.[48] Patent law itself contends quite regularly with questions around inventions that fundamentally question distinctions between organic and non-organic, or human and non-human. Patent law is at the centre of these binary distinctions, and the broader exploratory quality of distinctions makes sense given that patents represent the legal experience of the technological frontier and so raise difficult questions. This reflects the cyclical quality of ritual space, where the aggregation necessarily involves a negotiation of new margins that cannot be successfully resolved or reduced in a single ritual instance.

2.3.3 The contextual boundaries of reintegration

The ontological dimension of ritual space and its subjects is also particularly interesting in a patent context. Philosophical perspectives that provide a way of exploring the existence of the patent application can provide important insight in isolation, though they also can be integrated within van Gennep's repeated connection between ritual time and non-ritual time.[49] Schlag and the discussion

47. Where death and resurrection feature in the same ritual spaces, as well as other distinctions between male/female and animal/human: see Turner, *supra* note 11 at 237.

48. *Ibid.*

49. The relationship between the ritual stages and specific periods of time *outside* the ritual appears throughout van Gennep's work. These are sometimes vague, though there are some representations of stages of life which appear rapidly in the ritual and those which extend beyond the ritual structure: see van Gennep, *supra* note 9 at 47, 55, 94.

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of bounded objects is perhaps the most obvious connection to the separation that a patent application undergoes. For Schlag, the bounded object is finite in its reach and existence—though crucially, in its original context, the bounded object's boundedness is closely tied to the physical representation that enables it to become an "object-form."[50] Patents and patent applications reflect this embodied boundedness in the form of tangible manufactured technologies, yet the quality of boundedness also extends temporally as well. The entire patent application process, as well as the resultant patent itself, are strictly delineated by time in a way that reflects many of the same fundamental tensions in the discussion of bounded objects.

How this bounded object relates to its broader context—whether this is in terms of time or space—brings together the ontological understanding of ritual time with the changing boundaries of a subject. One perspective that stands out in ritual study is again found in Turner's "Betwixt and Between," which provides a unique way of interpreting how patents come into existence. Turner refers specifically to the terminology used by the Bamba and Shilluk people in discussing their rites, in which a girl is not mechanically 'made' a woman through the ritual but how a girl 'grows' to be a woman.[51] Turner locates the fundamental element of the ritual here by understanding it as effecting an ontological transformation rather than a more superficial change in title. Ritual and ritual space are not simply used to relabel existing elements of a configuration, but instead to reflect a more fundamental shift in their social and cultural state. Aggregation is then not simply a description of what is happening to the subjects of the ritual, but borders on something more performative.

Employing this human body analogy and applying it to a patent application, it is apparent that the process of applying for a patent involves a similar ontological transformation. The unique features of the patent office and the application process have been discussed in other work, describing a specialised and technocratic environment that works to question the understanding of patents as a neutral inscribing of technology.[52] But connecting this insight to the ontological transformation of ritual reveals a more fundamental understanding of what is occurring in the patent application process. The information progressively shifts not only through the stages of a ritual but through ontological states more fundamentally—the specialised vocabulary,[53] the incentives and culture of patent

50. Pierre Schlag, *The Enchantment of Reason* (Duke University Press, 1998) at 103.

51. "This term 'to grow' well expresses how many people think of transition rites … [where to] 'grow' a girl into a woman is to effect an ontological transformation; it is not merely to convey an unchanging substance from one position to another by a quasi-mechanical force." Turner, *supra* note 11 at 238.

52. See Siva Thambisetty, "The Construction of Legitimacy in European Patent Law" (2017) 3 IPQ 221 at 221-22.

53. With a corresponding interpretative dimension when distinguishing between the linguistic representation of the invention and the invention itself: see Tun-Jen Chiang & Lawrence B Solum, "The Interpretation-Construction Distinction in Patent Law" (2013) 123:3 Yale LJ 550 at 533, 534.

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professionals,[54] and the examination guidelines or classifications all influence the content and form of the would-be patent. The result is that, at every stage from application to grant, the information under consideration is transformed by its context in both form and content. Thus, the 'patent' that is granted does not simply involve a change of name in which a piece of information is relabelled as a patent. The ontological character of the patent has shifted from the point of application (and even before this, in that the applicant chose to apply specific boundaries and interpretations of the information in anticipation of a patent application) to the point of grant. A necessary result of this sequential ontological transformation is that the boundary of the patent—its precise scope—shifts as it proceeds through the different stages towards grant. Fundamentally, the process of the patent office is about facilitating these developments in state and working to contextualise the procedural elements of the patent grant. This is not to disregard their value entirely, but rather to recognise that there is more to the grant of a patent than the official guidelines or rules of the patent office.

Here, a more organic view would be that the boundaries (and thereby the scope of the patent) have a sense that they are *grown* rather than imposed. As discussed at the beginning of this section, the patent's scope is not certain—its margins and effective scope can be tweaked, reinterpreted, or re-established entirely. The recognition that these processes are both sequential and involved in something beyond surface-level classification also extends to patent applications which are *between* stages. The boundaries of a ritual in a more conventional context are not always entirely clear, but patent law benefits from a legal underpinning that provides a more explicit structuring.[55] The presence of explicit stages is juxtaposed with how the patent application shifts between these stages, influenced by contextual factors, demonstrating that the ontological transformation is part of a broader process that extends beyond singular moments in ritual space.

3. Liminal space and boundaries

3.1 Establishing the liminal quality of ritual space

3.1.1 The 'pure possibility' of transition

All of these things together highlight the important way in which the patent application process works to transition information from one legal state to another. Turner's work, rather than focusing on *rites de passage* in a broader ritual context, instead investigates the liminal or interstructural period of these rituals.[56] One important aspect is the focus on the typical importance of biological change—as a transition and rite of passage—where a transition in ritual reflects

54. Recognising that actors within the patent system have their own strategic incentives for participating, see Gittelman, *supra* note 7 at 21, 24, 26.
55. See Seaquist, *supra* note 32 at 345.
56. See Turner, *supra* note 11.

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a physical change in or between states. Turner argues that the space *between* stages in a ritual is not a neutral state, but instead, one in which there is the potential for reconfiguration and reinterpretation. Yet even here there is an expansiveness of what 'ritual' or 'transition' can be taken to mean. Turner recognises the more secular (or at least less overtly religious) aspect of these transitions by highlighting how "legal status, profession, office or calling, rank or degree" can all constitute a 'state' that can be the subject of a transition.[57] The emphasis here on social recognition and "social constancies" would suggest the liminal space is important not only in biological transitions, as in traditional ritual literature, but also in more abstract or intangible transitions.[58] Forth develops this further and describes how *rites de passage* are present "when a student ceases to be an undergraduate and becomes a graduate."[59] Central to *rites de passage*, but specifically exemplified in the example of the undergraduate, is the shift in state to one that is more valuable, more powerful, or more influential.[60]

From this perspective, patents share many similarities with how professionals or leaders experience the transition into their new social rank or class. Patents are intangible, but their stability as a state of being comes from the cultural recognition of their authority, content, and form by other participants in the patent system.[61] Liminality is important not just as an element of the broader ritual occurring, but as the enabling characteristic that supports the more fundamental ontological transformation which is occurring. Alexander argues this precisely by presenting liminality as "the basis of the transformations that ritual effects."[62] Key to this is the sense of *transformation*. Turner emphasises the potentiality of the liminal space that reflects not just a casting off of social categories but something more creative.[63] The patent application process, as with Turner's focus, centres the potentiality of the liminal space because of this creative dimension. Alexander notes that ritual, building on Turner's perspective, has an ontological status as a process of change rather than simply supplementing or depending upon some more fundamental social process.[64] Returning to patent law with this greater ontological emphasis highlights how the recognition of the patent application (and eventual patent right itself) is not simply a mirror to another social process but is itself an independent and fundamental element of how the patent acquires its new ontological state. Here, it is the ritualised transformation that itself establishes the (legal, social) reality of the patent right rather than acting as a confirmation or reduplication of some other, more fundamental, social (or biological) process.

57. *Ibid* at 234.
58. *Ibid*.
59. Gregory Forth, "Rites of Passage" in Hilary Callan, ed, *The International Encyclopedia of Anthropology* (Wiley, 2018) 1 at 1.
60. *Ibid*.
61. See Turner, *supra* note 11 at 234.
62. Alexander, *supra* note 34 at 69.
63. See Turner, *supra* note 11 at 236.
64. See Alexander, *supra* note 34 at 69.

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3.1.2 Continued motion and ongoing changes in state

Central to Turner's understanding of *rites de passage* and transition more generally is a sense of continuing motion. This perspective renders transition not as a state of being but as a "process, a becoming, and in the case of *rites de passage* even a transformation."[65] Two elements of this apply particularly directly to patents. The first is the understanding of transition as a 'becoming', which reflects many of the traditional perspectives in ritual literature discussed earlier. In proceeding through the patent application system, the patented information does not enter and exit in the same state. The information is elevated in status, acquiring a more distinct legal impact, and is granted the status of property through a process of constant motion. Viewed as a process of becoming, the patent system does not simply evaluate the patented information on the basis of technical requirements. Instead, these requirements guide the transition and the process of becoming that shapes the information at an ontological level as it proceeds through the patent application process.

Related to this, the second important element of Turner's transition is the persistent emphasis on transformation. Though the patent application system and the role of examiners can be understood in terms of the 'becoming' of a patent, there is certainly something more bold in characterising this as a transformation. Transformation can be identified in two further aspects of the patent application. The first is a transformation of form, though this necessarily produces the second transformation, which is of content. The patent application produces a transformation in the form of the information at a basic level that occurs from the moment of preparation for an application. How a technical solution to a problem is constructed is not simply an aesthetic question because, in a patent context, it shapes the precise scope of the patent. This rearranging of technical information has been approached from the perspective that emphasises the reduction of legal risk or exposure,[66] and Thambisetty in particular has presented 'textualisation' as a way of understanding the central character of the text in the patent specification.[67] From that perspective, the text is not simply a passive reflection or encoding of an invention but a distinct artefact with its own conventions (which extend across form, content, and design).[68] Yet a more ritual-focused approach that emphasises

65. Turner, *supra* note 11 at 234.
66. See Gittelman, *supra* note 7.
67. "The analysis makes the broader conceptual point that patent law standards are shaped by a version of 'textualisation' that relies on linguistic and rhetorical structures to cumulatively entrench meanings, and manage the acceptance of the EPO's legal positions by those who are governed by them. . . . I argue that legitimacy at the level of examining practices in patent offices is socially constructed, its claims mangled through unusual textual arrangements that frame resolutions of disputed or uncertain legal positions with a view to gaining credibility amongst the constituents it addresses." Thambisetty, *supra* note 52 at 221, 222.
68. "Patents are not passive encodings of inventions, but are constructed within a complex institutional framework by strategizing actors who use patents to strengthen competitive positions. If we do not understand the institutional, organizational, and strategic contexts in which patents are created, we risk misusing the data, misinterpreting our results, and in many cases attributing causality to covariance." Gittelman, *supra* note 7 at 21. Yet in addition to the "institutional,

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transition and transformation further integrates these perspectives within a broader framework of transition. From this more integrated perspective, it suggests the transformative effect occurs not only at the point of application, but again at grant and expiration in a series of recursive textualisations.

This leads to the second transformation, which is in terms of the content of the patent. Again, the textualisation focus suggests a transformation of the information through specific language conventions, but the ritual framing takes this further. The transformation in form is itself a transformation in content. Specialised language is the primary tool for enacting these transformations, though the role of this language has been under-explored outside of a technical context. The specialised vocabulary of patent law and its complexity have been discussed elsewhere, presenting an image of patent law that is characterised by its opaqueness to generalist legal discussion.[69] This lack of generalist input raises concerns generally for accountability, but it also reflects how patent law produces specialist spaces with their own dynamic. This creative space facilitates the transformation of information as it travels through the patent application system, isolated from broader legal reality. Ritual literature is full of analysis that details the use of special words or words that take on a particular meaning within a ritual space—though this is not to say that the patent application uses magical phrases to produce a patent.[70] Rather, the use of specialised language and conventions represents an encoding (and thus a transformation) of specific pieces of information in very particular ways, the result of which is a piece of information which becomes a specific type of property and given legal effect. The use of this vocabulary is not just a tool to enable a more precise understanding of what is being claimed, but instead reflects a fundamental change in what is being claimed, described, and protected. Taken together, there is a sense of 'knowing' that is described in ritual literature. The use of technical language and the specific conventions of drafting a specification work as signals to both the patent office and other inventors that the applicant is, at least provisionally, part of the community.[71] This contributes to the specialisation of the patent office space, because its participants actively seek to integrate themselves in order to incorporate their

organisational, and strategic" elements, the ritual perspective highlights the important social dimension of patents.

69. And particularly the difficulties that this presents for interpretation and the use of "multiple linguistic registers." Christian E Mammen, "Patent Claim Construction as a Form of Legal Interpretation" (2012) 12 John Marshall Rev Intellectual Property 40 at 64. See also *ibid* at 58.

70. There is a general discussion of pronouncements and naming that appears in ritual literature in a more mystical sense. Yet even in Turner's work, there is a specific mode of vocabulary that balances between specific terminology, trying to capture something specific in the use of "'initiate' and 'neophyte'." Turner, *supra* note 11 at 235. This also reflects the shifts in van Gennep's original terms and the way they were variously translated.

71. In van Gennep's original work, the discussion of specific greetings works similarly. Greetings between members of the same group (tribe, family) are used to reinforce their bonds, while greetings that involve a stranger are used to establish a transition. The stranger is introduced to a limited, almost quarantined, group and then eventually the society more broadly. In this case and the patent context, the specialised language is used not only to indicate a connection or membership but to reinforce existing or establish new connections. See van Gennep, *supra* note 9 at 33.

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conventions. This obviously has an economic aspect to it, because a patent applicant would like to have the patent accepted. Yet it also has a more abstract impact, in that it produces an environment with a strong delineation between a patent office space—which requires conformity and coherence—and the rest of the world.

3.2 The legal context and liminal space

3.2.1 Identifying the liminal in other areas of legal study

The liminal space that is emphasised in Turner's work is a key element in applying concepts from ritual studies beyond anthropology. Just as Forth (and Turner before him) highlighted, the essence of *rites de passage* is a sense of transition that does not necessarily have to be religious in character.[72] The liminal space, the "realm of pure possibility," is what allows otherwise rigid states of being to be reconfigured.[73] The creation of a transitory state in which reality can be reinterpreted or reconfigured is key in applying ritual concepts outside of the traditional subject matter. Work across history, human rights, and sociology have all deployed the concept of liminal space in a more general, secular, way.[74]

But law in particular has an interesting relationship to the creative potential of the liminal space because of how these states of being are produced (and enforced) by explicitly binding frameworks. Bankruptcy and the work of Korobkin demonstrate the potential for restructuring that is produced by the liminal space in *rites de passage*.[75] Korobkin identifies the potential for bankruptcy law to undo or modify existing commitments in the same way that a rite of passage does—where not only the commitment itself is undone, but its broader relationship to the social order is revisited.[76] The example of a ritual approach to bankruptcy is important for patent law here, because it emphasises the relationship between specific ritual events and the broader social structure. In patent law, the difficulty in the transitory phase, just as with bankruptcy, is that the knowledge under consideration is at once a distinct object and yet is also representative of more abstract or broader categories within the patent system. Korobkin explores how the ritual space serves to "insulate the prevailing social order from disturbance," with clear delineation between the literal world and the ritual world.[77]

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72. See Forth, *supra* note 59.
73. Turner, *supra* note 11 at 236.
74. See e.g. Maria Johansson, "Moving in Liminal Space: A Case Study of Intercultural Historical Learning in Swedish Secondary School" (2021) 18:1 History Education Research J 64; Juan Auz, "'So, This is Permanence': The Inter-American Human Rights Systems as a Liminal Space for Climate Justice" (2021) 22:2 Melbourne J Intl L 187; Svetlana Bankovskaya, "Living in-between: The Uses of Marginality in Sociological Theory" (2014) 13:4 Russian Sociological Rev 94 at 94-95.
75. See generally Donald R Korobkin, "Bankruptcy Law, Ritual, and Performance" (2003) 103:8 Colum L Rev 2124.
76. *Ibid* at 2146.
77. *Ibid* at 2147.

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In terms of contemporary patent law, the discussions around COVID-19 and the possibility of a waiver are particularly interesting when considering the concept of social order and disturbance.[78] The waiver offers a distinct approach to the patent when considered from a ritual perspective, because it essentially brings about a temporary 'death' of the patent. A waiver is an attempt to forcefully push a successfully granted patent back into a liminal space—where it has an incomplete or ineffective legal impact and cannot give rise to legal action—and allow its material to be used without fear of enforcement. And yet the use of a waiver in COVID-19, rather than compulsory licensing, clearly reflects Korobkin's analysis of how ritual space insulates the social order. This is because a waiver is at once a recognition of the validity of the patent and the bundle of obligations that it represents, whilst essentially (and however temporarily) undoing them at the same time. The waiver, if successful, must balance between its material objectives and the risk that it demonstrates the fragility of patents as legal objects. This balance would appear to be achieved predominantly through its time-limited nature and the fact that it is in specific response to COVID-19 (and not epidemics in general). Yet the undoing of an obligation and the fundamental risk that it poses to the entire concept of the patent system could explain some of the unarticulated tensions that underlie opposition to the patent waiver.

Yet what appears to be understated or more implicit in Korobkin's work is the liminal space. While the transition between states and the actions that signal a transition between states are discussed, they are not explicitly linked with the reorganising potential of the space *between* states.[79] Of particular importance for patent law is the sense of altered time that Korobkin highlights in the use of legal mechanisms.[80] Here, the filing of a bankruptcy petition has a profound impact.[81] What is described as "an extended 'present tense'"[82] in the context of bankruptcy could be more properly understood as the liminal space that Turner describes. In establishing a legal context that is isolated from ordinary rules or expectations, the automatic stay in bankruptcy marks the start of the liminal space and an (extended) transition between existing states.[83] For patent law, the patent application functions in a very similar way. Just as with bankruptcy, the environment that this application produces is at once isolated from existing rules or expectations in a way that supports reconfiguration, whilst also being necessarily dependent on that broader social order for its stability and the eventual reintegration of the subject. Crucially, from a legal perspective, this isolated state of transition has not only a societal impact but a legal one—the bankruptcy petition changes the ability for debtors to pursue the applicant's assets, whilst the patent ap-

78. See Mercurio, *supra* note 4 at 16-17.
79. See Korobkin, *supra* note 75 at 2153.
80. *Ibid* at 2148.
81. Where the "filing of the petition also introduces an altered sense of time," but has a significant legal impact because of the automatic stay in US bankruptcy law (*ibid*).
82. *Ibid* at 2149.
83. *Ibid.*

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plication gives weight to the claimed invention through rules of priority.[84] The subjects of these transitions, because they remain integrated within broader frameworks and social categories, are never truly isolated in this period of transition. As such, the 'pure possibility' of these transitory spaces is not necessarily unlimited and, in a legal context, is constrained quite significantly by the broader social order.

3.2.2 The liminal quality of borders in patent law

Liminality and the 'between-ness' of *rites de passage* also appear prominently in other areas of patent law beyond the application and grant procedures. Enforcement of the patent demonstrates perhaps a clearer sense of the 'pure possibility' that Turner describes when a subject is progressing through the different stages of a ritual.[85] And this sense of potentiality highlights an important element when looking at patent applications—the diversity of both discipline and quality.[86] Software is perhaps an example which stretches across both of these concerns, but there are sure to be others. The border between inventive and non-inventive shifts depending on discipline, and yet there is something much more fundamental to the liminal quality of inventiveness. The dividing line between these for an examiner will likely be clear when encountering the extremes of a high-quality application and a low-quality one. Yet it is precisely the cases of a borderline invention which highlight the improvisational element that is central to the practice of examination guidelines. Can the line between inventive and non-inventive ever be scientifically expressed? The very existence of these liminal applications represents an invitation, primarily to the examiner, to subtly renegotiate where exactly the inventive border lies in a way that cannot be expressed in strict legal language.

The enforcement of a patent—that is, a response to an alleged infringement—would at first appear to be a simple question of fact that tries to position where a patent is located in terms of knowledge and also in terms of the patent application process. Yet the reality of a patent challenge highlights how, in practice, a claim of patent infringement occurs in a liminal space in which the patent can take on multiple, potentially overlapping, roles within this isolated context.

This liminality appears in two distinct contexts, the first of which is more administrative. Many jurisdictions separate out proceedings for infringement and validity, though they are often deployed at the same time for strategic reasons, as in systems with a unified approach.[87] This represents a fundamental

84. The applicant's assets are protected through the automatic stay in US bankruptcy, which is not a feature of all bankruptcy regimes. For in-depth comparative analysis, see Tibor Tajti (Thaythy), "The overlooked building blocks of secured transactions law reforms: policing and the role of organized industries" (2022) 27:2 Unif L Rev 320 at 340-41.

85. See Turner, *supra* note 11 at 236.

86. Thank you to Reviewer 2, who raised the subject of diversity of quality in patent applications.

87. See Katrin Cremers at al, "Invalid but infringed? An analysis of the bifurcated patent litigation system" (2016) 131 J Economic Behavior & Organization 218 at 219-20.

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contradiction in the state of the patent. A defending party can respond to a claim of alleged infringement by arguing—at the same time and potentially in the same venue—that their patent or product is not infringing, and *even if it was*, the original patent to which infringement is claimed is not valid anyway. This has been described as the double-track problem in specific jurisdictions, such as Japan, because the separation of infringement and validity proceedings risks producing contradictory judgments.[88] A variety of approaches can be deployed to address this tension, such as through a unified appellate forum and more explicit communication between the institutions involved.[89] The overlapping quality of dispute context(s) here highlights the important reminder that these transitions in state or category of the patent do not progress unilaterally. The contextual space that allows the reconfiguration of legal space is as much an undoing as it is "a doing."[90]

3.2.3 The hazy quality of liminal boundaries in patent adjudication

But beyond the judicial way that this problem has been approached—constructed as a problem of competing venue and claim—emphasising the liminal space provides a more comprehensive understanding of the ontological dimension of the patent in these circumstances. The claim of infringement and the commencement of proceedings function essentially as a recursive stage in the patent ritual that presents four potential ways of progressing, producing a liminal space to facilitate the ontological shift in the status of the underlying information. This also works to reaffirm the non-linearity of these transitions. If the infringement claim is unsuccessful, then the elevation of information to the status of a patent is reaffirmed and its legal influence is proven. If the patent has not been infringed but is successfully defended from the validity challenge, then its elevated position and status are again confirmed. If the patent is judged to be invalid, then the underlying information loses its authoritative legal status (though it retains some influence as part of the commons), and the judgment pronounces this shift in status.

Perhaps most interestingly for liminal space and the shifting character of the patent would be the fourth potential situation, in which the patent is judged to be partially valid or partially infringed.[91] In this situation, the legal proceedings

88. Which has been particularly prominent in the Japanese context: see Nahoko Ono, "Legislative Reform Related to Intellectual Property Enforcement in Japan" in Christoph Antons, ed, *The Enforcement of Intellectual Property Rights: Comparative Perspectives from the Asia-Pacific Region* (Kluwer, 2011) ch 5.

89. On the partial resolution of the double-track problem in Japan, see generally David Tilt, "Comparative Perspectives on Specialised Intellectual Property Courts: Understanding Japan's Intellectual Property High Court Through the Lens of the US Federal Circuit" (2021) 16:2 Asian J Comparative Law 238.

90. Korobkin, *supra* note 75 at 2146, quoting Elin Diamond, "Introduction" in Elin Diamond, ed, *Performance and Cultural Politics* (Routledge, 1996) 1 at 1. Korobkin focuses on Turner's description of unmaking, where performance is capable of both creation and undoing. For bankruptcy, it involves the balancing between the undoing of a social state, a reversion, without undoing the broader social order.

91. On invalidation (full and partial) outcomes in patent challenges, see Colleen Chien, Christian Helmers & Alfred Spigarelli, "Inter Partes Review and the Design of Post-Grant Patent Reviews" (2018) 33:3 BTLJ 817 at 823.

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function as a kind of instanced version of the original patent office process.[92] The court takes the essential steps of the original ritual and replays them, though its fundamental elements are still drawn from the original uses of specialist language and defined process. Crucially, this sense of an instanced or condensed ritual process applies to cases emerging from both invalidation and infringement. Obviously these are distinct legal procedures, and yet they are both—in terms of the liminal space—performing a similar function. It is the legal challenge to the integrity of the patent that is the catalyst for a return to the liminal space. The court then takes on the same position as the original patent office, as it replays the same steps and carries out the same judgments as to the legal character and quality of the patent but from their own perspective and in their own unique context.

It is the liminal space that enables this reconfiguration of the patent and its legal effect, because it renders the underlying information as between legal states again, where its effect remains indeterminate until a decision has been made. This has been overlooked in conventional patent literature, but the ritual perspective highlights how significant this ontological reconsideration actually is. Patents function as property and their boundaries are relied upon in much the same way as real property: They can not only be assigned or licensed (leased) to others, but can also be used to secure venture capital funding or function as collateral for financing.[93] It is precisely the in-between character of the legal proceeding that enables the reconfiguration of a patent and its boundaries as a form of property.

Understood as part of a broader *rite de passage*, it realises this by elevating certain elements of the underlying information (as a confirmation of validity or non-infringement) and rendering others as lacking the legal authority of a patent (through disallowing specific claims). The fact that this occurs on an ad hoc basis for a piece of property is significant for what it demonstrates about how far the reconfiguring power of the liminal space can go. In fact, the use of 'information' to refer to the patent throughout the article has been an attempt to recognise the complexity of the liminal space in patent law. 'Information' has been used not only to distinguish the patent from the technical knowledge that it represents, but also to try and find a neutral term to describe that underlying knowledge. Rather than framing the patent as a vehicle or representative of information, however, one could also understand it as representing investment or the labour of an inventor. Each of these implicitly recognises that the 'patent' is working somehow as a stand-in or is distinct from its contents. The article focused on 'information' because the liminal space in patent law is the reconfiguring of knowledge—of information about a technical solution—that affects not only the form in which it is expressed but the legal impact of that reshaping.

92. For discussion on the difficulties of distinguishing between ritual as a particular instance and ritual as an 'event type', see Seaquist, *supra* note 32 at 344.

93. On use as collateral, see Bruno Amable, Jean-Bernard Chatelain & Kirsten Ralf, "Patents as Collateral" (2010) 34:6 J Economic Dynamics & Control 1092; on supporting venture capital funding, see Haibo Zhou et al, "Patents, trademarks, and their complementarity in venture capital funding" (2016) 47 Technovation 14 at 14-15.

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Information can be represented by a patent or manifest in a patent, but the patent itself is a distinct artefact in terms of its legal effect and characteristics.

Approaching the infringement proceedings as an instance of the ritual also reflects many of the tensions found in more conventional ritual literature. Van Gennep does not necessarily consider this in *The Rites of Passage*, but the distinction between ritual particulars (though here 'instance' is used), ritual type, and ritual change was deconstructed expertly by Seaquist.[94] Again, we see reflections of improvisation and how this does not necessarily render the instance a different *type* of ritual—where the choice, based on the evidence submitted, to elevate some elements and disallow others necessarily involves a contextually responsive improvisational approach.[95] The infringement proceeding is certainly distinct from the original patent office procedure, particularly in terms of how the process is initiated and the venue where it takes place, but the essential steps and the result are the same (though the court results in a reaffirmation with the same legal weight as an 'original' determination). The infringement proceeding functions as an instanced form of the original, overarching ritual, but one that is nonetheless contextually limited. Also interesting to the later process of infringement is that it occurs with knowledge of the patent already granted. Seaquist has discussed how assessing ritual change or adaptation necessarily requires knowledge of how the ritual existed *before* these changes.[96] And so in this revisiting of the patent in an infringement context, there is at least an immediate sense of continuity between the previous transitions that occurred to produce the patent originally and the current instance of them. This also extends to the explicitly creative task of judges in these cases—to imagine what another inventor could have known at that time, and to imagine what informational materials would have been available at the time.[97] All of these elements together produce a process which is less concrete and more improvisational than it would first appear.

Though even in this reaffirmation of the patent there is a sense of transition between the liminal and the prescribed, where the conclusion of the process (the judgment) produces a legal effect that stretches beyond those involved in the case and to society more generally. This can also be found more explicitly in cases that deal with validity in specific jurisdictions where it does not render a formal change in validity but one that remains *inter partes* and yet still broadly effective.[98] From this perspective, the conclusion of the infringement proceeding is

94. See Seaquist, *supra* note 32 at 345, 348.
95. *Ibid* at 347.
96. *Ibid.*
97. See Dan L Burk & Mark A Lemley, "Is Patent Law Technology-Specific?" (2002) 17:4 BTLJ 1155 at 1190-91. On the use of 'person who is ordinarily skilled in the art': "The two PHOSITAs also differ in the date at which knowledge is imputed to them. The knowledge of the obviousness PHOSITA is assessed as of the time of invention, while the enablement PHOSITA is aware of information available at the time a patent is filed." *Ibid*.
98. Such as the situation that emerged in Japan with the 2005 amendment to the Patent Act allowing invalidity challenges to be raised during infringement proceedings: Nari Lee & Marcus Norrgard, "Alternatives to Litigation in IP Disputes in Asia and Finland" (2012) 43:1 Cal W Intl' LJ 109 at 122.

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again a form of aggregation—whereby the patent is reintegrated as a form of property and its legal status reaffirmed, with borders that have again taken on an *erga omnes* character. The liminal space resolves and the result is a complete property right with defined boundaries. Yet this conclusion of certainty masks the amorphous quality of information in a patent while proceeding through these stages, as well as the serial transformations that occurred through the liminal space.

4. Conclusion

The development of international cooperation on intellectual property has worked to emphasise the economic characteristics of patents. They have been presented by a variety of governments as central to economic recovery,[99] a tool for empowering SMEs,[100] and unlocking the economic potential of universities and other educational institutions.[101] Yet this focus on such a narrow interpretation of patent law obscures a more fundamental understanding of how patents come into being. Crucially, the process of applying for a patent begins a series of contextualised processes that transform the claimed information. The information changes as it proceeds through the application process, and is not simply changed in name when the application is successful. Instead, as understood through the lens of *rites de passage*, the information undergoes an ontological transformation by way of a liminal space in which its legal and social state is reconfigured. All of this together presents a more rounded understanding of patent law that works towards complementing the semantic isolation that is described in patent literature with an analysis of a corresponding ontological isolation.

The article demonstrates this by interpreting the patent and patent application process through the lens of ritual and ritual space. Van Gennep's work is central to understanding patent law as a particular type of ritualised transition—a *rite de passage*—but particular attention was given to the flexibility that the liminal space provides in this context. Together, these perspectives in a patent law context emphasise the grounded and contextual nature of the patent process. Focusing on the stages of ritual in the patent office centres a more mediated understanding of reality—one in which information does not simply *become* patentable at an abstract level, but rather undergoes a series of ontological

99. WIPO's COVID-19 Response Package makes specific mention of patent law and is aimed at helping members use intellectual property to "strengthen economies, support communities and drive sustainable recovery post-pandemic." WIPO, "In Summary: WIPO's COVID-19 Response Package" (last accessed 27 November 2024), online: *WIPO* www.wipo.int/covid-19/en/response-package.html.

100. See Runhua Wang, "How do patent subsidies drive SMEs to patent? Evidence from China" (2023) 16:4 J Development Effectiveness 408.

101. Part of the motivation for legislative reform in this area was to exploit the knowledge produced in universities: see David Orozco, "Assessing the Efficacy of the Bayh-Dole Act Through the Lens of University Technology Transfer Offices (TTOS)" (2019) 21:1 NCJ Law & Technology 115 at 120-21.

https://doi.org/10.1017/cjlj.2024.26 Published online by Cambridge University Press

transformations that are at once both social and legal. From this perspective, the patent office (and the applicant) are not simply applying objective technical standards to a piece of neutral information. The ritual processes through which the state of this information is changed highlight that the patent office and its standards are contextually dependent and operate within a distinct legal, social, and cultural space. The analysis of this article attempts not to erase the economic significance of patent law, but to recognise that patents are complex legal objects that are produced through a variety of interactions and can take on a variety of identities.

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https://doi.org/10.1017/cjlj.2024.26 Published online by Cambridge University Press