

ART

INTELLECTUAL PROPERTY

&

THE KNOWLEDGE ECONOMY

By

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Doctoral Thesis

Submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy

Goldsmiths College, University of London, 2002



ABSTRACT

This thesis proposes that the discourse of the '*knowledge economy*' must be analysed in relation to *intellectual property* law, and to creative concepts drawn from *aesthetics*. Insofar as the '*knowledge economy*' is dependant on specific theories of *creativity*, the thesis contends that its political economy must be examined as a *cultural* formation. This thesis demonstrates that a dynamic conflict exists within the conceptualisation of creative labour, which is central to the theory and operation of the knowledge economy. On the one hand, rhetorically-based concepts of creative labour – such as 'originality' and 'invention' – remain central to copyright and patent law. On the other hand, more recent conceptualisations (here termed the 'semiotic/network model') are central to the management of the knowledge economy, though such a model also possesses the potential to undermine the rhetorical concepts within intellectual property law. This thesis therefore contends that the limits of the knowledge economy can be established by analysis of the cultural and aesthetic components it utilises

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Introduction

OVERVIEW

The project laid out above abstract raises a number of questions. What common ground exists between concepts of creative labour that inform contemporary theories of *political economy*, and those that inform *art theory* and *practice*? How culturally and aesthetically orientated is the discourse of the knowledge economy? What *constraints* are placed on definitions of culture and the practice of art by such an economic discourse? Why is the role of *intellectual property* currently so central to this economic discourse, and to the ‘appropriational aesthetics’ of the last twenty years?

In order to analyse the aesthetic-creative concepts at play in the knowledge economy, it is necessary to recuperate aspects of the history of intellectual property that have long been overlooked. Situating the study of intellectual property in the context of visual culture permits an analysis previously unavailable to either literary-centred studies of copyright or industrially-orientated studies of patent. In the 15th and 16th centuries, image making was already an important ‘creative industry’. Its position within the social nexus of the guilds therefore permits examination of the transition from medieval forms of social and industrial organisation (with respect to ‘intellectual property’) to more modern forms. Situating the analysis of intellectual property in the context of visual culture and aesthetic theory, also provides the vital ground from which to explore more recent developments with respect to creative labour and intellectual property. As will be demonstrated below, such developments provide key points of articulation in the theory of the knowledge economy.

Since the early Renaissance, creative concepts derived from the ancient art of rhetoric have informed the production of art, music and literature. There is a complex relationship between early European systems of intellectual property and the

'rhetorical model' of *creative labour & composition*. The earliest 'modern' systems of intellectual property, such as that of the 15th century Venetian republic, emerged from attempts to regulate trade. Though having much in common with the guild system, the Venetian 'privileges' system reflected the new concepts of creative labour emergent in the period. Over the course of the 16th century, a *de facto* 'right' (which was related to personal labour and expressed through the medium of composition), increasingly informed the operation of the system. Though undergoing many changes, the rhetorical concepts of 'invention' and 'originality' survived into later acts of intellectual property legislation and doctrine. Though the cultural history of such concepts is generally unacknowledged, the concepts themselves continue to inform contemporary legal thinking with respect to intellectual property.

It was not until the *'aesthetic dematerialisation'* of the 1960s, that the rhetorical concept of creative labour and composition was significantly challenged. Such 'dematerialisation' was predicated on degrading the significance of the material art *object*, in favour of what became known as *'concept art'*. In effecting this transition, dematerialisation was marked by a bifurcation in the production of property, consisting of a growth in the relative importance of *'intellectual property'* over that of *'movable property'*. Paradoxically however, the move from object to concept was achieved by distancing creative production from the rhetorical model of composition and its cognate form of creative labour. The 'refusal' of the rhetorical concepts of composition and creative labour by artists of the period was accompanied by the development of *new* creative strategies, which attempted to open up the categorical borders of both the individualistic artist-author and the 'autonomous' composition. The new strategies investigated collaborative, and often, unattributed forms of creative production. Later, under the influence of post structuralism, such *'networked'* production was increasingly conceptualised within a *semiotic* framework. Theorised thus, this new model suggested that, rather than occurring 'within' a given individual, the creative act occurred in the relational spaces *between* individuals. This new model – here termed the *'semiotic/network'* model – had the potential to be interpreted in different ways. In the late 1970s, critical art practice developed its challenge to

rhetorical concepts of creative labour and composition, into a confrontation with copyright law. This ‘*strong*’ interpretation of the semiotic/network was retrospectively tagged ‘*appropriation art*’. Beyond the art world, the broader dissemination of the semiotic/network model brought the cultural model of creativity into line with the practice of scientific and industrial innovation – wherein research and development had long been based on *networks*. This ‘*weak*’ mode of interpreting the semiotic/network was focussed on its challenge to the *individualism* of the ‘rhetorical model’. The *de-subjectivising* tendencies of this new *ideology* loosened the grip of older assumptions about *individual rights* to creative property as inherited from the ‘rhetorical model’. Beyond the art world therefore, the new ‘common sense’ of creative production did not threaten to undermine the regime of intellectual property, but rather suggested a new way in which individual *claims* to intellectual property assets might be *managed*.

For this reason, the continuing co-existence of the ‘rhetorical’ and ‘semiotic/network’ models is therefore central to the *identity* of the knowledge economy, and the deferral of a *definitive confrontation* between them, is *crucial* to its operation. An outright – or ‘strong’ – application of the ‘semiotic/network model’ threatens the destruction of the rhetorical concepts on which the intellectual property system (and by extension the knowledge economy) rests. A rigorous application of the ‘rhetorical model’ would create an ‘unmanageable’ plethora of *individual rights*, and thereby threaten the established accumulations of ownership and power that characterise such an economy. The ultimate ‘success’ of the semiotic/network model suggests the *destruction* of the institution that secures and structures the current asset base, while the ‘success’ of the rhetorical model, would lead to a *democratising* of its ownership. For this reason, the knowledge economy is both *grounded* on, and *limited* by, its ability to defer a definitive confrontation between the old and new concepts of creativity. In order to avoid such a definitive confrontation, it is essential to ensure the general ascendancy of the ‘weak’ interpretation of the ‘semiotic/network’. In practical terms, this has meant restraining the ‘strong’ interpretation developed within aesthetic practice under the aegis of ‘appropriation art.’

Beyond the art world, the general adoption of the semiotic/network model of creative labour was facilitated by the economic developments that presented eerie parallels to the '*aesthetic dematerialisation*' of the 1960s (from which the creative model had initially developed). From the 1970s onwards, the economies of developed states had been gripped by new technological and material challenges, the effect of which, was to shift the focus of economists and politicians from *material* or industrial production, to the production of ideas or *concepts*. While '*economic dematerialisation*', was not caused by its aesthetic counterpart, the latter did establish a receptive *cultural grounding* for what later became known as the 'creative economy'.

The development of the concept of the knowledge economy moved the focus of analysis from the observation of the dematerialisation phenomena towards a policy of strengthening intellectual property and maximising the production of new ideas. The new economy's dependency on creative labour draws together a 'complex' of creative concepts. On the one hand, this results from the need to maximise the production of 'creativity' essential to an intellectual property-based economy – for which both rhetorical and semiotic/network models of creativity are necessary. On the other hand, the theoretical creation of such an economy is itself an *aestheticising* project. The literature of the knowledge economy evokes a heterogeneous range of theories relating to aesthetics and creativity, some of which are pre-modern, some Romantic, some Modernist/avant gardist and others of which, are post Modern. From this *complex matrix*, theorisations of the knowledge economy impel an 'ideal economic subject' that is generally disposed towards creative labour and attuned to the production of intellectual property assets. While the labour of the '*creative-destructive*' subject is 'managed' through the prevailing semiotic/network ideology of production, the fruits of such creative labour can only be rendered as capital assets by a system of intellectual property still inured within the older discourse of rhetoric. The co-existence of the rival models therefore ensures the transfer of assets in a manner that does not threaten the established equilibrium of economic power.

The ‘cultural turn’ represented by theorisations of the knowledge economy, is also evident where its concepts are actualised as policy objectives. The refinements to Joseph Schumpeter’s concept of *creative destruction* have lent it a *culturally* and geographically specific identity. In evoking the ‘creative economy’ as a palliative to the problem of ‘price competition’ emanating from developing states, the ‘Modernist’ universality of Schumpeter’s theory has been reconfigured. The effect of the reformulation is to render the *economic* divisions created by knowledge economies as *cultural* divisions. This phenomenon is particularly evident in the settlement reached over the internationalisation and harmonisation of intellectual property law under the ‘Trade-Related Aspects of Intellectual Property’ agreement (*TRIPs*). The view of ‘common knowledge’ that prevailed under this treaty limited the ‘public domain’ to that which was already woven together by the threads of intellectual property law. *TRIPs* thereby created a sharp division between ‘*modern*’ knowledge bases and those effectively designated as ‘*traditional*’, and thus ‘ownerless’ resources open for economic exploitation.

Against this background, *cultural challenges* to the legitimacy of intellectual property in developed states have been taken very seriously. The case of *Rogers v Koons* was conducted in the United States at the height of international negotiations over *TRIPs*. The case was crucial in establishing a ‘direction’ for the semiotic/network model of creativity that was conducive to the nascent knowledge economies. The legitimacy of the ‘strong’ interpretation of the semiotic/network, enacted under the aegis of ‘appropriation art’, was the central issue in the case. However, the defence of appropriational strategies presented in court meant that, win or loose, the earlier anti-intellectual property stance of mainstream ‘appropriation art’ was restrained. The case was therefore central in ensuring the ascendancy of the ‘weak’ interpretation vital to the operation of the knowledge economy. The case therefore demonstrates the kind of restraints on cultural practice that can be expected in the era of the knowledge economy.

METHODOLOGY AND LITERATURE REVIEW

INTERDISCIPLINARY METHOD

The project described above draws on elements from three disciplines, art history/theory, law and economic theory. From the point of view of this thesis, the commonality between such diverse disciplines is located in the arenas of intellectual property law and the related theories of creative labour. It is the nature of interdisciplinary projects to provide new approaches to questions that may have become over-familiar and overly determined within the methodologies and protocols of more distinct disciplines. The discourses of every discipline evolve within set parameters, resetting such fixed boundaries is the work of a critical interdisciplinary project.¹

The advantage of an interdisciplinary approach then is to suggest different complexities and nuances to those that usually dominate and characterise an academic discipline or discursive field. However, as with all such insights, the moments of fixity that occur in the flows between the disciplinary discourses, and the connections made, do not pretend to present a full and definitive narrative. The use of an interdisciplinary method in this thesis is tied to a specific purpose. The entrenchment of intellectual property in the era of the knowledge economy is frequently presented as the ‘natural’ corollary to the activity of free markets, driven by some hidden, ‘evolutionary’ dialectic. In contrast, critiques of intellectual property frequently suggest that intellectual property is a historically ‘recent’ occurrence, which has now been overtaken by new technologies and cultural practices.² The reductionism of these

¹ As Foucault suggested in a much quoted passage, criticism consists in “analysing and reflecting upon limits” and in transforming the critique “conducted in the form of necessary limitation into a practical critique that takes the form of a possible transgression”. See Michel Foucault, ‘What is the Enlightenment?’ in *The Foucault Reader*, ed., Paul Rabinow, Penguin, London, 1984, p. 50. In an American vernacular, such a definition of criticism might alternatively be construed as ‘pushing the envelope’.

² As will be demonstrated in Chapter Five, Part II, such a position was central to the early phase of appropriation art in the late 1970s and early 1980s, and to the ‘authorial’ debates of the late 1980s and early 1990s. Such a view is still in play in critiques of copyright law.

positions obscures the complexity of the law, along with a wealth of complex social, economic and aesthetic issues that relate to the emergence and maintenance of intellectual property laws. This thesis has been conducted with the aim of recovering some of the complexity lost in such presentations.

ECONOMIC THEORY: AESTHETICS, RHETORIC AND THE CREATIVITY OF BUSINESS

Within the general field of economics, there have been two main areas of interdisciplinary study relevant to this thesis. Firstly, and most obviously, there exists a ‘business’ literature relating specifically to the knowledge economy, which focuses on the relationship between creativity and economics. Secondly, there is a smaller critical literature within economics relating to the use of rhetoric and aesthetics.

The business/knowledge economy literature will be criticised at length in chapters four and five. It is sufficient to note at this point the contribution of Diane Coyle’s *The Weightless World* and Charles Leadbeater’s *Living on Thin Air*.³ The former text describes what has so far been identified as the ‘dematerialised economy’, an economy that centres on ‘knowledge assets’ as opposed to ‘material assets’. The latter text extends the remit of enquiry to focus on questions surrounding the creation of knowledge. These two texts are therefore key starting points for an investigation of the current relationship between theories of creativity and the knowledge economy. Both texts develop the earlier insights of Joseph Schumpeter’s classic works on the relationship between creativity and economy, and in particular the influential chapter from *Capitalism, Socialism and Democracy* on ‘The Process of Creative Destruction’⁴. While unaccountably not a central text of the current knowledge

³ Diane Coyle, *The Weightless World: Strategies for Managing the Digital Economy*, Capstone, Oxford, 1997. Charles Leadbeater, *Living on Thin Air: The New Economy*, Viking, London, 1999.

⁴ Joseph Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, London, 2000, pp. 81-87. (First published in Britain, 1943.)

economy discourse, Karl Polanyi's *The Great Transformation*⁵ is however vital for an understanding of how such an economy might emerge and operate. Polanyi's understanding of the social construction of markets has been useful here in conceptualising the institutional development of intellectual property law in both historical and contemporary contexts. In distinction from 'evolutionary' approaches to economics, Polanyi's analysis stress on the social constructedness of markets provides a grounding on which cultural approaches to economic analysis can be developed.⁶

The literatures relating specifically to rhetoric and aesthetics in the realm of economics are fewer in number. Donald McCloskey's *The Rhetoric of Economics* established an influential analysis drawing attention to the use of rhetorical structures in economic theory.⁷ McCloskey's analysis of rhetoric and economics has more recently been supplemented by work that specifically examines the relationship between the tropes of economic theory and those of early 20th century Modernist avant gardes.⁸ Rick Szostak's *Econ-Art* examines the early to mid 20th century economist's relation to surrealism and cubism, has been particularly useful to this thesis since his research concentrates on economic theory in general. While it is only to be expected that creative theory would rise to the top of agendas in an economy dominated by intellectual property, Szostak's contention that the rhetoric of the visual arts might inform economic theory even at moments when intellectual property is relatively insignificant, has been very informative.⁹

⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, Beacon, Boston, 1957. (Originally published, 1944.)

⁶ See Alan Scott, 'Globalization: Social Process or Political Rhetoric?' in *The Limits of Globalization: Cases and Arguments*, ed., Alan Scott, Routledge, London, 1997. Here Scott provides a very useful analysis of Polanyi's relevance to contemporary concerns.

⁷ Donald McCloskey, *The Rhetoric of Economics*, Wheatsheaf, Brighton, 1986. (Donald McCloskey now publishes as Deirdre McCloskey.) It is also necessary to mention here, Howard Caygill's *The Art of Judgement*, which investigated the relationship between aesthetics, rhetoric and political discourse. See Howard Caygill, *The Art of Judgement*, Basil Blackwell, Oxford, 1989.

⁸ Rick Szostak, *Econ-Art: Divorcing Art from Science in Modern Economics*, Pluto, London, 1999.

⁹ Also of use here, is: Neil De Marchi and Craufurd D.W. Goodwin, eds., *Economic Engagements with Art: Annual Supplement* to vol. 31, Duke University Press, London, 1999. See also, Martha Woodmansee and Mark Osteen, eds., *The New Economic Criticism: Studies at the Intersection of Literature and Economics*, Routledge, London, 1999.

LEGAL THEORY: RHETORIC AND AESTHETICS

Within the arena of legal studies, there are two principle interdisciplinary discourses relevant to the concerns of this thesis. Most obviously, the discourses around intellectual property law in all its forms involves discussion of economic and aesthetic/creative concepts. Since much of the recent debate forms the ‘focal theory’ of this thesis, the discourses of intellectual property law will be dealt with in a separate section below. The second area of interdisciplinary study is rather similar in methods to that described above for economic discourses. Both rhetoric and aesthetics have been explored in recent critical movements. The school of jurisprudence sometimes described as ‘Law And Literature’ rests upon well-established tradition of examining the role of rhetoric in legal formulations.¹⁰ Such an approach challenges the ‘transparency’ of legal language and attempts to point up the literary nature of legal discourse and the role such ‘aesthetic’ concerns have in shaping the law. In recent years the approach has been supplemented by a school of ‘Literary Jurisprudence’ that has moved towards a linguistics-based mode of analysis.¹¹ The most recent development in this ‘post modern’ linguistic turn is the development of a ‘legal iconology’. This move is partly a development from literary jurisprudence and partly a riposte to formalist, aesthetics-based approaches to jurisprudence. Ronald Dworkin’s attempt to analyse the issues of subjectivity and context left open by legal positivism by using an aesthetic (specifically Kantian) approach to legal judgement has been attacked for its universalising tendencies.¹² In contrast post modernist approaches to legal theory have rejected the notion that underlying and unifying principles can be recovered from the law and stressed in their place the messy, discontinuous and contingent.¹³ A notable feature of such critical practice is the contention that the law can never be fully ‘objective’ but is rather ‘productive’ of particular social relations. Rather than objectively and transparently representing and organising the social real,

¹⁰For a recent example, see Victoria Kahn and Lorna Hutson, eds., *Rhetoric and Law in Early Modern Europe*, Yale University Press, London, 2001.

¹¹ See for example, Costas Douzinas and Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text and the Text of the Law*, Routledge, London, 1991.

¹² Richard Dworkin, *Law’s Empire*, Hart, Oxford, 1996. (Originally published, 1986.)

the law is one of the factors that constitutes the real it seeks to represent. From such a position, the law is itself interdisciplinary and requires interdisciplinary methods of analysis.¹⁴

As far as this thesis is concerned, the most significant interdisciplinary work outside of current studies of intellectual property is the attempt to move linguistic deconstruction towards a semiotic analysis of the visual. The attempt to create a 'legal iconology',¹⁵ together with the interdisciplinary work of Szostak in economic theory, have been important guides in the parts of this thesis that use close reading of theoretical texts in order to establish the 'discourse' of the knowledge economy. However, while suggesting ways that visual theory and aesthetics might operate at a discursive level in the realms of economics and the law, none of the above have attempted to examine the importance of the subject central to this thesis, namely the models of creative labour derived from aesthetic theory and practice.

ART HISTORY AND THEORY IN POSTMODERNISM

Changes in what is said to constitute the creative labour of an artist that developed in the 1960s are central to Chapter Three of this thesis. However, some introduction is necessary here. The developments in art practice and theory of the 1960s, and in particular the moment of dematerialisation, have had great effect in the art world, constituting what later, under the application of post structuralist theory in art criticism, came to be retrospectively tagged 'post modernism'. While some of the strategies of creative labour were not without precedent in the period that art historians

¹³ For a discussion of Dworkin in light of postmodern legal theory, see Douzinas, Warrington, McVeigh, op. cit.

¹⁴ This view of intellectual property has been highly influential here. (The postmodern 'turn' is sometimes referred to as Critical Legal Studies, or C.L.S.)

¹⁵ See here, Douzinas' more recent work: Costas Douzinas and Lynda Nead, eds., *Law and the Image: The Authority of Art and the Aesthetics of the Law*, University of Chicago Press, 1999. The text attempts to develop the linguistic approach, and expands into a semiotics of visual imagery of the law, or a 'legal iconology'. See also, Costas Douzinas and Ronnie Warrington, *Justice Miscarried: Ethics and Aesthetics in Law*, Harvester, London, 1994.

refer to as 'Modernism'¹⁶, it was only in the 1960s that such creative strategies gained a general ascendancy. As the changes in creative labour in the period will be dealt with later in the thesis, there is no need for detailed explanation at this point.¹⁷ However, it is worth noting that in self-conscious contrast to the orthodoxies of 'Greenbergian Modernism',¹⁸ the dematerialisation of the 1960s actively sought out connections between art production and the social spheres of politics and economics.

While the art theory and practice of the 1960s placed a special stress on the interdisciplinary relationship of art and society, such an emphasis was not unprecedented or unique. Social history approaches to art history had long sought to embed art objects and the actions of their creators within the broader histories of the socio-economic sphere. The most significant work as far as this thesis is concerned dates from the late 1940s, namely Arnold Hauser's *Social History of Art*. Hauser was the first art historian to make a specific connection between the concepts of intellectual property and the concept of genius. It is a connection that is important because, for a generation of historians and theorists of post modernism in the 1970s and 1980s, the concepts of genius and copyright were held (erroneously) to be co-extensive. Before engaging directly with the latter group, it is useful to lay out Hauser's claim.

¹⁶ Definitions of 'Modernism' and 'Post-Modernism' have become increasingly elastic and hotly debated in recent years. Generally, art historians bracket the years from 1863 to mid 1950s, as the epoch of 'Modernism'.

¹⁷ A central problem here is the question of how to recover the history of creative labour from a history of persons and things. As Donald Preziosi has argued, art history as a discipline is suspended between two historical urges. On the one hand is the biographical tradition of Vasari, which creates lineages of artists. On the other, is a museological tradition, which begins with Winklemann and is dedicated to the accounting of objects. See Donald Preziosi, ed., *The Art of Art History: A Critical Anthology*, Oxford University Press, Oxford, 1998. Available also of course, is the art theory of different historical periods – the work for example, of Cennini and Alberti; the collections of later Renaissance material made by Panofsky, Blunt and Williams; reprints of Reynolds' *Discourses on Art*; 19th century Romantic theory such as M H Abrams', *The Mirror and the Lamp* and, a number of collections of 20th century theory. However, few attempts have been made, to construct a history of *modes of creative labour* in the art world. In this respect, Catherine Soussloff's attempt to recover a historiography of the concept of the artist via historical texts (such as early biographies and other fragmentary writings) is one of the few. See Catherine Soussloff, *The Absolute Artist: The Historiography of a Concept*, University Of Minnesota Press, London, 1997.

¹⁸ A detailed examination of Greenbergian Modernism will be conducted in Chapter Three.

Hauser's "Social History" reflects the determinisms and periodisations of mid 20th century Marxist history.¹⁹ His claim with respect to intellectual property and genius is brief and, ostensibly, straightforward: 'the concept of genius began with the idea of intellectual property'²⁰. Hauser placed the development within the context of new forms of subject, property and culture that attended the disintegration of medieval Christian culture. Unfortunately, Hauser gives no argument to support his suggestion save his belief in the shape of 'History'. However, Hauser was at least correct in pointing towards the 14th and 15th century, rather than the Enlightenment, for evidence of the 'origin' of intellectual property law.²¹ His contribution is striking as it is one of the few to allude to the relationship between concepts of creative labour in visual art and the formation of intellectual property law.²²

¹⁹ Despite the rigidity of its general framework, much of Hauser's *Social History of Art* still manages to maintain some complexity and subtlety.

²⁰ Hauser's entire consideration of the topic is dealt with, in under a page, in his four-volume history. See Arnold Hauser, *The Social History of Art*, vol.2, Section 5 Chapter 3, 'The Social Status of the Renaissance Artist', Routledge and Kegan Paul, 1962, pp. 311-340. First published, Germany 1948 and England, 1951.

²¹ For example, Donna Haraway – supposedly drawing on Mark Rose but rather misrepresenting him – suggests that intellectual property "begins with the English liberal theory of property" and has its "roots in the doctrines of property in the self" (by which she means Lockean labour theory). See Donna J Haraway, *Modest - Witness @ Second_Millennium_in FemaleMan Ō_Meets_OncoMouse Ō*, Routledge, London, 1997, pp. 71-73. The oft-repeated contention that copyright is an Enlightenment concept is erroneously derived from Lyman Ray Patterson's seminal study, *Copyright in Historical Perspective*, Vanderbilt University Press, Nashville, 1968. Patterson's narrative drew attention to the fact that in England, copyright emerged from attempts to regulate publishing monopolies and enact censorship laws – rather than as an attempt to give statutory recognition to a supposed common law proprietorial right of authorship. Only with the *Statute of Anne*, 1710, did the author as *property-creating subject* come into being. The aim of Patterson's research was to explain the logical inconsistencies of US copyright law, the latter of which was derived from English law. However, the misreading of his narrative has often foreclosed discussion of intellectual property law, by suggesting that it is simply 'an Enlightenment phenomenon'. This, of course, not Patterson's suggestion. He merely pointed to the fact that the first modern state to enact a statute giving specific recognition to an author's 'proprietary' right, emerged in 1710. It is a fallacy to conclude that 'intellectual property' or concepts of authorship and beliefs in authorial rights emerge without precedent in some 'Ur-moment' during the Enlightenment. (A specific problem in literary studies has been the conflation of the emergence of the *novel*-form with the emergence of 'literary authorship', which has again attempted to suggest that authorship is a 'recent phenomenon'.) Attempts to confine to the Enlightenment, or to discourses of literary authorship, the complex social, economic and legal formations that are now termed 'intellectual property', are ultimately reductive and distorting. Further discussion of this topic is undertaken in Chapter Two.

²² There are a number of texts, which are important to the history of printing and intellectual property, and which will be dealt with below. Of those sources relating specifically to Venetian laws, the most important are the collections of miscellaneous printing privileges which were amassed separately by Rinaldo Fulin and Horatio Brown in the late 19th century. Both of these collections contain facsimiles of papers from the Notatorii del Collegio and the Venetian Senate. See Rinaldo Fulin, *Documenti per servire all storia della tipografia veneziana*, Estratto dall' Archivio Veneto, Venezia, 1882. Also,

The general linkage Hauser suggested between genius and intellectual property law remained unnoticed in art history and theory until the early 1980s, when the link was remade in Rosalind Krauss' seminal essay of early postmodern theory, *The Originality Of The Avant Garde*.²³ Krauss' essay was strong on assertions about intellectual property law but devoid of any serious engagement with the history of law and its relationship to aesthetic norms. The essay effectively reversed the order of Hauser's argument, implying that copyright law was modelled on an (outmoded) aesthetic concept, that of 'Original' genius. Krauss' contribution generated a broader cultural discourse critical of intellectual property. The emergence of this 'cultural wing' critical of intellectual property law came in the wake of the widespread dissemination in the New York art world of Roland Barthes and Michel Foucault's works on authorship from the late 1960s.²⁴ The effect of these two essays in critical circles was the development of the notion that authorship was a 'recent concept', forged in the heat of Romanticist ideology. For this 'Law and Cultural Studies' approach, authorship was an unpleasant, exclusionary and reactionary formation based on an outmoded concept of 'Originality' the function of which was to order discourse in such a way as to marginalize the voices of women, non-Europeans and those working in 'traditional forms' of culture.²⁵ On such a view, copyright law reified cultural discriminations by rendering them economic. This view of authorship and copyright has remained central to the theoretical organisation of many cultural readings of

Horatio Brown, *The Venetian Printing Press 1469-1800*, J.C. Nimmo, London, 1891. More recently, Leonardas Gerulaitis has dealt with similar material in *Printing and Publishing in 15th Century Venice*, Mansell, London, 1976. Landau and Parshall's *The Renaissance Print 1475-1550*, reserves some space for discussion of the artist's 'privilege' and regulation of the early single-leaf print market. See Landau & Parshall's *The Renaissance Print 1475-1550*, Yale University Press, Yale 1994. More generally on the history of print the following have been useful: Arthur Hind's *History of Engraving and Etching: From the 15th Century to 1914*, Dover, New York, 1963; William Ivins' *Prints and Visual Communication*, MIT, London, 1996 (first published, 1953); Elizabeth Eisenstein's *The Printing Press as and Agent of Change*, Cambridge University Press, Cambridge, 1979; Febvre & Martin, *The Coming of the Book: The Impact of Printing, 1450-1800*, eds., G Nowell-Smith and D Wooton, NLB, 1976; Colin Claire's *A History of European Printing*, Academic, London, 1976.

²³ Rosalind Krauss, *The Originality of the Avant Garde*, M.I.T., London, 1986.

²⁴ Only in the mid 1970s, did these texts become widely discussed in the U.S.

²⁵ The notion of authorship as a Romantic construction was drawn from Barthes. See especially, his 'Death of the Author', in *Image - Music - Text*, trans. Stephen Heath, Fontana, Glasgow, 1977, pp. 142-148. However, the notion that such a Romantic trope could structure discourses and, by extension, influence social relations, was taken from Foucault. See Foucault, 'What is an Author?' in *The Foucault Reader*, op. cit., pp. 101-120.

intellectual property law, which have, in the main, been conducted in literary studies. Following Krauss, Martha Woodmansee linked the emergence of copyright in late 18th/early 19th century Germany to the aesthetic and literary discourses of genius.²⁶ In a similar vein, Molly Nesbitt revisited Foucault's author tracing the relationship between the author as a cultural figure in French law and the emergence of new 'culture industries' from the late 1950s onwards.²⁷

In the late 1980s and early 1990s, the critical discourse on authorship and copyright progressed from the realms of art theory and literary studies into mainstream legal discourse. In the early 1990s, James Boyle took up the discourse on authorship, which, until that point, had been the concern of art critics and literary professors rather than legal scholars.²⁸ Boyle's discourse analysis of legal argument in the United States highlighted the increasing use of metaphors of 'Romantic' authorship in cases involving the new information economy. The cultural critique of 'Romantic' authorship has remained attractive to anyone who wishes to argue against extensions of intellectual property law, since it implies that copyright belongs to a particular historical epoch that has now been superseded.

²⁶ Martha Woodmansee's oft-quoted essay, 'Genius and Copyright', was later developed into a book entitled, *The Author, Art and the Market: Rereading the History of Aesthetics*, Columbia University Press, New York, 1994. However, recent work in this field has been more circumspect in respect of its claims. Mark Rose for example, goes no further than to suggest that the liberal discourse on property "with its concerns for origins and first proprietors...blended readily with the eighteenth century discourse of original genius". Rose builds on Lyman Ray Patterson's earlier work bringing it into line with the post-Barthesian/Foucauldian *author-as-genius* critique. In line with the latter project, Rose's interest in, and understanding of copyright, is filtered through the prism of literary authorship. See here, Mark Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, London, 1993. For the antithesis to all such author/subject centricism, see David Saunders, *Authorship And Copyright*, Routledge, London, 1992. See also, Saunders' essay, 'Dropping the Subject: An Argument for a Positive History of Authorship and the Law of Copyright', in *Of Authors and Origins*, eds., Brad Sherman and Alain Strowel, Clarendon, Oxford, 1994. A general overview of the authorial debates is available in Sean Burke's anthology, *Authorship: From Plato to Postmodernism*, Edinburgh University Press, Edinburgh, 1995.

²⁷ Molly Nesbitt's 'What Was an Author?' was originally published as part of the *Yale French Studies*, 73, Yale University Press, 1987. A shortened version is reprinted in Burke, op. cit.

²⁸ James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society*, Harvard University Press, London, 1996. The main difference between Boyle and the authorial critiques he alludes to, is that he does not fall into the trap of *foundationism*. Despite citing Woodmansee in his introduction, his analysis is *not* in fact, reliant on the notion that forms of intellectual property law are *founded* on Romanticism. His analysis is more modest, suggesting that when issues of creativity come before the courts, legal discourse frequently draws its understanding of creativity from the common stock of Romanticism.

INTELLECTUAL PROPERTY LAW: CREATIVE, LEGAL AND ECONOMIC

In contrast to the dialectical determinism of such a position, a discourse has emerged in recent years, mainly in legal studies, that aims to recover the complexity and contingency of legal history. While remaining open to critiques of intellectual property, this discourse also attempts to balance the oversimplifications of the 'authorial critique'. The work of David Saunders in cultural studies, and Anne Barron in legal theory, are broadly representative of an alternative wave of Foucauldian-influenced legal analysis that has come to rather different conclusions than the 'law and cultural studies' approach described above.²⁹ Rather than focussing narrowly on Foucault's work on authorship, the 'alternative wave', sometimes associated with the term 'Critical Legal Studies', has developed other aspects of Foucault's work. In place of Foucault's reflections on the nature of authorship, his methodological approach to history has been applied to the formation of intellectual property laws. Where the former group presents a view of intellectual property that is centralised around the subject-category of author and Enlightenment concepts of property, the latter stress the lack of single organising principles, and the immense complexity, discontinuity and ruptures within the history of intellectual property law.³⁰ Applying Foucault's genealogical method, intellectual property law is therefore interrogated as a 'practice' that forms at the intersection of a variable grid of conditioning factors.³¹ For example Lionel Bently and Brad Sherman stress the 'alloy of factors' that influence the construction of all intellectual property in which the usual arguments of natural law, philosophy and questions of legal principle, are decentred and put on an even footing

²⁹ Anne Barron, 'No Other Law? Authority, Property and Aboriginal Art', in *Perspectives on Intellectual Property: Intellectual Property and Ethics*, eds., Lionel Bently and Spyros Maniatis, Sweet and Maxwell/I.P. Law Unit, Queen Mary and Westfield College, London, 1998. See also Saunders, *Authorship and Copyright*, op. cit. Saunders and Barron are influenced in different ways by Foucault. Saunders' method could be described as 'hyper-historicist'. His position is distinctly anti-foundationalist – particularly in its rejection of subject-centred approaches to intellectual property law and its stress on historical discontinuity and rupture. Barron is similar concerned with distancing the history of intellectual property law from overbearing theoretical frameworks and stressing in their place, the contingency of intellectual property law and its lack of singular founding or organising principles.

³⁰ In this respect, the approach of this group has much in common with the Critical Legal Studies group covered in earlier sections.

³¹ Foucault stressed the contingent nature of all such intersections and the consequent complexity and partiality of knowledge. See for example, Foucault's essay, 'Questions Of Method', op. cit.

with a plethora of often overlooked factors such as ‘the art of negotiating bilateral treaties, the formation and exercise of rules designed to regulate the way patent specifications were crafted and the stories intellectual property tells about itself.’³² Foucault’s influence is also manifest in Christopher May’s analysis of the international political economy of intellectual property. In May’s case, it is Foucault’s analysis of power that provides a framework for analysing recent attempts to strengthen and internationalise intellectual property regimes.³³

As far as intellectual property law is concerned, this thesis is most clearly in line with the critical positions of the latter group.³⁴ In addition to this wave of Foucault influenced analysis, Bernard Edleman’s seminal text *The Ownership of the Image* remains the most important starting point for any analysis of intellectual property and the image. Edleman’s analysis of the long battle in French law over whether to extend authorial rights to images created by photographers and film-makers has set the background tone for much of the work undertaken in this thesis.³⁵ Edleman was the

³² Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999. (Their more recent publication – *Intellectual Property Law*, Oxford University Press, Oxford, 2001 – is the best standard text for students of intellectual property law. Another useful reader – one which brings together many aspects of recent intellectual property debate – is that edited by Adam D Moore, namely, *Intellectual Property: Moral, Legal and International Dilemmas*, Rowman and Littlefield, Oxford, 1997. The volume also contains reprints of influential articles like Edwin Hettinger’s ‘Justifying Intellectual Property’ and John Perry Barlow’s ‘The Economy of Ideas’.)

³³ Christopher May, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* Routledge, London, 2000. May’s work has been invaluable to the discussion in Chapter Five. Graham Dutfield’s *Intellectual Property Rights, Trade and Biodiversity*, Earthscan, London, 2000. Published as part of the IUCN (World Conservation Union) project, The Convention on Biological Diversity and the International Trade Regime. Effectively, the text works as a manual, explaining the specific operations of intellectual property at international level with respect to biodiversity. Despite the fact that ostensibly, this is not a ‘critical’ work, it nevertheless does much that Foucauldian analysis attempts – insofar as the job Dutfield was hired to do, involved excavating the intersections of two specific areas of study and forming a new understanding of their relationship.

³⁴ As will become apparent, the research and conclusions of the early chapters of this thesis sheds doubt on some of the claims of the ‘Law and Cultural Studies’ work from the early 1990s.

³⁵ Bernard Edleman, *The Ownership of the Image: Elements for a Marxist Theory of Law*, Routledge and Kegan Paul, London, 1979. (Originally published in France as, ‘Le Droit saisi par la photographie’ in 1973.) Apart from Edleman’s work, there are a small number of texts with a bearing on the relationship between intellectual property and the image – however the contents of these are rather tangential to the focus of this thesis. See here, Rosemary J Coombe’s *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*, Duke University Press, London, 1998. This is a fascinating study of the coding, appropriation and recoding of intellectual properties of all types. Coombe’s study was preceded by Celia Lury’s *Technology Legality and Personality*, (Routledge, London, 1993,) which broke new ground in coming to terms with the increasing importance of trademark law and branding in popular culture. In contrast to the earlier work, Coombe’s approach to

first to set the legal concept of authorship within the context of broad scale economic and social developments.³⁶ Unlike many of the later approaches to intellectual property and authorship, Edleman managed to avoid the over-determining the role of the subject.³⁷ Despite the general Marxist framework – Edleman found the extension of the subject space of authorship to be the corollary of the processes of capital rather than the result of an ‘ethical’ recognition of the rights of the subject – his work is not overly reliant on the confines of Marxist historicism. However, despite providing a useful starting point, Edleman’s work does not cover the historical and aesthetic issues of creative labour that are necessary to pursue the aims of this thesis.

visual culture is more *anthropological* in character. It centres on the social relationship between visual phenomena and intellectual property, rather than the excavation of modes of creative labour in images. However, like Jaime M Gaines, *Contested Culture: The Image, the Voice, and the Law*, (B.F.I., London, 1992) which covers slightly different territory, Coombe’s study is dedicated to analysing the social relationship between visual phenomena and intellectual property, rather than attempting to excavate modes of creative labour with respect to images. For a different approach to intellectual property and anthropology, see Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things*, Athlone, London, 1999. Strathern’s interest is the uptake of intellectual property in the tribal communities of Papua New Guinea.

³⁶ Edleman’s research suggests that, only when it was economically expedient to do so, did French law lift the barriers between culture and industry; or extend copyright protection to ‘mechanical’ arts such as photography and film. In the 19th century, as Edelman’s work shows, the products of technical draughtsmen were not ‘authorial products’ capable of protection under copyright – since such ownership of one’s labour might impede the process of industrial capitalism. However, by the 20th century, ‘droits d’auteurs’ laws were seen to move from ‘high culture’ into industrial productions, such as cinema. (For a more recent account of copyright law in a Marxist framework, see Roland V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*, Westview and Harper Collins, Oxford, 1996.)

³⁷ This is because Edelman’s work is as much concerned with the formation of the *subject* under various historical, political, economic and ideological forces, as it is with the ‘creative subject’ and the law of the image. Edleman does not fall for the notion that the extension of copyright law is an extension of outmoded Romantic subjectivity, but rather, that the law produces subjectivities at the behest of interested parties, such as those of capital. Edleman’s copyright is not a beast created by particular *subjectivities*, but a complex economic structure that creates rights and subject spaces, only when it is economically and politically expedient to do so. The true ‘creative subject’ is capital. Or, as Edleman says, “capital assumes the mask of the subject, it is animated, it speaks and signs contracts”. See Edleman, *op. cit.*, p. 57. On a more tangential level, the spirit of Edleman’s work has been influential on later stages of this thesis. For Edleman contended that central problematic of copyright was the overlaying, or *doubling*, of property rights. In this respect, his research has greatly contributed to the analysis of issues at stake in the *Rogers v Koons* case. Edleman suggested that the law runs into trouble when granting authorial rights to images. In For Edleman, the ‘real’ of capitalist societies was founded on the notion of individual property-owning subjects, who, collectively constituted the social ‘real’. Authorial rights to the image were therefore problematic, since they were based on re-personifying, and therefore ‘appropriating’, chunks of this ‘real’. In this sense, the author was a super-subject, with a *doubly possessive* legal personality. Edleman’s analysis was the inspiration behind the analysis of the claims of Jeff Koons’ legal team presented in Chapter Five, Part II. Koons defence was built on the possibility of turning Edleman’s theoretical critique into a new legal reality, much against the grain of Edleman’s original critical observation.

CONTRIBUTION TO FIELDS OF STUDY

In order to pursue this thesis, it has been necessary to open up a number of new lines of critical enquiry that have not been broached by work considered in the foregoing review. The contribution this thesis makes is therefore not solely confined to a synthesis of existing interdisciplinary work drawn from the fields considered above. By way of clarification here, the following points can now be made.

This thesis contributes to a new understanding of the formation and operation of intellectual property law in both historical and contemporary contexts. This contribution stems from the investigation of the long over-looked relationship between theories of aesthetic *labour* (formed in the context of image making), and the formation and operation of intellectual property laws. Contingent upon this analysis is the observation that the creative concepts of ‘originality’ and ‘invention’ – which continue to inform contemporary copyright and patent law – are cognates of the ancient art of *rhetoric*. Situating intellectual property laws within the context of creative theory enables a fuller understanding of the emergence of modern laws. It also permits examination of the *current* pressures that beset such laws, since the main challenge to rhetorical concepts of creative labour and composition was manifested in the art world between the 1960s and the 1980s. Gaining an insight into the conflict between *rhetorical* and the *semiotic/network* theories of creative labour with respect to intellectual property laws facilitates the analysis of dynamics central to the contemporary knowledge economy. To date, no attempt has been made to analyse the theory of knowledge economy as *cultural* formation that is articulated in relation to specific *aesthetic* concepts. In so doing, this thesis sheds light not only upon the aesthetic and cultural components of the knowledge economy, but also on the *limitations* placed on the practice of art within such an economy.

ORDER OF CHAPTERS

The themes analysed in this thesis are unfolded in the following order. *Chapter Two* examines the emergence of early modern systems of ‘intellectual property’ from trade law and demonstrates the relation of such laws to concepts of ‘authorial’ right as derived from rhetoric. The chapter argues that the crucial concepts of ‘invention’ and ‘originality’ devolved from theories of rhetorical invention as applied to concepts of creative labour and composition. *Chapter Three* examines challenges to the rhetorical model that begun in the art world of the 1960s, namely through the project of *dematerialisation*. The chapter focuses in particular on the emergence of the semiotic/network model of creativity and its dissemination in academic and economic discourses. *Chapter Four* examines *economic dematerialisation* and the emergence of the ideology of the ‘knowledge economy’. The focus here is on the uptake of the new ideology of creative labour and its relation to a matrix of concepts relating to creativity and aesthetics in the discourse of the knowledge economy. The chapter ends by considering the extent to which knowledge economies exploit a geo-specific ‘cultural’ ideology. The *final chapter* divides into two parts. The first examines the actualisation of the ‘idea’ of the knowledge economy in the foreign policy of ‘developed states’ in the 1990s under the auspices of TRIPs and the WTO. The second part of the chapter examines the curtailing of appropriation arts’ radical interpretation of the semiotic/network model, subsequent to the rise of the knowledge economies.

2

Intellectual Property And Creative Labour In Renaissance Venice: The Rhetorical Model

“The concept of genius began with the idea of intellectual property.” *Arnold Hauser, 1947*

INTRODUCTION

This aim of this chapter is to examine the emergence of ‘modern’ systems of intellectual property and their relation to concepts drawn from the art of rhetoric. The system of state privileges that regulated the printing industry of 15th century Venice is the earliest example of a ‘formal’ model of intellectual property with an established link to contemporary formations of intellectual property. However, the advent of the Venetian system did not mark the ‘invention’ of intellectual property but rather the reformation of older, more ‘informal’, attempts to regulate local economies. The roots of the new privilege system lay in the ‘intellectual properties’ of the trade guilds, where restrictions on knowledge were used to limit the spread of competition.

The transition from ‘softer’ to ‘harder’ forms of intellectual property is most clearly visible in the arena of image production. The advent of printing divided the production of images across different forms of market organisation, and as a consequence, across the old regulatory structures of the guilds and the new system of printing privileges. The earliest claims to privileges with respect to images however were not based on arguments related to an authorial ‘right’, but firmly grounded in commerce. Nevertheless, over time privileges were increasingly granted in such a way as to recognise – *de facto* – an individuals ‘right’ to the composition of an image.¹ The basis of the ‘right’ in question lay in adaptations of the theory of rhetoric that dominated contemporary theories of knowledge and more particularly the *training* of artists. The

¹ The concept of a right in this context is based on the standard definition – i.e. that which is upholdable before a judge.

rhetorical concepts of *composition* and individual *creative labour* accepted *de facto* within the Venetian system were to prove enduring. The concepts of ‘*invention*’ and ‘*originality*’ drawn from rhetoric remained central to all later systems of intellectual property that grew from the example set by the 15th century Venetian republic.

Before examining these issues in more detail, it is necessary to consider a methodological question with respect to intellectual property law. Arnold Hauser suggested that the ‘idea of genius *begins* with the concept of intellectual property’.² Hauser therefore implied a particular, directional, relationship between economic/legal activity and cultural formations. As we have seen, recent critical analyses have reversed the order of Hauser’s argument, suggesting that intellectual property emerged from the cultural machinations of theories of original ‘Genius’.³ The belief in ‘culture’ as a lever, which, if pushed in the right direction, will determine changes in the political, economic and legal realms, is the other side of the coin that informs the economic determinism of Hauser’s Marxist-orientated analysis. The firm directionality of the ‘genius and intellectual property’ debate over the last twenty five years is surprising given that, over the same period, debates within the sociology of the law have centred on the problematising of straightforward assumptions with respect to the law and the objects it represents. The line between *representing* the social real, and *constituting* it, is often difficult to establish.⁴ At times, the law may simply represent pre-existing ‘realities’; at others, its representations may actively create new social formations. Even the apparently straightforward act of representing given social formations may involve the effective re-formulation of the object represented. In other cases, the law may reify the social formations it ‘transparently’ represents, or ‘creatively’ purports to represent, or may even obfuscate or destroy them.

The general relationship between law and the things it regulates cannot be assumed to operate uniformly in one direction. This is apparent when examining the particular

² Hauser op. cit. p. 62.

³ This view is common in the ‘Law and Cultural Studies’ discourse. See especially the influence of Krauss in art theory, and Woodmansee, in literary theory.

relationship between the cultural and legal realms that pertain to the developments in intellectual property; here it is unwise to begin by assuming any definite a priori relationship. The charge – so frequently made – that intellectual property has its ‘origins’ in the growth of a ‘modern’ property-bearing subject, in the literary author, in the ideology of genius, and can be criticised on such grounds, assumes a linear and deterministic relationship exists between culture and the law which can simply be reversed. In rejecting that critical position, the chapter that follows is not intended as a ‘defence’ of the autonomy of intellectual property, but rather as an attempt to understand it within a more accurate framework as the basis for a more strongly founded critique of its contemporary operation.

SYSTEMS OF INTELLECTUAL PROPERTY

THE SYSTEM OF PRIVILEGES

It is generally accepted that between the later half of the fifteenth, and first half of the sixteenth, century the economic and legal organisation of European cities underwent substantial change.⁵ It is therefore not by chance that it is in this period that the first ‘modern’ forms of ‘intellectual property’ emerge. At the economic level, the period is marked by the erosion of civic control over local markets in favour of larger units of economic organisation.⁶ At the legal level ‘customary’ and ‘municipal’ law were giving way to the humanist rediscovery of Roman jurisprudence.⁷ At the general level

⁴ For an overview of the early debates, see Pat Carlen’s introduction in *The Sociology of Law*, ed., Pat Carlen, Sociological Review Monograph 23, University Of Keele, 1976.

⁵ Rudolf Hirsch places the development of privilege systems in the context of such development: see *Printing, Selling and Reading, 1450–1550*, Otto Harrassowitz, Wiesbaden, 1974. Karl Polanyi tied the reorganisation of legal and semi-legal frameworks to the emergence of market economies and nascent statehood: see, *The Great Transformation: The Political and Economic Origins of our Time*, Beacon, Boston, 1957. (First published, 1944).

⁶ The disintegration of the towns is complex and dealt with at some length by Polanyi, op. cit., pp. 56–67.

⁷ Such ‘customary’ and ‘municipal’ law is best thought in relation to what was historically termed ‘Civil law’. Civil law in medieval Europe referred to the body of rediscovered Roman law used to

then the period is marked by a redistribution of economic regulation from local, city-based units to larger regional and ‘national’ units and a corresponding shift in the institutions of the law, from civic organs such as guilds towards more centralised forms of social organisation. It is also the period in which ‘free’, or competitive, markets begin to become a feature of social organisation. None of these developments was inevitable nor did they progress seamlessly.⁸

The emergence of the ‘privilege system’ – from which other European systems of intellectual property grew – has thus to be seen in relation to three primary issues. Firstly, it must be viewed in relation to the emergence of a humanist-influenced jurisprudence that was open to formal innovations. Secondly, against a shift from the soft ‘intellectual properties’ of the guild system towards harder, ‘legislative’ forms of regulation. Finally, it must be placed in relation to the physical qualities of printed material, and the position of printing in Venice as an export trade. Having established these economic and legal foundations of the system in the first part of this chapter, consideration will be given to the cultural and aesthetic determinations of the system. Of particular importance will be the way the operation of the system came to depend on concepts of creative labour derived from rhetoric.

General Legal Backdrop

The origin of the Venetian privilege system is most accurately explained with reference to trade regulation rather than ‘rights’ discourses, and the legal measures taken in respect of trade need to be placed in their historical context. Despite the frequent claim that intellectual property is as old as the classical world, there is no evidence of continuity between what is known of Roman law and the emergent

supplement to existing ‘customary’ law. In the late middle ages, an array of legal courts – such as church courts administering cannon law, feudal, or local courts administering ‘customary law’ – increasingly turned to Justinian law as a superior technical tool to supplement the deficiencies of customary arrangements. For a detailed account of this, see Peter Stein, *Roman Law In European History*, Cambridge University Press, Cambridge, 1999.

Venetian system.⁹ The Venetian system was not the result of ancient continuity, nor was it directly modelled on contemporary notions of ‘right’ or ‘property’. From the legal point of view, its construction was piecemeal and complex, stemming from trade regulation, but increasingly constituting ‘rights’ *de facto*.¹⁰

The system emerged in a window of legal innovation sandwiched between the two great historical moments of ‘natural law’ theory. The natural rights theory of property of the late Middle Ages was based on theological justifications of property and liberty and reached its apotheosis with the ‘Gersonian’ view of the early 15th century, which suggested that property and liberty were natural to man ‘in the state of nature’ and therefore preceded the development of human society.¹¹ While many historical and

⁸ The ‘formal’ system of ‘modern’ ‘intellectual property’ in Venice, lasted from 1469 to 1570, before being scrapped in favour of a ‘traditional’ guild.

⁹ The re-application of Roman law was patchy. Though (incomplete) notes made by medieval scholars were in circulation, access to the ‘Digest’ held in Florence, was severely restricted until the latter half of the 16th century. Even today, evidence of Roman ‘intellectual property’ is sparse. No Roman jurisprudence relating to authorial rights has survived. There are however, some surviving contracts between authors and publishers, which suggest that some form of civil right, or ‘iura’, were generally accepted. ‘Iura’ were private contractual agreements made upon a general acceptance of a ‘ius’, or right. This ‘ius’ was understood by Roman lawyers, in relation to the concept of ‘dominium’, or property. Roman law distinguished between *corporeal* and incorporeal things. The Institutes of Justinian defined incorporeal things as “consisting in a right” such as, “inheritance, usufruct, use, obligations howsoever contracted”. See here, R. W. Lee, *The Elements of Roman Law: With a Translation of the Institutes of Justinian*, Sweet and Maxwell, London, 1956, pp. 110, 114. The Roman lawyer Gaius suggested the ‘iura’, were a kind of incorporeal object because some such iura could be exchanged. The idea of a right as a kind of incorporeal ‘object’ clearly has some distant echo of the modern concept of intellectual property. Circumstantial evidence suggests that aspects of Roman jurisprudence connected to the image did survive, or were revived in the period of the privileges. (These will be dealt with later in the chapter.) For discussion of rights/property discourse, see Richard Tuck, *Natural Rights Theories: Their Origin and Developments*, Cambridge University Press, Cambridge, 1979.

¹⁰ Property is usually thought of as ‘bundles of rights’ – the right to use a thing, to alter it, to give it away, to sell it, to destroy it, and to prevent anyone else from doing so. The extent of ownership therefore, is reflected in a number of rights and the legal history of all property is therefore, piecemeal in character. See Patterson, op. cit., p. 10.

¹¹ This late medieval view was based on the collapsing of the old division between ‘ius’ (right) and ‘dominium’ (property). Even in the Late Roman period, ‘dominium’ had come to be conceived of, as the ‘thick end’ of a spectrum of rights. In the 13th century, Bartolus de Sassoferrato glossed the Roman terms to suggest that ‘dominium’ was an unrestricted ‘ius’ to dispose of a *corporeal* object unless ‘prohibited by law’. This description of dominium (as a *series* of ius, up to and including a right of *disposal* upholdable against all comers) anticipates later theories of property. Bartolus’ concept of dominium later received a theological patina. The Papal Bull ‘Quia vir reprobis’ – designed to challenge the Franciscan order’s promotion of apostolic poverty – gave dominium a theological justification by arguing that God’s natural dominium over the earth was paralleled by man’s dominium over property. In the early 15th century, Jean Gerson added that since ius and dominium are interchangeable and ius is an ‘unrestrained facultas’ or *ability* of man given by God, that both property and liberty are the *natural* state of man in nature. Property and liberty therefore precede society, which

contemporary legal scholars have viewed authorial rights through the prism of natural right,¹² natural rights theories were generally unsympathetic to the construction of ‘new’ fields of law. However, the humanist inspired view of property that emerged in the mid 15th century was inclined to view rights to property as the result of man-made social compacts.¹³ The humanist regard for the culture and civilisation of cities and their focus on the laws man makes for himself, rather than those that may exist in nature – whether justified by God or not – therefore made the emergence of new legal forms more likely.

Soft and Hard Intellectual Properties

Despite the fact that histories of intellectual property commonly begin with attempts to regulate the printing industry, it is a mistake to believe that ‘intellectual property’, in its broadest sense, is contemporary with the advent of printing.¹⁴ As early as 1421, while working on the dome of Santa Maria del Fiore, Brunelleschi was given a ‘patent’ by the Florentine state for a system of moving stone blocks on and off barges.¹⁵ Even then the practice of giving exclusive rights for a limited period guaranteed by state power was not new.¹⁶ What was bought about by the growth of printing in Venice, and later in other European cities, was a new formalisation of ‘intellectual property’.

moulds itself upon such realities. (Though the Gersonian ‘*facultas*’ is *open* enough to account for *creativity as a property right*, there is no indication that it was ever interpreted thus.)

¹² See for example, the famous judgement on common law rights to authorship, as made by Lord Mansfield in *Millar v Taylor*. See also, the contemporary use of Lockean labour theory with respect to justifications of intellectual property.

¹³ Sometimes referred to as the ‘*ius gentium*’ or the ‘*ius civile*’.

¹⁴ It has been argued that the first laws resembling modern intellectual property can be found in the Greek Colony of Sybaris at around 500BC – the laws themselves relate to the invention of new recipes. See C.H. Greenstreet, ‘History of Patent Systems’, in *Mainly on Patent: The Use of Industrial Property and its literature*, ed., F. Liebesny, Butterworths, London, 1972.

¹⁵ This patent will be discussed in more detail, later in the chapter.

¹⁶ Such systems were used to grant rights of use, or temporary ownership, over tracts of land. They had their origin in the Roman concept of ‘*usufruct*’. In England, as far back as the early 14th century, open letters or letters patent were used to regulate trades. For example, in 1315 the craft guilds and merchants of Worsted in Norfolk were granted exclusive rights to make and sell worsted cloth. In 1327, Edward the third outlawed the wearing of foreign cloth and in return, offered letters patent to foreign manufacturers so that they could bring their manufacturing businesses to England.

Insofar as no society is ever fully transparent to itself – every society has secrets and absences around which it organises a series of inclusions and exclusions that structure its internal relations – every society has some form of ‘intellectual property’.¹⁷

Whether these take the form of trade ‘mysteries’ – forms of trade secret around which medieval guilds and lodges were formed¹⁸ – or the rituals, secrets and exclusions of religious practice, each society is ordered around an ‘economy of information’, intangible, incorporeal bodies of knowledge whose transfer is, of necessity, partial, whose borders exclude and include as part of the structuring of that society. The specific character of ‘intellectual properties’ is only apparent when its portfolio of inclusions and exclusions are set against the complexities of differing social, cultural, economic and legal arrangements. Knowledge that is withheld for economic, religious, governmental or a personal purpose does not have to be seen as ‘property’ in order to act on and within the social body as a series of structuring inclusions and exclusions. However, within the social structures of economically developed nation states, under the conditions of capitalism, and increasingly under the conditions of globalisation, ‘intellectual properties’ are most commonly expressed as distinct, exchangeable units of *property*.¹⁹ In this broad sense ‘intellectual properties’ are bodies of knowledge withheld or asymmetrically diffused within a society. The printing privileges that emerge in 15th century Venice have then to be seen not as the ‘invention’ of

¹⁷ One of the few texts to recognise the importance of soft regimes in organising knowledge and the flow of information in all societies is Edward W. Ploman and L. Clark Hamilton’s, *Copyright: Intellectual Property in the Information Age*. (Routledge and Kegan Paul, London, 1980.) Ploman and Hamilton suggest that legal doctrine on intellectual property must be supplemented by recognition of informal forms of intellectual property. They provide examples of ancient Chinese, Egyptian, Jewish and Roman forms of ‘intellectual property’, in addition to an example from medieval Ireland.

¹⁸ Arnold Hauser’s view of the ‘mysteries’ of lodge and guild is specifically and pointedly related to the concept of intellectual property. See Hauser, op. cit.

¹⁹ In this sense, knowledge may well be regarded as a ‘fictitious commodity’. As Polanyi argued with respect to land and labour, a false scarcity must be brought into being, if knowledge is to be constructed in such a way as to make it function as a commodity. Even in contemporary society, not all forms of ‘intellectual property’ conform to the rule of positive legal conceptions of property. Until very recently, the structures of academic work were largely unconcerned with considerations of property. While a lecturer wrote and performed knowledge for and in the classroom, it was only when converting such labour and knowledge into articles or books, that such ‘intellectual property’ it became the subject of positive law forms of intellectual property (like copyright). Academic social systems are constructed from disciplines and social rules – the prohibition on plagiarism for example, or the formation of professional patterns of kinship. Such systems ensure the social or ‘civic’ character of academic ‘intellectual properties’. For a contemporary discussion of intellectual property in academic

‘Intellectual Property’, but as a moment of transition from generally informal episodic and reactive systems, to systems that are more predictable, rational and formal. In the case of the industries that concern this thesis, the transition is from the ‘mysteries’ of the guild system that controlled the production of painted images, towards new, harder forms of economic regulation created to regulate the print trade.

The Facts of the System

Before moving on to examine this process, it is necessary to say a few things about the system. Printing arrived in Europe, or was ‘invented’ in 1436,²⁰ however the first printing privilege did not appear for another thirty-three years, thereafter both printing and privileges spread fairly rapidly.²¹ The very first Venetian printing privilege took the form of a five-year monopoly on printing itself and was given to Johannes de Spira in 1469. On his death in 1470, the monopoly was withdrawn. In 1517, the Senate cancelled all existing privileges issued by ‘The College of Councillors’ and the Senate. In future privileges were to be issued only by the agreement of a two-thirds majority of the Senate, and only on works that were new, or that had never been printed. This process was repeated again in 1537 and the purpose of the law reiterated.²²

environments, see Corynne McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property*, Harvard University Press, London, 2001.

²⁰ The citation of Gutenberg as an inventor, is not without challenge. Prior claims to invention have been made with respect to Chinese and Arabic sources. Arguably, Gutenberg’s greatest contribution was the capitalisation of the process.

²¹ Elisabeth Armstrong provides an overview of the earliest examples of privileges, beginning with Venice (1469), the German states (1479), Milan (1481), Naples (1489), Spain (1498), France (1498), Portugal (1501), Holy Roman Empire (1501), Poland (1505), Scotland (1507), Papal States (1509), Scandinavia (1510), Low Countries (1512) and England (1518). See *Before Copyright: The French Book Privilege System 1498-1526*, Cambridge University Press, Cambridge, 1990.

²² The privilege system was also entwined with censorship laws. Censorship begun with attempts to secure an imprimatur from the ‘Council Of Ten’, as part of the attempt to secure a privilege. In 1526 however, legislation was passed forcing all books to submit to the ‘Council of Ten’, in order to receive an imprimatur. The law was again strengthened in 1543. However in the 1570s, the entire system of privilege and censorship was revoked and printing was placed under the supervision of a guild of printers and booksellers. Mark Rose has suggested that the move to guilds was to ensure better surveillance of the press. Other studies however suggest that the reason was an economic one. See Brown and Gerulaitis, op. cit.

The system mixed elements of modern patent and copyright laws²³ with little discrimination and made no formal distinction between the kinds of subject given rights. Privileges were secured by writers and image-makers of various kinds, but also by publishers, capital providers, entrepreneurs, printers and booksellers.²⁴ The visual arts were not marginal to the system, it has been estimated that about a third of the books published in the incunabula contained illustrations.²⁵ Between 1500 and 1529, the largest number of privileges granted to a single publisher were given to a publisher of images – Bernardino Benalio²⁶. Privileges were not granted automatically as a positive right but as the result of a specific petition bought by the individual seeking protection.²⁷ Protection was given on a first-come-first-served basis, rewarding not the ‘originator’ of an image, text or printing technique, but the first person to seek protection for it. Despite the assumptions of modern critiques of copyright law, neither ‘rights’ within the new formal system, nor the system itself, were based on an aesthetic concept of ‘originality’. A number of reasons for this can be suggested. Firstly, the system of open letters or letters of safe conduct that pre-existed the privilege system, and upon which it partly rested, were used to entice industries to settle in a town or state.²⁸ De Spira’s privilege was not granted in respect of his

²³ It is important to note that privileges issued in relation to printing were joined by a similar system begun in 1474, that was specifically for inventions.

²⁴ Printing businesses had themselves, no definitive, organisational model. Some, involved aspects of the ‘commenda system’ – a short-term, sleeping partnership used to organise foreign trading expeditions. One partner undertook the actual expedition, while the other, financed the venture and remained at home. However, print shops also display elements of the ‘compagnie’ system of inland areas. Rather than a strict division of capital and labour, the individuals in this ‘family’ partnership supplied both capital and various forms of labour. Contracts for both systems limited the duration of the ‘company’ and set out systems for remuneration. (Compagnie contracts also included mechanisms permitting additional investments – on which interest was paid – by partners and other third parties.) Most importantly, contracts stipulated that partners should not belong to another company or a *guild*. The latter rule was customarily laid down in city statutes. For a description of contemporary business systems, see Iris Origo, *The Merchant of Prato: Daily Life in a Medieval City*, Penguin, London, 1992, pp. 105-136. (First published, 1957.)

²⁵ David Landau and Peter Parshall suggest that, in the first decade of the sixteenth century, virtually every book published in Venice was subject to a privilege. See Landau and Parshall, *op. cit.*, p. 301. Applications for book privileges often stressed the value of the illustrations. The first to do so was Antonio Zantoni’s application of 1498.

²⁶ Ibid. From about 1500, Benalio turned from book publishing, towards specialising in *images*.

²⁷ This is one of the main differences from modern law.

²⁸ For example, in 1449, despite the fact that stained glass was not a new invention, Henry VI granted a ‘patent’ to Venetian glass makers, giving them a monopoly on coloured glass in England. Interestingly C.H. Greenstreet argues that Venetian glass makers were responsible for spreading the concept of

‘invention’ of printing but in respect of his ability to bring printing to Venice. Elements of this general rule seem to have adhered in the later operation of the system. Secondly, the old Roman property law relating to land granted ownership rights through a lineage traced back to the first owner. The question for the law was not ontological – how land came into being – but practical – how the rights to land should be administered. Privileges were similarly pragmatic. Thirdly, pragmatism can be put down to practical considerations. The Venetian system lacked both the resources and the inclination to decide whether the person who first claimed protection had a ‘just’ claim. The failure to distinguish the first claimant from the ‘originator’, and the failure to make category distinctions between printers, merchants, artists and writers, stems from the fact that the system was not brought into being in order to defend the ‘rights’ of individuals but in order to regulate a trade.

EARLY INTELLECTUAL PROPERTY, COMPETITION AND TRADE

Guilds and the Privilege System

In order to gauge the extent and character of the changes wrought by the new system of intellectual property, it is necessary to set it against that of the guilds. For the purposes of this thesis the particular guild trade in question is that of painting. There are two reasons for such a focus. Firstly, the visual arts fell across the old and new regulatory systems.²⁹ Secondly, the focus on visual art serves as a prelude to the discussion of Chapter Three, where the departure from long established norms of creative labour and composition by artists of the 1960s culminated in a direct challenge to copyright law.

With the arrival of printing, the image making industry was spread across two different forms of market organisation, held in place by two different forms of

patents by seeking such monopolies wherever they travelled. The fact that such a system was clearly common in the glass industry, would seem to foreshadow the later development of printing privileges.

‘intellectual property’. Painting, in the main, remained a guild art, while the conditions for printed images fell under the economic organisation similar to that of the early book trade. As already suggested, the early privilege system was not based on a recognition of aesthetic or authorial rights, but on trade regulation.³⁰ The economic aim of the system was twofold. Firstly, privileges were a means of attracting printing businesses to set up in Venice. As such, they have to be seen in relation to other economic inducements such as trading concessions, tax breaks and providing sites for print shops on favourable terms. The return on such inducements lay in the ultimate potential for tax revenues, prestige and political influence that accrued to the city.³¹ The second aim of the system – like that of the guilds – was to deal with the problem of competition.³² However, this issue is very complex and requires some clarification.

It has been suggested that the very first privilege of 1469 giving a five-year monopoly on printing was revoked in 1470 because the authorities recognised that ‘competition’ would further the new industry.³³ However, this should not be taken to mean that removing the monopoly was motivated by a desire to create competition in order to push down prices. Given the protectionist attitudes of civic organs and the city authorities generally, it is more likely that the aim was to develop the potential *volume* of the industry.³⁴ A single monopoly operator – no matter how well financed – was in no position to develop the potential of the industry.³⁵ Having granted printing a foothold, the change of tack is likely to have been motivated by the potential tax revenues on a larger industry – destined, in the main, for export – than the desire to keep down prices in a local market. The character of ‘competition’, and of the new

²⁹ An event that is not comparable with the history of writing and printing.

³⁰ Rudolf Hirsch also notes that “protection was not based on moral scruples” but on “economic considerations”. See Hirsch, *op. cit.*, p. 81.

³¹ *Ibid.* Hirsch’s discussion of printing with respect to the Reformation is particularly interesting.

³² *Ibid.* Hirsch suggests the issue was how to deal with ‘unfair competition’ caused by reprinting.

³³ *Ibid.*, p. 79. De Spira died in 1470 and the printing monopoly was not passed on to his heirs.

³⁴ *Ibid.*, p. 79. De Spira’s privilege specifically sought to encourage *printing*, not reward de Spira. As Hirsch says, “this invention, so different and special to our age, should be encouraged and nourished with any possible help and action”.

³⁵ Between 1470 and 1480, at least fifty printing shops were operating in the city. These shops produced printed material well in excess of the demands of a local market. See, Armstrong, *op. cit.*, p. 2. One estimate suggests, that one eighth of all books published in Europe during the incunabula, were

system of intellectual property, needs to be set in relation to the value of printing as an export trade within the general context of a nascent market economy.³⁶

The wealth of 15th century Venice was built on external trade.³⁷ Industries that relied on external markets generally required a different form of social organisation than industries whose markets were local. The latter group were organised through craft guilds, which existed in order to prevent the social dislocation engendered by unfettered competition in local markets.³⁸ As political institutions, guilds formed the backbone of the civil society.³⁹ As economic associations, their aim was to ensure local stability by stalling competition between local producers and protecting local markets from external competition. Control of supply in local markets was achieved through systems of fraternity and by controlling the ‘mysteries’ or ‘intellectual properties’ of every craft.⁴⁰ In contrast to the guild pattern, the new intellectual property was conceived in relation to a local industry whose market was, in the main, external to the Venetian state. In the small, local market for print the new system operated like a guild by working against competitive forces. However, the export market was beyond regulatory scope for two reasons. Firstly, and obviously, export

printed in Venice. It is worth pointing out that Venetian presses also printed in a number of languages including Arabic. For more on this, see Gerulaitis, op. cit.

³⁶ Polanyi's work on the formation of market patterns has been important to the analysis here. See Polanyi, op. cit., pp. 43-67.

³⁷ In the vital years of the privilege system, between 1472 and 1517, Venice was the richest city in Europe – a centre of financing capital and with a stable currency. It was at the centre also, of the revolution in business mathematics and accounting, which were important factors in the emergence of capitalism. For a discussion of the ‘Treviso Arithmetic’, see Frank J. Swetz, *Capitalism and Arithmetic: The New Math of the 15th Century*, Open Court, La Salle, Illinois, 1987. For a discussion of the role of Luca Pacioli's double entry bookkeeping, see Swetz op. cit., and also James Buchan, *Frozen Desire: An Inquiry into the Meaning of Money*, Picador, London, 1997.

³⁸ Essentially, the problem was that of excessive highs of demand or of sudden floods of supply, followed by unpredictable lapses. Polanyi suggests a number of reasons for such protectionism. Temporary competitive intrusion into a market by new buyers and sellers (while offering no guarantee of permanency or stability) may disrupt the existing balance of the market and disappoint regular buyers and sellers. Alternatively, predicted margins may be eroded by gluts; supply may fall into the hands of a monopolist; there may be a dropping-off of predicted demand, etc. See Polanyi, op. cit., pp. 66.

³⁹ Only the burgess of a town, the guildsmen, had full rights of citizenship. As Polanyi points out merchants were not naturally burgess. Many towns also forbade those working in commenda or compaignie system from belonging to guilds and therefore from full citizenship. Ibid. p. 66.

⁴⁰ Hauser suggests that guilds devolved from itinerant Lodges. The increasing size of medieval towns created enough demand to encourage lodges to settle. Both organisations placed restrictions on members right to ‘intellectual property’ – that is, to the ‘mysteries’, or trade techniques, which were usually protected by oath.

markets were beyond Venetian jurisdiction and secondly there was no local economic, or social, utility in limiting the supply to external markets.⁴¹ So, whereas the guild system used ‘intellectual property’ as a means of *controlling* supply in order to meet demand in local markets, the new system of intellectual property focussed on *expanding* local production to feed the burgeoning export market. While guilds used ‘intellectual property’ to avoid over supply and thus *limit* local price competition for the sake of stability in the local economy, the new system sought to limit price competition but in order to *expand* an export trade. The reason for this shift is complex and stems from the physical qualities of printed matter.

The Competition Problem

The physical problems of regulating printing are best illustrated by a comparison to the guild regulation of painting. The late 15th century market for painted images was largely fixed by locality. In addition to operating under the civic authority of the guilds, the material condition of painting made it an irreducibly local matter. Paintings were mainly conceived in relation to fixed architectural supports: frescos, obviously, were site specific, panelled altarpieces though often made in a workshop were tailored to a specific architectural site.⁴² In contrast, the material nature of the printed image was both easily *reproducible* and *portable*. These were the material factors that made printing an ideal export industry. However, the same factors also left the industry more than usually vulnerable to competition based on price. Portability multiplied the opportunity for copying, or ‘reprinting’, a printed product. Reproducibility increased the possibility that *identical* images from different sources could be offered for sale in the same market, thus depressing sale prices.⁴³ Price competition may not have been such a problem were it not for the fact that printing operated mainly in an export

⁴¹ This is different from Hirsch’ reading, since privileges only pertain within the Venetian state he assumes their *sole* purpose to be stymieing competition in the local market. See Hirsch’s discussion of Paganino de Paganinis’s privilege, op. cit., p. 84.

⁴² Even though painted objects, such as shields and chests, were in principle portable, the guilds prevented the development of a significant mercantile trade in such objects.

⁴³ See Polanyi’s analysis, op. cit., p. 60.

market. Within local markets, price competition was strictly controlled by guilds fearful of the disruption it may cause to the local economy.⁴⁴ However, such restrictions were not available with respect to the external market.⁴⁵ The problem that faced the Venetian authorities was how to prevent publishers and booksellers from producing competitive products, that undercut each other in the export market, while simultaneously encouraging them to expand the volume of printed products for export.⁴⁶ The usual method of controlling price competition in a local market by using 'soft' forms of intellectual property to limit the number of suppliers would not work for an external market, since it would also limit the *volume* of the trade and, by extension, limit potential tax revenues.⁴⁷ The new system of regulation therefore had to be substantially different from that of the guilds. Price competition had to be regulated, not in order to maintain stability in local markets, but to ensure that Venetian publishers did not compete directly with each other in external markets.

The New Intellectual Property

To this end the new system of privileges discouraged the production of *identical* or 'competing goods', while encouraging the production of *differentiated* goods.⁴⁸ In the years when Venetian traders and publishers dominated the export trade in print, there

⁴⁴ In addition to controlling the mysteries, a number of other measures were in use, such as controlling the number of suppliers in a trade, imposing minimum standards on their practice, and fixing price levels. Limited control over demand for painting could also be applied since, collectively, guilds were the main commissioners of new artworks.

⁴⁵ Nor generally were they needed. Other export trades were not nearly as vulnerable to direct competition as was the reproducible print.

⁴⁶ It must be stressed that such economic reasoning could only prevail, on condition that Venice remained one of the few centres of printing. It was a position that rapidly eroded.

⁴⁷ In these early circumstances, the possibility also existed, that unfettered competition might shrink the industry to a small number of players and thus reduce revenues.

⁴⁸ This explains something that has puzzled legal scholars of the system. The granting of monopoly privileges on whole sectors of literature is often put down to the sheer incompetence of those running the new system (See here, Brown, Hirsch, Gerulaitis, op. cit.) However, the system begins to make more sense when viewed as an attempt to develop the volume of external trade, by encouraging the differentiation of products for export. Creating diversity by operating on a book-by-book basis – even if they were best sellers – was slow and inefficient. When given the opportunity to differentiate an entire sector, the authorities jumped at it. In theory, granting control over a sector encouraged a form of cross-subsidy. Since price competition on the major titles in the field was excluded, the economic buoyancy supported the printing of lesser titles, and the range of wares available for external trade was increased.

were few competitors in the external markets and, as a consequence, price was not as important as it would later become. Selling in an external market where there were no presses – or later selling books that had no equivalent in a market that did possess presses – meant selling a ‘complimentary’ or *non-competitive* product.⁴⁹ Until foreign competitors entered the market in large numbers, it made little sense for the authorities to encourage price competition amongst Venetian printers, particularly if they could be encouraged to produce complimentary products that may develop the volume of foreign trade.⁵⁰

The new system of intellectual property then shared the old guild instincts as regards market intervention and the perils of price competition. However, its concern for encouraging product differentiation was new. As far as the trade in books was concerned differentiation simply meant dissuading publishers from chasing the same well-known titles and persuading them to publish alternatives instead. However, the longer-term effect was to mutate the character of ‘intellectual property’. The soft ‘intellectual property’ of the guilds were essentially – though not exclusively – a form of trade secret that focussed on protecting what was already known. However, the new system contained an element that encouraged the creation of new products. Though both were measures to deal with price competition, the new system achieved this aim by *encouraging* a form of competition based on novelty.

That this was so is supported by both the new industrial law of 1474 that followed the founding of the printing privileges, and the reforms to printing privileges of 1517. The new industrial law of 1474, ratified by an overwhelming majority of the Senate, is often regarded as an antecedent to modern patent law.⁵¹ The most interesting part of the text reads as follows

⁴⁹ As Polanyi pointed out, external trading is generally ‘complementary’ in character. See Polanyi, *op. cit.*, p. 60.

⁵⁰ That the privilege system ground to a halt in the 1570s was partly the result of external competition. The spread of printing and privileges eroded the early economic advantage enjoyed by the Venetians.

There are in this City and its surroundings, attracted by its excellence and greatness, many men of divers origin, having most subtle minds and apt to imagine and discover divers ingenious artifices. And if it were provided that others may not make nor take unto themselves to increase their own honour the works and artifices they may have seen so discovered by such men, such men would use their minds and would discover and make things which would be of no little utility and advantage to our state.⁵²

The new industrial law set the mood for the later operation of printing privileges. It entirely re-conceived the purpose of ‘intellectual property’ as civic protectionism, positioning the encouragement of ‘invention’ and ‘discovery’, at the centre of attempts to regulate and protect local markets and livelihoods. Its central proposition was that if competition (local or external) were held in abeyance, the men of ‘subtle minds’ would be more inclined to use their imaginations, which would be to the general advantage of the state.⁵³ Though the industrial law indicates the way the Senate had come to think about the purpose of privileges in general, the full force of their conceptualisation only comes to be felt much later in the applications for printing privileges relating to images.

However, the 1474 law does seem to have had some influence on the reform of the law relating to printing privileges of 1517. The scrapping of all existing privileges has often been seen by print historians, and legal scholars with an interest in copyright history, as an attempt to eradicate abuses that had grown up within the system.⁵⁴ While this may partly be true, it does not explain why the Senate decided that in future it

⁵¹ From surviving documentation, Greenstreet estimated that about 100 such ‘patents’ were granted between 1500 and 1550. Such documentation cannot, however, be taken to indicate the full extent of the system.

⁵² As quoted by C.H. Greenstreet, *op. cit.*, p. 3.

⁵³ It is interesting that none of the commentators on book and printmaking privileges (such commentators are based in literary studies, cultural studies and art history) have undertaken analysis of this piece of industrial legislation. Gerulaitis, the most authoritative source on Venetian printing privileges, makes reference to inventions within the privileges covering printing – suggesting five were given – but makes no mention at all of the 1474 law.

would give privileges only to ‘new’ works. While scrapping existing privileges may have put an end to existing abuses, granting future privileges only on ‘new’ works would not stop them from reoccurring. This is borne out by the fact that the process had to be repeated in 1534.⁵⁵ However when viewed within the general framework laid out above, the reform appears more logical. By 1517, the spread of printing to other European cities had created a good deal of price competition on the best-known titles. On one hand, the scrapping of control on old, well-known books permitted Venetian publishers to compete, if they could, on price with foreign publishers. On the other hand, the newly refocused law encouraged them to produce new, different, works on which price competition was not yet significant. As the system developed then, some aspects of its protectionist instinct receded, while the novelty aspect increased in line with the laws relating to mechanical inventions.

On the account given so far, it is clear that the new system of intellectual property was not *initially* based on the notion of rewarding innovation, nor on the notion of ‘rewarding’ investment. However, these factors quickly became important to its operation. A content analysis of the extant documents relating to the system reveals many instances of ‘reward’ for the investment of time and labour, and recommendations as to the novelty of the work seeking protection, but the system was not created, without precedent and from thin air, simply in order to service such pleas, but rather grew out of the social regulation of trade and competition. The element of continuity that endured the transition from the old guild-form of ‘intellectual property’ to the new system was that of *intervention* – the attempt to regulate production and construct markets in such a way as to maintain local economic and social stability. The character of the emergent intellectual property system was therefore twofold. On one hand, it was an intervention to defend local markets against price competition. On the other, it was an intervention that sought to encourage the innovation of new products. In its latter guise, its aim was still social and protective, insofar as its point was to

⁵⁴ Brown, Gerulaitis and Hirsch, op. cit., all make this observation. The main problem was that of publishers taking out privileges with no intention of printing the works, but rather in order to prevent others from doing so. In contemporary practice, such actions are referred to as ‘blocking patents’.

increase the products available for export whilst also protecting the home market. It was in the character of the new system to encourage innovation as a means of discouraging, or ameliorating, the effects of price competition.⁵⁶ As later chapters will demonstrate, this dual characteristic is still at work in the operation of modern intellectual property law.

PRIVILEGES AND THE IMAGE

CONTENT ANALYSIS 1500 – 1518

Thus far, the privilege system has been viewed from the point of view of trade regulation. However, the stress the system placed upon differentiation of products and newness abutted on cultural concerns that, ultimately, came to inform the operation of the system. The concept of counterfeiting, which had its origin in questions of truth and representation, bore, tangentially, on the new economic realm.⁵⁷ The same was true of the social and economic hierarchies that operated within the artists' bottega and of emerging notion of 'rights' connected to an artist's labour.⁵⁸ Once in existence, the day-to-day operation of the privilege system was refined through use. The fact that the law abutted on to many other social and economic issues meant that, as it grew, it was shaped in relation to such pre-existing concerns. Despite the existence of the industrial law of 1474, it took many years for the privileges related to images to come to focus

⁵⁵ In this revamp, works that had been granted a privilege but remained unprinted a year thereafter, had the privilege rescinded.

⁵⁶ Given a choice between expanding an economy or shrinking it in a price war, the former is obviously preferable.

⁵⁷ Counterfeiting, or 'passing off', applied to a million prosaically economic issues – from adulterating flour to pretending azurite was lapis lazuli. For more on copying, see Hirsch, *op. cit.*, pp. 81-82. In the incunabula, the main problem was not copying a text – which was acceptable (except in certain specified circumstances) – but copying the *layout* of another printer's edition with the intent to deceive the buyer. The earliest example of such 'passing off' was in 1466. Hirsch suggests that by 1480, thanks to the increased use of publishing 'imprints', and a general awareness as to the value of a name (either that of publisher or 'author'), there was an increase in such forgeries or '*contrefaçons*'.

⁵⁸ As we shall see, the rhetorical concepts of invention present in theories of knowledge and increasingly common in the art theory, tuition, and appreciation of art in the period, made a partnership with the new system.

centrally on the imaginative and ‘inventive’ capacities of the image-maker. Even when this did happen it was the result of a complex of factors rather than a straightforward acceptance of an individual ‘right’ to the image.

The absence of any ‘rights’ discourse at the beginning of the system is evident in the very first privilege granted in relation to an image. The privilege of 1500 was not granted to an image-maker but to a German merchant, Anton Kolb, in respect of a topographical view of Venice. The text of the privilege reads as follows.

Anton Kolb, German merchant, being that he, primarily to the fame of this most excellent city of Venice, had rendered and printed, rightly and properly, a work of art, three years in the making, having been made in such a way, and for the difficulty of the making of this a real and faithful to reality design, and also for the dimensions of it, and the dimensions of the paper that was never made before in a similar way and also because of the novelty of the craft of printing in such dimensions and for the difficulty of the composition, for all these reasons, these things not being estimated for their value by people for the subtlety of the intellect of their printing, that these forms might be provided (...) for 3 florins in one work that can be seen so universally, does not give hope that I (Kolb) will get a sufficient return on the money and effort I have invested...⁵⁹

In addressing the issue of a return on time and labour, Kolb’s petition followed a pattern that had already been set by supplicants for book privileges.⁶⁰ However, beyond the now customary economic formulation, there are a number of additional factors used to strengthen the petition. The methods of technical production are

⁵⁹ This document is re-printed in Fulin, op. cit. The latter includes available documents until 1517. An original translation from Fulin was made for me by Michele Turriani. Post 1517 documentation can be found in Horatio Brown, op. cit.

⁶⁰ The flattery element follows the recommendation in Sabellico’s privilege petition for *History of Venice*, 1487 – the first privilege given directly to an author in Venice.

recommended for their ‘intellect’ and ‘novelty’.⁶¹ Asking for recognition of such elements was clearly in line with the kind of petitions advanced to the Senate with respect to mechanical inventions. Though the ‘reality’ of the design, and its ‘difficulty of composition’, used as indicators of the general novelty, are elements connected to aesthetic labour, they are not related to the claims of a ‘creative subject’. As the closing argument suggests, the claim is made in order to protect Kolb and his investment. Though the difficult composition carried out by the designer, Jacopo de Barbari, and the novel techniques of the German engravers responsible for the blocks, justify and strengthen the petition they are merely aspects of the company that Kolb has bought together.⁶² In such businesses, the ‘creative’ labour of the image-makers operated under the general rule and condition of a wage economy. The entrepreneur, not the ‘creative subject’, sought protection for the image.

Despite the fact that the Kolb privilege is not based on an artist’s ‘right’ to the image, there is evidence that, as early as 1475, there was a move toward such a concept. Six years after the first Venetian privilege and a year after the industrial law, a case concerning the engravers Zoan Andrea and Simone de Regio, and their apparently ‘illicit’ use of designs created by Andrea Mantegna, was brought before the court of Lodovico, Marquis of Mantua. De Regio’s deposition is the only document of the case to survive and it reads as follows.

When I came to Mantua Andrea Mantegna made me big offers, presenting himself as my friend. And since I had long been a friend of Zoan Andrea, painter in Mantua, and he told me when we were talking that he had been robbed of prints, drawings and medals, he moved me to pity that he had been so badly treated. I said I would do these prints over, and I worked for him for about four months. When the devilish Andrea Mantegna found out I was doing these prints over, he sent a Florentine to threaten me, saying I would pay

⁶¹ Kolb’s aerial view of the city is 1390mm x 2820mm and was created in sections on six wood blocks – an innovation at the time. Paper for the project had to be made specially and the sections then glued or sewn together for presentation either on canvas or on a wall.

⁶² For discussion of this work, see Landau and Parshall, *op. cit.*, p. 45.

for it. And besides that, one evening I was assaulted by the nephew of Carlo de Moltone and more than ten armed men, Zoan Andrea and I, and left to die, and this I can prove. And again, to keep the work from continuing, AM found some ruffians to do his bidding and they accused me to the criminal courts of being a sodomite, and the one who accused me is named Zoano Luca of Novara, the notary who has the accusation is a relative of Carlo Moltone.⁶³

Threatened, beat up, left for dead and finally denounced as a sodomite; engraving in Mantua was clearly a dangerous business. Despite the fact that no privileges operated in Mantua at this time Mantegna's position clearly indicates that he believes he possesses some 'right' to the image. However, it is equally clear that de Regio is not cognisant of any such 'right'. There is no indication that he believes himself guilty of wrongdoing.⁶⁴ De Regio's view was not unreasonable given that in most parts of Europe engravings could still be freely copied. Furthermore he was not involved in 'forging' Mantegna's work. As Creighton Gilbert has observed, Andrea signed the prints he and de Regio made from Mantegna's designs with his own name. The case then rested on the assumption that the *composition* of the image in some way belonged to Mantegna. Though there was no basis for such a 'right' in law, a belief in the 'right' was clearly active.

There are three possible origins for the assumption of such a 'right'. First, word of the embryonic privileges granted to Venetian publishers may have reached Mantua. The apparent 'right' maybe nothing more than a belief in his own role of 'publisher' of his work and the hope that such a system might evolve in Mantua. The second possibility

⁶³ The English translation of the document, and Gilbert's commentary, is in *Italian Art 1400–1500: Sources and Documents*, ed., Creighton E Gilbert, Prentice-Hall, London, 1980. It is not known whether 'doing over' involved literally re-cutting discarded plates, or whether de Regio was simply hired to 'do over' Mantegna's designs - those that Andrea had copied and transferred to fresh plates. The latter is the most likely. Interestingly, Mantegna was already known to have had violent disputes with his neighbours over property.

⁶⁴ He is confident enough to 'bad-mouth' Mantegna to his patron. If one can infer anything about his view of the affair, it is that Mantegna is quite mad. De Regio is straightforwardly honest about what he has done and relates the threats and intimidation to Mantegna being "devilish", "arrogant" and out of control. The deposition ends: "I believe I have gone to forty cites and nothing was ever said against my

is that Mantegna was simply responding to the competitive tensions inherent in printing's reproductive nature. Both are good economic reasons for wishing to identify a particular image as one's own. The third possibility is that Mantegna was simply reiterating the social, economic and theoretical divisions of creative labour that were common in the period. The hierarchical distinctions that ordered production in the artist's bottega long preceded the development of printing. The overall *design* of a painting was usually the responsibility of the master, while various aspects of the *execution* of the design were spread amongst the members of the workshop and wage labourers bought in for specific craft-related tasks. This general division of labour carried into most printing enterprises run by artists in northern and southern Europe. As early as 1470, German printers named the *maler* (designer) and the *schreiner* (cutter) on the front of the print.⁶⁵ Mantegna's 'right' to the composition of an image is likely to have been based on such pre-existing divisions of labour.⁶⁶ Only the third reason therefore could give Mantegna the grounds for attempting to push a proprietorial claim to the image as a kind of 'right'. Rather than being a product of the new printing privileges then, Mantegna's pursuit of a 'right' is more an archaic defence of guild-related social hierarchies. There is good reason to suppose therefore that the basis for the 'right' lay not within the positive legal framework of the law, but in the quasi-legal, 'soft' intellectual properties of the guild system.

In 1504, four years after Kolb's privilege, Benedetto Bordon was granted protection in Venice for a series of prints known as 'The Triumph of Caesar'. Bordon worked mainly as a miniaturist, and for the prints, he hired a woodcutter, Jacob of Strasbourg, to cut the designs. Bordon's privilege states specifically that it was 'with very great labour and not indifferent expense' that he 'took the initiative to print the drawings' and had 'them then cut into the said wood.'⁶⁷ As with the Kolb privilege, though the composition is the channel through which an economic interest is expressed, the primary issue at stake is not Bordon's 'rights' as the composer or designer of the

name, only now Andrea Mantegna with his arrogance and rule of Mantua, and if your lordship does not restrain him, he would be the cause of great scandals". Op cit.

⁶⁵ Landau and Parshall, op. cit., p. 140.

⁶⁶ The theoretical basis of such a claim will be examined in the final section of this chapter.

image, but his role as business entrepreneur. Bordon's claim was justified in relation to the fact that it was he who had taken the initiative, and risked his labour and capital in order to create the work. In this first privilege awarded directly to an artist, the primary recognition is not of an aesthetic 'right' but economic protection and reward. The award is made in respect of the creating-publishing business run by the artist, operating on the traditional hierarchies of the bottega with the master as designer of the image, the execution of which was farmed out to a hired wageworker.⁶⁸

That such a working arrangement could secure a privilege in Venice in 1504 is probably the reason for Dürer's visit to the city two years later. The aim of Dürer's visit was to attempt to prevent Marcantonio Raimondi from continuing to sell copper engravings based on his own woodcut series 'The Life of the Virgin'. That Dürer considered taking action against Marcantonio is surprising given that his own earlier works – such as the 'Apocalypse' series (1498) – 'borrowed' their composition in the 'traditional' manner from the *Cologne Bible* and the *Koberger Bible*. There is therefore the strong possibility that sometime between 1504 and 1506 word of Bordon's privilege reached Dürer. Apart from the fact that Dürer's god father, Anthony Koberger, was a leading German publisher working in direct competition with the Venetian, privileges had also been adopted in some German states as early as 1479.⁶⁹ Exactly how Dürer came to know about Marcantonio's 'Virgins' is unknown though it is likely that he came across them as imports in his home market.⁷⁰ For political reasons guilds had been banned in Dürer's hometown of Nuremberg. In their place, the city operated a two-track system of trade regulation. Some trades were 'sworn crafts', controlled and protected by the city council, others were 'free arts' and

⁶⁷ A translation of part of this privilege is printed in Landau and Parshall, op. cit., p. 150.

⁶⁸ Such casual employment was typical for 'journeymen' who had completed apprenticeships, but had not yet been accepted as masters in a guild.

⁶⁹ But not in Nuremberg where Dürer was based. There is no extant evidence indicating Dürer's use of such systems. None of the state papers relating to the Venetian case have survived. The surviving documentation was collected in the 19th century and no estimate has ever been put on the full extent system.

⁷⁰ Trade was extensive between Venice and Dürer's hometown of Nuremberg. Kolb himself, was from Nuremberg, but traded in Venice. There remains also the slim possibility that Jacob returned to Strasbourg after his sojourn with Bordon and spread news of the Bordon privilege and/or Marcantonio's

operated in an entirely open market. Artists and printers operated without regulation in the latter group. However, it is known that in this period external competition led to a number of trades, and printing in particular, to petition to be admitted into the ‘sworn crafts’.⁷¹ Given that Dürer had been operating as artist, printer and publisher since 1478, he would have been acutely aware of such economic arguments.⁷²

To understand the economic threat posed by Marcantonio’s ‘borrowings’ it is necessary to reiterate the ‘speculative’ character of the market for print in comparison to the ‘commission’ market that typified the production and consumption of painting. Provided an image-maker was ensconced within the relative safety of a commission market, appropriating devices, figures, or even entire compositions, from another artist’s fresco or book illustration was of little economic consequence. Copying posed little threat in a market where the artist copied had already been paid in full *before* their work was exposed to public gaze. However, within the speculative market for prints, such borrowings have a disproportionate economic effect, which can be illustrated in a simple model. If one first assumes a series of one hundred engravings and a small altarpiece require equal investments of capital and labour, and that the artists expect an equal remuneration, then the artist-publisher has a hundred units whose aggregate value is equal to the altarpiece. Under a commission market conditions – provided the work is executed to the satisfaction of the client – the artist will be paid. (Much of the risk and material cost of the production will also be covered in advance by the client.) In the speculative market, the engraver-publisher must sell every unit before costs and a personal return can be recouped. There is also the risk that the prints will not sell and that both costs and return will not be met. A significant part of that risk stems from the physical characteristics of printing – namely the problems of *portability* and *reproducibility*. While the altarpiece will remain in one place and access to it restricted, each print goes home with who ever buys it, making

‘copies/forges’. Dürer may also have had friends in Jacob’s hometown, since he is known to have worked in Strasbourg in 1493.

⁷¹ Landau and Parshall, op. cit., p. 10.

⁷² He is known to have employed a number of cutters within the workshop on an ad hoc basis. Hans Baldung, Bartel Beham and Georg Pencz are have all been suggested as former members of his workshop. Beham may have worked as one of Dürer’s cutters.

the opportunity to produce a competitive product a hundred times greater. It is also in the character of the print to remain obediently flat on a tabletop while it is copied. Competing with Dürer on price was therefore very simple. Every print sold by Marcantonio had the theoretical potential to remove a buyer from Dürer's market.

The economics of such borrowing are therefore the most likely reason for Dürer's trip to Venice. However, it is important to remember that borrowing *parts* of another artist's composition was still a common practice. For example in 1510, Titian copied figures from Marcantonio whose own engraving had probably been made after a drawing by Raphael. Appropriations on such a scale attracted no ire.⁷³ Given Dürer's own borrowings, it is unlikely that he was worried about copying per se. The issue was not 'ethical' in any sense that might be attached to aesthetics but rather the simple, brute economics that attended the wholesale copying of entire compositions.

From Marcantonio's point of view, there is some evidence to suggest an innocent mistake. Since he had legitimately purchased Dürer's work, a number of factors may have led him to believe that making such copies was legitimate. Firstly, as suggested, in the market for painting, copying was not a significant problem. Secondly, privileges were not granted as a natural 'right' but as the result of a specific petition. Copying material already in print was acceptable providing it was not under privilege. Thirdly, there is also evidence that the 'right' to make copies was traditionally tied to the physical possession of an image.⁷⁴ Despite these points, there is also evidence that

⁷³ By the middle of his career, Marcantonio was producing 'reproductive engravings' specifically designed to be copied in the manner of medieval copybooks. Elizabeth Broun suggests that, even in the mid 1540s, Titian was still relying on Marcantonio's engravings for inspiration. See Elizabeth Broun, 'The Portable Raphael' in *The Engravings of Marcantonio Raimondi*, Spenser Art Museum, University of Kansas, ex. cat., 1981.

⁷⁴ When Raphael died, the ownership of the plates engraved for him by Marcantonio, was passed to Baviero de'Carrocci (il Baviera) who, by all accounts, lived well off the proceeds. Secondly, the legend of Marcantonio's death suggests ownership of copies adhered to those who owned the image. Marcantonio is said to have been murdered by a patron who discovered that he had kept copies of engravings he had been engaged to make of the patron's painting collection. This rule of physical possession also applied to the trade in manuscripts and is most likely derived from Roman law. Roman jurist Paulus suggested that ownership of the image adhered to the ownership of the support. The contrasting position, provided by Gaius, suggested that the labour of the artist was of crucial importance, provided that is, that the artist was of sufficient ability. In the Raphael case, either argument would apply. In the case of Marcantonio and his 'Dürers', Paulus' position would seem

Marcantonio was knowingly forging Dürer's work. As far back as 1475, Zoan Andrea had 'signed' his copies of Mantegna's designs with his own insignia, the fact that the Marcantonio's 'copies' were not signed suggests that forgery or 'passing off' was intended.

The results of Dürer's visit to Venice are interesting. Marcantonio continued to produce 'Dürers' but in all engravings after this date, Marcantonio replaced Dürer's monogram with his own initials, suggesting some form of business arrangement other than forgery.⁷⁵ The nature of the deal struck with Dürer is not known, however Vasari records that the two later worked 'in company' to publish Dürer's 'The Passion of Christ'.⁷⁶ Though the possibility of a complex business relationship with Dürer cannot be ruled out, it seems likely that Marcantonio took on the role of wage labourer since his later career with Raphael seems to have been based on such a model.⁷⁷

The Move Towards a 'Right'

From these early cases it is obvious that neither an aesthetic concept of 'originality', nor a concern for an 'authorial' right, was at the centre of the printing privileges.

relevant. For a discussion of Glaus and Paulus, see Peter Goodrich 'The Iconography of Nothing' in *Law and the Image* Ed. Douzinas and Nead, op. cit.

⁷⁵ Elizabeth Broun suggests that this declared the "reproductive" nature of work. See Broun, op. cit. Landau and Parshall however, disagree, suggesting that true 'reproductive' engraving did not begin until after Marcantonio's death. See Landau and Parshall, op. cit. It is also interesting to note that generally with respect to paintings, monograms were used in periods or in places where painting was controlled by guilds. In contrast, initials or signatures general signify the end or absence of guild control.

⁷⁶ Marcantonio's engraved version of which, from about 1515, reproduces the shape of Dürer's signature tablet but omits his monogram.

⁷⁷ Not much is actually known about the business arrangements between Raphael, Marcantonio and Baviera, it is generally recognised that Baviera acted as a publisher, managing all the business aspects of the prints. Marcantonio worked from *modelli* produced by Raphael or others in his workshop. Often the modelli used were the same as those used by Raphael's painting assistants. Frequently the engravings were issued at the same time that the paintings they derived from were completed. In this sense, they operated like a form of advertising. Like an architect's office today, not all that was sold under Raphael's name was the work of his hand. Despite the fact that Marcantonio was likely to have been a wageworker, his friendship with Aretino indicates that he was educated and socially speaking, a cut above a journeyman. Vasari records his friendship with the Pope and adds that later in life, he had

Bordon's privilege was granted in respect of his business organisation. Similarly, Dürer's visit did not arise from a problem with 'copying' per se, but from the economic damage that could be wrought on his business as an artist-publisher by the wholesale copying of a composition or series of prints. Marcantonio's career is testament to the commercial division of labour that operated with respect to the production of printed images. Insofar as Bordon and Dürer exercised any sense of a 'right', they did so not because they were 'artists' who had created particular compositions, but because they headed business organisations that built on well-established divisions of labour. It happened that as heads of a business they were both designers and the claimant of the privilege. The fact that engravers such as Marcantonio never received privileges stemmed from their position within the organisational structures of such businesses.⁷⁸

The first indication of a departure from such models came in a privilege issued in 1514 to the painter Zuan da Brexa (da Porexa). Da Brexa's privilege indicates a subtle change of emphasis to the pattern of earlier privileges. His petition for a privilege was made in response to the activity of 'copyists', or 'pirates'. The circumstances resulted in a claim that, while economic in character, is nevertheless more tightly focussed on a notion of 'right' related to his personal creative labour as an artist. In this sense it reflects the industrial law of 1474 insofar as the apparent 'right' is focussed in relation to the *creative* labours of the individual. It is also significant that the artist's labours are described in relation to the formation of a composition.

Being that I am a scholar of my own virtue, I made one drawing, and that drawing I made cut in wood with my own name in which I consumed a lot of time and effort and expense so that it would be an excellent work. This I did willingly as I am deserving of honour, and then through my own effort and

enough powerful friends to have himself sprung from prison while on a charge for producing indecent engravings.

⁷⁸ Despite the fact that by 1518, privileges had spread to the papal court, there is no evidence that Il Baviera ever secured one. Landau and Parshall suggest that this may be because Raphael was concerned to spread the fame of his own name, not the head of his publishing operation. Landau and Parshall, op. cit.

industry, to be able to get some use of this afore-mentioned work, which is called 'The History of the Emperor Trajano', and having I, the supplicant, wanting to have some concrete, direct experience of that work and see how it came out, I got someone to print parts of it in its entirety. And as this aforementioned design is beautiful and worthy, it was immediately taken by others who started to want to print it, which would be against any right of justice and gravely to my damage, that I having suffered and made great effort for a long time in such a work, that others should without any effort gain from my own effort and sweat. I ask that I Zuan, the aforementioned, come to your feet in supplication, that you might want to prohibit anyone who in any way has printed the aforementioned work of mine and grant that I only might finish that work and then print it and sell it in my own name for ten years only under the penalty [he goes on to list penalties]...I demand special concession so that I won't have made my effort in vain, so that I might have some advantage in compensation of the time and expense I had to bring the aforementioned work to perfection.⁷⁹

Like Bordon and Dürer, da Brexa was both the designer and publisher and, in addition, cut his own plates. The privilege makes the standard claims relating to compensation for 'time and expense', however the substantive argument, which arises from the specifics of his situation, is based on what he terms a '*right of justice*'. Before the illustrations had been completed, the printers (or some other party) copied the test-proofs and bought out a competing edition. The plea therefore is not simply economic. The claim to the image is clear-cut – the work is 'mine' – and it should be recognised as such. Da Brexa further argues that he alone be allowed to complete the composition of the series. The extent of the claim with respect to the issue of composition is revealing. Da Brexa was in effect claiming a 'right' to the parts of the series that had yet to be executed, a right over something incorporeal, an 'idea', that would only become physically manifest at some point in the future. This privilege is the first evidence to suggest a link between the justifications inherent in the industrial law of

⁷⁹ See Fulin, op. cit. Original translation from Fulin's documents, was made by Michele Turriani.

1474 – the notion that the point of privileges was to hold off competition in order to encourage men of ‘subtle mind’ to exercise their imaginations – and the ‘rights’ discourse – evident in Mantegna’s claim to ‘his’ compositions – of 1475.

Despite the ‘rights’ claim in this privilege there is no evidence that it immediately set a general precedent. However outside of the Venetian printing privileges there is evidence of an increasing ‘rights’ discourse. The formalisation of the division of labour operating in artist’s print businesses is evident in the way prints were ‘signed’ or otherwise identified. The division of labour between designer and cutter/engraver went back at least as far as the 1470s. Bordon’s relationship with Jacob of Strasbourg was made explicit in his petition for a privilege in 1504. Their *Virgin And Child With St Sebastian And St Roch* identifies Bordon with the term ‘*pinxit*’, or painter, and Jacob with the term ‘*fecit*’, the cutter or engraver in small panels on the front of the image.⁸⁰ By 1509, Marcantonio’s engraving ‘The Bather’ identifies Michelangelo as the designer of the image by the use of the term *invenit* (he invented it).⁸¹ In 1516, two years after da Brexa’s privilege, the cutter and publisher Ugo da Carpi issued a woodcut of St Jerome that identifies Titian as the designer and himself as cutter/publisher.⁸² In the same year, da Carpi also secured a sweeping privilege from the Venetian Senate covering both images and an industrial technique for printing in

⁸⁰ The date of this image is uncertain. Landau and Parshall *imply* that it preceded the 1504 privilege but fail to assign a date to it. See Landau and Parshall, op. cit. Mark McDonald, (specialist in Early Print at the British Museum), could only broadly date it for me, c.1500-1525.

⁸¹ Landau and Parshall, op. cit., p. 146. It is also interesting to note the timing of this dedication since it was sometime between 1508 and 1512 that the famous spat between Michelangelo and Raphael occurred. While Michelangelo was away from the Sistine chapel, Bramante, who had keys to the chapel, let Raphael in to see the work. This, according to Vasari was “so that he would be able to understand Michelangelo’s *techniques*”. See Giorgio Vasari’s ‘Life of Raphael’ in *The Lives of the Painters, Sculptors and Architects*, trans. George Bull, London, Harmondsworth, Penguin, p. 315. On the basis of the illicit visit Raphael immediately repainted parts of the Vatican apartments that he had recently completed which ‘greatly improved and magnified his style in this work and gave it more noble proportions.’ As Vasari records, “when Michelangelo later saw Raphael’s work, he thought and rightly so that Bramante had done him this bad turn in order to benefit Raphael and to increase his reputation.” Ibid., p. 315. Since Marcantonio is best known as Raphael and Il Baviera’s engraver, the credit to Michelangelo’s inventiveness is rather interesting. It also worth noting, that Venetian privileges were well established by the time of this tussle, and that the first Papal privilege is recorded in the same year, 1509, as the Marcantonio/Michelangelo’s print.

⁸² The identification is made by the prominent positioning of Titian’s name in the centre of the image and a discrete ‘Ugo’ in the bottom right hand corner.

chiaroscuro. The text of this privilege is very revealing of the changes that were underway within the system.

Ugo di Carpi, engraver of pictures in wood, found a way to print in chiaroscuro which is new and has never been done before and it is beautiful and useful to many who take pleasure in drawings. He has also engraved things never made before or thought by anyone. I plea that you grant without restriction in time that no-one might or dare to counterfeit any drawing or engraving forever.⁸³

The breadth of the privileges secured at this point is staggering. Not only are Ugo's images protected in perpetuity, but their nature is not even specified. Ugo was not alone. In the lead up to the reform of 1517 there are examples of privileges given on all the works by particular author and others in which entire subject areas are covered. There is at least one in which neither authors nor titles are specified.⁸⁴ It is inconceivable that such privileges were issued through bureaucratic incompetence. The scope of such privileges suggests that they were intended to protect businesses rather than particular images or inventions. As suggested earlier, when considering the system in general, designating whole areas of production is likely to have been regarded as a faster and more efficient way of guaranteeing the volume production of works that were different, than was possible operating on a book-by-book basis.

The most interesting aspect of Ugo's privilege is that it was clearly necessary to couch the petition in a way that was attractive to the Senate. The claim for the system for printing chiaroscuro is based on the fact that it is 'new'. An unspecified number of images are claimed on the basis that they have "never before or thought by anyone". The justification for his claim to the mechanical technique and his claim to the compositions are identical, which places the *invention of images* and *industrial invention* on an equal footing. Such a petition can only have been made with the 1474 law in mind and, since privileges were secured by a vote in the Senate, with

⁸³ See Fulin, op. cit. Original translation from source was made for me by Michele Turriani.

⁸⁴ Gerulaitis, op. cit., p. 46.

consideration of the general attitude of the Senators towards the privilege system. The by-product of such institutional considerations was to bring together the concepts of the 1474 law and the composition of images. These images are Ugo's forever since he is the one who thought of them. However, the primary motive for making such claims was not the emergent notion of an artist's 'right'. There is good evidence to suggest that Ugo's aim in claiming to have 'invented' the chiaroscuro technique was to protect himself from competition. Far from having 'invented' the block printing system, it was appropriated from German printers. Similarly, there is no evidence that he ever made any attempt to design images himself.⁸⁵ Despite the claim to 'authorship' of the images in question, they are more likely to have been his 'stock', since his actual business was cutting, printing and publishing images.⁸⁶ The petition was therefore most likely to have been sought in order to stymie competition. The dissembling of the nature of his creative labours indicates the increasing necessity to stake claims in a way that reflected prevailing attitudes in the Senate with respect to the general framework of the 1474 law. The claim to 'invention' or 'authorship' did not stem from Ugo's belief in a personal 'right' of recognition, but from the demands of the system itself. Ugo's stress on the production of 'new' works suggests that the Senate was increasingly concerned to apply the concepts of the 1474 law to the printing industry.⁸⁷ The reform of the law a year later did indeed make this clear, by emphasising that in future privileges would only be granted to *new* works. From 1517 on there was an increasing likelihood that artists-publishers, in addition to seeking

⁸⁵ Landau and Parshall, op. cit., p. 301.

⁸⁶ Ugo was one of the first to have a sound grasp of the privilege system. After the Venetian Senate scrapped existing privileges in 1517, he moved to Rome, wherein he managed to secure one of the first papal privileges. The jurisdiction here was far wider, and the penalties far tougher, than anything Venice could offer, and infringers were threatened with excommunication. Ugo's privilege was printed on the front of his 'Death of Ananias'. It reads: "Raphael from Urbino. Whoever will print these images without permission of the author will incur the excommunication of Pope Leo X and other penalties of the Venetian Senate. Printed at Rome at Ugo di Carpi's 1518." Cited in Landau and Parshall, op. cit., p. 150. The use of Raphael's name is interesting since, as Landau and Parshall argue, this work was actually based on an engraving by Agostino Veneziano. The appropriation of Raphael's name and its association with Ugo's was presumably a marketing device.

⁸⁷ As suggested above, the early Venetian printing industry was relatively insensitive to price competition. However, as both printing and privilege systems spread throughout Europe, competition increased, necessitating a policy that would keep both the volume of production and price high in order to maintain tax revenues. Encouraging the production of 'new' works was central to such a policy.

protection for their time, labour and capital, would also stress the newness or inventiveness of their work when seeking privileges.

The Right to the Image after 1517

By 1518, systems of privilege based on the Venetian model had spread to most states in Europe.⁸⁸ As we have seen, from the turn of the century to the reform of 1517, the discourse of trade and industry that informed the printing privileges was occasionally crossed by the discourse of artists 'rights'. However, despite the fact that the developing notion of artist's 'rights' paralleled the development of the system, they were clearly not its origin. As Ugo's claim suggests, if anything, the reverse was true. The discourse of artist's 'rights' was greatly aided by the character of a trade law, in turn influenced by an industrial law, which regarded encouraging new works as a means of fending off competition.

Nevertheless, within the cases discussed up to 1517, a pattern of artist's 'rights', albeit small and piecemeal, can be perceived within the privilege system. Mantegna's attempt to murder Zoan Andrea and Simone di Regio can be read as the first rumblings of an assertion of an authorial 'right' connected to the composition of a work. Bordon's 'company' is evidence of the use of traditional divisions of labour in image publishing businesses where the head of the bottega acted as both designer of images and claimant of privileges. The argument between Dürer and Marcantonio seemingly resolved itself around the issue of Dürer's signature, indicating the growing economic importance of an artist's name and, possibly, a 'right to signature'. Da Brexa's privilege demonstrates the way artists had come to think of their labour with respect to composition as a kind of 'right of justice'. Ugo's privilege shows how even a printer-publisher could seek refuge from competition in the claim of his (supposed)

⁸⁸ Armstrong op. cit. gives the following dates for the spread of printing privileges: Venice (1469), the German states (1479), Milan (1481), Naples (1489), Spain (1498), France (1498), Portugal (1501), Holy Roman Empire (1501), Poland (1505), Scotland (1507), Papal States (1509), Scandinavia (1510), Low Countries (1512), England (1518).

capacity to create new mechanical devices and images. Though his claim was shaped by the particularities of the system, rather than any notion of ‘authorial right’, the fact that it was granted suggests that the Senate regarded a claim to personal artistic ‘invention’ as plausible.

Despite these defacto intimations of an ‘authorial right’ to the image it is not until 1566 that Titian, by then an old man, claimed a printing privilege based clearly on the notion of his ‘first authorship’ of the image.

I, Titian...having in the past days printed again in copper, to the communal benefit of those who study painting, one drawing of Paradise and other pieces of other creations, with great expense and effort, no-one else, unless by me be authorised, might engrave those drawings, in the cities of this most famous dominion, neither sell it elsewhere cut, in any form or way, for 15 years uninterrupted. So that men with little study of the art, to avoid effort and for lust of gain, might not damage the name of the first author of those prints by worsening them, and take advantage of the fruit of the effort of others; also deceive the people with counterfeit prints of little value.⁸⁹

Titian’s claim was based both on the now well-developed *de facto* recognition of an artist’s ‘right’, a ‘right’ that had come increasingly to resemble the provisions of the 1474 industrial law.⁹⁰ The claim is based firmly on the fact of his ‘first authorship’ of his drawings of Paradise and “other creations”.⁹¹ The standard entrepreneurial justifications for protection are tightly focused on guaranteeing the ‘first author’ the ‘fruit’ of his creative effort.⁹² The argument that incompetent counterfeiting may

⁸⁹ Brown’s English translations of the later privileges are lodged in the Bibliotheca Nazionale Marciana in Venice. Brown did not include this privilege in his reprints of selected documents from the Venetian archives. The text of the privilege (in Italian) is included in David Rosand and Michelangelo Murano, *Titian and the Venetian Woodcut*, International Exhibitions Foundation, Washington DC, ex. cat., 1976., f.48, chapter 1. Original translation by Michele Turriani.

⁹⁰ The reason for this will be explained in the closing section of this chapter.

⁹¹ Though the image is specified as an image of Paradise there is still a vagueness with respect to “other pieces of other creations”. Op. cit.

⁹² Titian employed Cornelius Cort to cut the images and published them himself.

‘damage the name of the first author’ strongly indicates the presence of some form of ‘rights’ discourse. The notion that the name of the author may be damaged if their work is tampered with in fact predicts the concept of ‘moral right’, upon which ‘continental’ copyright law was later based.

The presence of a form of ‘rights’ discourse in later privileges is in fact a reflection of developments in other aspects of the organisation of visual arts that develops in parallel with the privilege system. By the time of Titian’s privilege the concept the ‘ingenium divino’, often translated as ‘genius’, was already informing Vasari’s *Lives of the Artists*. While the notion of personal inventiveness had a long history, the designation of ‘first author’ has about it elements of the contemporaneous discourse of ‘genius’. However, it should not be inferred that the status of ‘first author’ was given by some notion of originary ‘Genius’. The claim is based on the artist’s *labour* not the innate capacities of the subject, it is for this reason the copyists are condemned simply as men of “little study”.⁹³

THE ARTIST’S ‘RIGHT’ AND THE ART OF RHETORIC

THE RISE OF THE ARTIST: HUMANISM AND THE MARKET

As we have seen, the evidence of the extant privileges suggests that the intellectual property in images emerged from trade regulation rather than as a recognition of the

⁹³ Interestingly, the petition attempts to balance one form of copying against another. On the one hand, it suggests that the prints will be “to the communal benefit of those who study painting” and on the other, it condemns counterfeiters. Op. cit. In the new art academies, the copying of prints formed part of an artist’s training and remained so for many centuries to come. (Interestingly this was just the period in which the training of artists was beginning to move from the bottega towards semi-state controlled academies.) The term ‘counterfeit’ suggests that other forms of copying were regarded as fraudulent. However, this modern understanding of the term is somewhat misleading. If the copies ‘passed off’ were of such inferior quality that they might bring Titian’s name into disrepute, they could hardly operate as ‘counterfeits’ in the modern sense of the term. This suggests two possibilities. *Firstly*, Titian may have been worried about the use of his name in connection with such ‘inferior’ work – which indicates a proprietorial concern for correct attribution. *Secondly*, and more likely, the issue was not really counterfeiting, as it is *now* understood, but unsolicited ‘borrowing’ of the compositions.

‘rights’ of the creative subject. However over time the operation of the system came to recognise something approaching an ‘authorial right’ *de facto*. The question of how such a ‘rights’ discourse came into being therefore remains to be answered. Given that a figure resembling that of originary ‘Genius’ was emerging in the discourse of art parallel to the development of printing privileges, it is tempting to conclude – as has been the assumption of many subject-centred approaches to the history of intellectual property – that the discourse of ‘rights’ emerged from the social ascent of the Renaissance artist.⁹⁴ Unfortunately, despite the emergence of a figure resembling that of ‘Genius’ there is no evidence to link such an ideology of production with the actual operation of the Venetian system. Only very late in the day does any figure resembling such a social construction obtain a privilege. As far as the applications for privileges were concerned, figures such as Titian were very rare exceptions to the rule; figures like the publisher Bernardino Benalio were by far the most frequent type of petitioner. Rather than pursue the personality-centred discourse of ‘Genius’ then, it is more fruitful to look elsewhere for the discursive origins of this apparent ‘right’. Contemporary theories of creative labour and the market conditions set in motion by the advent and spread of printing therefore provide a more plausible arena for analysis.

The Market for Composition

From the beginning of the 15th century both the appreciation of art, and the practical training of artists, were increasingly subject to a humanist discourse that drew its central concepts from the ancient art of rhetoric. Despite the emergent concept of ‘*divino ingenium*’, and a revitalisation of neo-Platonism towards the end of the 16th century, from the early 15th century onwards the training of artists was modelled on a mode of creative labour and composition grounded in the discourse of rhetoric, a

⁹⁴ The ‘Law and Cultural Studies’ approach is typical in this respect.

foundation upon which all future systems of intellectual property were eventually built.⁹⁵

The reorientation of artistic training away from medieval models was intended to be sympathetic to changes in an art market that was increasingly subject to a new kind of art appreciation inured in rhetoric. The increasing influence of humanist scholarship has long been regarded as crucial to the social assent of the artist that begun in the early 15th century.⁹⁶ At a general level humanist discourse projected the reputation of particular artists, thereby increasing demand for the ‘personality artist’.⁹⁷ In this it was aided by the developing public sphere created by printing which increased the circulation of both humanist appreciations of art and of printed images (in the form of book illustrations and single leaf prints), thereby strengthening the recognition of an artist’s name and their association with particular images.⁹⁸ The increasing importance of such supplementary information was certainly one of the key constituent factors that led to the social assent of the Renaissance artist from which the concept of ‘originary Genius’ was later derived. However, as already suggested, the rise of such a figure is of limited help in explaining the emergence of a quasi-authorial ‘right’ operating within the privilege system. It is important therefore to recognise that on a more intricate level, the new criticism created changes in the *quality* of demand within

⁹⁵ The notion that neo-Platonism within art theory was in abeyance in the early Renaissance period is drawn from Panofsky’s study, *op. cit.* The practical stress placed on the observation of nature mitigated against the metaphysical/theological notion of innate Ideas within the mind of the artist, which had been central to medieval neo-Platonist ‘art theory’.

⁹⁶ Jacob Burckhardt was the first to make this link in the late 19th century. See excerpts from Jacob Burckhardt, *Reflections on History*, M.D.H., London, 1943.

⁹⁷ The change can be tracked in artist’s contracts. For example, in Michelangelo’s youth (1475- 1564), contracts stipulated not only the subject matter of a work, but also elements of execution and materials to be used. By his mid career, contracts stipulated neither the subject matter nor even whether the patron was to receive a painting or a sculpture. Such changes, Hauser suggests, hastened the end of guild power. A new class of “free intellectual workers” moved from court to court, breaking local guild monopolies, and amassing considerable personal wealth in the process. See Hauser, *op. cit.* The cultivation of individuality that appears in the early 15th century did not develop into a “mania for originality” until the end of the 16th according to Hauser. The actual figure of “originary Genius” did not appear until the 18th century with the development of a free, speculative market for painting. Competition amongst artists forced the issue of individuality to the surface, placing a new emphasis on fame and greatness of the individual. Interestingly Hauser overlooked the existence of a speculative market for printed images in the late 15th and early 16th centuries.

⁹⁸ See William Ivins, *Prints and Visual Communication*, MIT, London, 1996. (First published, 1953.) See also, Eisenstein, *op. cit.* and Broun, *op. cit.*

the art market.⁹⁹ Humanist criticism created a receptive framework that highlighted the individual's capacity for 'invention', a faculty that was expressed through the composition of the painting. The effect of this rhetorical discourse could be felt in the art theory of the early 15th century, well before the advent of printing in Italy.¹⁰⁰ In aligning the practical training of artists with the new conditions of appreciation in the market, the rhetorical structures of humanist criticism created a new platform of artistic training. It is in the discourse of rhetoric and its effect on the conceptualisation of creative labour with respect to composition that the quasi-right in evidence within the privilege system originated.

THE DISCOURSE OF RHETORIC

In addition to underpinning practical art theory, the concepts of rhetoric also increasingly underpinned the 'common sense' of everyday discourse.¹⁰¹ Within art theory rhetoric often made alliances with the philosophical discourse of the Idea drawn from Aristotle and Plato.¹⁰² Elsewhere – such as in the claim to 'invention' made by Brunelleschi in his Florentine 'patent' of 1421 – its operation was more straightforward. As a general method for storing and retrieving knowledge, it proved adaptable to many uses.¹⁰³ Even today, it is a system so common that its historical and

⁹⁹ This was a by-product of humanist activity. Michael Baxendall points to the use of paintings as objects upon which to practice Latin discourse. The primary purpose of art appreciation was to improve the scholar's skills in Latin and rhetoric. However, this activity changed the character of reception in the market for paintings. See Michael Baxendall, *Giotto and the Orators: Humanist Observers of Painting in Italy and the Discovery of Pictorial Composition*, Oxford University Press, 1971.

¹⁰⁰ See Erwin Panofsky, *Idea: A Concept in Art Theory*, Berlin, 1924; trans. Joseph J.S. Peake, Harper and Row, London, 1968; Anthony Blunt, *Artistic Theory in Italy 1450-1600*, Clarendon, 1940; Robert Williams, *Art, Theory and Culture in Sixteenth-Century Italy*, Cambridge University Press, Cambridge, 1997.

¹⁰¹ The best early source is Alberti's *de Pictura* of 1435 whose prescriptions were relatively unaltered by Vasari's *Lives* of 1550/1565. Even the work of metaphysical theorists such as that of Zuccaro, 1607 remained premised on rhetorical theory. See Zuccaro, *op. cit.*

¹⁰² The best account of this discourse is given by Erwin Panofsky, *op. cit.*

¹⁰³ The system was the basis of most medieval and later schooling. Essays derive from the rhetorical discourse.

contemporary role in ordering the production and dissemination of knowledge are most often taken for granted.¹⁰⁴

As a method for conceptualising how knowledge was gathered and recalled, the system was strongly centred on the personal capacities and labours of the individual. As a practical system for action in the world it similarly emphasised how the individual made use of knowledge and, in particular, how an individual gave form to knowledge.¹⁰⁵ The root of the rhetorical system lay in the revival of classical sources that described the method by which an orator might compose, memorise, and then perform, a speech.¹⁰⁶ In principle, the system was simple and rested on the gathering of individual parts and their arrangement into a coherent whole. In preparation for a public address, an orator would make a mental ‘inventory’ of the various facts and ‘commonplaces’ that would comprise their speech.¹⁰⁷ The act of gathering together the elements of the inventory into a coherent arrangement, or composition, was dependant on the skill, and memory, of the individual,¹⁰⁸ it was for that ability, the ‘invention’, that an orator was appreciated. Invention then was the work of an individual in synthesising, and thereby personalising, information that was available elsewhere as part of the common stock. In this sense, while information remained in common, its composition stood in relation to the individual in an intimate and personal way.¹⁰⁹

¹⁰⁴ The system is still vital to contemporary conceptualisations of knowledge and intellectual property.

¹⁰⁵ This latter point is important since the rhetoric model is clearly in evidence throughout the history of intellectual property – from the period under discussion here, to Fichte’s formulation of literary property in early 19th century Germany, to the current descriptions of how genes might be patented.

¹⁰⁶ Francis Yates, *The Art of Memory*, Routledge and Kegan Paul, London, 1966.

¹⁰⁷ The term ‘commonplace’ derives from rhetoric – originally, it denoted the stock phrases and epigrams, used to embellish a speech. For a very interesting take on the issue of such commonplaces, with respect to intellectual property, see Kathy Eden, ‘Intellectual Property and the *Adages* of Erasmus’ in *Rhetoric and Law in Early Modern Europe*, eds., Victoria Kahn and Lorna Hutson, Yale University Press, London, 2001.

¹⁰⁸ The system strongly suggested that such skills could be learnt and improved with practice.

¹⁰⁹ It is interesting that the concept of ‘ingenium’, which influenced the later concept of genius, was also drawn from Cicero’s book on rhetoric, *De Inventione*, where it was used to signify a high level of inborn ‘talent’ with respect to invention and memory. The acceptance of asymmetries of ability was a judgement of ‘quality’ that operated within a ‘method’ that was practical and technical, and which generally stressed the labours of the individual. While the method could be taught, and was thus not ‘exclusive’, there was clearly a belief that some begun with innate abilities. For more detail see footnote 122 below.

The system could be deployed in any field of knowledge, for example Brunelleschi's 'patent' of 1421 was granted in respect of his 'invention' of a crane capable of moving stone blocks on and off barges. The 'patent' specifically states that 'Brunelleschi did not want to give the invention to public use for fear of being robbed of the reward of his labours'. The patent goes on to state its own purpose; that 'he himself be urged to further exertion, and stimulated to achieve greater inventions'.¹¹⁰ Even before gaining this privilege Brunelleschi is known to have been highly secretive and extremely careful when divulging knowledge.¹¹¹ He was also a master of 'discursive synthesis', the gathering and application of knowledge in the rhetorical manner. His understanding of structural engineering was pieced together from his own field studies of ancient Roman buildings.¹¹² The recovery of classical techniques and their imaginative reapplication to contemporary structural problems was entirely in line with the rhetorical practice of research and invention. The facts upon which his knowledge was based were freely available 'commonplaces' – literally lying on the ground in some cases – having gathered and mastered the available knowledge, its application – the composition of various techniques together to meet a particular end – was entirely his own.

Rhetoric and the Image

The concept of 'invention' within this first 'patent' was firmly ensconced in the techniques of practical theory and entirely unencumbered by any metaphysical notion of 'Ideas'. However, the use of the technique within contemporaneous art theory was

¹¹⁰ The text is quoted in full by Greenstreet, op. cit., p. 3.

¹¹¹ The building of the dome of Santa Maria del Fiore testifies to his secretiveness. Vasari details his fractious relationship with Lorenzo Ghiberti (also a sculptor turned to architect). Both were employed to work on the cathedral dome, which caused a vicious argument over the credit for its design. On more than one occasion, Brunelleschi remained in bed – feigning illness, telling the clerk of works to get the "other architect" to finish the work. Only get up when Ghiberti's incompetence had been sufficiently exposed and ridiculed would Brunelleschi arise to complete the work. For full account, see Vasari, 'Life of Brunelleschi' op. cit.

¹¹² In 1401, he gave up his early career as a sculptor, in pique at having lost the competition to Ghiberti, to build the doors for the baptistery of Florence Cathedral. He travelled with Donatello to Rome, in

not so straightforward. The precise method by which the system came first into the appreciation of pictorial composition, and later into the training of artists, has been traced by a number of scholars.¹¹³ A few years after Brunelleschi's patent, in 1435, a fellow architect, Leon Battista Alberti, wrote a famous art manual '*De Pictura*'.¹¹⁴ Alberti was well aware of Brunelleschi and his methods, since the latter's 'Costruzione Legittima' – a system of perspective – plays an important part in the book. Despite his practical utilisation of the rhetorical model, in writing about painting Alberti was also, necessarily, concerned with questions of beauty. His manual therefore mixes the practical techniques of rhetoric with elements drawn from the theory of Ideas that had been present in medieval commentaries on art.

Medieval accounts of the production of art were based on a Christianised version of the Platonic theory of Ideas. Within such a metaphysical cosmology, the inner 'idea' from which an artist created an image was placed in his mind by the 'divine intellect'.¹¹⁵ Though this neo-Platonic/theological view fell into abeyance in the early 15th century, it was reformulated in the last quarter of the 16th century in line with a new wave of neo-Platonism in art theory inspired, in part, by the Counter Reformation.¹¹⁶ In contrast to these earlier and later moments of neo-Platonism, which regarded the Idea, or inner image, as divinely innate, Renaissance art theory was practically, rather than theologically, organised, placing its emphasis on the study of nature. In such discourse, the inner 'idea' from which an artist worked came to be

order to study the classical remains. Donatello seems to have quickly tired, but Brunelleschi spent a number of years studying and attempting to reconstruct Roman architectural techniques.

¹¹³ Michael Baxendall, op. cit. and Thomas Puttfarcken, *The Discovery of Pictorial Composition: Theories of Visual Order in Painting 1400-1800*, Yale University Press, London, 2000.

¹¹⁴ Leon Battista Alberti, 'On Painting', trans. Cecil Grayson, Penguin, London, 1991. A full version of Alberti's text is also available in Gilbert, op. cit. Page references cited here refer to the reprint in Gilbert's text.

¹¹⁵ Medieval creative theory thought beauty, as represented by the plastic arts, to be a feeble revelation of the invisible beauty of God. The relationship between the inner notion of the artist and its material manifestation was merely a subset of the inner Ideas of the divine intellect and the world it created. In contrast, Renaissance art theory up to Vasari emphasised the practical orientation. See Panofsky, op. cit., pp. 35 – 40. See also, Umberto Eco, *Art and Beauty in the Middle Ages*, Yale University Press, London, 1986.

¹¹⁶ Panofsky, op. cit., p. 51.

regarded as the product of external sensory experience.¹¹⁷ The art theory that ran parallel to the Venetian privilege system then tended towards accounts of the idea that stressed an individual's labour rather than the innate quality of the Idea from which they worked.

So, while a writer like Alberti gathered some concepts of the Idea and beauty from the contemporary Florentine revival of neo-Platonism, the influence of such concepts was marginal in comparison to what was gathered from classical texts referring to painting. As Erwin Panofsky noted, Alberti's conceptualisation of beauty was based on 'selection theory' (Panofsky's term) rather than any neo-Platonic concept derived from the theory of Ideas. The 'phenomenal' idea of beauty was not derived from divine authority but constructed piece-by-piece from the observation of external models in nature. The construction of an internal 'idea' from selective research, composed into a 'harmonious' whole, was entirely in line with rhetorical method.¹¹⁸

The method is even more explicit in Alberti's practical instruction to painters. Alberti recommended that the artist cultivate the company of poets and orators, who he suggested, 'have many adornments in common with painters.' From such people the painter could receive invaluable help with the problem of 'composing the narrative', a narrative 'whose every praise consists in the invention'. The aim of such advice was obviously to bring the practice of painting into line with the new humanist criticism. The 'invention' thus appreciated by humanist criticism, though expressed within the composition of the painting, was conceptual in character. To make the point Alberti even suggests that 'a beautiful invention is attractive by itself, *without the painting*,' a point he demonstrates by recounting a passage from Lucian that describes a painting

¹¹⁷ Panofsky, *ibid.* In turning away from the fundamental first principles, of metaphysics and theology (which were associated with the theory of the 'Idea') the art theory of the period, paralleled the move by humanist jurisprudence from the theologically-orientated natural rights theories of the late middle ages, towards a jurisprudence concerned with the rule of cities and the humanly constructed compacts of law that regulated them.

¹¹⁸ The ancient legend of Zeuxis and the Crotonian maidens was the favourite example to illustrate such a point – no adequate model of beauty could be found in a single model, so Zeuxis took parts from many models and composed them into a whole. While this has been taken as a neo-Platonic parable – insofar as the ideal form of beauty is never present in the material world and must be constructed by the artist – its methodology is entirely consonant with rhetorical method.

by Apelles. Even though lost, the force of the painting's invention, recorded in Lucian's words, is enough to identify the work as 'agreeable and attractive'.

Alberti's account of how to produce such forceful inventions is straightforwardly rhetorical and practical. The student must learn to compose paintings in a way that is analogous to that in which one is taught to write. In learning to write, one is first taught "the form of each letter separately, which the ancients called the elements, then they teach the syllables, and then they put together all the sounds, and one should learn to paint by the same system."¹¹⁹ In place of these linguistic elements, the artist should learn first the "edges", then the "surfaces" and finally "members". The "members" consist of a repertoire of parts, for which Alberti gives the parts of the body and various facial characteristics as examples. Once the various parts, or commonplaces, are committed to memory, the method of composition is similar to that of the orator. The inventive capacities of the painter consists in their ability to arrange the various parts into a harmonious whole. As with the production of arguments for an oration, Alberti stresses that the artist must avoid 'contradiction' and 'indecorousness' that may detract from the 'bella invenzione', the harmony of the whole. The artist then must 'observe that the single members fit together well if in relation to size and measure, character and colour, and other similar things they harmonize and form one unified beauty'.¹²⁰

Alberti's definition of beauty – 'the proportion of the parts to one another and to the whole' – was an aesthetic concept born out of the logic and pedagogical structures of

¹¹⁹ Baxendall shows how Alberti's term 'compositio' (which in usage, is close to that of 'concetto') was drawn from Cicero's rhetoric. 'Compositio' was a technical concept used in sentence construction that "every schoolboy in a humanist school had been taught to apply". See Baxendall, op. cit. p 131.

¹²⁰ Drawing on the Zeuxis/Croton maidens story, Alberti suggests that since beauty rarely reaches perfection in nature, the student should "work with study and labour to learn what is good-looking...complete beauty is not found in a single body but scattered and uncommon in many bodies, still one must search it out and learn to put one's full labour into it". See Alberti, op. cit., p. 72. Parallels with composition in the realms of music and literature are fairly obvious – literary composition involves the arrangement of words; musical composition, the arrangement of notes. This base concept of composition was not challenged until the 1950s and 1960s when, in the realm of visual art, it seemed irrevocably linked to notions of mimesis and illusionism – the latter of which, had pervaded the history of Western painting. How and why that came to be seen as a problem, will be dealt with in the next chapter.

rhetoric. The ability to perceive beauty could be *trained* – ‘ideas’ in other words could be formed within one’s mind by experience and practice. This practical view proved remarkably durable. Even where a direct influence of neo-Platonism on art theory was apparent, for example in Dürer’s writing of 1512, the rhetorical concept was still dominant. Dürer’s notion that a mind filled by extensive drawing from life created a ‘secret collected treasure of the heart’ from which it was possible to bring forth a ‘new being in the shape of a thing’ – was entirely within the practical discourse of rhetoric.¹²¹ The rhetorical model was still in evidence, still largely unadorned by metaphysical influences, well over a hundred years after Alberti’s treatise, in Vasari’s ‘Lives’. Vasari’s use of the rhetoric model was considerably more direct than his forerunner insofar as he suggested that the ‘idea’ within the mind of the artist was not only trained by experience, but literally originated in experience.

Vasari’s concept of ‘disegno’ (design) was built upon the foundation of Alberti’s rhetorical concept of ‘invention’.¹²² Disegno, according to Vasari, was derived from studying the natural world, paintings, sculptures and buildings, in order to reveal ‘the proportion of the whole in relation to its parts as well as the proportion of the parts to one another and to the whole’. Having undertaken such researches, the invention, or idea, was executed in the form of a disegno. Vasari says:

And since from this recognition there derives a certain judgement, that forms in the mind the thing which later, formed by the hand, is called a design, one may conclude that this design is nothing but a visual expression and clarification of that concept which one has in the intellect, and that which one imagines in the mind and builds up in the idea.¹²³

¹²¹ “A good painter”, Dürer suggests, “is inwardly full of figures, and if it were possible that he live forever, he would have from the inner ideas, of which Plato writes, always something new to pour out into his works.” Quotation cited in Panofsky, *op. cit.*, p. 124. Dürer’s writing of 1512 squared the circle between neo-Platonism and the rhetorical mode by implying that while the idea was created by research, only certain individuals were capable of such work.

¹²² Panofsky suggests that, in its general usage by Vasari, disegno was practically indistinguishable from the old concept of ‘concetto’ – the idea for a composition – that was employed as far back as the 13th century. *Ibid.*, p. 66.

¹²³ Vasari, *op. cit.*, p. 61.

The ‘idea’ for Vasari was, first and foremost, the product of research. From such labours – the ‘mental act of choosing the individual from the many’ – individual choices are then ‘combined’ into a new whole.¹²⁴ Here Vasari stresses the conceptual aspect of production. Before the physical act of executing the *disegno*, a prior conceptual labour is required – the ‘idea’ must be ‘formed and sculptured’ in the mind of the artist. Before committing to a material form, ‘a certain judgement’ must be formed, which involves the clarification of the initial concept, which is built up in the mind of the artist.¹²⁵ The notion of the idea as an ‘incorporeal labour’ that pre-existed the execution of the work was in fact pre-figured in Alberti’s treatise. Alberti advised that only after thinking ‘long to ourselves what would be the most beautiful way and arrangement’, and establishing ‘in the mind’ what is to be done and how it is to be carried out, should one execute ‘concepts and models of the entire story and each of its parts’ in the form of a series of ‘modellos’.¹²⁶

The Doubled Labour of Production

The existence of rhetorically based art theory contemporaneous with the Venetian privileges suggests that there were two kinds of creative labour: the labour of research, which produced a mental inventory from which the idea for a composition was invented, and the secondary labour, the material execution of the actual artwork. The practical implications of that ‘double labour’ were commonly expressed through a practical division of labour in the organisation of the *bottega*. Even in Vasari’s time the job of producing the *disegno* – ‘the father of the arts’ – still fell to the leader of the workshop. As we have seen, the earlier printing operations – such as that of Benedetto

¹²⁴ These are Panofsky’s words: See Panofsky, op. cit., p. 62. Despite the rhetorical structure of such pedagogy, Panofsky only refers to such structures as reflective of “classical selection theory”. He complains that Vasari’s *disegno* is a “complete misunderstanding of the Platonic...theory of Ideas”. Thus, he misses the fact that *disegno* (and Alberti’s invention) are derived from *rhetoric*, not Platonism. The oversight stems from the methodological framework of his study – an investigation into the influence of Platonism on art theory.

¹²⁵ The practice Vasari describes essentially involves an interplay between an artist’s initial concept for a work and the various states of research required to bring it to fruition, during which the concept is modified and re-modified in light of visual observations.

¹²⁶ Alberti, op. cit., p. 73.

Bordon and Jacob of Strasbourg – fell upon similar divisions. As head of the operation Bordon took upon himself the conceptual aspects of the designs and produced the modello's from which Jacob worked. Though Bordon's claim to a privilege was motivated by business rather than any concept of 'rights' to the image, the traditional organisation of his shop gave him the role of 'intellectual' and 'physical' labourer, while Jacob remained within the artisanal tradition of physical labour.

While it remained the basis of a practical division of labour within the bottega, the 'double labour' of image production was generally unremarkable. However the changes in the art market, brought by the humanist appreciation of painting, placed a new emphasis on the aspects of the image that were, broadly speaking, 'conceptual' in character. That Alberti could appreciate an unseen painting by Zeuxis purely on the basis of its *composition* suggests just how deeply the humanist approach had penetrated practical discourse of the early 15th century. However the increasing admiration for the products of an artist's conceptual labours was at first merely social in character. While the humanist's admiration for an artist's 'invention' raised the work above the general, invention itself was not in any legal, or quasi-legal sense, a 'property'. This much can be gathered from Alberti's comments made in relation to invention and copying.¹²⁷

Some repeat the figures of other painters, and seek praise for that...if you still like to repeat the works of others, because they have more patience with you than living things, I would prefer to draw from a mediocre sculpture than an excellent painting, because you gain nothing from paintings except how to

¹²⁷ Ibid., p. 73. In a footnote to his discussion on Alberti's treatise on painting, Panofsky, (in connection to Alberti's attitude to copyists) makes the following remark: "but at first, imitation did not at all disgrace the artist; it proved his poverty of ideas, but it did not make him a 'thief'. For that which he took from others was not yet considered their personal property: nature belonged to everyone, and the idea was looked upon as a notion that, despite its origin in the subject, was endowed with a super-subjective, indeed normative value. It was in the 19th C when the work of art was considered to be the revelation of a thoroughly personal experience of nature or emotion, that the modern concept of 'plagiarism' emerged." See Panofsky, op. cit., p. 50, n. 14. Panofsky's comment, though very wide of the mark, was very revealing about mid 20th attitudes to art. Despite his own major work on Dürer, the above statement is blind to the importance of printed imagery to art history. The economic problem of copying was as old as counterfeit currency, and in art, as old as the artist's print.

duplicate them, but from sculpture you learn how to duplicate them and also how to draw the lights.

Under the gaze of humanist criticism, the artist was to be admired for their conceptual labours, their 'invention', their ability to compose an image. Alberti's criticism of copying rested not on any notion of theft, but on the fact that copying produced substandard work, that in addition offered nothing *particular* for which the artist might receive praise. In this sense then the artist who copied was only managing to do a part of the work, the part that relied on manual skill.¹²⁸ The principle concern of Alberti's training manual was to help artists to compete in a market increasingly dominated by a new class of viewers, schooled in humanist rhetoric, who increasingly viewed the invention of a composition as a criterion of judgement.

More generally then, the increasing regard over the 15th and 16th centuries for an individual's ability to invent, or compose, an image stemmed from this refocusing of the market created by humanist criticism not from any metaphysical discourse related to the concept of 'genius'. Seen in this light, Mantegna's battle with Simone di Regio and Zoan Andre becomes clearer. Mantegna's apparent claim over 'his' compositions stemmed from an awareness of his own conceptual labour and of the critical, social and market value attached to such inventions. The copyists not only threatened his market, but they worked solely by craft labour, independent of the mental labour of invention. While the rhetorical labour of composition did not make the resultant images Mantegna's 'property' in any positive legal sense, it does explain why his actions made them *appear* to be like a form of property.

¹²⁸ It must be remembered, that the training of this period was attempting to move away from instruction for artists based on medieval copybooks, towards an emphasis on observation from nature.

The Rhetoric-Based 'Right' of Creative Labour

The rhetorical model of creative labour then grounded what often *appeared* as a legal 'right' to an image. Da Brexa's privilege petition is the clearest early example of how such a 'right' came into operation. Da Brexa's claim was not to protect a work that was already executed, but to protect parts of a work that were yet to be materially executed. As was usual within the rhetorical model of production, research and mental inventories had made prior to the execution of the series and an 'idea' formed. Da Brexa's petition was effectively a claim that prior mental labour be recognised. While not recognising mental work as a property *de jure*, the granting of his privilege nevertheless recognised it *de facto*. The later claim to a 'property' in images by Ugo di Carpi (though probably fraudulent) extended this line of argument since it was directly based on the labour of 'invention'. By the time of Titian's privilege of 1566, the claim to the image is clearly made in tandem with a claim to be recognised its 'first author', which effectively establishes the personal link to an image in an entirely rhetorical manner.

Rhetoric, Metaphysics and Genius

However, despite the rhetorical character of Titian's privilege it was granted at the moment when the effects of the neo-Platonist revival and the Counter Reformation were beginning to be felt. In the last quarter of the 16th century, writers such as Ficino, Lomazzo, Zuccaro and Bellori begun to erect a metaphysical edifice on the practical foundations of earlier rhetorical theory. Despite the rhetorical character of Vasari's concept of *disegno*, *The Lives* was the apotheosis of the social elevation of the artist that had been under way since the early 15th century. The increasing emphasis on individualism was apparent in his account of the creative individual, or 'divino ingenium', which displays elements of what was later referred to as 'genius'.¹²⁹

¹²⁹ 19th Century writers often used the modern term 'Genius' anachronistically when translating 16th texts. Much has been written about the historical distortions of such anachronisms. However, Catherine

By the end of the 16th century, the increasingly theological account of the rhetorical discourse merged the concept of *disegno* with a Christianised neo-Platonism. Much as medieval philosophers had done, Federico Zuccaro emphasised the idea that God, in creating man in his own image, gave to man ‘the ability to form in himself an inner intellectual Design’.¹³⁰ Humans perceived the external world by relating sensory data to an interior faculty of design given by God. From the ‘*disegno interno*’, the individual was also granted the ability to produce paintings and sculptures in imitation of the process by which God produces the world. While the ‘*disegno interno*’ could be clarified and ‘enlivened’ by training, it was a faculty received directly as a ‘gift’ from God.¹³¹

The return to theology in Zuccaro’s account of production paralleled the re-emergence of theories of ‘natural right’ in the legal discourse of the period. The ‘*disegno interno*’

Soussloff, (op. cit.) argues that 15th century theory had a powerful determining effect upon the later Enlightenment concept of Genius. Martin Kemp has redefined the extent to which the ‘Genius’ concept existed in the Renaissance and Mannerist art theory by tracing elements of the concept through the use of words such as ‘*virtu*’ and ‘*divino*’. See Martin Kemp, ‘The Super-artist as Genius: The Sixteenth-Century View’ in *Genius: The History of an Idea* (ed) Penelope Murray, Basil Blackwell, London, 1989. Kemp argues that words derived from classical literary criticism and mediaeval poetics – for example the Latin terms ‘*fantasia*’, ‘*invenzione*’, ‘*excogitare*’, ‘*intelletto*’, ‘*spiritio*’ and ‘*furore*’ – contain elements of the modern term. The most important terms in 15th and 16th century art theory are ‘*Ingegno*’ (the general qualities of a individual), and ‘*ingenium*’, (their particular aptitudes). By mid 16th century, it had become common to associate the ‘*ingenium*’ of an artist with their *fame* – by using the additional moniker, ‘*divino*’. ‘*Ingenium*’ when coupled with ‘*divino*’, signified something approaching the later concept of ‘Genius’. However, despite being linked (by Ficino, in the late 16th century) with melancholy and madness, *ingenium* was hardly ever used in isolation from terms such as ‘*dottrina*’ and ‘*disciplina*’ – the latter of which denote mastery of the rational rules. Kemp argues that some elements of the later concept appear in Vasari – for example, his reference to “gifts” and notion that some artists work in “inspired rapture” to produce ‘divine concetti’ (divine compositions). Elements of the emerging concept of genius were certainly linked to the rhetorical discourse. Kemp points out that the term ‘*ingenium*’ itself was derived by humanist commentators from Cicero’s book on rhetoric, *De Invenzione*, where it was used to signify a high level of inborn talent with respect to invention and memory. However as already suggested, distinctions made on the basis of subject-type or ‘quality’ occurred within a general rhetoric-based framework of labour that was practical in character. Since the privilege system made no distinctions as to the kind of petitioner the question to keep in mind is not what kind of subject but what kind of labour was relevant to its operation.

¹³⁰ Zuccaro’s *L’Idea de Pittori, Scultori ed Architetti* was published in Torino, in 1607. Reprinted in Panofsky, op. cit., p. 88. (Zuccaro completed Vasari’s paintings as well as his conceptual work. In 1585 he finished the frescoes in the dome of Florence cathedral left incomplete by Vasari’s death. He also worked in the Vatican and founded the Academy of Saint Luke in Rome in 1593.

¹³¹ Zuccaro’s most well known teaching was an anagram: “Disegno, segno di Dio”, Design is the sign-manual of God.

was in fact a variant on both late medieval theories of property and creativity. In explaining the origin of design, Zuccaro says the following:

...as communal things are the property of all, and each may use them freely, possessing a part of them as the wealth of the republic, yet no one may become their absolute master except the Prince himself; in the same way we may say that, since the intellect and the senses are the subjects to Design and concept, Design, as their Prince, ruler and governor, uses them as his property.¹³²

Disegno had a double meaning for Zuccaro. In the first instance, it meant the world as designed and created by God, in which was folded man's own capacity for disegno. In this sense, man's capacity for disegno was a subset of God's greater Disegno. In the second sense, of the above quote, the disegno inherent in the individual rendered that individual the 'ruler' of their own internal faculties and by extension of what they were capable of composing. This theological justification of a *property in disegno* brought together late medieval views on property and creativity. The theological justification of property – established in the Papal Bull 'Quia vir reprobis' of 1329 – suggested that man's dominium over property was a subset of God's natural dominium over the earth. The medieval view of creativity similarly suggested that the relationship between an artist's inner idea' and its material manifestation was a subset of the inner Ideas of the 'divine intellect' and the world 'it' had created. While the medieval concept of an inner 'idea' implanted in the individual by God was ostensibly unrhetorical, its utilisation within the context of disegno was not, since the inner 'idea' was in fact the capacity of disegno itself.

CONCLUSION

Even under the emergent concept of genius and the theologising tendencies of later art theory, the rhetorical element was never entirely submerged. While the social

standing of artists and new theories of the subject came and went, the rhetorical mode of creative labour endured. Though these para-theological views of creativity and property of the early 17th century were not the ‘origin’ of the intellectual property system, they tended to substantiate the link between an individual’s labour of design and the ‘right’ to property that had developed *de facto* within the Venetian privilege system.¹³³ However by Zuccaro’s time, Venetian political and economic power had waned and with it the system of printing privileges. Nevertheless, in other European jurisdictions systems of privilege had taken firm root. The history of their development has been dealt with extensively elsewhere.¹³⁴ Despite encounters with theological and metaphysical discourses of various strips, the basic rhetoric-based discourse remained the bedrock of practical theories of creative labour. Claims, such as those made by Dürer, that only certain individuals possessed the necessary ‘gifts’ to create compositions, were made more frequently and vociferously as the discourse of originary genius increasingly took shape. This however did not preclude the older rhetorical precepts. Wherever intellectual property on the Venetian model took root, all individual legal rights – whether the concept of invention as it was increasingly defined within patent laws relating to science and industry, or the concept of originality as it was refined within copyright laws relating to the arts – were grounded in the discourse of creative labour drawn from the rhetorical model.¹³⁵

¹³² Panofsky, op. cit., p. 91.

¹³³ See *Millar v Taylor*. See also Hegel’s *Philosophy Of Right*, trans. T.M. Knox, Encyclopaedia Britannica, Chicago, 1952.

¹³⁴ The best country-by-country overview is given by Saunders. For more detailed accounts see Patterson and Rose on England and the US copyright, op. cit. See Bently and Sherman on intellectual property law generally in the UK, op. cit., and Edleman, Nesbitt and Armstrong on France, op. cit. See Woodmansee on Germany, op. cit. For information on China, see William P Alford, *To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilisation*, Stanford, UP Stanford California, 1995. On the development of the Berne Convention, see Vincent Porter, *Beyond the Berne Convention: Copyright, Broadcasting and the Single European Market*, Academia Research Monologue 2, John Libbey, 1991.

¹³⁵ It is interesting to speculate on the genealogy of transmission. The rhetorical model in Vasari’s *Lives* most certainly formalised the conceptual division of aesthetic labour into moments of mental and physical labour. Its widespread dissemination certainly helped, and continues to help’ reinforce the rhetorical view of creative labour. The influence of the Venetian system and of Vasari’s ideology on Hogarth and his agitation which led to the first formal copyright given to artists as a distinct legal ‘right’ in 1735 has yet to be fully researched and analysed. Clarke Hulse has examined the influence of the visual discourse on the literary, and in particular the transition from Italian art theory to English poetic theory. See Clarke Hulse, *The Rule of Art: Literature and Painting in the Renaissance*, University Of Chicago Press, 1990. The importance of English poetic theory, in particular Edward

The rhetorical model of creative labour survived to inform modern intellectual property law because its precepts were deeply embedded in the way knowledge, and its acquisition and dissemination, were conceptualised in *general* discourse. Despite the tenor of some justifications and defences of intellectual property law, the concepts of originality and invention have remained practical, ‘low threshold’ concepts rather than metaphysical ones. The rhetorical structure of composition and artistic creative labour with which they had become so entwined, remained as an almost invisible commonplace until the 20th century. The first challenge, more gestural than concrete, came from Marcel Duchamp in the teens of the 20th century. But it was not until the theories of John Cage in the late 1950s, and the Minimalist art of the 1960s, that the rhetorical mode of creative labour and composition received a more concrete and formal challenge.

Young’s *Conjectures On Original Composition* has been cited in analysis of the development of authorial rights in England by Rose and by Woodmansee with respect to the same in Germany. Accounting for such connects is beyond the scope of this current thesis.

3

Aesthetic Dematerialisation: The Semiotic/Network Model

“Economic and scientific modernization succeeds when it is accompanied by a cultural creativity that revolutionizes the way we see the world.” *Charles Leadbeater*

INTRODUCTION

As suggested in Chapter Two, the creative concepts of ‘invention’ and ‘originality’ derive from the discourse of rhetoric. Such rhetorical concepts of creative labour have long been utilised in the legislation, and doctrine, of copyright and patent laws. As a *practical* theory, the rhetorical conceptualisation of creativity centred on the *labouring* capacity of individuals. As suggested in Chapter Two, from very early on in ‘modern’ systems of intellectual property, the rhetorical system has made alliances with theories derived from *metaphysical* discourses. However, despite being frequently linked to theories of the creative subject (such as that of genius), the operation of the rhetorical model of creative labour was/is not dependent upon any *particular* theory of the subject.¹ The accretions of subject theories notwithstanding, the rhetorical system, as most commonly encountered, has operated simply as a ‘technology’ for producing, storing and disseminating knowledge.

The first concerted challenge to the rhetorical view of creative labour came in the music world of the late 1950s, and, under the guise of dematerialisation, in the art world of the 1960s. The new theories focussed on challenging the rhetorical concept of composition, and associated assumptions as to the nature of creative labour. These moves tended to ‘desubjectivise’ the production of art works. Whereas the theory of

¹ For example, in the 19th century, the individualism inherent in the rhetorical model, made complex partnerships with other discourses/ideologies. The stress on the concept of individual genius, in statute and doctrine, has to be seen in light of the broader concepts of the subject at play in society. Whether expressed in Carlyle’s view of history as a lineage of ‘great men’, or the instigation of the Nobel Prizes for science and literature.

rhetoric stressed the training of *individuals* for particular creative tasks, the new model approached the view that creativity occurred not *within* individuals, but in the relational spaces *between* human (and non-human) ‘actors’.

This chapter examines the challenges to the rhetorical model in the era of aesthetic dematerialisation, and the subsequent emergence of new theories of composition and creative labour. The new theories sought to distance themselves from ‘material’ definitions of art and the wounding divide between ‘art and life’ that such definitions purported to sustain. In the process, the new theories of creativity also sought to reconceive the practice of art by moving beyond the economic metaphors of production and consumption through which it was routinely understood. One result of such dematerialisation was the diversion of attention from the ‘discrete’ or ‘unique’ art object, towards the ‘concept’ that generates such material objects. This was achieved by refocusing the balance of ‘responsibilities’ within the artist’s ‘portfolio of labours’, emphasising the conceptualising work of the mind, at the expense of the physical labour of executing art works in material form. In its early stages then dematerialisation actively re-explored the forms of conceptual *labour* represented within intellectual property law.

The new theories of creativity that emerged from this period of experimentation led in two directions. The ‘strong’ interpretation of the new theories of creativity took shape in the art world of the late 1970s and early 1980s, where the challenge to the rhetorical view of composition was developed into an assault on its cognates in intellectual property law. In the work of artists such as Sherrie Levine, and in the critical theory of Douglas Crimp and Rosalind Krauss, copyright law came to be regarded as the defender of an ‘outmoded’ aesthetic and cultural order.² The ‘weak’ interpretation of the new theories took up the desubjectivising narrative of production and the new strategies of ‘creative collaboration’ that had developed in the wake of the assault on the rhetorical model. In the 1970s and 1980s, dematerialisation’s attempt to move

² See Krauss, op. cit. See also, Douglas Crimp, *The Museum in Ruins*, M.I.T, London, 1995. A fuller discussion of appropriation art is undertaken in Chapter Five, Part II.

beyond the economic framework of ‘author-producer’/‘consumer-viewer’, and the aesthetic frame of ‘subject-object’, was taken up in sociological approaches to art and culture which viewed production as a ‘field’ made up of a network of human and non-human factors. The new ‘de-subjectivising’ sociological accounts were paralleled by studies of creative production in science and industry, which brought the cultural *theories* of creativity into line with long standing *practice* in those sectors.³

The general agreement reached across a number of fields by the ‘weak’ version of the new theory, marked the beginning of a new ‘*ideology of creativity*’ – the ‘semiotic/network model’ – from which broader conclusions about social organisation have been drawn.⁴ Crucially, this version of the new model avoided direct confrontation with rhetorical concepts, and instead concerned itself with developing the desubjectivising narratives begun by aesthetic dematerialisation. The new ideology focussed not on the eradication of rhetorical models of creativity, and its cognates in intellectual property law, but on how to *manage* the claims to such property.⁵ As suggested in the Chapter One, establishing the dominance of the ‘weak’ interpretation of the semiotic/network model has been crucial in ensuring co-existence with the rhetorical model essential to the operation of the knowledge economy.⁶

³ The individualistic implications of rhetorical concepts made (and still make), odd bedfellows with the actual practice of science and technology – particularly where such individualism is linked to theories of the subject, like that of genius. For most of the 20th century, university departments and Research and Development departments in business, have been organised collectively. However, the concept of ‘invention’ at the centre of patent law, is a cognate of rhetoric, and was (in the 19th century), embroiled with the discourse of genius. Outside the law, scientific endeavour has been periodised by prizes (such as the Nobel), similarly predicated on a belief in the outstanding contributions of ‘great’ individuals.

⁴ The ‘cultural turn’ in economic and political theory will be dealt with in Chapter Four.

⁵ The increasing use of versions of Actor Network Theory in management theory might usefully be viewed as the extension of the ‘Death of the Author’ to the fields of economic and industrial relations.

⁶ The role of these models will be dealt with at the end of this Chapter and in Chapter Four. The reining in of ‘strong’ interpretations of the model will be dealt with in Chapter Five.

DEFINING DEMATERIALISATION

GENERAL DEFINITIONS

The term *dematerialisation* is now most commonly associated with the American critic Lucy Lippard who gave a retrospective focus to the notion in her famous book *Six Years: The Dematerialisation of the Art Object*⁷. As Richard Williams has argued, the term was not Lippard's invention, nor was it confined to her writing, but was in widespread use in the 1960s and 70s in order to describe a loose and generalised tendency in minimalist, conceptual, performance art and happenings that appeared across Europe and North America.⁸ Dematerialisation can be presented in a number of ways: as a shift from object to idea, inspired by Duchamp's readymades of the early teens of the 20th century; as a defiance of the commodity status of the art object; as an attack upon the notion of the masterpiece and its allied notion of genius; as a rejection of 'Berensonite' connoisseurship and the Romantic fetish made of the artist's hand. All such views stem from the rejection of what, by the early 60s, had become a ruling hegemony of American art theory - the notion of 'objecthood'.

Clement Greenberg's insistence upon the formal aspects of art practice stressed, above all else, the blunt fact of painting, its material nature – a revelation which, in Greenberg's view, was entirely coextensive with the trajectory of modernist painting initiated in the early 1860s by the crude brushwork of Manet's painting; a trajectory that led decisively away from the 'mimetic' drive of earlier western painting. In the

⁷ Lucy Lippard, *Six Years: The Dematerialisation of the Art Object*, University of California Press, California, 1997. (Originally published, 1973). Here, Lippard presents a chronological anthology from 1966-1971 – including interviews, reports of works, happenings and exhibitionary events. The book's structure demonstrates the "chaotic network of ideas" shared by very different individuals and groups under the umbrella of dematerialisation. *Ibid.*, p. 5.

⁸ Richard Williams, *After Modern Sculpture*, Manchester University Press, Manchester and New York, 2000.

hands of Greenberg and a younger generation of critics, in particular Michael Fried,⁹ the materiality of painting, that is to say its ‘objecthood’, was the most base and irreducible fact of an ‘artwork’, the condition of being which separated it from other forms of artistic expression. Objecthood was the primary material difference, the grounding fact, that differentiated painting and sculpture from literature, music and theatre, the aspect that it shared with no other art and which defined it as an area of specific creative investigation. Dematerialisation, insofar as it suggested a shift away from such material definitions of art, is often regarded as the beginning of, what retrospectively comes to be termed, ‘postmodernism’. Robert Morris produced one of the most succinct articulations of the dematerialisation sensibility. Responding to the accusation that Minimalism had rendered the art object *unimportant*, Morris retorted that it was not that the object was unimportant but simply less *self-important*. This way of expressing dematerialisation indicates both the general shift from Greenbergian formalism and that the shift is in *doctrine* rather than a literal abandoning of the art object. In other words, dematerialisation still presented objects to the viewer, but objects that were stripped of the ‘ideology of materiality’ and ‘objecthood’ laid out by Greenberg’s Modernism.

The view of dematerialisation as a challenge to the art object was key to early theorisations of ‘post modernism’ whose aim was to distance the production of art from the Greenbergian narrative. Retrospective accounts of the period, such as Rosalind Krauss’ very influential essay *Sculpture in the Expanded Field*,¹⁰ brought together the new theories and practices by applying models drawn from structuralism. Krauss’ aim was to produce a ‘relational field’ of new categories within which to define art works that could no longer comfortably be contained in the historical, and material, category of ‘sculpture’. This retrospective, semiotic account of the strategies that developed from dematerialisation was not produced until 1978, fifteen to twenty

⁹ See in particular, Michael Fried’s famous polemical essay, ‘Art and Objecthood’ in *Minimalist Art*, ed., Gregory Battcock, Dutton, New York, 1968, pp. 116-147. (First published in *Artforum*, June 1967.)

¹⁰ Rosalind Krauss’s essay ‘Sculpture in the Expanded Field’ (first published in *October*, 1978 and reprinted in her 1986 collection), attempts to account for art practices that are elsewhere described as ‘dematerialised’. Such work is then placed within a ‘relational field’ of meaning linking specifically to the term “postmodernism”. See Krauss, op. cit., p. 290.

years after the first murmurings of the dematerialisation. Despite attempting to move from the material ideology set for sculpture by Greenberg, the essay was dominated by the need to fill the critical space left vacant by the departure of 'the object'.

Dematerialisation is therefore presented as a process that occurred to the art object, and by extension a problem that must be addressed by art criticism.¹¹

While approaching dematerialisation as a problem concerned with evaluating art 'works' (as opposed to the discredited 'object') was important, it tended to overlook other important aspects of dematerialisation. In undermining the expectations as to what kind of 'work' an artist might produce, dematerialisation also challenged the kind of 'creative labour' an artist might reasonably be expected to engage in. The standard account of dematerialisation, established by Krauss' essay, therefore only considers one half of the production/consumption cycle. Dematerialisation is equally important for what it achieved with respect to the productive part of the cycle. Dematerialisation redefined artistic *labour*, challenging the rhetorical mode of creative labour that had been commonplace since the Renaissance.¹² When viewed from the consumptive part of the creative cycle, dematerialisation is merely a discrete development within art practice, a problem for art critics, with little bearing on anything beyond the art world. However when viewed from the productive part of the creative cycle, dematerialisation is not simply a discrete occurrence, but one which has implications for broader socio-economic relations. Since dematerialisation renegotiated what constituted creative *labour*, it also bore on how *property* was constituted from artistic labour. In other words, the issue at stake in dematerialisation was not what kind of *object* an artist makes, but what kind(s) of *property*. To be a little

¹¹ How, for example, is it possible to account for the artwork and its reception, without recourse to models of evaluation those artists themselves had rejected?

¹² Krauss's consideration of 'practice' is limited to a few sentences towards the end of the essay. Of particular relevance is the following: "From within the situation of postmodernism, practice is not defined in relation to a given medium – sculpture – but rather in relation to the logical operations on a set of cultural terms, for which any medium – photography, books, lines on walls, mirrors, or sculpture itself – might be used. ... the space of postmodernist practice is no longer organised around the definition of a given medium on the grounds of material, or, for that matter, the perception of material. It is organised instead through the universe of terms that are felt to be in opposition within a cultural situation." See Krauss, op. cit., pp. 228-229. The implied question here, could be read as, 'what now constitutes a postmodernist artist's labour?' However, such a question bypasses many of the effects of *dematerialisation* in respect of labour and the production of property.

more precise, dematerialisation challenged normalised expectations of creative labour, producing new theories and practices that were different to the rhetorical models that informed, and were reified in, intellectual property law.

CREATIVE LABOUR, PROPERTY AND COMPOSITION

The Portfolio of Creative Labours

As suggested in Chapter Two, the division of idea, or concept, from its execution in material form has a long history. In the bottega's of the 14th and 15th centuries, the social and economic division of labour was based on such a separation. Rhetorically based theories of art noted significant differences between the labour of research, which produced a mental inventory from which the idea for a composition was invented, and the second level labour, the material execution of the actual artwork. While the basic concepts of rhetorical labour endured as the system of intellectual property developed, new variants on the rhetorical model of creative production came and went. However, by the 19th century the once separate functions of design and execution had become increasingly blurred within aesthetic theory.¹³ Despite such fusions within aesthetic theory, within the law the property created by an artist fell into two conceptual domains. In producing an image, the artist created both corporeal and incorporeal properties. The production of a painting for example, created both rights to the image as a material object, and reproductive rights, the rights to make copies based on the composition of the painting. Selling the 'unique', 'movable', material object did

¹³ For example, by the early 19th century, theories of connoisseurship and elements of Romanticism had come to regard the 'work of the hand' as the essential mechanism through which the totality of art was revealed. In the mid to late 19th as the official art academies begun their decline, this notion became more practically explicit. Exponents of the 'New Painting' (Impressionism) increasingly dispensed with the production techniques of academic painting. In practice this meant that the academic stages of production – preparatory drawing (design), painted sketch and final painting – were reduced to a single operation, that of the painted sketch. In the 'plein air' painting of 'Impressionists', observation, design and execution were generally regarded as entirely coextensive with each other and indissoluble.

not necessarily mean selling the ‘image’ in its entirety.¹⁴ In this sense, a visual artist’s labour produced a ‘doubled domain’ of property. While in theory all producers of copyrighted work produce such a ‘doubled property’, the dualism was/is far more socially significant in the art world because of the historically well-developed market structures exist for both ‘original’ works and ‘reproductive’ works.¹⁵

In the period of dematerialisation the old division of labour separating design from execution re-emerged. Sol Le Witt’s famous statement – made with respect to his own ‘minimalist’ work – that the “idea is the machine that makes the work”, was a radical departure in creative theory only inasmuch as it suggested that the idea is *almost* enough in itself¹⁶. Le Witt’s own practice involved the production of instructions to be followed by fabricators who manufactured his work within galleries or the homes of his collectors.

In this sense then, dematerialisation involved a refocusing of the *doubled labour*, and *doubled property*, of the visual artist. The (re)bifurcation of the artist’s labours recalled 14th and 15th century divisions of labour that had long been buried beneath later aesthetic theories and practice. The common interpretation of dematerialisation as an unravelling of the ideology of Genius is therefore not unreasonable since the ‘new practices’ of the sixties in some respects recalled the semi-industrial production of the earlier centuries. The fetish for an individualism expressed through the ‘divine’ hand of the artist-Genius, made an insoluble compact between the concept for a work and its execution. Separating out the functions struck a blow against the elements of Romantic ideology of Genius that had remained active, in somewhat muted form, in

¹⁴ Since all property is formed from a bundle of rights, it is usual to view rights to images as a spectrum – across which corporeal and incorporeal are not greatly differentiated. However, the rights to corporeal property are subject to different constraints to those of incorporeal property. For example, *corporeal* property may in some cases, be regarded as ‘cultural property’, while, so far, this has *not* been the case for *incorporeal* property. Generally, rule tends to decree that rights to reproduction remain with the artist – unless explicitly handed over to the buyer by contract. In moral rights jurisdictions, the image tends to be seen as an extension of the artist’s personality. Consequently, there are even more stringent restrictions on the rights of the buyer in respect of corporeal *and* incorporeal objects.

¹⁵ For example, the market for literary manuscripts is insignificant in comparison. The main social and cultural value of a book, lays in its continued reproduction.

¹⁶ Sol Le Witt, ‘Paragraphs on Conceptual Art’ in *Artforum*, vol. 5, no.10, Summer 1967, pp. 79-83.

Modernist accounts of painting. The ‘return’ to old divisions of labour was in part possible because the law had continued to allude to, and perhaps maintained, a property distinction that pointed toward such a division. The existence of copyright laws always suggested that there was more in the artist’s ‘portfolio of labours’ than the straightforward execution of material property.¹⁷

As Le Witt’s statement suggests, dematerialisation’s departure from the material definitions of art involved a renewed stress on the artist’s ‘conceptual labour’ at the expense of their handling of materials. In challenging the definition of art as ‘objecthood’, dematerialisation also, of necessity, challenged the view of creative labour such a definition implied. In distancing itself from the ideology of ‘material objects’ dematerialisation therefore involved the excavation of principles of creative labour entailed in the production of intellectual, rather than material, properties. Put simply, dematerialisation was grounded on the possibility of the artist retreating into the production of intellectual properties and its cognate forms of creative labour.

The definition art as ‘objecthood’ severely restricted what could properly be defined as artistic labour. Greenberg’s famous suggestion that “even a stretched-up canvas was a work of art, though not necessarily a successful piece” succinctly sums up the view that the enabling ground, and ultimate limit, of painting was to be found in its material nature. By extension, the success or failure of the painting, as a work of art, can be measured by the artist’s labour within the parameters of possibility and limitation set by such a definition. Within such a framework labour is, of course, both ‘intellectual’ and ‘physical’ but there is no possibility whatever that success may be achieved in the absence of the personal, physical labour of the artist on the canvas. The necessity of such physical labour was taken for granted by Greenberg. The escape from ‘objecthood’ suggested by dematerialisation was then predicated on *refusing* such a mode of labour, and stressing in its place the mental, or conceptual, labours of the artist. In practical terms this frequently meant farming out the manufacture of

¹⁷ I use the term ‘material property’ to refer here to the singular object (e.g., a painting) that an artist executes. However, in this particular context, such a term could be used more or less interchangeably with the legal term ‘movable property’.

‘exhibitionary’ objects to professional fabricators. This division of labour was in itself only possible by recourse to the modes of creative labour manifest in the realm of intellectual property.

Dematerialisation then was not a literal challenge to the art object, but to the ‘doctrine’ of ‘objecthood’¹⁸. None of the artists involved eschewed physicality in its entirety, but all challenged *ideological* character of Greenberg’s Modernism. Crucially while certain notions of craft and certain traditions of execution (and with them certain traditions of viewing interpreting and marketing art) were abandoned, making work in ‘a fixed and tangible form’ is not.¹⁹ Though dematerialisation set itself against ‘objecthood’ and down graded the importance of the art object, making it ‘less self important’ in Morris’ words, it reject objects entirely, nor was it, as many have assumed, an outright ‘rejection’ of the ‘commodity form’ of art.²⁰ Rather *rejection* the dematerialisation of the 1960s played a complex (if somewhat problematic) critical game of *relocation* with the commodity. While much dematerialisation art did attack the fetish for uniqueness and permanence traditionally attached to the object of display, it did so by relocating the site of creative labour from the ostensible art object to its documentation. Dematerialisation then was not just a retreat from ‘physical labour’ into ‘intellectual labour’, but more specifically, a shift from an intellectual labour based in the visual realm, to an intellectual labour that was largely ‘literary’ in character.²¹ Though a number of dematerialised works presented problems for the commodity form, whether thought of as ‘movable’ or ‘intellectual’ property, the documentation of the work fell easily within the scope of copyright. Put simply

¹⁸ However, one must be careful against over-determining this dichotomy between *mental* and *physical* labour and between tangible and intangible property. ‘Mental’ labour is not without ‘physical’ aspects and ‘physical’ labour, not without ‘mental’ activity – a writer has to lift a pen, a farmer must know when to sow his seeds, etc.

¹⁹ Copyright law demands that the artwork seeking protection must be rendered as ‘*an expression in fixed and tangible form*’.

²⁰ Here I am thinking particularly of Levine and Krauss – and of those who have attempted to build a critique of *copyright* upon the critique of *originality*.

²¹ The ‘literary’ character of ‘dematerialised’ art has long been recognised. See for example, Joseph Kosuth’s essay ‘Art after Philosophy’, published in 3 parts in *Studio International*, vol. 178, nos. 917-919, October, November, December, 1969. See also Art & Language, ‘Concerning the article ‘The Dematerialisation of Art’’, in Lippard, op. cit., pp. 43-44. Similar sentiments expressed by Laurence Weiner, Hans Haacke, Jenny Holzer, Barbara Kruger etc.

dematerialisation achieved an ostensible critique of the commodity form by moving the site of copyright from images to texts.

The Issue of Composition

Dematerialisation then had a paradoxical relationship to intellectual property law. On one hand it depended on the framework of copyright law for its existence. On the other it threw out a nascent challenge to the conventional norms of composition inherent in copyright law. The site of challenge, as already suggested, was the rhetorical mode of composition that informed both the making of pictures and sculptures and the individual ‘expression’ protected in copyright law. However, the challenge to the rhetorical mode of composition was not general but limited to its application in the production of *visual art*.

In highly influential writings of the period, the minimalist artist’s Robert Morris and Donald Judd attacked what they termed “*relational composition*”.²² The act of composing was held to be inherently *hierarchical* since it involved the arrangement of separate sub-elements of a painting or sculpture in relation to each other, and in relation to the thing to which as an image they referred, in such a way as to constitute a whole composition.²³ Every representational artwork involved a stress on particular parts of the visual field that in turn led the viewer’s eye toward some areas and away from others – a portrait, for example, may involve a greater concentration of brushwork around the head than in the folds of the sitter’s clothing. In this sense, the brush marks across the picture plane are related to each other, and the sitter, by an

²² See Judd’s ‘Specific Objects’ and Morris’ ‘Notes On Sculpture’. Neither writer attempted to trace the origin of this view of composition to rhetoric, but simply regarded it as inherited baggage from an outmoded ‘European tradition’. See Donald Judd, ‘Specific Objects’ in *Art Yearbook* 8, New York, 1965. Reprinted in Judd, *Complete Writings 1959-1975*, Halifax Nova Scotia, 1975. Also, Robert Morris, ‘Notes on Sculpture’ in *Artforum*, Vol. 5, No. 10, Summer 1967.

²³ As we shall see later, the idea that such arrangements of sub-elements might be seen to refer to something *beyond* themselves had already been identified as a fundamental problem by Modernist theories of ‘abstraction’, which regarded references to the world beyond the surface of the painting as an anathema.

inherent hierarchy of parts.²⁴ As suggested in Chapter Two, this rhetorical notion of composition, the drawing together of sub-elements in a way that it is personal to the individual, was central to concepts of invention and originality that, from very early on, informed copyright law.²⁵

The paradoxical relationship between dependence on, and nascent critique of, copyright law that emerged from dematerialisation stemmed from a double think. On one hand, in the visual realm, relational composition was an outmoded relic. On the other, the means of moving beyond it was achieved by shifting the centre of creative labour from the production of visual works that were ‘rhetorical’ in character, to written documentation that was ‘rhetorical’ in character. While the rhetorical mode of composition was eschewed in visual art, this was merely an effect of moving the site of creative labour.

TOWARDS DEMATERIALISATION

GREENBERG’S MODERNISM

The Material Object and Creative Labour

As has already been suggested, dematerialisation was an attempt to escape the hegemony of Greenbergian Modernism that dominated American and European criticism in the late 1950s and early 1960s. However, the attempt to overcome Greenberg’s grip of the critical field in the 1940s and 1950s was not so much an outright assault on its orthodoxies so much as a mutation of them. The Greenbergian

²⁴Parallels with composition in the realms of music and literature are fairly obvious – literary composition involves the arrangement of words, musical composition the arrangement of notes. Such a notion of composition in the realm of visual art seemed, by the late 50s/ 60s, to be irrevocably linked to notions of mimesis and illusionism that had pervaded the history of Western painting at least since the Renaissance. How and why that came to be seen as a problem will be dealt with later in this chapter.

²⁵ The notion of an artist’s ‘expression’ is a cognate of the rhetorical notion of composition.

narrative was itself sustained by a series of arguments that place composition at the centre of debate in Modernist painting. A central aim of Modernist abstractionism was to overcome the ‘alienation of art from art’ – the state created by the historical striving for mimesis. On such a view, painters should distance themselves from any pictorial devices that referenced the world beyond the canvas. Within this ideology, ‘relational composition’ had already come to be regarded as just such a device, and therefore, a ‘problem’ to be solved. The artists most closely associated with Greenberg’s project in the late 1940s and early 1950s can be read as following the position he staked out with some fidelity.

Pollock’s compositions of the late 1940s were often painted flat on the floor, the density of the mark and tone sustained evenly across the surface of the canvas.²⁶ Pollock’s famous ‘drip technique’ offered a measure of control over the whole canvas while significantly reducing the scope of possible marks that could be achieved. While not entirely able to escape the problem of ‘internal relations’, the consistent application of paint across the canvas managed to reduce the importance of relational sub-elements of the composition. Other artists associated, rightly or wrongly, with the New York School in this period – such as Rothko and Motherwell – found slightly different solutions to the ‘problem’. For Rothko and Motherwell the composition issue was ‘solved’ by submitting all sub-elements of the picture to the logic dictated by the material limits of the canvas. Rothko’s work reduced composition to rectangles of colour, superimposed one on the other, mimicking the rectangular nature of the support.²⁷ While in the broadest sense colour can be regarded as a compositional

²⁶ Leo Steinberg later suggested that the work represented a fundamental departure from the condition of ‘verticality’ that had traditionally informed the relation between artist and viewer. From abstract expressionism on, American painting operated ‘horizontality’ or as a ‘flatbed’, marking its departure from Renaissance, specifically ‘European’, traditions of mimesis. Steinberg’s essay ‘Other Criteria’ was the first essay to use the term post-modernism with respect to ‘flat-bed’ work. A version of the essay was delivered as a lecture in 1968 and published in 1972. See Leo Steinberg, ‘Reflections on the State of Criticism’ in *Arforum*, New York March 1972 and his *Other Criteria: Confrontations with 20th Century Art*, Oxford University Press, London, 1975.

²⁷ The drift towards the support was regarded by Donald Judd as the only achievement of Abstract Expressionism – a revelation of shape that had its future he suggested outside of painting in Minimalist constructions where the problem of illusion (caused by the effects of colour and mark making) could be solved by making allusions to pictorial space real.

device, in these works ‘relational composition’ (that derived from rhetoric) ceased to be a central concern of painting.²⁸

On a general level then, within the critical avant-garde of the 1940s/50s, composition came to be seen as a remnant of an outmoded historical narrative that must, as far as possible, be eliminated from Modernist painting. It has become common in the last thirty years to point out that such a view of painting has an excessively exclusionary character.²⁹ The reductivist logic that pervades Greenberg’s Modernism defines art ever more tightly by deciding what it is not.³⁰ The result of such a ‘minimalising’ ideology was to create an increasingly narrow and didactic vein of aesthetic ‘research’ dedicated to solving ‘historical’ issues delineated by the critic.³¹

The exclusionary logic demonstrated by Greenbergian Modernism was predicated on the notion that a hard dividing line must be maintained between the aesthetic realm and that of life. Within such a view of art, relational composition suggested a kind of littoral between the realms of art and life – an aspect of painting that was not *exclusive* to painting, an aspect that shared its identity with the world beyond painting. This issue is important because, quite apart from the overwhelmingly narrow role Greenbergian Modernism assigned to the creative labours of the artist, the desire to overcome the wounded divide between art and life was a major driving force of dematerialisation. Since composition had come to be identified as a ‘problematic’ issue, a site in which the discrete identity of high modernist art might be compromised

²⁸ Motherwell’s work of this period is less rigid in this sense but the drift of the composition towards the shape of the support is nevertheless evident. These tendencies were worked out or, depending on one’s view, ironised, by Frank Stella’s work in the late sixties in which the support itself becomes shaped in order to reintroduce compositional shapes other than rectangles in to the field of ‘painting’.

²⁹ This exclusionary logic is even present in Greenberg’s early writing such as the infamous essay ‘Avant-Garde and Kitsch,’ (1939) where he suggests that most of the significant figures of European Modernism are inspired by their materials and that further more subject matter is something that most ‘avoid like the plague’.

³⁰ The text in which Greenberg lays out his thesis of the separation of the arts – ‘Towards a Newer Laocoon’ (1940) is clearly influenced by Irving Babbett’s Laocoon, a work which more clearly demonstrates the political exclusionism that such a position is clearly open to. See Clement Greenberg, *The Collected Essays and Criticism*, Ed. J O Brien, 2 Vols, Chicago, 1986.

³¹ In dismissing Greenberg’s view of abstraction Steinberg caustically (and mischievously) suggested a parallel between Greenberg’s tendency to set problems for artists to solve and industrial approaches to problem solving found in the contemporary automobile industry!

and the division between art and life breached, it seemed logical that any attempt to diverge from that position might do well to re-consider the issue. As shall be demonstrated in later in this thesis, one consequence of this address to the art/life question, is that the semiotic/network model of creative labour that emerged from dematerialisation tends to dedifferentiate the realms of art/creativity and political economy.

The Art/Life Dichotomy and the Issue of Composition

Before examining precisely how bridging the gap between art and life was attempted it is important to account for how and why the ‘schism’ occurred in Greenberg’s theories in the first place. The thrust of Greenberg’s early essays, such as *Avant Garde and Kitsch* (1939), suggest a fear of the corrupt uses of art by totalitarian regimes and the corruption of refined cultural sensibilities by the developing mass culture in pre-war United States. However, from the point of view of the labour theories that concern us here, it is the adaptations of Marxist theory that pepper such early forays into art criticism that are important. From *Avant Garde and Kitsch* onwards the main loci around which Greenberg organised his theoretical outlook – the issues of medium and materiality, the problem of illusionism – had their roots in an analysis of art and labour that begun in the 19th century. However, while taking on some of the nostrums of those debates, Greenberg reversed the principle of such arguments. The effect of these reversals was to sever the carefully tended relationship in Marx’s early work between theories of aesthetic labour and productive labour more generally. For many artists working under the rubric of dematerialisation, the notion of separating out the labour of the artist from productive labour more generally was an anathema, since it functioned a principle that divided the realm of art from society.

The relationship between the labour of the artist and labour generally had a central role in Marx’s earliest attempts to analyse the social conditions of nineteenth century industrial capitalism. In his analysis of the *Economic and Philosophic Manuscripts*,

Alan Ryan suggests that the labour of the painter represented, for Marx, an ideal of ‘unalienated production’ against which the degradations of alienated, industrial labour could be measured. Margaret Rose has similarly pointed up this connection and done much to tease out the specific historical situation that informed Marx’s early forays into aesthetics and their relationship to his later works on economics.³²

Rose’s analysis of the critical influences on Marx’s early aesthetic theory is important because she situates some of the principle critical nostrums later utilised by Greenberg within their original historical context. Of particular interest, as regards the formation of Greenberg’s thinking, are her accounts of the origin of the notion of an art/life divide, the notion of alienation and a general suspicion of ‘illusionism’ in painting.³³ Rose suggests that Marx’s early writings are in effect an alloy of Feuerbach’s critique of the official art of the Prussian state and Saint-Simon’s concept of avant gardism. From Feuerbach’s analysis of the yawning gap between painting and its viewer Marx gained a central plank of his theory of alienation. From Saint-Simon, he took the idea that a solution to political feudalism might be found in a forward thinking cadre of progressive forces of production – an avant-garde of artists and scientists. Feuerbach’s attack on the official art of the politically repressive Prussian State focussed on the state support of an outmoded ‘religious’ art. The naturalistic illusionism of such work, he suggested, simultaneously anthropomorphised God and alienated the viewer from their own sensual, human, nature. The *illusionism* of such painting was then identified with the *alienation* of the viewing subject from their true nature by a religious, or pseudo religious, art tamed to the service of the state. Saint-Simon linked the political repression of such states to redundant feudal power structures that remained at work even where such states were undergoing significant social change due to industrialisation. The Saint-Simonist ‘solution’ of a productivist avant-garde of artists

³² Margaret A Rose *Marx’s Lost Aesthetic: Karl Marx and the Visual Arts* Cambridge University Press, Cambridge, 1984 and Alan Ryan *Property and Political Theory*, Basil Blackwell, Oxford, 1986. The general agreement on this point is interesting given the very different political sensibilities the writers display.

³³ In Greenberg’s writing, the ‘problem’ of composition is usually folded into his critical vocabulary under the term *illusionism*. Relational composition was a problem because it seemed irrevocably linked to a tradition that strove for mimesis or verisimilitude.

and scientists was taken up by Marx as bulwark against the alienation of the subject in the broadest sense of the term.

As both Rose and Ryan seem to agree, the notion of artistic labour, free from state patronage and censorship, provides Marx with a basic model of unalienated labour, against which the depravations of alienated industrial labour can be gauged, and an ideal to which all productive labour could aspire. Artistic labour then was allied in a fundamental way to all other forms of labour and production. Greenberg's adaptations of these 19th century debates³⁴ retained their general architecture, as sketched out above, but reversed their central arguments, the effect of which was to place artistic labour beyond political usages. In Greenberg's analysis the separation of the labours of the artist from labour more generally, and the associated gap between art and life, becomes the positive *aim* of art criticism. Conversely, for artists involved with dematerialisation who wished to close the art/life schism, de-differentiating aesthetic labour from other forms of production become a critical tactic.

In the position staked out by Greenberg from 1939 onwards, the point of rejecting 'illusionism' in art was no longer to rid the subject of their false and alienated consciousness. Eliminating illusion became merely a method of concretising the tendency towards non-representational art that had the separation of art and life as its central condition. For Greenberg it was not that illusionism distorted the life of the *subject*, so much as the fact that, via illusionism, life – the world of the subject – distorts *art*. The Saint-Simonist notion of avant gardism was similarly turned on its head. In Greenberg's analysis, the avant-garde no longer sought partnership with other forms of creative production in an attempt to lead society, but rather sought

³⁴ It is not possible to say how, when, or in what form Greenberg came into contact with these debates, though the Marxists inflections in his early work has long been noted. See for example T J Clarke's 'On the Social History of Art' in *Pollock and After: The Critical Debate*, Ed Francis Francina, Harper and Row, London, 1985 and also his wonderfully titled paper 'Some Differences Between Comrade Greenberg and Ourselves' in *Modernism and Modernity, The Vancouver Conference Papers*, Eds. Benjamin Buchloh, Serge Guilbaut and David Solkin, Nova Scotia College of Art and Design, 1983.

‘protection’ from society, and the pressures of commercial kitsch and political commitment³⁵.

In other words, while maintaining the problematics of ‘illusionism’ and ‘alienation’, the site of alienation was radically shifted, from the *subject*, who produces, or views, an artwork, into the *artwork itself*. In this way the problematic of alienation was shunted from the realm of the *subject* – that of social, economic and political contention – into the aesthetic realm of art *object*. In Greenberg’s hands it is the art object, the painting, that is alienated *from itself* by illusionism, not the productive subject form their labour. The subsuming of the notion of alienation into a purely formal, aesthetic realm, neutralised the connections made in Marx’s early work between aesthetic alienation and economic and political alienation. In separating out the artist’s labour from the political world in this way, Greenberg struck at the heart of Marx’s labour theory, reified the division of art from life, and placed the avant garde into a super-social position, above and beyond the concerns of everyday life, their role to service the ‘problem’ of illusionism that separated art from its true *nature*.

The defence of non-representational forms of painting, and the push against illusionism, represented therefore, something more than a distaste for ‘politically committed’ art. It was also a strike against the alliance made between artistic labour and labour in general. One result of Greenberg’s reversals was that the expectation of creative labour on the part of the artist became increasingly narrowed. Wrenched from the world, and relationships with other forms of creative production, the artist’s labour came to be defined specifically in relation to the materials of art. The narrowing of what constituted artistic labour came to be regarded as highly restrictive by artists involved with the moment of dematerialisation. Challenging Greenberg’s refutation of Marx’s ‘package’ of alienation may not have been a conscious agenda for such artists,³⁶ rejecting the narrowing definition of creative labour however, certainly was.

³⁵ This is precisely the thrust of ‘Avant Garde and Kitsch’.

³⁶ However it is interesting to note that both Judd and Morris were interested in Russian Constructivism where the Saint-Simonist notion of a productivist avant garde had been a working assumption, where the labour of the artist was clearly aligned with that of the factory.

As I have already suggested, for artists wishing to distance themselves from such restrictions and renegotiate the relationship between an artist's labour and labour elsewhere in life, composition was a vital mechanism. For Greenberg illusionism, and by extension relational composition, stood on a littoral between art and life, a part of painting that shared its identity with the world beyond painting. It was through composition that the world entered into the realm of art, breaching its integrity and muddying the distinctions between art and life that sustained the formalist autonomy of art. It was within the nexus of composition then, that the artists involved with dematerialisation saw the possibility of overcoming the art/life dichotomy, and at the same time radically renegotiating what can be said to constitute an artist's labour.

REINTEGRATING ART AND LIFE

The Challenge to 'Rhetorical Composition'

The first challenges to Greenberg's grip on the critical field came in the mid 50s in the work of Robert Rauschenberg and Jasper Johns. Both took on aspects of Greenbergian discourse – such as the issue of illusionism and materiality - but twisted them to their own ends. Johns's work of the period subverts the issue of flatness and illusionism by painting images of images that are already flat, such as flags. In Rauschenberg's work, the materiality of paint is taken on but subverted by the use of found objects, detritus from the 'life' around the painting, which is bedded down into the field of the canvas by layers of paint. Rather than painting compositional illusions, bits of the world literally impact on the canvas. In this way Rauschenberg did not create illusionistic images so much as relocate them from one realm to another. While ostensibly working within the strictures of Greenberg's Modernism, its exclusionary logic was subverted as references to, and bits of, life were sneaked into the realm of painting.³⁷

³⁷ Rauschenberg's attempt to 'bed down' a stuffed goat onto the surface of a painting was famously unsuccessful. Since the gravity got the better of the goat, Rauschenberg placed the painting on the floor, moving the 'painting' from the vertical to the horizontal plane. Being neither 'painting' nor 'sculpture',

Given Rauchenberg's friendship and collaboration with John Cage it is perhaps not surprising to find similar approaches to the problem of the separation of art and life in Cage's experimental musical compositions of the period. Arguably more important for the spread of Cage's ideas about composition and creative labour than his relationship with Rauchenberg were the classes he held at the New School of Social Research in the late 1950s. These classes are important because they provide a direct link between Cage's theories of composition and later experiments in visual composition and creative labour, carried out under the auspices of Fluxus and Minimalism, which were later gathered under the rubric of dematerialisation. George Maciunas, the artist who gave Fluxus its name and did much to create its sense of identity, attended Cage's classes. Before his forays into Minimalism, Robert Morris, was also involved with Fluxus. As a consequence, the influence of Cage's theories on Minimalist theory is telling.

The issue of what constituted composition was at the centre of all these attempts to address the separation, or alienation, of art from life. The influence of Cage's theorisation of composition was crucial to such attempts. A central theme of Cage's writing and practice was the opening up of the discrete nature of the score in order to create compositions that were, in various ways, contingent upon chance and the vagaries of a particular time or place. The notion that what constituted 'a work' might be in some way variable, or available to the contingency of life, ran absolutely counter to formalist procedures staked out by Greenberg.

The best example of Cage's approach, and certainly the most infamous and influential manifestation his reconceptualisation of composition, is the piece 4'33'', which consists of a silence of four minutes and thirty-three seconds. Cage's intent was to empty the score, of notation in order to make it available to surrounding sounds, a strategy that effectively dissolved the conceptual boundaries between the work and its audience, rendering incidental noise, even the audiences breathing, a part of the work.

the work stood outside of the evaluative categories of Greenbergian Modernism and was thus central to the 'art/non-art' debates of the 1960s.

4'33'' was however more than a simple expansion of the borders of composition. It was also a refusal to compose a 'hierarchical' score of relational parts. For this reason it was also, ostensibly, the refusal to create a composition as recognised by copyright law. The Cagean reconceptualisation was both a *reduction*, and an *expansion*, of the notion of composition. On one hand it reduced and minimalised, pairing down of the creative labour of the composer. The creative labour of the composer consisted in presenting an opportunity, in bringing about of a set of circumstances, whereby art might exist.³⁸ Cage's 'refusal of composition' was also thereby a renegotiation of the relationship with the audience. The art object, or 'commodity', thus defined, confounded the expectation of its audience. In opening 'the work' to include the audience in their act of listening, the 'composition' took on a temporal and highly 'uncertain' aspect. In this sense the concept of composition was enlarged and simultaneously made mutable in ways that were unavailable to rhetorical, 'relational composition'. Enlarging the concept in this manner expanded the artwork, allowing its autonomy to be compromised, or infiltrated, by 'life'.³⁹ The reconfiguration of the creative labour of the composer, and the notion of composition, broke down the formal apparatus used to hold the realms of art and that of life as distinct entities.

Composition and Copyright: The Doctrinal Challenge

In Cage's experiments, changing one component – re-imagining the constitution of composition for example – meant, necessarily, refiguring the corresponding subject spaces of composer/producer and audience/consumer. Or from the opposite vantage, changing the roles of either producer or consumer meant, necessarily, changing the 'object of exchange', the composition, that stood between them. Put another way,

³⁸ Cage argued that by doing so the tyranny of the artist/composer was evacuated. As John Tilbury (Dept of Music, Goldsmiths College) has pointed out, this is a debatable point insofar as the role of composer is still unitary and domineering. Tilbury suggests that in fact improvisation provides a better answer to the questions that exercised Cage, providing a collective, collaborative, decentred event that can be orientated in ways unavailable to scored music, no matter how minimal.

³⁹ 'Temporalising' the composition in this way shattered the autonomy of the artwork, helping to pave the way for later views of the artwork as a creative network.

challenging the roles of composer and audience meant challenging the artwork – or in property terms, ‘the commodity’.⁴⁰

In this sense then it is possible to read 4’33’’ as a nascent theoretical challenge to copyright doctrine. Since it refuses the rhetorical mode of composition, it is difficult to see how four minutes thirty-three seconds of silence can constitute a personal ‘expression’ of the composer. If ‘the composition’ is read in such a way, then surely it is an annexation, or ‘appropriation’, of a section of time – but what section of time exactly? When precisely, and in what way, would *that* section be, in any way, distinguishable from any other?⁴¹ Though presenting a theoretical, or *doctrinal*, problem for copyright, in actuality 4’33’’ presented few practical problems for the law. That it did not do so is testament to the rhizomatic nature of copyright law, and indicative of the fact that the doctrinal narratives are never entirely co-extensive with the actuality of the law and its implementation. For while the ostensible ‘object’ of Cage’s ‘composition’ appears to be an unspecified moment of time well beyond the scope of copyright, the score itself, insofar as it comprises a set of written instructions, falls easily within its scope.⁴²

⁴⁰ Changes in what constitutes *property* in other words necessarily involve renegotiations of what is thought to constitute creative labour, and consumption (and vice versa). As we shall see in Chapter Four, in parallel to this general rule, the expansion of the envelope of copyright to include software in the 1980s necessarily involved reorganisation of patterns of productive labour and consumption.

⁴¹ As will be demonstrated later in this chapter and in chapter five, Cage’s ‘compositions’ have been read this way. Having been played out in Minimalism, the refusal of composition was taken up as ‘appropriation art’, which in the 1970s was read as direct critique of copyright law.

⁴² One might then be tempted to ask whether if I rerecorded a recording of a performance of 4’33’’ at Carnegie Hall I would be breaking copyright – how after all is silence itself copyrightable? The answer is actually provided by Cage himself – silence is a concept, never an actuality – every ‘performance’ of 4’33’’ is different. As far as intellectual property law is concerned, the performance at Carnegie Hall is constituted by recording a series of sounds and intervals that approximate to ‘silence’, that are in themselves unique. Performer’s arrangements as such, are covered by a branch of copyright law that is usually indicated by a ‘P’ in a circle. 4’33’’ then, like any other performed score, appears as the copyright of John Cage (or his representatives) and under the ‘P’ indicating a separate group of rights stemming from the performers or producers of the specific recording (or their representatives.) (It is telling of the times that since writing the above arguments with respect to Cage an infringement case has flared up. Mike Batt – a commercial composer best known for his seminal hit ‘Remember You’re a Womble’ – is being sued by Cage’s estate for a parody called ‘One Minute of Silence’. The PR puff suggests that the Cage estate is attempting to pursue a claim for ownership over the concept of silence as music!)

4'33'' presents than a paradox as far as copyright law is concerned. On one level it *appears* to elide the law, producing conceptual problems for copyright doctrine – how can a moment, or 'temporal composition', be the subject of property law? On another level, since the law is based not on a single deciding doctrinal principle, there is actually little problem in accommodating such work within the fold of the law. This paradoxical aspect of Cage's work re-emerged when his compositional principles were applied to the production of artworks in the 1960s. The paradox of dematerialisation – on one hand enabled by concepts of intellectual labour represented in copyright law and on the other, developing into a critique of that law – was an essentially Cagean paradox.

For artists attempting to challenge the hegemony of Greenberg's formalism the attraction of Cage's theoretical work is obvious. Cage's theories provided an escape route from the art/life dichotomy. The fact that this was achieved through a challenge to composition cohered with the problematisation of illusionism (composition) that was already well established in visual art. Most importantly, a fresh way of conceiving of composition meant, necessarily, reconceiving what constituted artistic *labour* in an age when the materialist narrative of Greenbergian Modernism had narrowed its definition to a few technical operations.

REDISCOVERING DUCHAMP: THE READYMADE AS COMPOSITION

While the uptake of Cage's ideas within dematerialisation was crucial, it was paralleled by a reassessment of Duchamp's legacy, and in particular of the 'unassisted readymade'. As with Cage's theories, the unassisted readymade posed fundamental questions about the nature of composition and aesthetic labour. During the 1960s, Duchamp's early works – such as *Fountain* (1917) – came to be 'rediscovered' as the

‘founding’ works of conceptualism.⁴³ Though posing a radical challenge to the conventions of rhetorical composition and creative labour, the implications of *Fountain* (though explored later by Duchamp) did not become common currency until the period of dematerialisation. *Fountain* confounds the viewer’s expectation of image making. *Fountain* is not in fact an image.⁴⁴ It is equally difficult to assess in terms of aesthetic labour.

Duchamp’s unassisted readymades were objects removed from their usual use-context and placed in another context – that of the aesthetic. It is difficult therefore to read such works through the concepts of rhetorical composition as emerging from the *labour* of the artist.⁴⁵ A large part of the labour of production consists of the act of recontextualisation. As far as the labour of the artist is concerned, the composition of the piece is not sustained *within* the object itself, but in the *relation* of the object to its context. Viewed in this way – as it was in the 1960s – *Fountain* is both a reconceptualisation of artistic labour, and an expansion of the notion of composition. On this view, composition is no longer a function of the interior relations of a ‘discrete’ art object but is rather a function of the relationships established between the object displayed *as* art, and the particular context in which it is consumed *as* art.⁴⁶ Like the Cagayan view of composition, in refiguring creative labour, Duchamp also necessarily refigured the ‘work’ and the position of the viewer in respect to the work.

⁴³ Duchamp’s unassisted readymades were cited by Joseph Kosuth in ‘Art after Philosophy’ (originally published, *Studio International*, 1969) as the crucial work that redirects the direction of western art.

⁴⁴ *Fountain* comprises a gentleman’s urinal, up ended through ninety degrees, and placed on a plinth, it is signed ‘R. Mutt’, and dated 1917.

⁴⁵ Though of course there are relational elements within the urinal itself which have nothing to do with the labours of the artist.

⁴⁶ The specific parallels between this work and works produced under the rubric of dematerialisation will become obvious later in the chapter.

Duchamp's contemplation of what constitutes creative labour⁴⁷ – what might be termed his interest in the *ontology of creativity* – was part and parcel of his general interest in the 'conceptual boundaries' of art.⁴⁸ In posing questions about the relationship between the 'creative' realms of art and industry, *Fountain* also posed questions about the different kinds of creative labour entailed in such divisions. On one hand, *Fountain* invited the possibility that the products, and creative labours, of the ceramics industry be viewed as art. On this view, *Fountain* could be read as begging the question of what might happen if one viewed *all* creative labour as art. On the other hand, *Fountain* could be read as an expansion of the artist's portfolio of labours. In refusing to make a composition in the rhetorical sense, the artist absorbs and subsumes other forms of creative production into the fold of art. On this latter reading, any object could, through the almost mystical labours of the artist, become an artwork.

The theme of what constitutes creative labour, and in what ways art is divided from industry, was taken up in later works. *Fresh Widow* of 1920 comprised a set of French Windows set on a plinth, with a copyright symbol placed on the bottom right hand side of the sill. This *could*, and has, been interpreted as an 'appropriative claim' by the artist Duchamp over the products of industry.⁴⁹ In so far as 'industrial' products – such as French Windows – *might* possibly fall under the protection of patent law, stamping the windows with a copyright symbol may mark the act of transferring, and

⁴⁷ As Rosalind Krauss suggests, the effect of so minimal amount of creative labour is to raise a question, the question as to how it is possible that *this* object is art – a question that is quickly followed by the insight, what qualifies *anything* to be art? *Passages in Modern Sculpture*, MIT Press, Cambridge, Massachusetts, 1993, p. 79. (First published, 1977) Here Krauss says "...the artists creative act is so obviously minimal, the transformation itself so absolutely negligible (leaving the urinal exactly the same as all other examples of its kind), that instead of feeling that we have found an answer, we must confront a whole new set of aesthetic questions."

⁴⁸ Brian O'Docherty, in *Inside the White Cube*, 1976, analysed Duchamp's interest in the *material* boundaries of art, arguing that works from the 1930s such as *Mile of String* and *1200 Bags of Coal*, developed from the line of thought initiated by *Fountain*, demonstrating Duchamp's growing interest in the walls of the gallery/exhibition space as boundaries that both enable and limit the artwork. O'Docherty analysis was elaborated by Hal Foster in the essay 'Who's Afraid of the Neo-Avant Garde' (also known as 'What's Neo about the Neo-Avant Garde?') in *The Return of the Real: The Avant-Garde at the End of the Century*, October, MIT, Cambridge Massachusetts and London, 1996, pp. 1-34.

⁴⁹ Molly Nesbitt's observations were made in the wake of the 'appropriation art' of the late 70s and 1980s. Her view co-opts Duchamp into a defence of 'appropriation art' as an art that has the *right* to unilaterally subsume any and every cultural production that it sees fit. See Nesbitt, op. cit.

subsuming, them from that realm into the aesthetic realm. However, as usual with Duchamp, the conclusions that can be drawn are ambiguous. It is reasonable to suggest that such works display his interest in the *topography of creativity*. The use of a copyright symbol on an object clearly not ‘made’ by the artist invites speculation as to what separates one creative realm, or category of creative labour, from another. In this sense, *Fresh Widow* appeared to push the interrogation of the borders of art and industry (and their different forms of creative labour) that was implicit in *Fountain*, into an interrogation of the forms of *property* that resulted from such different categories of labour. The work indicates that Duchamp was, to some extent, aware of the role intellectual property in functioning social divisions between the ‘*subjective*’ creative labour of the artist and the ‘*objective*’, and alienated, creative labour of the factory worker.⁵⁰

As far as dematerialisation was concerned, the main effect of Duchamp’s legacy lay in his concern for what, properly, constituted artistic labour. As with Cage, challenges to the concept of composition necessarily involved challenges to concepts of creative labour, and by extension, the role of the audience. As with the take up of Cage’s ideas, Duchamp’s challenge to the rhetorical mode of composition cohered with an already existing problematisation of it within abstraction. Again, as with Cage, alternative ways of conceiving what was meant by composition and creative labour provided an escape route from the narrowed possibilities of Greenbergian Modernism.

⁵⁰ Despite the fact that the role of intellectual property was an interest, there is no evidence that Duchamp pursued any particular analytical or ethical view of its role. When Duchamp actually ‘appropriates’ images, in works such as *LHOOQ*, (a print of the Mona Lisa on which he drew a moustache) his intent is playful and investigative rather than didactic. There is no evidence that such ‘appropriations’ displayed an antipathy towards intellectual property. As with most things, Duchamp’s approach was speculative and mildly amusing. In a letter to Tristram Tzara in 1922, he speculated on the possibility of marketing gold insignia with the letters DADA much as one might market a corporate logo, or brand, as a ‘universal panacea’.

DEMATERIALISATION AND THE NEW MODELS OF COMPOSITION

As already suggested, the aim of dematerialisation was to move beyond the ideology of 'objecthood' and the modes of artistic labour such a definition of art implied. In challenging 'objecthood', it also challenged both the narrowing definition of aesthetic labour and the division of an artist's labour from other forms of productive labour that, in effect, maintained the division between art and life. A new critical engagement with theories of composition drawn Cage and a re-engagement with the possibilities suggested by the Duchampian readymade were vital inspirations to the move away from Greenbergian Modernism.

In order to demonstrate how this critical engagement was manifested, the following sections will focus on two case studies from the plethora of material available from the period of dematerialisation. Works undertaken under the auspices of Minimalism and the Fluxus group demonstrate different approaches to the renegotiation of composition and creative labour. The Minimalist work of Donald Judd and Robert Morris in the mid 1960s demonstrates both the influence of a Cagean notion of composition and a re-engagement with the questions set by Duchamp's readymades. The specific aim of Minimalist work was to remove 'composition' from the art object and externalise it, rendering it a condition of the relationship between the object and its viewer at its moment of consumption. In a different approach to challenging the concepts of the rhetorical model of composition and creative labour, the Fluxus group developed collaborative and networked forms of creative labour. The analysis of these specific cases of dematerialisation provides a clearer picture of how the rhetorical model of creative labour was challenged and how the new 'semiotic/network' model developed and the role of intellectual property in that development.

MINIMALISM AND THE TEMPORALISING OF THE COMPOSITION

Minimalism has been described as an “apostate modernism”.⁵¹ Though Minimalism was a departure from the conditions of practice laid out by Greenberg, as the term ‘apostate’ suggests, that departure was more a renegotiation of its terms than an outright break with them. Minimalism followed a trend in American art identifiable as far back as Harold Rosenberg’s essay ‘The Fall of Paris’ (1940) insofar as its departure from the rhetorical mode of composition was viewed as part of an attempt to break with a specifically “*European tradition*” of art making. Donald Judd gave voice to this when he described ‘illusionism’ as ‘one of the salient and most objectionable relics of European art.’⁵² That ‘tradition’ was seen to be at work in the ‘heavy metal’ sculptors, then the predominant strand of Modernist sculpture on both sides of the Atlantic.⁵³ Maintaining some of the thrust of Greenberg’s position Judd and Morris objected that though notionally ‘abstract’ such sculptures too easily lent themselves to being read anthropomorphically.⁵⁴ They were in other words insufficiently ‘Modernist’. In contrast, Judd praised elements of ‘Abstract Expressionist’ painting for their relative success in escaping such anthropomorphic illusionism.⁵⁵ Rothko’s work was particularly singled out in this respect. The rectangles that reflected the material limits of the stretcher went some way to ‘solving’ the problem of relational composition however such works were only partially successful due to the spatial effects of colour. Judd’s solution was to suggest that the ‘shape’ discovered by such

⁵¹ Charles Harrison’s introduction to Morris’s writing in *Art in Theory* succinctly captures the position of Minimalism with respect to Greenbergian Modernism. See Charles Harrison & Paul Wood, *Art in Theory 1900-1990: An Anthology of Changing Ideas*, Blackwell, Oxford, 1993, pp. 797-802.

⁵² As I suggested earlier with reference to Greenberg the anxiety about the corrupting effects of relational composition were routinely referred to as a problem bought about by the desire for mimesis or ‘illusionism’. This specific formulation is drawn from Donald Judd’s essay *Specific Objects* originally published in *The Arts Yearbook* in 1965. This quote can be found in the edited version of the essay in *Art in Theory*, op. cit., p. 813.

⁵³ The artists most commonly associated with such work were the American David Smith and in London Anthony Caro and his allies at St Martins.

⁵⁴ The best overview of this moment and of the issue of anthropomorphism is provided by Michael Fried in his famous attack on what he termed ‘literalist’ art in the essay ‘Art and Objecthood’; originally published in *Artforum* in 1967, op. cit. A full version of the essay is reprinted in *Minimalist Art*, op. cit. It is also worth noting that the term ‘anthropomorphism’ was derided by both sides of the critical bust up and used as a critical insult. (The idea that there is something corrupting about anthropomorphism in painting had its roots in Feuerbach’s analysis of the anthropomorphisation of God in early 19th ‘religious painting’)

⁵⁵ Donald Judd, ‘Specific Objects’, 1965, op. cit.

painting had its future ‘outside of painting’ as three-dimensional constructions in which such ‘spatial illusions’ were eliminated by rendering them in real space.

The characteristic work of both Judd and Morris in this period comprises a linear arrangement of cubes and or rectilinear boxes, a ‘one thing after the other’ logic, as Judd termed it. Sometimes the ‘objects’ are sealed units; at others, the viewer is presented with open, or partial, forms. In his ‘Notes on Sculpture’, written in part as a critique of ‘Modernist’ sculpture and part as explanation of Minimalism, Morris gives a valuable account of this new non-relational form of composition.⁵⁶ The organisation of such works take the internal arrangement of parts found in relational composition and externalises them. The linear arrangement of parts therefore refuses the hierarchical aspects of such rhetorical approaches to composition. Composition in Minimalism then lies not *within* the art object but in the relationship between the ‘object’ and the viewer. Using Gestalt Theory Morris describes the movement of the viewer around the object as effectively the ‘moment’ of composition. Composition occurs as an interaction between the sense of shape the viewer holds within their mind and their actual bodily experience of the shape in the gallery. Composition in this sense does not reside in the object, and is effectively a temporalised affect of the presence of the viewer. Since composition is constituted by the relationship between the art object and the viewer, the object itself can no longer be seen as a discrete entity with a certain identity. In a sense, the viewer comes to be seen as a ‘variable component’ of the composition and thus the composition itself never entirely knowable.⁵⁷ Like Cage’s compositions, such a claim poses a problem as far as the rhetorical concepts of composition represented by copyright law are concerned. Before

⁵⁶ ‘Notes on Sculpture’, first published, *Artforum*, 1966. For relevant excerpts, see *Art and Theory*, op. cit., pp. 813-822.

⁵⁷ Morris was involved with Fluxus prior to his Minimalist phase and Fluxus was itself rooted in Cagean concepts of composition. There are also obvious correlations between the concepts of composition in Minimalist work of this period and the position staked out by Roland Barthes’ in ‘Death of the Author’ 1967, op. cit. The notion of composition as a temporal collaboration between object and viewer, and of the ‘work’ as never complete *in itself*, places great emphasis on the subjectivity of the consumer. This parallels Barthes contention that the text was not complete in itself but is effectively (re)created differently by the subjectivity of each successive reader. For a longer analysis see *Appendix A*.

addressing that issue however it is necessary to address the issue of creative labour in such works.

Minimalism took up the themes identified in Duchamp's *Fresh Widow* – particularly the idea that the division between art and industry is sustained by a *divided topography* of creative labour. The speculative elements of Duchamp's engagement with the two realms of creative endeavour – that of the subjective artist, the ideology of originality and unalienated labour, and that of industry, the realm of invention by the few, and the alienated labour of mass production – were revisited both in Morris's 'Notes on Sculpture' and in his practice as an artist. Morris's believed that industrial 'forming techniques' were central to the developmental history of mankind and indicative of a certain level of human development. It was therefore the artist's responsibility to work with such techniques and, where necessary, farm out the labour of production to fabrication companies. In a sense, the collaborative nature of such a practice recalls the division of labour between design and execution that pertained in the organisation of the bottega.⁵⁸

The splitting of concept and actual execution is however a little more complex. Devolving the execution of the work to the fabricators is not a market driven expedience but a part of Morris's creative ideology⁵⁹. It is an answer to the narrowing of the envelope of artistic labour under Greenbergian Modernism. While aspects of Greenberg's Modernism are retained, Morris refuses to have his labour defined in relationship to his action on materials, which in turn define the parameters of art.

At the level of composition, Morris's work, like Cage's, attempted to overcome the art/life dichotomy by dissolving the rhetorical compositional unity of the artwork, opening it to the contingency of spatial context and the temporal contingency of the viewer. On the level of labour however, Morris *maintains* the division between artistic

⁵⁸ With the obvious qualification that the collective work of the Bottega was executed within familial and kinship networks quite unlike the social conditions of production of late twentieth century United States.

⁵⁹ In the early 1960s, Morris expressed irritation at having to make the works himself because he could not afford professional fabricators.

labour and labour more generally. For Morris there is clearly a difference between the labour of 'the artist' and the labour of the fabricator's shop. But, the division is not seen as socially and culturally divisive. The work of modern fabrication plant is indicative of human development, the artist can do no better than work with such industrial creativity. In other words the old leftist notion that the mixed, unalienated labour of the artist represented an indictment of the divided and alienated labour of industry is gently elided. This is made possible, as suggested earlier, by a shift in the portfolio of labours of the artist. The shift is achieved by stressing those aspects of the artist's labour that are mental or conceptual in character – historically the aspects associated with the concept of invention and design – and a corresponding reduction in those aspects of an artists labour that are manual in character. In particular, the shift represents a decisive shift away from the idea that artistic production can be measured by the effective coordination of mental labours and their physical execution within the limits set by materials. One historical effect of this process is that after aesthetic dematerialisation it is no longer possible, as it was for nineteenth century thinkers, to hold up aesthetic labour as an ideal against which the social, moral and political problems of alienated labour can be gauged. Though obviously differentiated, the labours of artist, and that of the factory, are no longer differentiated *ideologically*. Modern industrial organisation is equated with an historical high point of human development, rather than an alienated and exploited labour force. Industrial 'modernity' becomes an equal partner with Modernist, or Greenbergian terms, post Modernist, avant gardism. While this is a riposte to Greenbergian Modernism's attempt to maintain the avant-garde as a super social category, it draws on an earlier moment – that of a Saint-Simonist avant gardism. However there is little to suggest that this Saint-Simonist alliance of art and industry that there is anything like a *political* project. As far as political ideology is concerned, the best one can say is that, for Judd, the move away from relational composition is identified with the project of producing a specifically American art, and that for Morris, the kinds of industrial organisation and fabrications techniques available to him in the United States of the 1960s were indicative of a high point in *human* development.

This moment of dematerialisation is interesting because it represents a reintegration of the labour of the artist with other forms of labour, but in such a way that the long hoped for integration is effectively *depoliticised*. The realignment of artistic labour towards conceptual practice necessitated a different relationship with industrial technology, in doing so the well-worn argument about alienation was laid to rest. Morris's dematerialised work of this period provides a fascinating echo of later modes of economic organisation that are currently referred to under the rubric of the weightless, or knowledge, economy. The shifts in the portfolio of creative labours that characterised dematerialisation are paralleled by presaging of mental, or conceptual, aspects of production in 'modern' economies. Playing down the importance of the physical aspects of labour in such contemporary economic theorisations has served as a prelude to relocating manual industries in less well developed economies. The consequence of such a division of labour for modern economies, as for the artists of the 1960s, is an increasing concern for the 'ontology of creativity', what is it, how can its production be maximised, and for businesses, how can the rights that flow from it can be 'managed'.⁶⁰

In order to clear the ground for analysing such relationships at the end of this chapter and in the next, it is necessary to account for how Morris, and others in the moment of aesthetic dematerialisation, achieved the shift of balance from one part of the labour portfolio to the other. The enabling mechanism was – as it is currently for the knowledge economy – intellectual property law. The paradox for Minimalism, as already suggested, was that its deconstruction of rhetorical modes of composition was achieved despite its dependence on copyright law that was historically built upon rhetorical concepts of creative labour.

MINIMALISM, CREATIVE LABOUR AND INTELLECTUAL PROPERTY

⁶⁰ A more detailed exploration of these 'parallels' will become evident later in this thesis.

The composition practice developed by Morris and Judd did not set out with the intention of conflicting with copyright law. However, in dismantling 'relational' composition both artists produced works which, at the visual level, were practically interchangeable. Any possible arguments that might, 'in theory,' have arisen between the artists as regards copyright would have been difficult to settle in terms of the usual doctrine of 'substantial similarity', given that both created lines of identical, 'primary' units.⁶¹ The very basic nature of such forms was, at least as far as Morris's gestalt theory was concerned, in order to ensure that the repeated elements of the work were as common, primary and *irreducible* as possible.⁶² In this sense minimalist works were, by definition, part of a common and extremely basic, visual vocabulary. In this sense, the display objects 'produced' by Minimalist artists were, like Cage's 4'33', difficult to comprehend as expressions of an individual within the ostensible framework of copyright.⁶³

Given these minimal visual and stylistic differences between Minimalist objects of display, defining the edges of one artist's contribution from another was, theoretically, problematic. A plethora of devices that did not depend on copyright law were in operation. Good faith and practical, or literal, differences between works in terms of material, exhibitions site, presentation, context and other 'non-legal' aspects of authorship were all employed.⁶⁴ These were supplemented by other devices, with well-established histories, drawn from practices in the field of print and photography, such

⁶¹ 'Substantial similarity' is based on whether a 'disinterested party' (i.e. a non-expert) could tell the works apart.

⁶² As far as the minimalist notions of composition and Gestalt are concerned, Morris stated that he wished to find primary forms that could not be further reduced into sub-elements that were in any way different from the forms he was already employing. As far as Morris was concerned, half a cube was still cubic if not a true cube. The point of such severity was to ensure that the objects that formed the composition were not themselves comprised of elements that could be described as relational. See Morris, op. cit., p. 815.

⁶³ To the best of my knowledge, no cases regarding infringement and minimalism were pursued in the 60s and 70s.

⁶⁴ The term non-legal in this context serves simply to differentiate methods that do not specifically rely on intellectual property law.

as special editions that limited the works by number or use of special materials,⁶⁵ and extensive use of paper trails and provenances.

The use of documentation was vitally important for Minimalism, and Conceptualism more generally, since such paper trails were themselves protectable by copyright. An awareness of the importance of the law as a means of supporting an artwork that was, ostensibly, ‘non-material’ was apparent across the whole of dematerialisation. An example of such awareness Morris’s 1963 work *Statement of Aesthetic Withdrawal* is informative.⁶⁶

The ‘statement’ followed an incident in which Morris failed to receive payment for a small sculpture. In a legally notarised statement, he withdrew ‘all aesthetic content’ from the work⁶⁷. The document, and a small photograph identifying the sculpture, thus formed the new work ‘Statement of Aesthetic Withdrawal’. By 1969, Morris was creating works entirely from such documentation. His work *Money*, conceived for the appropriately named exhibition *Anti-Illusion* held at the Whitney, was composed entirely of legal documentation. \$50,000 was held in a bank account during the exhibition gathering interest. The curators were invited to exhibit any documentation of the work they saw fit. Should ‘the work’ be sold, the loan would simply be taken over by the buyer, Morris’s price being half the interest accrued while the capital was active. Were the work to be sold in such a way it could be terminated by the withdrawal of the capital from the bank.

Morris was acutely aware of the role the law can play in securing the existence of a work which, at least as far as the object on display is concerned, has ‘refused composition’ in any sense that might be defensible in terms of copyright. Since the objects displayed in exhibitions of Minimalist work distanced themselves from the

⁶⁵ A good example of such practice is Carl Andre’s especially manufactured bricks for the *Equivalent* series.

⁶⁶ For a brief description of this piece, see Richard Williams, *After Modern Sculpture: Art in the United States and Europe 1965-70*.

⁶⁷ The statement, dated November 15, 1963, pronounced his withdrawal of “all aesthetic quality and content” and declared that “from the date hereof said construction has no such quality and content.” As cited by Lucy Lippard, *op. cit.*, p. 27.

rhetoical model of composition and creative labour, and *potentially* presented ‘difficulties’ for copyright law, it is tempting to see in them the beginning of the critique of copyright that later developed out of dematerialisation under the aegis of ‘appropriation art’. However, the achievement of Minimalism was not to critique copyright but to shift the *location* of copyright away from the ‘revealed object’, the exhibitionary object, and place it in its documentation.⁶⁸

In addition to reinstating the old division of labour between idea and execution, and formalising that division operating in partnership with industrial fabrication companies, Minimalism achieved a further division at the level of property. While its exhibitionary objects seemed able to elide or defer copyright law, and could even be read as a nascent critique of some of its concepts, control of the work was maintained through what one might call the *literary objects* of the artist’s labour. The idea of a ‘linguistic turn’ in the practice and theory of art in the period is nothing new.

However, it has generally gone unremarked that the turn was as much practical and legal, as it was, theoretical and linguistic.⁶⁹

⁶⁸ In this respect, the practice of Minimalism (and of much conceptual work of the 60s) paralleled 19th century theorisations of copyright. The latter suggested that any ‘object’ under copyright was only ever partly revealed in material form, thus implying that the ‘full’ work always lay somewhere beyond the *material* realm. It is tempting to characterise such a view as Platonic/Neo-Platonic. The view however, developed from rather more prosaic concerns. As Sherman and Bently have observed, by the 19th century there was considerable pressure to expand the scope of copyright in order to account for ‘derivatives’. For example, authors found that although their books were under copyright control, characters or plot lines could still be reworked by ‘pirates’ and made into, for example, a play or musical. Under the basic principle that an author’s words should not be copied verbatim, there was nothing wrong with such practice. The scope of the law was therefore increased in favour of the author’s claim to such derivatives. In this sense then, the ‘actual’ work, the line of words written down, was never entirely complete-in-itself – but incorporated also, future manifestations that had yet to be set down in material form. Though it is possible to read this as a neo-platonic conceptualisation of the law, the formulation merely *describes* the law rather than *constitutes* it.

⁶⁹ This legal turn can be viewed as the beginning of what is currently hyped as the new phenomenon – the author-as-brand. The division between concept and its material manufacture has moved from critical strategy to general practice in the last thirty years. However, its current prevalence is almost entirely the result of market conditions. Commercial theories of branding have heightened the awareness that the name of an artist is worth more than the material objects they produce. Where market demand outstrips the capacity of an individual farming out manufacture is a practical option. While this phenomenon has gained a new self consciousness in the era of knowledge economies – Tom Clancy’s novels are reputedly turned out by a team of writers working up short plot outlines he produces – the claim to newness is not sustainable. The contemporary demand for Raphael’s work was so great that he even delegated the *disegno*, as well as the execution of final works to his assistants. Generally speaking, the early Renaissance bottega operated in much the same way as a ‘brand’. The current claim to newness can only be sustained against a shallow history that takes Romanticism as its starting point.

COMPOSITION AS NETWORK: FROM FLUXUS TO MAIL ART

The influence of Cage on the direction taken in visual art is evident in the way Minimalist artists, such as Morris, attempted to empty the composition into its surrounding environment. Minimalist ‘compositions’ punctured the ‘discrete’ identity of the relational composition, the new form turned composition into a collaborative event acted out in time, somewhere between the gestalt shape, held in the mind of the viewer, and the actual shape of the material object, encountered in the gallery. Composition in this sense was not the prerogative of the artist, but of the encounter they functioned between the viewer and the ‘work’. Minimalist composition then, unlike rhetorical composition, was never complete in itself. Temporal, unstable and essentially unknowable in its entirety, Minimalist composition was, in theory, never able to be experienced in the ‘fixed and tangible form’ required by copyright law.⁷⁰

Another way of expressing the temporalisation of the composition in Minimalism is to say that it is not constituted in its entirety by the artist but by an entire field of possibilities, a network of ‘human actors’ – artists, viewers, critics, historians – and ‘non-human actors’ – the object, the gallery, the catalogue, the review – and ‘temporal factors’ – the conditions of the particular moment in which the event of ‘composition’ occurs.⁷¹ Minimalist composition, and many other strategies of dematerialisation, can

⁷⁰ By making the viewer a variable component of the composition, Minimalist Art therefore sought to erase the artist-object-viewer hierarchy. This technique was lifted directly from Cage. Though not mentioning him directly in ‘Notes on Sculpture 2’, Morris is quite explicit in making the Cagean claim for the role of the viewer, *op. cit.*, p. 818. Opening the composition in this manner was crucial for both artists, since it erased the barrier between art and life. In refusing the rhetorical mode of composition, both artists raised question marks over the applicability of copyright, or the ‘commodity form of the composition’. While both *could* be taken as examples of artists’ interrogating, or escaping the commodity form, such a view might equally be seen as illusory—since both simply relocate the site of copyright from the ostensible art work to its production notes or score. Thus, rather than attempting to position such work as a nascent critique of copyright, it is more fruitful to see it as an attempt to solve old problems – such as that of the subject/object divide, the art/life division, the producer/consumer dichotomy. The central observation that, (capitalist) economic models underpinned the conceptualisation of aesthetic relations, and that therefore, a concerted attack upon composition might reconfigure them – was almost entirely the result of Cage’s vision.

⁷¹ It is worth mentioning here that Duchamp, in a sense, foresaw some of these issues. His lecture ‘The Creative Act’ made during the American Federation of Arts Convention, 1957, stakes out an interesting

be viewed as shifting the burden of 'creation' from the solitary individual artist onto a broader network of social relations. During the 1960s, such desubjectivisation of production was largely avant gardist strategy, an attempt to detach a younger generation of artists from the outmoded beliefs about the art object and artistic labour that had become ever more narrow and oppressive under Greenberg's Modernism. The strategy of Minimalism was however not the only way that a composition might be sustained collaboratively, as an active relation between artist and viewer. A different stand of dematerialised art can be traced through the classes Cage held at the New School of Social Research.⁷² From its beginnings under the guiding figure of George Maciunas, Fluxus was an event-orientated grouping that, like many stands of dematerialisation, was highly suspicious of commodification. Maciunas' communism contributed greatly to the shape and identity he gave to the group. His influence is particularly potent in the famous 'Purge' manifesto, written entirely by Maciunas without consulting any other members of the group.⁷³ Maciunas' ire was particularly

alternative to the views above. Duchamp suggests that the network of producer and consumer, of artist and viewer, is temporal and historical. There is what he calls an "art coefficient" at work in the creative act. The artwork is in a sense created by a form of "esthetic osmosis" that transfers itself from artist to spectator via the medium of the art object. The artist's work necessarily involves a chain of subjective decisions that render the artwork divided between the artist's intention and the realisation of the intentions. The art coefficient is the "relation between the unexpressed but intended and the unintentionally expressed" as Duchamp puts it. The role of the spectator is to refine the coefficient bringing "the work into contact with the external world by deciphering and interpreting its inner qualifications" thus adding his contribution to "the creative act". This role may occur long after the death of the artist and in that sense the creative network is not merely temporal but historical. All quotations here from Duchamp, op. cit., p. 139.

⁷² Maciunas initially planned to use the term 'Fluxus' for a journal that would publish experimental compositions by artists and musicians drawn from Cage's classes. In addition to Cage's classes, Maciunas also attended a class in electronic music given by Richard Maxfield, at the New School of Social Research – and it was here that he met La Monte Young. Young knew Cage and provided Maciunas with his introduction to the New York avant-garde. Classes held at the New School, created a wealth of material – the latter of which was collected by La Monte Young and then published, in collaboration with Jackson Mac Low, under the title *An Anthology*. Maciunas was responsible for the general design of the anthology and collected the out takes which in 1962 he took to Wiesbaden where he had taken a job as a designer/architect with the US Air Force. His plan was to publish the overflow of material in a journal for which he chose the name *FLUXUS*. See Elizabeth Armstrong and Joan Rothfuss, eds., *In the Spirit of Fluxus*, Walker Art Centre, Minneapolis, ex. cat., 1993, p. 25.

⁷³ It must be stressed that this was fairly typical of both Maciunas and the 'group' as a whole. Fluxus (manifestos notwithstanding), was not a movement on the lines of the historical avant gardes. Maciunas drew up lists, flow diagrams and maps nominating people, works, things as 'Fluxus' – often without said artists' knowledge. By the same token, 'members' of Fluxus were excommunicated for offending George. The best account of the shape of Fluxus – with Maciunas as benevolent autocrat amongst the chaos – is given by Emmett Williams' autobiography, *My Life in Flux – and Vice Versa*, Thames and Hudson, London, 1992

directed against the socio-economic characterisation of art that were attached to the notion of the professional artist and keen to institute a more revolutionary model in its place. Amongst the definitions of the word Flux torn from a dictionary and pasted together for the manifesto, are three paragraphs written in Maciunas' hand. The first reads:

Purge the world of bourgeois sickness, 'intellectual', professional and commercialised culture, PURGE the world of dead art, imitation, artificial art, abstract art, illusionistic art, mathematical art – PURGE THE WORLD OF 'EUROPEANISM'!⁷⁴

Emmett Williams quotes a letter Maciunas wrote to Tomas Schmit in 1963, about the time of the Purge manifesto, that goes a little further in explaining Maciunas' ideals for the group as regards the role of the artist and the issue of commodification.

There is no such thing as an amateur or professional revolutionary. Revolution is for participation of all...One basic requirement: a revolutionary should not practice something he is trying to overthrow (or even worse make a living from it). Therefore Fluxus people should not make a living from their Fluxus activities but find a profession (like applied arts) by which he would do best Fluxus activity.⁷⁵

In Maciunas' view, the Fluxus artist should be all that the 'traditional' artist was not. Such 'professional' artists had to produce work that was "complex, pretentious, profound, serious, intellectual, inspired, skilful..." in order to make their living. In contrast he suggested the work of the Fluxus artist should be "*obtainable by all and*

⁷⁴ The other two paragraphs read: "PROMOTE A REVOLUTIONARY FLOOD AND TIDE IN ART, Promote living art, anti-art, promote NON ART REALITY to be fully grasped by all peoples, not only critics, dilettantes and professionals." And "FUSE the cadres of cultural, social and political revolutionaries into a united front and action". Williams suggests that most of the individuals associated with Fluxus at this moment took exception to the manifesto. See Williams, op. cit., p. 38.

⁷⁵ Ibid., p. 39. Characteristically, Maciunas ends the letter with a stylish ultimatum: "You then have a choice of dissociating yourself from Fluxus and becoming a social parasite and beatnik. Give careful thought to it and let me know by next mail." Ibid., p. 39.

eventually produced by all”, as such it should be, “simple, amusing, unpretentious, concerned with insignificances, require no skill or countless rehearsals, have no commodity or institutional value...”.⁷⁶ Williams also records another example of Maciunas’ mixing of revolution and comedy. Maciunas was so concerned by the encroachment of commodification on Fluxus practice that he explored the possibility of producing all Fluxus publications in ink that would disappear, on paper that would disintegrate. However, a more serious strategy to avoid the fetish for individualism that sustained the art market was the development of unattributed, collective acts of production. The best-known examples of such collaborative production are boxes, which were passed amongst members of the group to be reworked and adapted. The intention of these collaborative, networked, productions was to elide the orientation of the market towards the condition of ‘authorship’.

In later years an increasingly networked notion of creative labour developed within the group. The collaborative and anonymous production of *Flux Boxes*, (which had their root in the event-orientated, collaborative happenings), was more fully refigured into a fully networked compositional practice. Often regarded as the brain-child of Ray Johnson, an American member of Fluxus, the underground movement of Mail Art employed/employs the mail network as a system/institution for enabling the production and consumption of artwork that is, in principle at least, collaborative and which entirely blur the division between the subject spaces of ‘creator’ and ‘consumer’.

Like Fluxus, this off-shoot regards commodification and the art world institutions and devices that facilitate it – such as galleries, museums, art critics – as attempts to refine/define/confine and ultimately control art. In order to avoid the institutional nexus Mail Artists operate within a network of addresses through which work that is collaborative, and often extremely ephemeral, is passed. Techniques, similar to those used for chain letters, were devised to enable the free circulation of collaborative works within a *closed* system. The only access to Mail Art is through production.

⁷⁶ Williams, op. cit., p. 41. This is Williams’ quotation of Maciunas’ words – no source is given.

Once one has gained access to addresses in the system – in the early days this was done through word of mouth, in recent years addresses have been published in zines available at events and performances – the potential viewer/consumer of Mail Art must first create a work and pass it on into the system. The first *gift* of work gains the viewer/producer responses from others on the network. What comes back is confined by only one requirement – that it can be sent by post. (Consequently paper collages feature heavily in the system.) On receipt the viewer may simply bin it, stick it on their wall, photocopy it, add to it, deface it or change it in some other way before sending it, or photocopies of it back through the network.⁷⁷ The strategies and idealism of the system would be familiar to anyone with experience of the Internet in its infancy. Mail Art activists were some of the first to spot, and utilise, its potential for networked production. Much of the early creative ideology of the net paralleled exactly the Mail Art debates of the 1970s and 1980s.⁷⁸

Mail Art actualised the creative ideals set out by Fluxus, and took some of its techniques to their logical conclusion. The Minimalist temporalisation and decentring of rhetorical modes of composition, though in a sense networked, remained within the commodifying institutions of the gallery and museum. The achievement of Fluxus/Mail Art – very much in the spirit of Maciunas' high avant-garde ideals for the group – was to challenge the practice of composition by rolling up the labour divisions of producer and consumer into a single position.⁷⁹ Blurring the boundaries of the rhetorical mode of composition, and the division it functioned between creative labourer and audience, was common to many of the practices carried out under the

⁷⁷ The ad hoc, underground character of such work mitigates against its commodification. No system however, is perfect and spillage often occurs (of which this passage is one such leak.) Attempts to create museums from personal collections of this very ephemeral art have met with death threats by return of post.

⁷⁸ When draft of this chapter was made in 2000, no attempt had been made by art historians to address Mail Art. However, Craig J Saper has recently covered some of the ground between Fluxus and Mail Art covered here. See *Networked Art*, University of Minnesota, Minneapolis, London, 2001, pp. 51-67.

⁷⁹ This type of creative loop is now a characteristic of much cyber theory with respect to creative labour and production – see for example the (Richard) Stallman view on open software. Paradoxically, it is also central to theories of managing knowledge capital. An analysis of Charles Leadbeater's problematic use of such concepts will be undertaken in Chapter Four.

rubric of dematerialisation. Fluxus/Mail Art is however the best example⁸⁰ of a challenge to the author-composition-audience nexus that employed the fluidity, anonymity and collectivism of a fully networked production to elide institutional commodity forms.⁸¹

These two strands of dematerialised work, though emerging in order to address similar problems, lead in different directions. Minimalism presented one of the clearest and coherent attacks on the rhetorical concept of composition. Though this entailed reconfiguring the shape of creative labour, the challenge to the unitary authority of the author was muted. To paraphrase Morris, it was not that the artist became ‘unimportant’, just less ‘self-important’⁸². The challenge to the rhetorical mode demonstrated by Fluxus/Mail Art is of a different order. The site of challenge was not – as it was for Minimalism – the ‘composition’ in itself, but the way it was approached by creative labour. Where Minimalism identified composition as a way to challenge the mode of labour, Fluxus/Mail Art identified labour as the site to challenge the exchange value of the artwork. The approaches led in different directions. For Minimalism, *desubjectivising* production, giving the viewer a decisive role in the production of the work, was a theoretical ideal. For Fluxus/Mail Art *desubjectivising* production was a practical, material possibility.

The dual aspect of the ‘semiotic/network’ model of production that developed from dematerialisation reflects these differences. One strand of the model, represented in the case study of Minimalism, provided a coherent attack on the rhetorical modes of composition and creative labour inherent in copyright law. The other strand, represented by the case study of Fluxus/Mail Art, provided an *actualisation* of the desubjectivising ideal entailed in such an attack. As shall be obvious later in this thesis, the ‘strong’ interpretation of the semiotic/network model (that has the potential to threaten copyright law) has its antecedents in ‘the Minimalist strand’, and the

⁸⁰ The second best example is probably the work of the Situationist International between 1964 and 1972. For more on Situationism art, see Iwona Blazwick, ed., *An Endless Adventure, an Endless Passion, an Endless Banquet: A Situationist Scrapbook*, I.C.A. and Verso, 1989.

⁸¹ Mail Art literally hides the artwork both from the gallery museum and from copyright law.

⁸² Morris, ‘Notes on Sculpture 2’, op. cit., p. 819.

‘weak’ interpretation of the model (that helps facilitate claims to intellectual property) in ‘the Fluxus/Mail Art strand’.

The significance of these developments in creative theory was as resonant beyond the art world as within. Dematerialisation produced a complex challenge to the rhetorical model of creative labour and composition. In the art world, the delegitimation of notions of individual creative autonomy was filtered through market and media structures that remained focussed on individual authorship.⁸³ It was therefore the challenge to rhetorical composition that proved most potent. As will be demonstrated in Chapter Five this was particularly so in appropriation art’s strategy of sampling.⁸⁴ Elsewhere however, the delegitimation of notions of individual creative autonomy had peculiar resonance. In the wake of dematerialisation and the emergence of the semiotic/network it became possible for those wishing to accumulate intellectual property rights, to delegitimize individualist claims to creativity by asserting that such a view of creative labour was ‘outmoded’. In this way, cultural and aesthetic ideology made an increasingly comfortable alliance with the contractually based creative practice of industrial research and development.⁸⁵

NETWORK THEORY AND THE SOCIOLOGY OF CREATIVE LABOUR

As suggested earlier, in the late 1970s retrospective attempts were made to gather the disparate strands of dematerialisation under conceptual models drawn from semiotics.

⁸³ While this authorial figure was pressurised, market forces and media representations of art prevented the desubjectivisation of production from making serious inroads. For a view on the media’s role in mediating developments within the art world, see B. Buckley and J. Stapleton, Making Public Spectacles of Ourselves in ‘*Do You Really Want it That Much?*’ - . . . ‘*More!*’ ex cat. Ursula Bickle Foundation/Venice Biennale/IMMA, 1999.

⁸⁴ A strategy summed up in Hal Foster’s observation that appropriation artists do not so much ‘originate’ images as ‘curate’ them.

⁸⁵ Within R & D creative rights had long been organised by contract. (Much in the way that the art business encountered in Chapter Two hired cutters and engravers.) Interestingly some areas of ‘aesthetic production’, such as technical draughtsmanship in the engineering industry, were historically excluded from copyright protection.

Rosalind Krauss gathered the ‘products’ of dematerialisation within a ‘relational field’ developed from structuralism, claiming the work, and the methodology, for the ‘new epoch’ of post modernism.⁸⁶ Krauss’ approach was one part of a general flowering of various methods derived from semiotics enacted through waves of structuralism and post structuralism across many academic disciplines, in the 1970s and 1980s. The semiotic approach was not confined to discussing the ‘products’ of dematerialisation. The approach also fitted well with the ‘desubjectivising’ thrust of dematerialisation, where the individualism of the rhetorical model of creative production had given way to idealist, and practical, attempts to ‘network’ production. The semiotic approach also suited older, Marxist approaches to history/art history which were generally suspicious of subject-centrism, and which situated artistic production in the context of broader economic and social developments. The result of these correspondences was the development of a new *consensus* about creative production, what might be termed a new ‘common sense’, that was antithetical to the subject-centricism of accounts derived from rhetoric.

The ‘semiotic/network’ model of creative production was not simply an art world phenomenon but a complex, cross-disciplinary trend. The general level of agreement about creative production across a number of fields, recalled the type of social and cultural consensus achieved in the 19th century by theories of originary Genius. Were it not for the development of economic theories presaging the role of intellectual property however, the development of such a consensus would have been of little interest beyond the various disciplines in which it was active. However, as the quotation at the beginning of this chapter points out, attempts at scientific and economic modernisation succeed when accompanied by cultural shifts that change the way we see the world.⁸⁷

⁸⁶ Krauss, *Originality of the Avant Garde*, op. cit., pp. 298, 290. The application of linguistics to visual culture had a longer history of course, beginning with Barthes’ famous analysis of the saluting ‘French’ soldier on the cover of Paris Match, in his 1956 essay, ‘Myth Today’. See Roland Barthes, *Mythologies*, Paladin, 1973, pp. 117-174.

⁸⁷ Leadbeater, op. cit., p. 288. (Though Leadbeater would object, the best words to describe such a cultural and economic consensus are ‘ideology’ and ‘hegemony’.)

FIELD THEORY AND THE SOCIAL HISTORY OF ART

In 1993, Pierre Bourdieu published an essay in the journal *Poetics*. “Few areas”, suggests Bourdieu, “more clearly demonstrate the heuristic efficacy of relational thinking than that of art and literature”.⁸⁸ Conceiving of art and literature as a “relational field of production”, Bourdieu suggests, represents a “radical break” from the “substantialist” mode of thought that privileges the individual, and the relations between individuals, “at the expense of structural relations”.⁸⁹ Put simply, the ‘relational field’ can account for creative production without the ideological blockages caused by the ‘traditional’ emphasis on creative individualism. Bourdieu’s ‘field’ built on the desubjectivising tendencies intrinsic to the art practice of the preceding twenty years, and the structuralist/post-structuralist theorisations of authorship active in France since the late 1960s.⁹⁰ In Bourdieu’s hands, semiotics provided a sound methodological schema with which to concretise the theoretical and practical challenges to cultural production enacted under dematerialisation. The Saussurian notion that meaning resided not in words themselves, but in the relational play of differences between words, allowed Bourdieu to conceive of a field of productive forces in which creativity was not located in specific individuals, but in the relational play between individuals and other, non-human factors.⁹¹ Rather than locate production in a specific individual, a James Joyce for example, or in the subject-space they occupy, that of authorship, Bourdieu considered cultural production as the product of a field of power constructed between subject spaces that were themselves the result of the relational powers at work in the field.

⁸⁸ ‘The Field of Cultural Production, or: The Economic World Reversed’ (1983). As cited in Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature*, trans. Richard Nice, Polity Press, London, 1993, pp. 29-73.

⁸⁹ *Ibid.*, p. 29.

⁹⁰ Specifically of course, Foucault and Barthes, and in particular Barthes’ concept of the ‘text’ as a collaborative function of both the ‘author’, or ‘scriptor’ and the reader. See Roland Barthes, ‘Death of the Author’, *op. cit.* See also, Michel Foucault, ‘What is an Author?’, *op. cit.*

⁹¹ There is an interesting parallel between this linguistic view and Cage’s interest in the musical interval, which similarly draws attention away from the notes towards the play of spaces between them.

Such an approach attempted, as artists of an earlier generation had, to move beyond the characterisation of art within ‘traditional’ (i.e. capitalistic) modes of economic exchange. In doing so, it attempted to take account of both material and symbolic production. Where the remit of the social history of art stopped at considering “the social conditions of the production of artists, art critics, dealers, patrons etc., as revealed by indices such as social origin, education and qualifications” – field theory attempted to account for – “the social conditions of the production of a set of objects socially constituted as works of *art*, i.e. the conditions of production of the field of social agents (e.g. museums, galleries, academies, etc) which help to define and produce the value of works of art’. In other words, ‘the whole set of agents whose combined efforts produce consumers capable of knowing and recognising the work of art as such’”.⁹²

Bourdieu’s approach was part of a developing practice in social sciences that has more recently been described by terms such as ‘actor network theory’, or the ‘semiotics of materiality’.⁹³ Insofar as such a semiotic/network avoids privileging human actors above the non-human actors – such as galleries or catalogues – it provides a more inclusive view of the actual mechanisms of production. As a consequence, it also has a powerful *denaturalising* effect on the individualism of the rhetorical ideology of creativity.⁹⁴ So, while social or cultural narratives may place an undue weight on the role of the author this will not be allowed to skew what Bourdieu calls the “science”.⁹⁵

The desubjectivising analytical position of the ‘field’ paralleled that of dematerialisation, which effectively temporalised the composition and/or sought to spread its labour out within a network. However, like dematerialisation, Bourdieu’s

⁹² All quotes here from Bourdieu, op. cit., p. 37.

⁹³ See John Law and Kevin Hetherington, ‘Materialities, Spatialities, Globalities’ in *Knowledge, Space, Economy* eds., John R Bryson, Peter W Daniels, Nick Henry, Jane Pollard. Routledge, London, 2000. See also, John Law and John Hassard, *Actor Network Theory And After*, Blackwell, Oxford, 1999.

⁹⁴ And will be demonstrated, it also has serious denaturalising effects on the rights claims of individuals to what was (formally) regarded as ‘their’ creative labour.

⁹⁵ Bourdieu, op. cit., p. 35. As his opening remarks recognise, despite the dematerialisation, it was still common in 1983 (and still is) for cultural analysis to “uncritically accept the division of the corpus that is imposed on them by the names of authors (‘the work of Racine’) or the titles of works (*Phedre* or *Berenice*).” Ibid., p. 29.

field of relational forces did not escape the rhetoric-based notion of relational composition but rather *relocated* it. The attempt to overcome subject-centrism of the rhetorical mode was achieved by passing elements of that mode to the sociologist. Envisaging the ‘field’ entailed mapping a territory, collecting internal parts and arranging them in appropriate relation to each other, giving due weight to the eddies and flows of power that constitute them, in such a way that the parts approximate a reasonable representation of the whole social field under analysis. The network so produced, while desubjectivising production, was, in other words, itself a variant on the old rhetorical strategy.

This paradox was also apparent in the Minimalist attempt to undo the rhetorical mode. Rather than *eliminating* rhetorical, or ‘relational’ composition, it was *relocated* from the exhibitionary object to, on one hand the paper documentation of the work, and on the other, to the situation in which the exhibitionary object(s) were consumed. Though it was possible to say that the exhibitionary object itself ‘refused’ relational composition, insofar as the very primary objects on display did not have internal compositional elements, those elements were effectively externalised, and made a condition of the viewer’s relationship to the object. In a similar way, Bourdieu’s field theory removed ultimate creative responsibility from the subject, and made it a condition of the field, however this image of the network was itself a compositional variant on the rhetorical mode. To put this simply, then the ‘image’ of production as a network is, itself, an *aestheticisation of production*.

Crucially then the semiotic/network is not an *outright* rejection of the rhetorical vision of creativity. However, it does provide a strongly desubjectivising account of creative production, which presents some substantial theoretical problems for copyright law, and for intellectual property law more generally.⁹⁶ On the ‘weak’ interpretation it suggests, that an artwork is not so much the result of an individual’s creative labour, as it is the abstract product of a relational field of power. On the ‘strong’ (though as indicated above, deeply compromised) interpretation, it suggests that the rhetorical

⁹⁶ The concept of invention in patent law is also a derivative of rhetoric.

concept of composition has been superseded, and the forms of property associated with it, destabilised. Put simply, the semiotic/network manages an crucial balancing act, on one hand militating against the individual's claim to have created a composition, but on the other providing little in the way of an actual, material challenge to the law.

ACTOR NETWORKS: FROM THE SOCIAL HISTORY OF ART TO INNOVATION THEORY

As a theorisation of creative production, the semiotic/network had relevance beyond the confines of the art world. Though in the realms of science and industry, the day-to-day organisation of creative production had long been 'networked' through departments of research and development, widely held social beliefs about the nature of creativity still presaged individualism. The concept of 'invention' that operated (operates) within patent law, is a cognate of rhetoric, and thus implies the personal creative capacity of the individual. Outside the law, the fetish for the highly regarded individual, inherited from 19th concepts of Genius, was maintained, as it still is, through events such as the annual Nobel Prize and cult of celebrity. The growth of a new *cultural* model of creative production therefore helped to bring the prevailing *ideology* of creative production into line with actual practice. For the purposes of academic and business analysis, the semiotic/network model also provided a much more realistic account of how complex creative production actually occurs.

A good example of its application to the analysis of industrial innovation is Michel Callon's 'The Sociology of an Actor-Network: The Case of the Electric Vehicle'.⁹⁷ Callon's analysis of the innovation process involved in the (attempted) production of the *Vehicule Electrique* (VEL) by *Electricite de France* (EDF) in the early 1970s, attempted to move beyond the "constricting framework of sociological analysis with its pre-established social categories and its rigid social/natural divide".⁹⁸ Callon aimed to supplement social and anthropological analysis of science that situated scientific

⁹⁷ See, Michel Callon, John Law and Arie Rip, eds., *Mapping the Dynamics of Science and Technology*, MacMillan, London, 1986, pp. 19-34.

⁹⁸ Ibid., p. 34.

power within a matrix of constraining and enabling social factors, such as political interest and economic demand, by instead turning attention towards the role of science in constructing the social field. Like Bourdieu, Callon's concern was to expand the vantage point from which the field was viewed, by moving away from the usual determining points of orientation.

In order to create the VEL, EDF brought together what, Callon termed an "actor world"⁹⁹ which he describes as a relational field of heterogeneous human and non-human entities – such as researchers, engineers, plant equipment supplies, rubber flange makers etc. EDF's actor-world is shown to be mutable as problems with the project lead to Renault setting up a competing project thus creating their own actor-world. While actor-worlds have perceivable structural relations then, they are also part of a broader 'actor-network' that means that such structures are mutable and susceptible to change. Like Bourdieu's field of production, the actor-network is relational network where power operates between heterogeneous entities that are themselves constituted by the relational powers of the network. Using this model Callon situates the innovation of the VEL within economic and political processes but also demonstrates how the operation of the actor-world created by EDF itself (re)creates that nexus and how tensions within the nexus reconstitute EDF's actor-world.¹⁰⁰

In the years since the actor network theory of the mid 1980s, the semiotic/network model has developed from a mode of academic analysis that aimed to elucidate the social activity of innovation, into a mode of production.¹⁰¹ The idea of a 'networked

⁹⁹ Ibid., p. 34.

¹⁰⁰ These kind of interplays are to the fore of course, in Duchamp's 'The Creative Act', op. cit. But such interplays recall also, the Borgesian paradox that 'every writer creates their own antecedents'. Borges finds precursors to Kafka in Zeno of Elea and Robert Browning. Had Kafka never written however, such influence would not be discernible. In other words, past and present continually remould each other. Robert Browning is not the same Browning in a world in which there is also a Kafka. See Jorge Luis Borges, 'Kafka and his Precursors' in *Labyrinths*, eds., D.A. Yates and J.E. Irby, Penguin, 1970, pp. 234-236.

¹⁰¹ There are numerous examples, some of which will be examined, in the final chapter. One could for instance, discuss the innovation theory of Gary Hammett; the economic texts of Diane Coyle; Charles Leadbeater's work; Manuel Castells' *The Rise of Network Society*; Michael Hardt and Antonio Negri's *Empire*; a whole series of academic and populist economists and management theorists; Luis Suarez-Villa's *Invention And The Rise Of Technocapitalism*, Esther Dyson's *Release 2.1*, Kevin Kelly's *New*

economy' has, in other words, become a new 'common sense' of production. Where *desubjectivisation* was once thought a means to avoid the capitalist characterisation of aesthetic relationships, and *networks* an avant gardist strategy for avoiding the grip of commodification and overcoming the alienation of the art/life divide, they have in recent years come to constitute a new ideology for management theorists, 'Third Way' politicians and prophets of the Knowledge Economy.

INTELLECTUAL PROPERTY, INDIVIDUAL RIGHTS AND THE NETWORKED ECONOMY

Leaving aside the complex question as to whether the networked, de-subjectivised, account of creativity is a more accurate or desirable model of production than one focussed entirely through the prism of individual agency, it is necessary, as a prelude to the next chapter, to give some further account of how the semiotic/network model interacts with intellectual property law. For reasons that will become clear in the next chapter, over the last twenty years the envelope of intellectual property has been expanded, internationalised and toughened. The intensification of this area of property law has paralleled the development in creative ideology laid out in this chapter.

From the mid 1980s onwards, a process – sometimes referred to as '*economic dematerialisation*' – has occurred which presents some parallels to the aesthetic dematerialisation of the 1960s. The geographic relocation of heavy industrial production has led to an increasing concern with the intellectual, or conceptual, labours of production in 'post-industrial' economies. The question occupying business strategists, economists, and the governments of such economies, is how to maximise the production of the various forms of knowledge that constitute intellectual properties. This emphasis on creative, or intellectual, labours entails a second question

Rules for the New Economy, Clayton M. Christensen's *The Innovators Dilemma*; The Harvard Business Review's *Knowledge Management*; Richard Oliver's *The Coming Bio-Tech Age*; Thomas Stewart's *Intellectual Capital*; or Cooke and Morgan's *The Associational Economy*.

– namely how best to organise the property claims that attach to the production of knowledge.

Balancing the private rights against general public utility has been a central dynamic of intellectual property law at least since the late 15th century. In principle, there has always been a trade-off between maximumising ‘innovation’, and clogging the public sphere with a network of fenced-off resources held in private hands.¹⁰² However, as Bernard Edleman has demonstrated, business requirements also have a strong determining effect on the application of intellectual property law. Despite the fact that intellectual property utilises rhetorical concepts that presuppose the creative labour of *individuals*, the law has also long accepted the concept of ‘legally constituted subjects’ such as groups or business entities. The principle of balancing ‘private’ ownership against ‘public’ utility has therefore often, and quite perversely, been inscribed as a battle between the ‘rights’ of the workforce against the smooth operation of capital.¹⁰³ To use the words of Edleman’s analysis, the true ‘creative subject’ is capital, “it is animated, it speaks and signs contracts”.¹⁰⁴ The contradiction between public and private, labouring subject and capital, re-emerges at the heart of the contemporary Knowledge Economy.

¹⁰²This problem is at least as old as the Venetian privilege.

¹⁰³ Two historical examples from visual art are useful here. Edleman traced the development of copyright in photographic images in France. His research suggested that the granting of property rights to photographers had nothing whatsoever to do with the debate about the photographer’s aesthetic *subjectivity* – the latter of which had raged from the late 1830s onwards. The decisive moment came, when the government recognised that the taking of photographs generated enough capital to warrant its being seen as an industrial activity. See Edleman, op. cit. Similarly, Molly Nesbitt has shown that 19th century French copyright law drew a sharp division between the drawings of artists and those of ‘draughtsmen’. The former were regarded as expressions of a *subjective* maker and therefore deemed to be within the envelope of copyright. The latter on the other hand, were regarded as *impersonal* and ‘objective’ and therefore beyond the scope of the law. Aesthetically speaking, the division was ‘arbitrary’, but as Nesbitt suggests, it was nevertheless necessitated by the need to manage businesses. If the rights connected with image making spread too far, they would effect the operations of industry. Draughtsmen might, for example, decide on a whim that the drawing they had undertaken of a machine part for one company, was *their* property. (Current copyright law with respect to software provides businesses with similar ‘get-out’ clauses.) For such ‘practical’ reasons then, 19th century French law maintained a sociological and economic division between the ‘subjective’ aesthetic realm and the ‘objective’ realm of industry.

¹⁰⁴ Edelman, op. cit., p. 57.

On the face of it, the expansion of copyright law in the 1980s to include the writing of software, *should* have led to a new economic era in which the creative subject, implied by copyright law, becomes central to the economy. Ostensibly, at least, the developing concept of the knowledge economy has indeed led to a new ideal of economic subjectivity that is creative in character. However, the increasing emphasis on creative, intellectual labour has necessitated an ever-greater need on the part of business to ‘manage’, or control, the assets developed from such a ‘cultural’ turn. In theory, the expansion of intellectual property law has the potential to proliferate rights claims by individuals to the results of ‘*their*’ creative labours. Therefore, in order to avoid the threat of a democratisation of the asset base of the new economy, and the consequent disruption of current vested interests, it has proved necessary to produce justificatory narratives that aid the limitation of individualist claims to the properties that flow from creative labour.

As suggested above, ‘strong’ interpretations of the semiotic/network model of creative production have the potential to make ‘doctrinal’ challenges that theoretically challenge the rhetorical concepts within intellectual property law. However, the ‘weak’ interpretation of the semiotic/network strongly desubjectivises production in favour of networked concepts without producing a threat to the law, it is therefore highly useful in managing the rights claims to such property.

Examples of the tensions between still widely held individualist beliefs about the nature of creativity, and the network theory adopted by corporate entities can be seen across the knowledge economy. A direct example of such a conflict was the case brought in Texas against Evan Brown by DSC Communications. The case involved a legally successful, but practically unenforceable, attempt by DSC to compel Brown to divulge his idea for a software programme he claimed would automatically convert old software codes into new languages.¹⁰⁵ The case stemmed from Brown’s sacking by

¹⁰⁵ A brief account of the case is given in Seth Schulman’s, *Owning the Future*, Houghton Mifflin, New York, 1999. DSC won in all the lower courts. At the time of Schulman’s book, Brown was appealing. Whatever the result of the case, DSC’s argument is problematic. Even with judgement in its favour, it is difficult to see how Brown could be *compelled* to divulge the idea – or if he did divulge an idea,

DSC after ten years of employment. Before leaving Brown mentioned ‘his’ idea to his superiors. Despite the fact that the idea was not developed during his employment, DSC claimed Brown was legally bound to divulge his idea, because his employment contract specifically stated that all ideas an employee might have that relate to DSC’s line of business are company property. The company’s legal representative succinctly expressed this point when he suggested that ‘If a janitor came up with a method of cleaning a hardwood floor suggested to him by his work in cleaning a DSC hardwood floor, technically the idea belongs to DSC’.¹⁰⁶

CONCLUSION

Brown v DMC clearly demonstrates a conflict between different ideologies with respect to the nature of creativity, individual sovereignty, and property. In an economy where knowledge is defined as capital, and where employment contracts stripping employees of individual property rights are becoming standard practice, the notion that an individual’s internal thought processes can be made the subject of an employers property right, still runs counter to old, and deeply ingrained, ways of thinking about, creativity, individual agency and property. However, from the point of view of DSC, the case is straightforward. *It* operates as the *creator* of an *image of production*, an actor-world, comprised of heterogeneous human and non-human factors, from which it expects innovations, and property assets to flow. So, despite the expectation that expansions of intellectual property law might lead to a corresponding expansion of property owning subjects, the ‘image of production’ presented by the semiotic/network model mitigates against such an eventuality.

As the creative capacities of individual employees have become crucial economic assets, justifying the tapping of the rights that flow from such creativity has become

whether it could be established to have had any provable relation to that one alleged to be at the centre of the case. There may, of course, have been no workable idea in any case.

¹⁰⁶ As cited in Seth Schulman, *op. cit.*, p. 11.

essential. To this end, the preferred 'image of production' presents creativity as an effect of a relational field of heterogeneous actors. For DSC there is simply no difference between the creative capacities of the software programmer and the janitor, both are sub-elements of an image of production, or actor-world, they have initiated.

4

Think Tank Aesthetics: The Art Of Economic Dematerialisation

“*Knowledge is the DNA of the economy*” Anon

INTRODUCTION

As seen in Chapter Three, the *aesthetic dematerialisation* of the 1960s ushered in a wide-scale shift in the ideology of creative labour. Under the general rubric of postmodernism, a new model of creative labour, based on semiotics and network theory, took root well beyond the confines of the art world. This chapter examines the centrality of a generalised networked creativity to the *dematerialised economy*, and the tendency of theorists of that economy, to envisage the ideal economic subject as *creative*. As suggested at the end of Chapter Three, despite the emergence of the semiotic/network model, the old rhetorical model of creative labour has never been fully displaced. The coexistence and interplay of the two models, therefore remains a central and defining characteristic – of both contemporary art practice and the dematerialised economy. The structuring dynamics created by the co-existence of these two, competing, ideologies of creative labour is central to the operation of the dematerialised or ‘knowledge’ economy.¹

As suggested in Chapter Three, the importance of the semiotic/network theory of creative labour to contemporary economic theory can be accounted for by tracing the progress of the model in academic arenas over the last twenty years. However, such an account does not explain *why* a new theory of creative labour proved necessary for contemporary economists and political theorists. *Why* such aesthetic theorisations took

¹ There is a tendency to regard the terms dematerialised economy and knowledge economy as interchangeable. While the terms refer to the same economy, the latter term refers more clearly to a set of beliefs about the economy that, arguably, constitute an ideology. (The term ‘ideology’ is used in this chapter to refer to a set of theoretical propositions that have become reified into a belief system. While ‘theory’ suggests a way of understanding a given set of conditions, ‘ideology’ suggests that theory is

root in economic and political theory is the subject of the introductory sections of this chapter, which lay out the historical and theoretical factors that constitute the *concept* of the ‘knowledge economy’. The chapter argues that the knowledge economy is most fruitfully viewed, not simply as an ‘historical occurrence’, but as an ‘event in theory’. The introductory sections of the chapter therefore consider theoretical *events* – such as the ‘aestheticisation of everyday life’, McLuhan’s conceptualisations of commodity culture and the re-emergence of Joseph Schumpeter’s concept of ‘creative destruction’ – which contribute towards a ‘cultural turn’ in the economic theory of recent years. This chapter considers also, the extent to which this process can be considered as a process of *economic aestheticisation*, or as Rick Szostak has termed it, “econ-art”.²

The main body of the chapter contends that a central feature of the knowledge economy is a tendency to view the subject as *creative*, with a special value placed on subjects that can be characterised as *creative destructive*. This part of the chapter is divided into two sections, or case studies, in the literature of the knowledge economy – one drawn from economic and political theory and one from cultural criticism. The case studies outline a common ideology relating to the knowledge economy operating in both economic and cultural fields.

A twofold process is at work in the theory of the knowledge economy. The increasing economic reliance on forms of intellectual property has brought about a renewed stress on the *ontology of creative labour* in both business literature, and economic and political theory. On a practical level, business and managerial theories have attempted to disinter principles of ‘creative labour’ represented in intellectual property law, and sought ways to maximise the production of such labour. On a broader ideological level, economic and political theory has tended to present such creative labour as an *ideal organising principle* of the dematerialised economy as a whole. What could be regarded as simple self-interest at the level of business, fits comfortably with a long,

tied to the identity of the person using it. Any supplementary information that contradicts the established theory is therefore disavowed and repressed.)

² As cited in the title and throughout Szostak’s text, *Econ-Art: Divorcing Art from Science in Modern Economics*, op. cit. Rick Szostak is Prof. of Economics, University of Alberta, Canada.

though contested, tendency (in economic and political theory) to see aesthetics as a key tool in economic and political management.³ A central feature of the knowledge economy then is the folding together of attempts to maximise the *production of creative labour* with a more general tendency to *view the economy in aesthetic terms*.

This twofold process is evident in the case studies undertaken in this chapter. The economic and political theory of Charles Leadbeater indicates the growth of what can be termed '*think tank aesthetics*'. *Living on Thin Air* demonstrates the interplay between these dual forms of economic aestheticisation and lays out the other common themes of the knowledge economy ideology. Of particular interest of course, is the tendency to view the subject as, at all points creative. However, Leadbeater's text is also important for the way in which he *pairs* the divisions other theorists have made between *tacit* and *explicit* knowledge *cultures* on one hand, and between *incremental* and *radical* knowledge *production*, on the other. The avant gardist tropes of Leadbeater's aestheticised economy significantly reshape what is understood by '*radical*' politics – substituting *creative*, for political, radicalism. The 'cultural turn' of the knowledge economy is further explored in discussion of Philip Fisher's *Still the New World*. Fisher's literary criticism demonstrates the way key concepts of knowledge economy have penetrated recent cultural criticism. Ostensibly, a study of the American literary canon, the framework of Fisher's book is rooted in the contention that the 'American personality' is creative-destructive, or 'avant gardist', in character and hence entirely co-extensive with the requirements of a dematerialised, creative-destructive knowledge economy.

The chapter ends with a consideration of the concept of the creative-destructive subject played out in the case of *Moore v The Regents of the University of California*. The case is important for a number of reasons – the struggle over intellectual property rights, the differentiation between tacit and explicit knowledge, the privileging of the radical innovation and the creative-destructive subject. But, it is interesting also, for the ways in which rhetorical and semiotic modes of creative labour are in play with

³ The tendency in political theory could be said to go back at least as far as Machiavelli.

respect to the rights of the subject. The case demonstrates the legal ascendancy of the ideal subject of the knowledge economy – creative in general, creative-destructive or avant gardist in particular.

IDENTIFYING THE KNOWLEDGE ECONOMY: BETWEEN MATERIAL HISTORY AND AESTHETIC PROCESS

Every theorisation of the knowledge economy agrees that the historical development of western economies can be divided into three distinctive phases. The *first* phase can be defined by the relation of economics and politics to the control of land. The *second* phase shifted the locus of power towards the control of the resources of industrial production. The *third* phase, over the last twenty years or so, has witnessed a further shift, from controlling the materials of production to controlling the *concept of production* ⁴ - or as Luis Suarez-Villa argues, “the reproduction of capital as the most important social and economic function, with the reproduction of inventive creativity”. ⁵

⁴ For an example of this periodisation see Seth Schulman’s account in Appendix B. Schulman (*Owning The Future*, Houghton Mifflin, New York, 1999) cites Alvin Tofler as the immediate origin of the periodisation. Christopher May (*The Information Society*, Polity Press, 2002) concurs, suggesting that Tofler was drawing on both Schumpeter and Kondratieff.)

⁵ See Suarez-Villa, op. cit., p. 4. By “inventive creativity”, Suarez-Villa means here, scientific/ technological invention and innovation. Pushing the differentiation of the old and new economies further, he suggests that a *creativity gap* (as opposed to a straightforward wealth gap) is increasingly apparent: “Whereas the cleavage between the haves and the have-nots under industrial capitalism was based on the ownership of capital and material resources, under Technocapitalism that cleavage is more likely to be between societies that possess inventive creativity and new technological knowledge and those that do not.” Ibid., p. 4. It is not entirely clear what the difference between capital and ‘inventive creativity’ actually is. Inventive creativity is used by Suarez-Villa as a synonym for new technology. The owner of capital equipment (technology) is obviously the owner of capital. The only substantive difference between the new economy and the old, is the way technology is understood – i.e. it connotes not just capital equipment, but *incorporeal* capital assets, such as techniques of production, assets held as intellectual property, the skills of key personnel etc. To suggest therefore, that the reproduction of capital is over and that we are now in the age of the reproduction of creative invention, is simple sophistry.

Another way of expressing the periodisation from feudalism, to industrialism, to the modern 'Knowledge Economy', is to say that the central organising principle of the (Western) economic history has moved from land to material object, and from material object to incorporeal concept. Expressed in terms of the legal regimes of property, the periodisation suggests a shift from 'real' property (land) to 'movable' property (objects) to 'intellectual' property (concepts).⁶ Given that the periodisation can be expressed in terms of the '*objects*' of property, it can equally well be expressed as a development of 'ideal' figures of political and economic *subjectivity* represented by such property regimes. In this way it is possible to very broadly suggest that certain forms of labour correlate to the prevalence of particular property forms. Seen thus the first two phases suggest that labour is largely *physical* in character and that the shift to the third phase indicates a move towards labour that is largely '*mental*' in character. In other words, it is possible to see the periodisation as representing a shift in the 'ideal' subject of economic and political organisation from landowner/agricultural worker, to capitalist/factory worker, to author/reader or artist/viewer.⁷ The general periodisation of the knowledge economy suggests in other words that aesthetic subjectivity will perform the central tasks of such a 'cultural' economy.

Reading the shift in the third phase – the move towards intellectual property regimes – as a 'cultural turn' could be regarded as somewhat misleading. Such a reading takes little account of the aspects of intellectual property law (such as patents) that represent forms of creative labour which are not primarily *aesthetic* in character. While a phase of economic dematerialisation predicated on the exploitation of intellectual property law suggests that labour resources will be 'creative', or mental in character, not all intellectual labours can be regarded as *aesthetic*. However, as suggested in the introduction, a central feature of economic dematerialisation is a tendency to not only concentrate on the principles of creative labour represented within intellectual property laws, but also to set such 'ideal subjects' within a broader *aestheticisation* of

⁶ Viewing intellectual property as 'the property laws protecting *concepts*' is a highly generic interpretation.

It must be noted that patent protects inventions while copyright protects expressions; loosely these may be bracketed together, but it must be noted that, for example, copyright does not protect ideas as such.

the economy. Therefore reading the dematerialised economy, as a ‘cultural turn’ is only *partly* a reference to the labour forms inherent in intellectual property laws. The cultural turn is established only when the tendency toward aestheticisation in economic theory is taken into account.⁸

Most economic analysis of the knowledge economy is reluctant to identify itself as ‘cultural’ in character. Economic dematerialisation is most usually presented as the natural corollary of material factors that have impinged on ‘real’ economies. The historical narratives sketched out do, of course, represent historical events – however this is not to say that such events fully *determine* current conditions. As suggested in the introduction, the knowledge economy is more an *event in economic theory* and political rhetoric than a *description* of current conditions stemming from a deterministic historical process. The commonly cited historical events may have made a re-conceptualisation of the economies of western countries necessary, but they cannot be said to fully determine the *shape* of the re-conceptualisation. Before moving on to analyse the theoretical factors that have contributed towards the growth of the *concept* of the knowledge economy therefore, it is necessary to briefly account for those historical factors often seen as the ‘motors’ which generated economic dematerialisation.

THE KNOWLEDGE ECONOMY AS MATERIAL HISTORY

A general consensus exists as to the origin of the knowledge economy, placing it firmly in the context of the current phase of economic globalisation. The abandonment of the Bretton Woods agreement, degrading of exchange controls, the oil crisis of

⁷ Charles Leadbeater makes these final pairings explicit in his description of the knowledge economy.

⁸ The three-phase structure, in which the knowledge economy is typically projected, is itself an example of such aestheticising. The dialectical structure, adapted from the tropes of Hegelian/Marxist history, suggests a vision of history as intelligible and graspable *as an image*. Given that the dialectic is itself a

1973/4 oil crisis, deregulation of the financial markets and the subsequent age of ‘hot’, rapidly circulating, globalised capital are most commonly cited as the origin of both the dematerialisation of industrial economies and the development of the information or knowledge economy. The flight of capital in search of cheap, deregulated labour created structural problems for older industrialised economies. The restructuring of such economies over the last thirty years or so has tended to make good the loss of manufacturing base by concentrating on the development of service-orientated industries.

However, significant technological developments have also brought about the growth of new industries, the most significant of which – the computing/software and biotech sectors – are heavily dependent on intellectual property law as a mechanism to facilitate investment and secure the exploitation of research. The earliest legal cases involving the successful patenting of living organisms is Chakrabarty in 1971. The earliest legal cases debating the viability of copyright in software codes date from 1982/3. By the mid 1980’s, most western countries had either handed down court precedents allowing software to be copyrighted or passed specific legislation to provide protection. As the new information/knowledge-rich industries have become increasingly important there have been regular attempts to deepen, expand and enforce the worldwide system of intellectual property law. Since 1989, and largely due to economic and political pressure from the US and the EU, the Berne Convention has been developed into WIPO and in more hard-line form, the transition from GATT to the WTO has brought about the sub-treaty TRIPs.⁹

These economic developments have been labelled differently over the last thirty years. The acceleration of computing power from the early 80s to the early 90s was often descriptively tagged ‘the information revolution’ or the ‘information economy’. In the

literary trope, it is perhaps not surprising to find that its re-emergence in contemporary economic theory actually culminates in a ‘cultural phase’.

⁹ WIPO: World Intellectual Property Organisation. GATT: General Agreement on Tariffs and Trade.

WTO: World Trade Organisation. TRIPS: Trade Related Aspects of Intellectual Property Rights.

TRIPS has proved to be the more draconian treaty, since under the auspices of the WTO, it has

mid 1990s a more comprehensive term, the ‘weightless’ or ‘dematerialised’ economy came into use, indicating that a more fundamental economic reshaping was afoot. The notion of an economy dematerialising towards the point of weightlessness was based on the observation that an increasing amount of the added value of consumer products consisted of the folding of information into the objects of consumption.¹⁰ As Diane Coyle pointed out in her book *The Weightless World*, the thirty wealthiest countries have a GDP twenty times greater than a hundred years ago but the tonnage of the things produced has remained exactly the same.¹¹ In part, this is because economic output has changed in character – a shift towards making objects lighter and smaller – transistors rather than vacuum tubes, fibre-optic cables rather than copper wire, plastics rather than metals. But such technological advances have occurred at the same time as the economies of old, industrialised economies have moved towards high-tech service industries such as banking, media, software and biotechnology.

The most recent expression, the ‘knowledge economy’, is a portmanteau term that covers the conceptual ground of the older terms, but also attempts to go further by pointing toward the factors that *generate* information and weightlessness. As suggested above, the term, and the periodisation it implies, indicates a reconceptualisation of the terms by which the economy is understood. The development of the *concept* of a knowledge economy indicates that something more fundamental is afoot than simple weightlessness. The free flow of capital has facilitated a migration of industrial production to the geographic sites of cheap, deregulated labour. Against this background, there has been an increasing tendency to stake the viability of older industrial economies on conceptual, rather than physical labour. For the theorist of the knowledge economy therefore, the *production of ideas* has taken on great urgency. For such economists, ‘the recipe’ has become a vital metaphor, since it represents creative labour, or knowledge that has been fixed in a

encouraged developed states further enforce reluctant developing states into property harmonisation, by permitting various kinds of trade sanctions to be operated against countries that refuse to comply.

¹⁰ The premise of this observation is, obviously, not new. In a sense, margins are simply information disparities between seller and consumer. However, what *was* new about the observation was the connection it forged with information theory and in particular, with semiotic theory.

tangible form and thus become tradable as a commodity. In such a formulation, the secret of economic and political supremacy lies not in the cooking of metaphorical meals (industrial production), but in the creation of ‘recipes’, (the industrialised production of concepts) which effectively control a material industrial production that has passed to ‘client’ nations.¹² Conceptual, rather than physical labour then, has become the economy’s most valued tool and the privileged paradigm of economic subjectivity. One result has been an explosion of literature on creativity in management and economic theory. The *ontology of creativity* – what constitutes invention and originality and how their production can be increased, rationalised and made more efficient – has become the central question for the new economy.

THE KNOWLEDGE ECONOMY AS A CULTURAL TURN IN ECONOMIC THEORY

As suggested above, it is misleading to see the knowledge economy as the natural corollary of historical events – the latter of which, are usually cited as *the* factors leading to its emergence. The knowledge economy is more accurately assessed as a ‘cultural turn’, an event in the history of theorising the economy, a re-conceptualisation of the economy. To understand the knowledge economy then, the recent history of theory is as important as the recent history of geopolitical events themselves.

As Chapter Three suggested, the ‘cultural turn’ of the knowledge economy is in part rooted in the historical and theoretical relationship between the *aesthetic dematerialisation* in the art world of the 1960s and the *economic dematerialisation* of

¹¹ Coyle, op. cit. credits Alan Greenspan (the Head of the US Federal Reserve) with the original observation.

¹² The identity of the knowledge economy can only be sustained in relation to a ‘material’ economy operating elsewhere. The knowledge economy is therefore heavily reliant on operating a foreign policy that can sufficiently maintain its identity. These issues will be given more detailed attention in Chapter Five.

the last ten to fifteen years. A re-evaluation of intellectual property, and the models of creative labour represented within such laws, underpins *both* moments of dematerialisation. The aesthetic dematerialisation of the 1960s resulted from the agency of particular avant-garde artists, and their attempt to renegotiate the envelope of the creative subject. This was achieved by shifting emphasis away from physical labour and towards mental, or conceptual labour, as represented in intellectual property law. The position of the dematerialised economy of the 1990s and early 21st century is in some senses an inversion of that process. The sunrise industries of the dematerialised economy are highly dependant on the mechanisms of intellectual property law, leading corporations and governments to create policies aimed at encouraging the production, and effective management of, the creative labour central to such laws. The current interest of corporations and governments in the creative subject then, is a decisively top-down affair in comparison to the egalitarian ideals of aesthetic dematerialisation. Put most simply the moment of *aesthetic dematerialisation* was a subject-led movement for ‘creative freedom’. In contrast, *economic dematerialisation* is the recognition of the importance of mental or creative labour as a crucial capital asset of the modern economy. *Economic dematerialisation*, in other words, is the *imposition* of mental/creative labour as the ideal mode of subjectivity for a contemporary workforce.

In spite of the apparent differences between these two modes, aesthetic dematerialisation (as suggested in Chapter Three) nevertheless played a crucial role in the establishment and legitimisation of the semiotic/network ideology that now dominates the management of creative labour in the knowledge economy. The shift from an ideology of creative labour based on rhetoric, to one based on semiotics/networks, in part contributed towards the notion of an aestheticised economy. To some extent, such a shift implies a move away from a largely *individualist* ideology of creativity towards one that is, superficially at least, more

collective in character.¹³ However, the aestheticisation of the economy cannot simply be explained as the spreading of a new ideology of creativity. The tendency to aestheticise has itself something of a tradition in economic theory – one that needs to be touched upon before turning attention to the specific case studies below. What is unique in the knowledge economy is the *confluence* of such aestheticising theories with the emergence of a dematerialised economy – which is heavily dependant on forms of property that are clearly correlative with the notion of creative, mental labour.

THE IMAGE OF THE ECONOMY: ECONOMY AS DESIGN

A good example of the confluence between an overall sense of aesthetic design in the economy (on a macro level), and intellectual property (on a micro level), can be found in Paul Romer's economic theory based on 'the recipe'.¹⁴ Romer suggests that every economy consists of three primary resources – people, physical things (machines and raw materials) and rules. The rules or "*recipes*" are in effect different ways of combining people and things together. While the basic elements of an economy – people and materials – remain unchanged, what develops historically is the design or "recipe".

This image of the economy is more complex than, at first sight, it might appear to be. On one level Romer's view is imagistic. For example, his notion of disparate parts being brought into conceptual focus as a whole by a set of 'rules', recalls the central principles of the *rhetorical model of composition*. However, the 'recipe' thus formed can act as both a macro and a micro model of the economy. It can suggest both an historical *phase*, an *era* of economic production – or, when used as a micro description

¹³ There is nothing new in the notion of a more generalised concept of creativity per se. As we shall see later, the generalisation was at work in the departure of Modernism from Romanticism. Economists such as Schumpeter observed the change in innovation theory as far back as the 1940s.

¹⁴ Paul Romer is Prof. of Economics, Stanford University. The concept of the 'recipe' is in wide circulation. Leadbeater cites an article Romer wrote for *Worth* magazine as the origin of the notion, however. See Leadbeater, op. cit., p. 34.

of the innovation process, as a simile for mental labour solidified into a unit of intellectual property.

In the article in *Worth* magazine Romer puts it thus:

We used to use iron oxide to make cave paintings and now we put it on floppy disks. The point is that the raw material we have to work with has been the same for all of human history. So when you think about economic growth the only place it can come from is finding better recipes for rearranging the fixed amount of stuff we have around us.¹⁵

On the one hand, Romer's 'recipe' is knowledge, as expressed in a fixed or 'explicit' form. That is to say, when written down, the recipe is recognisable as intellectual property. Put another way, the recipe is a metaphor for the way an author draws words together in a sentence, bringing an expression into copyright; or for the way a corporation consolidates the knowledge of a new production process by seeking a patent. On the other hand, when used in a macro sense, the recipe places the entire economy within a historical continuum of such creative innovations – from the designs of cave paintings to that of floppy disks – in other words, all of history consists in the forward drive of creative innovation.

One result of such a teleology is that innovation (and by implication modern intellectual property) is placed within an historical continuum that appears '*natural*'.¹⁶ The idea that a history is the result of a single evolutionary process is not new of course. The notion of history being driven by the dialectical unfolding of new forms of economic production was as central to Marxist accounts of history, as the 'dialectic of ideas' was to Hegel's.¹⁷ In a sense theorisations of the knowledge economy

¹⁵ Ibid., p. 34.

¹⁶ Ibid., p.34. One gets the strong feeling that Romer imagines the ancient cave painters as deficient in one vital economic mechanism – a viable and enforceable system of intellectual property rights that would secure the efficient exploitation of their inventiveness!

¹⁷ In his review of *Living on Thin Air* for the *London Review of Books*, Nick Cohen criticises Charles Leadbeater for exactly such "sharp accents of Marxist teleology (...) History is moving down the

themselves stand in dialectic relation to dialectical accounts of history. Where Marx replaced the ‘idea’ as the motor of history with ‘production’, theorists of the knowledge economy have simply replaced production with the ‘production of ideas’.

In sum, the idea of a ‘grand design’ in economic theory is not unusual. What is unusual about theorisations such as Romer’s however, is the degree of intensification of the issue of aesthetics, on both a micro and macro scale, and the tendency to roll both together in a ‘unified field’ – the knowledge economy – that rolls in a ‘natural’ and dialectical fashion.

CRITIQUING THE AESTHETIC APPROACH

Despite the current popularity of such aestheticising tendencies the critique of such a position is well developed. The debate about the relationship between economic models and the world they purport to represent is as old as modern economic theory. In a lengthy analysis of the problem, Rick Szostak gives the sobriquet of ‘Econ-artist’ to the economist whose work has drifted far from the ‘real’ into an aesthetic realm – one populated by models that bear little relation to the actual economy they purport to represent.

Aestheticisation, Szostak suggests, is a problem that has dogged economic theory throughout the 20th century and may even be endemic to economics as a ‘literary form’. Most problems however occur when economists fail to admit to the aesthetic condition of economics.¹⁸ Most economic theory involves a distortion of the real economy as the available facts are squeezed into a coherent and plausible image. The

tracks; questioning the inevitable is pointless.” See Nick Cohen, ‘There is No Alternative to Becoming Leadbeater’ in *London Review of Books*, vol. 21, October 28, 1999, p.. (There is of course a longer history to the idea that creativity, and in particular the concept of design, offers the key to understanding the relationship between the subject and the world. As was demonstrated in Chapter Two, the art theory of the Counter Reformation – and in particular, that of Zuccaro – regarded the human faculty of ‘Disegno’ as a subsidiary faculty of the ‘divine creation’.)

¹⁸ Szostak’s book is mainly dedicated to establishing connections between economic models and forms of visual art such as cubism and surrealism.

work of the econ-artist says Szostak “must involve the transformation of the world we actually live in into one of superior aesthetic form.”¹⁹ The general perception that economics is a ‘science’ often obscures the distinctions between economic models²⁰ and the ‘real’ economy, distorting its understanding and effective management. Technological or ‘scientific’ approaches to economics that are stripped of the tendency to aestheticise and rhetoricise, often come off badly against ‘econ-art’ – particularly when forced to compete for the attention of policy-makers and other academics. Messy empirical data and specifically situated explanations of economic behaviour are never quite as convincing as grand models that possess a rhetorical ‘elegance’. In the absence of objective criteria or evidence by which to judge one theory against another, relevance frequently loses out to beauty,²¹ since politicians tend to be persuaded by those theories with the most convincing rhetoric. Judgement on vital economic issues is therefore frequently decided on aesthetic grounds, with an appeal to beauty and elegance.²² Szostak argues that some economists have been acutely aware of the aesthetic condition and have made cunning use of it.²³ However there are insidious aspects to such ‘aestheticised utopias’. They seduce the reader into believing that the order they represent is *natural* and in some circumstances, become ‘excuses for the horrors of economic life’.²⁴

¹⁹ Szostak, op. cit., p. 8.

²⁰ Such models are usually devised as teaching aids, or as simple rhetorical devices aimed at persuading an audience. On occasion however, they fall into the envelope of political ideology.

²¹ Szostak, op. cit., p. 12.

²² In addition to the tendency to make the facts fit a desirable image, a more fundamental aesthetic sense is also in play. The desire to bring the appearance of order to unpredictable and often incomprehensible situations, is particularly noticeable in the use of mathematical modelling. Szostak suggests that the reader recognises the inherent logic and beauty of such models. A coherent, logical and convincingly accurate modelling of one small aspect of the economy lends its authority to larger, less coherent modelling, since it establishes a belief that *beauty equates to accuracy* per se. Models (such as that of perfect competition where all consumers are rational), possess perfect information and behave in a predictable fashion. But, in fact, they have also to discount and suppress swathes of information that complicates, confuses or contradicts the model. In the real economy, economically ‘rational’ behaviour faces numerous non-economic constraints that are beyond the accounting of even the most sophisticated modelling.

²³ Here, Szostak cites John Maynard Keynes, as a prime example of an economist who “consciously appealed to the aesthetic sensibility of his audience.” See Szostak, op. cit., p. 11. Given Keynes’ connections with the Bloomsbury group, this should come as no surprise.

²⁴ Ibid., p. 44. Szostak even goes as far as suggesting that a fear of such aestheticised order motivated some aspects of the Chicago School’s theoretical stance. Leading members such as Henry Simon, found in the free market, a bulwark against the aesthetic and rhetoricising tendencies of the likes of Keynes. Simon suggests Szostak, was “like Keynes himself only too conscious of the justification the

There are, in short, serious and well-recognised problems in imposing a sense of harmonious ‘design’ on economic theory and the economy itself. The rhetorical desire for persuasive elegance and beauty often gives a false sense of order and harmony to the chaotic world that the economist describes. The belief in the order of such design can lead to a politics of exclusion – one where that which contradicts the model, is ignored or repressed in favour of the superficial coherence of the model.²⁵ By the same token, ‘design’ can be read as implying that a natural and unchallengeable order underpins a fractured, chaotic and unpredictable reality. It almost goes without saying that theories of the knowledge economy – such as that laid out above by Paul Romer – imply not only a good deal of aestheticising in terms of rhetoric, but also a strong sense of historical inevitability that derives from that aestheticising.

ELEMENTS LEADING TOWARDS THE CONTEMPORARY RE-EMERGENCE OF AN AESTHETICISED ECONOMY

FROM RHETORIC TO SEMIOTIC/NETWORK CREATIVITY

Given the existence of a strong tradition *critical* of aestheticising models of the economy, it is perhaps surprising to see the latter again rising in popularity. There is therefore a need to account for more recent theoretical influences responsible for the revival of aestheticising traditions, which during the 20th century have continued to rear up sporadically.

latter’s theories could provide to totalitarian regimes.” Ibid., pp. 48-9. Walter Benjamin’s famous objection to fascism’s aestheticisation of politics at the end of ‘The Work of Art in the Age of its Mechanical Reproduction’ suggests similar problems. On the one hand, aestheticisation can be read literally in terms of the spectacle of Spear’s state architecture and the organisation of set piece rallies like Nuremberg. On the other hand, the aestheticisation of politics suggests a ‘grand design’, which must repress heterogeneity in order to maintain its balance and coherence. See Hannah Arendt, ed., *Illuminations*, trans. Harry Zohn, Fontana, 1973, pp. 211-244.

²⁵ This was once the standard criticism of the centrally planned economies of the old Soviet Bloc but it stands equally well as a criticism of current theories of the knowledge economy.

One reason has already been suggested. The pervasive shift from the rhetorical model of creative labour towards the semiotic/network model suggests a generalisation of creative production. Superficially at least, the rhetorical model tended to imagine the creative subject as an individual, rights-creating subject.²⁶ Again superficially, the semiotic/network model suggests that a presumed border between ‘art and life’ has simply dissolved and that the creative act has become de-individualised and de-subjectivised, dispersed and collectivised. In other words, the breakdown of discrete categories and borders associated with post-modernist art and architecture, has led to the bleeding of art into the broader social realm. In an influential essay of the early 1990s, Mike Featherstone linked the breakdown of category, (an occurrence that was central to post modernist theorisations of fine art production), to Baudrillard’s theorisations of consumption as produced in the late 1960s and early 1970s.²⁷

CLOSING THE ART/LIFE DIVIDE: TOWARDS THE AESTHETICISATION OF EVERYDAY LIFE?

Featherstone’s conceptualisation of the “aestheticisation of everyday life” forms part of a broader study that reflects the widely held observation that contemporary economic and social organisation is most accurately viewed through the prism of consumption, rather than production.²⁸ As a consequence, Featherstone’s view of the art/life debate is partial – emphasising in particular, the role of aesthetics in the construction of consumption.

²⁶ It must be remembered however, that this caricature is a little misleading – the rhetoric model never did and does not now discourage collaborative labour.

²⁷ Mike Featherstone’s *Consumer Culture and Post Modernism*, Sage, London, 1991. (See especially, chapter entitled ‘The Aestheticisation of Everyday Life’, pp. 65-94.) In a sense, the connection between that moment in the art world and Baudrillard’s critique of consumption should not be surprising given Baudrillard’s early career as Situationist ‘poet’. Featherstone’s essay is cited in Heather Hopfl’s caustic analysis of post-modern managerial aesthetics. See Stephen Linstead and Heather Hopfl, eds., *The Aesthetics of Organisation*, Sage, London, 2000. In particular, see Höpfl’s contribution, ‘The Aesthetics of Reticence: Collections and Recollections’, pp.93-110.

²⁸ Featherstone, op. cit., p. 65.

Featherstone suggests three contexts in which the ‘aestheticisation of everyday life’ can be traced. *Firstly*, he suggests, it can be found in the breakdown of the boundaries between art and life – a theme present in Dada and Surrealism, but one which only reaches fruition in the art world of the 1960s in attempts to de-auraticise art²⁹. *Secondly*, it is found in attempts to turn life into art – a theme he locates in the figure of the flaneur – moving from Baudelaire’s dandy (who makes his very existence, a work of art) to Wilde’s aesthete, the Bloomsbury group, and onwards up to Foucault. The *third* context is that of the saturation of the everyday with signs.³⁰ In Featherstone’s analysis, the historical era of the post modern is co-extensive with the notion of the “aestheticisation of everyday life”, and the “figural semiotics” of consumption³¹ – a consumption whose ‘origin’ can be located in the growth of an urban middle class in mid 19th century.

Featherstone begins his narrative with the development of an anti-formalist art in the 1960s – which he argues, creates the conditions for a re-assessment of commodity production, enacted as - semiology of commodities.³² This history of recent theory then, moves from the reassessment of the art/life divide and the commodity form of the art object, towards a re-inscription of the commodity per se. Since consumption provides the framework of the discussion, the breakdown of the art/life divide-reads as a bleeding of art’s boundaries, a spilling of art into the everyday, or at least a spilling of aesthetics into the *theory* of the everyday.

This is, of course, not the only way to view the art/life relationship. As suggested in Chapter Three, for artists in the 1960s, breaching the boundaries was a way of escaping the *productive* straightjacket of Greenbergian Modernism. On that view, dedifferentiating the borders of art and life involved the loss of art’s specific

²⁹ Featherstone’s discussion is brief and therefore omits an account of the origins of the concept of the art/life divide in Feuerbach’s critique.

³⁰ The genealogy laid out here is from Lukacs, Frankfurt and Benjamin to Lefebvre, Baudrillard and Jameson.

³¹ Featherstone here draws on Scott Lash (adapting Lyotard) and his definition of the post-modern as ‘figural’ in character. See Featherstone, op. cit., p. 69.

³² Interestingly, the line here follows Baudrillard’s own development from Situationist ‘poet’ to sociologist of the economy.

autonomy, as it came increasingly to resemble other forms of visual communication.³³ Featherstone is of course not concerned with the liberation of art from the stultifying effects of formalism, but with the recognition that aesthetics has much to offer an analysis of the everyday. One result of this approach is that his discussion of the art/life relationship is not concerned with aspects of the discourse, which suggest that the de-differentiating of art and life might play a significant part in overcoming the alienation of productive labour.³⁴

The large amount of work synthesised by Featherstone suggests that this view of the art/life divide as an ‘aestheticisation of the everyday’, is relatively widespread within the field of cultural studies. As suggested in Chapter Three, the shift from rhetorical to semiotic/network theories of creative labour is not confined to art theory and has come to represent a large-scale shift in the prevailing ideology of creative *labour* held across a number of academic disciplines. Featherstone’s work suggests then, that this view is supplemented by a theoretical view of *consumption* based on the de-differentiation of art and life.³⁵ In sum then, it is reasonable to suggest that the aestheticisation inherent in theories of the knowledge economy may reflect a more widely held position in post modernist cultural studies as to the aesthetic condition of contemporary social experience. However there are other factors that must be accounted for.

³³ There is an ever-closer synergy between advertising techniques and art (see for example the work of Holzer and Kruger), that attempts to deconstruct and re-construct such operations. One might look here also to the enticing refusal by Wolfgang Tilmans to make any differentiation between his work as fashion photographer, artist and gay porn photographer.

³⁴ In this sense, he also misses the opportunity to make the most of parallels between the Feuerbachian notion of alienation, (as the inculcation of a false consciousness caused by an errant and dishonest art of the Prussian state) and the contemporary role of the ‘figural’ in maintaining political and cultural order.

³⁵ The failure of a meaningful de-differentiation at the level of labour is, however, spectacularly noticeable. Similarly, the dissolving of formalist aesthetic categories in the contemporary art world has been muted in its effect. The new creative freedoms of the 1960s have become today’s orthodoxies, and

MCLUHANISATION

Nowhere in Featherstone's account of the 'aestheticisation of the everyday', is there any mention of Marshall McLuhan. The overall effect of McLuhan's legacy is difficult to quantify. In the 1960s and 70s he enjoyed immense media coverage as a guru figure. Terms he invented – 'the global village', or the 'medium is the message' – have entered into general usage. Yet, towards the end of his life, McLuhan's work became increasingly vilified and discredited. Despite academic rejection of much of his writing, he has however, remained an important (if often un-cited) influence on thinking about the information age.³⁶

Given the central role that Baudrillard's writing plays in Featherstone's account of aestheticisation³⁷, it is important to point up his relationship with McLuhan.

despite the merging of aesthetic techniques with the world of advertising, at a sociological level, the art world remains a distinct and exclusive heterotopia.

³⁶ A central irony of McLuhan's legacy is the frequent conflict between those who have taken up advice he dished out as a management consultant, and those who have taken up the radicalism of his earlier work. McLuhan's early work, *The Mechanical Bride* and *The Gutenberg Galaxy*, have a radical political edge that has much to commend it to the anti-copyright movement. Arguably, McLuhan's work may even be the *origin* of much of the literary debate about authorship and copyright – rather than the frequently cited works of Barthes and Foucault. The latter are not nearly as overt in their political critique of authorship as McLuhan managed to be in the early 1950s. McLuhan's objection to the 'book culture', that developed from the invention of printing, was based on the notion that it atomised and privatised knowledge that had traditionally been communally held in an oral form. In short, the *book* brought about the *author* – who individualised common knowledge and parcelled it up in to packets of private property. Such a 'privatisation of knowledge' is obviously underpinned by concepts of copyright, though I have yet to find direct mention of intellectual property anywhere in McLuhan's writing. See here McLuhan's *The Gutenberg Galaxy: The making of Typographic Man*, Routledge and Paul Kegan, 1962, and, *The Mechanical Bride: Folklore of Industrial Man*, Routledge and Paul Kegan, 1967. See also Jonathan Miller, *McLuhan*, Fontana and Collins, London, 1971. A good example of McLuhan's influence can be found in Jeremy Rifkin's *The Biotech Century: Harnessing The Gene And Remaking The World*, Penguin, New York, 1998. See especially, Rifkin's uncritical acceptance of McLuhan's assertions Rifkin, op. cit., p. 178. Some of McLuhan's later work on the return to 'oralism' inherent in the concept of the 'Global Village' can be seen as a direct continuation of his earlier criticism of the economic and political ideology of authorship. However, running counter to such notions, are McLuhan's re-conceptualisations of industrial products and his work on the corporate lecture circuit that did so much to make multinational corporations aware of the strategic importance of the intellectual property component of their balance sheets. The most obvious site of tension between contenders for the inheritance of McLuhan's work is in the debate over *online* intellectual property. Here, the inheritors of his early work, and 'oralist' line, come up against the inheritors of his later approach to asset management.

³⁷ As suggested earlier, the influence of Featherstone and Baudrillard is also present in Hopfl and Linstead's *The Aesthetics of Organisation*.

Baudrillard's important works, 'The System of Objects' and 'Consumer Society',³⁸ are indebted to McLuhan³⁹ – a debt that is only made explicit in his later offerings.⁴⁰ The theoretical development that Baudrillard is often credited with – the application of an analysis of visual culture to that of economic and political culture – occurs earlier in McLuhan's published work of the 1950s.

In his preface to *The Mechanical Bride* (1951), Marshall McLuhan positioned his project in the following way

Ever since Buckhardt saw that the meaning of Machiavelli's method was to turn the state into a work of art by the rational manipulation of power, it has been an open possibility to apply the method of art analysis to the critical evaluation of society. That is attempted here. The western world, dedicated since the sixteenth century to the increase and solidification of the power of the state, has developed an artistic unity of effect, which makes artistic criticism of that effect quite feasible.⁴¹

The early writing of McLuhan recognised a deep-seated aestheticisation at work in political theory and attempted to analyse the kind of image-orientated economy that such aestheticisation produced. McLuhan was deeply suspicious of the "aesthetics of power", and explicitly recognised the opportunity for repression such political and economic concepts suggested. He suggests in the preface that "Visual symbols have been employed in an effort to paralyse the mind", and goes on to suggest that, "it is

³⁸ See Jean Baudrillard, 'The System of Objects', 1968, and 'Consumer Society', 1970, in *Jean Baudrillard: Collected Writings*, ed., Mark Poster, Polity, Cambridge, 1988, pp. 10-28 and pp.28-56, respectively.

³⁹ This early work is most frequently (and correctly) regarded as a logical development of Roland Barthes application of semiology to the analysis of visual culture.

⁴⁰ See especially, opening section of the chapter 'Requiem for the Media' in *For a Critique of the Political Economy of the Sign*, trans. Charles Levin, Telos, St Louis, 1981, pp. 164-184.

⁴¹ McLuhan, *Mechanical Bride*, op. cit., pp. (v)-(vi). First published, New York, 1951. First published, UK, 1967. It is worth pointing out that McLuhan's early work, though not widely discussed in the 1950s, predates the seminal application of semiology to the analysis of visual culture in Roland Barthes' *Mythologies*, 1956. It also predates the development of theories of 'the spectacle' in the 1960s.

observable that the more illusion and falsehood needed to maintain any given state of affairs, the more tyranny is needed to maintain the illusion and falsehood".⁴²

Despite becoming a somewhat discredited figure, McLuhan's move from Professor of English Literature to 'corporate theorist' of the 'information society' makes him a crucial figure in the development of the 'cultural turn' in economics. While his general mode of analysis remained fairly constant over the years, the political radicalism of his early writing dissipated as his career increasingly became that of lecturer and private advisor to large corporations.⁴³

His importance to the 'cultural turn' lays in the fact that in later books, (e.g. *Understanding Media*) and in his work as corporate lecturer, McLuhan evangelised for changes to traditional industries that were *conceptual* rather than material in nature. The beginnings of his reconceptualisation leading to the notion of the knowledge economy, can be seen in the famous essay 'The Medium is the Message'⁴⁴. Here, McLuhan suggests that the light bulb can be best seen as a *medium*, rather than as a *physical* unit of industrial production. A nighttime game of baseball, or a hospital operation, are, he argues, made possible by artificial light and can therefore be conceived as "in some way, the *content* of electric light." Moving from aesthetic analysis to economic pedagogy, he then suggests that:

It is only today that industries have become aware of the various kinds of business in which they are engaged. When IBM discovered that it was not in the business of making office equipment or business machines, but that it was in the business of processing information, then it began to navigate with clear

⁴² McLuhan, *The Mechanical Bride*, op. cit., p. (v).

⁴³ The toning down of the overtly political sentiments of his early work has never really been explained. In his deconstruction of McLuhan in the early 1970s, Jonathan Millar suggested that an affiliation to some form of socialism can be found in all McLuhan's writing. He does not however attempt a deep analysis of McLuhan's position on Marxism, or attempt to square his socialism with his role of corporate advisor. See Miller, op. cit. The reasons for the change are uncertain, however it is possible that stagnation in McLuhan's academic career and serious illness in later life simply encouraged him to 'take the money'.

⁴⁴ 'The Medium is the Message' can be found in Marshall McLuhan's *Understanding Media: the Extensions of Man*, Routledge, London, 1964.

vision. The General Electric Company makes a considerable portion of its profits from electric light bulbs and lighting systems. It has not yet discovered that, quite as much as AT&T, it is in the business of moving information.⁴⁵

Of course, McLuhan's observation that disparities of information are crucial to the creation of profit, cannot be said to be original. However, he nevertheless drew dramatic attention to the large amounts of weightless information in the products of modern industrial economies. So much so, that viewing the economy in terms of straightforward material production of heavy industry was becoming, even in the late 1960s, increasingly anachronistic. McLuhan's writing developed over the course of fifteen years in a startling way transforming his role—from *critic* of the aesthetic economy, into being its most vociferous campaigner. In the analysis of the early 1950s, the aesthetics of power, and its material 'effect' in the 'aesthetic economy' of consumption, is a site of critical, political contention. By the mid 1960s – as the tenor of the 'The Medium is the Message' makes clear – McLuhan has become an active proselytiser for a revolution in the way the economy was *conceptualised* that is aestheticising in character.

There are, in other words, two McLuhans. The *early* McLuhan recognises an implicit connection between the aesthetics of political power and the aestheticisation of the economy. The *later* work positions him as one of the first theorists of the 'weightless economy'. An *anti-formalism* was central to both positions, insofar as he refused the central tenet of high modernism – i.e. that a separation must be maintained between the realms of 'art' and 'life'. However, the *consequences* that stemmed from such a position were very different. For the early McLuhan, the *aestheticisation of everyday life* was an effect of a 400-year-old political technology ushered in by Machiavelli in the 16th century. The aesthetic economy was therefore repressive and the critic's job was to unmask its operations. For the later McLuhan the aestheticisation, or 'informisation', of commodities became a vital insight into industrial production that would 'revolutionise' the organisation of companies and the way corporations

⁴⁵ Ibid., p. 9.

regarded the commodity. Despite the lack of citation in academic work, McLuhan is a crucial figure in any account of the theoretical developments leading to the *concept* of the knowledge economy. McLuhan's own life exemplifies the shift from critical theory to think-tank aesthetics that is so noticeable in contemporary economic theory. His connection to the cultural turn however is best understood as 'soft', consisting in informal understandings, a feel for the information age, something akin to a folk memory of the information age.

THE IDEOLOGY OF CREATIVE DESTRUCTION

Contemporary Re-Emergence

The factors laid out above – the spread of the semiotic/network model of creative labour, the aestheticisation of everyday life, the semiotics of consumption, the informisation of material culture – create a fertile ground from which a concept such as the knowledge economy might grow. It is strange then that when turning to theorisations of the knowledge economy produced by economists, the theoretical argument so much in evidence in critical theory and cultural studies barely rates a mention.⁴⁶ However, the lack of citation means little, since textual analysis yields a wealth of evidence pointing towards aestheticisation.

Charles Leadbeater's *Living on Thin Air* provides one of the best attempts to create a theoretical genealogy of economic theory relating to the knowledge economy citing *only* economists. Leadbeater's genealogy focuses its attention on two specific traditions economic theory – economists that have historically placed an emphasis on *knowledge management* and economists who have concentrated on the *creation of knowledge* and in particular *the role of the entrepreneur*.

⁴⁶ There are of course two possible explanations. Firstly, interdisciplinary approaches are actually still quite rare on the ground. Secondly, 'real' economists – even those of the knowledge economy – often attach little academic importance to the 'cultural studies' approach.

In the group of ‘knowledge management’ theorists, Leadbeater cites the importance of Alfred Marshall, who, as far back as the 1920s, suggested that knowledge was the most powerful engine of economic production. Leadbeater also cites Edith Penrose, for her suggestion that the most valuable resource in any firm was its “distinctive stock of knowledge and experience”.⁴⁷ Penrose’s theme was later taken up by Richard Nelson and Sidney Winter who refined the approach, arguing that knowledge is an aspect of a firm’s ‘memory’.⁴⁸ Leadbeater’s own contribution to the teleology is to argue for a shift from concentration on the *management* of knowledge toward a concentration on how it is *created*.

When turning his attention to the latter issue – the creation of knowledge – his sense of aesthetics is clearly in evidence. In this genealogy, the creation of knowledge is positioned as co-extensive with the role of the entrepreneur and Leadbeater sticks entirely with those who have theorised the role.⁴⁹ Leadbeater puts aside definitions given by Adam Smith, Keynes, Mill and Alfred Marshall which all, in one way or another, describe the entrepreneur as either a supplier or manager of capital and labour. The heroes Leadbeater chooses to recall tell a particular narrative about entrepreneurship and knowledge.

Jean Baptiste Say’s concept of the entrepreneur as an ‘agent of change’ is cited⁵⁰ and its influence on Leon Walras noted. Walras pushed the envelope of Say’s ideas further suggesting the role of the entrepreneur was to bring together and *compose* the complementary assets of skills, labour and capital. Moving further down in the genealogy, Leadbeater places Frank Knight’s claim – made in the early 1920s – that the role of entrepreneur was to decide what need to be done and how it was to be achieved, without necessarily being *certain* how the future would pan out. The entrepreneur here is a figure takes risks on the future while lesser souls merely

⁴⁷ Leadbeater, op. cit., pp. 67-70.

⁴⁸ In such a context, memory was defined as that which could be located in the routines and procedures of a firm.

⁴⁹ Op. cit., pp. 98-101.

⁵⁰ Say’s ‘entrepreneur’ effectively shifts resources from sectors of low-productivity (such as agriculture) to areas of high productivity such as manufacturing. Ibid., p. 99.

entrench themselves in the already known. Knight's entrepreneur says Leadbeater is a 'masters of precognition' who is confident enough to work out the emerging shape of new markets and industries and 'confident enough to back their judgement.'⁵¹ The final figures in the genealogy are Israel Kirzner and Joseph Schumpeter. Israel Kirzner's entrepreneur has moved far from the supplier and manager of capital and labour model. For Kirzner the entrepreneur is a figure that thrives on 'the creative art of discovery and learning'. The most significant figure in the genealogy however is Joseph Schumpeter and his concept of '*creative destruction*' – the entrepreneur that destroys the old so that he might build the *modern* in its place.

The most crucial aspect of this genealogy is the way Leadbeater makes it appear that there is a 'natural' development in the theory of the entrepreneur, from the crude manager to a more creative figure with foresight and guts, towards an 'ideal' incarnation – the fully aestheticised, self reflexive, creative/destructive figure suggested by Kirzner and Schumpeter. The genealogy laid out by Leadbeater is highly selective and utterly teleological. There is no reason why a recounting of the production of knowledge in business should be so heavily focussed on the entrepreneur.⁵² Nor is there any particularly good reason why the entrepreneur should increasingly come to resemble the figure of the avant gardist artist! The story of knowledge production Leadbeater wishes to tell has particular characteristics in other words. Knowledge production is dependant upon a particular kind of economic agent – the entrepreneur – a risk taking, creative/destructive figure, who operates as much out of sheer exhilaration of creative endeavour as out of economic rationality. The primary figure of knowledge production in other words is aesthetic generally, and modernist-avant-gardist in particular.

Leadbeater's teleology guides the reader softly towards a recognition that there is a 'natural' sympathy between 'knowledge creation' and a figure of entrepreneurship that

⁵¹ Ibid., p. 100.

⁵² To give Leadbeater his dues, elsewhere in his book, he does give some credence to the notion that knowledge production may not be entirely focussed in one figure in head office. Running contrary to

is aesthetic in character. Even where there is no direct citation of social theory relating to aestheticisation therefore the aestheticisation of the contemporary economy nevertheless makes itself felt.⁵³

Schumpeter's concept of *creative destruction* plays a leading role in Leadbeater's account of the knowledge economy and in many other theorisations of the knowledge economy.⁵⁴ The frequent recurrence of Schumpeter's theme in contemporary theory requires some explanation.

Evolutionary Economics

A notable aspect of both the knowledge economy and theorisations of globalisation in general is the reliance on 'evolutionary' approaches to the economy. Schumpeter is one of the earliest theorists of such an approach and his influence is evident in a number of theorisations of the knowledge economy.⁵⁵ The evolutionary approach to the firm places learning, knowledge creation and innovation at the centre of analysis. In doing so, it is recognised that the firm is in a constant state of evolution and not a static entity. In such theories, the firm is conceived of as an organic unit capable of learning, devising and retaining knowledge about productive practices. Seen thus a firm is never able to act on the fully 'rational' basis put forward in neo-classical economic theory. In evolutionary economics, the firm is a temporal entity, devised

these sections however, is the continual incantation that it is high time that we all became more like the creative, risk-taking entrepreneur.

⁵³ A more detailed analysis of why Leadbeater's vision of the knowledge economy is so aestheticised, occurs later in this chapter.

⁵⁴ See for example, Richard Foster and Sarah Kaplan, *Creative Destruction: From Built-to-Last to Built-to-Perform*, F.T., Prentice Hall and Pearson Education, Edinburgh, 2001. See also, Cooke and Morgan, op. cit., pp. 10-12, 15-16, 33, 41, 194-6, 198. Also, Philip Fisher *Still the New World: American Literature in a Culture of Creative Destruction*, Harvard University Press, London, 1999, p. 13; Richard Oliver *The Coming Biotech Age* p40. Kevin Kelly, *New Rules For The New Economy* p 86; Dag Björkegren *The Culture Business: Management Strategies of the Arts-Related Business*, Routledge, London, 1996; Luis Suarez-Villa, op.cit., p. 175 and Bryson and Daniels op. cit., p. 74.

⁵⁵ Cooke and Morgan cite Schumpeter as the 'father' of evolutionary economics. In particular they point to his influence on Nelson and Winter's 'seminal' theory of the firm. See Richard Nelson and Sidney Winter, *An Evolutionary Theory of Economic Change*, Harvard University Press, Cambridge Massachusetts, 1982.

under the conditions of history, and as such at no time fully resolved to itself. Firms are, by their nature, in a constant state of flux. Therefore, there is never a point at which they possess the kind of ‘perfect information’ that would enable them to make entirely logical and rational decisions. As temporal entities, subject to the history, firms only ever possess asymmetries of information and are thus never entirely rationally and predictable in their operation.⁵⁶

The Ideology of Schumpeter’s History

Schumpeter’s is the first attempt at such an evolutionary theory. In the short but crucial chapter in his late work *Capitalism, Socialism and Democracy* (1943) Schumpeter lays out what has become his most influential idea – the concept of ‘creative destruction.’ The topic of creativity and innovation, and its role as the engine of history, comes into the chapter on creative destruction in an almost incidental way as part of a more lengthy and complex critique of the neo-classical concept of price competition. Defining ‘competition’ *entirely* through the rational operations of price, suggests Schumpeter, is erroneous. Competition is far more complex and the application of price mechanism models simply disassembles that complexity. The competitiveness, and ultimately the efficiency, of a company can only be measured when the company is situated in a social and historical context. Schumpeter therefore dismisses attempts to measure the worth of a company on the usual short-term indicators of success and suggests rather that the company is seen as part of broader ‘evolutionary’ processes of society.

The view expressed by Schumpeter has itself to be situated within the theories of history that were dominant at the time he was writing. The view of history as dialectical, he freely admits in the text, is adapted from Marxism. Schumpeter however brings a decisively ‘cultural’ feel to the notion – it might even be termed a

⁵⁶ For a discussion of the model developed from Nelson and Winter, see Cooke and Morgan, op. cit., pp. 13-17.

‘cultural turn’.⁵⁷ History, in Schumpeter’s view, is driven not by the high political dialectic of ideas, nor by the dialectic struggle of economic determinism, but by a *dialectic of creativity*. The broad historical movement in which competition between firms is enacted is therefore driven by the forces of invention and the onward thrust of innovation. Productive forces per se are not the engine that drives history, such forces are themselves primarily driven by human invention and innovation.⁵⁸

Capitalism, in other words, is a ‘method of economic change’ that can never be regarded as static, its evolutionary nature cannot be satisfactorily explained by reference to social factors such as wars, revolutions, population flows and shifts of capital. The ‘fundamental impulse’ Schumpeter asserts, is innovation – *new* forms of consumer goods, *new* kinds of production, *new* transportation systems, *new* markets and *new* forms of industrial organisation.⁵⁹

In such a schema history itself is driven by ‘incessant revolutionary’ changes to the ‘productive apparatus’ that unfold ‘through decades or centuries’. Industries mutate in an organic manner that ‘revolutionises the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one.’⁶⁰ Schumpeter sums up this process as definitive of capitalism itself. The process of Creative Destruction is *the*

⁵⁷ Interestingly Schumpeter’s early work on the creative entrepreneur was published in the same year, (1911) as Henri Bergson’s *Creative Evolution*. An exposition on this milieu is beyond the scope of the current study, but may stand further investigation. See Henri Bergson, *Creative Evolution*, trans. Arthur Mitchell, Dover, New York, 1988.

⁵⁸ Suarez-Villa’s suggestion, that Technocapitalism (the knowledge economy) consists of a development leading from “the reproduction of capital” towards “the reproduction of inventive creativity” is therefore not without precedent. Suarez-Villa, op. cit., p. 4.

⁵⁹ The full passage reads as follows: “Capitalism, then, is by nature a form or method of economic change and not only ever is but never can be stationary. And this evolutionary character of the capitalist process is not merely due to the fact that economic life goes on in a social and natural environment which changes and by its change alters the data of economic action; this fact is important and these changes (wars, revolutions and so on) often condition industrial change, but they are not its prime movers. Nor is this evolutionary character due to a quasi-automatic increase in population and capital or to the vagaries of monetary systems of which exactly the same thing holds true. The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers’ goods, the new methods of production or transportation, the new markets, and new forms of industrial organisation that capitalist enterprise creates.”

See Joseph Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, London, 1994 (first published, 1943), pp. 82-83.

⁶⁰ Ibid., p. 83.

‘essential fact about capitalism’. It is, he asserts, ‘what capitalism consists in and what every capitalist concern has got to live in.’⁶¹ In other words individual companies can only be realistically appraised within context of ‘the perennial gale of creative destruction’, they themselves create.⁶² Similarly capitalism as a whole cannot be understood simply in terms of the administration of a set of currently existing structures, the ‘relevant question’ Schumpeter says, is ‘how it creates and destroys them.’

For Schumpeter then, the economy it is *not* driven by production per se but by *the production of ideas about production*. Another way of expressing this is to say that while competition is central to driving the economy, competitive advantage is not secured by *price* competition but by innovation or *quality* competition.⁶³ In the contemporary parlance of the knowledge economy, Schumpeter’s concept can be expressed by saying that competition is best secured by creativity that is ‘*radical*’ in character as opposed to the creativity – engendered by price competition – that is ‘*incremental*’ in character.⁶⁴

The Ideology of Schumpeter’s Creative Theory

Given the re-emergence of Schumpeter’s theory of creative destruction in theories of the knowledge economy it is important to provide some historical context for his views. Unsurprisingly most historical work on Schumpeter has tended to set his economics within the ‘big ideas’ of his generation – the conflict between Capitalism

⁶¹ Ibid., p. 83.

⁶² Ibid., p. 84.

⁶³ See Schumpeter op. cit., p.84, and Cooke and Morgan, op. cit., pp. 10-17.

⁶⁴ Although Schumpeter does not express himself in terms of ‘radical’ and ‘incremental’, the concept is central to his view of competition. In more recent theorisations of the knowledge economy, such expressions have become commonplace. However, it is worth pointing out that the main difference between Schumpeter’s economics and its contemporary incarnation rests on the issue of intellectual property. Schumpeter’s innovation competition suggests only that creativity will lead to short term market advantages, not the concretisation of those advantages into units of intellectual property.

and Communism, the role of liberal democracy etc.⁶⁵ However, given the central role granted to creativity in his economic model it is also necessary to pin down Schumpeter's own 'ideology of creativity' with an historical context. It is often suggested that, in terms of innovation theory, that there are two Schumpeter's.⁶⁶ The early Schumpeter presaged the role of individual entrepreneurs in the process of innovation, while the later Schumpeter moved towards a more 'socialised' view of invention/innovation.⁶⁷

Schumpeter's early work theorising the role of entrepreneurship – *The Theory of Economic Development*⁶⁸ – is strongly orientated towards individualism. The agent of invention, innovation and change in the economy is portrayed in a noticeably Romantic idiom. The entrepreneur of Schumpeter's early years is a heroic, charismatic figure, with great vision and will, which are dedicated to breaking up routines and conventions. The success of such figures depends on an 'intuition' that allows them to see what others cannot and gives them the courage to act on impulse. Schumpeter specifically states that "no account of the principles" by which this creative figure operates can be given.⁶⁹ He further suggests that the 'mental freedom' of the

⁶⁵ See for example, Richard Swedberg's introduction to *Capitalism, Socialism and Democracy*, Schumpeter, op. cit. Perhaps, given Schumpeter's concern to navigate the waters between Communism and Capitalism, his re-emergence in 'Third Way' economic theory should come as no surprise. As far as setting a context for Schumpeter beyond such political and historical concerns, Swedberg makes some interesting connections between Schumpeter's personal life and the development of his work. Rick Szostak suggests also, that a good deal of Schumpeter's inconsistency can be put down to his attempt to meld aesthetic and scientific approaches to economic theory together and that Schumpeter's depressive personality played some role in his inability to fully resolve such conflicts. See Szostak, op. cit.

⁶⁶ See Cooke and Morgan, op. cit. Leadbeater makes a similar point, but then muddies the water by making generalisations drawn from both periods of his writing.

⁶⁷ For further discussion, see Cooke and Morgan, op. cit. It is worth noting that Schumpeter believed that, even in the teens of the 20th century, creativity was becoming increasingly socialised due to the growth of corporate capitalism. By the time of writing *Capitalism, Socialism and Democracy*, in the 1940s, Schumpeter regarded that socialisation as a 'good thing'. Corporate control was responsible for the rise in living standards over the preceding fifty years. However, corporatisation meant that the character of capitalism was changing – history was moving away from capitalism and eventually, it would become the victim of its own success. This is a variant on the theme that capitalism has within it the seeds of its own destruction.

⁶⁸ First published, 1911. First published in English, 1934.

⁶⁹ Schumpeter quoted in Cooke and Morgan, op. cit., p. 11. There is an obvious analogy here with the notion of genius as a figure who works beyond the rule.

entrepreneur, ‘presupposes a great surplus force over the everyday demand and is something peculiar and by nature rare.’⁷⁰

The trope utilised here to outline the ideal character of the entrepreneur is clearly a close relative of the genius figure of 19th century Romanticism. It is a figure however that, even in this early phase of his thinking, Schumpeter views as giving way to a new model of creative labour that is more ‘social’, or collective, in orientation.⁷¹ The growth of corporations meant an increasing bureaucratisation of the innovation process. In such organisations, trained specialists took on the creative role once held by the heroic entrepreneur of old. While believing the development from creative entrepreneur to corporate R&D team was a part of the general evolution of capitalism, it is interesting to note that he laments the loss of ‘romance’ incurred and specifically describes the development as leading away from the old ‘flash of genius’⁷².

Given the general framework of creative theory suggested by his writing, it is important to examine the cultural background in which the changing role of creative subject in Schumpeter’s writing is embedded. *The Theory of Economic Development* is a product of early European Modernism. In terms of creative theory, it replicates many of the uncertainties and commonplaces of the period. Economic change results from the activities of a tiny minority of forceful, creative individualists from whom the

⁷⁰ Quoted in Cooke and Morgan, op. cit., p. 11. The full passage reads as follows. “Here the success of everything depends on intuition, the capacity of seeing things in a way which afterwards proves to be true, even though it cannot be established at the moment, and of grasping the essential fact, discarding the unessential, even though one can give no account of the principles by which this is done...In the breast of one who wishes to do something new, the forces of habit rise up and bear witness against the embryonic project. A new and another kind of effort of will is therefore necessary in order to wrest, amidst the work and care of the daily round, scope and time for conceiving and working out the new combination... This mental freedom presupposes a great surplus force over the everyday demand and is something peculiar and by nature rare”.

⁷¹ By “social”, Schumpeter simply means that which is not individualist. He has in mind here, the teams of specialists brought together in corporate R&D departments. For Schumpeter, the shift from creative entrepreneur to corporate creativity was a part of the general evolution of capitalism.

⁷² “The romance of earlier commercial adventure is rapidly wearing away, because so many things can be strictly calculated that had of old to be visualised in a flash of genius.” Quoted in Cooke and Morgan, op. cit., p. 11. (It is worth reiterating that this observation and lament is now approaching its centenary.) Cooke and Morgan also note that even in later work, Schumpeter tends to prioritise the work of invention over the broader process of innovation. This view is now generally regarded as dated. Most contemporary theory rejects such linear thinking and stresses the multidirectional interplay between all levels of production and consumption.

rest of the economy will eventually draw its character – a view that is entirely consonant with the notion of Romantic genius that still operated in some parts of the early modernist avant gardes. The development of a socialised creativity within the research and development departments of corporations is not without parallel in the cultural sphere of the time either. One of the crucial developments of the early modernist avant gardes is the disaggregation of the concept of Romantic genius and its generalisation within the concept of the ‘movement’.⁷³

Another way of putting this is to say that the collectivity of ‘the movement’ takes on the identity and creative ticks of the individual creative subject of Romantic theory. The subject space of Romantic genius led aesthetic and social development – creating in fits and starts, such a figure was unconcerned with the judgements of the public thought. The ‘cost’ of such prodigious talent was melancholia. An outstanding ability set the genius figure apart from society, leaving them misunderstood, isolated and depressed. The curse of being above the mass and ahead of one’s time meant that the genius myth frequently ended in the squandering and dissipation of talents. Within early Modernism, the characteristics of such a figure are de-individualised, disaggregated and spread across a collectivity of greater and minor players within the concept of a ‘movement’. The ‘movement’, rather than the individual, became the radical pushing the boundaries forward. Where the figure of genius created hermetically, with characteristic disregard for the audience, the movement created as individuals but with communication with other members of the group a defining priority – the movement, not the individual, spluttered into view in a bright burst of creativity before its internal contradictions led it towards dissolution. The ‘cost’ of creativity, its melancholia, became not the sickness of an individual mind but the social alienation of the movement. Despite de-centring the cult of the individualist,

⁷³ In his 1968 essay, ‘The Concept of a Movement’, Renato Poggioli positions the ‘movement’ as if it were an individual subject on the psychoanalyst’s couch. For example, his concept of ‘antagonism’ is specifically related to Oedipal father and son relationships. Similarly, his concept of ‘agonism’ – the internal fractures that bring about self-destruction of the movement – is a fairly direct relative of the melancholic aspects of the genius model. See Renato Poggioli, *Theory of the Avant Garde*, trans. Gerald Fitzgerald, Harvard University Press, London, 1968, pp. 16-40.

Romantic, melancholic, genius, the concept itself was never entirely eradicated.⁷⁴ It was always possible to reconstitute a representative, or 'ideal', figure from such a network and actualise the ideal in a real person. In other words, a Picasso could always be extracted from the networked inventiveness of Cubism, a Pollock or a Rothko from the New York School⁷⁵

Within the general evolutionary scheme of economic history laid out by Schumpeter human creativity is cast in the leading role. In Schumpeter's own work between 1911 and 1943, the way such creativity is conceived undergoes considerable change. The early view of the entrepreneur as creative dynamo of the economy is deeply indebted to the creative ideologies of Romanticism. Schumpeter's later work, in which socialised corporate creativity plays the role of dynamo, can be regarded as Schumpeter's own shift into Modernism. It is unclear whether the shift in view is driven by a theoretical reassessment of his earlier position or by a conflict between the earlier theory and 'reality' as he experienced it after his move to America, or whether historical conditions themselves necessitated the shift in position.⁷⁶ Whatever the actual position, it is important to recognise that Schumpeter's view coheres remarkably well with the general view of the creative subject at work in the early modernist avant gardes.

The development in Schumpeter's work from Romanticism to Modernism, from individual to collective explanations of creative production, is however never entirely

⁷⁴ It is interesting to note that the Saint-Simonian notion of avant-gardism had its origin in the moment of Romanticism. The avant gardist position, whether expressed through individualism or through the collectivity of the 'movement', has always maintained an element of the 'Hero' of Greek myth.

⁷⁵ Though the avant garde 'movement' was a 'collective' arrangement in the sense described, the creative network was not viewed as a means of overcoming the unitary individualism of the rhetorical model of creative production. It was only in the 1960s, for the reasons described in Chapter Three, that creative networks were consciously employed as a means of overcoming the 'authorial' mode of production and consumption. Though Modernist avant gardes had collective characteristics and ambitions, this did not amount to a *ideology* of networked production. (For a discussion of the continual and rather haphazard re-emergence of the genius figure in 20th century art historical method, see Eric Fernie's introduction to *Art History and its Methods: A Critical Anthology*, Phaidon, London 1996. For a discussion of the early modernist notion of 'creativity' as present in the general population (as opposed to the 'academic/traditional' concept of talent), see Thierry de Duve's contribution to the conference *The Artist and the Academy: Issues in Fine Art Education and the Wider Cultural Context*, eds., Nicholas de Ville and Stephen Foster, John Hansard Gallery, Southampton, 1994.

clear-cut.⁷⁷ Despite the move towards a more socialised view of creativity elements of the individualist model remain. Much in the way that elements of the genius/melancholic figure remained within the concept of an avant gardist movement, elements of the individualist genius/melancholic model remain in Schumpeter's later work.

The concept of creative destruction in the late work, and upon which Schumpeter's relevance to the post modern economy is based, is the central example of this blurred vision. The avant gardist movement was infused with residual elements of the genius model, its collective creative principles regularly imploding, just as the mythic Romantic figure ended frequently in personal destruction. The model of creative destruction in Schumpeter's later work is similarly drawn from the individualist model but *applied to collective production*.⁷⁸ The notion of creative destruction is essentially a remapping of the genius/melancholic on to the collective production of the economy at large – an attempt to grasp the collectivity of production in all its detail in one simple trope – the metaphor of personhood. In this model the economy is given an *identity and pathology*.⁷⁹ The cost of genius was dysfunction and loss. The cost of the

⁷⁶ Schumpeter clearly thought that the economic world, empirically observed, had changed.

⁷⁷ Cooke and Morgan note that, even in his later work, Schumpeter tends to prioritise the work of *invention* over the broader process of *innovation* – or put colloquially, that of the individual over the collective and the genius, over the network.

⁷⁸ More subtly put, one might say that, in Modernism, the figure of the genius/melancholic is atomised and then expanded as a metaphor with which to grasp the new conditions of the avant gardist movement – conditions which may not be regarded as collective. However, in Schumpeter's economics, by comparison, that which is *obviously* collective, is grasped by a metaphor that is individualist in character – the notion of individual genius or of self-destructive genius, which he terms creative destruction.

⁷⁹ The construction of Romantic genius is a striking example of the *imposition* of the identity of otherness. It is not that the psychological aspects of the genius/melancholic are natural or elective, so much as it is that they are *imposed* on the individual as a specific form of subjecthood, with a specific social role in mind. Writers inspired by Foucault, (e.g. Bennett, Featherstone and others) concentrate largely on the social control of 18th and 19th century populations – through the substitution of 'unruly' pastimes (e.g. country fairs) with more 'disciplined' sites of 'spectacle' (e.g. the museum, art gallery and shopping mall). Little attention however, has been paid to the Romantic figure of melancholic genius in contemporary contexts. On a superficial level the pathologising and medicalising of artists who were frequently social radicals, is entirely in line with such a social process. On a more plausible level, it is not hard to see that the subject-space of genius/melancholic is a screen on which outrageous desires and fears can be projected and played out. In context of the broader project of creating 'disciplined' populations for emerging nation states, the genius/melancholic provided a marker-figure of social deviance and retribution, a role that in contemporary society is occupied by the celebrity. Such subjects provide a site of atavistic role-play. On the one hand, the genius-celebrity is expected to push

benefits of a truly ‘creative’ economy was the destruction of pre-existing orders; capitalism consisted entirely in that loss, the fact of that bargain according to Schumpeter.⁸⁰

The fact that the concept of creative destruction, so central in Schumpeter’s later writing, draws on the Romantic myth of the genius/melancholic is surprising given that, as far back as 1911, he believed that the era of creative individualism – represented by the entrepreneur – was already giving way to a socialised, corporate creativity. However, the accommodation Schumpeter made between elements of Modernist and Romantic creative ideology is entirely in keeping with the general confusion of such theories within early Modernism. In both art and economic theory, Romanticism was not so much overruled so much as diffused in to new modes of operation.⁸¹

One vital aspect of the mythology of the genius/melancholic that is drawn over into the Modernist phase of creativity is its medicalisation of the creative function. The notion of the genius/melancholic suggests a ‘pathology of creativity’⁸². The labour of genius in Romantic theory is not only fraught with personal costs to the subject, but those costs are understood in relation to an identifiable *disease*. As with all diseases, the subject cannot be said to be *consciously* in control of the symptoms, and is therefore never entirely culpable for their actions. The aesthetic at the heart of creative

the limit of the social envelope, and on the other, it is demanded that they pay the customary price. For the genius, the cost is madness, in comparison with that of melancholia, for the post-modern celebrity (or a spell in ‘The Priory’).

⁸⁰ In an interesting deconstruction of the contemporary uses of post-modernist aesthetics in managerial theory, Heather Höpfl defines melancholy and loss as aspects to the dislocation of the self in corporate organisations. See Linstead and Höpfl, op. cit. In particular, see here Höpfl’s own essay, op. cit., pp. 93-110.

⁸¹ It is arguable as to whether Romanticism has ever really gone away. Every art school is still infused with (untaught) elements of its theory. In a sense, Romantic ideology plays out its life as a vernacular concept of creative production and subject-spaces.

⁸² Szostak suggests that Schumpeter’s own depressive personality may have had some role in his characterisation of the economy as creative/destructive. He suggests further, that a tension was present in Schumpeter’s writing between elements of ‘science’ and ‘art’, and that such a tension led to the chronic depression which dogged Schumpeter throughout his life. In this way, Szostak proposes that Schumpeter’s desire for certainty was compromised by the “tentativeness of the science that underpinned his economics”. Szostak, op. cit., p. 19.

destruction moves therefore with the inevitability of a disease that is beyond the conscious control of individual agents.

Taken as a whole then, creative destruction functions as description of the motor of an evolutionary history in which *all* economic activity is inscribed.⁸³ The creative destructive model buries the cost side of economic development beneath the gloss of aesthetic achievement. In such a figure, history moves organically, beyond the literal control of the individual subjects that are charged with creative production. Subjects in such an aesthetic model may drive the motor but they are in turn swept along and driven by its collective thrust. In other words the pathology of the genius/melancholic, when read as the creative/destructive economy, lends a sense of helplessness to the economic process. The affliction of melancholia has its parallel in the affliction of destruction. The *subject*, whether that of Romantic theory or the personated economy, is not consciously in control of 'their' actions, the 'gift' of genius or socialised creativity comes with the necessary strings attached. The loss represented by destruction is not only 'reasonable', given the benefits of creativity, it is *inevitable*, part of an 'organic' and therefore natural process.⁸⁴

In this bipartite model, creativity is clearly represented as 'good', destruction and loss as a price worth paying. The transcendental position of creativity as good-in-itself is one repeated frequently in contemporary theories of the knowledge economy. As outlined above, Suarez-Villa replaces the well-worn dictum that capitalism's aim is to reproduce capital with the notion that the most important economic, *and social*, aim is

⁸³ It is interesting to note that *Capitalism, Socialism and Democracy* was first published ten years before Duchamp's 'The Creative Act' of 1954. Both figures are embedded in the moment of modernism, but recovered by the post modern. The production cycle of innovation that Schumpeter describes, has much in common with the 'temporal network' outlined by Duchamp in 'The Creative Act', (as discussed above, in chapter Three). The historical scope of the network, its temporality, is beyond the grasp and influence of the subject. for Schumpeter, measuring the economic success of a company, is as problematic as assessing the artwork is for Duchamp – and for the same reasons.

⁸⁴ It is interesting to speculate on just how far a specifically German Romanticism is at work in Schumpeter's view of creativity. (Schumpeter was born in Austria and spent the early part of his academic career there before moving to America.) The destructive/cathartic notion is endemic in German myth. Taken in this way, there is a certain irony in creative destruction being taken up as the paradigm of a specifically *American* condition – as we shall see below, in the study of Fisher's work.

‘the reproduction of inventive creativity’.⁸⁵ The idea that *all* social *aims* can be codified in such a way is not Schumpeter’s⁸⁶ however it is increasingly common in the writing of those who have taken up the baton of creative destruction. In the case studies that follow the figure of creative destruction is never far from the surface. Like Suarez-Villa, Charles Leadbeater positions creativity as the central *aim* of social and political activity, rather than as a subsidiary factor of such activity. It is with Leadbeater then that we will start the case studies of the knowledge economy.

THE KNOWLEDGE ECONOMY AS AESTHETIC IDEOLOGY: CASE STUDIES IN ECONOMIC THEORY, POLITICAL RHETORIC AND CULTURAL CRITICISM

THE KNOWLEDGE ECONOMY AS ECONOMIC THEORY: CHARLES LEADBEATER’S *LIVING ON THIN AIR*.

The Aim of Society

The idea that creativity be regarded as the central *aim* of social and political activity is emphasised in Charles Leadbeater account of the knowledge economy. Leadbeater’s

Leadbeater sets the dynamism of creative destructive (or in his terminology “radical”) economies, such as that of Silicon Valley, against the plodding (tacit) culture of the German economic model.

⁸⁵ It is worth reiterating again, the point made in Footnote 2. The difference between capital and ‘inventive creativity’ is unclear. Inventive creativity is used by Suarez-Villa as a synonym for ‘new technology’. The owner of capital equipment (technology) is obviously the owner of capital. The only substantive difference between the new economy and the old, is the way technology is understood to mean not just capital equipment but incorporeal capital assets (e.g. techniques of production, assets held as intellectual property, the skills of key personnel etc.). To suggest therefore, that the *reproduction of capital* is over and that we are now in the age of the *reproduction of creative invention* is simple sophistry. Leadbeater’s analysis follows this familiar pattern.

⁸⁶ Schumpeter’s primary concern is with social systems to be sure. However, business is his business. To view all social systems through the prism of business, or, in the case of the knowledge economy, to

input to the theorising of the knowledge economy is one of a number of possible theorisations could be taken as subject for analysis. As has already been suggested, the knowledge economy is best viewed as an event in economic theory (and the policies such theory engenders) rather than as the inevitable result of historical processes. Analysing Leadbeater's principle text on the subject therefore gives us clues as to the shape of such a theoretical narrative has taken in recent years. Leadbeater's text is particularly useful since it synthesises the work of many others in to a digestible pattern that has had demonstrable effects on political rhetoric and public policy in the United Kingdom.⁸⁷

As far as the 'aim' of society is concerned, Leadbeater echoes Suarez-Villa and many others. Towards the close of his opening chapter, he defines the goals of politics and the 'destination' of his economic vision.

The goal of politics in the 21st century should be to create societies which maximise knowledge, the well-spring of economic growth and democratic self governance. Markets and communities, companies and social institutions should be devoted to that 'larger goal'. Finance and social capital should be harnessed to the goal of advancing and spreading knowledge.⁸⁸

As with Suarez-Villa's dictum that we have moved from the reproduction of capital to the 'reproduction of creative invention', knowledge – which for Leadbeater is an interchangeable term – is placed as the ultimate *aim* of social policy. Like all evolutionary economics, the argument has about it a certain circularity. The aim of politics, social institutions, markets and companies is to create knowledge, because knowledge is the well spring of economic growth and democracy, so therefore the aim

view all business as creative, might however, be seen as a particularly post-Thatcherite/ Reganite strategy.

⁸⁷ The dust cover for *Living on Thin Air* advertises glowing endorsements from both Tony Blair and Peter Mandleson (in the days of the first Blair administration when Mandleson was seen as a key figure). Blair suggests the book raises "critical questions for Britain's future". Mandleson goes further suggesting that, "the book sets out the agenda for the next Blair administration". True to form, the book itself reads more like a political manifesto or 'reader' in management studies, than a book on economic theory. Since being published in 1999, many of the policy devices have become governmental policy.

of politics, social institutions, markets and companies is . . . and so on. Knowledge here is a very elastic term, elastic enough to sustain such circularity. However, in describing knowledge as the ‘larger goal’ Leadbeater stresses the central organisational role it plays in the distinctly circular description of the economy he puts forward. The chapter closes thus:

Knowledge is our most precious resource: we should organise *society* to maximise its creation and use. Our aim should not be a Third Way to balance the demands of the market against those of the community. Our aim should be to harness the power of markets and community to the more fundamental goal of creating and spreading knowledge.⁸⁹

This final sentence is a more frank explication of the framework within which the debate then proceeds. The utopian narrative put forward here has a definite shape. It is not unlike that of an Archimedes screw, a circular description of the creation of knowledge that draws us ever onwards and upwards, spewing us towards utopia. Knowledge is not simply the central hub of an economic model, it is *the ultimate destination* to which capital and labour, markets and communities must *dedicate* themselves.⁹⁰ Rather than pursuing a straightforward utilitarian argument and placing knowledge at the service of community and markets, Leadbeater stakes out a strongly *idealist* position. In this reading the knowledge economy is represented as a shift from the *utilisation of knowledge* (in diverse ways) towards the idea that diverse social institutions and processes be dedicated to an abstract notion – the *creation of*

⁸⁸ Leadbeater, op.cit., p. 16.

⁸⁹ Ibid., p. 17. The final line of the chapter reads, “How we do that, is what this book is about”. It is worth noting, that it is this passage that Rosabeth Moss Kanter (Harvard Business School) takes up, in her comment on the dust jacket – i.e. that “Leadbeater offers a vision of the “Fourth Way”.

⁹⁰ The *idealist* notion at work in Leadbeater’s theory here has interesting parallels with Counter Reformation theory as covered in Chapter Two. Leadbeater stretches the concept of ‘knowledge’ so that it serves as both a *foundational origin* and a *fundamental goal* of the economy. This circularity recalls that of Zuccaro’s concept of ‘disegno’ where the human ability to create flows from the divine design that underpins the universe, and human creative activity in turn serves the greater design.

knowledge – which is placed above all other possible considerations. Put most simply, the purpose of society is to serve the creativity that creates knowledge.⁹¹

There is a good deal of aestheticising in such an idealist position. The shape given to society as a whole organises, one might say *composes*, diverse social and economic elements into a singular purpose. (Despite forays into a semiotic/network analysis of creative labour in later chapters, the compositional tropes of the rhetorical mode are never far below the surface of Leadbeater's writing.) A specific role is assigned to the social realm to which it should conform; that role is to play a part in creation, to serve a creation that is ultimately greater than itself.⁹²

As suggested in the introduction, the idealist position staked out by theories of the knowledge economy derives from a two-pronged process that is clearly evident in Leadbeater's analysis. On one hand, aestheticisation is in play, a sense of design and harmony pervades many theorisations of the knowledge economy. On the other hand, weightlessness is not simply a theory. The massive growth in the utilisation of intellectual property law since the 1970s has made copyright products the largest export sector of the United States. Intellectual property laws are repositories of creative concepts – such as 'invention' and 'originality' – the maximisation of which has become vital to companies, corporations and policy makers.⁹³ The stress on creativity and the creation of knowledge in theories of the knowledge economy can therefore be traced to the conflation of creative/aesthetic concepts at play in intellectual property laws with the more generalised tendency of economists to aestheticise. The circularity of Leadbeater's theorisation, the tendency to find creativity everywhere and to see such activity within the framework of an image, has to be seen as the result of the conflation of such a two-pronged process.

⁹¹ It would be cynical to suggest that in such an analysis, the productive results always lay beyond us in some moment yet to come.

⁹² In many places, Leadbeater strays into what one would have to call 'metaphysical' tropes.

⁹³ There is no room here to account for the directionality of flows between political and economic rhetoric, and the material situation within an historical framework. It must be remembered that the increased use of intellectual property leads to increases in its theorisation. Increases in its theorisation inevitably lead to increases in its utilisation. Rhetoric has the habit of becoming policy and policy has

The Knowledge Economy as an Aesthetic Economy of Readers and Writers

One pertinent example of Leadbeater's aestheticising tendencies is his use of the concepts of 'tacit' and 'explicit' knowledge.⁹⁴ Leadbeater's discussion of the concepts displays both his understanding of the importance of intellectual property to the new economy and his aestheticising stance, since the form of intellectual property evoked by his discussion is that of literary copyright.

Tacit knowledge is defined by Leadbeater as the kind of knowledge an apprentice learns from a master - it is often "robust, intuitive, habitual and reflexive."⁹⁵ Such knowledge is passed on as if by osmosis, and is thus hardly ever written down and codified. Explicit knowledge on the other hand is articulated in 'hard form', written in books or presented as mathematical formulae. Explicit knowledge is therefore more movable and repeatable, shifting from one context to another. Explicit knowledge, with its nomadic tendencies, is less 'rich' than tacit knowledge but makes a better economic asset. Tacit knowledge only becomes valuable when it enters a form that allows it to communicate with a large audience. Tacit knowledge must therefore be translated into a 'transferable form' in order to be exchangeable. In other words to be traded it must be turned into explicit knowledge.⁹⁶ In other words there is a distinction between knowledge that is *ownable*, and protected by distinct legal regimes, and knowledge that is, in the main, not.⁹⁷ A central aim of the policy makers and players

the habit of hyperbolising activities it views as useful or successful. The relationship between the two strands of creative thought is therefore infinitely complex, and multidirectional.

⁹⁴ These terms are given general currency in management theory and contemporary economic theory. Garry Hammel is often credited with their popularisation however.

⁹⁵ Leadbeater, op. cit., p. 28.

⁹⁶ The distinction between 'tacit' and 'explicit' knowledge appears to have some root in the Platonic distinction between speech and writing. There are also some interesting resonances here, with the distinctions made between oral and written cultures in McLuhan's writing, and in the work of his collaborator Harold Innes. See especially, Harold Innes, *Empire and Communications*, Clarendon, Oxford, 1950. One of McLuhan's central contentions was that the 'privatisation of knowledge' engendered by the advent of printing was giving way to more amorphous forms of knowledge created by the 'oral' nature of electronic media. There is a sense in which his global village, bound by the collective earshot of the media, is a bastion of tacit knowledge. (The idea of course is unsustainable since intellectual property law applies as much to broadcast form as to printed material.)

⁹⁷ I say 'in the main', because some very explicit forms of tacit knowledge are protected by laws protecting 'trade-secret' – the most significant example of which, is the secret formula that goes into Coca Cola. More generally, the division between tacit and explicit knowledge mirrors earlier divisions

of the knowledge economy is the translation of tacit knowledge into a *fixed and tangible form* - it must in short, become property. The fixing of knowledge as an asset is however only half of the process. Utilising that knowledge involves turning it again into tacit form. Leadbeater expresses this in the following way:

Explicit knowledge, conveyed as information has to be brought back to life as personal knowledge. This internalisation often makes knowledge tacit once more. A recipe is just information; to bring it to life, the cook has to interpret and internalise it by making his own judgements.⁹⁸

Via the process of interpreting, explicit knowledge is once more turned into tacit knowledge. A more direct way of explaining the entire process is to say that the economy here is represented in *literary form*. Tacit knowledge is translated into explicit form, that is it is written up and made into personal (intellectual) property, then traded, and finally reconstituted as tacit knowledge by the process of *reading*.⁹⁹ Leadbeater's own description of the process serves equally well as a description of reading.

between the kinds of 'soft' 'intellectual properties' held within the guilds and bottegas, and the more tangible, 'hard' forms of intellectual property, which developed in the wake of the Venetian privilege system. Tacit knowledge is itself a form of 'intellectual property' is so far as it is an asymmetry of information. The central difference between tacit and explicit knowledge in this sense, is between knowledge that is 'owned' – insofar as it is enmeshed in certain social sites and processes – and knowledge that is *legally possessed* and transferable as property.

⁹⁸ Leadbeater, op. cit., p. 29.

⁹⁹ It is interesting to compare the transitions from 'tacit' to 'explicit' knowledge, with arguments formulated in the 18th century to justify the existence of intellectual property in books. As Martha Woodmansee has pointed out, the twenty-year debate over the establishment of literary property in Germany resolved itself around the issue of *form*. Fichte supplied an argument that disaggregated the property of the book into three parts, the physical, the material and the form. The physical ink and paper, along with the material and literary content, passes to the buyer of the book. In so far as a reader can appropriate ideas from the book by the effort of reading, ideas expressed in the text are the common property of the author and reader. The process of reading invokes a shift in the 'form' which ideas take. The *form* in which the author expresses themselves, belongs to them in perpetuity – "no-one can appropriate this (the author's) thought without thereby altering their form". Fichte, quoted in Woodmansee, op. cit., p. 52.

Knowledge cannot be transferred; it can only be enacted, through a process of understanding, through which people interpret information and make judgements on the basis of it.¹⁰⁰

The aestheticising tendency and its relation to intellectual property is made even more overtly when Leadbeater moves on to discuss the process with reference to Paul Romer's metaphor of the 'recipe' discussed earlier.¹⁰¹

A recipe has to be interrogated to be understood. This changes the character of consumption in a knowledge economy. We have been brought up with a physical, sensual notion of consumption inherited from agriculture and manufacturing. We are used to thinking that when we consume something it becomes ours, we take it into ourselves, we eat it up, like a piece of chocolate cake. Consumption is the pleasure of possessing something. Yet when we consume knowledge - recipe for example - we do not possess it. The recipe remains Delia Smith's; indeed that is why we use it. By buying her book we have bought a right to use the recipes within it. Ownership of the recipe is in effect shared between Delia and the millions of users. Consumption of the recipe is a joint activity. This is not so much consumption so much as reproduction or replication. The knowledge in the recipe is not extinguished when it is used; it is spread. The more knowledge-intensive products become, the more consumers will have to be involved in completing their production, to tailor the product to their needs. Consumption of knowledge-intensive products is not just joint and shared but additive as well: the consumers can add to the products qualities. This is one of the most important ways that software producers can learn about whether their products work; they give them to consumers to try them out and to develop them further. In a knowledge driven economy, consuming will become more a relationship than an act; trade will be more like replication than exchange; *consumption will often involve reproduction*, with the consumer as the last worker on the

¹⁰⁰ Leadbeater, op. cit., p. 29.

production live; exchange will involve money, but knowledge and information will flow both ways as well. Successful companies will engage the intelligence of their consumers to improve their products.¹⁰² [My italics]

Suarez-Villa's notion of 'the reproduction of inventive creativity' is given a new twist. The consumer here is caught in the act of 'reproducing inventive creativity'. In other words, the knowledge economy is an intellectual property economy, in which we are all 'readers'. However, the reader here is of a very specific kind. The *duty* of the consumer is not only to consume but also to consume in a *creative* manner. If production in the economy is aesthetic, the role of the subject is not simply that of reader or viewer. For Leadbeater such consumptive activity also has a *reproductive* role. The reader here is an economic Barthesian, an infinite creative resource, actively performing the meaning of the text in the act of reading, with the proviso that the economic fruits of such tacit creative activity are returned to the explicit *owner* of the intellectual property that has 'inspired' that activity.¹⁰³

The important point about this characterisation of economic relations is that aesthetics is at work both in terms of consumption and production. There remains however a great asymmetry between tacit creativity, the 'secondary authoring', 're-authoring', or 'collaborative authoring' of the consumer – which receives no recognition in copyright law – and the explicit creativity represented by the product that is read. Nevertheless the passage clearly indicates the aestheticising ideal at work; the identity of the economic and political subject in the knowledge economy is in other words broadly *authorial* in character. If tacit knowledge is the resource from which explicit knowledge (or property) is drawn, then it is necessary to ensure that one encourages the continual production and replenishment of tacit knowledge resources - all activity of the economic and political subject must be effectively monitored and where

¹⁰¹ As discussed above. See also, Leadbeater, *ibid.*, pp. 29-30.

¹⁰² *Ibid.*, pp. 32-3.

¹⁰³ In a sense, Leadbeater's view is a money-spinning variant on Richard Stallman's rhetoric of the free software movement. Leadbeater does not discuss asymmetrical economics in his view of the process. Neither does he examine specific financial arrangements, or the complex legal ramifications of such creative interactivity.

necessary, mined; social policy must in effect be dedicated toward such an end. In short, in Leadbeater's knowledge economy, creativity is the *duty* of the ideal citizen.

The Economy as Subject: The Networked Economic Body

Practically speaking the idea that the 'ideal subject' of the knowledge economy is creative has its roots in the increased prevalence of intellectual property as a method of calculating, holding and exchanging assets. However, the idea of the creative economic and political subject is reinforced by Leadbeater's aestheticising tendencies and his attempt to picture the entire *economy as a creative subject*. As suggested earlier, the idea of viewing the economy as creative/aesthetic subject is not particular to theories of the knowledge economy. Schumpeter's creative/destructive economy is one such early example of an aesthetic/evolutionary approach and his influence is evident throughout Leadbeater's book.¹⁰⁴ As suggested above, the concept of creative destruction is both a personation of the economy and a personation that rests on a model creative subject. Leadbeater's description of the knowledge economy is similarly a personation of the economy. However, where Schumpeter straddled the borders of Romanticism and Modernism, Leadbeater's personation straddles the borders of Modernism and Postmodernism. Leadbeater's economic body is in other words an amalgam of rhetorical and semiotic/network models of creative labour.

Taken at face value Leadbeater's conceptualisation of the economy is entirely in line with the prevailing ideology of creativity. In his analysis, creative labour is

¹⁰⁴ For example, Leadbeater's ideal entrepreneur, though a composite figure is clearly indebted to Schumpeter's work on the entrepreneur. Leadbeater's entrepreneur is an agent of change, a figure who creatively composes elements of production, who decides what is to be done while gambling that the future his actions help create will provide their ultimate justification. He is also a figure that destroys the old in order to build the modern, and that indulges in creative acts of learning and discovery. Such a figure possessed an intrinsic sense of achievement, autonomy and the "joy of creation." Leadbeater recounts Schumpeter's contribution in the following way: "For Schumpeter, the entrepreneur had to do more than manage risks. He had to be a leader, with the intuition to do the right things without analysis the situation; the power to create something new, and the power to overcome scepticism and hostility from his surroundings. Entrepreneurs were in part motivated by an intrinsic

unencumbered by the rhetoric of individual genius or idealised notions of originality. Knowledge creation he suggests 'is a collective endeavour... rarely the act of an individual genius'.¹⁰⁵ In a chapter devoted to the networked economy he suggests big breakthroughs in science only emerge from complex social relationships (between individuals and departments, departments and universities, university and partnerships with business etc.) Such extended networks, spread across many laboratories in many countries, work in 'trusting collaboration'.¹⁰⁶ Such collaboration is a key factor to the economy both on a micro scale within firms and on a macro scale across the global economy between firms and their consumers.¹⁰⁷ The networks of production conjured up by Leadbeater slavishly follow the prevailing ideology of creative labour. His assertion, that innovation occurs not so much *within* firms as 'within the learning networks that exist between them', is clearly ideological. No specific empirical data is provided to prove the pervasiveness of such activity and no account offered for the nitty gritty problem of how property rights stemming from such networks are allocated. However, such a view is entirely in keeping with the notion of networks as *semiotic* in character. The dictum, that meaning is not found in words but in the relational play *between* words, is revitalised in economic form with the idea that innovation is not found *in* firms but in the play of relations *between* them.

sense of achievement: solving a puzzle, being independent, the joy of creation, the satisfaction of coming out on top". Leadbeater, op. cit., p. 100.

¹⁰⁵ Ibid., p. 74.

¹⁰⁶ Particular discussion in Leadbeater, op. cit., pp. 131-138.

¹⁰⁷ Leadbeater is drawing here on the work of Walter Powell (Prof. of Sociology, University of Arizona) and also Manuel Castells, op. cit. The importance of such networks must not be over-determined, Leadbeater cautions: the most successful firms of the future will be "networked and integrated" – they will not network themselves to the extent that they become either short term, or totally virtual entities. See Leadbeater's discussion of the "E-Lance Economy", suggested by Thomas W Malone and Robert Laubacher at the MIT. (Their description of short terms virtual companies recalls the *compagnie* and *commenda* relationships of early Renaissance 'capitalism'.) See Leadbeater, op. cit., pp. 134-135. Leadbeater talks up the need for social cohesion, mutual trust and co-operation as a vital part of such innovation networks. When, towards the end of the book, he turns his attention to social policy, his main concern seems to be to ensure that the Knowledge Economy does not fragment the social body so much that it chokes off the source of creativity provided by 'networks'. "Innovation emerges from collaborative networks . . . Networks are sets of relationships between independent producers, they cannot prosper unless they have a fund of social capital to call upon - mutual trust, reciprocity, co-operative self help. Networks can be enabled by technology but they are held together by social ties." Ibid., p. 137. Leadbeater has a rather over optimistic view of trust. There is growing evidence that employees reaction to the knowledge economy is to hoard and keep secret from their employers as much tacit knowledge as possible as a hedge against redundancy. See British Psychology Society Report in *The Guardian*, July 2000.

Body as Metaphor

Despite the homage to the ideology of the network/semiotic model, Leadbeater's view of the creative subject on a micro scale, and the personated subject of the economy on a macro scale, is also indebted to the motif of creative destruction drawn from Schumpeter. Both views of the creative subject are in play in a short chapter in which he draws an analogy between the economy and the body as the site upon which knowledge is situated¹⁰⁸. The model of the body allows him to suggest that creative intelligence is networked but that networks operate on the basis of a hierarchy that privileges 'radical' innovation over a more slow paced 'incremental' innovation. Radical innovation in this analysis is the direct inheritor of Schumpeter's creative destruction.

In a chapter called 'If Organisations were Brains', Leadbeater sets out to explore the management of creative labour by pursuing an analogy between the brain and the firm. Human intelligence he suggests is not only housed within the brain but also distributed about the body in the form of habit and reflexes. Further than that, it is embedded in the words and tools we use and in our constructed environment. Intelligence in short, is *networked* through the body and its environment: such 'distribution' he suggests, 'is the key to human intelligence'.¹⁰⁹ Humans then have a highly efficient 'division of intellectual labour', we have an ability to distribute, store and retrieve intelligence embedded in words tools or the environment leaving 'the brain free to take on more sophisticated tasks: speculating, choosing, deciding, analysing, learning.'¹¹⁰

This dualistic model of intelligence parallels his model of 'tacit' versus 'explicit' knowledge. Leadbeater puts both models to use in describing the ideal firm of the knowledge economy which combines both kinds of intelligence/creativity. The ideal firm, like the human body, has a centralising organ that specialises in some forms of creative thought – the brain here is analogised to the management suite – and a

¹⁰⁸ See Chapter ,: 'If Organisations Were Brains', *ibid.*

¹⁰⁹ *Ibid.*, p. 88.

¹¹⁰ *Ibid.*, p. 88.

network through which its creativity and knowledge is put to use. The ‘total intelligence’ of a company is located across the whole network of body and brain. Leadbeater recognises that much of the creative labour actually occurs far away from head office, within the stored experience, knowledge and creative input of non-managerial staff. Such knowledge creation is clearly of tacit kind. Too strong a centralised control of the firm may blind it to the knowledge and creativity distributed within its own network of production. The ideal company therefore, though it is collaborative and networked must also possess a subtle hierarchical division of labour. Leadbeater says this:

A system of distributed intelligence allows the brain to get on with the tasks it is good at: sophisticated intellectual activities such as interrogating our intentions, making bets about the future, testing assumptions we rely upon, designing entirely new ways of behaving. The brain freed from the humdrum task of information processing, can focus on more complex tasks: creating plans, conceptual frameworks, and classifications. Our distributed intelligence engages in incremental innovation and adoption to the environment, allowing the brain to pursue more radical and risky innovation. Humans are especially intelligent because they have evolved a potent intellectual division of labour, combining networked and centralised forms of intelligence.¹¹¹

The division of labour within the networked body falls between a slow, incremental creativity based on tacit or distributed knowledge - in Leadbeater’s metaphor the activity of the body – and centralised, higher order creativity that pursues ‘radical and risky innovation.’ The latter form of creative labour is clearly *explicit* in character. In other words, it is the form of creative labour that is translated into intellectual property. In this metaphor then it is the brain, the management suite, that possesses the rights to creative labour of *the whole body*. To underline this point, at the end of the chapter he says this:

¹¹¹ Ibid., p. 91.

The most impressive acts of learning are those we complete in our heads, when we work out what to do without having to test it in practice. Imagine having to work out the best route from your home to a shop by trying out each route in turn. Learning through imagination involves working this out in one's head in advance. Brains excel at this kind of creative learning; fingers and toes do not. This is where tacit knowledge . . . is next to useless; more formal, analytical and speculative techniques are required.¹¹²

The crucial radical and risky part of creativity then is not networked in origin, though it may require networking and ultimately turning into tacit knowledge to become economically useful.¹¹³ The most important kind of creativity, that which has the most privileged place in his analysis, is headwork, pure intellectual labour, it requires 'imagination' and 'creative learning' and it is primarily '*speculative*' in character¹¹⁴. This kind of creativity occurs at the centre of the ideal firm within the management suite or within the brain. In order to become economically useful, it must enter a network and meet up and exchange creatively with other kinds of knowledge, it needs in other words to become tacit again.

Within the metaphor of the *economy as creative body* therefore, there exists a hierarchy. Mental labour, of an imaginative and speculative character, radiates outwards to be met by the less privileged creativity (or tacit intelligence) of the reader or viewer. Within the firm then the movement of knowledge involves the appropriation of tacit knowledge, its translation in to explicit knowledge or property. It is through the agency of superior 'radical' innovation of the management suite that knowledge is rendered as a tradable asset. The character of the management suite, the

¹¹² Ibid., p. 91.

¹¹³ Leadbeater recognises that "good ideas come from particular people", but that to be useful they have to be "spread across a company". Ibid., p. 71.

¹¹⁴ The privilege given speculative thinking here is interesting. Obviously, Leadbeater is taking about business thinking, the gamble on the future. Such modes of operation are of course also tied to aesthetic concerns. The early intellectual property laws for printed images grew up to protect a market that was *speculative* in character, as opposed to the more usual commission/patronage market for paintings and sculptures in 16th century Venice. Avant gardism itself was built upon the 'freedom' from state control offered by the 19th century speculative art market. In a sense, avant gardism – whatever its political inclinations – shares the sense of speculation on the future that drives entrepreneurship.

mental functions of the economic body, becomes clearer here. Counter to the generalised insistence he places upon the ‘collaborative’ nature of networks of innovation, the benefits that flow from such networks are heavily centralised. The collaborative aspect of production is akin to the collaboration between an author, his/her text, and the reader.¹¹⁵ In other words, no property rights accrue to the readership part of the creative cycle. The collaborative ‘networks of creativity’ Leadbeater describes are in fact ‘networks of production and consumption’. As far as production is concerned, there is little differentiation between the ‘performative creativity’ of the knowledge consumer or knowledge worker, both represent a vital source of new tacit knowledge, which can be exploited by those creating explicit knowledge, it is the latter group who have the privileged relation in this system.

Despite the intricate symbiosis of the different forms of knowledge it represents, *networked creative labour* should not be confused with any form of egalitarian belief. Everyone is creative in the networked leviathan but some are more creative than others. While consuming creatively (producing tacit knowledge) is rendered as a duty, it is the higher, more centralised form of creative intelligence (the producer of explicit knowledge) that turns creative labour into a right to property. The hierarchy here is important. The alignment between tacit intelligence and slow, incremental innovation in Leadbeater’s body metaphor suggests that radical and risky innovation is the *natural* partner to explicit intelligence. The implication is that radical and risky innovation is at the heart of the process that creates explicit knowledge, the kind of knowledge that is represented by intellectual property law. To put this most simply, the kind of creative labour privileged in Leadbeater’s knowledge economy is radical and risky innovation, the fastest and most nimble mode of creativity, always be jumping ahead of the slow, incremental plod of the (creative) reader or viewer. It is a mode of creativity that is most simply characterised as *avant-gardist*.

¹¹⁵ Or of course the artist, his/her work, and the viewer.

The Creative-Destructive Network Model

The asymmetries of Leadbeater's networked economic body are rooted in his desire to fuse together two models of creative labour drawn from different art historical epochs. The notional egalitarianism of the network/semiotic model of creative labour is tempered by the avant gardism of Schumpeter's model of creative destruction.¹¹⁶ The *radical* innovation that Leadbeater sets such store by is imbued with an avant gardist flavour, numerous of examples of which litter his text.

As suggested above, Schumpeter's model of creative destruction, like the early modernist avant-gardes, sits at the cross roads of Romanticism and Modernism. Though Schumpeter recognised that invention increasingly occurred within the 'socialised' environments of R&D departments, the trope he used to encapsulate such processes was that of the genius/melancholic. The avant-garde movement, though similarly socialised, displayed the creative ticks of the genius/melancholic. The contours of the creative/destructive economy correspond well with those of the avant gardist movement. Leadbeater's privileging of *radical innovation* therefore derives its intensity from the *avant gardist* thrust of Schumpeter's *creative/destructive* economy.

A good example of the avant gardism inherent in radical innovation can be found in Leadbeater's discussion of the differences between radical and incremental innovation with respect to the creative cultures of Japanese and American firms. Japanese firms are heavily dependant on tacit knowledge, the habits and rules of thumb that subsist within organisational structures. Such an approach to innovation tends to produce slow, incremental advances that merely refine and improve existing products. In the late 1980s, American companies attempted to grasp back the technological ascendancy by developing a more radical approach to innovation. The radical innovation pursued was entirely creative/destructive in character, in which every firm aimed to 'make obsolete its previous generation of goods'¹¹⁷. The economic edge of such radical

¹¹⁶ It is worth reiterating that the semiotic/network model as it emerged in the art world of the 1960s was aligned to the end of avant gardism.

¹¹⁷ Leadbeater, op. cit., p. 77.

innovation lays in its cathartic destructiveness.¹¹⁸ The way Leadbeater presents this historical development recalls the separation between ‘traditionalists’ and avant-gardists in late 19th and early 20th centuries in visual art. The eye of the academician looked backwards towards the models of classical antiquity, a slow process of refinement of contemporary work might bring it to the classical standard or even eventually surpass it. The avant-gardist stance by contrast did not attempt to equal or improve on past but rather sought to transgress its models.¹¹⁹ The avant-gardist experimented with eyes upon the future, taking risks, gambling that the future created by such experimental work would ultimately provide a framework, which legitimated and made intelligible their work.¹²⁰ The ‘untethered gestures’ of the avant-gardist, gesticulated towards the future, which could not, at the time they were made, be legitimised by recourse to existing models.¹²¹ Leadbeater’s description of radical innovation is a natural partner to such a view of progress and creative labour. The high failure rates of radical innovation are entirely in line with the risk strategy of avant-gardism. The idea that a firm should aim to make its own products obsolete could also be regarded as axiomatic of the Modernist avant-gardes approach to creative production.

The hierarchy between radical and incremental innovation that Leadbeater evokes is crucial to his definition of the knowledge economy. The battle-lines that are demarcated by the terms shape his discussion on all topics; from the theory of the firm to industrial policy, from theories of civic responsibility to social policy, Leadbeater places a strong and unwavering emphasis on ‘radicalism’. It is crucial to recognise that

¹¹⁸ Ibid., p. 77. Leadbeater gives Hewlett Packard’s approach to R&D, as a particular example of this kind of creative model.

¹¹⁹ Though a caricature itself, it is, nonetheless an important one, because it stood as the axiomatic ground for much modernist practice.

¹²⁰ Such an understanding is prefigured in Wordsworth’s ‘Essay Supplementary to the Preface’ in *Miscellaneous Poems* of 1815, in which he says that “Every author, as far as he is great and at the same time, original, has had the task of creating the taste by which he is to be enjoyed.” Quoted in Woodmansee, op. cit., p. 117.

¹²¹ The term “untethered gestures” is drawn from O’ Doherty’s *Inside the White Cube* – in a section where O’ Doherty examines the problem of being an inheritor of an “avant-gardist tradition”. O’ Doherty’s examination of the issue has more recently been taken up by Hal Foster in his essay now forming the first chapter of *The Return of the Real*. Depending on where it is printed, the essay is called, either ‘Who’s Afraid of the Neo Avant Garde?’ or, ‘What’s Neo About the Neo Avant Garde?’

radicalism for Leadbeater has its origin in creative theory rather than in the well-worn political sense of the term. The cultural nature of radicalism in Leadbeater's lexicon is best demonstrated by his division between 'knowledge radicals' and 'knowledge conservatives'.

Knowledge radicals stand for open societies prepared to engage in the diversity and experimentation that goes with radical knowledge creation. Politicians who embrace innovation and change will stand squarely in the Enlightenment tradition which puts reason and ideas at the heart of politics. Knowledge conservatives will take a much more cautious, risk-laden view of progress. Conservatives value tried and tested old knowledge and prefer a slower rate of innovation. The knowledge conservatives will come in different stripes: communitarians, new environmental romantics, authoritarian populists or, simply, traditional conservatives. Conservatives will argue that knowledge should be controlled, restrained or suppressed for the sake of some greater good, like tradition or the environment or a sense of community.¹²²

The difference between knowledge radicals and knowledge conservatives has nothing to do with political radicalism, 'Conservatives' in the old political sense, occupy the same space as old-style heavy industrialists, nationalists, teachers, doctors, environmental activists, anti-GM activists and anti-globalisation activists. Conservatism is defined as *that which stands against radical innovation* – an entirely aesthetic and avant gardist formulation.¹²³

Concluding Leadbeater

To sum up then, the economy Leadbeater describes is an economy predicated on an expanded sense of the importance of intellectual property and its associated creative

¹²² Op. cit., p. 230.

concepts. The aestheticising tendency in his writing draws out metaphors that correlate very closely with the creative tropes of such laws. When viewing the economy as a body, the ‘subject’ in play is a creative one. The economic leviathan is sub-divided into faculties that relate to the intelligence of the mind and the intelligence of the body. A privileged relation exists between the labours of the mind and those of the body, which is represented as hierarchy between incremental and *radical* innovation. The image of the economy as a creative subject is, in effect, a composite of two competing creative models, one of which harks back to early Modernist avant gardism, and the other which is post modernist in character. The balance struck between the creative/destructive model of Schumpeterian economics, and the contemporary network/semiotic model of creative labour, severely limits the egalitarian potential of the latter.¹²⁴

THE KNOWLEDGE ECONOMY AS CULTURAL CRITICISM: PHILIP FISHER’S *STILL THE NEW WORLD*

The radical aesthetic turn observable in the economic sphere is also observable in the cultural sphere. Philip French’s study of 19th and 20th century American literature *Still the New World: American Literature in a Culture of Creative Destruction*¹²⁵ is one of the most coherent attempts to bring the ideology of the knowledge economy into the cultural sphere. Ostensibly a study of the literature of Emerson, Twain, Melville and James, the ideological content is made clear in the opening chapters on abstraction and democracy. Literary works are set within a framework that purports to reveal the

¹²³ It is worth mentioning here that current and previous Labour administrations, which have attacked the “forces of conservatism”, are rooted in this demarcation of creativity.

¹²⁴ Interestingly, where Leadbeater’s theoretical position has turned into political rhetoric, it is presented as a division between those who stand for ‘radical innovation’, and those ‘of whatever political ideology’ who don’t. The political division is, in other words, predicated on aesthetic creative ideology. This division was made explicit in Tony Blair’s, Leadbeater-inspired speech to the Labour Party Conference, 25 September, 1999. For a short analysis of the speech, see Appendix C.

¹²⁵ See Philip Fisher op. cit. At the time of publishing, Fisher was Felice Crowl Reid Professor of English and American Literature, Harvard University.

‘nature’ of the American character. The works of ‘culture’ discussed are firmly situated within an economic history driven decisively by technological innovation. The essential character of American literature, he contends, ‘took its leading signals in an entirely new way from economic life rather than from religious or traditional, past-centred cultural foundations.’¹²⁶ Schumpeter’s model of creative destruction provides the central figure of Fisher’s analysis, bedding the creative labour of writers and poets within the creative labour of engineers and industrialists.¹²⁷ The ultimate point Fisher wishes to make is that the ‘American personality’ is creative in character and specifically creative destructive in inclination, a facility that he relates positively to the familiar lines of the American dream.¹²⁸ Fisher’s narrative therefore tells the reader rather more about his methodology than about the literature under discussion.

The American Personality: The Creative Destructive Subject

Fisher uses the division between tacit and explicit knowledge that informs Leadbeater’s economic analysis and turns it to discussion of the historic character of the United States.¹²⁹ The ‘thickly rooted, tacit culture’ has never been a part of the American experience he suggests.¹³⁰ The culture of the United States has, from the very beginning, preferred a minimal social space to “the thick detail of culture” passed from generation to generation so typical of the fault lines of ‘old’ European culture. The United States developed a number of devices to secure a national identity that could not be based on ethnic homogeneity or the economic and social determinates of geography. A written Constitution substituted for the depth of *tradition* abandoned by

¹²⁶ Ibid., p. 28.

¹²⁷ Take for example, this passage from his introduction: “With the onset of a richly inventive modern technology that presumed destructive restlessness, along with an economy that was committed to giving free rein to that destructive restlessness, the possibility opened up that in American culture the initial, unfinished newness would define the terms of a more permanent newness guaranteed by the one genuine permanent revolution, that of competitive technological capitalism.” Fisher, op. cit. p. 3.

¹²⁸ One of the fascinations of Fisher’s book is its mixture of quite plausible technological determinism and a ridiculously syrupy nationalism.

¹²⁹ It must be remembered that a major claim of Leadbeater’s, is that the United States is strong on explicit knowledge and weak on tacit knowledge. In contrast, German and Japanese companies are used as examples of strong, tacit knowledge cultures.

generation on generation of immigrants. Rather than the tacit culture of shared stories, songs, dances, ceremonies the constitution guaranteed the absence of tradition and of culture, ‘in the anthropologist’s sense of the word’. To have a Constitution, says Fisher, is “to be able to say good riddance to culture”.¹³¹ The Constitution set out in *explicit* form, the ‘minimal limits for whatever new world, new practices we may in the future choose to create’. The pairing here of tradition as tacit knowledge – “the warehouse of old recipes for living and thinking” – plays up the radical creative character of the Constitution.

The constitution however is partnered by another form of ‘explicit knowledge’ which substitutes for the absence of tradition and culture – that of the entertainment industry. British English, shorn of its tacit geographical and cultural groundings, became the language of the American immigrant, a second language, a mere ‘vehicle of communication’ rather than a pattern of speech deeply embedded in tradition and culture. Alternative forms of communication to the minimal shared language-space of the polyglot emerged in the early 20th century with the advent of cinema and later television.¹³² The ‘thin’ explicit culture produced a strong visual culture that was in principle able to ‘talk’ to the complex ethnicities that made up the social space of American society.¹³³ Commerce rather than tradition, culture or language then, is the glue that holds American culture together. The essential sameness required for nationhood is ‘secured not by ideology, religion language, or culture, but by the box of Kellogg’s Corn Flakes on the kitchen table, Sesame Street on the television screen at 4:30, the package of Marlboro cigarettes in the shirt pocket, and the same ten songs on every car radio on a certain summer day everywhere in America.’¹³⁴ Another way of expressing this view is to say that the *tacit* natures of ‘old’ cultures are substituted in

¹³⁰ Fisher, *op. cit.*, p. 27.

¹³¹ *Ibid.*, p. 41.

¹³² Fisher suggests that the impossibility of producing a ‘shared rich language’ in the US made the production of a shared social space, on the model of nation building in Germany, very impractical. The failure of language results in the silent hero/heroine of American novels and film, which is in turn an articulation of the awkward language skills, or ‘language embarrassment’, of an immigrant culture.

¹³³ One reason for the international success of American cultural products, he suggests, is that they are already designed to overcome the cultural and ethnic differences inherent in the domestic market.

¹³⁴ *Op. cit.*, p. 47.

the ‘American’ model by *explicit*, or commodified, products that in turn are consumed for the *aesthetic qualities* that build a sense of identity and belonging. In Fisher’s model of subjecthood, all human creativity is defined in economic terms.

Given the crucial importance of creative endeavour to national identity, Fisher also seeks a way to define the specific *character* of the ‘American’ creative act. This is achieved in a manner that places him firmly within the envelope of knowledge economy theory. As indicated by the discussion on identity, American identity is identified in opposition to the notion of tacit, (old, European) culture. The implication is that the explicit nature of American culture will therefore be ‘radical’ in character. And so in Fisher’s analysis it is. As with Leadbeater, the pairing of incremental innovation with tacit knowledge cultures, and of radical innovation with explicit knowledge cultures, is followed through in Fisher’s analysis. As with Leadbeater’s economic analysis, *radical innovation* is for Fisher entirely coextensive with the rhetoric of *creative destruction*.

Imagining into Wealth: Tom Sawyer, the American Persona and the Knowledge Economy

Fisher’s book begins with an analysis of a famous scene from Tom Sawyer. Tom’s attitude to the task set by Aunt Sally – the whitewashing of her fence – is turned by Fisher into a parable for the American economic imagination. Through his wit, Tom turns a boring chore into a game, engaging the labours of friends and passers by to do ‘his’ work. The usual interpretation of the scene, the sly intelligence of a trickster manipulating friends and strangers, is turned on its head. Fisher suggests that Tom, in fact, does not escape work. The presence of his imagination is required to keep the others at the work face. Tom has in Fisher’s words become ‘a manager, a salesman, a negotiator, and a supervisor... this requires him to work hard all day and to bring a wide range of talents and knowledge into play.’¹³⁵

¹³⁵ Ibid., p. 8. Aunt Sally, or ‘the employer’, is of course “satisfied beyond her wildest dreams”.

For Fisher, Tom's fence is a parable of the 'economics of imagination', of assets 'imagined into wealth,' and by extension of the contemporary knowledge economy.¹³⁶ For Fisher imagination is a distinctly unlimited resource, a resource that has *no* physical limitations. To illustrate the point, he offers the reader a choice of philosophical parables of American economic development; Mark Twain's Tom on one hand, and Frederick Jackson Turner's 'frontier hypothesis' on the other.¹³⁷ With its warnings of exhausted natural resources, Fisher sees the Turner hypothesis as an example of 'limited-resource capitalism', an economic paradigm that has its natural partner in contemporary concerns about unfettered consumption and the consequential degradation of the environment.¹³⁸ In contrast, Tom's fence painting stands for the imaginative faculty, the ability to continually re-imagine and re-draw the determinate economic parameters of American society, effectively escaping the censure of diminishing material resources.

Fisher's view of the economic imagination as a resource entirely 'unlimited' by material constraints provides clues as to the 'origin' of his view of imagination. Imagination, in an aesthetic sense is always confronted by some form of material constraint or limitation. Expression always acts through the agency of a medium, at some point therefore an engagement with material relations is simply unavoidable.¹³⁹ However there is an area of creative theory that is routinely in the habit of describing its 'subject' in terms of the infinite. Descriptions and defences of intellectual property law routinely make the claim that patents and copyrights represent resources that are *theoretically* inexhaustible. Theoretically 'intellectual objects' are 'nonexclusive', in other words they are not consumed by use and can be accessed simultaneously by an infinite number of people. The possession or use of an intellectual object does not

¹³⁶ Though not politically explicit, 'Tom's fence' is clearly a metaphor for a knowledge economy in which the creative, cultural imagination of the west exploits labour in underdeveloped countries.

¹³⁷ A contemporary of Twain, Turner claimed that the historic 'western frontier' provided a safety valve to the economic and social pressures of the already settled east. The closing of the frontier (around 1890-1910) symbolised the exhaustion of limited natural resources – the pressure valve that the west had provided. A corresponding shift in the American character was therefore inevitable.

¹³⁸ Fisher's position is distinctly unsympathetic to such a 'pessimistic' view.

¹³⁹ It would be pedantic to summon up an idealistic 'oral' culture in order to provide an exception to this generality.

prevent others from possessing or using the ‘object’. Communication costs aside, the marginal cost of producing extra goods is, theoretically, zero.¹⁴⁰ In his description of the knowledge economy Charles Leadbeater analogises the relationship between the ‘old’ economy and the knowledge economy as the difference between the consuming chocolate cake and consuming the recipe for chocolate cake, the latter being, in effect, a non-rival good.¹⁴¹ In the old economy if I eat the all the cake, you will be prevented from eating it. In the new economy, my use of the recipe does not explicitly *prevent* you from doing likewise. In a loose theoretical sense this is true, however, it omits to mention that the intellectual property rights that circumscribe the recipe severely restrict its ‘legitimate’ uses. It also omits to mention that the rights themselves require, even in the first instance, an ‘expression in a fixed and tangible form’. In other words, the communication requires paper and ink. The consumer may not consume chocolate cake but that is not to say that consuming recipes is entirely without limit from the material world. Fisher’s view of limitless then draws not on any aesthetic experience of imagination, but rather on a shorthand and entirely *theoretical* view of intellectual property that is very much in vogue in the imagery of the knowledge economy.

For Fisher, Tom’s fence painting exemplifies a specifically contemporary view of the creative act. The ability to continually re-imagine and re-draw the parameters of a given situation is ‘without material limit’. In Fisher’s analysis, it stands in direct opposition to the material limit. Echoing the rhetoric of contemporary economic theory, such re-imagining and re-drawing of parameters is ‘common to both poetry and industry’, suggests Fisher. But, more than that, such imaginative re-invention is characteristic of the American personality.¹⁴² De Tocqueville’s description of early

¹⁴⁰ For a discussion of these aspects of intellectual property, see Edwin C. Hettinger, ‘Justifying Intellectual Property’ in *Intellectual Property: Moral, Legal And International Dilemmas*, ed., Adam D Moore, Rowman and Littlefield, Oxford, 1997.

¹⁴¹ Leadbeater, op. cit., p. 29.

¹⁴² Fisher uses the imagery of Emerson’s early essay ‘Circles’ and the more post-modern language of ‘the frame’ to describe this process. The world as-it-is is encountered as a circle neatly arranged with all parts *composed* tightly together. In other words, the world encountered is under the imaginative spell of earlier generations of thought – the “sediment of thousands of years of different imaginations”, Fisher op. cit., p. 16. The fixed and perfect nature of the circle at first sight leaves little room for intervention from the newly arrived. In Emerson’s image, the new arrival then makes a new and larger circle – an

19th western settlers, he suggests, attests to the capacity for personal reinvention of the immigrant/settler.¹⁴³ But, more fundamentally, reinvention is built into the American persona by the incessant *re-framing of experience* created by technological development. In Fisher's imagery trains rust in obsolescence, canals are filled in with dirt, wharves and roads are grassed over, the pony express is buried by the telegraph, the telegraph by telephones, the telephone by cellular phones, computers and the Internet – each new technology has the capacity to reframe experience. Schumpeter's 'perennial gale of creative destruction' is called on as the image with which to grasp this essential social condition. The principle of creative destruction, Fishers suggests, is even written into the law of the United States in the 19th century.¹⁴⁴

The Law of Creative Destruction

Fisher calls the Charles River Bridge Case 'one of the classic turning points in the creation of a legal framework for society of permanent newness'.¹⁴⁵ The case concerned improvements to the crossing of the Charles River between Boston and Charlestown. The river ferry was a monopoly operated under the grant of a government licence. When a new bridge was built, the courts recognised the ferry owners right to compensation and a part of the tolls from the new bridge was granted in recompense to the owners of the old ferry licence. Forty years later, a new bridge was created alongside the old. In 1837, a ruling of the Supreme Court liquidated the payments to the old ferry operator and gave no compensation to the stockholders of the first bridge. The case is important because it created a legal precedent that placed the 'general good' stemming from a new technology over existing property rights that

invention that surrounds and dissolves what initially appeared to be fixed and complete. Likewise, in Fishers account, 'Circles' becomes a natural partner to 'frame-theory', as it was derived by contemporary US art critics from Derrida's *The Truth in Painting*, with its famous image of the "passe partout". See Jacques Derrida, *The Truth in Painting*, University of Chicago Press, London, 1987, pp. 1-15.

¹⁴³ The implication here is that, uprooted from strong tacit culture, you can represent yourself as anything you choose.

¹⁴⁴ Fisher here draws on Stanley Kutler's *Privilege and Creative Destruction: The Charles River Bridge Case*, John Hopkins University Press, Baltimore, 1971.

¹⁴⁵ Fisher, op. cit., p. 21.

might be said to stand in the way of such ‘advances’. The case represents for Fisher the moment in which creative destruction was built into the law of the United States and the ‘American mentality’.

With creative destruction thus hard wired into the American mentality, Fisher proceeds to find imaginative connections between the experience of the immigrant/settler and the inventive gale of technological creative destruction. A natural empathy exists between the two; just as the immigrant must cope with geographic and cultural dislocation, so every citizen must cope with the economic and cultural dislocation created by the gale of creative destruction. The characteristic ‘thinness’ of American personality lays in the inability of one generation to pass anything much on to its children. Whereas tacit cultures suggest depth, ‘thick’ knowledge passed on from generation to generation, the uprooted immigrant culture of the United States suggested knowledge made anew for each generation. As Fisher puts it ‘the consequence of an ever new culture of objects and systems is identical to that of an ever new body of citizens with their strangeness. Both cases require that one element of citizenship is constant adaptation to a new world on the part of both immigrants themselves and the former immigrants now called natives’.¹⁴⁶ In other words, strong linkages to past ‘tradition’ are identical with strong linkages between generations; both are ‘inimical to a society of invention, enterprise, and immigration with its bias towards the next-on world.’¹⁴⁷

In the cultural field itself the consequence of the creative destructive society is a tendency towards an ‘aesthetics of abstraction’. Fisher’s earlier work *Making and Effacing Art*, followed a well established line in contemporary art criticism, suggesting that the de-contextualising effects of museums, their ability to cut their objects of display from their originary social and cultural functions, results in a ‘minimal’ or ‘thin’ identity for such works. Abstract Expressionist painting, self consciously designed for an ultimate destination within the museum, wore such ‘abstraction’ on its

¹⁴⁶ Fisher, op. cit., p. 48.

¹⁴⁷ Ibid., p. 29.

sleeve.¹⁴⁸ Fisher suggests that the reader draw comparisons between the art object and the immigrant, both are decontextualised from the fabric of tradition, from religious, civic and familial cultural locations, it is possible in short to talk of both ‘abstracted artworks’ and ‘abstracted persons’.

The Knowledge Economy as Kulturkampf

The economic message from Fisher, buried in a book that is ostensibly dedicated to literary analysis, is perfectly clear. The ideal economic and ‘cultural’ subject is aesthetic and creative in character. It is an ideal synonymous for Fisher with the American character. More pointedly, it is a subject that is creative/destructive in temperament, a natural avant gardist to whom abstraction, cultural, economic and social, is a way of life. It is an analysis of the American subject that is acceded to in Charles Leadbeater’s economic analysis of the knowledge economy. Leadbeater sets his ideal economic subject, the radical creator of explicit knowledge, in Silicon Valley, sharply separated from the slow, hierarchal, incremental innovation practices of German and Japanese firms so pitifully embedded in strong tacit cultures.

In a thoughtful, and far from positive, review of *Still the New World*,¹⁴⁹ David Bromwich suggests that “it is natural to ask what the motive is for a study that so completely identifies the artistic avant garde with the momentum of the capitalist market, a work that is world-historical in its diagnosis yet ultra-American in its focus and preoccupations.”¹⁵⁰

¹⁴⁸ This reading of new museology and American formalism is highly partial and generally misleading. The ‘abstraction’ of the museological object hides the often-violent history of colonial conquest and cultural appropriation and is therefore, far from value free. Applying such a term to the social sphere similarly hides the violence of some forms of ‘immigration’ – slavery being the obvious example. Aesthetic abstraction is itself viewed entirely within the frame of American formalism as established by Harold Rosenberg and Clement Greenberg. The complexity of early 20th European abstraction – with its elements of political radicalism, tricksterism and anarchy – is less easily co-opted into such a neat and cosy formalist narrative.

¹⁴⁹ David Bromwich, *A Millennial Twilight Faith that has No Politics to Speak of*, *London Review of Books*, vol. 22, no. 10, 18 May, 2000.

¹⁵⁰ Bromwich questions Fisher’s positivistic acceptance of the loss incurred in creative destruction and what he regards as the American-centric regard for ‘the future’. The loss that results from creative

In view of such an observation, it is worth returning briefly to Leadbeater. In the chapter toward the end of his book called the 'Power of Fantasy' Leadbeater makes explicit his own belief in the relation between aesthetics and technological/industrial innovation.¹⁵¹

Culture - not Science technology or even economics - will determine how deeply embedded these changes become in our daily lives. The same was true of mass produced products of the industrial economy. Economic and cultural innovation went hand in hand. Henry Ford's River Rouge plant in Detroit was in full swing as James Joyce was writing *Ulysses*, the first challenge to the orthodox novel. The first films were shown commercially in 1903, as Ezra Pound was writing his first formalist poems, marking the start of modern poetry. And in 1907, Picasso put on view perhaps the most shocking painting of the century: a portrait of three prostitutes which marked the start of Cubism and modern art. Economic and scientific modernisation succeeds when it is accompanied by a cultural creativity that revolutionises the way we see the world.¹⁵²

In Leadbeater's analysis, technological and economic developments are tied to a process of acculturation enacted by 'radical' aesthetic visionaries. Two possible explanations are available as to why Leadbeater pursues such a notion. On one hand, his residual Marxism may lead him to believe that a 'common creativity' impels society forward.¹⁵³ On the other hand, 'modernisation' may require a '*cultural wing*', a

destruction he points out, is a loss of memory. The destruction of memory has always, as Bromwich suggests 'been a weapon of tyranny, a weapon that by coincidence it shares with competitive technological capitalism'.

¹⁵¹ Bromwich, op. cit., p. 228.

¹⁵² Of course *Demoiselles d'Avignon*, was *not* as Leadbeater claims, put 'on view' in 1907. Also, it is interesting to note that the pairings between the aesthetic and industrial here repeat the division between the legal regimes of copyright and patent that commodify such manifestations of creativity.

¹⁵³ The self-conscious pairing of the industrial and the aesthetic, also recalls the beliefs of art historians who worked under the influence of Hegel. Alois Riegl for example, suggested that all visual forms, whether 'fine art' or 'craft' (or in this case, industrial), were underpinned by *the will to form*. In other words, all created objects bore the 'spiritual hallmark' of their age. For a discussion of Hegel's influence on art historians, see Fernie, op. cit., pp. 13-20. Also see, Fernie's introduction to Riegl, *ibid.*, pp.16-17 and ,excerpt from Riegl, *ibid.*, pp. 120-126.

rhetorical cadre, to pursue its objectives.¹⁵⁴ Ostensibly, the idea of a ‘cultural creativity to revolutionise the way we see the world’ has a reasonably strong precedent in the Modernist avant gardes of the early 20th century. However, the avant gardes of mid 20th century New York provides a stronger case.

The thesis elaborated by Fisher – that abstraction is somehow a *natural* product of the American way of life, and can be taken as a symbol of that life – has a long pedigree. In 1950, Arthur Schlesinger published *The Politics of Freedom*, a book that identified the abstraction of the New York school of Abstract Expressionism with the core western values of individualism and freedom of expression. Modernist art was thus presented as a bulwark against ‘totalitarianism’.¹⁵⁵ Schlesinger’s book contributed an array of arguments that augmented what had, since 1947, become official, though covert, US foreign policy. The details of Schlesinger’s involvement with the *Psychological Warfare Division* of the CIA and the *American Committee for Cultural Freedom* are extensively documented in Francis Stoner Saunders’ recent study *Who Paid the Piper? The CIA and the Cultural Cold War*¹⁵⁶.

¹⁵⁴ One way of seeing Leadbeater’s aestheticising tendencies, and those of the knowledge economy in general, is as a particular kind of policy. In a sense, rhetoric can itself be *policy*. Denis Houck analyses the balance for example, between art (rhetoric) and science (hard figures) in two important letters written by John Maynard Keynes to Franklin Roosevelt – those that influenced the emergence of the New Deal. Houck suggests that the rhetorical, aestheticising, aspects of Keynes’ economics were devices consciously employed by Keynes. Within the context of the Great Depression, Houck argues, good rhetoric functioned as “the very ground of economic policy and economic recovery”. Rhetoric, in other words, can itself constitute a programme of action rather than merely functioning as window-dressing for economic ‘science’. Houck claims that the broadly Keynesian fiscal policy pursued by Roosevelt’s administration in the early 1930s, supplemented the scientific aspects of economic policy – acting as an article of faith, or a procedure for whipping up and hyperbolising business confidence in the future. See Denis W Houck ‘Rhetoric, Science and Economic Prophecy’ in Woodmansee and Osteen, op. cit. (Houck is Assistant Professor at Florida Atlantic University.) The sources of Keynes own aestheticising tendencies can be found in his well-documented association with the London avant-garde. In addition to his involvement in wartime art’s policies leading to the formation of The Arts Council, Keynes was close to the Bloomsbury Group. His relationship with Duncan Grant lasted until his marriage to Lydia Lopokova. See Richard Witt, *Artist Unknown: An Alternative History of the Arts Council*, Warner Books, London, 1998.

¹⁵⁵ ‘Totalitarianism’ in Schlesinger’s lexicon was a portmanteau word that conveniently encompassed both fascism and communism.

¹⁵⁶ Frances Stoner Saunders, *Who Paid The Piper? The CIA and the Cultural Cold War*, Granta, London, 1999. The American Committee for Cultural Freedom was an offshoot of the CIA’s main cold war device the Congress for Cultural Freedom. Perhaps unsurprisingly, Clement Greenberg was a regular attendee of the bashes organised by the American Committee.

Stoner Saunders' book is an attempt to rescue analysis of the maze of cultural organisations managed by the CIA in the cold war period from more radicalised political efforts of analysis made in the early 70s. As part of the attempt to characterise the motives of former left wing intellectuals involvement the cultural cold war, she cites a passage from Saul Bellow's *Humboldt's Gift*. The thought processes of Charlie Citrine, Bellow's narrator, capture something of the psychological character of those involved in 'The Congress'.

There came a time...when, apparently, life lost the ability to arrange itself. It had to be arranged. Intellectuals took this as their job. From, say, Machiavelli's time to our own this arranging has been the one great gorgeous tantalizing misleading and disastrous project. A man like Humboldt, inspired, shrewd, nutty, was brimming over with the discovery that the human enterprise, so grand and infinitely varied, had now to be managed by exceptional persons. He was an exceptional person, therefore he was an eligible candidate for power. Well why not?¹⁵⁷

What is striking about this particular choice of literature is the way the *Kulturkampf* is itself captured in an image of *rhetorical composition*. The image of arrangement is entirely consonant with an image Fisher draws on from Emerson's essay *Circles*. The world *as-it-is* is encountered as a circle, neatly arranged with all its parts *composed* tightly together. To the newcomer, the world encountered is already under the imaginative spell of earlier generations of thought, the "sediment of thousands of years of different imaginations" as Fisher puts it. At first sight, the fixed and perfect nature of the circle leaves little room for intervention from the newly arrived. However, in Fisher's account of Emerson, the new arrival then inscribes a new and larger circle, an invention that surrounds and dissolves what initially appeared to be fixed and complete. *Circles*, in other words, is a parable of the imagination working in the

¹⁵⁷ As quoted in Stoner Saunders, *ibid.*, p. 3.

rhetorical mode of composition.¹⁵⁸ The point Fisher wishes to make is that the world is what we imagine it to be. The economy he describes is based entirely upon such ‘imagining into wealth’. Fisher’s own book is an act of such re-composition. The literature he discusses has, like Humboldt’s ‘life’, apparently lost the ability to arrange itself. Each author is in turn therefore re-composed in line with the ideological economic image he wishes to project.

As Stoner Saunders suggests, a central feature of the *Kulturkampf* enacted between the 1940 and 1960s was ‘to advance the claim that it did not exist.’¹⁵⁹ The secret programme of cultural propaganda relied on ‘soft’ linkages and collusions, the power of friendship, ‘salon diplomacy and boudoir politicking’¹⁶⁰. One would be hard pressed to find definitive links between the cultural approach to the knowledge economy of Fisher and the economic and political approaches of Leadbeater and Suarez-Villa. However, just as in the cold war, it is the soft linkages and collusions between culture and political economy that are important here. The connections forged between ‘economic’ approaches to culture – exemplified here by Fisher – and the ‘cultural/aesthetic’ approach to political economy – exemplified by Leadbeater – reinforce each other. Where political economy becomes the touchstone for cultural criticism, and ‘cultural creativity’ provides a similar function for political economy, it is reasonable to suggest that a new, all encompassing, *ideology* of creative production is at work.

¹⁵⁸ As with the discussion of Bourdieu’s image of production in Chapter Three, the recourse to the rhetorical concepts of composition seems unavoidable.

¹⁵⁹ Arguably, this is still the case. Ex-CIA operatives provided Stoner Saunders with willing help in putting together an extremely well-researched and documented account of CIA activities between 1947 and (approximately) 1966 – this is interesting since it follows the first rule of denial – i.e. that was ‘then’ this in now.

¹⁶⁰ See Stoner Saunders, op. cit., p. 6.

THE CREATIVE SUBJECT AND CREATIVE DESTRUCTION: THE RHETORIC OF INTELLECTUAL PROPERTY LAW AND THE SEMIOTICS OF CREATIVE LABOUR

THE AMERICAN SUBJECT: JOHN MOORE'S BODY IN THE SOCIETY OF CREATIVE DESTRUCTION

The three case studies of the knowledge economy discussed above, at work in economic theory, political rhetoric and cultural criticism are tied together by a belief that the subject in the knowledge economy is at all points creative. Whether construed specifically through the locus of production or consumption as a general resource to be mined, or as the subject of political rhetoric and cultural criticism, the subject of the knowledge economy is always creative in character. A privileged position is retained however for creative subjects that are deemed to be radical or creative/destructive in character.

The knowledge economy however produces more than rhetorical positions. As the Charles River case suggested, American *law* has long recognised arguments related to innovation that could be regarded as creative destructive in character. The Charles River case established the principle that privilege granted in the past was secondary to the good of society 'understood as its right to the best possible future.'¹⁶¹ As Fisher argues, the Supreme Court ruling set 'the philosophic and legal tone for the American relation to property', affirming the priority of new creations over existing property rights, provided that a 'public utility' could be proved. In Fisher's words it 'made creative destruction the law of the land'¹⁶².

¹⁶¹ Fisher, op. cit., p. 22.

¹⁶² Ibid., p. 23.

In 1990, the case of *Moore v The Regents of the University of California*¹⁶³ established a precedent with regard to the rights of the subject that parallels and complements the principles of creative destruction established in Charles River case. Moore is significant for two reasons. Firstly, it demonstrates the operation of an ideology that privileges the rights of the creative subject over all other forms of subjecthood. Secondly, as in the case of *Brown v DMC* discussed in Chapter Three, Moore also demonstrates the way differing ideologies of creative labour – the rhetorical and the semiotic/networked – inform the division of property rights that stem from creative labour. It is therefore a further example of the structural patterns of the knowledge economy.

As argued in Chapter Three, the emergence of the semiotic/network models of creative labour has not simply replaced the rhetorical model. In the art world, as in the economy generally, the two models co-exist, operating side by side, frequently *without* conflict. Fisher's analysis of American literature a good example of the way the two modes can be used together without contention. For Fisher the works of individual authors – the very image of the rhetorical mode of composition – are set within the broader context of networked creative labour. His analysis skewers down the production of individual authors within the social networks of technological innovation. Such technological networks define the conditions of an age within which the individuated creative labour of authors takes place.¹⁶⁴ In Fisher's *no conflict* formulation, the semiotic/network theory of labour does not undermine the author's claim to property rights – networks of innovation simply provide the social ground upon which the possibility of authorial production and consumption is situated.¹⁶⁵

However, in the real politick of the knowledge economy there are many instances where the models are forced into conflict. *Brown v DMC* is one example of an increasingly common phenomenon in which semiotic/network theory is applied as a

¹⁶³ Boyle, op. cit., p. 101.

¹⁶⁴ In a sense, this could simply be seen as a straight social history approach were it not for the evolutionary straightjacket that is in play.

method of limiting an individual's property claims to their intellectual labour. Despite the use of the network model to limit the number of claimants to an invention or innovation, the rhetorical mode of composition is still very much in evidence at the point where property rights are claimed in law. Conflict between the semiotic/network and rhetorical models is clearly a factor in the Moore case. What is specifically interesting about the case however is the way that the creative network is organised to specifically exclude Moore. The final judgement in the case goes further, placing the property rights of the creative network over the individual in a manner that closely resembles the principle of creative destruction established in the Charles River Case.

The Facts of the Case

In 1976, John Moore underwent treatment for hairy-cell leukaemia at the University of California Medical Centre. The medical team attending him led by Dr David Golde became interested in the qualities of certain aspects of his blood, which massively overproduced T-lymphocytes. The doctors realised that the abnormalities in Moore's T-lymphocytes could be used to manufacture lymphokines that regulate the immune system. Put simply, Moore's cancerous spleen had enormous commercial potential. Without Moore's knowledge Golde's team performed tests on his blood, sperm, and bone marrow. Moore's spleen was eventually removed for 'arguable' medical reasons after arrangements had been made to deposit the tissue with a research unit at the University of California. In 1981, a cell line established from Moore's cell line was patented by the University of California and his doctors. Moore sued for damages, claiming firstly that consent had not been given for the research, and secondly for an invasion of his privacy. The aim of Moore's legal team was to prove that Moore possessed property rights to his DNA. In the absence of specific legislation relating to

¹⁶⁵ In this sense, Fisher's position recalls that of the Modernist avant garde, as described with reference to Schumpeter.

an individual's right to property in their gene line, the only measure available to Moore's legal team rested on a supposed 'property right' in privacy.¹⁶⁶

The Ruling

The Supreme Court of California reached a final ruling in favour of the University of California in 1990. The court ruled that the patent taken out by the university superseded any property claim Moore might possess in his genes. The court argued that the patented cell line was 'factually and legally distinct from the cells taken from Moore's body.'¹⁶⁷ Federal patent law permitted the patenting of organisms provided that such organisms were the result of 'human ingenuity'. The court judged therefore that the growth of human tissues and cells in culture is 'difficult' and is 'often considered an art' – effectively upholding a patent granted in 1983 as reasonable evidence of the university's claim.¹⁶⁸ In other words, the court ruled that there were no property rights applicable to Moore's body, except insofar as by 'inventive effort', and 'art', aspects of it could be *replicated* in the laboratory.¹⁶⁹ The judgement specifically suggested that Moore could not be given a property right in his own body since to do so may hinder the free flow of information on which scientific research culture is based. As James Boyle notes in a caustic analysis of the legal inconsistencies of the case, the same 'public interest' argument was studiously ignored in the aspect of the judgement that upheld the patent right given to the University of California. To put this another way property rights were only a 'problem' for the free flow of scientific research when the emanating from the uncreative 'source', Moore himself. Property rights that emanated from 'creative activity' of the network instigated by Moore's doctors however were not regarded as a hindrance to the free flow of information,

¹⁶⁶ It is not necessary here, to detail this particular legal argument, but a full discussion of the case, and the privacy argument, can be found in Boyle, op. cit., pp. 21-24, 97-107.

¹⁶⁷ All quotations in this paragraph from Boyle, *ibid.*, p. 106.

¹⁶⁸ Patent law rewards inventive labour and specifically prohibits the patenting of naturally occurring raw materials that are effectively 'discovered' rather than invented.

¹⁶⁹ In James Boyle's words: "Moore becomes a naturally occurring raw material whose un-original genetic material is rendered unique and valuable by the inventive effort, ingenuity and artistry of his doctors".' *Ibid.*, p. 106.

despite the fact that in terms of ‘the free flow of information’ *any* property right presents some form of impediment. The implication of the judgement therefore is that creative property rights, intellectual property rights, take priority over both the claims of Moore and the free flow of information. ‘Public utility’ is seen to reside not in an individual’s supposed private monopoly in their DNA ‘inheritance’ but in the *future* medical benefits that may arise by diverting those assets into the private property of the patent holder. To put this most simply the case extends the principle of creative destructive – thrashed out in the Charles River case – to the individual subject.

JOHN MOORE’S BODIES

In upholding the principle of creative destruction so central to postulations of the knowledge economy, Moore does so specifically through a discourse on the subject and intellectual property. One result of the property discourse in the Moore case is the division of John Moore’s body into two realms of property. In theory, the separation of the corporeal and the incorporeal realms of movable and intellectual property could provide a model that would permit Moore the literal and legal possession of his *physical* body without and prohibiting the ownership of the *image* of his body by his doctors. However the Moore case is very murky, no neat, clear-cut divisions between corporeal and incorporeal property applied in the case.

The judgement in Moore upsets some of the classical doctrines of property law. The concept, derived from Locke’s *Second Treatise of Government*, suggesting that all property rights stem from the *ownership of the self*, is frequently cited in defence of private property in all its forms.¹⁷⁰ The central principle of the ‘labour theory of property’ suggests that *self-possession*, and by extension the ownership of one’s labour,

¹⁷⁰ Particularly so in American legal literature – partly because of American law’s historical root in English law, and partly because of the widely-held opinion that Locke’s *Second Treatise* influenced Jefferson.

is the vital grounding of all property.¹⁷¹ The judgement in Moore ostensibly undercuts the grounding condition of the ‘labour defence’ of property – the literal ownership of the body/self – from which, in theory, all other property rights flow.¹⁷² Moore suggests that the self-possessed Enlightenment body can be gently disaggregated in the name of the ‘public good’ represented as possible medical advances in the future.¹⁷³ The case effectively suggests that the creative destructive networked-subject takes priority over the Enlightenment body. However, this is not to suggest that the subject of intellectual property law simply takes precedence over the bodily subject, or, that there is a clear division between the owner of the image of the body and the body itself.

The law has long made distinctions between *literal* possession and *legal* possession¹⁷⁴. While Moore operated as a unique individual in a Cartesian sense, ‘in one piece’ and in ‘possession’ of his faculties, the legal rights to ownership of his body were spread across *a number of different property forms*. The judgement in Moore rests upon questions of labour and differentiations made between different property forms. Despite the fact that Moore’s DNA was clearly ‘possessed’ rare and highly individualised properties, no property rights were found to be applicable to Moore as

¹⁷¹ On this basis, attempts were made by activists to draw analogies between the corporate ownership of Moore’s cell line and the provisions of the Constitution of the United States prohibiting slavery. See for example the patent sought by Stuart Newman and Jeremy Rifkin on the ‘Chimera’, or human pig hybrid. Here, the specific intention was to highlight the splicing of human genetic information into the genetic code of animals. Would for example a pig hybrid with 40% human genes possess 40% human rights? Does the ownership of such an ‘authored’ hybrid represent a form of human ownership or slavery? As James Boyle puts it “As yet no genetically engineered lumpenproletariat uses the language of the Thirteenth Amendment to plead for citizenship, but in the judgement of many, that is only a matter of time. It is the ultimate mark of the information society that we will soon have *authors* of living, sapient beings, authors who will presumably assert that they are not slave masters but creators, and entitled to intellectual property rights as such”. Boyle, op. cit., p5.

¹⁷² It has been argued that the case represents an aporia in property theory. If self-possession is undermined by intellectual property law, then labour theory falls apart and so, by extension, does intellectual property law since it rewards labour. There are however a number of problems with the assertion. Intellectual property is rhizomatic – personality/moral right defences for example, are not as reliant on labour theory. Similarly, monopoly of government grant does not imply property given in exchange for labour. The Lockean defence is likewise only one of many defences of property, but it is the only one that is so vociferous in grounding property in self-ownership. As I argue towards the end of this chapter, ownership of the body and ownership of images of the body are easily separable. However, the unsettling aspect of Moore is the failure to sufficiently separate the corporeal body from the incorporeal.

¹⁷³ It is doubtless a fortuitous accident that the public good coincides so neatly with the requirements of business.

the literal, physical embodiment of such a peculiar genetic ‘composition’. Property rights were however awarded to the scientific team who ‘discovered’ the peculiarities of his DNA. The labour of his doctors in *composing* an image of his cell line was regarded as special and individuated enough to qualify as an ‘invention’ and was thus able to sustain a patent. Put simply, Moore’s ‘composition’ was regarded as an effect of nature whereas his doctors composition was regarded as work.

Since the Thirteenth Amendment of the Constitution of the United States prohibits the ownership of individuals in a *corporeal* sense, Moore himself could not be ‘owned’ by his doctors. However in an *incorporeal* sense his image clearly could be. In the ruling Moore becomes something like Leadbeater’s chocolate cake, a finite corporeal entity, while his DNA become a ‘recipe’ *produced* and owned by his doctors. The division here is between tacit knowledge – that passed down by tradition, literally genealogical in this instance – and explicit knowledge.¹⁷⁵ ‘Moore the cell line’, ‘Moore the patent’, is explicit knowledge available everywhere, at a price, while ‘John Moore’ tacit knowledge incarnate, shuffles inevitably towards his grave.

Taken this way, the knowledge economy interpretation of the case would suggest simply that the relationship between Moore and his doctors is akin to that of an artist and his/her model – Golde’s team simply made an image of Moore’s cell line, converting it into useful information and as such possess intellectual property rights to that information. The Moore case however the case is not so simple as the knowledge economy theory would indicate. The process of translation into information was only possible with the removal of a ‘pound of flesh’ from the model. In order for informisation to take place, physical material had to be removed from Moore’s body and placed in culture. The law does not prohibit the trading of ‘spare’ body parts. Human tissue, once outside ‘the body’, is depersonalised and property law and market

¹⁷⁴ A thief, for example, may be in *literal* possession of stolen goods. *Legal* possession suggests that the individual possesses a right in the thing they effectively control.

¹⁷⁵ Collecting auntie’s recipe for chocolate cake and publishing it, or moving from tacit to explicit knowledge is the essence of the knowledge economy.

conditions come into play.¹⁷⁶ In other words for the image making to take place, parts of Moore's *body* first had to enter into private property. Once distinct from his body, the legal rights to Moore's spleen could be disaggregated¹⁷⁷. Despite the fact that Moore himself was not regarded as a tradable entity his body parts were. From his tissue Dr Golde's team were able to peel off an image of his DNA. The peculiarity of the process however is that even small amounts of tissue hold the image of the whole individual form which they are taken. Like a hologram, when broken into pieces, even the tiniest fragments retain within themselves the image of the whole. In other words, intellectual property rights could only be established once part of Moore's body had become 'movable' property. However, the *image* created from the part is not that of the part but that of the whole. In this sense in that sense two Moores emerged from the case, one corporeal and one incorporeal, John *Moore-the-person* and *Moore-the-commodity*.

THE USE OF RHETORICAL AND SEMIOTIC/NETWORK MODELS IN THE IDEOLOGY OF CREATIVE DESTRUCTION

Having divided Moore's body, however problematically, into the natural and the created, the creative aspect can itself be seen to be divided. Different models of creative labour informed the case, falling along now predictable lines. The 'creative' labour that secured the patent was networked in character. Golde headed a medical team and filed a patent on the research in his own name and that of selected members

¹⁷⁶ As Judge Broussard suggested in his dissenting opinion on the case, "the majorities rejection of plaintiff's conversion cause of action does not mean that body parts may not be bought or sold for research or commercial purpose or that no private individual or entity may benefit economically from the fortuitous value of plaintiff's diseased cells. Far from elevating these biological materials above the marketplace, the majority's holding simply bars plaintiff, the source of the cells, from obtaining the benefit of the cell's value, but permits defendants, who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of...liability." As quoted in Rifkin, op. cit., p. 61.

¹⁷⁷ The court left open the possibility of an appeal on the grounds that Moore did not give consent for removal of his organs.

of his team and the research institution – the University of California.¹⁷⁸ The disaggregation of rights to the ‘invention’ in such cases bears little or no relation to any hierarchy based on ‘inventive’ capacity of individuals. In such cases established academic hierarchies and institutional employment conditions characterise the network and the ownership of rights emanating from the network. Theoretically, the creative activity is ‘semiotic’ in character, a network of human and non-human actors is at work, the creative act is performed within the relationships of such actors. However the raw material – and in this case a human actor – is explicitly excluded from the network. When it comes to claiming property rights in the innovation created by the network, existing institutional hierarchies and protocols determine the shape of the claim, masking the actual flow of labour within the network.

As in *Brown v DMC*, the network is used to exclude actors that may have a proprietorial claim, which challenges the claims of the ‘instigators’ of the network. However, it is interesting to note that when the network finally seeks patent recognition the semiotic/network model gives way to the rhetorical model. The Moore judgement interprets patent law in terms that can be characterised as *compositional*. The court found that the patented cell line was distinct, ‘factually and legally’, from the cells taken from Moore’s body. The movement from the source, Moore’s body, to the new existence as a product of ‘human ingenuity’ involves a compositional trope. As Boyle points out the *uniqueness* of Moore’s DNA was precisely what interested Dr Golde’s team, despite the courts finding Moore’s DNA was ‘in principle’ *identical* to everyone else’s. The efficacy of Golde’s research rested upon the precise replication of Moore’s specific genetic abnormality in the laboratory. In no way then could the researchers be regarded as *innovating* the cell line.¹⁷⁹ The patent was, in effect, awarded for an act of *translation* or what one might call an act of *picture making*. The innovate step in such patents consists not simply in the ‘physical’ growth of the cell line but in its *translation into information* – a series of numbers and letters on the page

¹⁷⁸ The specific remuneration to individuals in such a case will usually be decided on the basis of pre-existing employment contracts.

¹⁷⁹ By the same token neither could they be said to innovate the techniques of cell culture which would in any case be covered by a separate patent.

that enact an identification and understanding of the cell line. To put this simply, such patents require the patentee to *compose* an image of pre-existing matter. An act of composition that is entirely consonant with the rhetorical mode of creative production.

CONCLUSION

Moore v. The Regents of the University of California follows then not only the creative destructive ideology of the knowledge economy but also articulates itself on divisional hierarchies of tacit and explicit knowledge (assumed self ownership and intellectual property), resolving itself finally upon the confluence of rhetorical and semiotic modes of creative ideology. The privileged subject in the case is creative in character and creative destructive in particular.

More generally then it is reasonable to suggest that the ‘cultural turn’ in economic theory, represented by the dematerialisation of the contemporary economy outlined in this chapter, fractures on lines similar to those laid out by dematerialisation in art in the 1960s. The overlay of rhetoric and semiotic models of creative labour is central to both moments of dematerialisation. The use of the semiotic model of creative labour as a tool with which to manage ‘human capital’ has become increasingly routine in the era of ‘the Knowledge Economy’. However conflicts between the semiotic model and deeply rooted beliefs in certain aspects of the rhetoric model are common and are often fought out between the instigators of creative networks (corporations) and participants in such networks (political subjects). The new ideology of creativity expounded from developments in art practice and post structuralist theory strongly *desubjectivises* the production of intellectual property. In the case of Moore, de-subjectifying takes on an entirely new *empirical* meaning. Post-modern theory moves directly into the realm of economic and political rights.

5

The Knowledge Economy and Globalisation: Internationalising Intellectual Property And The Fate Of Critical Art Practice

“Intellectual property is the oil of the 21st century.” Mark H Getty

INTRODUCTION: LIMITS OF THE CREATIVE ECONOMY

This chapter is divided into two distinct, but entwined, areas of concern. *Section One* concerns the identity of the knowledge economy. The section argues that ‘post-industrial’¹ economies can only maintain their theoretical identity as knowledge economies within the broader context of globalisation.² In Chapter Four, the knowledge economy was explored as an *idea* through the creative concepts that have shaped its discourse. In this Chapter, the identity of the knowledge economy is given greater definition by addressing the interaction between the knowledge economy as *concept* and the knowledge economy as political *policy*. The specific arena of analysis is that of foreign relations. The chapter argues that the ideology of the knowledge economy is synonymous with a division of labour that operates, not within the firm, but on a generalised global scale. Section One therefore examines the growth of a global legal architecture that enables, and limits, the concept of the knowledge economy. Much recent work on globalisation has concentrated on the multidirectional exchange of culture, capital, technology and natural resources. In contrast to that work, the globalisation narrative presented in this chapter centres on the issue of

¹ The term ‘post-industrial’ is used here within specific parameters. The knowledge economy is a theorisation of national economies within in context of globalisation – both as theory and as actuality. In that sense ‘advanced’, mainly western, economies are believed unable to compete on the basis of productivity in the manufacturing sector. The ‘knowledge economy’ therefore is synonymous with a process of de- or post – industrialisation. However that is not to suggest that the aspects of industrial production – those issues of *design* – claimed by the knowledge economy are simply the prerogative of such post-industrial economies.

² Many of the critical objections to the knowledge economy, such as its aestheticising tendencies, its sense of naturalism and inevitability, are applicable to the current phase of globalisation. The main contention of Chapter Four, that the knowledge economy is an event in theory as much as the corollary of a series of ‘historical’ (material) determinations is equally applicable to globalisation. For a

‘political vision’ – the economic will of nation states and corporate entities – as the main constitutive force behind attempts to globalise intellectual property law. Section One argues that the recent expansion and entrenchment of international laws regarding intellectual property are clearly bound to specific, national, and corporate, economic agendas.³ The development of the agreement on *Trade Related Aspects Of Intellectual Property*, or TRIPs, is central to this analysis. The main impetus behind the agreement was a coalition of ‘knowledge economy’ interests, ranging from corporate players, represented by the *Intellectual Property Committee*, or IPC, to the governments of the United States and Japan, and the European Union. The section examines the role played by theories central to the ‘knowledge economy’, in the development and *shaping* of the agreement. Of particular concern, here is the relationship between theories of creative destruction and price competition. The closing part of the section discusses the cultural characterisations of the agreement. A case study of an attempt by The University of Mississippi to patent turmeric is used to demonstrate the cultural characterisation of ‘knowledge bases’ as either ‘modern’ or ‘traditional’. The section ends with consideration of the tendency of the intellectual property system configured by TRIPs to render economic differences as cultural differences.

Having explored the expansion of the creative tropes of the knowledge economy into foreign policy and international law, *Section Two* examines the question of limits from a different direction. The vulnerability of knowledge economies to critiques of intellectual property is obvious. In recent years, such critiques have tended to focus on technological and ethical issues. However, the cultural realm is also relevant. As demonstrated in Chapters Three and Four, there are two possible interpretations of the semiotic/network model of creative production. The ‘weak’ interpretation, takes up the desubjectivisation of creative production, that developed in the wake of the attack on the rhetorical model of creative labour. This interpretation of the semiotic/network poses no specific threat to the rhetorical creative concepts within intellectual property

discussion of similar concerns in relation to globalisation see Alan Scott’s introduction to *The Limits of Globalisation: Cases and Arguments*, ed., Alan Scott, Routledge, London, 1997.

³ The relation between corporate power and the international negotiating power of particular nation states will be discussed later in the chapter.

laws. However, it is extremely useful in establishing a creative narrative with which to delegitimize the property claims of individual creative workers.

Section two shows how the ‘weak’ reading of the semiotic/network was itself legitimised, by examining the fate of the ‘strong’ interpretation in the era of the knowledge economy. The focus here is on a critical case of copyright infringement, *Rogers v Koons* (1989-1992). The case was fought out at a highly politically sensitive moment in the development of the legal infrastructure that now enables the knowledge economy. The case therefore marks the point at which the ‘strong’ interpretation was reined in. The ‘strong’ interpretation in question, took the form of ‘appropriation art’ – a practice that had developed from aesthetic dematerialisation’s critique of property relations. The early phase of ‘appropriation art’ specifically sought the overthrow of copyright law. The taming of this radical position, and the steering of ‘appropriation’ into more neutral waters, was central in ensuring the ascendancy of the ‘weak’ interpretation central to the operation of the knowledge economy.

PART ~ I

INTERNATIONALISING INTELLECTUAL PROPERTY

THE KNOWLEDGE ECONOMY AND GLOBALISATION

As suggested in Chapter Four, the knowledge economy does not simply emerge in a ‘natural’, or ‘evolutionary’ way from a determining set of material factors. The concept of a knowledge economy is more accurately viewed as an ‘event’ in the conceptualisation of the economy – rather than as the straightforward material result of deterministic historical processes. In other words, though it may be conceived of as a theoretical ‘response’ to deregulation and the dematerialisation of older industrial economies, the material factors that elicit that response do not fully account for the *identity* of the response. The theoretical proposition of the knowledge economy begins by assuming (or hoping?) that a ‘new economic age’ has begun – one that is qualitatively *different* from that of ‘industrial modernity’.

IDENTIFYING THE KNOWLEDGE ECONOMY

Insofar as knowledge economies are assumed to be co-extensive with ‘post-industrial economies’, they assume also, a specific geographical location. The identity of such economies is based therefore, on the relationship they strike with developing states at the level of competition – particularly with respect to labour costs. To put this another way, knowledge economies are grounded in *territorial* divisions of labour.⁴ If a

⁴ At a very base level, the knowledge economy defines itself in terms of creative labour, concepts and ideas. In this way, it is distinct from manual labour, which is related to the extraction or production of material resources and the manufacturing sector.

‘knowledge economy’ is anything, it is a geographic entity whose ability to compete in the manufacturing sector, on price, against other geographic entities is now limited. It is therefore an economy that can now only compete in terms of *innovation*.

However there are a number of things that might be held to complicate such a clear-cut division. The theory of the ‘knowledge firm’ suggests that the knowledge economy may have rather permeable borders. The knowledge firm, *whatever its geographic location*, is a ‘knowledge producer’. The aim of the firm is to gather creative, ‘tacit’, knowledge assets from employees and consumers – both of which could be located anywhere in the world – and turn such knowledge into ‘explicit’ property assets. In that sense, the knowledge firm has no fixed boundaries – it mines tacit knowledge *wherever it finds it* before rendering it as a tradable property asset. In theory then, the knowledge firm can be located anywhere.⁵

However, despite its theoretical fluidity, the actual transfer from ‘tacit’ into ‘explicit’ knowledge requires particular conditions. The transfer of knowledge assets is dependant upon a system of intellectual property that is generally recognised and practically enforceable. The ‘knowledge firms’, which form the backbone of the ‘knowledge economy’, feed on tacit knowledge wherever they find it. Despite this fact, such firms will also congregate where there is a secure intellectual property regime conducive to their activities.⁶ The second factor leading to such a congregation of firms is a stable social infrastructure, with a well educated, albeit ‘pricey’ workforce – one that can translate tacit into explicit knowledge, or better still, radically innovate new knowledge.⁷ In sum then, the concept of a knowledge economy

⁵ Arguably, given the infinite expansion of technology that erases the need for physical labour, *all* economies could become ‘knowledge economies’. The end of (physical) work promised by technology is sadly always ‘just around the corner’.

⁶ This is not without irony, as we shall see later, since to defend their assets, such economies also wish to extend and expand intellectual property law so as to protect themselves against ‘unfair’ competition. In doing so, they risk undermining the desirability of their location. Consequently, they run the risk that knowledge firms will, for cost benefits, relocate to countries where intellectual property systems have been newly instigated. The only bulwark against this occurrence, as the previous note suggests, is a well-educated workforce. Blair’s “education, education, education”?

⁷ This is vital as the previous footnote indicates. Leadbeater suggests that research universities form the hub of radical knowledge creation and are therefore the central institutions of the knowledge economy.

can be defined negatively. It is specifically conceived to be *different* from something else. In practice, this means that ‘knowledge economies’ have a geo-political location, most often within ‘*post-industrial*’ or developed economies.

THE LIMITS OF THE LAW: THE INSTITUTIONAL BASIS OF THE KNOWLEDGE ECONOMY

If the production of knowledge is central to knowledge economies, then the storage of assets is its most vital problem, since knowledge has a habit of spreading unchecked.⁸ As a number of commentators have noted, the necessity to protect the value-added components in consumer products, together with the general value of intellectual property licences, has pushed intellectual property to the top of foreign policy agendas in the developed world.⁹ Economic dematerialisation has therefore coincided with a consistent drive to widen and deepen intellectual property law and standardise its core concepts at international level.¹⁰

(So central in fact, that to leave them reliant on the good will of taxpayers, is simply bad management. Leadbeater’s answer, as usual is ‘sell, sell, sell’.)

⁸ To return to Romer’s metaphor of the ‘recipe’ for a moment. The logical corollary of a firm, or an entire economy, specialising in the production of ‘recipes’, is that the physical production of ‘meals’ will be devolved to areas where material production costs are lowest. Recipes are of course easily learnt and replicated. Completely deregulated economies – economies where intellectual property law is either not recognised or poorly observed – obviously present a problem, hence the need to strengthen, deepen and geographically expand such laws. The regional division of labour that knowledge economies are predicated on, also makes them vulnerable. Marginal costs for the reproduction of products like CDs, videos and medicines are low and often require little actual know how. ‘Illicit’ copying for export is therefore attractive in countries where enforcement of intellectual property law is weak or nonexistent.

⁹ See for example, Boyle, op. cit.

¹⁰ It is important to see this as a process of ideology and political action rather than as a simple matter of technological determinism. As Christopher May argues, the global knowledge commons are being circumscribed, not so much by the technology that makes appropriation possible, but by the extending legal architecture that creates false scarcities of knowledge and renders it ownable. See May op. cit., p. 89. As examples of the broadening of existing rights, Graham Dutfield suggests the extension of copyright to software programmes, the new generation of sui generis rights in plant varieties, and the layouts of integrated circuits. He also suggests the international standardisation of patent sunsets at twenty years, and the general acceptance that rights are assigned to the first applicant rather than the first inventor, as examples of the progressive standardisation of the core concepts, and justifications, of intellectual property rights. See Dutfield, op. cit.

Establishing the global 'free-market' necessary for the operation of knowledge economies, requires widespread international agreement on social institutions of property that support the market. Globalising specific institutions of property is demonstrably a political project and an obvious example of the truism that all property is a socio-political settlement. Property is not 'natural' and does not occur spontaneously but rather exists in relation to a positive legal framework that differentiates mere 'possession' from legal 'ownership'.¹¹ All property then, is a socially constructed institution, which is called into being in response to certain social and political requirements and interests.¹² The globalisation of intellectual property stands in contrast to many other current theorisations of globalisation, that present the process as 'natural', 'evolutionary' and inevitable. The rapid spread and concretisation of such an institution at an international level requires political will. Such a creation is demonstrably dependant on the ability of nation states to negotiate trading relationships in such a manner as to bring such an institution about. The development of an international regime of intellectual property is demonstrably dependent on the ability of nation states to negotiate trading relationships, in such a way as to bring about the creation of such an institution.

The theoretical and practical limits of knowledge economies can be glimpsed therefore, where such states have made attempts to spread and enforce the institution of intellectual property. The borders of such a vision then are particularly observable in places – nation states or regions – where the maintenance or operation of intellectual property law is still haphazard, or where it does not exist at all. Not all legal jurisdictions recognise intellectual property law – though such jurisdictions have become increasingly rare in the last twenty years due to pressure from economies that define themselves as knowledge economies. In other jurisdictions, though intellectual

¹¹ As May argues, property is often presented as a 'just history' that implies that the character of property is natural and de-emphasises the contingency on the current political and economic settlement. See May, *op. cit.*

¹² As May suggests, the state cannot be removed from the institution of property: without it there would be no institution of property. *Ibid.*

property has some statutory basis, for one reason or another, aspects of the laws are widely flouted.¹³

THE KNOWLEDGE ECONOMY AND FOREIGN POLICY

TRIPS AND THE INTERNATIONALISATION OF INTELLECTUAL PROPERTY

As suggested above, the concept of the knowledge economy is only viable where the institution of intellectual property can be guaranteed at an international level. The most significant treaty of recent years in this respect is TRIPs, or the *Trade-Related Aspects of Intellectual Property Rights* agreement. Christopher May has provided a pertinent account of the process by which the political and legal settlement was reached. However, before looking in detail at his account of that process, in the context of the forgoing theorisation of the knowledge economy, it is necessary to outline the agreement itself and suggest its importance.

There is some contention in the literature as to the precise relationship between TRIPs and *World Intellectual Property Organisation*, (WIPO) – differing accounts of which can be found in books published in the last two years. The following version draws May's work, which provides the most detailed account of the emergence of TRIPs. The section is further supplemented with Dutfield's account.¹⁴ There are two

¹³ Even where laws are rigorously enforced there are gaps – home-taping and the downloading of music being the obvious examples. On a more general level, it is important to remember that the statutory existence of any law tells one very little. The 'law' in its broadest definition is not coextensive with law in a positive sense. Some laws are enforced, other not, some laws are assumed to exist but have no clear statutory definition. It is therefore, not possible to simply read-off a direct relationship between positive law and social structures. Positive laws have social effects, but it is a mistake to imagine that legal codes accurately describe, measure, or define social behaviour.

¹⁴ Writing in 2000, Dutfield suggests that the institution WIPO is working to secure the treaty obligations of TRIPs. While May, writing in 2001, suggests that the institution WIPO has effectively been relegated to the dustbin of history by the emergence of TRIPs. However, the authors not only disagree about the current position of WIPO, but also about its history. While both suggest its emergence from the Paris and Berne Conventions (on patent and copyright respectively), they disagree on the actual date of the institution of WIPO. Here Dutfield gives 1967 as the date of establishment while May suggests that WIPO has its origin in 1970, with the replacement of BIRPI (The United

important international precursors to TRIPs, the Paris Convention on patent law, (1883), and the Berne Convention on copyright, (1886). In 1970, WIPO replaced BIRPI (The United International Bureaux for the Protection of Intellectual Property), which had until then been the main institution administering the conventions. In 1974, WIPO became an official agency of the UN.

The TRIPs agreement has its immediate origin in the now defunct General Agreement on Tariffs and Trade (GATT). GATT was initially launched in 1947, but contained no agreements on intellectual property until the Uruguay Round was launched in 1986. A draft agreement on TRIPs was effectively in place as early as 1990. However, negotiations refining the draft continued until the 'Final Act' of the Uruguay Round was signed in Marrakesh in April, 1994. The Final Act brought about the transition from GATT to the World Trade Organisation and incorporated TRIPs into the newly emergent institution.¹⁵

WIPO was widely regarded by developed states as a weak institution since its constitution contained no powers of enforcement or dispute settlement mechanisms.¹⁶ The development of TRIPs makes the enforcement of international intellectual

International Bureaux for the Protection of Intellectual Property). May then gives 1974 as the origin of its current form, the date when it became an official agency of the UN. Dutfield's points out that most intellectual property conventions are still administered by WIPO. Dutfield lists four areas that concern WIPO; one administering treaties; two assisting states in promulgating intellectual property laws; three harmonising such laws, and four promoting intellectual property throughout the world. Dutfield provides an adumbrated list of treaties administered by WIPO. See Dutfield op. cit., p. 95. In Dutfield's account despite the fact that TRIPs is the most important organisation for dealing with intellectual property tactically at the level of international politics, WIPO is more important in the day-to-day operation of the law and in sponsoring the growth of new forms of intellectual property.

¹⁵ May's view is that the incorporation of much of the Paris and Berne Conventions 'previously administered by WIPO' brought intellectual property law 'into the trade regime overseen by the new World Trade Organisation'. See May, op. cit., p.67.

¹⁶ Despite lack of instruments, Dutfield is at pains to claim that WIPO is not marginal to the global intellectual property regime. He suggests that it is "by far the most important international institution dedicated to IPRs, and is likely to increase its influence as WIPO builds closer links with other institutions such as the WTO and the CBD (Convention on Biodiversity)". Dutfield, op. cit., p. 96. Dutfield also reports that WIPO is collaborating with the WTO to help developing countries meet their TRIPs obligations by 2000 by providing technical assistance in "preparing legislation, training, institution building..." Dutfield here quotes from a WIPO document dated 1998. Ibid. p. 96. There would also appear to be some overlap with the administrative councils of TRIPs. The *Council for TRIPs* oversees TRIPs functions, monitoring its operation and compliance, acting as a talking shop, administering dispute and settlement procedures. Ibid., p.91.

property easier, for the simple reason that it makes acceptance of minimum standards of intellectual property protection, a condition of membership of the WTO.¹⁷

TRIPs is therefore the most important device for bringing developing states into line with the legal structures of developed states – it effectively internationalises intellectual property law.¹⁸ Although TRIPs aims to replace the fragmentary nature of multilateral agreements and ‘sectoral treaties’ administered through WIPO, by providing a legal framework for a single intellectual property regime throughout the international system, it is not ‘a direct legal structure’ for the recognition of intellectual property.¹⁹ It merely suggests ‘minimum standards’ for international intellectual property rights amongst members of the WTO.²⁰

In other words, it does not provide a blueprint or model piece of legislation that must be downloaded and incorporated into national laws. Although – as we shall see shortly – the US-Euro-Japanese systems of intellectual property law dominated the draft proposals for TRIPs, the intellectual property laws of member states do not have to be

¹⁷ TRIPs covers most areas of intellectual property; patent, copyright, trademark, geographical indications (e.g. wine regions) industrial designs, integrated circuit topographies and trade secrets – all of which had been separately dealt with by treaties between developed states, before TRIPs. As it is a guaranteed minimum standard of intellectual property protection, TRIPs does not forbid new, or *sui generis* forms of intellectual property particular to specific states.

¹⁸ May provides the following analysis as regards the scope of these arrangements. In 1994, when TRIPs came into force, the WTO included 111 states. By 1995, the figure rose to 128, with 20 states waiting in the wings to join WTO/TRIPs. In contrast, he suggests that, at its height, WIPO looked after 135 states under a ragbag of 18 separate conventions. The global scope of the agreements can be estimated against the current membership of the UN, which stands at 180 states. These figures are from a source published in 2001.

¹⁹ May, *op. cit.*, p.70.

²⁰ It is also important to point out that, in theory at least, TRIPs provides a balance of powers – attempting, as all intellectual property must, to strike a balance between incentives to produce new ideas and impeding the flow of knowledge. The most obvious conflicts between ownership rights and free flow of ideas are in the area of information where intellectual property comes into conflict with the public realm. Perhaps more importantly, there are also frequent conflicts between ownership rights to – for example anti-aids drugs – and public rights of access to such medicines. TRIPs does contain measures to account for such issues. However, the actual operation of such measures will always be hotly debated.

modelled on such paradigms. Local laws can be flexible to locale conditions provided that such laws comply with the 'minimum standard'.²¹

However, as May points out, the character of international intellectual property law has been reshaped by its subordination to an international institution concerned with governing trade. The necessity of following the general economic aims inherited from the GATT era, namely the issues of National Treatment, Most Favoured Nation Treatment (MFN) and the principle of Reciprocity, have come to dominate the 'minimum intellectual property standards' suggested by TRIPs.²² Such 'minimum standards' of intellectual property protection suggested by the treaty are played off against the principles of 'National Treatment' and 'Most Favoured Nation' (MFN) status. National Treatment demands that each WTO member must give the same rights to both nationals and non-nationals within their jurisdiction. Most Favoured Nation status requires that 'any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country be accorded immediately and unconditionally to the nationals of all other members'.²³ As May suggests, Most Favoured Nation status is the "key tool for expanding trade agreements" and is therefore perhaps "the most important innovative aspect of the TRIPs agreement."²⁴ In effect, whereas under WIPO there existed a plethora of small treaties and conventions on various forms of intellectual property, under TRIPs all such agreements apply immediately "to all the members of the WTO".²⁵ In that sense, limited conventions of the past, such as bilateral agreements, are now "as wide in scope as the main conventions"²⁶ and minimum standards of TRIPs.

²¹ Dutfield gives the example of local laws passed in Kenya in 1989 allowing for 'petty patents' relating to traditional medicinal knowledge. Since TRIPs provides only a minimum standard, there is no conflict between such local initiatives.

²² May, *op. cit.*, p. 69.

²³ Quoted in May, *ibid.*, (His citation GATT 1994, A1C:4.)

²⁴ *Ibid.*, p. 69.

²⁵ *Ibid.*, p. 69. The status of laws such as those given by Dutfield (see footnote 31) is interesting. Most Favoured Nation status effectively makes international, any attempt to protect such laws beyond Kenya.

²⁶ *Ibid.*, p. 69.

The general effect of TRIPs then has been to draw together the disparate strands of international intellectual property law and solidify them. The general movement has been in two directions. On one hand, the geographical scope of intellectual property is greatly enhanced by TRIPs. This expansion is endemic to TRIPs, not only by dint of the tying of intellectual property to membership of the WTO, but also because of the harmonisation clauses discussed above, that embed even minor agreements into the general platform of international law. In tandem with those geographical expansions, a plethora of new *sui generis* intellectual property rights have grown up in relation to issues stemming from new technologies (for example to cover the layouts of integrated circuits), and in relation to traditional knowledge bases.²⁷

However the general expansion has also been complemented by a move in the other direction, towards *narrowing* the concept or principles of intellectual property in terms of positive law, justification and doctrine.²⁸ One of the crucial effects of TRIPs is, as May argues, the *standardisation* of such core concepts and justifications at international level.²⁹ The two-fold process can be summed up in the following way. Intellectual property rights are becoming more *ubiquitous* in social terms – there are more laws and they are more likely to be invoked – however in the other direction, the general legal justifications and doctrines of intellectual property laws are becoming increasingly *homogenised*. Despite the fact that intellectual property is clearly expanding then it is also, in a vital sense, narrowing. The heterogeneous maze of national jurisdictions, piecemeal justifications and intellectual traditions from which intellectual property laws emerged are increasingly obscured in the move to TRIPs. This process can be described as the move from the history of intellectual property, with laws rooted in the particular and contingent, towards abstraction, with the

²⁷ The importance of these new forms will be touched on at the end of this section.

²⁸ This narrowing of the justificatory schemata runs counter to widespread claims that the expansion of IPRs leads to increasing incoherence. For a good analysis of the latter position, see Jessica Litman *Digital Copyright*, Prometheus, New York, 2001. A detailed analysis of the relationship between narrowing justifications and expanding content of the intellectual property law, is beyond the scope of the current study, but may well provide interesting material for future analysis.

²⁹ Dutfield also offers the example of the international standardisation of patent sunsets at twenty years, and the general acceptance that rights are assigned to the first applicant rather than the first inventor. Like May he sees the former as examples of the progressive standardisation of the core concepts and justifications of intellectual property rights.

establishment of general ‘principles’ upon which intellectual property is *imagined* to stand, and upon which TRIPs is founded. This consolidation of the law is not the result of an inevitable, ‘natural’, evolutionary shake down but the result of political and economic agency.

It is therefore important to remember that the current justifications of intellectual property are not entirely co-extensive with the historical foundations of such laws. As May points out, TRIPs, (like all forms of property), is a ‘settlement’, an institution that is contingent on the current balance of international power. This has important ramifications for attempts to critique intellectual property ontologically. The current raft of ‘principles’ and justifications are not, necessarily, ‘foundational’ to intellectual property in its broadest social and historical senses. The pre-eminence of current ‘principles’ and justifications is contingent on current economic, political, and *cultural*, power. To put this directly, critiquing the streamlined, defensive narratives utilised in the era of TRIPs, may not be particularly effective as a means of critiquing intellectual property in its broadest sense. The relative simplicity of current intellectual property narratives conceals hugely complex histories of asymmetric knowledge diffusion. In short the justificatory schemata of TRIPs, may not be representative of the histories of modern intellectual property, let alone of the ‘intellectual properties’ in their broadest sense.³⁰

The Battle for TRIPs

If the establishment of an international system of intellectual property is a prerequisite for the success of the knowledge economies then the establishment of TRIPs may give

³⁰ A good example of such a problem is the post-structuralist suggestion that, to dethrone the author, is effectively to dethrone copyright law. In moral rights jurisdictions such a position is understandable. However, the moral rights system was the only system of modern intellectual property that had ever existed. The existence of non subject-centred systems of copyright, such as the Anglo-American system, puts a lie to the notion that in the absence of a particular kind of creative subject, copyright itself will disappear. Despite such doctrines as the ‘Kolb copyright’ of 1500 (discussed in Chapter Two), the absence of a creative subject does not deny the absence of something resembling intellectual property law – nor less the asymmetric diffusion of knowledge and power.

some clues as to the shape and political operation of such economies. As suggested above, property institutions do not emerge without political will. The construction of the TRIPs agreement then provides an interesting example of the process required to create an institution of property, particularly because in some regions, cultures and states it demonstrates the *imposition* of a property institution. As suggested above, the story of TRIPs also demonstrates the narrowing of the range of justifications and doctrines of intellectual property law. Most importantly, it sheds light on why theories of the knowledge economy have given pride of place to creative destruction as a dominant creative ideology.

TRIPs is the product of a complex interpenetration of material and conceptual forces³¹. Before going on to discuss the treaty in relation creative theory of the knowledge economy, it is necessary to account for other factors usually considered to be important to its development. In this relation, May cites a 1992 brochure produced by GATT putting forward its arguments for a reassessment of existing intellectual property law. As far as GATT was concerned, given the increasing economic importance of information, a reform to the international system would be of benefit to *all* states. The document suggests three factors as important; firstly the need to counter the increasing incidence of piracy, secondly the need for technology transfer between developed and developing states, and finally the need to iron out inconsistencies in the current system. All these concerns were certainly factors in the emergence of the agreement. However, the simple recounting of factors in the brochure conceals a more complex story.

The desire to simplify and straighten out the inconsistencies of the existing treaties and conventions administered by WIPO is, perhaps, the most tenuous of the arguments for reform. It is inconceivable that such a difficult, and costly, operation would be undertaken simply for the sake of legal tidiness and that economic considerations were far more likely to have been paramount in the attempt to address such

‘inconsistencies’. The issues of technology transfer and piracy give a much more plausible rationale for the development of TRIPs. It is not inaccurate to say that the two poles of technology transfer and ‘piracy’ are at the heart of the political debate from which TRIPs emerges. As has already been suggested, knowledge economies are vulnerable to the bleeding of ‘knowledge’, whether one views this simply as information and technology transfer or straightforward piracy. By the 1980s, it had become apparent to the governments of developed states that future economic viability could only be secured by the internationalisation of an effective system of intellectual property law.³² In this sense then it is true to say, as many have, that simple material factors led to the development of TRIPs – the new technologies emerging in the communications and biotech sectors were/are vulnerable to piracy. Without the growth of such economic sectors, it is doubtful that a review of intellectual property laws would have been necessary.³³ The generally accepted fact that WIPO was a weak instrument with which to enforce intellectual property law provided the most obvious reason for a reassessment on the part of developed states. Bringing intellectual property law within the scope of trade negotiations offered the possibility of ‘linkage bargaining diplomacy’.³⁴ Since it was dedicated solely to the administration of intellectual property conventions, WIPO possessed little in the way of bargaining power with states that had no interest in protecting intellectual property. Under the administration of a general trade agreement however, the imposition of the fully international intellectual property regime desired by knowledge economies, could be played off against concessions on other trade agreements such as textiles and agriculture.³⁵

³¹ This interpenetration of material and conceptual factors is, in principle, multidirectional. No particular default settings, (such as one attempting to *direct* causations) can be assumed to be in operation.

³² As May notes, “The increasing speed of innovation and the expansion of the role for knowledge or information in the capture of economic value added have enhanced the importance of controlling knowledge resources (and by extension intellectual property) to national development. As the field of operations has expanded for corporations which accord significance to intellectual property, so their requirement to enjoy the same protection that has been institutionalised in their home markets has taken on an international dimension.” May, *op. cit.*, p. 81.

³³ May also makes this point. *Ibid.*, p. 80.

³⁴ This point is made by both Dutfield and May, *op. cit.*

³⁵ The dismantling of the Multi-Fibre Arrangement – which benefited textile and clothing sectors in developed countries – is a good example of such a trade-off. However, as May points out, the

However, as argued in Chapter Four, material factors such as those laid out above do not fully account for the theoretical responses of economists and the political responses of policy makers. Beliefs about the nature of economic activity, theories of creative labour and the feasibility of managing creative labour (and the value created by such labour), are also vitally important.³⁶ As will be demonstrated below, the formation of TRIPs can also reasonably be viewed as playing out a foreign policy agenda later expounded in theorisations of the knowledge economy. The shape that TRIPs took on reflects the fact that it was designed to tackle the problematic relationship between developed (or knowledge) economies and the economies of developing states. In addition to material perspectives then, TRIPs also represents a complex *cultural* interaction. On one hand, the deployment of creative ideology can be seen as a factor that structures the relationship between developed economies and developing states. On the other, the complex construction of creative ideology within theorisations of the knowledge economy can be seen as a factor of the relationship such economies strike with the economic capacities of developing states.

developed states essentially gave concessions in 'the industry of yesterday' while creating the international intellectual property system that secured the resources and technologies of the knowledge economy. May, op. cit., p. 88. Dutfield cites in particular, the efforts of the United States in this respect. He quotes the following from McGrath: "The United States saw that tying obligations to protect intellectual property rights to other trade commitments under GATT would provide the desired vehicle for pressurising recalcitrant trading partners. So, having recruited support from other developed nations, 1985 to 1989 saw the United States employing various methods to 'encourage' in particular the less developed countries and newly industrialised countries to accept the insertion of TRIPs into GATT". See Dutfield, op. cit., p. 12. See also, M.D. McGrath, 'The Patent Provisions in TRIPs: Protecting Reasonable Remuneration for Services Rendered – or the Latest Development in Western Colonialism?' in *European Intellectual Property Review*, 7, 1996, pp. 398-403.) Dutfield also cites Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, Brookings Institution Press, Washington D.C., 1998 and Susan K. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*, State University of New York Press, Albany, 1998 on the same issue.

³⁶ Technological advances are of course contingent upon social and cultural structures of knowledge, the activities of particular agents and various material factors. Assigning absolute primacy to either material or ideational factors in causative chains is problematic. Which is not to suggest that at some points, broad characteristics of causation cannot be established. Such causations however are infinitely complex.

INTELLECTUAL PROPERTY AS A TRADE RELATED ISSUE: THE QUESTION OF COMPETITION

A particularly good account of the political and economic factors at work in the development of TRIPs is given by May.³⁷ May points to the agency of two distinct actors in the development of TRIPs both of whom had an economic interest in reforming the international intellectual property system. The two actors however possessed very different economic agendas. In the 1960s and 70s developing states pressed hard for reform of the international system as it then stood. While any change from the status quo was initially resisted by the developed states, in the early to mid 1980s their attitude to reform changed, a shift that May suggests was largely due to the lobbying of corporate actors.

In the 1960s, the developing states came to regard intellectual property as a protectionist measure promulgated by developed states as a method of maintaining a technology gap that favoured the economies of the latter.³⁸ During the 1970s, *The Group of 77* argued for a dilution of intellectual property laws within their own borders and, with the help of the *United Nations Conference on Trade and Development*, had some success in reducing the monopoly rights accorded intellectual property.³⁹ The process of agitation led to *The Diplomatic Conference for the Revision of the Paris Convention*, which sat for the first time in 1980. However all four of the scheduled conferences became deadlocked on the question of the purpose of patent laws. Developing states viewed patent as development issue – such devices were a bar to technology transfer and prevented such states from competing effectively with developed nations. The developed states stuck to the well-worn instrumental

³⁷ Both May and Dutfield cite the same sources for accounts of the development of TRIPs. Peter Drahos, 'Global Property Rights in Information: The Story of TRIPs at the GATT', *Prometheus* 13, 1 June, 1995, pp. 6-19. Also, Susan K. Sell, 'The Origins of a Trade-Based Approach to Intellectual Property Protection', *Science Communication* 17, 2 December, pp. 163-185. The account of the development in this chapter is taken from May and Dutfield.

³⁸ May quotes Sell as follows, developing states "seized on patent protection as a culprit behind import monopolies and patent abuse as a tool to prevent them from developing their own technology for the internal market and for export." Quoted in May, op. cit., p 83.

³⁹ The 77 poorest states of the world at that moment.

justification of intellectual property, that without such measures there would be no investment, no innovation, no economic growth. For the latter group intellectual property was a well-established 'fact', the only issue in question was to whom the rights belonged.

Unfortunately for the developing states, rather than simply defending the status quo, the debate seems to have alerted the developed states to the importance of intellectual property and deficiencies of WIPO as an administrative agency, which led them to attempt to strengthen the international regime. However, the developing nations' approach to intellectual property as 'a trade issue' set the future framework through which international intellectual property would later be understood by the developed states.

By the early 1980s, the repercussions of the collapse of Bretton Woods agreement and the oil crisis were melding with the market deregulations of the 'New Right' and the broader effects of economic dematerialisation. The growth of biotechnology and communications sectors in the same period increased awareness of the importance of intellectual property.⁴⁰ The earliest cases debating the possibility of granting copyright protection to software codes date from 1982/3. By the mid 1980s, most developed states had either handed down court precedents allowing software codes to be copyrighted or passed specific legislation granting protection.⁴¹ The up-coming Uruguay Round of GATT therefore offered the perfect opportunity to address the issue of international intellectual property through the prism of *trade agreements*. As May notes, by the Uruguay Round of 1986, the developing states still considered intellectual property "a development issue". However for the newly emergent

⁴⁰ For the importance of these sectors in the early 1980s see the contemporary literature: Edward Yoxen, *The Gene Business: Who Should Control Biotechnology?* Pan Books, London, 1983 and Les Levidow and Bob Young, *Science, Technology and the Labour Process*, vols. 1-2, Free Association Books, London, 1985. Both books cover the milieu of the late 1970s and early 1980s.

⁴¹ G. Dworkin & R. D. Taylor, *Blackstone's Guide To The Copyright, Designs & Patents Act 1988*, Blackstone, London, 1989. The first important patent in the contemporary biotech sector – i.e. on a living organism – is Chakrabarty 1971.

‘knowledge economies’⁴² “intellectual property was now an invaluable and crucial resource linked to competitiveness”.⁴³

In response to the upcoming Uruguay Round, the knowledge-based industries formed the *Intellectual Property Committee*, or IPC, with the aim of lobbying the governments of developed states (where intellectual property protection was rigorous) to place a new intellectual property agreement on the GATT agenda. The IPC was sponsored by knowledge-centred industries that were “perceived widely to be the competitive and crucial sectors for the continuance of US economic strength and well-being”.⁴⁴ The software industry was one of the key players, partly because copyright is, for reasons that will become clearer in the closing sections of this chapter, currently the most vulnerable form of intellectual property⁴⁵. Sell, quoted in May, explains the role of the IPC in framing TRIPs in the following way:

The IPC began by pitching its proposals to the US government and then pressed its case abroad. It worked hard to convince the industrial associations of Europe and Japan that a code was possible, and then mobilised them to support its quest to include intellectual property protection in the Uruguay Round. The three groups then worked together to produce a consensual document, rooted in industrial countries’ laws, on fundamental principles for a multilateral approach to intellectual property protection. This industry coalition presented its document to the GATT secretariat and Geneva-based representatives of numerous countries. This process, in which industry played such a central role, was unprecedented in GATT.⁴⁶

⁴² The inverted comas here are to draw attention to the fact, that in this period, the use of the term is anachronistic.

⁴³ May, op. cit., p. 84. Despite being very useful for a consideration of the knowledge economy, consideration of the concept is not central May’s book. Nevertheless, his discussion of competition notes the importance of maintaining and expanding intellectual property law for the competitiveness of ‘knowledge-based industries’.

⁴⁴ Ibid., p. 82.

⁴⁵ Copyright is particularly vulnerable to both technological challenge and ‘cultural critique’.

⁴⁶ Sell, quoted in May, op. cit., p. 82.

As May notes, the IPC effectively drafted TRIPs leaving the negotiators of national governments to fine tune its proposals. Part of the reason for its success, he suggests, was its ability to present itself as representing the crucial sectors of the new information-based economy, and base its submissions “in the discourse of transformation to an information society”.⁴⁷ The globalising generalisation of the ‘information age’ tended to obscure the fact that the IPC lent particular “legal support to the US negotiating team”⁴⁸ and that the IPC “derived its influence from the economic resources and power it represented in the US domestic economy.”⁴⁹ It is, in other words, reasonable to question the generality of the claim that the transformation to an information age is globally uniform, and uniformly, ‘a good thing’.⁵⁰ The account of the emergence of TRIPs given by May rather demonstrates the enactment of foreign policy objectives of economically interested state actors. Property systems do not emerge without the agency of states, without the power of such actors there would be no institution of property. In any definition, property is a social institution constructed and reproduced by state legislation, developed in response to social requirements, filtered by existing political power. The fact that TRIPs is an international agreement between nation states does not belie the general observation that power manifests itself in those whose interests are prioritised by the law.⁵¹

⁴⁷ May, op. cit., p. 82.

⁴⁸ Ibid., p. 82. May cites both Drahos and Sell on this issue. See Drahos, op. cit. and Sell, *Power and Ideas*, op. cit., Dutfield quotes the same Drahos text. He also quotes Ryan on the horse-trading leading to TRIPs. See Ryan, op. cit. He also quotes G. S. Nijar, *TRIPs and Biodiversity: The Threat and Responses: A Third World View*, Third World Network Paper 2, T.W.N. Penang, 1996. Dutfield gives slightly more weight to the view that that states themselves, particularly the US Europe and Japan, were the chief agents behind the lobbying. Surprisingly, however – given that elsewhere he cites Sell’s paper – his analysis omits any mention the role of the IPC.

⁴⁹ May, op. cit., p. 82. (Even Dutfield, who is generally less critical of the current system than May, notes that the US had a particularly hard-nosed policy over Uruguay. He cites in particular, the insistent threat that the proposals for TRIPs were accepted ‘in their totality’ or not at all.)

⁵⁰ It is also worth pointing out that globalisation – in the restricted sense that it is enacted at the level of internationalising property regimes – is a rather one-way street. From this perspective globalisation looks very like ‘westernisation’ or even more specifically, ‘Americanisation.’ (The stress placed on the classically Anglo-American ‘instrumental’ justification of intellectual property in the agreement is particularly noticeable). This reading of the thrust of foreign policy seems to run counter to many contemporary accounts of globalisation, which have tended to stress the multidirectionality of globalisation. A good example of this is Hardt and Negri’s concept of ‘the Empire’. The claim to fully represent or dominate the concept of ‘globalisation’ in all aspects, is not made in the latter text.

THE KNOWLEDGE ECONOMY AS POLICY: THE CULTURE OF CREATIVE DESTRUCTION AND THE PROBLEM OF PRICE COMPETITION

Given the account of the emergence of TRIPs provided by May, it is now necessary to assess the relationship between the agreement and the theorisations of the knowledge economy we have already encountered. One obvious effect of the agreement is the coding of some trade practices as legal and others as illegal. On an international level then some agents are able to maximise and legitimate their cultural and trade practices through the imposition of the law while delegitimising alternatives.⁵² The original arguments of the Group of 77 are important here. As already suggested, developing states have long regarded the use of intellectual property as a form of ‘unfair’ trade competition, a form of state protectionism and thereby, an issue best addressed within the context of development.⁵³ However, as May points out, the effect of TRIPs is to delegitimise such a reading and concretise “the rights of owners” in its place.

As suggested in Chapter Four, theories of the knowledge economy centre on an ideal of economic subjectivity that is creative and attuned to the production of intellectual properties. As already suggested in this chapter, without the effective internationalisation of such laws, the geographic relocation of manufacturing, upon which the theory of the knowledge economy is grounded, will fail.⁵⁴ At this point then, it is possible to begin to posit some specific reasons as to why Schumpeter’s

⁵¹ Put another way, the extent to which the agreement is adhered to in the future will provide a good indicator of the power of actors those in whose image such property relations were initially forged.

⁵² Effectively, this legitimates the use of coercion against those states or individuals who refuse to comply with the new regime.

⁵³ That this is still a prevailing view is attested to by the recent evocations of TRIPs clauses allowing poorer states to manufacture anti-aids drugs without paying the customary price for the patent licences. The South African Government claimed it needed to relax licences in order to deal with its aids epidemic. This claim however, was challenged by the drug companies concerned, on the basis that the priorities of public health in South Africa, could be reorganised in order for them to be able to pay the full price. Notwithstanding whether such an option was realistic, or ethical, the debate centred on a familiar argument: corporations from developed states insisted on the priority of ownership rights, while the developed states insisted upon the priority of development and health.

⁵⁴ A good example of such relocation came as the draft of this chapter was being written. On the 10th February 2002, the vacuum cleaner producers Dyson announced the relocation of their manufacturing wing from the UK to the Far East with the loss of 800 jobs. This is particularly apposite since Dyson has, for the last five years, actively stressed the innovative aspects of its products in advertising campaigns based upon the number of patents applicable or pending on various parts of its machines.

conceptualisation of creativity, rather than any other, has been given such importance in theorisations of the knowledge economy.

The development issues outlined by the Group of 77 were based upon what is, and what is not, deemed to be 'fair competition'. For such states intellectual property was/is viewed primarily as a 'market intervention' – a view that has sound historical justification⁵⁵. Even the standard 'instrumental justification' – widely used by developed states in arguing *for* TRIPs – suggests that intellectual property is an instrument that encourages investment in new products and techniques of production by temporarily holding off 'price competition'.

It was the perceived inadequacies of classical theories of price competition that led Schumpeter to theorise creative destruction in the first place. For Schumpeter, price competition was a poor guide to economic performance because the most effective forms of competition were based on creating new products, new markets and new processes of production. The contemporary reading of Schumpeter however, has recast his analytical distinction between price competition and quality/innovation competition, forging from it a socio-cultural distinction, that privileges sites of 'radical' innovation over sites of 'incremental' innovation. In parlance of the knowledge economy, 'incremental innovation' is another way of saying 'price competition'.

The alarm that gripped developed economies after the deregulations of the 1970s and 1980s was rooted in a fear of *price competition* from developing states – an advantage that the Group of 77 saw clearly, if only the monopoly on technology could be challenged by dismantling patent laws. In other words, it was widely recognised, in both developed and developing states, that the economic advantages of older industrialised national economies were likely to erode under pressure from less regulated, cheaper workforces in developing states. The theory of the knowledge economy that emerged in developed, (post) industrial, high-cost economies did so

⁵⁵ As was established in Chapter Two.

because of a general recognition that such economies could no longer compete at the level of 'productive efficiency'.⁵⁶ The attraction of Schumpeter's 'creative destruction' to theorists of the knowledge economy lay therefore in its ability to 'answer' the question posed by global price competition. This reinvention of Schumpeter's concept moved it from an *analysis* of the conditions under which *all* firms historically operated, into a political *policy* that addressed the specific conditions of competition between particular *national economies*. Where a national or regional economy could no longer compete in world terms on the basis of price, it had no choice but to attempt to compete on the basis of 'quality', or 'creative innovation'.

This variation on Schumpeter's concept suggests that the theorisation of the knowledge economy is not simply a recognition of the fact that firms *are* increasingly knowledge-orientated. Nor is the knowledge economy itself the result of a 'natural' or 'evolutionary' phenomenon that stems from material factors – the burst of technology over the last thirty years. Rather it suggests that the theory of the knowledge economy has about it the character of an incantation, a plea for companies based in the developed world *to evolve* into knowledge-based firms. In this sense then, the knowledge economy is as much a geo-strategic, economic and political construction, a project or *policy objective*, as it is a straightforward historical occurrence born out of technological innovation.

The emergence of TRIPs clearly demonstrates the *political* will necessary to create the infrastructure such an economy requires. The debate that led to the concretisation of an international system of intellectual property is also clearly marked by the powerful tensions played out between the various groups with an interest in the settlement. On one hand, intellectual property is clearly the form of property most inclined to support the pursuit of the economy based upon innovation – the natural partner to the 'radical' innovation as opposed to 'incremental' innovation or 'price competition'. On the other hand (as instrumental justifications and the protestations of the Group of 77 suggest), it is also a perfect instrument for 'market intervention'. TRIPs is therefore doubly

⁵⁶ 'Efficiency' in this sense translates as low cost, deregulated labour for the manufacturing sector.

attractive. Firstly, it *legitimizes* market intervention by recourse to the expedient that intellectual property has long existed in developed states, and is therefore, a ‘naturalised’ reality. By the same token it is also demonstrably, a ‘good thing’, since it can claim to have encouraged the production of innovative technologies at the centre of the argument over fair competition.⁵⁷ Secondly, by bringing the issue of *property* to bear on an argument about *competition*, it effectively condemns certain forms of price competition as ‘theft’⁵⁸. In the age of TRIPs, the forms of price competition advocated by the Group of 77 in the 1970s are placed off limits, and condemned as ‘piracy’.⁵⁹ Securing TRIPs therefore was a vital geo-strategic issue for developed states/knowledge economies, since it both encourages, and enables, the move towards a workforce based upon creative labour deemed vital to economic growth at home, while *simultaneously* intervening in the global market to forestall the effects of price competition.

The Limits of the Knowledge Economy and the ‘Free-Market’

The advent of TRIPs therefore has repercussions for the notion of globalisation in terms of the ‘free market’. Knowledge economies require the widespread acceptance of social institutions such as intellectual property. The creation by force of such an international system is a vital example of the practical, and conceptual, *limits* of

⁵⁷ In such a view, globalising intellectual property will encourage innovation everywhere by protecting its rewards.

⁵⁸ May notes that the effect of TRIPs is to impose a competition discourse “based on the paradigm of property and theft”. May, op. cit., p. 86.

⁵⁹ May argues in his analysis of the Group of 77, that developing states see only an ‘enclosure’ of what *should* be public knowledge, vital to their development strategies. Via TRIPs, the developed states have defended and expanded a legal structure of property that stresses the primacy of proprietorship, making any other view seem ‘nonsensical’. Also relevant in May’s discussion is his point regarding issues of piracy and technology transfer. The developing states are currently in a position similar to that of developed states in the 18th and 19th centuries. The question arises as to whether developed states would have reached their current position had TRIPs been in force a hundred or two hundred years ago. (It is widely accepted that the relative looseness of intellectual property in the period enabled its rapid industrial development. Here, the development of photography in mid 19th century England and France, makes for an interesting case in point.

markets per se.⁶⁰ The fact that political and legal intervention is so obviously required to ensure the ‘free market’, reiterates the social basis of all markets and the political will required to create them.⁶¹ It is also a vital example of the way the (theoretically) level playing field of ‘perfect competition’, that informs the concept of the ‘free market’, is inevitably tilted toward particular *asymmetries* that are built into the ‘institutional architecture’ that supports the market.

To restate the above more simply, there is certain ‘directionality’ in the notion of the ‘free market’ established in the era of TRIPs. The international concept of property that TRIPs guarantees for the global ‘free market’ is partial, and rigged towards the interests of its initial proponents.⁶² Put simply, an analysis of the emergence of TRIPs demonstrates that the uniform application of *particular* property instruments is required, in order that a *particular* notion of ‘competition’ can be enacted. Firstly, intellectual property is defined as a proprietorial issue, as an issue of ‘owners rights’, as an encouragement to innovation, and *not* as an issue of market intervention, a problem of monopoly, or as an issue of development. Secondly then, the ‘free-market’ is defined in a way that is responsive to perceived needs of a *particular* economic analysis, from which are derived *particular* competition policies, which are designed to benefit *particular* developed states. *Control of the characterisation of what constitutes a ‘free market’ is, in other words, a geo-political issue.* The power to characterise resides with developed states, or knowledge economies, and reflects economic and *cultural* distinctions made historically within such jurisdictions. There

⁶⁰ Given the capacity for linkage-bargaining diplomacy within TRIPs, ‘force’ is not too strong a term. The history of Sino-US relations has also been dogged by US attempts to push China into accepting and enforcing intellectual property laws. (A good account of the historical and contemporary relationship as regards this issue can be found in Alford, op. cit. It is unreasonable to suppose that international relations are conducted upon a rational meeting of equal minds for the general good.

⁶¹ In his introduction to *The Limits Of Globalisation*, Alan Scott focuses on the economic limits of globalisation, by revisiting the arguments of Karl Polanyi’s *The Great Transformation*. See Scott, op. cit. Polanyi’s insistence that markets are *social* institutions – planned, created and regulated by political entities – is clearly in tune with this view. On another level, Polanyi’s stress on the effect of political philosophy, or belief in economic process, is also in line with the argument pursued in this chapter. Polanyi, op. cit.

⁶² May quotes Primo-Barga as follows: “Differences in national economies and their levels of development make it unlikely that the same protection afforded to intellectual property argued for by developed states will benefit all signatories in the same manner or to the same extent”. May, op. cit., p.

is, in other words, a strong cultural element in play. In the context of TRIPs, the globalisation of the 'free market' looks very like 'westernisation' (or even more specifically 'Americanisation').⁶³ To be more accurate, the appearance of a uniform 'free market' enacted by TRIPs tends to obscure the fact that the property institutions upon which it is founded are skewed towards the protection of forms of intellectual property that reflect the corporate power of the IPC, in whose image, and for whose benefit, TRIPs was initially drafted.⁶⁴

MOBALISING CREATIVITY AS FOREIGN POLICY

THE CULTURE OF CREATIVE DESTRUCTION

The tilting of the property institutions that underpin the market towards particular cultural determinants can be demonstrated in a number of areas. Schumpeter's 'gale of creative destruction' represented the general conditions of existence in which *all* firms operated. It was not an economic policy but a brute fact, structural to the capitalist system itself. The all-encompassing nature of creative destruction stemmed from Schumpeter's belief in the direction of history, which he adapted from the narratives of Marxism. Creative destruction, as Schumpeter tells it, is predicated on the

88. See also, C.A. Primo Braga, 'The Economics of Intellectual Property Rights and the GATT: A View From the South', *Vanderbilt Journal of Transnational Law* 22, 1989, pp. 243-264.

⁶³ For example, the stress in negotiations on the (classically Anglo-American) 'instrumental' justification of intellectual property was particularly noticeable in the agreement. May's argument is that the justificatory schemata utilised in the development of TRIPs is heavily indebted to such justifications.

⁶⁴ To avoid confusion here it is necessary to reiterate that multinational corporations are rarely multinational in ownership. Sell's argument also needs to be reiterated. The IPC worked with particular national entities with whom its interests coincided. The US government was first on the shopping list, Europe second and Japan third. The IPC had the interests of its members in mind and acting rationally approached those global actors most likely *and able* to meet its needs. The developed nations that then pursued TRIPs at the trade-negotiating table were exactly the economies vulnerable to price competition from developing nations and precisely those economies increasingly designating themselves as 'knowledge economies'.

assumption that history itself is an intelligible, global process. If creative destruction applied at all, it applied everywhere equally.

The recently modified version of creative destruction however, has rather concealed these underlying beliefs. In part this is because belief in the straightforward, dialectical view of history is currently unfashionable and widely regarded as overly deterministic. More importantly perhaps, the all-encompassing breadth of Schumpeter's view also mitigates against the use of creative destruction in a partial and strategic manner. As already suggested, the current use of creative destruction is topographical, identifying *particular* states or regions as 'creative destructive cultures'. For example, Leadbeater specifically places his model of creative destruction in Silicon Valley, setting it against other, more incremental, price competitive, economic models such as those of Germany and Japan. Fisher finds creative destruction to be entirely coextensive with the 'American Way'. To put this another way then, Schumpeter's concept of creative destruction has been particularised and 'culturalised'.

As suggested in Chapter Four, an unconscious *cultural* specificity operates in Schumpeter's original work. Schumpeter tends to view the world through a particular set of universalising cultural beliefs that can be placed in context of a particular moment of Modernism. In the contemporary usage the cultural positioning is, in contrast, conscious. In the era of TRIPs, creative destruction has come to mean a setting apart of one type of economy from another, a differentiation of cultural territories. In this usage, the 'culture of creative destruction' is deployed in defence of particular, economically developed states against the perceived threat of price competition from developing states. The creative-cultural concepts deployed in theorisations of the knowledge economy parallel those arguments used to produce TRIPs. In other words, a division is implicit in the new international legal system, which pits one form of 'culture' against another. An examination of a well known legal case of recent years will help to clarify how such cultural determinations operate within intellectual property law in the era of TRIPs.

CEATIVE DESTRUCTIVE ECONOMIES V INDIGENOUS KNOWLEDGE

Case Study: Patenting Turmeric

As has been suggested, the concept of a knowledge economy is predicated on a series of ideas about creativity that together form a ‘response’ to a fear generated by global price competition. As suggested in Chapter Four, the ‘ideal subject’ of the knowledge economy is formed from a matrix of heterogeneous concepts of creative labour. The considerable stress placed on ‘radical’ innovation, or creative destruction, within the matrix is particularly important because of its association with the historical and cultural moment of early 20th century avant gardism. Even in its current ‘strategic form’, creative destruction is marked, historically and thematically, by early 20th century Modernism. As suggested in Chapter Four, there is a symmetry between the avant gardist urge to gamble everything on ‘the future’ and the contemporary business incantation that one should aim to make one’s own products obsolete. The deployment of such creative doctrines at international level within the intellectual property regime inculcates a cultural hierarchy between developed and developing states. The knowledge creation model operated by developed economies envisages a positive image of creativity that effectively casts alternative, ‘non-explicit’, forms of knowledge production, dissemination and asset control, negatively as ‘traditional’ or ‘indigenous’. This culturisation of trade and property relationships is a feature of the current struggle over rights to ‘indigenous’ or ‘traditional’ knowledge systems.

This problem can be addressed on a number of levels. The conflict between the rhetorical concept of invention used in patent law and other forms of creative labour is one such. This problem is most apparent where patentees have failed to make sufficient distinction between ‘their’ ‘inventive’ step and the creative labour embedded in knowledge bases from which their work draws. For example in 1992 a patent was awarded to a firm called *Agreceetus* that ceded control on *all* future forms of transgenic cotton. Two principle objections can be made against such a patent. Firstly, and most obviously, such a patent has extraordinary breadth, which creates

disincentives to other researchers in the field inhibiting future innovation.⁶⁵ The second, less obvious objection to such a patent, and the most important for the current argument, is that it fails to sufficiently recognise the contribution of *previous* generations of ‘knowledge producers’ that have refined cotton by non-genetic means. This point is particularly acute in the large number of cases where patents have been granted on techniques and processes that have had a long history of usage in the ‘traditional’ cultures of developing states.⁶⁶ One of the most widely debated of such cases involved a patent granted in 1995 to the Mississippi Medical Centre for the use of Turmeric in healing wounds.⁶⁷ A challenge to the patent was lodged by the *Council of Scientific and Industrial Research of India* (CSIR) on the basis that the patent was ‘insufficiently novel’ and in 1996, it was successfully overturned. The arguments put forward by CSIR led to the repeal are informative as regards the attitude of knowledge economies toward systems of creativity and knowledge that they regard as ‘traditional’.

Patent law doctrine requires that there is no conflict between the product or process seeking patent protection and knowledge that is already in the ‘public domain’. However, the definition of the ‘public domain’ is limited. In one sense, the limitation is straightforward. As Dutfield points out in his discussion of the case, the definition cannot be too broad, there are, after all, practical limitations as to how far a patent examiner can reasonably be expected to research the grounds of a patent. However the limitations on the legal ‘public’ domain also reflects certain cultural determinations.

⁶⁵ Challenges to the patent were made on this very basis. However the cancellation of the patent in 1994, was not made on such arguments, but rather on the basis that the patent was not sufficiently *novel*. See Dutfield, op. cit., p. 16. Wallace Judd, quoted in Schulman, suggests that the breath of such patents stems from the fact that many recent innovations effectively established a new field, or class, of research and/or commodities. In consequence, patent offices have been inclined to grant control of the broad concept rather than a particular innovation. Judd likens the situation to granting patents on the idea of a mousetrap rather than on a particular improvement to mousetraps, a distinction that in a new field of research can be surprisingly subtle. See Schulman, op. cit., p. 7.

⁶⁶ Granted most commonly by the US Patent and Trademark Office.

⁶⁷ Dutfield quotes 40 patents in the US and 153 world wide on techniques or products derived from the Neem tree (*Azadirachta indica*) alone. Nearly all the patents use ‘public domain traditional knowledge as a starting point’. Dutfield, op. cit., p. 66.

In its patent application, the University of Mississippi actually pointed out that the knowledge on which its patent was based was commonly available. The application openly stated that turmeric “has long been used in India as a traditional medicine for the treatment of various sprains and inflammatory conditions”.⁶⁸ Despite the fact that the knowledge was clearly *public*, the patent was granted because the University and US patent office were working on the view that such ‘traditional’ uses were irrelevant to the legal concept of the ‘public domain’.

Two issues may have had a bearing on their view. Firstly a rigorous application of the principle that intellectual property rights are assigned to the ‘first applicant’ rather than ‘the inventor’ may have suggested that, since there was no prior patent, the Universities claim was, defacto, ‘novel’.⁶⁹ Secondly, and more importantly for this discussion, the University of Mississippi and the Patent Office were relying on a definition of ‘public domain’ that limits the concept to that which is public in the United States in the form of reports in scientific journals.⁷⁰ On such a view then ‘traditional’ or ‘indigenous’ knowledge bases are designated as ‘outside the public domain’. Crucially, the University’s patent was not revoked in 1996 because of a recognition that the properties of turmeric were known to tens of millions of Indians, and had been in the ‘public domain’ for hundreds of years, but because the CSIR were able to produce ‘the relevant scientific literature’.⁷¹

⁶⁸ Quoted in Dutfield, *ibid.*, p. 65.

⁶⁹ This principle has a long history in US law and has been internationalised by TRIPs. As suggested in chapter two, the ‘first applicant’ concept can be found in the privileges issued in 16th century Venice. However such a concept has, in recent years, become increasingly farcical. In January 1998, the office issued a patent, No 5,707,114 on an ‘*invention*’ consisting of “an annular rim, a central hub and a plurality of spoke portions running between the rim and hub.” Quoted in Schulman, *op. cit.*, 168. In an attempt, no doubt, to be self-satirising, the office granted the patent not to *the wheel* per se, but limited its scope to ‘vehicle wheels’ – which of course, somewhat narrows the field of potential litigants! Unlike the patent successfully sought on Kirchoff’s Law of 1845, (which states the electric current flowing into a circuit equals the current flowing out), the wheel patent is not as far as I can ascertain, an attempt at satirisation cooked up by an associate of Richard Stallman. See Schulman, *ibid.* p. 11.

⁷⁰ “Patent officers in the United States are not required to accept the evidence of traditional knowledge held outside the US as prior art (i.e. already known) unless it has been reported (and thereby validated) by scientists and published in learned journals or otherwise been made available to the public.” See Dutfield, *op. cit.*, p. 65.

Modernism Versus Tradition

The definition of the ‘public domain’ at stake in this case is characteristic of the creative ideology of the knowledge economy. For the purposes of intellectual property law, the ‘public domain’ is given a *geo-specific* identity – in this case it is limited to knowledge available in the United States. However, more importantly it is set within discursive parameters of science, industry and property. Firstly, for knowledge to be recognised as in the ‘public domain’, it must conform to particular standards that, in general, reflect the prerogatives of technological ‘modernity’. Secondly, it must be rendered in an ‘explicit’ form – it has to have been published. In other words, the ‘public domain’ of patent law consists of knowledge that has *already* entered into the realm of intellectual property by dint of the fact that it is written, and therefore already subject to copyright.⁷²

This characterisation of the ‘public domain’ creates a conflict between the knowledge economies – predicated as they are not simply upon the notion of ‘modernity’ but upon the avant gardism of ‘Modernism’ – and their conceptual other, that is, ‘tradition’. The disclosure of knowledge within ‘indigenous’ cultures, or ‘traditional’ knowledge structures, is effectively designated as *tacit* knowledge. ‘Traditional’ knowledge systems then are designated as reservoirs held together only by tenuous, ‘non-explicit’ forms of ‘possession’⁷³. In this culturally determined view, tacit knowledge bases are ‘open’ to be read by actors from developed states and reconstituted as ‘explicit’ knowledge through the system of intellectual property.

The characterisation ‘indigenous’ implies that, in such societies, knowledge is buried within the fabric of ‘tradition’ and that creative production is, in some sense, ‘static’. This characterisation recalls a view that was prominent in 19th and early 20th century anthropology but which is now widely discredited. Defining cultures as ‘indigenous’

⁷¹ Ibid., p. 65.

⁷² Catch 22.

⁷³ In other words, they are not legally held as *property* and, as far as knowledge economies are concerned, are therefore, ripe for exploitation.

or ‘traditional’ in contradistinction to ‘Modernity’ was a central trope of early ethnographers. The well-founded critique of such method drew attention to the fact that in such narratives the ‘discovered’ culture was always viewed as ‘complete’ and ‘authentically pure’ at the moment of ‘discovery’.⁷⁴ The result of such characterisation was the presentation of the ‘other’ culture as ‘static’, giving no credence to the possibility that processes of creative development are ongoing. From the current perspective, such a failure of recognition is crucial since it assumes that, in the absence, and active use of, intellectual property laws, no creative activity *at all* is underway with respect to such knowledge bases. The representation of knowledge bases as ‘handed down by tradition’ creates the myth that an alternative ‘public domain’ exists, unencumbered by active creative agents, or ‘law’, and that it can be plundered at will. As the established anthropological critique of such a position points out, knowledge that is in use is never ‘static’, that which is characterised as ‘tradition’ is always contingent on an *active* actualisation in the *present*. The characterisation of the ‘public domain’ in patent law is therefore, culturally loaded and methodologically suspect.

To sum up then, the cultural hierarchy in operation in international intellectual property disputes, recalls, quite closely, the outlines of 20th century Modernism. As in accounts of avant gardism in the visual arts from which theories of the knowledge economy take sustenance, the ‘inescapable’ thrust of ‘Modernity’, or the knowledge economy, gains its identity from that which *it* designates as ‘traditional’.

⁷⁴ See for example James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art*, Harvard University Press, London, 1988. Also, William H. Sewell, Jr., ‘The Concept(s) of Culture’, in *Beyond the Cultural Turn: New Directions in the Study of Society and Culture*, eds., Victoria E. Bonnell and Lynn Hunt, University Of California Press, London, 1999.

Counter-Commodification and the Entrenchment of the Logic of the Knowledge Economy

If the relationship between knowledge economies and its 'others' is as described above, it may not remain so for long. While the *limits* of the knowledge economy are cultural as well as practical, the borders are continually on the move. The 'creative destruction' verses 'tradition' dichotomy between developing and developed states is already blurring. While Indian farmers and their representational bodies are highly critical of, and resistant to, TRIPs, India also has a burgeoning software industry to whom the agreement is vital.⁷⁵ There is also an increasing tendency for developing states to join in the commodification game initiated by knowledge economies. Of the 156 patents granted world wide in connection with the Neem tree, since 1995 six have been awarded to Indian scientific institutions.⁷⁶ In other words, one posture available to developing states in the geo-political battle for knowledge resources is to use commodification as a strategy of defence against corporate encroachment.

It remains to be seen how far this attempt to redress the imbalances inbuilt within the international system will be. There are two 'classical' narratives that can be told about the social institution of property. The first suggests that the institution of property is determined favourably in relation to the interests most powerful at its inception. The emergence of TRIPs would certainly seem to follow this truism. TRIPs was certainly born out of the agency of particular international powers and, as it currently stands, the settlement reflects the interest of such agents. The second narrative of property presents it as all that stands between the individual and the capricious power of the state. While the first view is, by and large, true of 'real' and 'movable' property due to the natural limitations of such resources, it may not be ultimately so for the theoretically limitless resources of intellectual property. There is already evidence that the second view – property as a bulwark against despotism – may gain ground in the future.

⁷⁵ See Dutfield for comments, op. cit., p. 13.

⁷⁶ Ibid., p. 66. Dutfield's figures presumably applied as of 2000, his date of publication.

A counter blast of commodification in order to prevent ‘the corporate takeover’ has in fact already begun. This could be described as ‘fire-walling’ – commodifying knowledge to ensure that it is held in the public domain in order to prevent other, more business-orientated, actors from annexing common resources. There are numerous examples of such fire-walling.⁷⁷ ‘*Sui Generis*’ forms of intellectual property are currently being developed to protect ‘indigenous’ knowledge against unwanted commodification by the corporations based in developed states.⁷⁸ Such rights could in the future cover a vast amount of ‘common knowledge’ – dealing with everything from folklore to farmer’s rights to traditional plant varieties, to general rights awarded to communities for ‘informal innovations and bio-diversity related skills’ which are currently outside of intellectual property law.⁷⁹

The ultimate question raised by the increased use of intellectual property instruments in all areas, is familiar.⁸⁰ The recognition that a balance must be struck between encouraging innovation, and granting so many rights that the ‘public domain’ becomes insolubly blocked by the fencing off of resources, is at least as old as the Venetian privilege system.⁸¹ Designating an item as property, grants the owner the right to withhold use of the item against all comers. While that right can be use defensively, it is also a principal central to market economies, since it is through that mechanism that

⁷⁷ In 2001, following attempts by Celera Genomics to patent as much of the human genome as they could lay hands on, the Wellcome Institute suggested ‘fire-walling’ as a way of keeping the human genome in the public realm. A further example of firewalling can be seen in US academics’ attempts to copyright their lectures – in advance of Universities claiming such rights in new contracts.

⁷⁸ Drahos, quoted in May, suggests a number of responses for developing states in response to the spread of intellectual property in the era of TRIPs. firstly, non-compliance which, given the power of the WTO, is dangerous. Secondly such states may set up a TRIPs monitoring group to make the costs of the agreement transparent, and thus challenge the principles upon which the treaty is based – i.e. that the agreement will aid technology transfer and thus development. The third option is to develop sui generis intellectual property laws. As May notes the US has in the past itself used this method to great effect itself. May, op. cit.

⁷⁹ The scope of such new rights is massive and there are a plethora of initiatives in the offing. Dutfield provides an analysis of those that relate to the issue of trade & biodiversity throughout his book. Dutfield, op. cit.

⁸⁰ This also applies to the growth of the whole sector of ‘cultural rights’. For a view on the concept of cultural property, see Joseph L. Sax *Playing Darts at a Rembrandt: Public and Private Rights in Cultural Treasures*, University of Michigan Press, Ann Arbor, 1999.

⁸¹ As Dutfield points out the costs to R&D may become prohibitive particularly in the pharmaceutical sector where ‘future commercial products such as therapeutic proteins or genetic diagnostic tests often requires the use of multiple patented gene fragments’. Dutfield, op. cit., p. 16.

a false scarcity can be engineered, and price levels managed.⁸² Fire-walling therefore runs the risk of further embedding the expansion of intellectual property law and thereby legitimising to the concept of the knowledge economy from which it seeks defence.

Though fire-walling offers a partial defence from economic encroachment, it also paradoxically legitimates the spread of property forms into arenas of social organisation, which until recently had remained free of such concerns. In this, it conforms to a pattern that knowledge economies themselves have set in motion. The developed states conducted the negotiations that led to TRIPs in a manner which implied that intellectual property within their borders was uncontested and fully politically justified. Yet, as shall be demonstrated in Part II, even as negotiators projected this naturalised vision of intellectual property, vital aspects of such laws were being fiercely contested in the United States. The manner of that contest, and how a settlement was reached, was also crucial in establishing the equilibrium in contemporary creative theory vital to the operation of the concept of a knowledge economy.

⁸² As May suggests, the right to withhold or restrict use has been characterised as “the central issue of political economy”. May, *op. cit.*, p. 21.

PART ~ II

THE FATE OF CRITICAL ART PRACTICE

THE CULTURAL CRITIQUE OF INTELLECTUAL PROPERTY IN THE ERA OF KNOWLEDGE ECONOMIES

APPROPRIATION ART AND THE ‘STRONG’ INTERPRETATION OF THE SEMIOTIC/NETWORK

In the proceeding section, consideration has been given to some of the material and theoretical limits of the knowledge economy with respect to intellectual property. The viability of such economies is also vulnerable to other forms of limitation and challenge. The two most widely discoursed concern, on one hand ethical legitimacy of intellectual property, and on the other, its technical and logistical viability.⁸³ The number of such critiques has increased exponentially in line with recent expansions of the law.⁸⁴

Although less prominent, a further area of critical contention exists in the arena of culture. In the late 1970s and early 1980s, a new form of ‘critical art practice’ emerged that sought to confront the prerogatives of copyright law. Having been in retreat for a

⁸³ Technical questions for example, may depend upon the ease of copying and the availability of reproductive technologies. In contrast, logistical questions might address whether intellectual property laws (where existing) are actually obeyed and whether or not, they can be enforced. Copyright seems particularly threatened by contemporary technologies and the social practices they enable. In contrast, patent law seems most vulnerable to ethical challenges. For more comments, see Appendix D.

⁸⁴ However, as a number of writers have recognised, despite new ethical and technological questions, many critiques reproduce arguments about legitimacy and viability which were in play at the inception of the modern intellectual property laws and which have, in a sense, never really fallen out of fashion. For example Bently and Sherman Barron, Saunders, op. cit.

number of years, the practice of ‘appropriation’ has recently re-emerged as the expansions of intellectual property law have re-ignited critical debate with respect to such laws. From its development, to its quashing, and recent re-emergence, the history of ‘appropriation art’ is central to a study of the development of the knowledge economy.

The roots of ‘appropriation art’ lie in the aesthetic dematerialisation of the 1960s. In the era of the knowledge economy, its significance lies in the fact that it came to a very ‘strong’ view about the role of copyright law in cultural practice. This ‘strong’ interpretation of the semiotic/network model of creative production, viewed copyright as an instrument which reified reactionary, and outmoded, creative concepts. In such a formulation, copyright was an obstacle to the ‘creative freedom’ of ‘mainstream’ art practice, which threatened to impede its future development. In its early phase during the 1970s, this discourse was of little significance to anyone beyond on the art world. However, with changes in the economic and political spheres in the 1980s, the ‘radical’ claims of appropriation art were significantly, and *deliberately*, toned down. In recent years however, with increased concern about intellectual property and globalisation, the earlier claims have resurfaced in the art world, and in debates about music sampling.⁸⁵

As far as a study of the knowledge economy is concerned, the most significant aspect of the history of appropriation art is the case of *Rogers v Koons* (1989-1992). The case marks the moment that the radical *critique of property*, central to the early phase of

⁸⁵ The re-emergence of the discourse is particularly strong in the sphere of music, where sampling and downloading of files, have had significant commercial effect. As a means of tackling the perceived cultural weighting of copyright law, many of these debates have borrowed the theoretical framework and critical language established by 1970s ‘appropriation art’. The notion that copyright is based on the concept of genius – from which the law abstracts its central concept of ‘Originality’ – is frequently cited in such debates. The notion was first floated with respect to the appropriation art of the late 1970s and early 1980s. For recent views on appropriation and sampling, see Sven Lutticken, ‘The Art of Theft’, *New Left Review* 13, Jan/Feb, 2002. p. 89-106. Also, Jason Toynbee, ‘Creating Problems: Social Authorship, Copyright and the Production of Culture’, *Pavis Papers in Social and Cultural Research* No. 3, Open University, London, 2001. For an earlier view, see Simon Frith, ed., *Music and Copyright*, Edinburgh University Press, Edinburgh, 1993. A more recent view on these issues was given in a paper by Dominic Pettman, to the *Association of Art Historians*, in 2001. see Dominic Pettman, ‘A Break in

appropriation art, was abandoned by the ‘mainstream’ art world. The arguments of the case were therefore crucial to the broad establishment of a ‘weaker’ interpretation of the ‘semiotic/network’ model of creative labour that had developed from the dematerialisation of the 1960s. The establishment of such an interpretation has been vital to the smooth operation of creative concepts within the knowledge economy.

Ensuring the ‘Weak’ Interpretation of the Semiotic/Network

As suggested in earlier chapters, the existence and management of the knowledge economy requires the maintenance of two, *competing*, models of creative labour. Preventing a definitive confrontation between them is central to its operation. An outright application of the ‘rhetoric model’ would create an ‘unmanageable’ plethora of individual rights, threatening the established accumulations of ownership and power within the economy. An outright application of the ‘semiotic/network model’ threatens the legitimacy of the rhetorical concepts within intellectual property law. The ultimate ‘success’ of latter suggests the destruction of the institution that secures the current asset base – the ‘success’ of the former, a democratising of its ownership. To ensure that the equilibrium of the economy is maintained in favour of current vested interests, it is crucial that a ‘weak’ interpretation of the semiotic/network model achieves general ascendancy.

As suggested in Chapter Three, the semiotic/network model developed from challenges to concepts of composition and creative labour derived from rhetoric. A ‘strong’ interpretation of the model therefore threatens to de-legitimize the rhetorical concepts used in intellectual property law. In contrast, a ‘weak’ interpretation of the semiotic/network takes up the desubjectivisation of production and the strategies of ‘creative collaboration’, which had developed in the wake of the assault on the rhetorical model. The ‘weak’ interpretation poses no specific threat to the older

Transmission: Art, Appropriation and Accumulation’, *Making Connections*, 27th Annual Conference of The Association Of Art Historians, 2001.

creative concepts within the intellectual property law, but provides a strong delegitimizing narrative of with respect to the individual rights claims by creative workers. It is therefore a crucial tool in the management of the new economy.⁸⁶ The case of *Rogers v Koons* is important therefore because it marks the dénouement of the ‘strong’ interpretation of the semiotic/network model, and by extension, the point at which ‘weak’ interpretation of the new model moved into the ascendancy.⁸⁷

FROM AESTHETIC DEMATERIALISATION TO APPROPRIATION ART AND THE CRITIQUE OF COPYRIGHT

In order to account for the issues at stake – for both art practice and the nascent knowledge economy – in *Rogers v Koons*, it is first necessary to trace the development of the ‘strong’ interpretation of the semiotic network, from the moment of dematerialisation up to the time of the trial in the late 1980s.

As suggested in Chapter Three, dematerialisation developed in opposition to material definitions of art, around which Greenbergian Modernism was organised. The concept of ‘objecthood’ *limited* the things that could be seen as art, and by extension, the kind of creative activity an artist might engage in. The concept of ‘objecthood’ was itself developed from the notion that a hard *separation* must be maintained between ‘art and life’. Such a notion was often referred to as aesthetic ‘autonomy’. Breaching the autonomy of the artwork, presented the opportunity to broaden the scope of an artist’s creative labour and re-map relations with the viewer, and in doing so, overcome the art/life dichotomy.⁸⁸ A central tactic of such practice was to dissolve the concept of composition (as derived from rhetoric) into a *temporal* moment, contingent on the presence of the viewer. In this way, the ability of the ‘autonomous’ artwork to hold-off ‘life’ was gently corrupted. That power to ‘hold-off’ was tied to the artwork’s

⁸⁶ See for example, the discussion of *Brown v DMC* in Chapter Three above. For discussion of a more recent case in the UK, see Bently and Sherman, op. cit., pp. 191-120.

⁸⁷ The re-emergence of the ‘strong’ view in the last couple of years may of course change things.

material existence, its 'objecthood'. In this sense, 'autonomy' was a cognate of the 'right to exclude' central to the concept of private property. Reintegrating 'art and life' by corrupting the material borders of the artwork was then also a way of escaping the formal structures of *property* that defined the work. For this reason, dematerialisation's attack on the exclusivity of aesthetic autonomy has often been presented as a straightforward attack on the concept of *commodification*.⁸⁹

It was from these critical narratives that, in the 1970s, a new generation of artists developed, whose work centred on the concept of appropriation. The best-known work from this period was produced by Sherrie Levine. Levine's early practice became central to the concept of appropriation as it was practiced by the slightly later generation of artists of which Jeff Koons was a member. This was in no small part due to the way Levine's practice was positioned in the critical theory of early post modernism, particularly in the writings of Rosalind Krauss and Douglas Crimp.⁹⁰

In the late 1970s, Levine had begun to re-photograph the work of other photographers.⁹¹ Her one-to-one 'copies' were initially taken from magazines, but later from exhibition catalogues. The works were titled using both her name and the name of the artist whose images had been 'appropriated'. For example her re-photographing of Edward Weston's photographs of his son Neil, are identified as by Sherrie Levine, 'Photographs by Edward Weston'. Levine's work followed on from a line of critical thought about the relationship of art to popular culture and reproduction that had been central to much art of the 1960s, but most explicitly to Pop Art.⁹² However, as a

⁸⁸ As already suggested, the art/life divide had been an issue for leftward leaning criticism since Saint-Simon and Feuerbach.

⁸⁹ It is worth recalling here that Maciunas was so concerned by the encroachment of commodification that he explored the possibility of producing all Fluxus publications in ink that would disappear, on paper that would disintegrate.

⁹⁰ The two most relevant essays are Krauss' 'The Originality of the Avant Garde and Other Modernist Myths', in Krauss, op. cit. Also, Douglas Crimp's 'The Photographic Activity of Postmodernism' in *On the Museum's Ruins*, op. cit. See also Crimp's essay 'Pictures' in *Image Scavengers: Photography*, I.C.A., University of Pennsylvania, ex. cat., 1979

⁹¹ For an account of Levine's work see, Howard Singerman, 'Seeing Sherrie Levine', *October* 67, Winter 1994, pp. 79-107.

⁹² Of particular importance to this approach, was Leo Steinberg's essay 'Other Criteria', 1972, op. cit. Steinberg theorised that a new 'postmodern' sensibility came into being, when material that was

number of critics were quick to point out, her works contravened the spirit, if not the letter, of copyright law. In this sense, Levine also followed the line of ‘*refusal*’, established by artists involved with dematerialisation. As demonstrated in Chapter Three, from the ‘unassisted readymade’, to Cage’s 4’ 33’’ to the blank, primary forms of Minimalism, much dematerialised art effectively refused the rhetorical concepts of composition and associated assumptions about the nature of creative labour. While dematerialised work did not contravene copyright law, it did much to move away from the creative concepts used in such laws.⁹³ Levine’s work however manifested a crucial link between the ‘refusal’ of rhetorical concepts of composition and creative labour, and the ‘anti-commodification’ stance set out by dematerialisation. Copying the work of another artist in such a manner challenged that artist’s ‘right to exclude’ and the rhetorical concepts of creative labour upon which such a property claim was secured in law. In this sense, Levine continued the project of dematerialisation, tying together two of its most important lines of enquiry. Where dematerialisation proper had interrogated the *materiality* of the art object, and its commodity form – ‘movable’ property – Levine interrogated the invisible borders of the artwork, the *incorporeal* part of the commodity form – the realm of intellectual property.

Despite the fact that, within a few years, Levine herself moved away from such work, it was *this* understanding of appropriation that became central to artists working in the 1980s such as Koons. The endurance of this small part of Levine’s oeuvre was due to

‘already cultural’ was used as a source for the creation of new artworks. (Rauschenberg’s works, he suggested, were, indicative of a society in which the weather is something you hear over the radio, *ibid.*, p. 952. There is a particularly interesting similarity between Levine’s earliest re-photographs of ‘everyday’ magazine pages and Robert Smithson’s Land Art – the latter of whom was one of the most important critical contributors to dematerialisation. Smithson’s earliest *Displacements* involved photographing areas of earth and enlarging the resulting photographic prints, up to a 1:1 scale. The prints were then taken back to the site and positioned, at slight angles, in the patches of ground of which they were representations. From a distance, these large prints produced a disruption or ‘displacement’ in the viewer’s sightline. (In his later, and perhaps better-known ‘displacements’, Smithson replaced the photographs with mirrors.) Smithson then often re-photographed these installations for gallery presentation. Given Steinberg’s acclaimed shift from ‘*nature*’ to ‘*culture*’ – written between Smithson’s death and Levine’s early works – it is tempting to see the Smithson’s ‘interventions’ in ‘*nature*’, as the corollary of Levine’s ‘interventions’ in visual ‘*culture*’. Both artists worked on 1:1 representations. However, rather than working on the relationship between ‘*nature*’ and ‘representation’ as Smithson had done, the referent in Levine’s work, was that which was already an image.

⁹³ As argued in Chapter Three, this only occurs at the level of the ‘ostensible’ artwork, copyright itself is *deferred* to the production notes and provenances of the works.

the positioning of her early work in the context of the critique of the avant gardism of the 'Modernist' epoch expounded by Rosalind Krauss in the hugely influential essay 'The Originality of the Avant Garde'. The essay was part of a cluster of work written by Krauss in the late 70s and early 80s, which attempted to analyse the fault lines of Modernism and define the new era of the 'post modern'.⁹⁴ It was then Krauss' account of Levine's work, which set the tone of appropriation art up to the time of the Koons trial.⁹⁵ Krauss' famous deconstruction of the concept of 'originality' as a neo-Romantic construction, ended in a discussion of Levine's appropriations. While Levine's "act of theft" was "in violation of Weston's copyright", it was an act, Krauss suggested, that was essential to the liberation of the copy from its secondary position beneath the "original".⁹⁶ Appropriation art's liberation of the copy from the yoke of originality was held by Krauss to be synonymous with the new era of post modernism.

Krauss' essay implied that the concept of 'Originality' used in the aesthetic discourse of Romanticism was co-extensive with the concept of 'originality' that operated within copyright law.⁹⁷ It was Krauss' essay, as much as Levine's work, which established the notion that copyright law, was responsible for reifying the prerogatives of an outmoded creative ideology. Despite the fact that, at the end of the essay, Levine's work is linked to a critique of copyright, Krauss was careful to avoid engaging with the actual history of copyright law. While the early parts of the essay built up a convincing deconstruction of 'Originality', the final part implied a determining link between that cultural discourse and the legal discourse of 'originality', which was historically spurious. The implication of the essay was the copyright could be reduced

⁹⁴ The other contributions, all originally published in *October* include, 'Grids', 'Sculpture in the Expanded Field', 'Sincerely Yours', have all been re-published in Krauss' op. cit. See also 'A Note on Photography and the Simulacral' in Carol Squiers, *The Critical Image : Essays on Contemporary Photography*, Bay Press: Seattle, 1990.

⁹⁵ The term the 'early phase of appropriation' is used because for fifteen or twenty years, the notion of an art practice critical of copyright law had been regarded as a largely forgotten. Only recently (in the post TRIPs era) has attention again been focussed on this aspect of appropriation. See for example Lutticken op.cit.

⁹⁶ See Krauss, *Originality of the Avant Garde*, op. cit., p. 168.

⁹⁷ From this point on 'Originality' will be used to denote the concept of Romanticism, and 'originality', that of the legal concept of copyright law. The main problem with Krauss' assumption is that 'Originality' is a concept linked with a particular discourse of the subject – the discourse of Genius. The

to a single creative theory – that of Romanticism.⁹⁸ This notion was taken up elsewhere, and although some well-researched histories bore out the idea of an entanglement of genius and copyright at some historical junctures, the *foundationism* implied by Krauss' was not substantiated.⁹⁹ However, the position staked out by Krauss – that copyright was formed around particular Romanticist concepts, and that the law was lagging behind cultural developments – dominated appropriation art in the early 1980s.¹⁰⁰ It was not until the defence of Koons' appropriational practice in the later in the decade, that the concept of appropriation was radically reformulated to suit the new political and economic realities of, what can retrospectively be termed, knowledge economies.¹⁰¹

legal concept of 'originality', as has been demonstrated in this thesis, did not derive from an *a priori* theory of the subject, but is derived, in somewhat mutilated form, from the rhetorical theory of labour.

⁹⁸ For a longer analysis of Krauss' essay and its position on copyright law, see Appendix F.

⁹⁹ Martha Woodmansee's study of Romanticism and the emergence of copyright in Germany is the best source here. See Woodmansee, *The Author Art and the Market*, op. cit. Woodmansee's text outlines the literary correlative of Krauss' visual arts study. As in Krauss' essay, Woodmansee's impression is that copyright *begins* in the late 18th, early 19th century, with particular market conditions and aesthetic theories. There is no account of the deeper history of intellectual property law within Germany – printing privileges were operating in German states as far back as 1479. On a strict, one might say blinkered, reading of legal statute, Woodmansee's book is correct. There is however, no reason why cultural history should tie itself to a history of statute. It might also be said, that to fully position the history of such statutes, a broader cultural framework is required. To put this another way, the notion that the concept of genius, and the law of copyright are entwined, is only true at some very specific historical junctures. Even more tenuous, is the notion that copyright law is a straightforward representation of concepts derived from genius.

¹⁰⁰ The idea of this kind of conflict between cultural practice and copyright has re-emerged in recent years. On this basis, it is possible to suggest that the knowledge economy stands on the wobbly foundations of an outmoded, and western-centric, creative ideology. See for example Sven Lutticken, op. cit. And the ongoing trials of Negativland at <http://www.negativland.com> Also see Siva Vaidhyathan, *Copyright and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, New York University Press, New York, 2001. This view suggests that contemporary cultural practice is on a collision course with the knowledge economy, as it is currently understood. On such a view, simply insisting on the inescapable necessity of appropriation to contemporary aesthetic practices – in art or in music sampling – means challenging the established order of capital and with it, the project of globalisation. However, this supposes that copyright law *is* based on the Romantic discourse of authorship and that the expansions in copyright law *are* expansions of the cultural category of 'the author'. The earlier chapters of this thesis do not bear out the first assertion. The second looks rather far-fetched. (Though it may be true, as James Boyle contends, that there is an increased tendency to call upon concepts derived from the ideology of authorship when making decisions relating to all forms of intellectual property, this does not mean that the ideology of authorship is co-extensive with intellectual property.) For a more detailed analysis of these issues, see Appendix E.

¹⁰¹ Though the term is a recent one, and its use in context of the late 1980s therefore anachronistic, as chapter four suggested, the political will that lies behind the project, is somewhat older.

THE FATE OF APPROPRIATION ART IN THE AGE OF CREATIVE FOREIGN POLICY: THE CASE OF ROGERS V KOONS

Rogers v Koons

In 1989 the ‘commercial photographer’ Art Rogers, initiated a case for copyright infringement in the US courts against the ‘artist’ Jeff Koons.¹⁰² The timing of this case is central. As has already been suggested, a critical debate about intellectual property was already underway in the 1970s, under the auspices of the Group of 77. By the time the Uruguay Round of GATT begun in 1986, the importance of intellectual property to the economy viability of developed economies was clearly apparent. In the run up to the trade round, the IPC was formed to pursue a new, tougher international settlement on intellectual property.¹⁰³ In 1989, as part of the general strategy leading to the TRIPs, the United States Congress finally ratified membership of Berne Convention on copyright, a full century after most other ‘developed’ states. The somewhat late arrival was due to the desire to hold onto anomalies in US copyright law, whose maintenance had been generally beneficial to US interests. It was only with the granting of copyright to computer software – in which American corporations had an enormous international lead – that the US government begin to see the advantage of such a treaty.¹⁰⁴ By 1990, the draft of TRIPs thrashed out by the IPC had effectively been agreed, though the treaty did not come into force until the ‘Final Act’ of the Uruguay Round in 1994.¹⁰⁵ The fact that such a precedent-setting case of

¹⁰² The usual reaction to the case in critical cultural circles, as we shall see, is to throw arms in the air and dismiss the judgement as bad or corrupt law, by dint of the fact that the court refused to follow the position laid out by the defendant, an *Artist*! See Lutticken, op. cit.

¹⁰³ As pointed out in Part I of this chapter, the software industry was one of the chief players in the *Intellectual Property Committee*, and copyright was one of the its most crucial concerns because of the granting of protection to software codes in the mid 1980s.

¹⁰⁴ Until signing Berne, international copyrights were respected only if material had been published within US jurisdiction. An author did not have to be a US citizen, or a resident of the US, but their work had to be registered under the US copyright system to receive its protection. (A number of famous writers found themselves caught out. Most famously, Henry James found that work he had published in Britain, was already pirated on his return to America. While this position traditionally benefited US publishers, the advent of software copyrights made it anachronistic. At the time of writing, the copyrighted products are the largest export sector of the US economy.

¹⁰⁵ Though TRIPs was officially in effect from 1994, some WTO member states were given extra time to comply.

copyright law was initiated and concluded in the midst of these international machinations proved highly beneficial to proponents of the nascent knowledge economy.

Rogers v Koons came to court at perhaps *the* most sensitive moment for intellectual property law that the US legal system and legislature had *ever* witnessed.¹⁰⁶ At the moment when the US government and the IPC were attempting to massively expand and toughen the international regime, *the* leading edge of American contemporary art – which staked its post modern identity on an anti-copyright stance – found itself in an American court charged with copyright infringement.

The Facts of the Case

The facts of the case are fairly straightforward. Art Rogers was a ‘commercial photographer’ who made a substantial part of his living from licensing his images for reproduction as post cards.¹⁰⁷ At the time the case was brought in 1989, Rogers’ prints were selling for \$200-500 a print, in contrast Koons’ works were selling for between \$100,000-\$300,000. A lot was made of this differential by Koons’ defence team during the trial in order to suggest that there were in fact two kinds of artists in court – one a ‘real’ artist and the other, a kind of mass media hack. The importance of this will become evident in due course.

In 1984, Rogers licensed his image ‘Puppies’ to a company called ‘Museum Graphics’.¹⁰⁸ Three years later Koons purchased one of the cards in a tourist card

¹⁰⁶ This fact is missed by every commentary on the case, whether in legal textbooks, or in art journals.

¹⁰⁷ Rogers mainly made his living from commissioned work – it usually sold for sums between \$200-\$500 a print. An important part of his income came from selling reproduction rights to his images, to postcard and poster companies. Nevertheless, he had work in MOMA, San Francisco and his work had been described in the *Journal of American Photographers*.

¹⁰⁸ Jim Scanlon had originally commissioned Rogers to photograph him (Scanlon) and his wife, holding a litter of puppies. Rogers was paid \$200 for his prints, licensed the image for reproduction to Museum Graphics and kept the negatives and copyright on the image afterwards. The image was run up as a postcard and two editions of 5000 were printed.

shop. In a move that was to become important to his eventual prosecution, he tore off the part of the card that displayed the copyright mark and Rogers' name, before giving the card to a studio of Italian wood carvers to be made into three-dimensional carvings. Most importantly while the artisans of the Demetz studio worked on the image, Koons was in daily contact providing written instructions that specifically stated sculptures produced were to be "just like the photo".¹⁰⁹ The instructions made it clear that the sculptural version of Puppies – entitled *String of Puppies* – was to be a precise copy of Rogers' image.¹¹⁰ Koons denied none of the basic facts of the case, and the final decision of the Appeal Court found that his copying had been 'blatant'.

Heading off the Conflict with the Law and US Foreign Policy: The Koons-Carlin Defence of Appropriation

Against the trend for infringement cases involving 'appropriation' that preceded it, and followed it, the case was settled in court.¹¹¹ The very public nature of an open court battle, put the claims of appropriation art on public display, and the trial was widely covered in leading art magazines. The case then promised to sort out, once and for all, the position of appropriation art with respect to the law. However, the defence mounted by Koons' legal team significantly redrew the concept of appropriation art that had been laid out in Krauss' account of Levine's work. The arguments used by Koons' team had in fact been rehearsed a year before the case came to court, in an

¹⁰⁹ Demetz Studio produced the work in a series of four.

¹¹⁰ Koons' only vaguely significant alteration to Rogers' photograph, was the addition of some rather odd red noses to the puppies.

¹¹¹ One possible reason for bringing the case was to test the new measures offered by the ratification of Berne. Berne brought the US into line with the 'moral rights' view of copyright law which was integral to continental European systems of law – until then, such a view had been alien to the Anglo-US system. 'Moral rights' gives the creator of a work of art extra rights *above and beyond* those represented in the old Anglo-US system. In particular, the right to the integrity of one's work is considered crucial. Even after an artist has sold a work and its copyright, s/he retains the right to not have the work misrepresented or damaged by its new owners. It seems likely then, that at least one reason why *Rogers v Koons* came to court (unlike earlier cases) was because the litigant may have regarded appropriation as an infringement of his moral rights. This supposition cannot be confirmed, since the arguments for infringement lined up in court, were ultimately strong enough to secure conviction without having to resort to this new, untested, aspect of the law.

article written in *Journal of Law and the Arts*.¹¹² This reformation of appropriation was written by a barrister, John Carlin. Carlin's aim was to make a space for appropriation art *within* the law, by adapting the doctrine of 'fair use'. Carlin's article marked the beginning of the attempt to reconfigure appropriation art, steering it away from its radical political critique of property relations. By 1989 appropriation, as it had earlier been conceived, was a political embarrassment. Dulling the critical edge of such a cultural practice had become important to any economic actor with an interest in the new economy. The fact that the Koons' legal team chose to defend appropriation art on the grounds of Carlin's prescription meant that whether they won or lost, the notion of appropriation as a critique of the very idea of copyright, would be buried.

Carlin started from the same point as Krauss' earlier essay. Levine's *Neils* might be unjustified "within current interpretations of copyright law", they are however "justified in terms of recent art history".¹¹³ However, in his view Levine's work did not lead inexorably towards the 'law of the original' "splintering into endless repetition" as Krauss had suggested. Nor was the practice of appropriation *new*, and thereby definitive of the epoch of post modernism. Where Krauss had begun her discussion of Levine with a history that stretched to Rauchenberg's work of the 1960s, Carlin provided a heritage that stretched back into the historical epoch of early 20th century Modernism. Rather than being the harsh light of a new dawn, appropriation was conceived as part of a firm 'tradition'. The notion that it could be conceived as a critique of property relations, or as a deconstruction of an outmoded, legally reified patriarchy, was omitted. Rather than being on a collision course with copyright law, it was suggested that the law take account of such new creative practice. To this end, Carlin suggested, the doctrine of 'fair use' should be reinterpreted, in a limited way,

¹¹² John Carlin, 'Culture Vultures: Artistic Appropriation and Intellectual Property Law' in *Journal of Law and the Arts* 13, Columbia University Press, Columbia, 1988, pp.103-143. Carlin is cited extensively in Saunders but not with respect to the *Rogers v Koons*. Comments from Carlin's paper are also cited in Robert A. Gorman and Jane C. Ginsburg, *Copyright for the Nineties: Cases and Materials*, Michie, Virginia, 1993.

¹¹³ The photographic appropriations Levine made of Edward Weston's photographs of his son Neil.

“on public policy grounds”.¹¹⁴ The courts should recognise the strategies of appropriation art, and permit artists the freedom to infringe copyrighted material, on the grounds of a general ‘public interest’.

Such a defence, Carlin suggested, should *only* be open to artists since, if the right were expanded broadly, it would undermine “the incentives copyright serves to uphold.”¹¹⁵ The crucial point of the argument was the proviso that such an interpretation of ‘fair use’ should only be deemed legitimate “for valid conceptual reasons”. For Carlin, it was essential that copyright itself was not undermined – either by appropriation’s confrontation with the law, or by its acceptance within the law. Given the multi-billion dollar industry now riding on its back, this was not surprising.

As far as the cultural practice of art was concerned, the problem with the Carlin defence was that in order for it to hold, the courts, and possibly even the legislature, would have to accept the idea that there were *two* kinds of ‘creative artist’. The first would be a *regular* copyright holder, and the second, a kind of *super* copyright holder, with legal rights to appropriate the work of the first group. The latter group being defined on the basis that the ‘theft’ they carry out is done for ‘valid conceptual reasons.’¹¹⁶ The Carlin defence suggested the creation of a *hierarchy* which would legally separate ‘Artist’ from ‘artisan’, the ‘higher’ conceptual artist from mass media hack, the museum artist from mass culture, the ‘high’ from ‘low’. The irony of such a position was that postmodern critical theory had staked its identity on breaking down the ‘autonomy’ of art. The Carlin defence rebuilt the barriers around art, and effectively asked for them to be set within the legal regime of copyright.¹¹⁷

¹¹⁴ Quotations from Carlin’s paper are taken here from the account of the case given in Gorman and Ginsburg, supplemented with Saunders’ commentary. See Gorman and Ginsburg, *op. cit.* and Saunders, *Authorship and Copyright*, *op. cit.*

¹¹⁵ Gorman and Ginsburg, *op. cit.* If, under fair use, *everyone* had the right to appropriate, copyright law would disappear in a puff of illogicality.

¹¹⁶ As one legal wag pointed out, on that defence, muggers could claim their practice was ‘performance art’.

¹¹⁷ A second irony lay in the fact that, what had been a critique of property, was defended in such a way as turn into a method of creating property. Carlin’s interpretation of ‘fair use’ would allow the Super Artist not only to infringe, but also to reproduce the infringement. In other words, intellectual property rights would accrue to the artist on the basis of their infringement.

The Carlin-Koons Defence in Court

Even before *Rogers v Koons* came to court, the means by which to pull the radical teeth of appropriation art already existed. The first actual hearing of the case, in a lower court, came in 1991 - three years after Carlin's article, two years after the US Congress ratified Berne, and at the moment when the TRIPs agreement was in the process of being fine tuned. Carlin's article influenced Koons' defence in two ways. Firstly, Koons' lawyers borrowed Carlin's elongated historicisation of appropriation. Secondly, the main part of the defence rested on the interpretation of 'fair use'.

Carlin had placed appropriation within a rather generalised theory of the simulacrum.¹¹⁸ The role of the artist in the 'cultural simulacrum', he suggested, was to balance the media's monopolisation of 'reality'.¹¹⁹ In such a formulation, the artist was accorded a privileged role. The artist alone was able to slip from the semiotic chain of corporate simulacra – one might say the corporate imaginary– the artist alone was ceded access to what used to be termed 'the real'. It was the artist alone who could critically challenge the monopoly of the media over 'reality'. This capacity was placed in an historical trajectory that led from Manet's *Olympia*, through Picasso's collages and Duchamp's ready-mades, to Warhol's multiples, and finally from there into music master mixes and sampling – the latter signifying the expansion of the culture of appropriation from the art world into mainstream social life.¹²⁰

¹¹⁸ All quotations are from Carlin's text as quoted in Saunders, op. cit., p. 228. Appropriation had to be understood within the context of an environment "increasingly determined by simulated signs" – one where the realm of the "*imaginary*" has supplanted the "*real*" in determining our sense of self and nature. In a culture suffused with visual representations, "our collective sense of reality owes as much to the media as it does to a distinct unmediated perception of nature." Within such a scenario, the artist is left to appropriate images from in order to "help us understand the process by which the media has come to monopolise huge chunks of reality". Ibid., p. 228.

¹¹⁹ In other words, appropriation artists are needed so as to provide a counterweight against the corporate monopoly on images that makes up our sense of reality.

¹²⁰ As David Saunders points out in his commentary on Carlin, despite the contemporary theory, the real thrust of Carlin's argument is 'aesthetic, moral and dialectical'. Saunders, op. cit., p. 228. Innovations in art *lead* society– that they do so is moral, because art provides a counter-balance to the deleterious effect of corporate mass media on the social perception of reality. Situated thus, art is positioned within an eternal dialectic with 'the mass'. From such a stance, appropriation has much in common with the well-worn critical positions of Modernism, rather than the 'new' era of the post modern.

In the trial, Koons legal team deployed Carlin's argument with respect to the cultural simulacrum. *String of Puppies* was a fair social criticism, they argued, insofar as Koons belonged to a "school of American artists" who believed that the "mass production of commodities and media images has caused a deterioration in the quality of society."¹²¹ Koons' appropriations were part of an "artistic tradition" and were intended to "comment critically", both on the incorporated (appropriated) object, and on "the political and economic system that created it".¹²² Where, ten years earlier the appropriated image was intended to send the 'Modernist origin' (copyright) 'splintering into endless repetition', the Koons' defence reduced its ambition to simple 'comment'. Following Carlin's formula, Koons' practice was historicized, citing the 'appropriations' of Cubism and Dada through to Warhol. Rather than being presented as a new critical practice, appropriation was presented as an 'always-has-been', embedded in the fabric of tradition going back to Duchamp's readymades of 1913.¹²³

When it came to using the 'fair use' defence, Koons' team stuck to Carlin's proposal and rested the defence on the 'public interest'. The team claimed the main purpose of the work was social comment and asked that the work be considered as in the 'public interest', under the 'fair use' clauses covering works of *satire* and *parody*.¹²⁴ In its final judgement, the court recognised Koons' *intention* to satirise consumer culture. However, it could not see how the very precise copying of Rogers' photograph constituted satire within the terms of the law. Koons' instructions to the Demetz studio, stipulated that *String of Puppies* was to be "exactly like the photograph".

¹²¹ Gorman and Ginsberg, op. cit., p. 607.

¹²² Ibid., p. 607

¹²³ 1913 was the date at which Duchamp's earliest readymades. His incorporation of manufactured objects within the artwork, set a precedent that Koons followed. Koons' team also used the argument that recontextualisation established a new set of meanings for an object, while at the same time leaving its physical form intact. To push home the cosy feel of 'establishment Modernism', Koons described Rogers' photo card as "typical commonplace and familiar," a part of "mass culture nesting in the collective sub-conscious of people regardless of whether the card had actually ever been seen by such people." Quoted in Gorman and Ginsberg, op. cit., p. 603.

¹²⁴ In the US jurisdiction in which the case was conducted, fair use must consider three possibilities. Using a copyrighted image without permission can be defended on consideration of whether the copy was done in 'bad faith,' whether it is detrimental to the copyright holder, or whether the copy was done solely for 'personal financial benefit' of the pirate. Finally, consideration is given to whether any of those conditions can be balanced against a public interest that may be served by the infringement. The

Koons did not deny copying. The court found the copying to be blatant. It went beyond a simple appropriation of the idea presented in the photograph – a string of puppies on the laps of two sitters – which may have been within the law. The very precise instructions indicated that not only the idea but also the *expression* of the image was copied.¹²⁵ Under the rule of *substantial similarity*, the infringement was clear – the question was whether it constituted a ‘fair use’ of Rogers’ image. Unfortunately for Koons, the court could not see how such a close copy could be construed as satire. To accept it as such was tantamount to suggesting that Rogers’ own work was self-satirising. If that was the case, Koons had copied that as well.¹²⁶

The crucial issue was *how* appropriation art achieved its satirical effects. Koons’ position implied that satire was achieved by presenting a part of kitsch, ‘mass culture’ within the rarefied atmosphere of an art gallery or museum. *Context* was *the* crucial issue. For the arguments of the Carlin-Koons’ defence to stick, the court would have had to accept that there was an implicit, and generally agreed, cultural and social division between the *context* of Koons’ work as an artist and the *context* of those who worked within the realm of ‘mass culture’. Had such an argument been accepted, it would have reinstated, and legally concretised, the art/life divide – a divide that post modern art practice was supposed to have overcome.

The final coup in this repositioning of appropriation was given in the submission made when the case went to appeal. The fundamental issue at stake, Koons’ team suggested,

classes of parody and satire come under the final consideration of public interest. Naturally, Koons had little recourse on the first three considerations.

¹²⁵ The court found that “Original elements of creative expression in the copyrighted work were copied and the copying was blatant”. Gorman and Ginsburg, op. cit., p. 605. The court accepted the argument that Rogers had made a number of decisions making the photograph, choosing the location, asking Scanlon and his wife to be in the shot and deciding how they were posed. “Substantial creative effort” went into the photograph in terms of compositions and production according to the Rogers trial team. Rogers drew on years of experience and artistic development, in selecting light location, seating, arrangement of dogs and figures. Of the fifty images on the contact sheet only one image was selected for enlargement.

¹²⁶ Final judgement found that Koons had prejudiced Roger’s potential market. In theory, Rogers may, in the future, have sold the rights to make sculptures from his photographs. Similarly, photographs and postcards of his work, and Koons’s sculptures may be confused. Koons was ordered to hand over his artist’s copy of *String of Puppies* to Rogers and a decision on compensation was deferred to a later date. (The level of compensation has not, to the best of my knowledge, been reported.)

was whether “a mass distributor of a rather mundane photographic note card can prevent a highly regarded artist from creating a limited edition, *original*, provocative and critical work of art.” (My italics).¹²⁷ In this new definition of appropriation, the critique of ‘Originality’ and copyright was entirely obliterated – appropriation was defended on the basis of the very *originality* it was once pledged to destroy.

The final judgement of the appeal court rejected the argument that a creative distinction could be made between ‘high art’ and ‘mass culture’.¹²⁸ In doing so, the court maintained the principle that copyright gives equal access to all.¹²⁹ The ruling was met with apoplexy in the art world. Writing in *Art in America* in 1992, Martha Buskirk suggested that contemporary art, and post modernism itself, was *under attack*. The refusal to extend copyright to include strategies of contextualisation and recontextualisation, that were fundamental to contemporary art practice, was a *failure of the law*. If the ‘fair use’ was not opened up to “nuance, multivalence and ambiguity”, “severe limitations” would be placed on artists that tried to respond critically to “the contemporary world of existing, mass media images”.¹³⁰ The irony of the case – that post modernism was most under attack from the defence of its practices

¹²⁷ Martha Buskirk ‘Commodification as Censor: Copyrights and Fair Use’, in *October*, 60, April, 1992, p. 106.

¹²⁸ In rejecting the argument they said, “The copying was so deliberate as to suggest that the defendants resolved, so long as they were significant players in the art business, and the copies they produced bettered the prices of the copied work by a thousand to one, their privacy of a less-well known artist’s work would escape being sullied by an accusation of plagiarism.” Gorman and Ginsburg, op. cit. p. 605.

¹²⁹ Had judgement gone the other way, a two-tier system of copyright would have ring-fenced art practice, giving it a hierarchical position over all other forms of creativity. Such a judgement had the potential to quickly run out of control. Who exactly is to say where the ‘art world’ starts and finishes? Given the claims of post modernism to indeterminacy and the eradication of the borders, are there in fact any limits to the art world? Acceptance of the Koons’ argument would also have meant that copyright subsisted in nebulous ‘relational moments’ between given objects and given contexts. Exactly how such a reformed copyright could be limited, remains an open question.

¹³⁰ Martha Buskirk ‘Art and the Law: Appropriation Under The Gun’, *Art in America*, June 1992, pp. 37-43. There is an assumption here, that the freedom of the artist is entirely *synonymous* with freedom per se. It is a general rule of thumb that the artist’s *freedom of expression* is seen as synonymous with *freedom of speech*. While the rule is generally true – where one finds repression of art, one also finds a more general repression of political subjects – it should not be taken to mean that *freedom of expression* and *freedom of speech* are interchangeable notions. The artist’s freedom of expression is a right that entails, though not exclusively, a right to create property. Freedom of speech categorically does not. The right to the free creation of commodified expression in copyright law is not an unlimited right synonymous with democracy in the way that freedom of speech is. The idea that a large swathe of free speech was jeopardised by the Koons’ judgement is nonsense. Anyone could say, or write, (or

that had just been put forward in court – was lost to the commentators in the art world.¹³¹

CONCLUSION: ART AND FOREIGN POLICY IN THE AGE OF TRIPS

The case of *Rogers v Koons* was crucial to the emergent knowledge economy, the actual outcome however, was entirely irrelevant. The Koons-Carlin defence had already disavowed the early political radicalism of appropriation art. The broad economic effect of the case was the same whether ‘appropriation’ won or whether it did not. As it was, copyright law was left unchanged by the ruling – which served the purpose of the burgeoning information economy as well as bringing appropriation within the law would have done. The general effect of the case was to massage away any perceived conflict between cultural practice and the powerful interests then at work on the international stage. Given that these were the years of the IPC’s most fevered activity, the motivation for Carlin’s essay, and Koons’ decision to fight the case in open court, is open to question – though there is no evidence of any direct involvement of either with the IPC.¹³² Happily for the architects of the knowledge economy, an argument blunting the radical critique of copyright law, came along at the precise moment that US Congress ratified Berne, and the IPC and the government were pushing hard for a wider, deeper and tougher international regulation of copyright.¹³³

In the years since the case, the Koons-Carlin view of appropriation has held in mainstream art criticism. The long historiography of appropriation, rather than Krauss’

visualise), anything they like about Rogers work, what they do not have the right to do, under the above circumstances, is to make property out of that expression.

¹³¹ There is no evidence that this postmodern irony has been appreciated elsewhere either.

¹³² The relationship – if any – between Carlin and the IPC is a line for future research to follow.

¹³³ The decision of Koons to fight the case in court, rather than doing the usual out-of-court deal, also requires further research. Since *Rogers v Koons*, the practice of settling out of court, by cutting agreements to limit reproductions of appropriated work, has become standard practice. See for example here, the accommodation struck between Glenn Brown and the estate of Salvador Dali, and/or Damien Hirst’s settlement with Humbrol, regarding Hirst’s work *Hymn*.

shorter and more radical view, has become the accepted version.¹³⁴ If anything, in the years since the case, the embedding of ‘appropriation’ in ‘tradition’ has become even deeper. In 2000, *The Times* newspaper carried a story about that year’s *Turner Prize*. The front page feigned shock that the entry by ‘appropriation artist’ Glenn Brown was in fact a copy of the cover of a 1970s science fiction paperback. However, the editorial that day put the reader’s mind at rest. It read as follows:

Art and imitation have always been bedfellows. Brown’s description of his epiphanic moment of copycatery would be familiar to each and every luminary in the canon of Western art. Just as Renaissance artists learnt from imitating the Ancients, so the traditional discipline of learning to draw relied upon Old Masters on the principle that the best way of finding out how to do something is to have a crack at it oneself. Even where direct imitation was not at stake, the variations on set tableaux - the Annunciation, the Passion, the Pieta, the Judgement of Paris, Leda and the Swan, Europa and her bull, created a thriving culture of what might now be referred to as “intertextuality”.

Postmodernism has given copying a vocabulary, and with it a new legitimacy. We live in a multi-meeja confusion where to steal has become to *sample* and the rip off has become the *homage*. Where Renaissance art borrowed from a storehouse of classical and religious images, so pop culture has become the lingua franca of today’s visual world. (My Italics.)¹³⁵

As far as mainstream art criticism is concerned, the notion of appropriation as a critique of property relations is a distant memory. That cultural realignment is critical for the knowledge economy. The early moment of appropriation art represented the fulfilment of the critique of property relations that had been central to the aesthetic

¹³⁴ For example, John C. Welchman, though keen to move on from appropriation, uses the same long historiography as Carlin. See, *Art after Appropriation: Essays on Art in the 1990s*, G+B Arts and Gordon and Breach, London, 2001.

¹³⁵ The ‘editors’ fluency in ‘post modern’ rhetoric may be related to the fact that both the Tate’s P.R. company, Bolton and Quinn, are also employed by *The Times*, November 28th 2000. (According to my source in the Tate press office, who would like to remain nameless.)

dematerialisation of the 1960s. *Rogers v Koons* was the moment at which the ‘strong’ interpretation of the semiotic/network model of creative production, developed from dematerialisation, was finally reined in. The case was therefore instrumental in securing the ascendancy of the ‘weak’ interpretation of the semiotic/network, crucial to the smooth operation of the knowledge economy.

Despite the fact that *Rogers v Koons* represents the moment mainstream contemporary art ‘backed off’ from narratives critical of property relations, there is no reason to believe that the settlement reached will not be challenged in the future. Although considerable effort was expended in enforcing a particular reading of the semiotic/network model, the model’s potential as a critique of rhetorical concepts of creative labour and composition remains. Predicating a theory of political economy on creative concepts leaves such a theory open to culturally and aesthetically informed criticism. Where such an economy requires the effective *policing* of cultural and aesthetic concepts, it is doubly vulnerable. As the cold war era of Greenbergian Modernism and Schlesinger’s *Politics of Freedom* demonstrate, politically motivated interpretations of cultural are habitually reductive. Insofar as it is cultural in character, the theory of the knowledge economy is vulnerable to the problems of all creative hegemonies. A generation of artists in the 1960s found the field of creative possibilities artificially narrowed by a creative ideology constructed in contradistinction to communism. The central challenge to that hegemony came not from a political quarter but from aesthetics. Ultimately, boredom provides the greatest threat to creative hegemony.

6

Conclusion

This thesis proposes that the knowledge economy must be analysed in relation to its use of particular *creative concepts*. This thesis has shown that such concepts are located within particular historical and cultural contexts. In this respect, attention has been concentrated on the use of concepts derived from *aesthetics*. Important here, has been the need to demonstrate the importance of such creative concepts to intellectual property law, and the special centrality of intellectual property to the knowledge economy. This enquiry has situated intellectual property within a nexus of factors, which include *aesthetic* and *cultural* concepts, as well as the more usual concerns of business economics, the regulation of markets, and the broader requirements of social organisation. In this, it has been necessary to recuperate aspects of the history of intellectual property that have long been overlooked or misunderstood.

The examination of privileges granted with respect to *images* in 15th and 16th century Venice, has been important to the recognition that the concepts of ‘originality’ and ‘invention’, used in modern intellectual property law, are cognates of the ancient art of rhetoric. Situating the study of intellectual property and rhetoric in the context of visual culture has permitted an analysis previously unavailable in literary-centred studies or copyright. Image making, was already an important ‘industry’ in the 15th and 16th centuries. Its position within the social nexus of the guilds has therefore permitted an examination of the transition from medieval forms of social and industrial organisation to more modern forms of intellectual property. Staying with the context of visual culture in the examination of the 1960s permitted an analysis of the shift from, material to conceptual production, which characterised the moment of *aesthetic dematerialisation*. As has been shown, such a bifurcation was contingent on the specific social and legal position of *art* with respect to *intellectual property*.

The attempt to liberate *aesthetic* relationships from *economic* determinations¹ provided a new set of creative theories, which later proved useful in reconceptualising

¹ Such as the tendency to view the author as *producer*, the viewer as *consumer*, and the art work as a *commodity*-object that functions (and is functioned by) such subject spaces.

broader economic relationships. Of particular importance in this respect, was the challenge dematerialisation posed to the rhetorical model of creative labour and composition, that had hitherto characterised creative production, and which was, and still is, in use in intellectual property law. The new model of creative production, the semiotic/network, could be interpreted in two ways. The ‘strong’ interpretation, suggested the delegitimisation of creative concepts drawn from rhetoric. In contrast, the ‘weak’ view centred on the desubjectivising narratives that stemmed from the attack on the rhetorical model. Where the ‘strong’ interpretation was threatening to intellectual property, the ‘weak’ interpretation was useful in attempts to manage the law. Establishing the ascendancy of the latter later therefore was central to the development of the concept of the knowledge economy.

The shift from ‘object’ to ‘idea’ that was indicative of aesthetic dematerialisation was paralleled by a later phase of ‘*economic dematerialisation*’. The latter resulted from technological and material changes, which gripped the economies of developed states from the 1970s onwards. While aesthetic dematerialisation obviously did not cause economic dematerialisation, it nevertheless provided creative *models* that were later developed in the context of the new economy. The rise of the semiotic/network in the economic sphere was not without irony. For the leftish radicals of the 1960s it constituted a more ‘egalitarian’ approach to creative production than had older subject-centred models of authorship. However, in the era of the new economy, the semiotic/network no longer offers an *escape* from commodified relationships, but rather a means by which managers can gain control over the fruits of creative labour.

It is this context then, that the move to the knowledge economy has been approached as a theoretical and ideological project. Insofar as such a project requires advocacy, it continues the ‘traditional’ notion of politics as an ‘art’. However, theories of the knowledge economy push ‘creative’ and aesthetic components far beyond the ‘traditional’ uses, moving from simple presentation of policy, towards the constitution of policy. In expanding the remit of creative theory, theories of the knowledge have drawn together a ‘complex’ of creative concepts. On one hand, this results from the

need to maximise the production of ‘creativity’ essential to an intellectual property-based economy – for which both rhetorical and semiotic/network models of creativity are necessary. On the other hand, the theoretical creation of such an economy is itself an aestheticising project.

The creative concepts in play within the creative ‘complex’ are heterogeneous but can be given specific historical and cultural identifications – some are pre-modern (e.g. rhetoric); some are Romantic (e.g. the early phase of Schumpeter’s thinking, and elements of Leadbeater’s writing); some are Modernist/avant gardist (e.g. Schumpeter latter work, and elements of Leadbeater’s writing); others are post modern (e.g. all semiotic and networked approaches). Taken together the ‘complex’ impels an ideal economic subject that is creative, but ideally *creative destructive*. The ‘complex’ does not operate in isolation but in conjunction with a multitude of other economic, political and material factors, which may include: technological and material factors; theoretical and political arguments, responses and judgements; legal measures; the beliefs, traditions and knowledge structures of particular agents, etc. The interplay between the creative ‘complex’ and such factors is in principle multidirectional, however the direction of particular exchanges can be mapped. On a more general level, it can be said that the detailed interactions between the creative ‘complex’ and other factors are presented in aestheticising terms. However, in theories of the knowledge economy, such complex social interactions are reduced to creative metaphors, such as that of the ‘recipe’. Similarly, the concept of ‘creativity’ is presented as a category of social and political judgement – its absence is the index of failure, its general application the panacea for all ills.

The cultural loading built into theories of the knowledge economy is readable at the points where theory turns into policy. The knowledge economy’s redeployment of Schumpeter’s concept of creative destruction has undermined its modernist universality and lent it a specific cultural, and geographic, identity. The effect of the reformulation is to render the economic divisions created by knowledge economies as

cultural divisions. International agreements such as TRIPs can and must therefore be subjected to cultural analysis.

By way of conclusion then, it can be said that aesthetic theory has had effects on the conceptualisation of the knowledge economy. Ironically, however, while such theory has been greatly aided by some developments in creative theory that developed from aesthetic dematerialisation, it has found itself in conflict others. In the era of knowledge economies, cultural challenges to the legitimacy of intellectual property have been taken very seriously. A defining conflict of the knowledge economy lies within creative theory, specifically with respect to the identity of the semiotic/network. Ensuring the ascendancy of the ‘*weak*’ interpretation is central, since a ‘*strong*’ interpretation threatens to delegitimize the rhetorical concepts used in intellectual property law. The battle to control its definition was central to the case of *Rogers v Koons*. The case was crucial in establishing the general ascendancy of the ‘*weak*’ interpretation vital to the operation of the knowledge economy. The attempt to direct culture towards particular political ends has an immediate history stretching back to 1947 and the case suggests that powerful economic and political actors outside of the art world had a vested interest in ensuring the ascendancy of a particular view of creative theory conducive to the management of the economy.

Though a legal settlement has been reached with respect to the identity of the semiotic/network, it remains open to challenge. Insofar as the knowledge economy is a cultural construction, it will be vulnerable to culturally informed analysis and criticism. The creative hegemony it necessitates, like all hegemonies, is reductive and therefore invites challenge. In this sense, the criticism that was levelled at Modernist Avant Gardism is pertinent to the knowledge economy. In the 1970s, post Modernist critics drew attention to the yawning chasm between creative ideology and creative fact. The protestation of originality, invention and innovation often operates, as the signifier of a particular *identity*. In her caustic analysis of Modernist art, Rosalind Krauss pointed to a seemingly limitless numbers of artists who ‘discovered’ the form of the grid, and posited the shape of the painting’s support and the warp and weft of

the canvas beneath the paint, as an ‘innovation’ that signified their Modernity. The incantation towards ‘radical innovation’ always runs the risk of proliferating a claim to a particular style, rather than encouraging ‘innovation’ itself. For the Modernist avant gardes, ‘radical innovation’ was demonstrably easier to achieve on the pages of manifestos, than in the studio. The textbooks of the new economy run the risk of striking a similar relationship with the firm. The difference between the production of creative rhetoric and creative production is often marked.

7

Appendices

APPENDIX A (Chapter 3)

MINIMALISM, BARTHES AND COPYRIGHT

Morris was involved with Fluxus prior to his Minimalist phase and Fluxus was itself rooted in Cagean concepts of composition. There are also significant correlations between the concepts of composition in Minimalist work of this period and the position staked out by Roland Barthes' in 'Death of the Author' (1967). The notion of composition as a temporal collaboration between object and viewer, and of the 'work' as never complete *in itself*, places great emphasis on the subjectivity of the consumer. This parallels Barthes contention that the text was not complete in itself but is effectively (re)created differently by the subjectivity of each successive reader.

As far as literature is concerned, such a claim is fairly toothless as a device with which to challenge copyright doctrine. Copyright is not concerned with hermeneutics, meaning may well be the result of the kind of collaborations between the writer and the reader that Barthes suggests but since such a formulation is clearly applicable to works that are in copyright as well as work that are out of copyright, it cannot of itself stand as an indictment of copyright. As far as copyright is concerned the meaning of a text, and how that meaning is constructed, is irrelevant, the arrangement of words used by the writer is all that matters, copyright has nothing whatever to say about content, about the ideas and the meaning of ideas contained in the work, it merely seeks to protect, for a limited period, the form of expression of an idea not the idea itself. This is not to suggest that there are not other elements in Barthes essay that could be *taken* to form the basis of an anti-copyright argument although there are no concrete statements about copyright law in Barthes writing that suggests that he was of such an opinion. Barthes essay is in fact remarkably orthodox in terms of copyright doctrine, the famous sections where the text is presented as a 'multi-dimensional space in which a

variety of writings, none of them original, blend and clash;’ or as ‘a tissue of quotations drawn from innumerable centres of culture;’ are merely a preamble to the statement that the writers ‘*only power*’ lays in his ability ‘to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.’ Such sentiments are, as far as copyright is concerned, pretty much orthodoxy, suggesting as they do the collaging of elements or commonplaces in a way that is personal to the writer and which does not rest too heavily on any one of his/her sources.

Barthes has however been called upon to support a critique of copyright. In an artists statement published in 1982 in the catalogue for the exhibition *Mannerism: a Theory of Culture* Sherrie Levine appropriated/plagiarised large sections Barthes’ essay particularly those referring to originality. Within Barthes *own* terms there is nothing to suggest that such a reading is either legitimised by the text or ruled out by it. However as pointed out elsewhere, one would have to believe unquestioningly that copyright specifically, and intellectual property more generally, was based unilaterally and unthinkingly on a monolithic notion of Romantic Originality and nothing else, to make such an interpretation of Barthes’ essay stick.

APPENDIX B (Chapter 4)

SCHULMAN’S PERIODISATION OF THE KNOWLEDGE ECONOMY

Schulman expresses the periodisation of the knowledge economy in the following way:

The widely accepted theory goes, the so-called First Wave pre-industrial economy was marked by the private control of land. Agriculture, timber, hunting, mining – bounties that arose from the land – formed the foundation of economic well-being. During this pre-industrial period, the big economic winners were land owners, who could use their dominion over real estate to control economic life

within their fiefdoms. Wars large and small were waged to maintain or acquire power over territory.

Eventually though, with the ascent of industrialisation in the so-called Second Wave, the locus of power shifted, as Karl Marx astutely recognised, from control of the products derived from land to control of the means of production. Of course, control of land and its bounty continued to be important as it is today. But in the industrial economy, the biggest winners were those capitalists – such as factory and railway owners – who controlled not just physical property but the tools to make and transport the mass-produced goods sought by a growing urban population.

Today, the product-orientated manufacturing industries are being eclipsed as the control of knowledge and know-how moves to the vibrant centre of the economy. The knowledge of how to efficiently use scarce material resources now assumes at least as much value as owning or controlling the materials themselves. The key in the emerging economy is the ownership and control of the *concept of production*: the blueprint, formula, or essential information that may enable a sought-after development. Similarly, for some products such as software, marginal production cost approach zero: the value of these knowledge wares is almost entirely divorced from the costs traditionally associated with the production of tangible goods.

See Schulman, op. cit., p. 154. Schulman credits the origin of this periodisation to Alvin Tofler in the early 1980s.

APPENDIX C (Chapter 4)

TONY BLAIR'S ADDRESS TO THE LABOUR PARTY CONFERENCE 1999

On September 25, 1999, a few months after the publication of Leadbeater's book and his personal endorsement of its contents, Tony Blair addressed the Labour Party Conference in Bournemouth. The editorial leader in *The Guardian* of 29th September paused to marvel at the way Blair managed to find a "thread of argument" with which to "tie together the apparently disconnected goals and actions of the government he leads."¹ The speech set out the agenda for the 21st century in terms that rejected the traditional divisions between Capitalism and Socialism, laying out instead a new front line between the forces of *progress* and the forces of *conservatism*. The speech was notable for its repeated use of the image of creativity, talent and radicalism. The following are excerpts from the speech:

A technological revolution is driving the forces of change without respect for tradition. People are born with talent and everywhere it is chains . . . Look at Britain, the country ran for far too long on the talents of the few when the genius of the many lies uncared for and ignored. Fail to develop the talents of any one person, and we fail Britain. Talent is the 21st century wealth.

Arrayed against us: the forces of conservatism, the cynics, the elites, the establishment. On our side, the forces of Modernity and Justice . . . those who have the courage to change. Those who have confidence in the future.

A new Britain where the extraordinary talent of the British people is liberated from the forces of conservatism that have so long held them back . . . Step up the pace, be confident, be radical . . . We can let rip - not on spending, but on policies and ideas . . . We are re-writing some of the traditional rules of politics

. . . Old elites, establishments, have run our profession and our country for too long.

The central dynamic of the speech closely replicated the message of Leadbeater's text. The political, economic and ethical divisions of the future were arranged across an aesthetic and creative topography. The old political battle lines that divided Conservatives and Socialists were elided in favour of a division between the forces of progress and those of conservatism – those who stood for innovation of a radical kind and those who, for whatever reason, stood against the creative impulse.² The speech explicitly set *Modernity* against 'the traditional rules of politics'. The concepts of 'talent' and 'the genius of the many' were in turn ranged against the dark forces of the 'establishment'³, the 'old elites' and the 'cynical'. The audience was encouraged to 'let rip' and 'be radical' and face change with confidence in the future.⁴ The 'political' division represented in the rhetorical pairings that litter the speech rattle with the

¹ These excerpts are taken from an edited version of the speech published in *The Guardian* on Wed 29th, September, 1999 and from additional comments reported in *The Independent's* lead article on the same day

² Other broadsheets unfamiliar with Leadbeater's text echoed the Guardians puzzlement at the content of Blair's speech. Similarly, the Labour governments highly positive attitude to genetically modified foods in 1999–2000 at first puzzled many unfamiliar with the new political landscape. The assumption that New Labour would climb aboard the populist bandwagon against GM was proved wrong. The endorsement of Leadbeater's aesthetic radicalism by the first Blair administration proved more powerful than the well advertised desire to be 'liked.'

³ Blair used the terms 'talent' and 'genius' interchangeably. Genius, as a quality of 'the many', indicates that a broad and loose concept of 'creativity' is at work. Such generalised concepts of creativity are particularly evocative of the Modernist outlook. One way of situating the differences between Modernism and the traditionalism or academicism it set itself against is found in its attitude to teaching art. The 18th and 19th century academic training preached the development of 'talent' through the learning of rules, and metier or skills. Talent is not distributed equally - a fact that the Bauhaus model of teaching attempted to overcome by stressing a loose concept of 'creativity' latent in all individuals, that will find its expression through the challenges it brings to a particular medium. Modernism in short, sought a more egalitarian approach to the questions raised by the possibility of producing art. For discussion see Thierry de Duve's contribution to the conference *The Artist, The Academy*, Ed. Nick De Ville and Stephen Foster, John Hansard Gallery: Southampton, 1994. (De Duve's position incidentally is that general 'creativity' is a myth and that old academic leading was more clear-sighted and ruthlessly honest in its belief in 'talent'.) When Blair celebrates 'the genius of the many' then, he comes close to such a formulation. Later in his speech he uses the term 'talent' in much the same way. 'Everyone has talent. Everyone has something to offer. And this country needs everyone to make a contribution.'

⁴ It is worth reiterating here that 'conservatives' for Blair as for Leadbeater, means the old left, environmental activists, anarchists and any grouping of the left that is not aligned specifically to new labour.

ghosts of twentieth century avant gardism. Modernity against tradition; creativity (talent or the genius of the many) against the establishment and the unbelieving cynic; a radicalism that faces the future with hope – Blair’s speech made a good fist of the rhetoric of early twentieth century Modernism.⁵ The new aesthetic topography of the knowledge economy is set out by the specific alignment of ‘talent’ with concepts such as Progress, Modernity and *Justice*. The alignment of radical creativity with Justice is particularly important since it gives some clue as to the role creativity plays in this aestheticised view of the political landscape. The amendment to Rousseau’s famous dictum – man is born free but everywhere he is in chains – to read ‘People are born with talent and everywhere it is in chains’ is also highly significant. It is not the subject that is *oppressed* in any political or moral sense; rather it is the economic resource perceived in that subject – talent – is *repressed*. Justice is represented as a natural partner to radical innovation of Modernity; freedom is equated with talent ‘letting rip’. The creative faculty here is raised above all other considerations of the political and ethical subject. Suarez-Villa’s social aim, the reproduction of creative invention, is again reproduced. Creativity is not the servant of a broadly conceived and

⁵ The use of avant-gardist tropes in the speech is not simply an invasion of political discourse by art historical concepts. The origin of the term avant-gardism is military and was for example used by Baudelaire to refer to a kind of committed leftish political literature. Only in the later 19th century does the term lose its overt political connotation and come to refer to a radical art form (in its Modernist sense (For discussion see Renato Poggioli theory of the avant-garde.) However, it is ironic that avant gardism so self-consciously (re)enters the political realm at the moment that its stock in the art world is at an all time low. Few in the contemporary art world or the world of literature would currently conceptualise cultural practice in such terms. Since Peter Bürger announced the concept and term dead in the late 1960s, attempts to resuscitate and breathe new life into it have been muted affairs. (See for example Hal Foster’s *Return of the Real*, which draws on earlier assertions in Brian O Doherty’s *Inside The White Cube*, Foster’s avant gardism is a somewhat muted progressive critique of the institutional (museological) framework of art as opposed to the unruly and incontinent alley-cat of early Modernist avant gardism.) Whether viewed as a victim of its own success in itself becoming an institution, or a failure because of its inability to overcome institutionalisation, the general claims to a privileged alterity, to be more progressive and advanced than anyone else, have generally been eyed with suspicion in the era of post modernism. The implied reliance of avant-gardism on Hegelian/Marxist theories of history and their respective loss of credibility in many quarters most probably explains the general loss of credibility of concepts of avant gardism. However notably where narratives of progress are still held in esteem, avant-gardist groupings seem to flourish. The best example that comes to mind is the Internet group ‘The Extropians’ who blend their neo-Darwinism with a belief in a technologically shaped progressive history and free market ideology – a kind of Marxist historical narrative stripped of any social concerns beyond personal libertarianism. With their Extropy Journal, Manifesto, Artworks etc., the group closely resembles an early 20th century model of avant-gardism.

multi-directional civil society but the *point* of society, the narrow target to which it must dedicate itself.⁶

APPENDIX D (Chapter 5, Part II)

CRITICAL POSITIONS ON INTELLECTUAL PROPERTY

Technological Critiques

On a technical level, the most common and reasonable argument is that networked computers rely upon the continual copying of information. Essentially every connection to the Internet requires some form of electronic copying. Such critiques tend to stress practical arguments that stem from innovation – the fact that copying has become exponentially cheaper and easier for example – is called upon in order to suggest that the continuation of intellectual property law untenable. A particular sight of conflict in such technological critiques emerged with granting of copyright protection to software codes in the 1980s. Against such a move early web activists (under the influence of McLuhan) asserted the ‘oral’ character of web communication. Such arguments usually followed McLuhan’s assertion that a return to ‘oralism’ was synonymous with de-commodifying knowledge coupled with the assumption that speech fell beyond the remit of copyright law. (An acquaintance with broadcast law may have quashed such hopes earlier on.) On a slightly more cultural level, inter- or hyper- textuality – the polyphonic character of electronic communication – was

⁶ There is no room here to recount the numerous examples of policy derived from such a position. The sustained attacks on professions teachers, nurses, the GMC, attacks on, and policies to restrict, anti-GM and anti-capitalism protests, educational policy aimed at teaching creativity in primary schools, etc. The most significant effects of the position are felt in foreign policy. Chapter Five will cover some of the issues involved. The knowledge economy is a concept unsustainable without the effective operation of an international system of intellectual property rights. Theories of the knowledge economy explain the force of political will behind the transition from GATT to the WTO bringing about the TRIPs

presented as undermining the ‘principle’ of singular ‘Romantic’ authorship on which copyright was presumed to be based. The mistake here was to conflate the individuated authorial subjectivity of ‘Romantic’ ideology with the ‘author’ of copyright law. (Again an acquaintance with the notion of ‘legally constituted subjects’ i.e. companies or groups that claim authorship would have saved a lot of speculation.)

Ethical critiques.

‘Ethical’ critiques of intellectual property cover an enormous range of debate. The main areas of contention are medical and religious ethics, but ethical critiques diffuse into every area of debate – for example: the freedom of speech, the ‘right’ to privacy, ethical arguments about access to information, the ethical implications that stem from practical snags in the distribution and flow of knowledge, ethical questions that stem from the transition from common knowledge to commodified information, ethical questions that grow from economic problems that in turn stem from the growth of monopoly, loose ethical problems that stem from instrumental argument that intellectual property exists to encourage innovation, and many more. Many of the arguments related to intellectual property can also be related to the concept of property per se. There is also a good deal of interpenetration between the technical, ethical and cultural debates. New technologies create new ethical problems where the ownership of creative labour is in play. On a more subtle level, a good deal of moralising is also present in arguments about technology. For example the growth of reproductive technologies is often presented not only as a technical ‘problem’ for copyright, the technical advance is presented as an ‘ethical’ *challenge* to outmoded ways of thinking.

agreement and the move from the Berne Convention to WIPO. WIPO and TRIPs provide the legal architecture that grounds the possibility of the knowledge economy.

APPENDIX E (Chapter 5, Part II)

THE SOCIAL FIELD OF AUTHORSHIP

Rosalind Krauss' essay *The Originality Of The Avant Garde* was followed by a number of other works examining the relationship between authorship and copyright. Like Krauss, all these works followed a line of argument begun in the 1960s with Barthes and Foucault's critiques of authorship. However, it was Krauss' *The Originality Of The Avant Garde* that established the notion that Romanticist notions of 'Originality' were directly linked to copyright law, and that there was a cultural-aesthetic conflict with the law.

After Krauss' essay, a number of other writers contributed to the debate. The idea that expansions in copyright law can be read as expansions of the cultural logic of authorship can be traced to Molly Nesbitt's 1987 essay *What Was An Author?* Nesbitt set out to situate Foucault's earlier epistemology of the author within the context of developments in French copyright law, in particular the changes brought about by the 1957 copyright act.⁷ The result of her approach was to give the impression that the social, economic and aesthetic concepts of the author are, more or less, co-extensive with each other and more importantly that they are co-extensive with the 'author' that is represented in copyright law.⁸ The various expansions of French copyright law are therefore presented as expansions of the envelope of 'authorship'.⁹ Since the earliest of French laws discussed related to literary authorship the expansion in copyright was presented as an expansion of the domain of 'the author' – that is to say a particular kind of creative cultural subject – into the realm of industry.¹⁰ The general breakdown of the border between culture and industry, associated with the post modernism of the

⁷ Michel Foucault *What Is An Author?* (1967) op. cit., Molly Nesbitt *What Was An Author?* op. cit.

⁸ It is important to remember that while the history of the law provides a useful and interesting guide to the changing shape of authorship one cannot assume that there is a direct and exclusive relationship between the legal and the social. The illegality of theft tells you little about the sociology of crime. A similar disclaimer must also be attached to the aesthetic realm.

⁹ To the point at which authorship seems to be becoming increasingly incoherent.

¹⁰ A more detailed analysis of Nesbitt's claims will be included in the closing section of this chapter.

1970s and 1980s, was therefore presented as a cultural *expansion* of authorship, which entailed the increasing loss of the once certain identity possessed by the cultural realm.¹¹ In such an analysis then the literary form of the author spread from its old home in ‘culture’ and was increasingly dispersed as a method of enclosing, potentially all, socio-economic space.¹²

Following on from Nesbitt’s work, in the mid 1990s Martha Woodmansee and Peter Jaszi were at the centre of attempts to move an ethical critique of cultural form of authorship into a critique of copyright law. This view linked the emergence of copyright to the traditions of German Romanticism and Idealism.¹³ The impression created by such writing was that in the absence of the concept of Romantic Genius, no system of copyright would ever have emerged.¹⁴ The genius concept, drawn from Romantic aesthetic ideology, was positioned as *the* model creative subject upon which the authorial figure of copyright law was presumed to rest. In a general critique of such totalising approaches Anne Barron succinctly summed up the cultural critique’s ‘ethical’ position in the following way: ‘Given that, in terms of the Romantic aesthetic, the author is an exceptional individual, inspired from within by a unique and original genius and expressing this ‘soul’ in works of the imagination, the ethical question is generally assumed to ask how this personage has established its claim to universal author-ity as *the* mode of creative being, and indeed a model of individuality to which all should aspire’.¹⁵ Woodmansee and Jaszi’s answer to that question proposed that the Romantic category of author was, in effect, reified and reproduced

¹¹ The general framework informing Nesbitt’s essay is that which was central to Post Modernist art theory, namely the mesh of the ‘high’ and the ‘low’ and the consequent loss, or abandonment, of aesthetic autonomy that was central to high Modernist art theory.

¹² There is a parallel here with Featherstone’s view (discussed in Chapter Four) that the breakdown of the art/life divide can be read as the invasion of life by aesthetics.

¹³ See for example Woodmansee’s account of the development of German copyright laws in *The Author, Art And The Market*, and her earlier papers and conferences in collaboration with Peter Jaszi on copyright law and authorship. Woodmansee’s book is peculiar for what it does not mention – in particular the pre-existence of English, French and Venetian copyright laws, an account of who’s influence is completely absent from her work, leaving the impression that *only* aesthetic and cultural forces are at work in the development of the law.

¹⁴ As we have seen such a conclusion would be factually incorrect.

¹⁵ For a particularly interesting critique of such totalising positions see Anne Barron, *No Other Law? Author-ity, Property and Aboriginal Art, in Perspectives On Intellectual Property*, Vol 4, *Intellectual*

by copyright law. In this reading, the author, protected by copyright, was a central device for marginalizing and excluding the cultural production of ‘women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative projects’.¹⁶

The third contribution to the field was made in James Boyle’s analysis of the use of creative tropes of ‘Romantic authorship’ in the case law that has grown up in response to the information society. Boyle pointed to the increasing presence of such discursive tropes in juridical reasoning in *all* areas of intellectual property law.¹⁷ While in general terms Boyle is undoubtedly correct in his observations – insofar as there *are* elements of Romanticism in the theory of creative destruction – his work stops short of analysing the Romantic trope in any detailed way, or attempting to set it within broader discourses, let alone suggesting *why* such creative tropes should be so widely in use.¹⁸ Despite being careful to limit the range of his claims, Boyle’s book still gives the general impression of the unwarranted spread the concept of authorship from the aesthetic and literary realms into the veins of the information society.¹⁹

Taken together then these three arguments – all of which have their precedent in Krauss’ *The Originality Of The Avant Garde* – can be taken to construct a ‘critical field’ in which copyright is presented as a comparatively recent historical

Property And Ethics, Sweet and Maxwell, London, 1998. P 39-87. (At the time of writing Barron was Lecturer in Law at the London School of Economics) Current quote P39.

¹⁶ Woodmansee and Jaszi quoted in Barron Op Cite. P 39. It is important to point out that Barron’s critique of such positions does not imply a rejection of the ethical and political motives that inspired such a position. Barron’s concern is the accuracy of the claims and the plausibility of their method.

¹⁷ James Boyle *Shamans, Software, And Spleens: Law And The Construction Of The Information Society*, Harvard University Press, London, 1996. Boyle’s work is indebted to Martha Woodmansee’s *The Author, Art And The Market*, and her earlier papers and conferences in collaboration with Peter Jaszi on copyright law and authorship.

¹⁸ To be fair to Boyle his book is essentially a discourse analysis of legal cases, not an attempt to theorise the broader circulation of creative theory and within in its own terms an exceptionally well researched and insightful.

¹⁹ Boyle’s concern to limit his claims is most likely due to the fact that he is a professor of law and not an art of literature theorist. At no point does he suggest that intellectual property law in general, or copyright in particular, is based on aesthetics. He merely notes the presence of the tropes of Romantic theories of creativity in the language used by judges and barristers in cases of intellectual property law which, he suggests, simply replicates the ideology of authorship constructed by Romanticism. However he relies on Woodmansee’s work on Romanticism and copyright, ignoring its very obvious deficiencies.

construction, based on an objectionable, and outmoded, cultural concept. Furthermore it suggests that copyright, and the Romantic ideology of authorship it represents, has expanded in recent years into new cultural and industrial forms, and thereby represents the unwarranted spread of a reactionary, and anachronistic, aesthetic determinism.

APPENDIX F (Chapter 5, Part II)

(The following arguments are drawn from a paper titled '*The Law of Appropriation: Critiquing the Privilege of the Critical*' given at the *Association of Art Historians*, in 2001)

THE CRITIQUE OF ORIGINALITY AND COPYRIGHT

The *Originality Of The Avant Garde* (henceforth referred to as the Critique of Originality or the Critique) is divided into four sections. The first three parts of the essay concern themselves with a critique of the concept of Originality as it was formulated by Romanticism, and as it remained in the currency of Modernism.²⁰ The fourth section of the Critique however moves specifically into an analysis of the relationship between the critique of originality, appropriation art and copyright law.

Despite only making a specific appearance in the final section, intellectual property law is actually an unspoken presence throughout the essay. While not being the specific subject of the earlier sections, notions of intellectual property are present in the language of the critique and more importantly as an absence around which Krauss'

²⁰ The first section concerns the recasting of Rodin's Gates of Hell. The second section is on the Modernist Avant-Gardes' obsession with the grid. Both are extremely important contributions towards an understanding of the concept of Originality as it has been formed and utilised in particular contexts within art theory. The third section on the picturesque is perhaps the most theoretically and historically coherent section of the critique, twenty years on, its arguments still have great purchase. As suggested above there is much in the critique could be held to question the knowledge economies belief in 'radical' creativity.

argument is organised. The opening paragraphs of the critique concern the recasting of Rodin's *The Gates of Hell* in 1979.²¹ Krauss ask it what sense such an art object is 'original'. In these opening paragraphs, she raises the question of the relationship of originality to the law only to dismiss it. Krauss first points out that, in a 'strict legal sense' the cast is 'a legitimate work: a real original we might say.'²² But in the next sentence she very consciously drops the idea that the law will help her in the discussion of originality/Originality.²³ Despite this, the law remains as a ghost in the text, a repressed discourse, a fundamental 'absence' that in fact shapes the critique and gives it its coherence.

Crucially the Critique is founded on an insistence that the 'discourse of originality' and the activity of the 'Lawyers office' can be separated, or at least that the question of copyright can be held-off until dragged in for interrogation in the final section of the Critique.²⁴ Perhaps aware that such a conceptual distinction cannot be maintained, Krauss feels it necessary to rhetorically reinforce the divide at the end the discussion of the recast with the words 'we do not care if the copyright papers are all in order.'²⁵ Despite declaring the law off limits for the discussion of Originality, the law continually rears up in her text. This happens in two ways. Firstly, on a simple rhetorical level, Krauss uses actual legal terminology in a colloquial and rather clumsy way.²⁶ The second level is crucial to the Critique. Refusing to discuss the legal

²¹ A new cast was made of the gates 60 years after the death of the artist. P151

²² Ibid. Rodin's will left all his works, and the right to make bronze editions from the estates plasters, to the French nation.

²³ 'But once we leave the lawyers office and the terms of Rodin's will, we fall immediately into a quagmire' Ibid. From this point on, fourth paragraphs into an 18-page essay, her discussion on the nature of originality will make no direct reference to the legal concept of originality.

²⁴ Krauss p.162. Separating the aesthetic from the legal could be a hangover from the methodology of Modernism and the insistence on aesthetic autonomy. When, later in the essay, Krauss suggests that the discourse of originality both sources, and is fuelled by, 'wider interests' that the 'restricted circle of professional art-making', it is only by way of including 'the shared discursive practice of the museum' and the art historian. P162. In other word though for the art object may no longer be 'discrete' and the 'discourse of originality' is not uniquely the preserve of the artists, however the 'art world' can apparently still achieve a measure of autonomy from such everyday places as the lawyer's office. It is obviously to imagine that it is possible to separate out and keep apart the realms of art and of law.

²⁵ p. 157

²⁶ Krauss's use of legal terms that are ultimately critical to her argument are in sections 1 –3 extremely vague and colloquial. As is common practice outside the legal profession, she uses the term 'invention' as a synonym for, or a subsection of, the term 'originality'. For example; 'Rilke has long ago composed that incantatory hymn to Rodin's originality in describing the profusion of bodies invented for *The*

discourse of originality directly in the first three sections is in effect an insistence on the ‘*autonomy*’ of the art world. The impression created by the critique is that the law can be held off while the discourse of aesthetics is conducted. In other words, the Critique achieves its coherence only by negation, by repressing the complex historical interplay between art and the law.²⁷ Only when the critique of ‘Originality’ has been made is the law finally invited in to the discussion. It suddenly re-emerges at the very end where the forgoing critique of ‘Originality’ is tied into the appropriation art of Sherrie Levine. It is in this section that the theoretical trajectory of Krauss’s critique of ‘Originality’ impacts as a practical critique of copyright law. However, it is an impact that is *implied* rather than spelt out. Section four seems very hurried in comparison with the logical and well thought through (if somewhat legally ‘repressed’) sections of analysis that precede it.²⁸ Ironically it is the quick, easy-grip, sound bite rhetoric of the conclusion’s take on copyright that came to represent *the* ‘Critique’, rather than the more measured (and perhaps useful) critique of the millstone of avant gardist ‘Originality’.

Gates.’ P 155. Rodin here is original, because he invents. In the legal discourse of copyright though, artists may create something ‘original’ they do not ‘invent’. Invention is a creative process that operates within a different social and economic arena covered by the legal category of patent. Though colloquially we may use such terms interchangeable, they represent in legal discourse, quite distinct and concrete concepts, excessively theorised and defined, they are held to be mutually exclusive. As the central creative paradigms at the heart of different branches of the law, dealing with different socio-economic manifestations of human creativity, they are anything but interchangeable. One cannot hold both patent and a copyright as the same product. Another example is Krauss’s discussion of Avant-Gardist notions of originality and the repetitious use of the grid Modernist artists. ‘Yet as we have seen, not only is he – artists x, y, or z – not the inventor of the grid, but no-one can claim this patent: the copyright expired something in antiquity and for many centuries, this figure has been in the public domain’. p160. Here Krauss correctly links creative concept, invention, to the appropriate branch of law – patent. But she then blows it with a flip rhetorical flourish about copyright. Nobody can claim a patent, the copyright has expired in antiquity – it’s all now in the public domain. The quasi-legal language sounds impressive but in this rhetoric even the distinct legal categories of copyright and patent are seen as interchangeable.

²⁷ This thesis suggests such a separation is not possible.

²⁸ It is interesting to note that section three on the concept of the picturesque is the most convincing argument and the one that is furthest from the argument about intellectual property.

The Critique of Originality as a Critique of Copyright

Section Four is very short, just six paragraphs long. Section three ends by suggesting that the historical period of ‘Modernism’ is synonymous with the notion of the Avant Gardism, and that in turn, the Avant Garde is synonymous with a ‘discourse of originality’ that ‘represses the copy’. Section four begins therefore with a question.

What would it look like not to repress the concept of the copy?²⁹

The answer to the question, Krauss suggests, can be found in a “certain kind of play with photographic reproduction that begins in the silkscreen canvases of Robert Rauschenberg and has recently flowered in the work of a group of younger artists”.³⁰ The young artist she pulls from the group is Sherrie Levine. In placing Rauschenberg at the beginning of the trend of appropriation art, and Levine as its leading edge, she both historicizes Levine’s work as part of a larger, but recent, project of ‘appropriation’, and redefines that project in new, highly charged, critical and political terms.³¹ In choosing Levine, Krauss puts ‘deconstructive practice’ at the leading edge of the field of ‘appropriation art’, which also has the effect of establishing an historical ‘direction’ for the practice. Appropriation is no longer simply a matter of transferring images from one cultural mode of circulation into another, as it had been for Rauschenberg. Transferring an image from one realm to another is effectively positioned as a ‘critical strategy’, a deconstructive strategy, in which rather than being merely unable to avoid the welter of read-made images circulating in the atmosphere of contemporary culture, the artist must now seek to actively *deconstruct* that mode of circulation.

²⁹ p. 168

³⁰ Ibid.

³¹ The positioning of Rauschenberg’s silk screens at the beginning of an appropriation practice later to be described as post modern, is merely a restatement of the 1972 version of Leo Steinberg’s ‘Other Criteria’ in which Steinberg famously categorised Rauschenberg’s work as “flatbed” and flatbed work as post-modern – one of the earliest uses of the term with respect to art practice.

The specific works Krauss is concerned with are Levine's appropriations of the photographic work of Edward Weston and Eliot Porter.³² Levine's works she suggests, revolve around an 'act of theft'³³ and are in 'violation of Weston's copyright'. Krauss however is careful to avoid too direct a confrontation with the law.³⁴ Levine's work is presented as a critique of the 'Modernist notion of 'origin' – a notion that Krauss supposes underwrites the entire concept of copyright.³⁵ Levine's 'act of theft' then draws attention to the fact that Weston's work is only marginally 'Original' insofar as it lays in the fabric of traditional imagery, amongst a long line of images of the male torso that, in fact, have their 'origin' in ancient Greek statuary. In other words the aesthetic concept of 'Originality' – deconstructed in sections 1-3 – is made to appear entirely co-extensive with the legal concept of 'originality' at the centre of copyright law, and further still, both concepts of O/originality are linked to the notion of *origin*.³⁶ In such a formulation, Levine's work heroically draws attention to the ridiculousness of the notion that Weston might, on the basis that it is his 'O/original', have a property claim in 'his' images.³⁷

³² As suggested earlier in this period of Levine's career involved re-photographing the photographic works of other artists. One-to-one 'copies' were taken from exhibition catalogues and magazines and the image presented under Levine's name and titled using the name of the artist whose work had been appropriated as in the following examples – *Photographs by Edward Weston* or *Photography by Eliot Porter*.

³³ p. 168. There is perhaps a problem here that resembles the one attached to Proudhon's famous maxim that 'all property is theft.' The concept of 'theft' implicitly recognises the prior validity of the concept of property. While Proudhon can be eased off the hook by suggesting that he is arguing for a more even 'distribution' of property (See May P23) this defence is not available to Krauss, since as we will see, she is clearly arguing, and has been widely taken to be arguing, that violating copyright questions the entire concept of that sector of property law.

³⁴ At no point does Krauss simply and straightforwardly dismiss the law, rather she leaves the reader to draw conclusions based on the arguments she produces with respect to the ontology of the concept of Originality. If Modernism, and its 'discourses of originality', repressed the copy, it is for the new art of appropriation to 'liberate the copy' freeing itself from Originality and Modernism one in one neat move. If one is to be post modern one cannot be Original. If copyright is based on Originality – as section four implies – then one cannot be post modern *and* in broad agreement with copyright law.

³⁵ Copyright is of course not founded on any one principle. Rather than being based on Originality copyright could be said to be based on difference, or difference of expression.

³⁶ There is of course a confusion here between a notion of originality as something that simply ties an expression to an individual and a panoramic, ontological notion of origin. In some ways this is surprising given the influence of Foucault in Krauss' writing. His formulation of the author as the 'principle of thrift in the economy of meaning' aptly describes what the law means by originality. The fundamentalist tone of the debate would seem to suggest that nothing 'new' ever happens.

³⁷ And on such a basis who could disagree?

Krauss's argument is, in fact, borrowed from Douglas Crimp's analysis of Levine's work published a year earlier in the same journal in which the Critique appeared.³⁸ Crimp was slightly more precise in his formulation than Krauss.

According to copyright law, the images belong to Weston – or now the Weston estate. I think, to be fair, however, we might as well give them to Praxiteles, for if it is the image that can be owned, then surely these belong to classical sculpture, which would put them in the public domain.³⁹

This more clearly states that which Krauss alludes to but refuses to spell out; that Levine's work constitutes a critique of copyright law, insofar as copyright law specifically protects claims of an artist to 'originate', and therefore *own*, an image.⁴⁰ While refusing to deal directly with the legal discourse of 'originality', the dismissal of its discourse is *implicit* in Levine's work, and in the account, Krauss gives of it. Though Krauss is reluctant to say it out loud, the Critique effectively positions the leading edge of appropriation art as a critique of the legal discourse of originality. The impression given is that *Art* is on the move and the law had better catch up.

The implicit critique of copyright law has to be seen within the context of cultural politics of the late 1970s and early 1980s. As Anne Barron suggests, with respect to the general discourse of which Krauss' work was a part, the aim of the critique of the author and copyright was to draw attention to the exclusions such concepts engendered. In such a view, the author and copyright are tools for marginalizing and excluding the cultural production of 'women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative

³⁸ Douglas Crimp, 'The Photographic Activity of Postmodernism' in *October* No 15, Winter, 1980

³⁹ Douglas Crimp, p.18. This quotation precedes and is clearly very similar to Krauss' throwaway comment about the copyright expiring in antiquity and now being in the public domain, discussed earlier.

⁴⁰ Crimp's choice of Praxiteles is particularly pointed. Praxiteles' work is only known through contemporary descriptions and through Roman copies of his work. The one work in existence said to be by Praxiteles is of dubious 'originality'. Therefore *the* 'origin' in Crimp's analysis is itself either dubious or deferred by generations of simulacra.

projects'.⁴¹ There is a good deal of textual evidence to suggest that Krauss, and Levine, viewed copyright law as such a patriarchal tool. For example when Krauss discusses the discourse of 'Originality' in Modernism, the artist is pointedly gendered and referred to as 'he'.⁴² The deeper implication of an art practice that overturns the notions of genius and 'Originality' is that it strikes not only at the patriarchy inherent in such cultural concepts, but also at the law that reproduces such patriarchy. Insofar as the law is imagined to protect 'Originality', the law itself is part of a repressive patriarchal order. In such a formalisation, Levine's work strikes at the Achilles heel of male power in both aesthetic and legal realms, transgressing the expectation of Originality inherent in Modernism, transgressing the copyright law that protects it, transgressing the interests of the male order represented in both.⁴³ Such a strategy has a beautifully neat precision about it.⁴⁴ A simple but well-conceived strike at the Achilles heel will bring about the liberation of the copy from its repression under the Modernist discourse of Originality. One simple strike will loosen the Gordian Knot of the law, calling into question its discourse of originality, a male dominated art history, that lineage of "great men" or geniuses, to whom that repressive discourse of 'Originality', and its singular origin, was a central credo.⁴⁵

⁴¹ Barron Op Cite. Barron's essay provides an interesting critical take on such a view. While not wishing to move away from such well-meaning criticism she points up the deficiencies in the view of copyright and authorship as it was portrayed in the 1980s and early 1990s. Her case study involves the battle to grant copyright to 'traditional' aboriginal images in Australia. The nature of such works, and the cultural structure of aboriginal society, would be outside of the arena of copyright if it were simply based on such a notion of 'Originality' as suggested by the critical cultural wing. Barron points to the elasticity of copyright and its lack of universal grounding principles or ideologies.

⁴² Take for example this: '...always taking it up as though he were just discovering it, as though the origin he had found... this graph paper ground were *his* origin, and his finding it an art of originality.' (P 158.) That final "*his*" is printed in italics to push home the point.

⁴³ This aspect of Levine's critical approach is actually brought out more clearly by Craig Owens in his famous essay 'The Discourse of Others: Feminists and Postmodernism'. Of the series of appropriations from Weston, he asks: 'Is she simply dramatising diminished possibilities for creativity in an image-saturated culture, as is so often repeated? Or is her refusal of authorship not in fact a refusal of the role of creator as "father" of the work, of the parental rights assigned to the author by law?' (Owens quoted in Foster p 73) Here in one well-articulated sentence, Owens spells out what Krauss implies about Levine's critical project. The parental rights refused here are masculine; the creative rights are father's rights and such gendered rights are assigned by law. Refusing the law in its patriarchal process of confirming fatherhood on creativity by casting it as original, Levine's work refused a patriarchy hard wired into social processes well outside the usual realm of art. Transgressing copyright law was part of a more general strategy of transgressing 'Daddy's Law'.

⁴⁴ It is also worth pointing out the ambition of such a take on the artist's powers.

⁴⁵ It is very interesting that in the current uses of the Kraussian argument that the feminist aspects have been overlooked, repressed or forgotten. However, in a sense it is not surprising. Owens' essay was

If the structure of the Critique is neat, it is nevertheless important to continually reiterate that Krauss actually avoids a direct confrontation with the law. Nevertheless, the thrust of the argument is elaborated in her highly rhetorical prose, which leads the reader to the water and invites them to drink. This is particularly obvious in the final paragraphs where Krauss specifically aligns the critical project of postmodernism with the ‘discourse of the copy’.⁴⁶ The closing sentences ram home the distinction between the old order – caricatured by terms associated with the concepts of ‘original’ and ‘Originality’ such as: singular, unitary, unique, authentic, – and the new order based on the copy, which the reader must assume in contrast to be multiple, pluralist and democratic.

As far as positioning the Critique of Originality as a *critique of copyright* is concerned, the tone of the closing sentences is vitally important. The final sentence of the Critique reads as follows:

This is a complex of cultural practices, among them a demythologising criticism and a truly postmodernist art, both of them acting now to void the basic propositions of modernism, to liquidate them by exposing their fictitious condition. It is thus from a strange new perspective that we look back on the modernist origin and watch it splintering into endless repetition.⁴⁷

Rather than spell out an explicit criticism of copyright law Krauss lets rhetoric do the work. Terms such as ‘Void’ and ‘Liquidate’ are carefully positioned alongside a Modernist origin that ‘splinters’ ‘into endless repetition’. The language in the final paragraph is clearly not that of the level-headed analysis of earlier sections of the Critique. The demythologising analysis of Rodin’s castings, the almost comic analysis of Modernism’s affection for the grid, and the very uncontroversial handling of the

built around the premise that, even in 1983(?) the feminist aspect of much contemporary work was missed or skated over. There are a number of feminist analyses of the law; none that I have found so far have built upon Krauss/Levine’s position.

⁴⁶ A discourse of the copy that begins with the early ‘appropriational’ strategies of Rauschenberg and is now led by the ‘deconstructional appropriations’ of Sherrie Levine.

⁴⁷ p.170

picturesque, hardly add up to a ‘voiding’, a liquidating’, or such an explosive ‘splintering’. Rather the rhetoric of Section Four belongs to the claim that is made for the cutting edge of Appropriation Art. It is that paradigmatic post modern practice that so aggressively assaults ‘the Modern’. Most specifically the language belongs to the radical implications of Levine’s work and the implied possibility that art may take the law in new directions, and in doing so, bring down the patriarchal edifice of Modernism. The ‘Modernist origin’ that splinters into endless repetition is an ‘Originality’, once protected by copyright law, that is now shattered and splintered by the new arts rejection of the law. In other words, the ‘endless repetition’ here has to be read as the freedom to copy *without* ‘permission’⁴⁸.

On one hand, the critique of ‘Originality’ demythologises the creative principles upon which Modernism, and copyright law, are presumed to stand. On the other hand, a fully Post Modern art practice moves beyond such mythology. The logic of appropriation marks an epochal shift away from a Modernism that was *exclusive*, that presaged a particular *property form* of creativity, ‘Originality’, that in its turn reified a masculine-centred concept of creativity and, more generally, masculine economic and cultural power.

The Philosophy of Krauss’ Concept of Appropriation

In order to pin down the anti-copyright sentiment that seems inherent in Section Four, and which many assumed to have been the point of the Critique, it is necessary to examine other work Krauss produced at about the same time in order to suggest how copyright law might have become a target for criticism. Were the reputation of the Critique to rest simply on the six paragraphs linking the practice of appropriation to a critique of the patriarchy present in Romanticism, Modernism, and the law, it would not be nearly so influential. It is important therefore to recover the philosophical concepts underlying Krauss’s work in this period. Particularly so since many of the

⁴⁸ Without having to refer to the patriarchy of the law.

more recent attempts to utilise the appropriation argument Krauss put forward cite her philosophical sources rather than the critique of originality itself.⁴⁹

Though not actually cited in the Critique itself, the influence of Gilles Deleuze is particularly apparent. In the same year as the Critique, Krauss published another very influential essay on photography, '*A Note on Photography and the Simulacral*'.⁵⁰ The essay clearly draws arguments from, and cites, Deleuze's *Logique du Sens*.⁵¹ Deleuze's concept of 'reversed Platonism' is central to the arguments about appropriation art Krauss presented in Section Four. Deleuze's deconstruction of the Platonic theory of Ideas is a particularly attractive tool for anyone attempting a critique of copyright since Deleuze's deconstruction of Plato is couched in terms of *just* and *unjust claimants* to the copy and specifically addresses the theoretical *foundations* of such claims. Ostensibly the hierarchy of claims between 'image' and 'copy', and between the 'just' and 'unjust' copy, achieves a perfect Cinderella fit with a legal, or pseudo legal, discourse that represents 'just' or 'unjust' claims to an image that has been copyrighted.

The hierarchy of a 'just claim' – between the image icon/true copy and the phantasm/simulacra – is even expressed by Deleuze as a battle between the Platonically 'just claim' of the 'icon' as opposed to an aggressive and subversive '*simulacra*'. The latter is even described as acting 'against the father' since it resembles 'without passing through the Idea'. Interestingly, the analogy of Idea with 'father' is cited by Deleuze to Derrida's well-known analysis of writing as a simulacrum.⁵² Simulacra tries to grasp the logos by trickery 'and even to supplant it without going through the father'.⁵³ The grounding of Krauss' Critique in this analysis is fairly obvious. Deleuze provides

⁴⁹ See for example Lutticken op. cit.

⁵⁰ Published in *October* 31, Winter, 1981

⁵¹ Krauss finally published her own translation of the section critical to both '*A Note on Photography and the Simulacral*' and the Critique under the title *Plato and the Simulacrum*, Gilles Deleuze translated by Rosalind Krauss, *October* 27, Winter, 1983.

⁵² Ibid., p.48, n.2

⁵³ Ibid. Deleuze is even more explicit in further citing the analogy to the 'Statesman': '... the Good as father of the law, the law itself, the constitutions. Good constitutions are copies, but they become simulacra from the moment they violate or usurp the law, in escape from the Good'.

a well-grounded philosophical debate on the Idea and image, origin and copy, as well as a metaphor of the law as the 'father'. This philosophical grounding makes the 'discourse of the copy' – on which Krauss stakes her definition of Post Modernism – far more clear. When, at the end of Section Four, Krauss talks about 'the copy', 'the copy' has to be read not as *any* copy but as the 'unjust' copy, *the claim of the simulacrum*. Krauss in fact definitively stakes out the central role of the theory of the simulacra to Post Modernism later the same year, in the essay *A Note On Photography And The Simulacrum*. In that essay an art practice based on photography – that of Cindy Sherman – is specifically positioned as a practice that is deconstructive of the 'aesthetic discourse' of originals and copies.⁵⁴

To sum up then, the use of Deleuze grounds the Critique, and the aesthetic practice that it defends and valorises, in a sound (and radical) philosophical discourse. The influence of the Critique, and of the kind of appropriation art that it propagated, can be summed up in the following way. Contemporary copyright law provides a hierarchy between 'legitimate copies' of a protected work and 'illegitimate', or 'pirate', copies. Platonism separates out 'good copies' from 'false copies' and in doing so creates an unwelcome hierarchy of 'true copies' (icons) over 'simulacra' (phantasms) – false or illegitimate copies. Platonism then would seem to be the *Ur* discourse upon which copyright law's notion of 'legitimate' and 'illegitimate' copies is *founded*. Thus Deleuze's philosophical 'overthrowing' of Platonism *deconstructs* that hierarchy and even connects the overthrow by simulacra with the notion that what is over thrown is law the 'father' – the law as patriarchy. In such a scenario, copyright law is *definitively* grounded in Platonism, whose theory of the Ideas supplies its only legitimating narrative. In short, Deleuze, in overthrowing the hierarchy of just and unjust claimants, provides the nemesis of both Platonism and copyright law. It is however Krauss, and not Deleuze, that links such a project to appropriational art, and links the critical position and the new practice to the broad historical epoch of the post modern.

⁵⁴ Krauss famously asks what is an 'original' photograph.

It is however important to reiterate that Krauss is a subtle writer to whom allusion and absence are key critical tools. Krauss does not spell out the philosophical basis of the Critique as it is laid out above.⁵⁵ Krauss simply sets the target, supplies some tools and invites the reader to fill in the blanks. This others have done, and continue to do, every time a discussion of copyright law turns to Appropriation Art, or to sampling, as a cultural manifestation of critical Post Modernism.⁵⁶

The Problem of Foundationalism

Copyright law is not based on a single, unitary principle. Though not saying so directly Krauss's comments about Levine can be understood in relation to the notion that Platonism provides *the* foundational narrative that shapes and legitimates copyright law.⁵⁷ The law may on occasion follow, or more accurately, represent, aesthetic principles, but those determinations are not necessarily rooted in the discourse of Classical philosophy.⁵⁸ It is unreasonable to suggest that there is not, and never has been, any connection whatsoever between Platonist and neo-Platonist ideas and copyright law.⁵⁹ However to suggest that the law is *founded* on such ideas is

⁵⁵ It would however be stretching credulity to suggest that the *Logique du Sens* was not informing her thought in 1981 given that she cites it in *A Note On Photography And The Simulacral* published in the same year.

⁵⁶ A recent example occurs as I write this chapter. Sven Lutticken's *Art Of Theft* contends that 'Capitalism has entered its neo-Platonic phase, with a hint of German idealism, or its debasement in theosophy: spirit triumphs over matter as images, brands and experiences prevail over more down-to-earth commodities.' Here the link between copyright and neo-Platonism and German Idealism is linked to the dematerialised commodity of the knowledge economy. P96-97.

⁵⁷ Even *if* one could demonstrate a reasonable historical co-extensivity between Platonic discourse and copyright law there is a great difference between an argument used to *justify* the law and the idea that the law may itself be *founded* or modelled on that argument. Deconstructing an argument used to defend and justify the law may leave the legitimacy of the law weakened, but is hardly enough to bring about its 'splintering into endless repetition'. Only if one believed that the law was *founded* upon such a notion could one imagine such an explosive occurrence.

⁵⁸ For an account of the relationship between the platonic and neo-platonic discourse and the aesthetic discourse of originals and copies with respect to theories of the simulacrum see Michael Camille's *Simulacrum* in Robert S. Nelson and Richard Shiff, *Critical Terms For Art History*, University Of Chicago Press, London, 1996.

⁵⁹ There are moments when a 'Platonising' influence seems apparent. In Sherman and Bentley's account of the development of modern intellectual property law, 19th century developments appear in such a way. In the 19th century legislators came under pressure to protect not only the literal lines of words in novels, but also to prevent other authors from 'stealing' plot lines or characters, for their

reductive and ahistorical. However, the closing sentences of the Critique seem to indicate that Krauss assumes exactly that. Deleuze cites the emergence of Pop Art as the moment when the ‘triumph of simulacra emerges’. Following fashion, Krauss begins her account of appropriation with Rauchenberg. For Deleuze it is the post-Pop epoch that marks the ‘destruction’ of Platonism, for Krauss the epoch is synonymous with the splintering of copyright into endless repetition. Reversing Platonism then is an overthrow, a popular coup, that pulls the rug from beneath copyright law.

Unfortunately for such a theoretical position, the history of copyright is more complex. Laws arise in different countries at different moments, in response to different socio-economic and political circumstances. The one attempt to write a comprehensive history of authorship and copyright, by David Saunders, is he admits, a testament to the impossibility of such a project.⁶⁰ Copyright is, a sprawling rhizome, a patchwork of origins and influences, with a patchwork of justifications and legitimating arguments, a patchwork of remedies to specific problems at specific times. Copyright is not a taproot – there is no simple centre, no founding principle that can be simply deconstructed in order to bring about its end.⁶¹ While it is true to

novels, plays or musicals. In giving rights to authors on aspects of their works that authors had yet to create, the law gave the impression that ‘the work’ itself must exist in a ‘complete’ and ultimate state in an abstracted and incorporeal metaphysical realm. Thought in this way, only a part of the ideally complete work was ever really ‘revealed’ by the artist in material form. Such a development clearly resembles the Platonic world of ideal forms and partially revealed essences. However as Sherman and Bently demonstrate such expansions in the law were fuelled by a maze of practical and contingent conditions not the desire to make Platonic theory flesh.

⁶⁰ Saunders was inspired, like Krauss, by Barthes and Foucault’s essays on the author. However, the broad brush of theory in the 1960s created a discourse that gave little indication of the immense complexity at work in the cultural histories from which notions of authorship and notions of copyright emerge.

⁶¹ In 1981, when Krauss was writing, there were still fundamental differences between Anglo-American and continental European copyright law. The histories of each country’s law cannot simply be lumped together. Apart from the historical vagaries of specific national origins, their development and cross-fertilisation justifications for copyright law can be made at any time; sometimes before a statute is passed, sometimes after it is passed, sometimes in order to increase the scope of such laws, the theoretical justifications for such laws are also formed by a complex of considerations. A justification may be informed by classical philosophy but may also be formed in respect of a particular social context such as ideology, political and practical expediency, or any number of reasons that are not specifically related to an ontological argument about the nature of originality. Copyright may stem from a gift of monopoly by a government to encourage a particular industry. Presented as such, either as part of a theoretical legitimation, or as a part of an historical analysis, or as both, one could also suggest that copyright is a law to protect the interests of Capital. Similarly it is also false to say that in some senses

say that *some* aspects of copyright are predicated upon aesthetic and subjective concepts, it is also possible for copyright laws to exist entirely without such ‘principles’.⁶² Copyright is a many-headed hydra, it plays off many different interests, it is not a centralised monolith built on aesthetics or on the directives of artists or the art world in general.

Mistaking the Arguments of Trips for the Foundations of Intellectual Property Law

Despite the historical social and cultural complexity of intellectual property laws, there is a sense in which, in the era of TRIPs, one could imagine that intellectual property is coming to resemble a taproot. This however is just a matter of appearances. As we saw in Part I, the era of TRIPs can be characterised as a two-fold process. On one hand, intellectual property rights are becoming more ubiquitous in social terms, which coheres with the notion that ‘authorship is spreading’. On the other hand, the legal justifications and doctrines of intellectual property laws are becoming increasingly homogenised. That homogenising at times gives the impression that there are in fact a few simple, foundational principles, upon which intellectual property is built. The move in the TRIPs era is towards a general embedding, and simplifying, of ‘core concepts’ of intellectual property law. The process can be characterised as a process of making the complexities and contingency of the rhizome look ‘natural’ and inevitable. This process is in marked contrast to the sprawling rhizome of contingent factors that make up the history of intellectual property law.

The foundationalism of Krauss’ argument and of those who have followed her work reflects the move towards the *appearance* of foundationalism in international law. However, the assumption that the claims of the internationalisation can be taken as actual foundational *facts* is problematic. As suggested in *Part I*, it is only very recently

continental European law is conceived as a measure to protect aspects of personality that extend beyond the body through acts of inscription of one sort or another.

that intellectual property has taken on such a ‘distinct’ identity, and that identity is effectively produced and stabilised within a matrix of international power. Given the spread of such legal measures, the rush to commodify the ‘intellectual commons’, the massive sprawl of the central (and *sui generis*) branches of intellectual property law, it is tempting to imagine that the spread can be tackled at the ‘root’- or more specifically that the ‘root’ that is offered as justification and legitimation of such laws. However, the appearance of ‘the root’, the core principles, is *chimeral*, since intellectual property emerged from a heterogeneous range of sources. As May suggests, the justificatory schemata presented for TRIPs is designed to mask, naturalise and legitimate, the interests of certain powerful agents. In other words, dislodging the foundational schemata, even if the schemata honestly represented the historical emergence of intellectual property law, may not be enough to dislodge the law.

Originality in Copyright Law

The most important problem for critical projects based on Krauss’ Critique, is the assumption that the concept of originality in copyright law is identical with the discourse of ‘Originality’ that she so ably deconstructs in sections one to three of the Critique. However, in contemporary law, and historically, originality is a ‘low threshold’ concept. As far as copyright is concerned, originality is not profound; it is not a supernatural aspect of spirit dragged from the depths of the soul. Nor is it a Christianised Platonic concept whipped up into a Romantic ideology of creativity. It is simply a mode of expression, it requires no particular specialist training, and it is free for all to enter.⁶³ Copyright does not protect ideas but simply and only the way they are expressed.⁶⁴ Originality, as far as the law is concerned is quite banal. While

⁶² As David Saunders points out in *Drop The Subject*, Anglo-American copyright law historically got by for a long time without the ‘creative subject’ basing itself on the governmental grant of monopoly to favoured businesses.

⁶³ It is worth remembering that rhetoric was always a technology of knowledge, not a theory of the subject. Rhetorical skill could, had to be, acquired. It was, in principle, available to all.

⁶⁴ It is worth noting that this way of conceiving copyright does seem to rely on a buried Platonic division of form and matter. It is worth pointing out then that this way of conceiving of intellectual property is comparatively modern. 18th and early 19th century laws conceive intellectual property

Krauss very ably levels the claims of a rather dubious ideology of creative 'Originality' that is linked to the concept of Genius, an 'Originality' that is thunderous and profound, extending such a critique to copyright law is a step too far. The legal discourse of originality, though it has a fascinating relationship with 'Originality' in Krauss' meaning, nevertheless remains a very *modest* concept.

To sum up then, the deconstruction of Originality was never going to have much effect on copyright law for two reasons. Firstly the copyright law is not fundamentally and historically based on reified concepts drawn from Platonism, and secondly because copyright cannot be limited to a discourse on O/originality and Genius.

Post Modernism and Authorship: The Cultures of Common Law and Moral Rights

A further problem that dogs the Critique and those that have built on it, is a sense of confusion over what an 'author' is. Like Nesbitt, Woodmansee and Jaszi, and Boyle, Krauss is indebted to the theorisations of authorship that emerged in the writings of Barthes and Foucault.⁶⁵ One of the most interesting aspects of the take up of structuralist/post-structuralist work by American academics in the 1970s, was the elision of cultural difference, the assumption that the author figure Barthes and Foucault were writing about, was not only historically accurate, but also entirely co-extensive with the author of Anglo-American tradition.⁶⁶ The curious aspect of

through metaphors of performativity, the difference between the 'original' painting and its copy was a notional moment of performance. If one bought a 'copy' of an 'original' image, one bought a lesser or inferior performance.

⁶⁵ Barthes and Foucault wrote theory without much in the way of empirical research despite the fact that both essays run on a kind of historicist argument that the enlightenment age has been superseded by something qualitatively better.

⁶⁶ It is obviously inaccurate and reductive to suggest that the legal author of copyright history is entirely coextensive with the space of authorship in general. What of pre-copyright 'authors', for example Dante? Or Aristotle or Plato? To listen to the debate sometimes one could run away with imagining that before there was copyright there was nothing remotely resembled the modern author, which possessed any of the social, cultural or personal attributes the modern world ascribed to the concept 'author'. Literary theorists have far too often confused arguments about the comparatively recent concept of the *novel*, with that of the author. Elements of the social space denoted by the term author, have of course a very long and complicated history. In a sense it is better to think of authorship in the way legal theorists think of property – as a bundle of rights. For the author it is useful perhaps to think of a bundle of

Nesbitt's work was that, while recognising that Foucault's author was embedded in epistemological categories already in place in French law, she did not seem interested in the fundamental differences between the 'common law' tradition of English law – from which much of the law of the United States was extracted – and the continental 'moral rights' tradition from which Foucault was working.

The tradition from which Barthes and Foucault were writing, envisaged the author's copyright as a human right that protected the labour of the individual personality.⁶⁷ The Anglo-American law – or common law – tradition, into which such theories were planted, was built on a different notion. In the history of common law jurisdictions copyright is the cornerstone on which the power and profits on information industries are built.⁶⁸ In common law jurisdictions copyright works *never* had to be personal creations or intellectual creations in the sphere of the arts and literature – non-personal creations and creations outside the sphere of the arts could always be copyrighted.⁶⁹ The author's copyright in Anglo-American system stems from the state grant of monopoly to business; the author as such is simply a sub set of industrial organisation. That is, for the Anglo-US system, the creative subject emerged not from a rights theory but from an instrument designed to control the publishing industry.

Nesbitt's notion that somehow authorship – in a cultural sense was spreading into industry was, in a sense, true of the French context. However it gave the general impression that 'authorship', was something that was only as old, and just as reactionary, as Romanticism, and was ultimately based on the dubious concepts drawn from Classical philosophy, and that such an anachronistic construction was on the

personal attributes and social functions that are variable over time and contingent upon particular social arrangements and settlements. For a longer view on this see Sean Burke's *Authorship: Plato To Post-Modernism* op. cit.

⁶⁷ Anglo-American critics have also tended to miss the point that Barthes' 'Death of the Author' in its French context reads as a cultural *and* political, an attack on official culture and the political system akin to the attack on the salon by the early avant gardes of the mid 19th century.

⁶⁸ See Lyman Patterson and Mark Rose. And also Vincent Porter, *Berne And After* for comment. Since the first copyrights in English law were given to the Stationers Company and not individual authors, in 'common law' jurisdictions the author has always been able to be recognised as a large company, since the first authors were essentially publishing companies, capitalist organisations.

loose, carving up the modern/post-modern world. The demand to ‘fix’ the emergence of copyright to the Romantic discourse of Genius, as it was implied in Krauss’s Critique, was taken up by Woodmansee. In a very able book Woodmansee succeeded in the task of linking the emergence of copyright law to Romantic theory but only by omitting to mention that the German debates on the creation of a copyright of the late 18th and early 19th followed the emergence of English copyright law in the early 16th century, and the Venetian intellectual property laws dating from the late 15th century, and the German law of 1475.

The deconstruction of ‘*the Author*’ in Post Modern discourse was then the deconstruction of a ‘moral rights’ figure that had no cultural basis in Anglo-American jurisdictions. Extending the ‘Death Of The Author’ to a *Death Of Copyright* – which was essentially the motivation behind Krauss’ Critique – might have some purchase as an attack on the cultural notion of authorship. However such a method is useless as a way undermining the so-called ‘spread of authorship’ into the industrial realm that appears to be happening with the rise of the knowledge economy, since, in the Anglo-American legal system, that is precisely where the concept of authorship emerged from. To sum up then, the central problem inherited by cultural critiques of intellectual property from Krauss’ Critique is an inaccurate, and reductive view, of authorship

⁶⁹ The first code to be copyrighted was not as some have assumed, software codes in the 1980s but Morse Code in the early 20th century.

8

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