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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

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[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

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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

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[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 reprobus' – 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'.

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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 formed[18] – 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

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[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 Councellors' 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]

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

[20] The citation of Guttenberg 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 laws[23] 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 Benalio[26]. 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 bought 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

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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

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[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

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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 compagnie 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

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[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

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[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 authoritive 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

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[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

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[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 '*contrefacons'*.

[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' capacitates 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 bought 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 equa lly 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

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[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' law 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

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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 wage-worker.[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 form 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

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[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

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'copies/forgeries'. 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

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[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.

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relevant. For a discussion of Giaus 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

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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, Harmondworth, 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

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[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

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[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

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[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

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[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]

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[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, *Di Invenzione*, 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

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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 Puttfarken, *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

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[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

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[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 ones 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 fourth 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 forbearer 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] Designo, 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]

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[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 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 Titians 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 'designo 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 'designo 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', 'inteletto', '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, *Di 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* bought together late medieval views on property and creativity. The theological justification of property – established in the Papal Bull 'Quia vir reprobus' 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 with in 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]

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[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.