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Appendices

APPENDIX A (Chapter 3)

MINIMALISM, BARTHES AND COPYRIGHT

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

As far as literature is concerned, such a claim is fairly toothless as a device with which to challenge copyright doctrine. Copyright in not concerned with hermeneutics, meaning may well be the result of the kind of collaborations between the writer and the reader that Barthes suggests but since such a formulation is clearly applicable to works that are in copyright as well as work that are out of copyright, it cannot of itself stand as an indictment of copyright. As far as copyright is concerned the meaning of a text, and how that meaning is constructed, is irrelevant, the arrangement of words used by the writer is all that matters, copyright has nothing whatever to say about content, about the ideas and the meaning of ideas contained in the work, it merely seeks to protect, for a limited period, the form of expression of an idea not the idea itself. This is not to suggest that there are not other elements in Barthes essay that could be *taken* to form the basis of an anti-copyright argument although there are no concrete statements about copyright law in Barthes writing that suggests that he was of such an opinion. Barthes essay in fact remarkably orthodox in terms of copyright doctrine, the famous sections where the text is presented as a 'multi-dimensional space in which a

variety of writings, none of them original, blend and clash;' or as 'a tissue of quotations drawn from innumerable centres of culture;' are merely a preamble to the statement that the writers *'only power'* lays in his ability 'to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.' Such sentiments are, as far as copyright is concerned, pretty much orthodoxy, suggesting as they do the collaging of elements or commonplaces in a way that is personal to the writer and which does not rest too heavily on any one of his/her sources.

Barthes has however been called upon to support a critique of copyright. In an artists statement published in 1982 in the catalogue for the exhibition *Mannerism: a Theory of Culture* Sherrie Levine appropriated/plagiarised large sections Barthes' essay particularly those referring to originality. Within Barthes *own* terms there is nothing to suggest that such a reading is either legitimised by the text or ruled out by it. However as pointed out elsewhere, one would have to believe unquestioningly that copyright specifically, and intellectual property more generally, was based unilaterally and unthinkingly on a monolithic notion of Romantic Originality and nothing else, to make such an interpretation of Barthes' essay stick.

APPENDIX B (Chapter 4)

SCHULMAN'S PERIODISATION OF THE KNOWLEDGE ECONOMY

Schulman expresses the periodisation of the knowledge economy in the following way:

> The widely accepted theory goes, the so-called First Wave pre-industrial economy was marked by the private control of land. Agriculture, timber, hunting, mining – bounties that arose from the land – formed the foundation of economic well-being. During this pre-industrial period, the big economic winners were land owners, who could use their dominion over real estate to control economic life

within their fiefdoms. Wars large and small were waged to maintain or acquire power over territory.

Eventually though, with the ascent of industrialisation in the so-called Second Wave, the locus of power shifted, as Karl Marx astutely recognised, from control of the products derived from land to control of the means of production. Of course, control of land and its bounty continued to be important as it is today. But in the industrial economy, the biggest winners were those capitalists – such as factory and railway owners – who controlled not just physical property but the tools to make and transport the mass-produced goods sought by a growing urban population.

Today, the product-orientated manufacturing industries are being eclipsed as the control of knowledge and know-how moves to the vibrant centre of the economy. The knowledge of how to efficiently use scarce material resources now assumes at least as much value as owning or controlling the materials themselves. The key in the emerging economy is the ownership and control of the *concept of production*: the blueprint, formula, or essential information that may enable a sought-after development. Similarly, for some products such as software, marginal production cost approach zero: the value of these knowledge wares is almost entirely divorced from the costs traditionally associated with the production of tangible goods.

See Schulman, op. cit., p. 154. Schulman credits the origin of this periodisation to Alvin Tofler in the early 1980s.

APPENDIX C (Chapter 4)

TONY BLAIR'S ADDRESS TO THE LABOUR PARTY CONFERENCE 1999

On September 25, 1999, a few months after the publication of Leadbeater's book and his personal endorsement of its contents, Tony Blair addressed the Labour Party Conference in Bournemouth. The editorial leader in *The Guardian* of 29th September paused to marvel at the way Blair managed to find a "thread of argument" with which to "tie together the apparently disconnected goals and actions of the government he leads." [1] The speech set out the agenda for the 21st century in terms that rejected the traditional divisions between Capitalism and Socialism, laying out instead a new front line between the forces of *progress* and the forces of *conservatism*. The speech was notable for its repeated use of the image of creativity, talent and radicalism. The following are excerpts from the speech:

> A technological revolution is driving the forces of change without respect for tradition. People are born with talent and everywhere it is chains . . . Look at Britain, the country ran for far too long on the talents of the few when the genius of the many lies uncared for and ignored. Fail to develop the talents of any one person, and we fail Britain. Talent is the 21st century wealth.
>
> Arrayed against us: the forces of conservatism, the cynics, the elites, the establishment. On our side, the forces of Modernity and Justice . . . those who have the courage to change. Those who have confidence in the future.
>
> A new Britain where the extraordinary talent of the British people is liberated from the forces of conservatism that have so long held them back . . . Step up the pace, be confident, be radical . . . We can let rip - not on spending , but on policies and ideas . . . We are re-writing some of the traditional rules of politics

> . . . Old elites, establishments, have run our profession and our country for too long.

The central dynamic of the speech closely replicated the message of Leadbeater's text. The political, economic and ethical divisions of the future were arranged across an aesthetic and creative topography. The old political battle lines that divided Conservatives and Socialists were elided in favour of a division between the forces of progress and those of conservatism – those who stood for innovation of a radical kind and those who, for whatever reason, stood against the creative impulse.[2] The speech explicitly set *Modernity* against 'the traditional rules of politics'. The concepts of 'talent' and 'the genius of the many' were in turn ranged against the dark forces of the 'establishment'[3], the 'old elites' and the 'cynical'. The audience was encouraged to 'let rip' and 'be radical' and face change with confidence in the future.[4] The 'political' division represented in the rhetorical pairings that litter the speech rattle with the

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[1] These excerpts are taken from an edited version of the speech published in ***The Guardian*** on Wed 29th, September, 1999 and from additional comments reported in ***The Independent's*** lead article on the same day

[2] Other broadsheets unfamiliar with Leadbeater's text echoed the Guardians puzzlement at the content of Blair's speech. Similarly, the Labour governments highly positive attitude to genetically modified foods in 1999–2000 at first puzzled many unfamiliar with the new political landscape. The assumption that New Labour would climb aboard the populist bandwagon against GM was proved wrong. The endorsement of Leadbeater's aesthetic radicalism by the first Blair administration proved more powerful than the well advertised desire to be 'liked.'

[3] Blair used the terms 'talent' and 'genius' interchangeably. Genius, as a quality of 'the many', indicates that a broad and loose concept of 'creativity' is at work. Such generalised concepts of creativity are particularly evocative of the Modernist outlook. One way of situating the differences between Modernism and the traditionalism or academicism it set itself against is found in its attitude to teaching art. The 18th and 19th century academic training preached the development of 'talent' through the learning of rules, and metier or skills. Talent is not distributed equally - a fact that the Bauhaus model of teaching attempted to overcome by stressing a loose concept of 'creativity' latent in all individuals, that will find its expression through the challenges it brings to a particular medium. Modernism in short, sought a more egalitarian approach to the questions raised by the possibility of producing art. For discussion see Thierry de Duve's contribution to the conference *The Artist, The Academy*, Ed. Nick De Ville and Stephen Foster, John Hansard Gallery: Southampton, 1994. (De Duve's position incidentally is that general 'creativity' is a myth and that old academic leading was more clear-sighted and ruthlessly honest in its belief in 'talent'.) When Blair celebrates 'the genius of the many' then, he comes close to such a formulation. Later in his speech he uses the term 'talent' in much the same way. 'Everyone has talent. Everyone has something to offer. And this country needs everyone to make a contribution.'

[4] It is worth reiterating here that 'conservatives' for Blair as for Leadbeater, means the old left, environmental activists, anarchists and any grouping of the left that is not aligned specifically to new labour.

ghosts of twentieth century avant gardism. Modernity against tradition; creativity (talent or the genius of the many) against the establishment and the unbelieving cynic; a radicalism that faces the future with hope – Blair's speech made a good fist of the rhetoric of early twentieth century Modernism.[5] The new aesthetic topography of the knowledge economy is set out by the specific alignment of 'talent' with concepts such as Progress, Modernity and *Justice.* The alignment of radical creativity with Justice is particularly important since it gives some clue as to the role creativity plays in this aestheticised view of the political landscape. The amendment to Rousseau's famous dictum – man is born free but everywhere he is in chains – to read 'People are born with talent and everywhere it is in chains' is also highly significant. It is not the subject that is *oppressed* in any political or moral sense; rather it is the economic resource perceived in that subject – talent – is *repressed*. Justice is represented as a natural partner to radical innovation of Modernity; freedom is equated with talent 'letting rip'. The creative faculty here is raised above all other considerations of the political and ethical subject. Suarez-Villa's social aim, the reproduction of creative invention, is again reproduced. Creativity is not the servant of a broadly conceived and

[5] The use of avant-gardist tropes in the speech is not simply an invasion of political discourse by art historical concepts. The origin of the term avant-gardism is military and was for example used by Baudelaire is to refer to a kind of committed leftish political literature. Only in the later 19th century does the term loose its overt political connotation and come to refer to a radical art form (in its Modernist sense (For discussion see Renato Poggioli theory of the avant-garde.) However, it is ironic that avant gardism so self-consciously (re)enters the political realm at the moment that its stock in the art world is at an all time low. Few in the contemporary art world or the world of literature would currently conceptualise cultural practice in such terms. Since Peter Bürger announced the concept and term dead in the late 1960s, attempts to resuscitate and breathe new life into it have been muted affairs. (See for example Hal Foster's *Return of the Real*, which draws on earlier assertions in Brian O Doherty's *Inside The White Cube*, Foster's avant gardism is a somewhat muted progressive critique of the institutional (museological) framework of art as opposed to the unruly and incontinent alley-cat of early Modernist avant gardism.) Whether viewed as a victim of its own success in itself becoming an institution, or a failure because of its inability to overcome institutionalisation, the general claims to a privileged alterity, to be more progressive and advanced than anyone else, have generally been eyed with suspicion in the era of post modernism. The implied reliance of avant-gardism on Hegelian/ Marxist theories of history and their respective loss of credibility in many quarters most probably explains the general loss of credibility of concepts of avant gardism. However notably where narratives of progress are still held in esteem, avant-gardist groupings seem to flourish. The best example that comes to mind is the Internet group 'The Extropians' who blend their neo-Darwinism with a belief in a technologically shaped progressive history and free market ideology - a kind of Marxist historical narrative stripped of any social concerns beyond personal libertarianism. With their Extropy Journal, Manifesto, Artworks etc., the group closely resembles an early 20th century model of avant-gardism.

multi-directional civil society but the *point* of society, the narrow target to which it must dedicate itself. [6]

APPENDIX D (Chapter 5, Part II)

CRITICAL POSITIONS ON INTELLECTUAL PROPERTY

Technological Critiques

On a technical level, the most common and reasonable argument is that networked computers rely upon the continual copying of information. Essentially every connection to the Internet requires some form of electronic copying. Such critiques tend to stress practical arguments that stem from innovation – the fact that copying has become exponentially cheaper and easier for example – is called upon in order to suggest that the continuation of intellectual property law untenable. A particular sight of conflict in such technological critiques emerged with granting of copyright protection to software codes in the 1980s. Against such a move early web activists (under the influence of McLuhan) asserted the 'oral' character of web communication. Such arguments usually followed McLuhan's assertion that a return to 'oralism' was synonymous with de-commodifying knowledge coupled with the assumption that speech fell beyond the remit of copyright law. (An acquaintance with broadcast law may have quashed such hopes earlier on.) On a slightly more cultural level, inter- or hyper- textuality – the polyphonic character of electronic communication – was

[6] There is no room here to recount the numerous examples of policy derived from such a position. The sustained attacks on professions teachers, nurses, the GMC, attacks on, and policies to restrict, anti-GM and anti-capitalism protests, educational policy aimed at teaching creativity in primary schools, etc. The most significant effects of the position are felt in foreign policy. Chapter Five will cover some of the issues involved. The knowledge economy is a concept unsustainable without the effective operation of an international system of intellectual property rights. Theories of the knowledge economy explain the force of political will behind the transition from GATT to the WTO bringing about the TRIPs

presented as undermining the 'principle' of singular 'Romantic' authorship on which copyright was presumed to be based. The mistake here was to conflate the individuated authorial subjectivity of 'Romantic' ideology with the 'author' of copyright law. (Again an acquaintance with the notion of 'legally constituted subjects' i.e. companies or groups that claim authorship would have saved a lot of speculation.)

Ethical critiques.

'Ethical' critiques of intellectual property cover an enormous range of debate. The main areas of contention are medical and religious ethics, but ethical critiques diffuse into every area of debate – for example: the freedom of speech, the 'right' to privacy, ethical arguments about access to information, the ethical implications that stem from practical snags in the distribution and flow of knowledge, ethical questions that stem from the transition from common knowledge to commodified information, ethical questions that grow form economic problems that in turn stem from the growth of monopoly, loose ethical problems that stem from instrumental argument that intellectual property exists to encourage innovation, and many more. Many of the arguments related to intellectual property can also be related to the concept of property per se. There is also a good deal of interpenetration between the technical, ethical and cultural debates. New technologies create new ethical problems where the ownership of creative labour is in play. On a more subtle level, a good deal of moralising is also present in arguments about technology. For example the growth of reproductive technologies is often presented not only as a technical 'problem' for copyright, the technical advance is presented as an 'ethical' *challenge* to outmoded ways of thinking.

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agreement and the move from the Berne Convention to WIPO. WIPO and TRIPs provide the legal architecture that grounds the possibility of the knowledge economy.

APPENDIX E (Chapter 5, Part II)

THE SOCIAL FIELD OF AUTHORSHIP

Rosalind Krauss' essay *The Originality Of The Avant Garde* was followed by a number of other works examining the relationship between authorship and copyright. Like Krauss, all these works followed a line of argument begun in the 1960s with Barthes and Foucault's critiques of authorship. However, it was Krauss' *The Originality Of The Avant Garde* that established the notion that Romanticist notions of 'Originality' were directly linked to copyright law, and that there was a cultural-aesthetic conflict with the law.

After Krauss' essay, a number of other writers contributed to the debate. The idea that expansions in copyright law can be read as expansions of the cultural logic of authorship can be traced to Molly Nesbitt's 1987 essay *What Was An Author?* Nesbitt set out to situate Foucault's earlier epistemology of the author within the context of developments in French copyright law, in particular the changes bought about by the 1957 copyright act.[7] The result of her approach was to give the impression that the social, economic and aesthetic concepts of the author are, more or less, co-extensive with each other and more importantly that they are co-extensive with the 'author' that is represented in copyright law.[8] The various expansions of French copyright law are therefore presented as expansions of the envelope of 'authorship'.[9] Since the earliest of French laws discussed related to literary authorship the expansion in copyright was presented as an expansion of the domain of 'the author' – that is to say a particular kind of creative cultural subject – into the realm of industry.[10] The general breakdown of the boarder between culture and industry, associated with the post modernism of the

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[7] Michel Foucault *What Is An Author?* (1967) op. cit., Molly Nesbitt *What Was An Author?* op. cit.
[8] It is important to remember that while the history of the law provides a useful and interesting guide to the changing shape of authorship one cannot assume that there is a direct and exclusive relationship between the legal and the social. The illegality of theft tells you little about the sociology of crime. A similar disclaimer must also be attached to the aesthetic realm.
[9] To the point at which authorship seems to be becoming increasingly incoherent.
[10] A more detailed analysis of Nesbitt's claims will be included in the closing section of this chapter.

1970s and 1980s, was therefore presented as a cultural *expansion* of authorship, which entailed the increasing loss of the once certain identity possessed by the cultural realm.[11] In such an analysis then the literary form of the author spread from its old home in 'culture' and was increasingly dispersed as a method of enclosing, potentially all, socio-economic space.[12]

Following on from Nesbitt's work, in the mid 1990s Martha Woodmansee and Peter Jaszi were at the centre of attempts to move an ethical critique of cultural form of authorship into a critique of copyright law. This view linked the emergence of copyright to the traditions of German Romanticism and Idealism.[13] The impression created by such writing was that in the absence of the concept of Romantic Genius, no system of copyright would ever have emerged.[14] The genius concept, drawn from Romantic aesthetic ideology, was positioned as *the* model creative subject upon which the authorial figure of copyright law was presumed to rest. In a general critique of such totalising approaches Anne Barron succinctly summed up the cultural critique's 'ethical' position in the following way: 'Given that, in terms of the Romantic aesthetic, the author is an exceptional individual, inspired from within by a unique and original genius and expressing this 'soul' in works of the imagination, the ethical question is generally assumed to ask how this personage has established its claim to universal author-ity as *the* mode of creative being, and indeed a model of individuality to which all should aspire'.[15] Woodmansee and Jaszi's answer to that question proposed that the Romantic category of author was, in effect, reified and reproduced

[11] The general framework informing Nesbitt's essay is that which was central to Post Modernist art theory, namely the mesh of the 'high' and the 'low' and the consequent loss, or abandonment, of aesthetic autonomy that was central to high Modernist art theory.
[12] There is a parallel here with Featherstone's view (discussed in Chapter Four) that the breakdown of the art/life divide can be read as the invasion of life by aesthetics.
[13] See for example Woodmansee's account of the development of German copyright laws in *The Author, Art And The Market*, and her earlier papers and conferences in collaboration with Peter Jaszi on copyright law and authorship. Woodmansee's book is peculiar for what is does not mention – in particular the pre-existence of English, French and Venetian copyright laws, an account of who's influence is completely absent from her work, leaving the impression that *only* aesthetic and cultural forces are at work in the development of the law.
[14] As we have seen such a conclusion would be factually incorrect.
[15] For a particularly interesting critique of such totalising positions see Anne Barron, *No Other Law? Author-ity, Property and Aboriginal Art, in Perspectives On Intellectual Property*, Vol 4, *Intellectual*

by copyright law. In this reading, the author, protected by copyright, was a central device for marginalizing and excluding the cultural production of 'women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative projects'.[16]

The third contribution to the field was made in James Boyle's analysis of the use of creative tropes of 'Romantic authorship' in the case law that has grown up in response to the information society. Boyle pointed to the increasing presence of such discursive tropes in juridical reasoning in *all* areas of intellectual property law.[17] While in general terms Boyle is undoubtedly correct in his observations – insofar as there *are* elements of Romanticism in the theory of creative destruction – his work stops short of analysing the Romantic trope in any detailed way, or attempting to set it within broader discourses, let alone suggesting *why* such creative tropes should be so widely in use.[18] Despite being careful to limit the range of his claims, Boyle's book still gives the general impression of the unwarranted spread the concept of authorship from the aesthetic and literary realms into the veins of the information society.[19]

Taken together then these three arguments – all of which have their precedent in Krauss' *The Originality Of The Avant Garde* – can be taken to construct a 'critical field' in which copyright is presented as a comparatively recent historical

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Property And Ethics, Sweet and Maxwell, London, 1998. P 39-87. (At the time of writing Barron was Lecturer in Law at the London School of Economics) Current quote P39.

[16] Woodmansee and Jaszi quoted in Barron Op Cite. P 39. It is important to point out that Barron's critique of such positions does not imply a rejection of the ethical and political motives that inspired such a position. Barron's concern is the accuracy of the claims and the plausibility of their method.

[17] James Boyle *Shamans, Software, And Spleens: Law And The Construction Of The Information Society*, Harvard University Press, London, 1996. Boyle's work is indebted to Martha Woodmansee's *The Author, Art And The Market*, and her earlier papers and conferences in collaboration with Peter Jaszi on copyright law and authorship.

[18] To be fair to Boyle his book is essentially a discourse analysis of legal cases, not an attempt to theorise the broader circulation of creative theory and within in its own terms an exceptionally well researched and insightful.

[19] Boyle's concern to limit his claims is most likely due to the fact that he is a professor of law and not an art of literature theorist. At no point does he suggest that intellectual property law in general, or copyright in particular, is based on aesthetics. He merely notes the presence of the tropes of Romantic theories of creativity in the language used by judges and barristers in cases of intellectual property law which, he suggests, simply replicates the ideology of authorship constructed by Romanticism. However he relies on Woodmansee's work on Romanticism and copyright, ignoring its very obvious deficiencies.

construction, based on an objectionable, and outmoded, cultural concept. Furthermore it suggests that copyright, and the Romantic ideology of authorship it represents, has expanded in recent years into new cultural and industrial forms, and thereby represents the unwarranted spread of a reactionary, and anachronistic, aesthetic determinism.

APPENDIX F (Chapter 5, Part II)

(The following arguments are drawn from a paper titled *'The Law of Appropriation: Critiquing the Privilege of the Critical'* given at the *Association of Art Historians,* in 2001)

THE CRITIQUE OF ORIGINALITY AND COPYRIGHT

The *Originality Of The Avant Garde* (henceforth referred to as the Critique of Originality or the Critique) is divided into four sections. The first three parts of the essay concern themselves with a critique of the concept of Originality as it was formulated by Romanticism, and as it remained in the currency of Modernism.[20] The fourth section of the Critique however moves specifically into an analysis of the relationship between the critique of originality, appropriation art and copyright law.

Despite only making a specific appearance in the final section, intellectual property law is actually an unspoken presence throughout the essay. While not being the specific subject of the earlier sections, notions of intellectual property are present in the language of the critique and more importantly as an absence around which Krauss'

[20] The first section concerns the recasting of Rodin's Gates of Hell. The second section is on the Modernist Avant-Gardes' obsession with the grid. Both are extremely important contributions towards an understanding of the concept of Originality as it has been formed and utilised in particular contexts within art theory. The third section on the picturesque is perhaps the most theoretically and historically coherent section of the critique, twenty years on, its arguments still have great purchase. As suggested above there is much in the critique could be held to question the knowledge economies belief in 'radical' creativity.

argument is organised. The opening paragraphs of the critique concern the recasting of Rodin's *The Gates of Hell* in 1979.[21] Krauss ask it what sense such an art object is 'original'. In these opening paragraphs, she raises the question of the relationship of originality to the law only to dismiss it. Krauss first points out that, in a 'strict legal sense' the cast is 'a legitimate work: a real original we might say.'[22] But in the next sentence she very consciously drops the idea that the law will help her in the discussion of originality/Originality.[23] Despite this, the law remains as a ghost in the text, a repressed discourse, a fundamental 'absence' that in fact shapes the critique and gives it its coherence.

Crucially the Critique is founded on an insistence that the 'discourse of originality' and the activity of the 'Lawyers office' can be separated, or at least that the question of copyright can be held-off until dragged in for interrogation in the final section of the Critique.[24] Perhaps aware that such a conceptual distinction cannot be maintained, Krauss feels it necessary to rhetorically reinforce the divide at the end the discussion of the recast with the words 'we do not care if the copyright papers are all in order.'[25] Despite declaring the law off limits for the discussion of Originality, the law continually rears up in her text. This happens in two ways. Firstly, on a simple rhetorical level, Krauss uses actual legal terminology in a colloquial and rather clumsy way.[26] The second level is crucial to the Critique. Refusing to discuss the legal

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[21] A new cast was made of the gates 60 years after the death of the artist. P151

[22] Ibid. Rodin's will left all his works, and the right to make bronze editions from the estates plasters, to the French nation.

[23] 'But once we leave the lawyers office and the terms of Rodin's will, we fall immediately into a quagmire' Ibid. From this point on, fourth paragraphs into an 18-page essay, her discussion on the nature of originality will make no direct reference to the legal concept of originality.

[24] Krauss p.162. Separating the aesthetic from the legal could be a hangover from the methodology of Modernism and the insistence on aesthetic autonomy. When, later in the essay, Krauss suggests that the discourse of originality both sources, and is fuelled by, 'wider interests' that the 'restricted circle of professional art-making', it is only by way of including 'the shared discursive practice of the museum' and the art historian. P162. In other word though for the art object may no longer be 'discrete' and the 'discourse of originality' is not uniquely the preserve of the artists, however the 'art world' can apparently still achieve a measure of autonomy from such everyday places as the lawyer's office. It is obviously to imagine that it is possible to separate out and keep apart the realms of art and of law.

[25] p. 157

[26] Krauss's use of legal terms that are ultimately critical to her argument are in sections 1 –3 extremely vague and colloquial. As is common practice outside the legal profession, she uses the term 'invention' as a synonym for, or a subsection of, the term 'originality'. For example; 'Rilke has long ago composed that incantatory hymn to Rodin's originality in describing the profusion of bodies invented for *The*

discourse of originality directly in the first three sections is in effect an insistence on the '*autonomy*' of the art world. The impression created by the critique is that the law can be held off while the discourse of aesthetics is conducted. In other words, the Critique achieves its coherence only by negation, by repressing the complex historical interplay between art and the law.[27] Only when the critique of 'Originality' has been made is the law finally invited in to the discussion. It suddenly re-emerges at the very end where the forgoing critique of 'Originality' is tied into the appropriation art of Sherrie Levine. It is in this section that the theoretical trajectory of Krauss's critique of 'Originality' impacts as a practical critique of copyright law. However, it is an impact that is *implied* rather than spelt out. Section four seems very hurried in comparison with the logical and well thought through (if somewhat legally 'repressed') sections of analysis that precede it.[28] Ironically it is the quick, easy-grip, sound bite rhetoric of the conclusion's take on copyright that came to represent *the* 'Critique', rather than the more measured (and perhaps useful) critique of the millstone of avant gardist 'Originality'.

Gates.' P 155. Rodin here is original, because he invents. In the legal discourse of copyright though, artists may create something 'original' they do not 'invent'. Invention is a creative process that operates within a different social and economic arena covered by the legal category of patent. Though colloquially we may use such terms interchangeable, they represent in legal discourse, quite distinct and concrete concepts, excessively theorised and defined, they are held to be mutually exclusive. As the central creative paradigms at the heart of different branches of the law, dealing with different socio-economic manifestations of human creativity, they are anything but interchangeable. One cannot hold both patent and a copyright as the same product. Another example is Krauss's discussion of Avant-Gardist notions of originality and the repetitious use of the grid Modernist artists. 'Yet as we have seen, not only is he – artists x, y, or z – not the inventor of the grid, but no-one can claim this patent: the copyright expired something in antiquity and for many centuries, this figure has been in the public domain'. p160. Here Krauss correctly links creative concept, invention, to the appropriate branch of law – patent. But she then blows it with a flip rhetorical flourish about copyright. Nobody can claim a patent, the copyright has expired in antiquity – it' all now in the public domain. The quasi-legal language sounds impressive but in this rhetoric even the distinct legal categories of copyright and patent are seen as interchangeable.

[27] This thesis suggests such a separation is not possible.

[28] It is interesting to note that section three on the concept of the picturesque is the most convincing argument and the one that is furthest from the argument about intellectual property.

The Critique of Originality as a Critique of Copyright

Section Four is very short, just six paragraphs long. Section three ends by suggesting that the historical period of 'Modernism' is synonymous with the notion of the Avant Gardism, and that in turn, the Avant Garde is synonymous with a 'discourse of originality' that 'represses the copy'. Section four begins therefore with a question.

> What would it look like not to repress the concept of the copy? [29]

The answer to the question, Krauss suggests, can be found in a "certain kind of play with photographic reproduction that begins in the silkscreen canvases of Robert Rauschenberg and has recently flowered in the work of a group of younger artists". [30] The young artist she pulls from the group is Sherrie Levine. In placing Rauschenberg at the beginning of the trend of appropriation art, and Levine as its leading edge, she both historicizes Levine's work as part of a larger, but recent, project of 'appropriation', and redefines that project in new, highly charged, critical and political terms.[31] In choosing Levine, Krauss puts 'deconstructive practice' at the leading edge of the field of 'appropriation art', which also has the effect of establishing an historical 'direction' for the practice. Appropriation is no longer simply a matter of transferring images from one cultural mode of circulation into another, as it had been for Rauschenberg. Transferring an image from one realm to another is effectively positioned as a 'critical strategy', a deconstructive strategy, in which rather than being merely unable to avoid the welter of read-made images circulating in the atmosphere of contemporary culture, the artist must now seek to actively *deconstruct* that mode of circulation.

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[29] p. 168
[30] Ibid.
[31] The positioning of Rauschenberg's silk screens at the beginning of an appropriation practice later to be described as post modern, is merely a restatement of the 1972 version of Leo Steinberg's 'Other Criteria' in which Steinberg famously categorised Rauschenberg's work as "flatbed" and flatbed work as post-modern – one of the earliest uses of the term with respect to art practice.

The specific works Krauss is concerned with are Levine's appropriations of the photographic work of Edward Weston and Eliot Porter.[32] Levine's works she suggests, revolve around an 'act of theft'[33] and are in 'violation of Weston's copyright'. Krauss however is careful to avoid too direct a confrontation with the law.[34] Levine's work is presented as a critique of the 'Modernist notion of 'origin' – a notion that Krauss supposes underwrites the entire concept of copyright.[35] Levine's 'act of theft' then draws attention to the fact that Weston's work is only marginally 'Original' insofar as it lays in the fabric of traditional imagery, amongst a long line of images of the male torso that, in fact, have their 'origin' in ancient Greek statuary. In other words the aesthetic concept of 'Originality'- deconstructed in sections 1-3 – is made to appear entirely co-extensive with the legal concept of 'originality' at the centre of copyright law, and further still, both concepts of O/originality are linked to the notion of *origin*.[36] In such a formulation, Levine's work heroically draws attention to the ridiculousness of the notion that Weston might, on the basis that it is his 'O/original', have a property claim in 'his' images.[37]

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[32] As suggested earlier in this period of Levine's career involved re-photographing the photographic works of other artists. One-to-one 'copies' were taken from exhibition catalogues and magazines and the image presented under Levine's name and titled using the name of the artist whose work had been appropriated as in the following examples – *Photographs by Edward Weston* or *Photography by Eliot Porter*.

[33] p. 168. There is perhaps a problem here that resembles the one attacked to Proudhon's famous maxim that 'all property is theft.' The concept of 'theft' implicitly recognises the prior validity of the concept of property. While Proudhon can be eased off the hook by suggesting that he is arguing for a more even 'distribution' of property (See May P23) this defence is not available to Krauss, since as we will see, she is clearly arguing, and has been widely taken to be arguing, that violating copyright questions the entire concept of that sector of property law.

[34] At no point does Krauss simply and straightforwardly dismiss the law, rather she leaves the reader to draw conclusions based on the arguments she produces with respect to the ontology of the concept of Originality. If Modernism, and its 'discourses of originality', repressed the copy, it is for the new art of appropriation to 'liberate the copy' freeing itself from Originality and Modernism one in one neat move. If one is to be post modern one cannot be Original. If copyright is based on Originality – as section four implies – then one cannot be post modern *and* in broad agreement with copyright law.

[35] Copyright is of course not founded on any one principle. Rather than being based on Originality copyright could be said to be based on difference, or difference of expression.

[36] There is of course a confusion here between a notion of originality as something that simply ties an expression to an individual and a panoramic, ontological notion of origin. In some ways this is surprising given the influence of Foucault in Krauss' writing. His formulation of the author as the 'principle of thrift in the economy of meaning' aptly describes what the law means by originality. The fundamentalist tone of the debate would seem to suggest that nothing 'new' ever happens.

[37] And on such a basis who could disagree?

Krauss's argument is, in fact, borrowed from Douglas Crimp's analysis of Levine's work published a year earlier in the same journal in which the Critique appeared.[38] Crimp was slightly more precise in his formulation than Krauss.

> According to copyright law, the images belong to Weston – or now the Weston estate. I think, to be fair, however, we might as well give them to Praxiteles, for if it is the image that can be owned, then surely these belong to classical sculpture, which would put them in the public domain.[39]

This more clearly states that which Krauss alludes to but refuses to spell out; that Levine's work constitutes a critique of copyright law, insofar as copyright law specifically protects claims of an artist to 'originate', and therefore *own*, an image.[40] While refusing to deal directly with the legal discourse of 'originality', the dismissal of its discourse is *implicit* in Levine's work, and in the account, Krauss gives of it. Though Krauss is reluctant to say it out loud, the Critique effectively positions the leading edge of appropriation art as a critique of the legal discourse of originality. The impression given is that *Art* is on the move and the law had better catch up.

The implicit critique of copyright law has to be seen within the context of cultural politics of the late 1970s and early 1980s. As Anne Barron suggests, with respect to the general discourse of which Krauss' work was a part, the aim of the critique of the author and copyright was to draw attention to the exclusions such concepts engendered. In such a view, the author and copyright are tools for marginalizing and excluding the cultural production of 'women, non-Europeans, artists working in traditional forms and genres, and individuals engaged in group or collaborative

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[38] Douglas Crimp, 'The Photographic Activity of Postmodernism' in *October* No 15, Winter, 1980

[39] Douglas Crimp, p.18. This quotation precedes and is clearly very similar to Krauss' throwaway comment about the copyright expiring in antiquity and now being in the public domain, discussed earlier.

[40] Crimp's choice of Praxiteles is particularly pointed. Praxiteles' work is only known through contemporary descriptions and through Roman copies of his work. The one work in existence said to be by Praxiteles is of dubious 'originality'. Therefore *the* 'origin' in Crimp's analysis is itself either dubious or deferred by generations of simulacra.

projects'.[41] There is a good deal of textual evidence to suggest that Krauss, and Levine, viewed copyright law as such a patriarchal tool. For example when Krauss discusses the discourse of 'Originality' in Modernism, the artist is pointedly gendered and referred to as 'he'.[42] The deeper implication of an art practice that overturns the notions of genius and 'Originality' is that it strikes not only at the patriarchy inherent in such cultural concepts, but also at the law that reproduces such patriarchy. Insofar as the law is imagined to protect 'Originality', the law itself is part of a repressive patriarchal order. In such a formalisation, Levine's work strikes at the Achilles heel of male power in both aesthetic and legal realms, transgressing the expectation of Originality inherent in Modernism, transgressing the copyright law that protects it, transgressing the interests of the male order represented in both.[43] Such a strategy has a beautifully neat precision about it.[44] A simple but well-conceived strike at the Achilles heel will bring about the liberation of the copy form its repression under the Modernist discourse of Originality. One simple strike will loosen the Gordian Knot of the law, calling into question its discourse of originality, a male dominated art history, that lineage of "great men" or geniuses, to whom that repressive discourse of 'Originality', and its singular origin, was a central credo.[45]

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[41] Barron Op Cite. Barron's essay provides an interesting critical take on such a view. While not wishing to move away from such well-meaning criticism she points up the deficiencies in the view of copyright and authorship as it was portrayed in the 1980s and early 1990s. Her case study involves the battle to grant copyright to 'traditional' aboriginal images in Australia. The nature of such works, and the cultural structure of aboriginal society, would be outside of the arena of copyright if it were simply based on such a notion of 'Originality' as suggested by the critical cultural wing. Barron points to the elasticity of copyright and its lack of universal grounding principles or ideologies.

[42] Take for example this: '...always taking it up as though he were just discovering it, as though the origin he had found... this graph paper ground were *his* origin, and his finding it an art of originality.' (P 158.) That final "*his*" is printed in italics to push home the point.

[43] This aspect of Levine's critical approach is actually brought out more clearly by Craig Owens in his famous essay 'The Discourse of Others: Feminists and Postmodernism'. Of the series of appropriations from Weston, he asks: 'Is she simply dramatising diminished possibilities for creativity in an image-saturated culture, as is so often repeated? Or is her refusal of authorship not in fact a refusal of the role of creator as "father" of the work, of the parental rights assigned to the author by law?' (Owens quoted in Foster p 73) Here in one well-articulated sentence, Owens spells out what Krauss implies about Levine's critical project. The parental rights refused here are masculine; the creative rights are father's rights and such gendered rights are assigned by law. Refusing the law in its patriarchal process of confirming fatherhood on creativity by casting it as original, Levine's work refused a patriarchy hard wired into social processes well outside the usual realm of art. Transgressing copyright law was part of a more general strategy of transgressing 'Daddy's Law'.

[44] It is also worth pointing out the ambition of such a take on the artist's powers.

[45] It is very interesting that in the current uses of the Kraussian argument that the feminist aspects have been overlooked, repressed or forgotten. However, in a sense it is not surprising. Owens' essay was

If the structure of the Critique is neat, it is nevertheless important to continually reiterate that Krauss actually avoids a direct confrontation with the law. Nevertheless, the thrust of the argument is elaborated in her highly rhetorical prose, which leads the reader to the water and invites them to drink. This is particularly obvious in the final paragraphs where Krauss specifically aligns the critical project of postmodernism with the 'discourse of the copy'.[46] The closing sentences ram home the distinction between the old order – caricatured by terms associated with the concepts of 'original' and 'Originality' such as: singular, unitary, unique, authentic, – and the new order based on the copy, which the reader must assume in contrast to be multiple, pluralist and democratic.

As far as positioning the Critique of Originality as a *critique of copyright* is concerned, the tone of the closing sentences is vitally important. The final sentence of the Critique reads as follows:

> This is a complex of cultural practices, among them a demythologising criticism and a truly postmodernist art, both of them acting now to void the basic propositions of modernism, to liquidate them by exposing their fictitious condition. It is thus from a strange new perspective that we look back on the modernist origin and watch it splintering into endless repetition.[47]

Rather than spell out an explicit criticism of copyright law Krauss lets rhetoric do the work. Terms such as 'Void' and 'Liquidate' are carefully positioned alongside a Modernist origin that 'splinters' 'into endless repetition'. The language in the final paragraph is clearly not that of the level-headed analysis of earlier sections of the Critique. The demythologising analysis of Rodin's castings, the almost comic analysis of Modernism's affection for the grid, and the very uncontroversial handling of the

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built around the premise that, even in 1983(?) the feminist aspect of much contemporary work was missed or skated over. There are a number of feminist analyses of the law; none that I have found so far have built upon Krauss/Levine's position.

[46] A discourse of the copy that begins with the early 'appropriational' strategies of Rauschenberg and is now led by the 'deconstructional appropriations' of Sherrie Levine.

[47] p.170

picturesque, hardly add up to a 'voiding', a liquidating', or such an explosive 'splintering'. Rather the rhetoric of Section Four belongs to the claim that is made for the cutting edge of Appropriation Art. It is that paradigmatic post modern practice that so aggressively assaults 'the Modern'. Most specifically the language belongs to the radical implications of Levine's work and the implied possibility that art may take the law in new directions, and in doing so, bring down the patriarchal edifice of Modernism. The 'Modernist origin' that splinters into endless repetition is an 'Originality', once protected by copyright law, that is now shattered and splintered by the new arts rejection of the law. In other words, the 'endless repetition' here has to be read as the freedom to copy *without* 'permission'[48].

On one hand, the critique of 'Originality' demythologises the creative principles upon which Modernism, and copyright law, are presumed to stand. On the other hand, a fully Post Modern art practice moves beyond such mythology. The logic of appropriation marks an epochal shift away from a Modernism that was *exclusive*, that presaged a particular *property form* of creativity, 'Originality', that in its turn reified a masculine-centred concept of creativity and, more generally, masculine economic and cultural power.

The Philosophy of Krauss' Concept of Appropriation

In order to pin down the anti-copyright sentiment that seems inherent in Section Four, and which many assumed to have been the point of the Critique, it is necessary to examine other work Krauss produced at about the same time in order to suggest how copyright law might have become a target for criticism. Were the reputation of the Critique to rest simply on the six paragraphs linking the practice of appropriation to a critique of the patriarchy present in Romanticism, Modernism, and the law, it would not be nearly so influential. It is important therefore to recover the philosophical concepts underlying Krauss's work in this period. Particularly so since many of the

[48] Without having to refer to the patriarchy of the law.

more recent attempts to utilise the appropriation argument Krauss put forward citate her philosophical sources rather than the critique of originality itself.[49]

Though not actually cited in the Critique itself, the influence of Gilles Deleuze is particularly apparent. In the same year as the Critique, Krauss published another very influential essay on photography, *'A Note on Photography and the Simulacral'*.[50] The essay clearly draws arguments from, and citates, Deleuze's *Logique du Sens*.[51] Deleuze's concept of 'reversed Platonism' is central to the arguments about appropriation art Krauss presented in Section Four. Deleuze's deconstruction of the Platonic theory of Ideas is a particularly attractive tool for anyone attempting a critique of copyright since Deleuze's deconstruction of Plato is couched in terms of *just* and *unjust claimants* to the copy and specifically addresses the theoretical *foundations* of such claims. Ostensibly the hierarchy of claims between 'image' and 'copy', and between the 'just' and 'unjust' copy, achieves a perfect Cinderella fit with a legal, or pseudo legal, discourse that represents 'just' or 'unjust' claims to an image that has been copyrighted.

The hierarchy of a 'just claim' – between the image icon/true copy and the phantasm/ simulacra – is even expressed by Deleuze as a battle between the Platonically 'just claim' of the 'icon' as opposed to an aggressive and subversive *'simulacra'*. The latter is even described as acting 'against the father' since it resembles 'without passing through the Idea'. Interestingly, the analogy of Idea with 'father' is citated by Deleuze to Derrida's well-known analysis of writing as a simulacrum. [52] Simulacra tries to grasp the logos by trickery 'and even to supplant it without going through the father'.[53] The grounding of Krauss' Critique in this analysis is fairly obvious. Deleuze provides

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[49] See for example Lutticken op. cit.
[50] Published in *October* 31, Winter, 1981
[51] Krauss finally published her own translation of the section critical to both *'A Note on Photography and the Simulacral'* and the Critique under the title *Plato and the Simulacrum,* Gilles Deleuze translated by Rosalind Krauss, *October* 27, Winter, 1983.
[52] Ibid., p.48, n.2
[53] Ibid. Deleuze is even more explicit in further citating the analogy to the 'Statesman': '… the Good as father of the law, the law itself, the constitutions. Good constitutions are copies, but they become simulacra from the moment they violate or usurp the law, in escape from the Good'.

a well-grounded philosophical debate on the Idea and image, origin and copy, as well as a metaphor of the law as the 'father'. This philosophical grounding makes the 'discourse of the copy' – on which Krauss stakes her definition of Post Modernism – far more clear. When, at the end of Section Four, Krauss talks about 'the copy', 'the copy' has to be read not as *any* copy but as the 'unjust' copy, *the claim of the simulacrum*. Krauss in fact definitively stakes out the central role of the theory of the simulacra to Post Modernism later the same year, in the essay *A Note On Photography And The Simulacrum.* In that essay an art practice based on photography – that of Cindy Sherman – is specifically positioned as a practice that is deconstructive of the 'aesthetic discourse' of originals and copies.[54]

To sum up then, the use of Deleuze grounds the Critique, and the aesthetic practice that it defends and valorises, in a sound (and radical) philosophical discourse. The influence of the Critique, and of the kind of appropriation art that it propagated, can be summed up in the following way. Contemporary copyright law provides a hierarchy between 'legitimate copies' of a protected work and 'illegitimate', or 'pirate', copies. Platonism separates out 'good copies' from 'false copies' and in doing so creates an unwelcome hierarchy of 'true copies' (icons) over 'simulacra' (phantasms) – false or illegitimate copies. Platonism then would seem to be the *Ur* discourse upon which copyright law's notion of 'legitimate' and 'illegitimate' copies is *founded*. Thus Deleuze's philosophical 'overthrowing' of Platonism *deconstructs* that hierarchy and even connects the overthrow by simulacra with the notion that what is over thrown is law the 'father' – the law as patriarchy. In such a scenario, copyright law is *definitively* grounded in Platonism, whose theory of the Ideas supplies its *only* legitimating narrative. In short, Deleuze, in overthrowing the hierarchy of just and unjust claimants, provides the nemesis of both Platonism and copyright law. It is however Krauss, and not Deleuze, that links such a project to appropriational art, and links the critical position and the new practice to the broad historical epoch of the post modern.

[54] Krauss famously asks what is an 'original' photograph.

It is however important to reiterate that Krauss is a subtle writer to whom allusion and absence are key critical tools. Krauss does not spell out the philosophical basis of the Critique as it is laid out above.[55] Krauss simply sets the target, supplies some tools and invites the reader to fill in the blanks. This others have done, and continue to do, every time a discussion of copyright law turns to Appropriation Art, or to sampling, as a cultural manifestation of critical Post Modernism.[56]

The Problem of Foundationalism

Copyright law is not based on a single, unitary principle. Though not saying so directly Krauss's comments about Levine can be understood in relation to the notion that Platonism provides *the* foundational narrative that shapes and legitimates copyright law.[57] The law may on occasion follow, or more accurately, represent, aesthetic principles, but those determinations are not necessarily rooted in the discourse of Classical philosophy.[58] It is unreasonable to suggest that there is not, and never has been, any connection whatsoever between Platonist and neo-Platonist ideas and copyright law.[59] However to suggest that the law is *founded* on such ideas is

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[55] It would however be stretching credulity to suggest that the *Logique du Sens* was not informing her thought in 1981 given that she cites it in *A Note On Photography And The Simulacral* published in the same year.

[56] A recent example occurs as I write this chapter. Sven Lutticken's *Art Of Theft* contends that 'Capitalism has entered its neo-Platonic phase, with a hint of German idealism, or its debasement in theosophy: spirit triumphs over matter as images, brands and experiences prevail over more down-to-earth commodities.' Here the link between copyright and neo-Platonism and German Idealism is linked to the dematerialised commodity of the knowledge economy. P96-97.

[57] Even *if* one could demonstrate a reasonable historical co-extensivity between Platonic discourse and copyright law there is a great difference between an argument used to *justify* the law and the idea that the law may itself be *founded* or modelled on that argument. Deconstructing an argument used to defend and justify the law may leave the legitimacy of the law weakened, but is hardly enough to bring about its 'splintering into endless repetition'. Only if one believed that the law was *founded* upon such a notion could one imagine such an explosive occurrence.

[58] For an account of the relationship between the platonic and neo-platonic discourse and the aesthetic discourse of originals and copies with respect to theories of the simulacrum see Michael Camille's *Simulacrum* in Robert S. Nelson and Richard Shiff, *Critical Terms For Art History*, University Of Chicago Press, London, 1996.

[59] There are moments when a 'Platonising' influence seems apparent. In Sherman and Bentley's account of the development of modern intellectual property law, 19th century developments appear in such a way. In the 19th century legislators came under pressure to protect not only the literal lines of words in novels, but also to prevent other authors from 'stealing' plot lines or characters, for their

reductive and ahistorical. However, the closing sentences of the Critique seem to indicate that Krauss assumes exactly that. Deleuze cites the emergence of Pop Art as the moment when the 'triumph of simulacra emerges'. Following fashion, Krauss begins her account of appropriation with Rauchenberg. For Deleuze it is the post-Pop epoch that marks the 'destruction' of Platonism, for Krauss the epoch is synonymous with the splintering of copyright into endless repetition. Reversing Platonism then is an overthrow, a popular coup, that pulls the rug from beneath copyright law.

Unfortunately for such a theoretical position, the history of copyright is more complex. Laws arise in different countries at different moments, in response to different socio-economic and political circumstances. The one attempt to write a comprehensive history of authorship and copyright, by David Saunders, is he admits, a testament to the impossibility of such a project. [60] Copyright is, a sprawling rhizome, a patchwork of origins and influences, with a patchwork of justifications and legitimating arguments, a patchwork of remedies to specific problems at specific times. Copyright is not a taproot – there is no simple centre, no founding principle that can be simply deconstructed in order to bring about its end.[61] While it is true to

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novels, plays or musicals. In giving rights to authors on aspects of their works that authors had yet to create, the law gave the impression that 'the work' itself must exist in a 'complete' and ultimate state in an abstracted and incorporeal metaphysical realm. Thought in this way, only a part of the ideally complete work was ever really 'revealed' by the artist in material form. Such a development clearly resembles the Platonic world of ideal forms and partially revealed essences. However as Sherman and Bently demonstrate such expansions in the law were fuelled by a maze of practical and contingent conditions not the desire to make Platonic theory flesh.

[60] Saunders was inspired, like Krauss, by Barthes and Foucault's essays on the author. However, the broad brush of theory in the 1960s created a discourse that gave little indication of the immense complexity at work in the cultural histories from which notions of authorship and notions of copyright emerge.

[61] In 1981, when Krauss was writing, there were still fundamental differences between Anglo-American and continental European copyright law. The histories of each country's law cannot simply be lumped together. Apart from the historical vagaries of specific national origins, their development and cross-fertilisation justifications for copyright law can be made at any time; sometimes before a statute is passed, sometimes after it is passed, sometimes in order to increase the scope of such laws, the theoretical justifications for such laws are also formed by a complex of considerations. A justification may be informed by classical philosophy but may also be formed in respect of a particular social context such as ideology, political and practical expediency, or any number of reasons that are not specifically related to an ontological argument about the nature of originality. Copyright may stem from a gift of monopoly by a government to encourage a particular industry. Presented as such, either as part of a theoretical legitimation, or as a part of an historical analysis, or as both, one could also suggest that copyright is a law to protect the interests of Capital. Similarly it is also fare to say that in some senses

say that *some* aspects of copyright are predicated upon aesthetic and subjective concepts, it is also possible for copyright laws to exist entirely without such 'principles'.[62] Copyright is a many-headed hydra, it plays off many different interests, it is not a centralised monolith built on aesthetics or on the directives of artists or the art world in general.

Mistaking the Arguments of Trips for the Foundations of Intellectual Property Law

Despite the historical social and cultural complexity of intellectual property laws, there is a sense in which, in the era of TRIPs, one could imagine that intellectual property is coming to resemble a taproot. This however is just a matter of appearances. As we saw in Part I, the era of TRIPs can be characterised as a two-fold process. On one hand, intellectual property rights are becoming more ubiquitous in social terms, which coheres with the notion that 'authorship is spreading'. On the other hand, the legal justifications and doctrines of intellectual property laws are becoming increasingly homogenised. That homogenising at times gives the impression that there are in fact a few simple, foundational principles, upon which intellectual property is built. The move in the TRIPs era is towards a general embedding, and simplifying, of 'core concepts' of intellectual property law. The process can be characterised as a process of making the complexities and contingency of the rhizome look 'natural' and inevitable. This process is in marked contrast to the sprawling rhizome of contingent factors that make up the history of intellectual property law.

The foundationalism of Krauss' argument and of those who have followed her work reflects the move towards the *appearance* of foundationalism in international law. However, the assumption that the claims of the internationalisation can be taken as actual foundational *facts* is problematic. As suggested in *Part I*, it is only very recently

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continental European law is conceived as a measure to protect aspects of personality that extend beyond the body through acts of inscription of one sort or another.

that intellectual property has taken on such a 'distinct' identity, and that identity is effectively produced and stabilised within a matrix of international power. Given the spread of such legal measures, the rush to commodify the 'intellectual commons', the massive sprawl of the central (and sui generis) branches of intellectual property law, it is tempting to imagine that the spread can be tackled at the 'root'- or more specifically that the 'root' that is offered as justification and legitimation of such laws. However, the appearance of 'the root', the core principles, is *chimeral*, since intellectual property emerged from a heterogeneous range of sources. As May suggests, the justificatory schemata presented for TRIPs is designed to mask, naturalise and legitimate, the interests of certain powerful agents. In other words, dislodging the foundational schemata, even if the schemata honestly represented the historical emergence of intellectual property law, may not be enough to dislodge the law.

Originality in Copyright Law

The most important problem for critical projects based on Krauss' Critique, is the assumption that the concept of originality in copyright law is identical with the discourse of 'Originality' that she so ably deconstructs in sections one to three of the Critique. However, in contemporary law, and historically, originality is a 'low threshold' concept. As far as copyright is concerned, originality is not profound; it is not a supernatural aspect of spirit dragged from the depths of the soul. Nor is it a Christianised Platonic concept whipped up into a Romantic ideology of creativity. It is simply a mode of expression, it requires no particular specialist training, and it is free for all to enter.[63] Copyright does not protect ideas but simply and only the way they are expressed.[64] Originality, as far as the law is concerned is quite banal. While

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[62] As David Saunders points out in *Drop The Subject*, Anglo-American copyright law historically got by for a long time without the 'creative subject' basing itself on the governmental grant of monopoly to favoured businesses.

[63] It is worth remembering that rhetoric was always a technology of knowledge, not a theory of the subject. Rhetorical skill could, had to be, acquired. It was, in principle, available to all.

[64] It is worth noting that this way of conceiving copyright does seem to rely on a buried Platonic division of form and matter. It is worth pointing out then that this way of conceiving of intellectual property is comparatively modern. 18th and early 19th century laws conceive intellectual property

Krauss very ably levels the claims of a rather dubious ideology of creative 'Originality' that is linked to the concept of Genius, an 'Originality' that is thunderous and profound, extending such a critique to copyright law is a step too far. The legal discourse of originality, though it has a fascinating relationship with 'Originality' in Krauss' meaning, nevertheless remains a very *modest* concept.

To sum up then, the deconstruction of Originality was never going to have much effect on copyright law for two reasons. Firstly the copyright law is not fundamentally and historically based on reified concepts drawn from Platonism, and secondly because copyright cannot be limited to a discourse on O/originality and Genius.

Post Modernism and Authorship: The Cultures of Common Law and Moral Rights

A further problem that dogs the Critique and those that have built on it, is a sense of confusion over what an 'author' is. Like Nesbitt, Woodmansee and Jaszi, and Boyle, Krauss is indebted to the theorisations of authorship that emerged in the writings of Barthes and Foucault.[65] One of the most interesting aspects of the take up of structuralist/post-structuralist work by American academics in the 1970s, was the elision of cultural difference, the assumption that the author figure Barthes and Foucault were writing about, was not only historically accurate, but also entirely co-extensive with the author of Anglo-American tradition.[66] The curious aspect of

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through metaphors of performativity, the difference between the 'original' painting and its copy was a notional moment of performance. If one bought a 'copy' of an 'original' image, one bought a lesser or inferior performance.

[65] Barthes and Foucault wrote theory without much in the way of empirical research despite the fact that both essays run on a kind of historicist argument that the enlightenment age has been superseded by something qualitatively better.

[66] It is obviously inaccurate and reductive to suggest that the legal author of copyright history is entirely coextensive with the space of authorship in general. What of pre-copyright 'authors', for example Dante? Or Aristotle or Plato? To listen to the debate sometimes one could run away with imagining that before there was copyright there was nothing remotely resembled the modern author, which possessed any of the social, cultural or personal attributes the modern world ascribed to the concept 'author'. Literary theorists have far too often confused arguments about the comparatively recent concept of the *novel*, with that of the author. Elements of the social space denoted by the term author, have of course a very long and complicated history. In a sense it is better to think of authorship in the way legal theorists think of property – as a bundle of rights. For the author it is useful perhaps to think of a bundle of

Nesbitt's work was that, while recognising that Foucault's author was embedded in epistemological categories already in place in French law, she did not seem interested in the fundamental differences between the 'common law' tradition of English law – from which much of the law of the United States was extracted – and the continental 'moral rights' tradition from which Foucault was working.

The tradition from which Barthes and Foucault were writing, envisaged the author's copyright as a human right that protected the labour of the individual personality.[67] The Anglo-American law – or common law – tradition, into which such theories were planted, was built on a different notion. In the history of common law jurisdictions copyright is the cornerstone on which the power and profits on information industries are built.[68] In common law jurisdictions copyright works *never* had to be personal creations or intellectual creations in the sphere of the arts and literature – non-personal creations and creations outside the sphere of the arts could always be copyrighted.[69] The author's copyright in Anglo-American system stems from the state grant of monopoly to business; the author as such is simply a sub set of industrial organisation. That is, for the Anglo-US system, the creative subject emerged not from a rights theory but from an instrument designed to control the publishing industry.

Nesbitt's notion that somehow authorship – in a cultural sense was spreading into industry was, in a sense, true of the French context. However it gave the general impression that 'authorship', was something that was only as old, and just as reactionary, as Romanticism, and was ultimately based on the dubious concepts drawn from Classical philosophy, and that such an anachronistic construction was on the

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personal attributes and social functions that are variable over time and contingent upon particular social arrangements and settlements. For a longer view on this see Sean Burke's *Authorship: Plato To Post-Modernism* op. cit.

[67] Anglo-American critics have also tended to miss the point that Barthes' 'Death of the Author' in its French context reads as a cultural *and* political, an attack on official culture and the political system akin to the attack on the salon by the early avant gardes of the mid 19th century.

[68] See Lyman Patterson and Mark Rose. And also Vincent Porter, *Berne And After* for comment. Since the first copyrights in English law were given to the Stationers Company and not individual authors, in 'common law' jurisdictions the author has always been able to be recognised as a large company, since the first authors were essentially publishing companies, capitalist organisations.

loose, carving up the modern/post-modern world. The demand to 'fix' the emergence of copyright to the Romantic discourse of Genius, as it was implied in Krauss's Critique, was taken up by Woodmansee. In a very able book Woodmansee succeeded in the task of linking the emergence of copyright law to Romantic theory but only by omitting to mention that the German debates on the creation of a copyright of the late 18th and early 19th followed the emergence of English copyright law in the early16th century, and the Venetian intellectual property laws dating from the late 15th century, and the German law of 1475.

The deconstruction of '*the* Author' in Post Modern discourse was then the deconstruction of a 'moral rights' figure that had no cultural basis in Anglo-American jurisdictions. Extending the 'Death Of The Author' to a *Death Of Copyright* – which was essentially the motivation behind Krauss' Critique – might have some purchase as an attack on the cultural notion of authorship. However such a method is useless as a way undermining the so-called 'spread of authorship' into the industrial realm that appears to be happening with the rise of the knowledge economy, since, in the Anglo-American legal system, that is precisely where the concept of authorship emerged from. To sum up then, the central problem inherited by cultural critiques of intellectual property from Krauss' Critique is an inaccurate, and reductive view, of authorship

[69] The first code to be copyrighted was not as some have assumed, software codes in the 1980s but Morse Code in the early 20th century.