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The Knowledge Economy and Globalisation: Internationalising Intellectual Property And The Fate Of Critical Art Practice

"Intellectual property is the oil of the 21st century." Mark H Getty

INTRODUCTION: LIMITS OF THE CREATIVE ECONOMY

This chapter is divided into two distinct, but entwined, areas of concern. *Section One* concerns the identity of the knowledge economy. The section argues that 'post-industrial' [1] economies can only maintain their theoretical identity as knowledge economies within the broader context of globalisation.[2] In Chapter Four, the knowledge economy was explored as an *idea* through the creative concepts that have shaped its discourse. In this Chapter, the identity of the knowledge economy is given greater definition by addressing the interaction between the knowledge economy as *concept* and the knowledge economy as political *policy*. The specific arena of analysis is that of foreign relations. The chapter argues that the ideology of the knowledge economy is synonymous with a division of labour that operates, not within the firm, but on a generalised global scale. Section One therefore examines the growth of a global legal architecture that enables, and limits, the concept of the knowledge economy. Much recent work on globalisation has concentrated on the multidirectional exchange of culture, capital, technology and natural resources. In contrast to that work, the globalisation narrative presented in this chapter centres on the issue of

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[1] The term 'post-industrial' is used here within specific parameters. The knowledge economy is a theorisation of national economies within in context of globalisation – both as theory and as actuality. In that sense 'advanced', mainly western, economies are believed unable to compete on the basis of productivity in the manufacturing sector. The 'knowledge economy' therefore is synonymous with a process of de- or post – industrialisation. However that is not to suggest that the aspects of industrial production – those issues of *design* – claimed by the knowledge economy are simply the prerogative of such post-industrial economies.

[2] Many of the critical objections to the knowledge economy, such as its aestheticising tendencies, its sense of naturalism and inevitability, are applicable to the current phase of globalisation. The main contention of Chapter Four, that the knowledge economy is an event in theory as much as the corollary of a series of 'historical' (material) determinations is equally applicable to globalisation. For a

'political vision' – the economic will of nation states and corporate entities – as the main constitutive force behind attempts to globalise intellectual property law. Section One argues that the recent expansion and entrenchment of international laws regarding intellectual property are clearly bound to specific, national, and corporate, economic agendas.[3] The development of the agreement on *Trade Related Aspects Of Intellectual Property*, or TRIPs, is central to this analysis. The main impetus behind the agreement was a coalition of 'knowledge economy' interests, ranging from corporate players, represented by the *Intellectual Property Committee,* or IPC, to the governments of the United States and Japan, and the European Union. The section examines the role played by theories central to the 'knowledge economy', in the development and *shaping* of the agreement. Of particular concern, here is the relationship between theories of creative destruction and price competition. The closing part of the section discusses the cultural characterisations of the agreement. A case study of an attempt by The University of Mississippi to patent turmeric is used to demonstrate the cultural characterisation of 'knowledge bases' as either 'modern' or 'traditional'. The section ends with consideration of the tendency of the intellectual property system configured by TRIPs to render economic differences as cultural differences.

Having explored the expansion of the creative tropes of the knowledge economy into foreign policy and international law, *Section Two* examines the question of limits from a different direction. The vulnerability of knowledge economies to critiques of intellectual property is obvious. In recent years, such critiques have tended to focus on technological and ethical issues. However, the cultural realm is also relevant. As demonstrated in Chapters Three and Four, there are two possible interpretations of the semiotic/network model of creative production. The 'weak' interpretation, takes up the desubjectivisation of creative production, that deve loped in the wake of the attack on the rhetorical model of creative labour. This interpretation of the semiotic/network poses no specific threat to the rhetorical creative concepts within intellectual property

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discussion of similar concerns in relation to globalisation see Alan Scott's introduction to *The Limits of Globalisation: Cases and Arguments*, ed., Alan Scott, Routledge, London, 1997.

[3] The relation between corporate power and the international negotiating power of particular nation states will be discussed later in the chapter.

laws. However, it is extremely useful in establishing a creative narrative with which to delegitimate the property claims of individual creative workers.

Section two shows how the 'weak' reading of the semiotic/network was itself legitimised, by examining the fate of the 'strong' interpretation in the era of the knowledge economy. The focus here is on a critical case of copyright infringement, *Rogers v Koons* (1989-1992). The case was fought out at a highly politically sensitive moment in the development of the legal infrastructure that now enables the knowledge economy. The case therefore marks the point at which the 'strong' interpretation was reined in. The 'strong' interpretation in question, took the form of 'appropriation art' – a practice that had developed from aesthetic dematerialisation's critique of property relations. The early phase of 'appropriation art' specifically sought the overthrow of copyright law. The taming of this radical position, and the steering of 'appropriation' into more neutral waters, was central in ensuring the ascendancy of the 'weak' interpretation central to the operation of the knowledge economy.

PART ~ I

INTERNATIONALISING INTELLECTUAL PROPERTY

THE KNOWLEDGE ECONOMY AND GLOBALISATION

As suggested in Chapter Four, the knowledge economy does not simply emerge in a 'natural', or 'evolutionary' way from a determining set of material factors. The concept of a knowledge economy is more accurately viewed as an 'event' in the conceptualisation of the economy – rather than as the straightforward material result of deterministic historical processes. In other words, though it may be conceived of as a theoretical 'response' to deregulation and the dematerialisation of older industrial economies, the material factors that elicit that response do not fully account for the *identity* of the response. The theoretical proposition of the knowledge economy begins by assuming (or hoping?) that a 'new economic age' has begun – one that is qualitatively *different* from that of 'industrial modernity'.

IDENTIFYING THE KNOWLEDGE ECONOMY

Insofar as knowledge economies are assumed to be co-extensive with 'post-industrial economies', they assume also, a specific geographical location. The identity of such economies is based therefore, on the relationship they strike with developing states at the level of competition – particularly with respect to labour costs. To put this another way, knowledge economies are grounded in *territorial* divisions of labour.[4] If a

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[4] At a very base level, the knowledge economy defines itself in terms of creative labour, concepts and ideas. In this way, it is distinct from manual labour, which is related to the extraction or production of material resources and the manufacturing sector.

'knowledge economy' is anything, it is a geographic entity whose ability to compete in the manufacturing sector, on price, against other geographic entities is now limited. It is therefore an economy that can now only compete in terms of *innovation.*

However there are a number of things that might be held to complicate such a clear-cut division. The theory of the 'knowledge firm' suggests that the knowledge economy may have rather permeable borders. The knowledge firm, *whatever its geographic location*, is a 'knowledge producer'. The aim of the firm is to gather creative, 'tacit', knowledge assets from employees and consumers – both of which could be located anywhere in the world – and turn such knowledge into 'explicit' property assets. In that sense, the knowledge firm has no fixed boundaries – it mines tacit knowledge *wherever it finds it* before rendering it as a tradable property asset. In theory then, the knowledge firm can be located anywhere.[5]

However, despite its theoretical fluidity, the actual transfer from 'tacit' into 'explicit' knowledge requires particular conditions. The transfer of knowledge assets is dependant upon a system of intellectual property that is generally recognised and practically enforceable. The 'knowledge firms', which form the backbone of the 'knowledge economy', feed on tacit knowledge wherever they find it. Despite this fact, such firms will also congregate where there is a secure intellectual property regime conducive to their activities.[6] The second factor leading to such a congregation of firms is a stable social infrastructure, with a well educated, albeit 'pricey' workforce – one that can translate tacit into explicit knowledge, or better still, radically innovate new knowledge.[7] In sum then, the concept of a knowledge economy

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[5] Arguably, given the infinite expansion of technology that erases the need for physical labour, *all* economies could become 'knowledge economies'. The end of (physical) work promised by technology is sadly always 'just around the corner'.
[6] This is not without irony, as we shall see later, since to defend their assets, such economies also wish to extend and expand intellectual property law so as to protect themselves against 'unfair' competition. In doing so, they risk undermining the desirability of their location. Consequently, they run the risk that knowledge firms will, for cost benefits, relocate to countries where intellectual property systems have been newly instigated. The only bulwark against this occurrence, as the previous note suggests, is a well-educated workforce. Blair's "education, education, education"?
[7] This is vital as the previous footnote indicates. Leadbeater suggests that research universities form the hub of radical knowledge creation and are therefore the central institutions of the knowledge economy.

can be defined negatively. It is specifically conceived to be *different* from something else. In practice, this means that 'knowledge economies' have a geo-political location, most often within '*post-industrial'* or developed economies.

THE LIMITS OF THE LAW: THE INSTITUTIONAL BASIS OF THE KNOWLEDGE ECONOMY

If the production of knowledge is central to knowledge economies, then the storage of assets is its most vital problem, since knowledge has a habit of spreading unchecked.[8] As a number of commentators have noted, the necessity to protect the value-added components in consumer products, together with the general value of intellectual property licences, has pushed intellectual property to the top of foreign policy agendas in the developed world.[9] Economic dematerialisation has therefore coincided with a consistent drive to widen and deepen intellectual property law and standardise its core concepts at international level.[10]

(So central in fact, that to leave them reliant on the good will of taxpayers, is simply bad management. Leadbeater's answer, as usual is 'sell, sell, sell'.)

[8] To return to Romer's metaphor of the 'recipe' for a moment. The logical corollary of a firm, or an entire economy, specialising in the production of 'recipes', is that the physical production of 'meals' will be devolved to areas where material production costs are lowest. Recipes are of course easily learnt and replicated. Completely deregulated economies – economies where intellectual property law is either not recognised or poorly observed – obviously present a problem, hence the need to strengthen, deepen and geographically expand such laws. The regional division of labour that knowledge economies are predicated on, also makes them vulnerable. Marginal costs for the reproduction of products like CDs, videos and medicines are low and often require little actual know how. 'Illicit' copying for export is therefore attractive in countries where enforcement of intellectual property law is weak or nonexistent.

[9] See for example, Boyle, op. cit.

[10] It is important to see this as a process of ideology and political action rather than as a simple matter of technological determinism. As Christopher May argues, the global knowledge commons are being circumscribed, not so much by the technology that makes appropriation possible, but by the extending legal architecture that creates false scarcities of knowledge and renders it ownable. See May op. cit., p. 89. As examples of the broadening of existing rights, Graham Dutfield suggests the extension of copyright to software programmes, the new generation of sui generis rights in plant varieties, and the layouts of integrated circuits. He also suggests the international standardisation of patent sunsets at twenty years, and the general acceptance that rights are assigned to the first applicant rather than the first inventor, as examples of the progressive standardisation of the core concepts, and justifications, of intellectual property rights. See Dutfield, op. cit.

Establishing the global 'free-market' necessary for the operation of knowledge economies, requires widespread international agreement on social institutions of property that support the market. Globalising specific institutions of property is demonstrably a political project and an obvious example of the truism that all property is a socio-political settlement. Property is not 'natural' and does not occur spontaneously but rather exists in relation to a positive legal framework that differentiates mere 'possession' from legal 'ownership'.[11] All property then, is a socially constructed institution, which is called into being in response to certain social and political requirements and interests.[12] The globalisation of intellectual property stands in contrast to many other current theorisations of globalisation, that present the process as 'natural', 'evolutionary' and inevitable. The rapid spread and concretisation of such an institution at an international level requires political will. Such a creation is demonstrably dependant on the ability of nation states to negotiate trading relationships in such a manner as to bring such an institution about. The development of an international regime of intellectual property is demonstrably dependent on the ability of nation states to negotiate trading relationships, in such a way as to bring about the creation of such an institution.

The theoretical and practical limits of knowledge economies can be glimpsed therefore, where such states have made attempts to spread and enforce the institution of intellectual property. The borders of such a vision then are particularly observable in places – nation states or regions – where the maintenance or operation of intellectual property law is still haphazard, or where it does not exist at all. Not all legal jurisdictions recognise intellectual property law – though such jurisdictions have become increasingly rare in the last twenty years due to pressure from economies that define themselves as knowledge economies. In other jurisdictions, though intellectual

[11] As May argues, property is often presented as a 'just history' that implies that the character of property is natural and de-emphasises the contingency on the current political and economic settlement. See May, op. cit.

[12] As May suggests, the state cannot be removed from the institution of property: without it there would be no institution of property. Ibid.

property has some statutory basis, for one reason or another, aspects of the laws are widely flouted.[13]

THE KNOWLEDGE ECONOMY AND FOREIGN POLICY

TRIPS AND THE INTERNATIONALISATION OF INTELLECTUAL PROPERTY

As suggested above, the concept of the knowledge economy is only viable where the institution of intellectual property can be guaranteed at an international level. The most significant treaty of recent years in this respect is TRIPs, or the *Trade-Related Aspects of Intellectual Property Rights* agreement. Christopher May has provided a pertinent account of the process by which the political and legal settlement was reached. However, before looking in detail at his account of that process, in the context of the forgoing theorisation of the knowledge economy, it is necessary to outline the agreement itself and suggest its importance.

There is some contention in the literature as to the precise relationship between TRIPs and *World Intellectual Property Organisation*, (WIPO) – differing accounts of which can be found in books published in the last two years. The following version draws May's work, which provides the most detailed account of the emergence of TRIPs. The section is further supplemented with Dutfield's account.[14] There are two

[13] Even where laws are rigorously enforced there are gaps – home-taping and the downloading of music being the obvious examples. On a more general level, it is important to remember that the statutory existence of any law tells one very little. The 'law' in its broadest definition is not coextensive with law in a positive sense. Some laws are enforced, other not, some laws are assumed to exist but have no clear statutory definition. It is therefore, not possible to simply read-off a direct relationship between positive law and social structures. Positive laws have social effects, but it is a mistake to imagine that legal codes accurately describe, measure, or define social behaviour.

[14] Writing in 2000, Dutfield suggests that the institution WIPO is working to secure the treaty obligations of TRIPs. While May, writing in 2001, suggests that the institution WIPO has effectively been relegated to the dustbin of history by the emergence of TRIPs. However, the authors not only disagree about the current position of WIPO, but also about its history. While both suggest its emergence form the Paris and Berne Conventions (on patent and copyright respectively), they disagree on the actual date of the institution of WIPO. Here Dutfield gives 1967 as the date of establishment while May suggests that WIPO has its origin in 1970, with the replacement of BIRPI (The United

important international precursors to TRIPs, the Paris Convention on patent law, (1883), and the Berne Convention on copyright, (1886). In 1970, WIPO replaced BIRPI (The United International Bureaux for the Protection of Intellectual Property), which had until then been the main institution administering the conventions. In 1974, WIPO became an official agency of the UN.

The TRIPs agreement has its immediate origin in the now defunct General Agreement on Tariffs and Trade (GATT). GATT was initially launched in 1947, but contained no agreements on intellectual property until the Uruguay Round was launched in 1986. A draft agreement on TRIPs was effectively in place as early as1990. However, negotiations refining the draft continued until the 'Final Act' of the Uruguay Round was signed in Marrakesh in April, 1994. The Final Act bought about the transition from GATT to the World Trade Organisation and incorporated TRIPs into the newly emergent institution. [15]

WIPO was widely regarded by developed states as a weak institution since its constitution contained no powers of enforcement or dispute settlement mechanisms.[16] The development of TRIPs makes the enforcement of international intellectual

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International Bureaux for the Protection of Intellectual Property). May then gives 1974 as the origin of its current form, the date when it became an official agency of the UN. Dutfield's points out that most intellectual property conventions are still administered by WIPO. Dutfield lists four areas that concern WIPO; one administering treaties; two assisting states in promulgating intellectual property laws; three harmonising such laws, and four promoting intellectual property throughout the world. Dutfield provides an adumbrated list of treaties administered by WIPO. See Dutfield op. cit., p. 95. In Dutfield's account despite the fact that TRIPs is the most important organisation for dealing with intellectual property tactically at the level of international politics, WIPO is more important in the day-to-day operation of the law and in sponsoring the growth of new forms of intellectual property.

[15] May's view is that the incorporation of much of the Paris and Berne Conventions 'previously administered by WIPO' bought intellectual property law 'into the trade regime overseen by the new World Trade Organisation'. See May, op. cit., p.67.

[16] Despite lack of instruments, Dutfield is at pains to claim that WIPO is not marginal to the global intellectual property regime. He suggests that it is "by far the most important international institution dedicated to IPRs, and is likely to increase its influence as WIPO builds closer links with other institutions such as the WTO and the CBD (Convention on Biodiversity)". Dutfield, op. cit., p. 96. Dutfield also reports that WIPO is collaborating with the WTO to help developing countries meet their TRIPs obligations by 2000 by providing technical assistance in "preparing legislation, training, institution building…" Dutfield here quotes from a WIPO document dated 1998. Ibid. p. 96. There would also appear to be some overlap with the administrative councils of TRIPs. The *Council for TRIPs* oversees TRIPs functions, monitoring its operation and compliance, acting as a talking shop, administering dispute and settlement procedures. Ibid., p.91.

property easier, for the simple reason that it makes acceptance of minimum standards of intellectual property protection, a condition of membership of the WTO.[17]

TRIPs is therefore the most important device for bringing developing states into line with the legal structures of developed states – it effectively internationalises intellectual property law.[18] Although TRIPs aims to replace the fragmentary nature of multilateral agreements and 'sectoral treaties' administered through WIPO, by providing a legal framework for a single intellectual property regime throughout the international system, it is not 'a direct legal structure' for the recognition of intellectual property.[19] It merely suggests 'minimum standards' for international intellectual property rights amongst members of the WTO.[20]

In other words, it does not provide a blueprint or model piece of legislation that must be downloaded and incorporated into national laws. Although – as we shall see shortly – the US-Euro-Japanese systems of intellectual property law dominated the draft proposals for TRIPs, the intellectual property laws of member states do not have to be

[17] TRIPs covers most areas of intellectual property; patent, copyright, trademark, geographical indications (e.g. wine regions) industrial designs, integrated circuit topographies and trade secrets – all of which had been separately dealt with by treaties between developed states, before TRIPs. As it is a guaranteed minimum standard of intellectual property protection, TRIPs does not forbid new, or sui generis forms of intellectual property particular to specific states.

[18] May provides the following analysis as regards the scope of these arrangements. In 1994, when TRIPs came into force, the WTO included 111 states. By 1995, the figure rose to 128, with 20 states waiting in the wings to join WTO/TRIPs. In contrast, he suggests that, at its height, WIPO looked after 135 states under a ragbag of18 separate conventions. The global scope of the agreements can be estimated against the current membership of the UN, which stands at 180 states. These figures are from a source published in 2001.

[19] May, op. cit., p.70.

[20] It is also important to point out that, in theory at least, TRIPs provides a balance of powers – attempting, as all intellectual property must, to strike a balance between incentives to produce new ideas and impeding the flow of knowledge. The most obvious conflicts between ownership rights and free flow of ideas are in the area of information where intellectual property comes into conflict with the public realm. Perhaps more importantly, there are also frequent conflicts between ownership rights to – for example anti-aids drugs – and public rights of access to such medicines. TRIPs does contain measures to account for such issues. However, the actual operation of such measures will always be hotly debated.

modelled on such paradigms. Local laws can be flexible to locale conditions provided that such laws comply with the 'minimum standard'.[21]

However, as May points out, the character of international intellectual property law has been reshaped by its subordination to an international institution concerned with governing trade. The necessity of following the general economic aims inherited from the GATT era, namely the issues of National Treatment, Most Favoured Nation Treatment (MFN) and the principle of Reciprocity, have come to dominate the 'minimum intellectual property standards' suggested by TRIPs.[22] Such 'minimum standards' of intellectual property protection suggested by the treaty are played off against the principles of 'National Treatment' and 'Most Favoured Nation' (MFN) status. National Treatment demands that each WTO member must give the same rights to both nationals and non-nationals within their jurisdiction. Most Favoured Nation status requires that 'any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country be accorded immediately and unconditionally to the nationals of all other members'[23]. As May suggests, Most Favoured Nation status is the "key tool for expanding trade agreements" and is therefore perhaps "the most important innovative aspect of the TRIPs agreement."[24] In effect, whereas under WIPO there existed a plethora of small treaties and conventions on various forms of intellectual property, under TRIPs all such agreements apply immediately "to all the members of the WTO".[25] In that sense, limited conventions of the past, such as bilateral agreements, are now "as wide in scope as the main conventions"[26] and minimum standards of TRIPs.

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[21] Dutfield gives the example of local laws passed in Kenya in 1989 allowing for 'petty patents' relating to traditional medicinal knowledge. Since TRIPs provides only a minimum standard, there is no conflict between such local initiatives.
[22] May, op. cit., p. 69.
[23] Quoted in May, ibid., (His citation GATT 1994, A1C:4.)
[24] Ibid., p. 69.
[25] Ibid., p. 69. The status of laws such as those given by Dutfield (see footnote 31) is interesting. Most Favoured Nation status effectively makes international, any attempt to protect such laws beyond Kenya.
[26] Ibid., p. 69.

The general effect of TRIPs then has been to draw together the disparate strands of international intellectual property law and solidify them. The general movement has been in two directions. On one hand, the geographical scope of intellectual property is greatly enhanced by TRIPs. This expansion is endemic to TRIPs, not only by dint of the tying of intellectual property to membership of the WTO, but also because of the harmonisation clauses discussed above, that embed even minor agreements into the general platform of international law. In tandem with those geographical expansions, a plethora of new *sui generis* intellectual property rights have grown up in relation to issues stemming from new technologies (for example to cover the layouts of integrated circuits), and in relation to traditional knowledge bases.[27]

However the general expansion has also been complemented by a move in the other direction, towards *narrowing* the concept or principles of intellectual property in terms of positive law, justification and doctrine.[28] One of the crucial effects of TRIPs is, as May argues, the *standardisation* of such core concepts and justifications at international level.[29] The two-fold process can be summed up in the following way. Intellectual property rights are becoming more *ubiquitous* in social terms – there are more laws and they are more likely to be invoked – however in the other direction, the general legal justifications and doctrines of intellectual property laws are becoming increasingly *homogenised.* Despite the fact that intellectual property is clearly expanding then it is also, in a vital sense, narrowing. The heterogeneous maze of national jurisdictions, piecemeal justifications and intellectual traditions from which intellectual property laws emerged are increasingly obscured in the move to TRIPs. This process can be described as the move from the history of intellectual property, with laws rooted in the particular and contingent, towards abstraction, with the

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[27] The importance of these new forms will be touched on at the end of this section.
[28] This narrowing of the justificatory schemata runs counter to widespread claims that the expansion or IPRs leads to increasing incoherence. For a good analysis of the latter position, see Jessica Litman *Digital Copyright,* Prometheus, New York, 2001. A detailed analysis of the relationship between narrowing justifications and expanding content of the intellectual property law, is beyond the scope of the current study, but may well provide interesting material for future analysis.
[29] Dutfield also offers the example of the international standardisation of patent sunsets at twenty years, and the general acceptance that rights are assigned to the first applicant rather than the first inventor. Like May he sees the former as examples of the progressive standardisation of the core concepts and justifications of intellectual property rights.

establishment of general 'principles' upon which intellectual property is *imagined* to stand, and upon which TRIPs is founded. This consolidation of the law is not the result of an inevitable, 'natural', evolutionary shake down but the result of political and economic agency.

It is therefore important to remember that the current justifications of intellectual property are not entirely co-extensive with the historical foundations of such laws. As May points out, TRIPs, (like all forms of property), is a 'settlement', an institution that is contingent on the current balance of international power. This has important ramifications for attempts to critique intellectual property ontologically. The current raft of 'principles' and justifications are not, necessarily, 'foundational' to intellectual property in its broadest social and historical senses. The pre-eminence of current 'principles' and justifications is contingent on current economic, political, and *cultural*, power. To put this directly, critiquing the streamlined, defensive narratives utilised in the era of TRIPs, may not be particular effective as a means of critiquing intellectual property in its broadest sense. The relative simplicity of current intellectual property narratives conceals hugely complex histories of asymmetric knowledge diffusion. In short the justificatory schemata of TRIPs, may not be representative of the histories of modern intellectual property, let alone of the 'intellectual properties' in their broadest sense.[30]

The Battle for TRIPs

If the establishment of an international system of intellectual property is a prerequisite for the success of the knowledge economies then the establishment of TRIPs may give

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[30] A good example of such a problem is the post-structuralist suggestion that, to dethrone the author, is effectively to dethrone copyright law. In moral rights jurisdictions such a position is understandable. However, the moral rights system was the only system of modern intellectual property that had ever existed. The existence of non subject-centred systems of copyright, such as the Anglo-American system, puts a lie to the notion that in the absence of a particular kind of creative subject, copyright itself will disappear. Despite such doctrines as the 'Kolb copyright' of 1500 (discussed in Chapter Two), the absence of a creative subject does not deny the absence of something resembling intellectual property law – nor less the asymmetric diffusion of knowledge and power.

some clues as to the shape and political operation of such economies. As suggested above, property institutions do not emerge without political will. The construction of the TRIPs agreement then provides an interesting example of the process required to create an institution of property, particularly because in some regions, cultures and states it demonstrates the *imposition* of a property institution. As suggested above, the story of TRIPs also demonstrates the narrowing of the range of justifications and doctrines of intellectual property law. Most importantly, it sheds light on why theories of the knowledge economy have given pride of place to creative destruction as a dominant creative ideology.

TRIPs is the product of a complex interpenetration of material and conceptual forces[31]. Before going on to discuss the treaty in relation creative theory of the knowledge economy, it is necessary to account for other factors usually considered to be important to its development. In this relation, May cites a 1992 brochure produced by GATT putting forward its arguments for a reassessment of existing intellectual property law. As far as GATT was concerned, given the increasing economic importance of information, a reform to the international system would be of benefit to *all* states. The document suggests three factors as important; firstly the need to counter the increasing incidence of piracy, secondly the need for technology transfer between developed and developing states, and finally the need to iron out inconsistencies in the current system. All these concerns were certainly factors in the emergence of the agreement. However, the simple recounting of factors in the brochure conceals a more complex story.

The desire to simplify and straighten out the inconsistencies of the existing treaties and conventions administered by WIPO is, perhaps, the most tenuous of the arguments for reform. It is inconceivable that such a difficult, and costly, operation would be undertaken simply for the sake of legal tidiness and that economic considerations were far more likely to have been paramount in the attempt to address such

'inconsistencies'. The issues of technology transfer and piracy give a much more plausible rational for the development of TRIPs. It is not inaccurate to say that the two poles of technology transfer and 'piracy' are at the heart of the political debate from which TRIPs emerges. As has already been suggested, knowledge economies are vulnerable to the bleeding of 'knowledge', whether one views this simply as information and technology transfer or straightforward piracy. By the 1980s, it had become apparent to the governments of developed states that future economic viability could only be secured by the internationalisation of an effective system of intellectual property law.[32] In this sense then it is true to say, as many have, that simple material factors led to the development of TRIPs – the new technologies emerging in the communications and biotech sectors were/are vulnerable to piracy. Without the growth of such economic sectors, it is doubtful that a review of intellectual property laws would have been necessary.[33] The generally accepted fact that WIPO was a weak instrument with which to enforce intellectual property law provided the most obvious reason for a reassessment on the part of developed states. Bringing intellectual property law within the scope of trade negotiations offered the possibility of 'linkage bargaining diplomacy'.[34] Since it was dedicated solely to the administration of intellectual property conventions, WIPO possessed little in the way of bargaining power with states that had no interest in protecting intellectual property. Under the administration of a general trade agreement however, the imposition of the fully international intellectual property regime desired by knowledge economies, could be played off against concessions on other trade agreements such as textiles and agriculture.[35]

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[31] This interpenetration of material and conceptual factors is, in principle, multidirectional. No particular default settings, (such as one attempting to *direct* causations) can be assumed to be in operation.
[32] As May notes, "The increasing speed of innovation and the expansion of the role for knowledge or information in the capture of economic value added have enhanced the importance of controlling knowledge resources (and by extension intellectual property) to national development. As the field of operations has expanded for corporations which accord significance to intellectual property, so their requirement to enjoy the same protection that has been institutionalised in their home markets has taken on an international dimension." May, op. cit., p. 81.
[33] May also makes this point. Ibid., p. 80.
[34] This point is made by both Dutfield and May, op. cit.
[35] The dismantling of the Multi-Fibre Arrangement – which benefited textile and clothing sectors in developed countries – is a good example of such a trade-off. However, as May points out, the

However, as argued in Chapter Four, material factors such as those laid out above do not fully account for the theoretical responses of economists and the political responses of policy makers. Beliefs about the nature of economic activity, theories of creative labour and the feasibility of managing creative labour (and the value created by such labour), are also vitally important.[36] As will be demonstrated below, the formation of TRIPs can also reasonably be viewed as playing out a foreign policy agenda later expounded in theorisations of the knowledge economy. The shape that TRIPs took on reflects the fact that it was designed to tackle the problematic relationship between developed (or knowledge) economies and the economies of developing states. In addition to material perspectives then, TRIPs also represents a complex *cultural* interaction. On one hand, the deployment of creative ideology can be seen as a factor that structures the relationship between developed economies and developing states. On the other, the complex construction of creative ideology within theorisations of the knowledge economy can be seen as a factor of the relationship such economies strike with the economic capacities of developing states.

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developed states essentially gave concessions in 'the industry of yesterday' while creating the international intellectual property system that secured the resources and technologies of the knowledge economy. May, op. cit.,
p. 88. Dutfield cites in particular, the efforts of the United States in this respect. He quotes the following from McGrath: "The United States saw that tying obligations to protect intellectual property rights to other trade commitments under GATT would provide the desired vehicle for pressurising recalcitrant trading partners. So, having recruited support from other developed nations, 1985 to 1989 saw the United States employing various methods to 'encourage' in particular the less developed countries and newly industrialised countries to accept the insertion of TRIPs into GATT". See Dutfield, op. cit., p. 12. See also, M.D. McGrath, 'The Patent Provisions in TRIPs: Protecting Reasonable Remuneration for Services Rendered – or the Latest Development in Western Colonialism?' in *European Intellectual Property Review*, 7, 1996, pp. 398-403.) Dutfield also cites Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, Brookings Institution Press, Washington D.C.,1998 and Susan K. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*, State University of New York Press, Albany, 1998 on the same issue.

[36] Technological advances are of course contingent upon social and cultural structures of knowledge, the activities of particular agents and various material factors. Assigning absolute primacy to either material or ideational factors in causative chains is problematic. Which is not to suggest that at some points, broad characteristics of causation cannot be established. Such causations however are infinitely complex.

INTELLECTUAL PROPERTY AS A TRADE RELATED ISSUE: THE QUESTION OF COMPETITION

A particularly good account of the political and economic factors at work in the development of TRIPs is given by May.[37] May points to the agency of two distinct actors in the development of TRIPs both of whom had an economic interest in reforming the international intellectual property system. The two actors however possessed very different economic agendas. In the 1960s and 70s developing states pressed hard for reform of the international system as it then stood. While any change from the status quo was initially resisted by the developed states, in the early to mid 1980s their attitude to reform changed, a shift that May suggests was largely due to the lobbying of corporate actors.

In the 1960s, the developing states came to regard intellectual property as a protectionist measure promulgated by developed states as a method of maintaining a technology gap that favoured the economies of the latter.[38] During the 1970s, *The Group of 77* argued for a dilution of intellectual property laws within their own boarders and, with the help of the *United Nations Conference on Trade and Development,* had some success in reducing the monopoly rights accorded intellectual property.[39] The process of agitation led to *The Diplomatic Conference for the Revision of the Paris Convention*, which sat for the first time in 1980. However all four of the scheduled conferences became deadlocked on the question of the purpose of patent laws. Developing states viewed patent as development issue – such devices were a bar to technology transfer and prevented such states from competing effectively with developed nations. The developed states stuck to the well-worn instrumental

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[37]Both May and Dutfield cite the same sources for accounts of the development of TRIPs. Peter Drahos, 'Global Property Rights in Information: The Story of TRIPs at the GATT', *Prometheus* 13, 1 June, 1995, pp. 6-19. Also, Susan K. Sell, 'The Origins of a Trade-Based Approach to Intellectual Property Protection', *Science Communication* 17, 2 December, pp. 163-185. The account of the development in this chapter is taken from May and Dutfield.

[38] May quotes Sell as follows, developing states "seized on patent protection as a culprit behind import monopolies and patent abuse as a tool to prevent them from developing their own technology for the internal market and for export." Quoted in May, op. cit., p 83.

[39] The 77 poorest states of the world at that moment.

justification of intellectual property, that without such measures there would be no investment, no innovation, no economic growth. For the latter group intellectual property was a well-established 'fact', the only issue in question was to whom the rights belonged.

Unfortunately for the developing states, rather than simply defending the status quo, the debate seems to have alerted the developed states to the importance of intellectual property and deficiencies of WIPO as an administrative agency, which led them to attempt to strengthen the international regime. However, the developing nations' approach to intellectual property as 'a trade issue' set the future framework through which international intellectual property would later be understood by the developed states.

By the early 1980s, the repercussions of the collapse of Bretton Woods agreement and the oil crisis were melding with the market deregulations of the 'New Right' and the broader effects of economic dematerialisation. The growth of biotechnology and communications sectors in the same period increased awareness of the importance of intellectual property.[40] The earliest cases debating the possibility of granting copyright protection to software codes date from 1982/3. By the mid 1980s, most developed states had either handed down court precedents allowing software codes to be copyrighted or passed specific legislation granting protection.[41] The up-coming Uruguay Round of GATT therefore offered the perfect opportunity to address the issue of international intellectual property through the prism of *trade agreements*. As May notes, by the Uruguay Round of 1986, the developing states still considered intellectual property "a development issue". However for the newly emergent

[40] For the importance of these sectors in the early 1980s see the contemporary literature: Edward Yoxen, *The Gene Business: Who Should Control Biotechnology?* Pan Books, London, 1983 and Les Levidow and Bob Young, *Science, Technology and the Labour Process*, vols. 1-2, Free Association Books, London, 1985. Both books cover the milieu of the late 1970s and early 1980s.
[41] G. Dworkin & R. D. Taylor, *Blackstone's Guide To The Copyright, Designs & Patents Act 1988*, Blackstone, London, 1989. The first important patent in the contemporary biotech sector – i.e. on a living organism – is Chakrabarty 1971.

'knowledge economies'[42] "intellectual property was now an invaluable and crucial resource linked to competitiveness".[43]

In response to the upcoming Uruguay Round, the knowledge-based industries formed the *Intellectual Property Committee,* or IPC, with the aim of lobbying the governments of developed states (where intellectual property protection was rigorous) to place a new intellectual property agreement on the GATT agenda. The IPC was sponsored by knowledge-centred industries that were "perceived widely to be the competitive and crucial sectors for the continuance of US economic strength and well-being".[44] The software industry was one of the key players, partly because copyright is, for reasons that will become clearer in the closing sections of this chapter, currently the most vulnerable form of intellectual property[45]. Sell, quoted in May, explains the role of the IPC in framing TRIPs in the following way:

> The IPC began by pitching its proposals to the US government and then pressed its case abroad. It worked hard to convince the industrial associations of Europe and Japan that a code was possible, and then mobilised them to support its quest to include intellectual property protection in the Uruguay Round. The three groups then worked together to produce a consensual document, rooted in industrial countries' laws, on fundamental principles for a multilateral approach to intellectual property protection. This industry coalition presented its document to the GATT secretariat and Geneva-based representatives of numerous countries. This process, in which industry played such a central role, was unprecedented in GATT.[46]

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[42] The inverted comas here are to draw attention to the fact, that in this period, the use of the term is anachronistic.
[43] May, op. cit., p. 84. Despite being very useful for a consideration of the knowledge economy, consideration of the concept is not central May's book. Nevertheless, his discussion of competition notes the importance of maintaining and expanding intellectual property law for the competitiveness of 'knowledge-based industries'.
[44] Ibid., p. 82.
[45] Copyright is particularly vulnerable to both technological challenge and 'cultural critique'.
[46] Sell, quoted in May, op. cit., p. 82.

As May notes, the IPC effectively drafted TRIPs leaving the negotiators of national governments to fine tune its proposals. Part of the reason for its success, he suggests, was its ability to present itself as representing the crucial sectors of the new information-based economy, and base its submissions "in the discourse of transformation to an information society".[47] The globalising generalisation of the 'information age' tended to obscure the fact that the IPC lent particular "legal support to the US negotiating team"[48] and that the IPC "derived its influence from the economic resources and power it represented in the US domestic economy."[49] It is, in other words, reasonable to question the generality of the claim that the transformation to an information age is globally uniform, and uniformly, 'a good thing'.[50] The account of the emergence of TRIPs given by May rather demonstrates the enactment of foreign policy objectives of economically interested state actors. Property systems do not emerge without the agency of states, without the power of such actors there would be no institution of property. In any definition, property is a social institution constructed and reproduced by state legislation, developed in response to social requirements, filtered by existing political power. The fact that TRIPs is an international agreement between nation states does not belie the general observation that power manifests itself in those whose interests are prioritised by the law.[51]

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[47] May, op. cit., p. 82.

[48] Ibid., p. 82. May cites both Drahos and Sell on this issue. See Drahos, op. cit. and Sell, *Power and Ideas*, op. cit., Dutfield quotes the same Drahos text. He also quotes Ryan on the horse-trading leading to TRIPs. See Ryan, op. cit. He also quotes G. S. Nijar, *TRIPs and Biodiversity: The Threat and Responses: A Third World View*, Third World Network Paper 2, T.W.N. Penang, 1996. Dutfield gives slightly more weight to the view that that states themselves, particularly the US Europe and Japan, were the chief agents behind the lobbying. Surprisingly, however – given that elsewhere he cites Sell's paper – his analysis omits any mention the role of the IPC.

[49] May, op. cit., p. 82. (Even Dutfield, who is generally less critical of the current system than May, notes that the US had a particularly hard-nosed policy over Uruguay. He cites in particular, the insistent threat that the proposals for TRIPs were accepted 'in their totality' or not at all.)

[50] It is also worth pointing out that globalisation – in the restricted sense that it is enacted at the level of internationalising property regimes – is a rather one-way street. From this perspective globalisation looks very like 'westernisation' or even more specifically, 'Americanisation.' (The stress placed on the classically Anglo-American 'instrumental' justification of intellectual property in the agreement is particularly noticeable). This reading of the thrust of foreign policy seems to run counter to many contemporary accounts of globalisation, which have tended to stress the multidirectionality of globalisation. A good example of this is Hardt and Negri's concept of 'the Empire'. The claim to fully represent or dominate the concept of 'globalisation' in all aspects, is not made in the latter text.

THE KNOWLEDGE ECONOMY AS POLICY: THE CULTURE OF CREATIVE DESTRUCTION AND THE PROBLEM OF PRICE COMPETITION

Given the account of the emergence of TRIPs provided by May, it is now necessary to assess the relationship between the agreement and the theorisations of the knowledge economy we have already encountered. One obvious effect of the agreement is the coding of some trade practices as legal an others as illegal. On an international level then some agents are able to maximise and legitimate their cultural and trade practices through the imposition of the law while delegitimating alternatives.[52] The original arguments of the Group of 77 are important here. As already suggested, developing states have long regarded the use intellectual property as a form of 'unfair' trade competition, a form of state protectionism and thereby, an issue best addressed within the context of development.[53] However, as May points out, the effect of TRIPs is to delegitimate such a reading and concretise "the rights of owners" in its place.

As suggested in Chapter Four, theories of the knowledge economy centre on an ideal of economic subjectivity that is creative and attuned to the production of intellectual properties. As already suggested in this chapter, without the effective internationalisation of such laws, the geographic relocation of manufacturing, upon which the theory of the knowledge economy is grounded, will fail.[54] At this point then, it is possible to begin to posit some specific reasons as to why Schumpeter's

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[51] Put another way, the extent to which the agreement is adhered to in the future will provide a good indicator of the power of actors those in whose image such property relations were initially forged.
[52] Effectively, this legitimates the use of coercion against those states or individuals who refuse to comply with the new regime.
[53] That this is still a prevailing view is attested to by the recent evocations of TRIPs clauses allowing poorer states to manufacture anti-aids drugs without paying the customary price for the patent licences. The South African Government claimed it needed to relax licences in order to deal with its aids epidemic. This claim however, was challenged by the drug companies concerned, on the basis that the priorities of public pending in South Africa, could be reorganised in order for them to be able to pay the full price. Notwithstanding whether such an option was realistic, or ethical, the debate centred on a familiar argument: corporations from developed states insisted on the priority of ownership rights, while the developed states insisted upon the priority of development and health.
[54] A good example of such relocation came as the draft of this chapter was being written. On the 10th February 2002, the vacuum clearer producers Dyson announced the relocation of their manufacturing wing from the UK to the Far East with the loss of 800 jobs. This is particularly apposite since Dyson has, for the last five years, actively stressed the innovatory aspects of its products in advertising campaigns based upon the number of patents applicable or pending on various parts of its machines.

conceptualisation of creativity, rather than any other, has been given such importance in theorisations of the knowledge economy.

The development issues outlined by the Group of 77 were based upon what is, and what is not, deemed to be 'fair competition'. For such states intellectual property was/is viewed primarily as a 'market intervention' – a view that has sound historical justification[55]. Even the standard 'instrumental justification' – widely used by developed states in arguing *for* TRIPs – suggests that intellectual property is an instrument that encourages investment in new products and techniques of production by temporarily holding off 'price competition'.

It was the perceived inadequacies of classical theories of price competition that led Schumpeter to theorise creative destruction in the first place. For Schumpeter, price competition was a poor guide to economic performance because the most effective forms of competition were based on creating new products, new markets and new processes of production. The contemporary reading of Schumpeter however, has recast his analytical distinction between price competition and quality/innovation competition, forging from it a socio-cultural distinction, that privileges sites of 'radical' innovation over sites of 'incremental' innovation. In parlance of the knowledge economy, 'incremental innovation' is another way of saying 'price competition'.

The alarm that gripped developed economies after the deregulations of the 1970s and 1980s was rooted in a fear of *price competition* from developing states – an advantage that the Group of 77 saw clearly, if only the monopoly on technology could be challenged by dismantling patent laws. In other words, it was widely recognised, in both developed and developing states, that the economic advantages of older industrialised national economies were likely to erode under pressure from less regulated, cheaper workforces in developing states. The theory of the knowledge economy that emerged in developed, (post) industrial, high-cost economies did so

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[55] As was established in Chapter Two.

because of a general recognition that such economies could no longer compete at the level of 'productive efficiency'.[56] The attraction of Schumpeter's 'creative destruction' to theorists of the knowledge economy lay therefore in its ability to 'answer' the question posed by global price competition. This reinvention of Schumpeter's concept moved it from an *analysis* of the conditions under which *all* firms historically operated, into a political *policy* that addressed the specific conditions of competition between particular *national economies*. Where a national or regional economy could no longer compete in world terms on the basis of price, it had no choice but to attempt to compete on the basis of 'quality', or 'creative innovation'.

This variation on Schumpeter's concept suggests that the theorisation of the knowledge economy is not simply a recognition of the fact that firms *are* increasingly knowledge-orientated. Nor is the knowledge economy itself the result of a 'natural' or 'evolutionary' phenomenon that stems from material factors – the burst of technology over the last thirty years. Rather it suggests that the theory of the knowledge economy has about it the character of an incantation, a plea for companies based in the developed world *to evolve* into knowledge-based firms. In this sense then, the knowledge economy is as much a geo-strategic, economic and political construction, a project or *policy objective*, as it is a straightforward historical occurrence born out of technological innovation.

The emergence of TRIPs clearly demonstrates the *political* will necessary to create the infrastructure such an economy requires. The debate that led to the concretisation of an international system of intellectual property is also clearly marked by the powerful tensions played out between the various groups with an interest in the settlement. On one hand, intellectual property is clearly the form of property most inclined to support the pursuit of the economy based upon innovation – the natural partner to the 'radical' innovation as opposed to 'incremental' innovation or 'price competition'. On the other hand (as instrumental justifications and the protestations of the Group of 77 suggest), it is also a perfect instrument for 'market intervention'. TRIPs is therefore doubly

[56] 'Efficiency' in this sense translates as low cost, deregulated labour for the manufacturing sector.

attractive. Firstly, it *legitimates* market intervention by recourse to the expedient that intellectual property has long existed in developed states, and is therefore, a 'naturalised' reality. By the same token it is also demonstrably, a 'good thing', since it can claim to have encouraged the production of innovative technologies at the centre of the argument over fair competition.[57] Secondly, by bringing the issue of *property* to bear on an argument about *competition*, it effectively condemns certain forms of price competition as '*theft*'[58]. In the age of TRIPs, the forms of price competition advocated by the Group of 77 in the 1970s are placed off limits, and condemned as 'piracy'.[59] Securing TRIPs therefore was a vital geo-strategic issue for developed states/knowledge economies, since it both encourages, and enables, the move towards a workforce based upon creative labour deemed vital to economic growth at home, while *simultaneously* intervening in the global market to forestall the effects of price competition.

The Limits of the Knowledge Economy and the 'Free-Market'

The advent of TRIPs therefore has repercussions for the notion of globalisation in terms of the 'free market'. Knowledge economies require the widespread acceptance of social institutions such as intellectual property. The creation by force of such an international system is a vital example of the practical, and conceptual, *limits* of

[57] In such a view, globalising intellectual property will encourage innovation everywhere by protecting its rewards.
[58] May notes that the effect of TRIPs is to impose a competition discourse "based on the paradigm of property and theft". May, op. cit., p. 86.
[59] May argues in his analysis of the Group of 77, that developing states see only an 'enclosure' of what *should* be public knowledge, vital to their development strategies. Via TRIPs, the developed states have defended and expanded a legal structure of property that stresses the primacy of proprietorship, making any other view seem 'nonsensical'. Also relevant in May's discussion is his point regarding issues of piracy and technology transfer. The developing states are currently in a position similar to that of developed states in the 18th and 19th centuries. The question arises as to whether developed states would have reached their current position had TRIPs been in force a hundred or two hundred years ago. (It is widely accepted that the relative looseness of intellectual property in the period enabled its rapid industrial development. Here, the development of photography in mid 19th century England and France, makes for an interesting case in point.

markets per se. [60] The fact that political and legal intervention is so obviously required to ensure the 'free market', reiterates the social basis of all markets and the political will required to create them.[61] It is also a vital example of the way the (theoretically) level playing field of 'perfect competition', that informs the concept of the 'free market', is inevitably tilted toward particular *asymmetries* that are built into the 'institutional architecture' that supports the market.

To restate the above more simply, there is certain 'directionality' in the notion of the 'free market' established in the era of TRIPs. The international concept of property that TRIPs guarantees for the global 'free market' is partial, and rigged towards the interests of its initial proponents.[62] Put simply, an analysis of the emergence of TRIPs demonstrates that the uniform application of *particular* property instruments is required, in order that a *particular* notion of 'competition' can be enacted. Firstly, intellectual property is defined as a proprietorial issue, as an issue of 'owners rights', as an encouragement to innovation, and *not* as an issue of market intervention, a problem of monopoly, or as an issue of development. Secondly then, the 'free-market' is defined in a way that is responsive to perceived needs of a *particular* economic analysis, from which are derived *particular* competition policies, which are designed to benefit *particular* developed states. *Control of the characterisation of what constitutes a 'free market' is, in other words, a geo-political issue.* The power to characterise resides with developed states, or knowledge economies, and reflects economic and *cultural* distinctions made historically within such jurisdictions. There

[60] Given the capacity for linkage-bargaining diplomacy within TRIPs, 'force' is not too strong a term. The history of Sino-US relations has also been dogged by US attempts to push China into accepting and enforcing intellectual property laws. (A good account of the historical and contemporary relationship as regards this issue can be found in Alford, op. cit. It is unreasonable to suppose that international relations are conducted upon a rational meeting of equal minds for the general good.
[61] In his introduction to *The Limits Of Globalisation*, Alan Scott focuses on the economic limits of globalisation, by revisiting the arguments of Karl Polanyi's *The Great Transformation.* See Scott, op. cit. Polanyi's insistence that markets are *social* institutions – planned, created and regulated by political entities – is clearly in tune with this view. On another level, Polanyi's stress on the effect of political philosophy, or belief in economic process, is also in line with the argument pursued in this chapter. Polanyi, op. cit.
[62] May quotes Primo-Barga as follows: "Differences in national economies and their levels of development make it unlikely that the same protection afforded to intellectual property argued for by developed states will benefit all signatories in the same manner or to the same extent". May, op. cit., p.

is, in other words, a strong cultural element in play. In the context of TRIPs, the globalisation of the 'free market' looks very like 'westernisation' (or even more specifically 'Americanisation').[63] To be more accurate, the appearance of a uniform 'free market' enacted by TRIPs tends to obscure the fact that the property institutions upon which it is founded are skewed towards the protection of forms of intellectual property that reflect the corporate power of the IPC, in whose image, and for whose benefit, TRIPs was initially drafted.[64]

MOBALISING CREATIVITY AS FOREIGN POLICY

THE CULTURE OF CREATIVE DESTRUCTION

The tilting of the property institutions that underpin the market towards particular cultural determinants can be demonstrated in a number of areas. Schumpeter's 'gale of creative destruction' represented the general conditions of existence in which *all* firms operated. It was not an economic policy but a brute fact, structural to the capitalist system itself. The all-encompassing nature of creative destruction stemmed from Schumpeter's belief in the direction of history, which he adapted from the narratives of Marxism. Creative destruction, as Schumpeter tells it, is predicated on the

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88. See also, C.A. Primo Braga, 'The Economics of Intellectual Property Rights and the GATT: A View From the South', Vanderbilt Journal of Transnational Law 22, 1989, pp. 243-264.

[63] For example, the stress in negotiations on the (classically Anglo-American) 'instrumental' justification of intellectual property was particularly noticeable in the agreement. May's argument is that the justificatory schemata utilised in the development of TRIPs is heavily indebted to such justifications.

[64] To avoid confusion here it is necessary to reiterate that multinational corporations are rarely multinational in ownership. Sell's argument also needs to be reiterated. The IPC worked with particular national entities with whom its interests coincided. The US government was first on the shopping list, Europe second and Japan third. The IPC had the interests of its members in mind and acting rationally approached those global actors most likely *and able* to meet its needs. The developed nations that then pursued TRIPs at the trade-negotiating table were exactly the economies vulnerable to price competition from developing nations and precisely those economies increasingly designating themselves as 'knowledge economies'.

assumption that history itself is an intelligible, global process. If creative destruction applied at all, it applied everywhere equally.

The recently modified version of creative destruction however, has rather concealed these underlying beliefs. In part this is because belief in the straightforward, dialectical view of history is currently unfashionable and widely regarded as overly deterministic. More importantly perhaps, the all-encompassing breadth of Schumpeter's view also mitigates against the use of creative destruction in a partial and strategic manner. As already suggested, the current use of creative destruction is topographical, identifying *particular* states or regions as 'creative destructive cultures'. For example, Leadbeater specifically places his model of creative destruction in Silicon Valley, setting it against other, more incremental, price competitive, economic models such as those of Germany and Japan. Fisher finds creative destruction to be entirely coextensive with the 'American Way'. To put this another way then, Schumpeter's concept of creative destruction has been particularised and 'culturalised'.

As suggested in Chapter Four, an unconscious *cultural* specificity operates in Schumpeter's original work. Schumpeter tends to view the world through a particular set of universalising cultural beliefs that can be placed in context of a particular moment of Modernism. In the contemporary usage the cultural positioning is, in contrast, conscious. In the era of TRIPs, creative destruction has come to mean a setting apart of one type of economy from another, a differentiation of cultural territories. In this usage, the 'culture of creative destruction' is deployed in defence of particular, economically developed states against the perceived threat of price competition from developing states. The creative-cultural concepts deployed in theorisations of the knowledge economy parallel those arguments used to produce TRIPs. In other words, a division is implicit in the new international legal system, which pits one form of 'culture' against another. An examination of a well known legal case of recent years will help to clarify how such cultural determinations operate within intellectual property law in the era of TRIPs.

CEATIVE DESTRUCTIVE ECONOMIES V INDIGENOUS KNOWLEDGE

Case Study: Patenting Turmeric

As has been suggested, the concept of a knowledge economy is predicated on a series of ideas about creativity that together form a 'response' to a fear generated by global price competition. As suggested in Chapter Four, the 'ideal subject' of the knowledge economy is formed from a matrix of heterogeneous concepts of creative labour. The considerable stress placed on 'radical' innovation, or creative destruction, within the matrix is particularly important because of its association with the historical and cultural moment of early 20th century avant gardism. Even in its current 'strategic form', creative destruction is marked, historically and thematically, by early 20th century Modernism. As suggested in Chapter Four, there is a symmetry between the avant gardist urge to gamble everything on 'the future' and the contemporary business incantation that one should aim to make one's own products obsolete. The deployment of such creative doctrines at international level within the intellectual property regime inculcates a cultural hierarchy between developed and developing states. The knowledge creation model operated by developed economies envisages a positive image of creativity that effectively casts alternative, 'non-explicit', forms of knowledge production, dissemination and asset control, negatively as 'traditional' or 'indigenous'. This culturisation of trade and property relationships is a feature of the current struggle over rights to 'indigenous' or 'traditional' knowledge systems.

This problem can be addressed on a number of levels. The conflict between the rhetorical concept of invention used in patent law and other forms of creative labour is one such. This problem is most apparent where patentees have failed to make sufficient distinction between 'their' 'inventive' step and the creative labour embedded in knowledge bases from which their work draws. For example in 1992 a patent was awarded to a firm called *Agrecetus* that ceded control on *all* future forms of transgenic cotton. Two principle objections can be made against such a patent. Firstly, and most obviously, such a patent has extraordinary breadth, which creates

disincentives to other researchers in the field inhibiting future innovation.[65] The second, less obvious objection to such a patent, and the most important for the current argument, is that it fails to sufficiently recognise the contribution of *previous* generations of 'knowledge producers' that have refined cotton by non-genetic means. This point is particularly acute in the large number of cases where patents have been granted on techniques and processes that have had a long history of usage in the 'traditional' cultures of developing states.[66] One of the most widely debated of such cases involved a patent granted in 1995 to the Mississippi Medical Centre for the use of Turmeric in healing wounds.[67] A challenge to the patent was lodged by the *Council of Scientific and Industrial Research of India* (CSIR) on the basis that the patent was 'insufficiently novel' and in 1996, it was successfully overturned. The arguments put forward by CSIR led to the repeal are informative as regards the attitude of knowledge economies toward systems of creativity and knowledge that they regard as 'traditional'.

Patent law doctrine requires that there is no conflict between the product or process seeking patent protection and knowledge that is already in the 'public domain'. However, the definition of the 'public domain' is limited. In one sense, the limitation is straightforward. As Dutfield points out in his discussion of the case, the definition cannot be too broad, there are, after all, practical limitations as to how far a patent examiner can reasonably be expected to research the grounds of a patent. However the limitations on the legal 'public' domain also reflects certain cultural determinations.

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[65] Challenges to the patent were made on this very basis. However the cancellation of the patent in 1994, was not made on such arguments, but rather on the basis that the patent was not sufficiently *novel*. See Dutfield, op. cit., p. 16. Wallace Judd, quoted in Schulman, suggests that the breath of such patents stems from the fact that many recent innovations effectively established a new field, or class, of research and/or commodities. In consequence, patent offices have been inclined to grant control of the broad concept rather than a particular innovation. Judd likens the situation to granting patents on the idea of a mousetrap rather than on a particular improvement to mousetraps, a distinction that in a new field of research can be surprisingly subtle. See Schulman, op. cit., p. 7.

[66] Granted most commonly by the US Patent and Trademark Office.

[67] Dutfield quotes 40 patents in the US and 153 world wide on techniques or products derived from the Neem tree (Azadirachta indica) alone. Nearly all the patents use 'public domain traditional knowledge as a starting point'. Dutfield, op. cit., p. 66.

In its patent application, the University of Mississippi actually pointed out that the knowledge on which its patent was based was commonly available. The application openly stated that turmeric "has long been used in India as a traditional medicine for the treatment of various sprains and inflammatory conditions".[68] Despite the fact that the knowledge was clearly *public*, the patent was granted because the University and US patent office were working on the view that such 'traditional' uses were irrelevant to the legal concept of the 'public domain'.

Two issues may have had a bearing on their view. Firstly a rigorous application of the principle that intellectual property rights are assigned to the 'first applicant' rather than 'the inventor' may have suggested that, since there was no prior patent, the Universities claim was, defacto, 'novel'.[69] Secondly, and more importantly for this discussion, the University of Mississippi and the Patent Office were relying on a definition of 'public domain' that limits the concept to that which is public in the United States in the form of reports in scientific journals.[70] On such a view then 'traditional' or 'indigenous' knowledge bases are designated as 'outside the public domain'. Crucially, the University's patent was not revoked in 1996 because of a recognition that the properties of turmeric were known to tens of millions of Indians, and had been in the 'public domain' for hundreds of years, but because the CSIR were able to produce 'the relevant scientific literature'.[71]

[68] Quoted in Dutfield, ibid., p. 65.
[69] This principle has a long history in US law and has been internationalised by TRIPs. As suggested in chapter two, the 'first applicant' concept can be found in the privileges issued in 16th century Venice. However such a concept has, in recent years, become increasingly farcical. In January 1998, the office issued a patent, No 5,707,114 on an '*invention*' consisting of "an annular rim, a central hub and a plurality of spoke portions running between the rim and hub." Quoted in Schulman, op. cit., 168. In an attempt, no doubt, to be self-satirising, the office granted the patent not to *the wheel* per se, but limited its scope to 'vehicle wheels' – which of course, somewhat narrows the field of potential litigants! Unlike the patent successfully sought on Kirchoff's Law of 1845, (which states the electric current flowing into a circuit equals the current flowing out), the wheel patent is not as far as I can ascertain, an attempt at satirisation cooked up by an associate of Richard Stallman. See Schulman, ibid. p. 11.
[70] "Patent officers in the United States are not required to accept the evidence of traditional knowledge held outside the US as prior art (i.e. already known) unless it has been reported (and thereby validated) by scientists and published in learned journals or otherwise been made available to the public." See Dutfield, op. cit., p. 65.

Modernism Versus Tradition

The definition of the 'public domain' at stake in this case is characteristic of the creative ideology of the knowledge economy. For the purposes of intellectual property law, the 'public domain' is given a *geo-specific* identity – in this case it is limited to knowledge available in the United States. However, more importantly it is set within discursive parameters of science, industry and property. Firstly, for knowledge to be recognised as in the 'public domain', it must conform to particular standards that, in general, reflect the prerogatives of technological 'modernity'. Secondly, it must be rendered in an 'explicit' form – it has to have been published. In other words, the 'public domain' of patent law consists of knowledge that has *already* entered into the realm of intellectual property by dint of the fact that it is written, and therefore already subject to copyright.[72]

This characterisation of the 'public domain' creates a conflict between the knowledge economies – predicated as they are not simply upon the notion of 'modernity' but upon the avant gardism of 'Modern*ism*' – and their conceptual other, that is, 'tradition'. The disclosure of knowledge within 'indigenous' cultures, or 'traditional' knowledge structures, is effectively designated as *tacit* knowledge. 'Traditional' knowledge systems then are designated as reservoirs held together only by tenuous, 'non-explicit' forms of 'possession' [73]. In this culturally determined view, tacit knowledge bases are 'open' to be read by actors from developed states and reconstituted as 'explicit' knowledge through the system of intellectual property.

The characterisation 'indigenous' implies that, in such societies, knowledge is buried within the fabric of 'tradition' and that creative production is, in some sense, 'static'. This characterisation recalls a view that was prominent in 19th and early 20th century anthropology but which is now widely discredited. Defining cultures as 'indigenous'

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[71] Ibid., p. 65.
[72] Catch 22.
[73] In other words, they are not legally held as *property* and, as far as knowledge economies are concerned, are therefore, ripe for exploitation.

or 'traditional' in contradistinction to 'Modernity' was a central trope of early ethnographers. The well-founded critique of such method drew attention to the fact that in such narratives the 'discovered' culture was always viewed as 'complete' and 'authentically pure' at the moment of 'discovery'. [74] The result of such characterisation was the presentation of the 'other' culture as 'static', giving no credence to the possibility that processes of creative development are ongoing. From the current perspective, such a failure of recognition is crucial since it assumes that, in the absence, and active use of, intellectual property laws, no creative activity *at all* is underway with respect to such knowledge bases. The representation of knowledge bases as 'handed down by tradition' creates the myth that an alternative 'public domain' exists, unencumbered by active creative agents, or 'law', and that it can be plundered at will. As the established anthropological critique of such a position points out, knowledge that is in use is never 'static', that which is characterised as 'tradition' is always contingent on an *active* actualisation in the *present*. The characterisation of the 'public domain' in patent law is therefore, culturally loaded and methodologically suspect.

To sum up then, the cultural hierarchy in operation in international intellectual property disputes, recalls, quite closely, the outlines of 20th century Modernism. As in accounts of avant gardism in the visual arts from which theories of the knowledge economy take sustenance, the 'inescapable' thrust of 'Modernity', or the knowledge economy, gains its identity from that which *it* designates as 'traditional'.

[74] See for example James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art,* Harvard University Press, London, 1988. Also, William H. Sewell, Jr., 'The Concept(s) of Culture', in *Beyond the Cultural Turn: New Directions in the Study of Society and Culture*, eds., Victoria E. Bonnell and Lynn Hunt, University Of California Press, London, 1999.

Counter-Commodification and the Entrenchment of the Logic of the Knowledge Economy

If the relationship between knowledge economies and its 'others' is as described above, it may not remain so for long. While the *limits* of the knowledge economy are cultural as well as practical, the borders are continually on the move. The 'creative destruction' verses 'tradition' dichotomy between developing and developed states is already blurring. While Indian farmers and their representational bodies are highly critical of, and resistant to, TRIPs, India also has a burgeoning software industry to whom the agreement is vital.[75] There is also an increasing tendency for developing states to join in the commodification game initiated by knowledge economies. Of the 156 patents granted world wide in connection with the Neem tree, since 1995 six have been awarded to Indian scientific institutions.[76] In other words, one posture available to developing states in the geo-political battle for knowledge resources is to use commodification as a strategy of defence against corporate encroachment.

It remains to be seen how far this attempt to redress the imbalances inbuilt within the international system will be. There are two 'classical' narratives that can be told about the social institution of property. The first suggests that the institution of property is determined favourably in relation to the interests most powerful at its inception. The emergence of TRIPs would certainly seem to follow this truism. TRIPs was certainly born out of the agency of particular international powers and, as it currently stands, the settlement reflects the interest of such agents. The second narrative of property presents it as all that stands between the individual and the capricious power of the state. While the first view is, by and large, true of 'real' and 'movable' property due to the natural limitations of such resources, it may not be ultimately so for the theoretically limitless resources of intellectual property. There is already evidence that the second view – property as a bulwark against despotism – may gain ground in the future.

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[75] See Dutfield for comments, op. cit., p. 13.
[76] Ibid., p. 66. Dutfield's figures presumably applied as of 2000, his date of publication.

A counter blast of commodification in order to prevent 'the corporate takeover' has in fact already begun. This could be described as 'fire-walling' – commodifying knowledge to ensure that it is held in the public domain in order to prevent other, more business-orientated, actors from annexing common resources. There are numerous examples of such fire-walling.[77] '*Sui Generis'* forms of intellectual property are currently being developed to protect 'indigenous' knowledge against unwanted commodification by the corporations based in developed states.[78] Such rights could in the future cover a vast amount of 'common knowledge' – dealing with everything from folklore to farmer's rights to traditional plant varieties, to general rights awarded to communities for 'informal innovations and bio-diversity related skills' which are currently outside of intellectual property law.[79]

The ultimate question raised by the increased use of intellectual property instruments in all areas, is familiar.[80] The recognition that a balance must be struck between encouraging innovation, and granting so many rights that the 'public domain' becomes insolubly blocked by the fencing off of resources, is at least as old as the Venetian privilege system.[81] Designating an item as property, grants the owner the right to withhold use of the item against all comers. While that right can be use defensively, it is also a principal central to market economies, since it is through that mechanism that

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[77] In 2001, following attempts by Celera Genomics to patent as much of the human genome as they could lay hands on, the Welcome Institute suggested 'fire -walling' as a way of keeping the human genome in the public realm. A further example of firewalling can be seen in US academics' attempts to copyright their lectures – in advance of Universities claiming such rights in new contracts.

[78] Drahos, quoted in May, suggests a number of responses for developing states in response to the spread of intellectual property in the era of TRIPs. firstly, non-compliance which, given the power of the WTO, is dangerous. Secondly such states may set up a TRIPs monitoring group to make the costs of the agreement transparent, and thus challenge the principles upon which the treaty is based – i.e. that the agreement will aid technology transfer and thus development. The third option is to develop sui generis intellectual property laws. As May notes the US has in the past itself used this method to great effect itself. May, op. cit.

[79] The scope of such new rights is massive and there are a plethora of initiatives in the offing. Dutfield provides an analysis of those that relate to the issue of trade & biodiversity throughout his book. Dutfield, op. cit.

[80] This also applies to the growth of the whole sector of 'cultural rights'. For a view on the concept of cultural property, see Joseph L. Sax *Playing Darts at a Rembrandt: Public and Private Rights in Cultural Treasures*, University of Michigan Press, Ann Arbor, 1999.

[81] As Dutfield points out the costs to R&D may become prohibitive particularly in the pharmaceutical sector where 'future commercial products such as therapeutic proteins or genetic diagnostic tests often requires the use of multiple patented gene fragments'. Dutfield, op. cit., p. 16.

a false scarcity can be engineered, and price levels managed.[82] Fire-walling therefore runs the risk of further embedding the expansion of intellectual property law and thereby legitimising to the concept of the knowledge economy from which it seeks defence.

Though fire-walling offers a partial defence from economic encroachment, it also paradoxically legitimates the spread of property forms into arenas of social organisation, which until recently had remained free of such concerns. In this, it conforms to a pattern that knowledge economies themselves have set in motion. The developed states conducted the negotiations that led to TRIPs in a manner which implied that intellectual property within their boarders was uncontested and fully politically justified. Yet, as shall be demonstrated in Part II, even as negotiators projected this naturalised vision of intellectual property, vital aspects of such laws were being fiercely contested in the United States. The manner of that contest, and how a settlement was reached, was also crucial in establishing the equilibrium in contemporary creative theory vital to the operation of the concept of a knowledge economy.

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[82] As May suggests, the right to withhold or restrict use has been characterised as "the central issue of political economy". May, op. cit., p. 21.

PART ~ II

THE FATE OF CRITICAL ART PRACTICE

THE CULTURAL CRITIQUE OF INTELLECTUAL PROPERTY IN THE ERA OF KNOWLEDGE ECONOMIES

APPROPRIATION ART AND THE 'STRONG' INTERPRETATION OF THE SEMIOTIC/NETWORK

In the proceeding section, consideration has been given to some of the material and theoretical limits of the knowledge economy with respect to intellectual property. The viability of such economies is also vulnerable to other forms of limitation and challenge. The two most widely discoursed concern, on one hand ethical legitimacy of intellectual property, and on the other, its technical and logistical viability.[83] The number of such critiques has increased exponentially in line with recent expansions of the law.[84]

Although less prominent, a further area of critical contention exists in the arena of culture. In the late 1970s and early 1980s, a new form of 'critical art practice' emerged that sought to confront the prerogatives of copyright law. Having been in retreat for a

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[83] Technical questions for example, may depend upon the ease of copying and the availability of reproductive technologies. In contrast, logistical questions might address whether intellectual property laws (where existing) are actually obeyed and whether or not, they can be enforced. Copyright seems particularly threatened by contemporary technologies and the social practices they enable. In contrast, patent law seems most vulnerable to ethical challenges. For more comments, see Appendix D.
[84] However, as a number of writers have recognised, despite new ethical and technological questions, many critiques reproduce arguments about legitimacy and viability which were in play at the inception of the modern intellectual property laws and which have, in a sense, never really fallen out of fashion. For example Bently and Sherman Barron, Saunders, op. cit.

number of years, the practice of ‘appropriation’ has recently re-emerged as the expansions of intellectual property law have re-ignited critical debate with respect to such laws. From its development, to its quashing, and recent re-emergence, the history of ‘appropriation art’ is central to a study of the development of the knowledge economy.

The roots of ‘appropriation art’ lie in the aesthetic dematerialisation of the 1960s. In the era of the knowledge economy, its significance lies in the fact that it came to a very ‘strong’ view about the role of copyright law in cultural practice. This ‘strong’ interpretation of the semiotic/network model of creative production, viewed copyright as an instrument which reified reactio nary, and outmoded, creative concepts. In such a formulation, copyright was an obstacle to the ‘creative freedom’ of ‘mainstream’ art practice, which threatened to impede its future development. In its early phase during the 1970s, this discourse was of little significance to anyone beyond on the art world. However, with changes in the economic and political spheres in the 1980s, the ‘radical’ claims of appropriation art were significantly, and *deliberately*, toned down. In recent years however, with increased concern about intellectual property and globalisation, the earlier claims have resurfaced in the art world, and in debates about music sampling.[85]

As far as a study of the knowledge economy is concerned, the most significant aspect of the history of appropriation art is the case of *Rogers v Koons* (1989-1992). The case marks the moment that the radical *critique of property*, central to the early phase of

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[85] The re-emergence of the discourse is particularly strong in the sphere of music, where sampling and downloading of files, have had significant commercial effect. As a means of tackling the perceived cultural weighting of copyright law, many of these debates have borrowed the theoretical framework and critical language established by 1970s ‘appropriation art’. The notion that copyright is based on the concept of genius – from which the law abstracts its central concept of ‘Originality’ – is frequently cited in such debates. The notion was first floated with respect to the appropriation art of the late 1970s and early 1980s. For recent views on appropriation and sampling, see Sven Lutticken, ‘The Art of Theft’, *New Left Review* 13, Jan/Feb, 2002. p. 89-106. Also, Jason Toynbee, ‘Creating Problems: Social Authorship, Copyright and the Production of Culture’, *Pavis Papers in Social and Cultural Research* No. 3, Open University, London, 2001. For an earlier view, see Simon Frith, ed., *Music and Copyright*, Edinburgh University Press, Edinburgh, 1993. A more recent view on these issues was given in a paper by Dominic Pettman, to the *Association of Art Historians*, in 2001. see Dominic Pettman, ‘ A Break in

appropriation art, was abandoned by the 'mainstream' art world. The arguments of the case were therefore crucial to the broad establishment of a 'weaker' interpretation of the 'semiotic/network' model of creative labour that had developed from the dematerialisation of the 1960s. The establishment of such an interpretation has been vital to the smooth operation of creative concepts within the knowledge economy.

Ensuring the 'Weak' Interpretation of the Semiotic/Network

As suggested in earlier chapters, the existence and management of the knowledge economy requires the maintenance of two, *competing*, models of creative labour. Preventing a definitive confrontation between them is central to its operation. An outright application of the 'rhetoric model' would create an 'unmanageable' plethora of individual rights, threatening the established accumulations of ownership and power within the economy. An outright application of the 'semiotic/network model' threatens the legitimacy of the rhetorical concepts within intellectual property law. The ultimate 'success' of latter suggests the destruction of the institution that secures the current asset base – the 'success' of the former, a democratising of its ownership. To ensure that the equilibrium of the economy is maintained in favour of current vested interests, it is crucial that a 'weak' interpretation of the semiotic/network model achieves general ascendancy.

As suggested in Chapter Three, the semiotic/network model developed from challenges to concepts of composition and creative labour derived from rhetoric. A 'strong' interpretation of the model therefore threatens to de-legitimate the rhetorical concepts used in intellectual property law. In contrast, a *'weak'* interpretation of the semiotic/network takes up the desubjectivisation of production and the strategies of 'creative collaboration', which had developed in the wake of the assault on the rhetorical model. The 'weak' interpretation poses no specific threat to the older

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Transmission: Art, Appropriation and Accumulation', *Making Connections*, 27th Annual Conference of The Association Of Art Historians, 2001.

creative concepts within the intellectual property law, but provides a strong delegitimating narrative of with respect to the individual rights claims by creative workers. It is therefore a crucial tool in the management of the new economy.[86] The case of *Rogers v Koons* is important therefore because it marks the dénouement of the 'strong' interpretation of the semiotic/network model, and by extension, the point at which 'weak' interpretation of the new model moved into the ascendancy.[87]

FROM AESTHETIC DEMATERIALISATION TO APPROPRIATION ART AND THE CRITIQUE OF COPYRIGHT

In order to account for the issues at stake – for both art practice and the nascent knowledge economy – in *Rogers v Koons*, it is first necessary to trace the development of the 'strong' interpretation of the semiotic network, from the moment of dematerialisation up to the time of the trial in the late 1980s.

As suggested in Chapter Three, dematerialisation developed in opposition to material definitions of art, around which Greenbergian Modernism was organised. The concept of 'objecthood' *limited* the things that could be seen as art, and by extension, the kind of creative activity an artist might engage in. The concept of 'objecthood' was itself developed from the notion that a hard *separation* must be maintained between 'art and life'. Such a notion was often referred to as aesthetic 'autonomy'. Breaching the autonomy of the artwork, presented the opportunity to broaden the scope of an artist's creative labour and re-map relations with the viewer, and in doing so, overcome the art/life dichotomy.[88] A central tactic of such practice was to dissolve the concept of composition (as derived from rhetoric) into a *temporal* moment, contingent on the presence of the viewer. In this way, the ability of the 'autonomous' artwork to hold-off 'life' was gently corrupted. That power to 'hold-off' was tied to the artwork's

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[86] See for example, the discussion of *Brown v DMC* in Chapter Three above. For discussion of a more recent case in the UK, see Bently and Sherman, op. cit., pp. 191-120.

[87] The re-emergence of the 'strong' view in the last couple of years may of course change things.

material existence, its 'objecthood'. In this sense, 'autonomy' was a cognate of the 'right to exclude' central to the concept of private property. Reintegrating 'art and life' by corrupting the material borders of the artwork was then also a way of escaping the formal structures of *property* that defined the work. For this reason, dematerialisation's attack on the exclusivity of aesthetic autonomy has often been presented as a straightforward attack on the concept of *commodification*.[89]

It was from these critical narratives that, in the 1970s, a new generation of artists developed, whose work centred on the concept of appropriation. The best-known work from this period was produced by Sherrie Levine. Levine's early practice became central to the concept of appropriation as it was practiced by the slightly later generation of artists of which Jeff Koons was a member. This was in no small part due to the way Levine's practice was positioned in the critical theory of early post modernism, particularly in the writings of Rosalind Krauss and Douglas Crimp.[90]

In the late 1970s, Levine had begun to re-photograph the work of other photographers.[91] Her one-to-one 'copies' were initially taken from magazines, but later from exhibition catalogues. The works were titled using both her name and the name of the artist whose images had been 'appropriated'. For example her re-photographing of Edward Weston's photographs of his son Neil, are identified as by Sherrie Levine, 'Photographs by Edward Weston'. Levine's work followed on from a line of critical thought about the relationship of art to popular culture and reproduction that had been central to much art of the 1960s, but most explicitly to Pop Art.[92] However, as a

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[88] As already suggested, the art/life divide had been an issue for leftward leaning criticism since Saint-Simon and Feuerbach.
[89] It is worth recalling here that Maciunas was so concerned by the encroachment of commodification that he explored the possibility of producing all Fluxus publications in ink that would disappear, on paper that would disintegrate.
[90] The two most relevant essays are Krauss' 'The Originality of the Avant Garde and Other Modernist Myths, in Krauss, op. cit. Also, Douglas Crimp's 'The Photographic Activity of Postmodernism' in *On the Museum's Ruins*, op. cit. See also Crimp's essay 'Pictures' in *Image Scavengers: Photography*, I.C.A., University of Pennsylvania, ex. cat., 1979
[91] For an account of Levine's work see, Howard Singerman, 'Seeing Sherrie Levine', *October* 67, Winter 1994, pp. 79-107.
[92] Of particular importance to this approach, was Leo Steinberg's essay 'Other Criteria', 1972, op. cit. Steinberg theorised that a new 'postmodern' sensibility came into being, when material that was

number of critics were quick to point out, her works contravened the spirit, if not the letter, of copyright law. In this sense, Levine also followed the line of '*refusal'*, established by artists involved with dematerialisation. As demonstrated in Chapter Three, from the 'unassisted readymade', to Cage's *4' 33''* to the blank, primary forms of Minimalism, much dematerialised art effectively refused the rhetorical concepts of composition and associated assumptions about the nature of creative labour. While dematerialised work did not contravene copyright law, it did much to move away from the creative concepts used in such laws.[93] Levine's work however manifested a crucial link between the 'refusal' of rhetorical concepts of composition and creative labour, and the 'anti-commodification' stance set out by dematerialisation. Copying the work of another artist in such a manner challenged that artist's 'right to exclude' *and* the rhetorical concepts of creative labour upon which such a property claim was secured in law. In this sense, Levine continued the project of dematerialisation, tying together two of its most important lines of enquiry. Where dematerialisation proper had interrogated the *materiality* of the art object, and its commodity form – 'movable' property – Levine interrogated the invisible borders of the artwork, the *incorporeal* part of the commodity form – the realm of intellectual property.

Despite the fact that, within a few years, Levine herself moved away from such work, it was *this* understanding of appropriation that became central to artists working in the 1980s such as Koons. The endurance of this small part of Levine's oeuvre was due to

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'already cultural' was used as a source for the creation of new artworks. (Rauschenberg's works, he suggested, were, indicative of a society in which the weather is something you hear over the radio, ibid., p. 952. There is a particularly interesting similarity between Levine's earliest re-photographs of 'everyday' magazine pages and Robert Smithson's Land Art – the latter of whom was one of the most important critical contributors to dematerialisation. Smithson's earliest *Displacements* involved photographing areas of earth and enlarging the resulting photographic prints, up to a 1:1 scale. The prints were then taken back to the site and positioned, at slight angles, in the patches of ground of which they were representations. From a distance, these large prints produced a disruption or 'displacement' in the viewer's sightline. (In his later, and perhaps better-known 'displacements', Smithson replaced the photographs with mirrors.) Smithson then often re-photographed these installations for gallery presentation. Given Steinberg's acclaimed shift from '*nature'* to '*culture'* – written between Smithson's death and Levine's early works – it is tempting to see the Smithson's 'interventions' in '*nature*', as the corollary of Levine's 'interventions' in visual '*culture'*. Both artists worked on 1:1 representations. However, rather than working on the relationship between 'nature' and 'representation' as Smithson had done, the referent in Levine's work, was that which was already an image.

[93] As argued in Chapter Three, this only occurs at the level of the 'ostensible' artwork, copyright itself is *deferred* to the production notes and provenances of the works.

the positioning of her early work in the context of the critique of the avant gardism of the 'Modernist' epoch expounded by Rosalind Krauss in the hugely influential essay 'The Originality of the Avant Garde'. The essay was part of a cluster of work written by Krauss in the late 70s and early 80s, which attempted to analyse the fault lines of Modernism and define the new era of the 'post modern'.[94] It was then Krauss' account of Levine's work, which set the tone of appropriation art up to the time of the Koons trial.[95] Krauss' famous deconstruction of the concept of 'originality' as a neo-Romantic construction, ended in a discussion of Levine's appropriations. While Levine's "act of theft" was "in violation of Weston's copyright", it was an act, Krauss suggested, that was essential to the liberation of the copy from its secondary position beneath the "original".[96] Appropriation art's liberation of the copy from the yoke of originality was held by Krauss to be synonymous with the new era of post modernism.

Krauss' essay implied that the concept of 'Originality' used in the aesthetic discourse of Romanticism was co-extensive with the concept of 'originality' that operated within copyright law.[97] It was Krauss' essay, as much as Levine's work, which established the notion that copyright law, was responsible for reifying the prerogatives of an outmoded creative ideology. Despite the fact that, at the end of the essay, Levine's work is linked to a critique of copyright, Krauss was careful to avoid engaging with the actual history of copyright law. While the early parts of the essay built up a convincing deconstruction of 'Originality', the final part implied a determining link between that cultural discourse and the legal discourse of 'originality', which was historically spurious. The implication of the essay was the copyright could be reduced

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[94] The other contributions, all originally published in *October* include, 'Grids', 'Sculpture in the Expanded Field', 'Sincerely Yours', have all been re-published in Krauss' op. cit. See also 'A Note on Photography and the Simulacral' in Carol Squiers, *The Critical Image : Essays on Contemporary Photography,* Bay Press: Seattle, 1990.

[95] The term the 'early phase of appropriation' is used because for fifteen or twenty years, the notion of an art practice critical of copyright law had been regarded as a largely forgotten. Only recently (in the post TRIPs era) has attention again been focussed on this aspect of appropriation. See for example Lutticken op.cit.

[96] See Krauss, *Originality of the Avant Garde*, op. cit., p. 168.

[97] From this point on 'Originality' will be used to denote the concept of Romanticism, and 'originality', that of the legal concept of copyright law. The main problem with Krauss' assumption is that 'Originality' is a concept linked with a particular discourse of the subject – the discourse of Genius. The

to a single creative theory – that of Romanticism.[98] This notion was taken up elsewhere, and although some well-researched histories bore out the idea of an entanglement of genius and copyright at some historical junctures, the *foundationism* implied by Krauss' was not substantiated.[99] However, the position staked out by Krauss – that copyright was formed around particular Romanticist concepts, and that the law was lagging behind cultural developments – dominated appropriation art in the early 1980s.[100] It was not until the defence of Koons' appropriational practice in the later in the decade, that the concept of appropriation was radically reformulated to suit the new political and economic realities of, what can retrospectively be termed, knowledge economies.[101]

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legal concept of 'originality', as has been demonstrated in this thesis, did not derive from an *a priori* theory of the subject, but is derived, in somewhat mutilated form, from the rhetorical theory of labour.

[98] For a longer analysis of Krauss' essay and its position on copyright law, see Appendix F.

[99] Martha Woodmansee's study of Romanticism and the emergence of copyright in Germany is the best source here. See Woodmansee, *The Author Art and the Market*, op. cit. Woodmansee's text outlines the literary correlative of Krauss' visual arts study. As in Krauss' essay, Woodmansee's impression is that copyright *begins* in the late 18th, early 19th century, with particular market conditions and aesthetic theories. There is no account of the deeper history of intellectual property law within Germany– printing privileges were operating in German states as far back as 1479. On a strict, one might say blinkered, reading of legal statute, Woodmansee's book in correct. There is however, no reason why cultural history should tie itself to a history of statute. It might also be said, that to fully position the history of such statutes, a broader cultural framework is required. To put this another way, the notion that the concept of genius, and the law of copyright are entwined, is only true at some very specific historical junctures. Even more tenuous, is the notion that copyright law is a straightforward representation of concepts derived from genius.

[100] The idea of this kind of conflict between cultural practice and copyright has re-emerged in recent years. On this basis, it is possible to suggest that the knowledge economy stands on the wobbly foundations of an outmoded, and western-centric, creative ideology. See for example Sven Lutticken, op. cit. And the ongoing trials of Negativland at http://www.negativland.com Also see Siva Vaidhyanathan, *Copyright and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, New York University Press, New York, 2001. This view suggests that contemporary cultural practice is on a collision course with the knowledge economy, as it is currently understood. On such a view, simply insisting on the inescapable necessity of appropriation to contemporary aesthetic practices – in art or in music sampling– means challenging the established order of capital and with it, the project of globalisation. However, this supposes that copyright law *is* based on the Romantic discourse of authorship and that the expansions in copyright law *are* expansions of the cultural category of 'the author'. The earlier chapters of this thesis do not bear out the first assertion. The second looks rather far-fetched. (Though it may be true, as James Boyle contends, that there is an increased tendency to call upon concepts derived from the ideology of authorship when making decisions relating to all forms of intellectual property, this does not mean that the ideology of authorship is co-extensive with intellectual property.) For a more detailed analysis of these issues, see Appendix E.

[101] Though the term is a recent one, and its use in context of the late 1980s therefore anachronistic, as chapter four suggested, the political will that lies behind the project, is somewhat older.

THE FATE OF APPROPRIATION ART IN THE AGE OF CREATIVE FOREIGN POLICY: THE CASE OF ROGERS V KOONS

Rogers v Koons

In 1989 the 'commercial photographer' Art Rogers, initiated a case for copyright infringement in the US courts against the 'artist' Jeff Koons.[102] The timing of this case is central. As has already been suggested, a critical debate about intellectual property was already underway in the 1970s, under the auspices of the Group of 77. By the time the Uruguay Round of GATT begun in 1986, the importance of intellectual property to the economy viability of developed economies was clearly apparent. In the run up to the trade round, the IPC was formed to pursue a new, tougher international settlement on intellectual property.[103] In 1989, as part of the general strategy leading to the TRIPs, the United States Congress finally ratified membership of Berne Convention on copyright, a full century after most other 'developed' states. The somewhat late arrival was due to the desire to hold onto anomalies in US copyright law, whose maintenance had been generally beneficial to US interests. It was only with the granting of copyright to computer software – in which American corporations had an enormous international lead – that the US government begin to see the advantage of such a treaty.[104] By 1990, the draft of TRIPs thrashed out by the IPC had effectively been agreed, though the treaty did not come into force until the 'Final Act' of the Uruguay Round in 1994.[105] The fact that such a precedent-setting case of

[102] The usual reaction to the case in critical cultural circles, as we shall see, is to throw arms in the air and dismiss the judgement as bad or corrupt law, by dint of the fact that the court refused to follow the position laid out by the defendant, an *Artist*! See Lutticken, op. cit.
[103] As pointed out in Part I of this chapter, the software industry was one of the chief players in the *Intellectual Property Committee,* and copyright was one of the its most crucial concerns because of the granting of protection to software codes in the mid 1980s.
[104] Until signing Berne, international copyrights were respected only if material had been published within US jurisdiction. An author did not have to be a US citizen, or a resident of the US, but their work had to be registered under the US copyright system to receive its protection. (A number of famous writers found themselves caught out. Most famously, Henry James found that work he had published in Britain, was already pirated on his return to America. While this position traditionally benefited US publishers, the advent of software copyrights made it anachronistic. At the time of writing, the copyrighted products are the largest export sector of the US economy.
[105] Though TRIPs was officially in effect from 1994, some WTO member states were given extra time to comply.

copyright law was initiated and concluded in the midst of these international machinations proved highly beneficial to proponents of the nascent knowledge economy.

Rogers v Koons came to court at perhaps *the* most sensitive moment for intellectual property law that the US legal system and legislature had *ever* witnessed.[106] At the moment when the US government and the IPC were attempting to massively expand and toughen the international regime, *the* leading edge of American contemporary art – which staked its post modern identity on an anti-copyright stance – found itself in an American court charged with copyright infringement.

The Facts of the Case

The facts of the case are fairly straightforward. Art Rogers was a 'commercial photographer' who made a substantial part of his living from licensing his images for reproduction as post cards.[107] At the time the case was brought in 1989, Rogers' prints were selling for $200-500 a print, in contrast Koons' works were selling for between $100,000-$300,000. A lot was made of this differential by Koons' defence team during the trial in order to suggest that there were in fact two kinds of artists in court – one a 'real' artist and the other, a kind of mass media hack. The importance of this will become evident in due course.

In 1984, Rogers licensed his image 'Puppies' to a company called 'Museum Graphics'.[108] Three years later Koons purchased one of the cards in a tourist card

[106] This fact is missed by every commentary on the case, whether in legal textbooks, or in art journals.
[107] Rogers mainly made his living from commissioned work – it usually sold for sums between $200-$500 a print. An important part of his income came from selling reproduction rights to his images, to postcard and poster companies. Nevertheless, he had work in MOMA, San Francisco and his work had been described in the *Journal of American Photographers*.
[108] Jim Scanlon had originally commissioned Rogers to photograph him (Scanlon) and his wife, holding a litter of puppies. Rogers was paid $200 for his prints, licensed the image for reproduction to Museum Graphics and kept the negatives and copyright on the image afterwards. The image was run up as a postcard and two editions of 5000 were printed.

shop. In a move that was to become important to his eventual prosecution, he tore off the part of the card that displayed the copyright mark and Rogers' name, before giving the card to a studio of Italian wood carvers to be made into three-dimensional carvings. Most importantly while the artisans of the Demetz studio worked on the image, Koons was in daily contact providing written instructions that specifically stated sculptures produced were to be "just like the photo".[109] The instructions made it clear that the sculptural version of Puppies – entitled *String of Puppies* – was to be a precise copy of Rogers' image.[110] Koons denied none of the basic facts of the case, and the final decision of the Appeal Court found that his copying had been 'blatant'.

Heading off the Conflict with the Law and US Foreign Policy: The Koons-Carlin Defence of Appropriation

Against the trend for infringement cases involving 'appropriation' that preceded it, and followed it, the case was settled in court.[111] The very public nature of an open court battle, put the claims of appropriation art on public display, and the trial was widely covered in leading art magazines. The case then promised to sort out, once and for all, the position of appropriation art with respect to the law. However, the defence mounted by Koons' legal team significantly redrew the concept of appropriation art that had been laid out in Krauss' account of Levine's work. The arguments used by Koons' team had in fact been rehearsed a year before the case came to court, in an

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[109] Demetz Studio produced the work in a series of four.

[110] Koons' only vaguely significant alteration to Rogers' photograph, was the addition of some rather odd red noses to the puppies.

[111] One possible reason for bringing the case was to test the new measures offered by the ratification of Berne. Berne brought the US into line with the 'moral rights' view of copyright law which was integral to continental European systems of law – until then, such a view had been alien to the Anglo-US system. 'Moral rights' gives the creator of a work of art extra rights *above and beyond* those represented in the old Anglo-US system. In particular, the right to the integrity of one's work is considered crucial. Even after an artist has sold a work and its copyright, s/he retains the right to not have the work misrepresented or damaged by its new owners. It seems likely then, that at least one reason why *Rogers v Koons* came to court (unlike earlier cases) was because the litigant may have regarded appropriation as an infringement of his moral rights. This supposition cannot be confirmed, since the arguments for infringement lined up in court, were ultimately strong enough to secure conviction without having to resort to this new, untested, aspect of the law.

article written in *Journal of Law and the Arts*.[112] This reformation of appropriation was written by a barrister, John Carlin. Carlin's aim was to make a space for appropriation art *within* the law, by adapting the doctrine of 'fair use'. Carlin's article marked the beginning of the attempt to reconfigure appropriation art, steering it away form its radical political critique of property relations. By 1989 appropriation, as it had earlier been conceived, was a political embarrassment. Dulling the critical edge of such a cultural practice had become important to any economic actor with an interest in the new economy. The fact that the Koons' legal team chose to defend appropriation art on the grounds of Carlin's prescription meant that whether they won or lost, the notion of appropriation as a critique of the very idea of copyright, would be buried.

Carlin started form the same point as Krauss' earlier essay. Levine's *Neils* might be unjustified "within current interpretations of copyright law", they are however "justified in terms of recent art history". [113] However, in his view Levine's work did not lead inexorably towards the 'law of the original' "splintering into endless repetition" as Krauss had suggested. Nor was the practice of appropriation *new*, and thereby definitive of the epoch of post modernism. Where Krauss had begun her discussion of Levine with a history that stretched to Rauchenberg's work of the 1960s, Carlin provided a heritage that stretched back into the historical epoch of early 20th century Modernism. Rather than being the harsh light of a new dawn, appropriation was conceived as part of a firm 'tradition'. The notion that it could be conceived as a critique of property relations, or as a deconstruction of an outmoded, legally reified patriarchy, was omitted. Rather than being on a collision course with copyright law, it was suggested that the law take account of such new creative practice. To this end, Carlin suggested, the doctrine of 'fair use' should be reinterpreted, in a limited way,

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[112] John Carlin, 'Culture Vultures: Artistic Appropriation and Intellectual Property Law' in *Journal of Law and the Arts* 13, Columbia University Press, Columbia, 1988, pp.103-143. Carlin is cited extensively in Saunders but not with respect to the Rogers v Koons. Comments from Carlin's paper are also cited in Robert A. Gorman and Jane C. Ginsburg, *Copyright for the Nineties: Cases and Materials*, Michie, Virginia, 1993.

[113] The photographic appropriations Levine made of Edward Weston's photographs of his son Neil.

"on public policy grounds".[114] The courts should recognise the strategies of appropriation art, and permit artists the freedom to infringe copyrighted material, on the grounds of a general 'public interest'.

Such a defence, Carlin suggested, should *only* be open to artists since, if the right were expanded broadly, it would undermine "the incentives copyright serves to uphold."[115] The crucial point of the argument was the proviso that such an interpretation of 'fair use' should only be deemed legitimate "for valid conceptual reasons". For Carlin, it was essential that copyright itself was not undermined – either by appropriation's confrontation with the law, or by its acceptance within the law. Given the multi-billion dollar industry now riding on its back, this was not surprising.

As far as the cultural practice of art was concerned, the problem with the Carlin defence was that in order for it to hold, the courts, and possibly even the legislature, would have to accept the idea that there were *two* kinds of 'creative artist'. The first would be a *regular* copyright holder, and the second, a kind of *super* copyright holder, with legal rights to appropriate the work of the first group. The latter group being defined on the basis that the 'theft' they carry out is done for 'valid conceptual reasons.'[116] The Carlin defence suggested the creation of a *hierarchy* which would legally separate 'Artist' from 'artisan', the 'higher' conceptual artist from mass media hack, the museum artist from mass culture, the 'high' from 'low'. The irony of such a position was that postmodern critical theory had staked its identity on breaking down the 'autonomy' of art. The Carlin defence rebuilt the barriers around art, and effectively asked for them to be set within the legal regime of copyright.[117]

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[114] Quotations from Carlin's paper are taken here from the account of the case given in Gorman and Ginsburg, supplemented with Saunders' commentary. See Gorman and Ginsburg, op. cit. and Saunders, *Authorship and Copyright*, op.cit.

[115] Gorman and Ginsburg, op. cit. If, under fair use, *everyone* had the right to appropriate, copyright law would disappear in a puff of illogicality.

[116] As one legal wag pointed out, on that defence, muggers could claim their practice was 'performance art'.

[117] A second irony lay in the fact that, what had been a critique of property, was defended in such a way as turn into a method of creating property. Carlin's interpretation of 'fair use' would allow the Super Artist not only to infringe, but also to reproduce the infringement. In other words, intellectual property rights would accrue to the artist on the basis of their infringement.

The Carlin-Koons Defence in Court

Even before *Rogers v Koons* came to court, the means by which to pull the radical teeth of appropriation art already existed. The first actual hearing of the case, in a lower court, came in 1991 - three years after Carlin's article, two years after the US Congress ratified Berne, and at the moment when the TRIPs agreement was in the process of being fine tuned. Carlin's article influenced Koons' defence in two ways. Firstly, Koons' lawyers borrowed Carlin's elongated historicisation of appropriation. Secondly, the main part of the defence rested on the interpretation of 'fair use'.

Carlin had placed appropriation within a rather generalised theory of the simulacrum.[118] The role of the artist in the 'cultural simulacrum', he suggested, was to balance the media's monopolisation of 'reality'.[119] In such a formulation, the artist was accorded a privileged role. The artist alone was able to slip from the semiotic chain of corporate simulacra – one might say the corporate imaginary– the artist alone was ceded access to what used to be termed 'the real'. It was the artist alone who could critically challenge the monopoly of the media over 'reality'. This capacity was placed in an historical trajectory that led from Manet's *Olympia*, through Picasso's collages and Duchamp's ready-mades, to Warhol's multiples, and finally from there into music master mixes and sampling – the latter signifying the expansion of the culture of appropriation from the art world into mainstream social life.[120]

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[118] All quotations are from Carlin's text as quoted in Saunders, op. cit., p. 228. Appropriation had to be understood within the context of an environment "increasingly determined by simulated signs" – one where the realm of the *"imaginary"* has supplanted the "*real"* in determining our sense of self and nature. In a culture suffused with visual representations, "our collective sense of reality owes as much to the media as it does to a distinct unmediated perception of nature." Within such a scenario, the artist is left to appropriate images from in order to "help us understand the process by which the media has come to monopolise huge chunks of reality". Ibid., p. 228.

[119] In other words, appropriation artists are needed so as to provide a counterweight against the corporate monopoly on images that makes up our sense of reality.

[120] As David Saunders points out in his commentary on Carlin, despite the contemporary theory, the real thrust of Carlin's argument is 'aesthetic, moral and dialectical'. Saunders, op. cit., p. 228. Innovations in art *lead* society– that they do so is moral, because art provides a counter-balance to the deleterious effect of corporate mass media on the social perception of reality. Situated thus, art is positioned within an eternal dialectic with 'the mass'. From such a stance, appropriation has much in common with the well-worn critical positions of Modernism, rather than the 'new' era of the post modern.

In the trial, Koons legal team deployed Carlin's argument with respect to the cultural simulacrum. *String of Puppies* was a fair social criticism, they argued, insofar as Koons belonged to a "school of American artists" who believed that the "mass production of commodities and media images has caused a deterioration in the quality of society."[121] Koons' appropriations were part of an "artistic tradition" and were intended to "*comment* critically", both on the incorporated (appropriated) object, and on "the political and economic system that created it".[122] Where, ten years earlier the appropriated image was intended to send the 'Modernist origin' (copyright) 'splintering into endless repetition', the Koons' defence reduced its ambition to simple 'comment'. Following Carlin's formula, Koons' practice was historicized, citing the 'appropriations' of Cubism and Dada through to Warhol. Rather than being presented as a new critical practice, appropriation was presented as an 'always-has-been', embedded in the fabric of tradition going back to Duchamp's readymades of 1913.[123]

When it came to using the 'fair use' defence, Koons' team stuck to Carlin's proposal and rested the defence on the 'public interest'. The team claimed the main purpose of the work was social comment and asked that the work be considered as in the 'public interest', under the 'fair use' clauses covering works of *satire* and *parody*.[124] In its final judgement, the court recognised Koons' *intention* to satirise consumer culture. However, it could not see how the very precise copying of Rogers' photograph constituted satire within the terms of the law. Koons' instructions to the Demetz studio, stipulated that *String of Puppies* was to be "exactly like the photograph".

[121] Gorman and Ginsberg, op. cit., p. 607.
[122] Ibid., p. 607
[123] 1913 was the date at which Duchamp's earliest readymades. His incorporation of manufactured objects within the artwork, set a precedent that Koons followed. Koons' team also used the argument that recontextualisation established a new set of meanings for an object, while at the same time leaving its physical form intact. To push home the cosy feel of 'establishment Modernism', Koons described Rogers' photo card as "typical commonplace and familiar," a part of "mass culture nesting in the collective sub-conscious of people regardless of whether the card had actually ever been seen by such people." Quoted in Gorman and Ginsberg, op. cit., p. 603.
[124] In the US jurisdiction in which the case was conducted, fair use must consider three possibilities. Using a copyrighted image without permission can be defended on consideration of whether the copy was done in 'bad faith,' whether it is detrimental to the copyright holder, or whether the copy was done solely for 'personal financial benefit' of the pirate. Finally, consideration is given to whether any of those conditions can be balanced against a public interest that may be served by the infringement. The

Koons did not deny copying. The court found the copying to be blatant. It went beyond a simple appropriation of the idea presented in the photograph – a string of puppies on the laps of two sitters – which may have been within the law. The very precise instructions indicated that not only the idea but also the *expression* of the image was copied.[125] Under the rule of *substantial similarity*, the infringement was clear – the question was whether it constituted a 'fair use' of Rogers' image. Unfortunately for Koons, the court could not see how such a close copy could be construed as satire. To accept it as a such was tantamount to suggesting that Rogers' own work was self-satirising. If that was the case, Koons had copied that as well.[126]

The crucial issue was *how* appropriation art achieved its satirical effects. Koons' position implied that satire was achieved by presenting a part of kitsch, 'mass culture' within the rarefied atmosphere of an art gallery or museum. *Context* was *the* crucial issue. For the arguments of the Carlin-Koons' defence to stick, the court would have had to accept that there was an implicit, and generally agreed, cultural and social division between the *context* of Koons' work as an artist and the *context* of those who worked within the realm of 'mass culture'. Had such an argument been accepted, it would have reinstated, and legally concretised, the art/life divide – a divide that post modern art practice was supposed to have overcome.

The final coup in this repositioning of appropriation was given in the submission made when the case went to appeal. The fundamental issue at stake, Koons' team suggested,

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classes of parody and satire come under the final consideration of public interest. Naturally, Koons had little recourse on the first three considerations.

[125] The court found that "Original elements of creative expression in the copyrighted work were copied and the copying was blatant". Gorman and Ginsburg, op. cit., p. 605. The court accepted the argument that Rogers had made a number of decisions making the photograph, choosing the location, asking Scanlon and his wife to be in the shot and deciding how they were posed. "Substantial creative effort" went into the photograph in terms of compositions and production according to the Rogers trial team. Rogers drew on years of experience and artistic development, in selecting light location, seating, arrangement of dogs and figures. Of the fifty images on the contact sheet only one image was selected for enlargement.

[126] Final judgement found that Koons had prejudiced Roger's potential market. In theory, Rogers may, in the future, have sold the rights to make sculptures from his photographs. Similarly, photographs and postcards of his work, and Koons's sculptures may be confused. Koons was ordered to hand over his artist's copy of *String of Puppies* to Rogers and a decision on compensation was deferred to a later date. (The level of compensation has not, to the best of my knowledge, been reported.)

was whether "a mass distributor of a rather mundane photographic note card can prevent a highly regarded artist from creating a limited edition, *original*, provocative and critical work of art." (My italics).[127] In this new definition of appropriation, the critique of 'Originality' and copyright was entirely obliterated – appropriation was defended on the basis of the very *originality* it was once pledged to destroy.

The final judgement of the appeal court rejected the argument that a creative distinction could be made between 'high art' and 'mass culture'.[128] In doing so, the court maintained the principle that copyright gives equal access to all.[129] The ruling was met with apoplexy in the art world. Writing in *Art in America* in 1992, Martha Buskirk suggested that contemporary art, and post modernism itself, was *under attack*. The refusal to extend copyright to include strategies of contextualisation and recontextualisation, that were fundamental to contemporary art practice, was a *failure of the law.* If the 'fair use' was not opened up to "nuance, multivalence and ambiguity", "severe limitations" would be placed on artists that tried to respond critically to "the contemporary world of existing, mass media images".[130] The irony of the case – that post modernism was most under attack from the defence of its practices

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[127] Martha Buskirk 'Commodification as Censor: Copyrights and Fair Use', in *October*, 60, April, 1992 , p. 106.

[128] In rejecting the argument they said, "The copying was so deliberate as to suggest that the defendants resolved, so long as they were significant players in the art business, and the copies they produced bettered the prices of the copied work by a thousand to one, their privacy of a less-well known artist's work would escape being sullied by an accusation of plagiarism." Gorman and Ginsburg, op. cit. p. 605.

[129] Had judgement gone the other way, a two-tier system of copyright would have ring-fenced art practice, giving it a hierarchical position over all other forms of creativity. Such a judgement had the potential to quickly run out of control. Who exactly is to say where the 'art world' starts and finishes? Given the claims of post modernism to indeterminacy and the eradication of the borders, are there in fact any limits to the art world? Acceptance of the Koons' argument would also have meant that copyright subsisted in nebulous 'relational moments' between given objects and given contexts. Exactly how such a reformed copyright could be limited, remains an open question.

[130] Martha Buskirk 'Art and the Law: Appropriation Under The Gun', *Art in America*, June 1992. pp. 37-43. There is an assumption here, that the freedom of the artist is entirely *synonymous* with freedom per se. It is a general rule of thumb that the artist's *freedom of expression* is seen as synonymous with *freedom of speech*. While the rule is generally true – where one finds repression of art, one also finds a more general repression of political subjects – it should not be taken to mean that *freedom of expression* and *freedom of speech* are interchangeable notions. The artist's freedom of expression is a right that entails, though not exclusively, a right to create property. Freedom of speech categorically does not. The right to the free creation of commodified expression in copyright law is not an unlimited right synonymous with democracy in the way that freedom of speech is. The idea that a large swathe of free speech was jeopardised by the Koons' judgement is nonsense. Anyone could say, or write, (or

that had had just been put forward in court – was lost to the commentators in the art world.[131]

CONCLUSION: ART AND FOREIGN POLICY IN THE AGE OF TRIPS

The case of *Rogers v Koons* was crucial to the emergent knowledge economy, the actual outcome however, was entirely irrelevant. The Koons-Carlin defence had already disavowed the early political radicalism of appropriation art. The broad economic effect of the case was the same whether 'appropriation' won or whether it did not. As it was, copyright law was left unchanged by the ruling – which served the purpose of the burgeoning information economy as well as bringing appropriation within the law would have done. The general effect of the case was to massage away any perceived conflict between cultural practice and the powerful interests then at work on the international stage. Given that these were the years of the IPC's most fevered activity, the motivation for Carlin's essay, and Koons' decision to fight the case in open court, is open to question – though there is no evidence of any direct involvement of either with the IPC.[132] Happily for the architects of the knowledge economy, an argument blunting the radical critique of copyright law, came along at the precise moment that US Congress ratified Berne, and the IPC and the government were pushing hard for a wider, deeper and tougher international regulation of copyright.[133]

In the years since the case, the Koons-Carlin view of appropriation has held in mainstream art criticism. The long historiography of appropriation, rather than Krauss'

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visualise), anything they like about Rogers work, what they do not have the right to do, under the above circumstances, is to make property out of that expression.

[131] There is no evidence that this postmodern irony has been appreciated elsewhere either.

[132] The relationship – if any – between Carlin and the IPC is a line for future research to follow.

[133] The decision of Koons to fight the case in court, rather than doing the usual out-of-court deal, also requires further research. Since *Rogers v Koons*, the practice of settling out of court, by cutting agreements to limit reproductions of appropriated work, has become standard practice. See for example here, the accommodation struck between Glenn Brown and the estate of Salvador Dali, and/or Damien Hirst's settlement with Humbrol, regarding Hirst's work *Hymn*.

shorter and more radical view, has become the accepted version.[134] If anything, in the years since the case, the embedding of 'appropriation' in 'tradition' has become even deeper. In 2000, *The Times* newspaper carried a story about that year's *Turner Prize.* The front page feigned shock that the entry by 'appropriation artist' Glenn Brown was in fact a copy of the cover of a 1970s science fiction paperback. However, the editorial that day put the reader's mind at rest. It read as follows:

> Art and imitation have always been bedfellows. Brown's description of his epiphanic moment of copycatery would be familiar to each and every luminary in the canon of Western art. Just as Renaissance artists learnt from imitating the Ancients, so the traditional discipline of learning to draw relied upon Old Masters on the principle that the best way of finding out how to do something is to have a crack at it oneself. Even where direct imitation was not at stake, the variations on set tableaux - the Annunciation, the Passion, the Pieta, the Judgement of Paris, Leda and the Swan, Europa and her bull, created a thriving culture of what might now be referred to as "intertextuality".
>
> Postmodernism has given copying a vocabulary, and with it a new legitimacy. We live in a multi-meeja confusion where to steal has become to *sample* and the rip off has become the *homage*. Where Renaissance art borrowed from a storehouse of classical and religious images, so pop culture has become the lingua franca of today's visual world. (My Italics.)[135]

As far as mainstream art criticism is concerned, the notion of appropriation as a critique of property relations is a distant memory. That cultural realignment is critical for the knowledge economy. The early moment of appropriation art represented the fulfilment of the critique of property relations that had been central to the aesthetic

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[134] For example, John C. Welchman, though keen to move on from appropriation, uses the same long historiography as Carlin. See, *Art after Appropriation: Essays on Art in the 1990s*, G+B Arts and Gordon and Breach, London, 2001.

[135] The 'editors' fluency in 'post modern' rhetoric may be related to the fact that both the Tate's P.R. company, Bolton and Quinn, are also employed by *The Times*, November 28th 2000. (According to my source in the Tate press office, who would like to remain nameless.)

dematerialisation of the 1960s. *Rogers v Koons* was the moment at which the '*strong'* interpretation of the semiotic/network model of creative production, developed from dematerialisation, was finally reined in. The case was therefore instrumental in securing the ascendancy of the *'weak'* interpretation of the semiotic/network, crucial to the smooth operation of the knowledge economy.

Despite the fact that *Rogers v Koons* represents the moment mainstream contemporary art 'backed off' from narratives critical of property relations, there is no reason to believe that the settlement reached will not be challenged in the future. Although considerable effort was expended in enforcing a particular reading of the semiotic/network model, the model's potential as a critique of rhetorical concepts of creative labour and composition remains. Predicating a theory of political economy on creative concepts leaves such a theory open to culturally and aesthetically informed criticism. Where such an economy requires the effective *policing* of cultural and aesthetic concepts, it is doubly vulnerable. As the cold war era of Greenbergian Modernism and Schlesinger's *Politics of Freedom* demonstrate, politically motivated interpretations of cultural are habitually reductive. Insofar as it is cultural in character, the theory of the knowledge economy is vulnerable to the problems of all creative hegemonies. A generation of artists in the 1960s found the field of creative possibilities artificially narrowed by a creative ideology constructed in contradistinction to communism. The central challenge to that hegemony came not from a political quarter but from aesthetics. Ultimately, boredom provides the greatest threat to creative hegemony.