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Introduction

OVERVIEW

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

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

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

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

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

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

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

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

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

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

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

METHODOLOGY AND LITERATURE REVIEW

INTERDISCIPLINARY METHOD

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

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

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

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

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

ECONOMIC THEORY: AESTHETICS, RHETORIC AND THE CREATIVITY OF BUSINESS

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

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

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[3] Diane Coyle, *The Weightless World: Strategies for Managing the Digital Economy*, Capstone, Oxford, 1997. Charles Leadbeater, *Living on Thin Air: The New Economy*, Viking, London, 1999.
[4] Joseph Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, London, 2000, pp. 81-87. (First published in Britain, 1943.)

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

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

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

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

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

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

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

LEGAL THEORY: RHETORIC AND AESTHETICS

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

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[10] For a recent example, see Victoria Kahn and Lorna Hutson, eds., *Rhetoric and Law in Early Modern Europe,* Yale University Press, London, 2001.
[11] See for example, Costas Douzinas and Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text and the Text of the Law,* Routledge, London, 1991.
[12] Richard Dworkin, *Law's Empire,* Hart, Oxford, 1996. (Originally published, 1986.)

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

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

ART HISTORY AND THEORY IN POSTMODERNISM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTELLECTUAL PROPERTY LAW: CREATIVE, LEGAL AND ECONOMIC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONTRIBUTION TO FIELDS OF STUDY

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

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

ORDER OF CHAPTERS

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