

FIXING THE SHADOWS
ACCESS TO ART AND THE LEGAL CONCEPT
OF CULTURAL COMMONS

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Merima Bruncevic
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ENTER

Izmedju Vrta is the name of a narrow but busy and densely populated cobbled street hidden behind the grand Hilton Hotel in the Pile district of Dubrovnik, Croatia. Walking up and down the hill towards the Old Town locals as well as tourists pass through it daily. During the hot summer days and nights the street is awash with the characteristic Adriatic scents of salty sea, pine trees, freshly cooked food and magnolias.

It was the summer of 2010, I had once again returned to Dubrovnik. I was there for a conference. *Izmedju vrta*, at first glance, means “Between the Garden”, a weird and beautiful name, I thought to myself, with connotations nothing short of Alice in Wonderland. This name, or even little phrase gave rise to countless images in my mind. But, I wondered, what does it mean? Where in a garden is between supposed to be? Again, I thought of Alice and the hole down which she falls into Wonderland. The fact that one of the front doors towards the end of the street proudly announces that Mr. Zec (Mr. Rabbit in Croatian) lives there did not make this fantasy any less compelling. What could *between* be referring to? Between the garden, and what? Spatially and linguistically speaking, it is an impossibility, one cannot be *between* the garden.

The impossibility of the street name made my thoughts wander and for some reason I thought of Kafka’s protagonist who spends his entire life standing before a door made only for him but one that he will never pass through, a door where the guard never reveals what lies hidden beyond it. Thinking further about Kafka’s story, had the protagonist been allowed to pass through the door, what might he have found on the other side, might it have been a place that is as strange and as improbable as the *between the garden*? The spatial impossibility of the name and its linguistic improbability made me think of the people who had built this city. The Old Town in Dubrovnik, a medieval city, one of the first important Mediterranean maritime powers, can today be found on the UNESCO’s world heritage list. I found it symbolic that this strangely named street, the ‘Pearl of Adriatic’ as Dubrovnik is also known, leads down to a port that has historically fought off both pirate ships and Venetian armies. It seemed to me that Dubrovnik itself was as ephemeral as the notion of between the garden, a door that connects the past and the present, the here and the beyond. I had numerous other ideas and variations, and the name became a constant source of wonderment for me. It did not leave my thoughts and it stayed with me until the next summer, when I returned to Dubrovnik.

Then, the following summer in 2011, suddenly it came to me! I realised the mistake I had made in translating the phrase, and it was wholly due to my linguistic shortcomings. What I had assumed to be the singular object case form of the noun 'vrt' pronounced [vrta] was in fact the plural pronounced [vrtà]. While it is spelled the same in both instances, the street name obviously refers to the second option, [vrtà], simply meaning between the gardens.

The solution to the riddle that had plagued me for over a year, turned out to be far less romantic than I had imagined. No Alice, no Kafka, nothing. In reality it was not even a riddle at all, it was just a simple language trick that I had played on myself. However, it did not make it any less interesting or less compelling. Once I understood the meaning of the name I did not stop playing the language game and thinking about these gardens, in between which a Dubrovnik architect or city planner had once squeezed in a narrow street. Why was there a need for a street between the gardens, I asked myself? I searched for clues. Today, on the one side of the street there is mainly the imposing Hilton Hotel that is hidden behind a wall, but the grounds of which are nonetheless visible from the outside. People standing on the street are fully able to get a good glimpse of the beautiful 19th century building, with its characteristic emerald green shutters, a building that looks out on Dubrovnik's Old Town and the harbour.

The other side of the street is, astonishingly, also lined with an even taller wall than the one that fences off the Hilton, a wall that is adorned by small front doors like the one that announces the residence of a man with the last name Zec. If you are standing on the street the wall on the opposite side from the Hilton is impossible to see behind. It goes all the way from one end through to the other end of the street. On that side of the wall there are mainly private residences. In 2010 I rented one of these houses, and have since visited several other in the neighbourhood and I have realised, to my amazement, that these front doors in the wall can often directly open up to steep steps leading up and down, labyrinthine walkways and even roofless tunnels, that always in the end lead to a beautiful garden and the family home. The private sphere of Dubrovnik is truly a complex network of streets, tunnels, staircases and gardens.

In the summer of 2012 I was back in Dubrovnik once again. Being one of the organisers of the Critical Legal Conference that was held in Stockholm in September 2012, my work for the summer also involved some preparation for the conference. The theme that we had given the conference was *Gardens of Justice*. I was thus once again, both physically as well as mentally, back on the subject of the Dubrovnik street whose name had occupied my thoughts for years. The street that separates the large international hotel from the small private residences, the street that wriggles between the two walls on its either sides, a street that marks the border between the two Dubrovniks, the one that accommodates for the foreign, temporary, movable, public and the other that guards the local, eternal, immovable, private. I spent the summer once again playing

with words and while this time the English translation did not fail me, I became aware that the correct translation of the street name could still be manipulated. I played with it and came up with: Between the Guardens [sic!]. There is no guard component to the word garden etymologically (which stems from the root yard), but one can still be imagined or artificially construed.

I elaborated on these ideas in the following manner: behind the walls there is a garden, and in the garden there is something one might want to guard and protect, the family home and everything that belongs to that most private sphere, thus we enclose it, we raise fences around it and we keep it behind a wall.

The ideas of gardens, walls, boundaries between the family home and the public life, and everything else that wiggles in-between, the connections throughout time and space that people make in order to communicate, sums up my work here. This research project has been marked with riddles, either erroneously constructed by me like the one surrounding the name of the Dubrovnik street, or riddles that others have bestowed upon scholars like myself navigating through this particular field. I have gone through doors that have led me to places I may have imagined, or through other doors that have led me somewhere I never imagined even in my wildest dreams.

This work has been marked by travel and journeys, sometimes road travel, sometimes rail travel, sometimes air travel, and other times by slower journeys, by walking like Walter Benjamin and Guy Dabord preferred to do it. Writing mainly in Gothenburg on the shore of the North Sea, but also in London by the Thames or in Paris by the Seine, this work came to life in environments very closely connected to water, canals, seas, rivers, harbours. This will be evident throughout the thesis, the fact that I have made a scholarly journey in search for a connection between law, that usually connotes boundaries and walls, and art that challenges them. Water transcends all boundaries and therefore it gave me the inspiration needed to go on with this work that at times challenges everything.

This research project is difficult to describe, it can only be explained as an attempt to fix a fleeting shadow on water. Because any attempt to fix a shadow will often turn out to be impossible. It is impossible to capture a moving shadow, to close it in, let alone to then place it under a microscope, or a telescope for that matter, and seek to study it. The realms of law and art are just like the realms of shadows, waters, waves, shores, and canals. Once inside these spheres we can never talk about walls, gardens, guards, boundaries or enclosures, at least not as we are used to talking about them. The object of this study that you are about to read can only be described as a hunt for a shadow on a watery surface, unlike Wendy in Peter Pan, my work is never able to capture it. Whenever I attempt to trace it, my own shadow overlaps it, if I take too long tracing it, the light source disappears, alters or moves and everything changes completely. Nevertheless, I carry on.

Researching within this field means trying to constantly look for the connections between art and law, to make them communicate and understand each other, to see how they float into one another, attempting to fix that fleeing shadow, in search of the spaces in which shadows might dwell, dealing with and exploring the links, contexts and connotations between the two different fields, hoping to find an elusive understanding of it all that might be lingering in (between) the shadows.

VOLUME I

BEYOND THE ONTOLOGICAL QUESTION

PART 1

THE LAW

“I renounce the fundamental contradiction.”

- Peter Gabel and Duncan Kennedy in *Roll Over Beethoven*

CHAPTER 1

INTRODUCTION

1 INTRODUCTION

In November 2013 a cache containing more than 1500 paintings came to public attention. It had been found by chance in 2011 when Cornelius Gurlitt, the son of an art dealer, was being investigated for tax evasion and the authorities had obtained a warrant to search his home. Stored in his private Munich residency, the trove found by the German authorities is believed to have included looted art from World War II that had been referred to by Hitler as *generate art* [Der Gerettete Schatz]¹. Most of the artworks held by Gurlitt might possibly be artworks that had been pulled off the walls of German museums in 1937 and 1938. The find may also include artworks acquired for Hitler in France for the aim of creating the “greatest museum in the world on the banks of the river Danube in Linz, the so called Führer Museum”.² The cache, the contents of which are not known by the public, seems to contain artworks (some hitherto completely unknown) by artists such as Picasso, Matisse, Chagall, Courbet, Degas, among others. According to the *Focus* magazine the worth of the trove may be more than one billion Euros.³

It is believed that the descendants to families whose art had been seized by the Nazis will claim ownership to many of these artworks.⁴

*

On the 15th of April 2013 the US Supreme Court opened the oral hearing for the case that has been making its way through the American courts since 2009. The case, *Myriad Genetics*,⁵ calls into question whether human DNA can be claimed as intellectual property. This case treats the question where, in legal terms, products of nature (which cannot be patented) end and human-made inventions that are the results of human ingenuity and invention (that can be pa-

¹ The saved art, as opposed to *degenerate art* that was deemed un-German.

² Art historian Godfrey Barker in an interview for BBC (3rd November 2013). Available at: <http://www.bbc.co.uk/news/world-europe-24794970>. Last accessed 15th March 2014.

³ Markus Krischer and Thomas Röhl, ‘Der gerettete Schatz’ in *Focus Magazine*, (13th November 2013). Available at: http://www.focus.de/kultur/kunst/tid-34646/titel-der-gerettete-schatz_aid_1146923.html. Last accessed 15th March 2014.

⁴ In fact, many of the artworks have been published at the site [lostart.de](http://www.lostart.de) in order to facilitate the owners to locate and claim artworks. Available at: <http://www.lostart.de/Webs/EN/Datenbank/KunstfundMuenchen.html>. Last accessed 15th March 2014.

⁵ Latest decision: *Association for Molecular Pathology, et al., Petitioners v. Myriad Genetics, Inc., et al.* United States Court of Appeals for the Federal Circuit, No. 12-398, (16th April 2012).

tented) begin. Is merely isolating, even if the act of isolation requires human expertise and knowledge, a human gene enough to grant a patent? If so, what repercussions can such a legal decision have?

*“The patent law is filled with uneasy compromises,” commented Supreme Court Justice Stephen G. Breyer.*⁶

*“Why would a company undertake massive investment if it cannot patent?” asked Supreme Justice Antonin Scalia.*⁷

*Supreme Court Justice Sonia Sotomayor suggested that an isolated gene is “just nature sitting there.”*⁸

*

On March 15th 2013 the French newspaper *Le Monde* published an open letter, signed by sixty professionals belonging to the community of higher education and research: university presidents, directors of several *Maisons des Sciences de l’Homme*, publishers, representatives of journals, representatives of university libraries, professors and researchers.⁹ The letter was entitled « Qui a peur de l’open access ? » / “Who is afraid of open access?”. Commenting on the European Commission’s recommendation on Open Access,¹⁰ some French editors of journals in the Humanities and Social Sciences had expressed their concern with regards to this recommendation, which they saw as a threat to an already vulnerable business model.¹¹ The signatories of the open letter address the concern by writing:

⁶ Adam Liptak, ‘Justices wary of bold action on gene patenting’ in *Boston Globe Online*, (16th April 2013). Available at:

<http://www.bostonglobe.com/news/nation/2013/04/15/justices-seem-wary-bold-action-gene-patenting-case/yREhWeoaTBjToiKvKkboMP/story.html>. Last accessed 5th September 2013

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Quotes taken from the English translation provided from the website iloveopenaccess.com where the petition is open for further signatures <http://iloveopenaccess.org/arguments-for-open-access/>. Last accessed 15th March 2014.

¹¹ Commission Européenne, *Communication De La Commission Au Parlement Européen, Au Conseil, Au Comité Économique Et Social Européen Et Au Comité Des Régions, Pour un meilleur accès aux informations scientifiques: dynamiser les avantages des investissements publics dans le domaine de la recherche*, Bruxelles, le 17.7.2012 COM(2012) 401 final.

“To be afraid of Open Access is, in our eyes, to commit oneself to a narrow – and in fact erroneous – vision of the future.”

“According to us, this is not only an economic and commercial problem. [...] Knowledge cannot be treated as a commodity and its dissemination is more than ever a vital concern in our societies: we can work towards a revolutionary democratisation of access to research results.”

“We are not afraid of Open Access. To take knowledge out of silos and beyond the boundaries of academic campuses is to open knowledge to everyone, acknowledge that it has a pivotal role to play in our societies and open up perspectives for collective growth.”¹²

*

This dissertation is about *access to art* as knowledge, and the role law plays in facilitating access. As such it touches upon all of these examples above from the point of view of artworks. It analyses cultural property and cultural heritage aspects and its enforcement difficulties. It studies intellectual property law and its uneasy compromises, incentives as well as at instances where “nature is just sitting there” as US Supreme Court Justice Sotomayor expressed it in *Myriad Genetics*, i.e. the instances of knowledge transmission that concern the question of enclosure of something that exists out in the open and in the public domain for everybody to access. It also studies open access and the discussions and projects connected to the open access initiatives in order to situate the access to knowledge issues¹³ within a broader framework.

This project discusses how to advance and strengthen access to art and create legal pathways that facilitate the communication of art, the access and sharing of it. This project introduces the *legal concept of the cultural commons* and how such a concept could be given a platform in law. In order to introduce the concept, it needs to be *conceived of* in jurisprudence. The project therefore also discusses the traditional dogmatic legal reasoning and the impediments it faces in order to arrive at a conception of the cultural commons.

The study has been divided into two volumes. The first one is called *Beyond the ontological question* and studies obstacles to access created by certain types of traditional legal reasoning and dogmatic law. Through a theoretical exercise that opens up the possibility of a commons conception, Volume I aims to get at the

¹² Quotes taken from the English translation provided from the website iloveopenaccess.com where the petition is open for further signatures. Available at: <http://iloveopenaccess.org/arguments-for-open-access/>. Last accessed 15th March 2014.

¹³ This research does not have the ambition or intention to address artworks ontologically and get engrossed in the questions of what art is. In order to focus on access to art, a rhizomatic approach to the artworks has been applied. As such, artworks are approached as knowledge sources within this research. For further detail in this question see chapter 3 below.

potential of law. The second volume analyses the concept of the commons and is called *The performativity of the Commons* – it aims to analyse the potential of a cultural commons concept when applied to current law. The overall aim is to develop an alternative approach to law and how it deals with access to art.

Often, studies discussing access to art from a legal perspective tend to be written either from a *cultural heritage* point of view e.g. discussing return, restitution or repatriation of artworks that have been stolen, looted or otherwise acquired,¹⁴ where culture functions as an identity or an ideology. Or, as they have been more recently considered, i.e. from a *new media, internet, information and knowledge society* perspective,¹⁵ where culture is often presented as a property, information, or a power in a class dependent structure. Law regulates both of these areas. My research project, it could be argued, is about both. And neither.

Cultural heritage studies, in a broad sense, often study the value of ancient artworks, their provenance and the manner in which they were imported, exported¹⁶ or generally acquired, as well as where these artefacts might belong, to

¹⁴ It is impossible to even account for a fracture of those works, but see e.g. James Cuno (ed.), *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, (2009), (ed.) Kate Fitz Gibbon, *Who Owns the Past?: Cultural Policy, Cultural Property, and the Law*, Rutgers University Press, (2005), John Carman, *Against Cultural Property: Archaeology, Heritage and Ownership*, Duckworth, (2005), (ed.) Barbara T Hoffman, *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, (2006), (ed.) John Henry Merryman, *Imperialism, Art and Restitution*, Cambridge University Press, (2006), Etienne Michon, *Venus de Milo: Son arrivée et son exposition au Louvre*, Paris: Revue des Etudes Grecques (1900), Colin, *Loot: Legitimacy and Ownership*, Duckworth, (2006), (eds.) Franz and Keebet von Benda-Beckmann and Melanie G. Wiber, *Changing Properties of Property*, Berghahn Books, (2006), etc!

¹⁵ It is equally impossible to account for this other strand also, but do see e.g. James Boyle, *Shamans, software and spleens: Law and the Construction of the Information Society*, Cambridge, Mass: Harvard University Press, (1996), Gillespie Tarleton, *Wired Shut?: Copyright and the Shape of Digital Culture*, MIT Press (2007), Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, Chicago University Press, (2010), Lawrence Lessig, *Code and other laws of cyberspace*, New York: Basic books (1999), Lessig, Lawrence *Code version 2.0*, New York: Basic books cop, (2006), Lawrence Lessig, *Free culture: how big media uses technology and the law to lock down culture and control creativity*, New York: Penguin Books, (2004), Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, New York: Penguin Press (2008), Lawrence Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World*, New York: Vintage Books, (2002), Jessica Litman, *Digital Copyright*, Prometheus Books, (2001), (ed.) Pelle Snickars, *Efter Pirate Bay*, Mediehistoriskt arkiv, Kungliga biblioteket, Stockholm (2010), Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, New York: New York University Press, cop, (2001), etc!

¹⁶ All governed by various international conventions, see e.g. Convention for the Protection of Cultural Heritage during Armed Conflicts, 1954 (Hague Convention), International Covenant on Economic, Social and Cultural Rights, 1966, International Covenant on Civil and Political Rights, 1966, Rapport du secrétariat, Report from the 15th Session of the UNESCO Intergovernmental, Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Paris, 11-13 May 2009, UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Trans-

whom they belong etc. The questions within the cultural heritage paradigm revolve around the rights of the people in the source countries, i.e. the countries in which the artworks were found, *vis-à-vis* the rights of large, influential museums or cultural institutions, in the keeper countries, such as the so called “encyclopaedic museums” with collections that span over a broad range of times, places, and cultures,¹⁷ e.g. the Louvre in Paris, the British Museum in London, the Metropolitan Museum of Art in New York, etc. places in which the artworks often are kept and exhibited today. These discussions often revolve around the ownership issue and the legal ownership of the artefact.

*The first type of discussion usually concerns the ownership of artefacts which is closely connected to the “identity issue,” and in these instances cultural heritage represents, constitutes and re-constitutes identity and heritage (national, local or that of the human kind as a whole).*¹⁸ Within the cultural heritage paradigm, the questions often make up a discussion whether it is truly, morally, as well as legally, always right to claim that the finder¹⁹ per default always should be the keeper? And so it seems to go round and round in what appears to be an endless debate that seems to be leading nowhere. The source countries demand their cultural heritage back, while the keeper countries as often as they possibly can politely decline these requests for return citing that the works are either too fragile to travel,²⁰ that the source country does not have the proper means and knowledge to tend to the works’

fer of Ownership of Cultural Property, 1970 UNESCO Intangible Cultural Heritage Convention, 2003 UNESCO Recommendation Concerning the International Exchange of Cultural Property of Nov. 26, 1976 UNESCO World Heritage Convention, 1975 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995 United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007 Universal Declaration of Human Rights, 1948...

¹⁷ Holly Flora, ‘The Quest for the Masterpiece’, in (eds.) Francesco Francioni and James Gordley, *Enforcing International Cultural Heritage Law* Oxford Scholarship Online (2013), p. 228.

¹⁸ See e.g. UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) (World Heritage Convention)

¹⁹ The fact that the finders are often former colonial powers needs not be stressed any further.

²⁰ In her very interesting book *Loot: Tomb Robbers, Treasure and the Great Museum Debate*, Old Street Publishing, London, (2010), Sharon Waxman discusses in particular the Zodiac Ceiling that was taken from Denderah in Egypt and is now in the Louvre Paris. All Egyptian requests for its return have according to Waxman been denied on the account that the piece is too fragile to travel, pp. 62-107. She presents a number of similar types of argumentation concerning also the so called Nefertiti Bust being stored in the Egyptian Museum in Berlin, taken from Tell el-Amara in Egypt, see Waxman pp. 55aa. Another, much less known Swedish example, is the case of the Peruvian Paraccas textiles being stored at the Museum of World Culture in Gothenburg, Sweden. At the time of writing a decision by Gothenburg Municipality Council acknowledges that the ownership of the textiles befalls the state of Peru and that the textiles ought to be returned to Peru (Göteborgs Stad, Kommunfullmäktige, Handling 2013 nr 148). However, the cost for transport and the return process are still being debated. Out of 89 Paraccas textiles, so far only two have been returned due to the high costs connected to the return.

safekeeping, or that the artefacts, after all, rightfully belong where they are now, as some works have indeed been exported in due legal procedures. For instance, the encyclopaedic museums and other cultural institutions, claim in a rather utilitarian way that the artworks in their possession have been acquired legally, and where provenance is not straightforward they claim that the objects nevertheless belong with them, as they are there for the enjoyment of all, that they constitute heritage of the entire human kind, and should therefore be exhibited where the greatest majority of people (regardless of national belonging) can access them – e.g. Paris, the number one tourist destination in the world, and not some remote town, in a conflict torn country.²¹ This is the “benefit for the entire human kind” argument that is often brought forward as an alternative to the national or local identity.

The second type of discussion concerns access to art that mainly stems from a new media, internet, knowledge society perspective. This discussion runs almost in the opposite direction to the one of cultural heritage. The issue of where a work ought to be kept is virtually non-existent in this discussion. All digital or digitised works can theoretically be available to anybody regardless of their physical location. However, due to for instance intellectual property laws, in day-to-day practice, it is not possible for everybody to have access to everything. Far from it, in fact. The studies from this second perspective tend to constitute a discussion concerning the balance of interests between closed and open access, pros and cons of platforms for accessing content, balance of interest between rights owners and consumers, between the public and the private. Such discussions often end up in some type of democracy or power discourse: who can access information, on what terms and to *whom*, be it an individual or a community, such information and knowledge belongs?

So my research is about “both” of these discussions in that it does analyse cases concerning artefacts of cultural heritage that were found somewhere, and taken elsewhere, and then a legal dispute might have ensued concerning: ownership, which identity it can be ascribed to, or where it ought to be kept. In other places my study discusses the perils and possibilities of the digital spheres, of the art that exists digitally and/or online, and what law in the digital era does, does not, and could do, when it comes to access to art.

My research is also about the “neither” as it does not seek to provide any answers to any of these questions, and certainly not the *ownership* question, since the study focuses on articulating and posing the problem differently than what has been done in other recent similar studies.²² Dividing the field in this way, as

²¹ See e.g. Waxman, *Loot*.

²² See e.g. Francoise Benhamou, *Who Owns Cultural Goods?: The Case of Built Heritage*, Emerald Books Business, Management and Economics, (2004), (ed.) Barbara T. Hoffman, *Art and Cultural Heritage*, (eds.) Kenji Yoshida & John Mack, *Preserving the Cultural Heritage of Africa: Crisis or*

has been done so far, in either cultural heritage *or* digital production, by presenting the issue as two-fold, by creating dichotomy pairs and binary opposites, makes the issue appear as though there is no alternative entrance into the field of access to art.²³

The research focuses on questions such as what does law *do*, what could law *do*, what functions it performs, other than to settle conflicts and answer the questions *who* the legal owner is. Is it at all possible for law to do something other than that? Can law be a productive, creative force? Is law supposed to *do*, and can we as lawyers make such claims, or is law only meant to *be*?

The project utilises the theories and methods of the French philosopher Gilles Deleuze (1925-1995) and the French psychoanalyst Félix Guattari (1930-1992) in dealing with jurisprudence and law. Its aim is to develop a critique of dogmatic legal thinking and study particular obstacles to access to art created by certain traditional approaches to jurisprudence. This project aims to challenge such reasoning by using the philosophy of Gilles Deleuze (henceforward “Deleuzian”) in a legal theoretical setting as well as the theories which Deleuze developed together with Félix Guattari (henceforward “Deleuzeoguattarian”), and finally, the research project arrives at a discussion concerning access to art through a legal concept of cultural commons. This is done by way of a rhizomatic legal reasoning that can conceive of a conception of a cultural commons by means of avoiding, for instance, the usual legal dichotomies and, hopefully, overcoming them. Therein lie the theoretical and methodological approaches of this project.

For a reader of Deleuze these types of questions are obvious when using a Deleuzian theory and method. Addressing a similar issue Deleuze once wrote in a letter:

You either see it as a box with something inside and start looking for what it signifies, and then if you're even more perverse and depraved you set off after signifiers. And you treat the next *law* as a box contained in the first or containing it. And you annotate and interpret and question and write a book about the *law*, and so on and on. Or there's another way: you see the *law* as a little non-signifying machine, and the only question is 'Does it work, and how does it work?' How does it work for you?... This second way of reading's intensive: something comes through or it doesn't. There is nothing to explain, nothing to understand, nothing to interpret. It's like

Renaissance?, Suffolk ; Rochester, NY : James Currey ; [Pretoria] : Unisa Press, (2008), John Carman, *Against Cultural Property*, (ed.) Kate Fitz Gibbon, *Who Owns the Past*, etc.

²³ I shall return to this in more detail in chapter 2 below.

plugging into an electric circuit... It relates a *law* directly to what is Outside...²⁴

In that vein, this research seeks not to see law as a 'box' but instead it attempts to get beyond this proverbial box that seems to regard law either as a cognitive creation or as an ontological metaphor. For this research, it does not help to approach law as a set of boxes placed inside one another. It only leads to a dead-end. The theoretical approach (Deleuze/Guattari) shall be developed in chapter 2 below, but I will already in this chapter step-by-step introduce some concepts and basic Deleuzeoguattarian ideas.

1.1 ACCESS AND NOT OWNERSHIP

In the book *Chasing Venus: The Race to Measure the Heavens*²⁵ the author Andrea Wulf describes how during two days in the years 1761 and 1769 astronomers from across the world set out on dangerous journeys to various corners of the world, from as far away as Siberia, St Helena, to India and Indonesia, in order to observe the so called Venus transit, that is, when the planet Venus passes the Sun and when this occurrence is fully visible from Earth. Measuring this passage from various places around the world meant that certain previously unmeasured distances on Earth and in the Universe could for the first time be calculated (more) accurately. One single astronomer could not possibly conduct such an endeavour alone, nor could one single country send people to all these places, due to practical and political restrictions as many of the colonial empires such as England and France were at war at the time. The only way to carry out the measurements was for the astronomers to exercise diplomacy, to collaborate, access and to share each other's data and findings. Wulf writes how this was achieved, despite wars, savage weather and personal rivalries. Various countries²⁶ decided to contribute with funds, astronomers, and access to their colonies and territories as well as their own scientific findings in order to be able to conduct this project, to measure and observe the Venus passage. Each country had its own reason for doing so, not only the prestige of conducting such advanced studies during the Enlightenment era, but also because they knew that participating in this project would mean an increased and more accurate knowledge that could help navigation, increase trade, and perhaps, paradoxical-

²⁴ [my emphasis, quote modified], The words in italics have been changed from the word 'book' in the original quote, to the word 'law' in order to fit in my text here. Quote taken from Judith L. Poxon and Charles J. Stivale, "Sense, series" in (ed.) Charles Stivale, *Gilles Deleuze, Key Concepts*, Acumen, (2005), p. 73.

²⁵ Andrea Wulf, *Chasing Venus: The Race to Measure the Heavens*, William Heinemann: London, (2012).

²⁶ The transit of 1761: Britain, France, Sweden, Russia, America (not yet United States of America). The transit of 1769: Britain, France, Sweden, Russia, America (not yet United States of America), Denmark.

ly, even lead to new colonies. Whatever the reason, the goal to measure the Venus passage could only be achieved by cooperating with others, by communicating and by sharing and accessing each other's territories and data.

Likewise, when discussing the notion of cultural commons, or cultural *commonwealth* as the literary theory and political philosopher Michael Hardt and the political philosopher Antonio Negri refer to it, requires finding ways in which jurisprudence, law and the legal method can allow for, and perhaps even encourage, these types of endeavours: cooperation, sharing, communication, etc. And for such purposes law becomes something that *acts, does, creates, fosters, produces* rather than something that forbids, restricts, encloses and raises fences. This very *production* that law can give rise to becomes interesting from this research perspective, particularly, as we shall see further down, when it comes to the *production of public space, production of the commons* and later on, *production of knowledge* and ultimately *production of law*. There is a lot to be said, theoretically, as well as legally and practically, about the *production(s) of issues*. Hardt and Negri arrive at the creative force of productivity and commons via Foucault's *History of Madness*,²⁷ his critique of the "false universals", and Spinoza's concept "common notion" when they discuss the production and the productivity of the commons.²⁸ I shall develop their approach to the commons below in chapter 5. For now, suffice it to say that we are searching for the *productive potential of jurisprudence and law* and with that a conception of commons in legal thinking and a legal concept of the cultural commons in law.

So how does the cultural commons fit inside the legal sphere? The phenomenon of the commons usually refers to resources that are held and managed in common. The concept of commons is typically divided into two parts – the *natural commons* that consists of goods in nature such as land, water, air, and the *human commons* that is occasionally also referred to as artificial or cultural commons. This second type of commons refers to the man-made, intellectual, tangible and intangible resources and comprises broadly of language, knowledge, ideas, images, rites, styles, beliefs, etc.²⁹ The intellectual resources that form the intellectual commons are idiosyncratic in their nature.³⁰ Because of the vastness of the concept, this research will focus particularly on *artistic works and the aspect of the*

²⁷ Michel Foucault, *History of Madness*, (trans.) Jonathan Murphy, Routledge; 1 edition (2006, [originally published in 1961]).

²⁸ Michael Hardt and Antonio Negri, *Commonwealth*, Cambridge Massachusetts: Harvard University Press, (2009), p. 120-121.

²⁹ For a closer analysis of the two commons types see chapter 5 below. See also Michael Hardt, 'The Common in Communism', in *Rethinking Marxism: A Journal of Economics, Culture & Society*, 22:3, 346-356. See also (eds.) Enrico Bertacchini, Giangiacomo Bravo, Massimo Marrelli and Walter Santagata, *Cultural Commons: New perspectives on the Production and Evolution of Culture*, Edward Elgar, (2012).

³⁰ See Enrico Bertacchini, Giangiacomo Bravo, Massimo Marrelli, 'Defining Cultural Commons' in (eds.) Bertacchini, Bravo, Marrelli, Santagata, *Cultural Commons*, p. 3.

intellectual commons that is connected to the artistic expression in particular. Most of the significant research in terms of commons-based resources has so far been conducted within the area of the natural commons, confining the cultural commons often to the margins of the commons studies. The legal framework that concerns the natural commons is furthermore also marginalised in these types of studies. As an economic concept, often presented as an aspect of the prisoners' dilemma, the concept of the commons in general, and the cultural commons in particular, often marginalises and ostracises theoretical legal exercises, and as such, the concept has only been topographically (at least in terms of theoretical approaches) treated from the legal point of view. That is not to say that prominent scholars have not commented on and treated the subject. The American professor of law James Boyle has addressed the commons within the so called "second enclosure movement"³¹ – i.e. within the framework of what he refers to as expansion of intellectual property rights and the private paradigm that has taken over resources previously held in common. Law professor and the creator of the Creative Commons initiative Lawrence Lessig has addressed the legal restrictions on culture and ideas, often discussing the benefits of a commons construction as an alternative.³² Outside the legal sphere Michael Hardt and Antonio Negri have made a significant contribution in terms of the theoretical framework surrounding the (natural as well as artificial) commons of which the artistic and cultural content is naturally part of. Carol M. Rose,³³ law professor, has also conducted some significant studies in terms of law and the theoretical aspects of the commons as a legal concept particularly with regards to information and intellectual property law. One of the most recent studies, at the time of writing, called *Protecting Future Generations Through Commons*³⁴ edited by Saki Bailey, Gilda Farrell and Ugo Mattei adds some further interesting aspects to the commons, particularly discussing the Italian Rodotà Commission that interestingly introduced the category of "common goods" into the Italian Rodotà

³¹ The second enclosure of the commons is one of the defining tropes within the A2K movement. James Boyle has coined the phrase. He refers to the first enclosure of the commons, which took place in England between the fifteenth and nineteenth century, encompassing a long historical "process of fencing off common land and turning it into private property". With the advent of global intellectual property rights "once again things that were formally thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights." James Boyle, 'The Second Enclosure Movement and the Construction of The Public Domain' in *Law and Contemporary Problems*, 66, nos 1/2 (Winter/Spring 2003), pp. 33-34 (first quote) p. 37 (second quote).

³² See e.g. James Boyle, *The Public Domain: Enclosing the Commons of the Mind*, New Haven & London: Yale University Press, (2008). Lawrence Lessig, *The Future of Ideas*, see also (eds.) Bertacchini, Bravo, Marrelli and Santagata, *Cultural Commons*, p. 3.

³³ Carol, M. Rose, 'Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age' in 6 *Law & Contemporary Problems* 89 (2003).

³⁴ (eds.) Saki Bailey, Gilda Farrell and Ugo Mattei, *Protecting Future Generations Through Commons*, Trends in Social Cohesion, No. 26, Council of Europe Publishing, (2013).

Commission that introduced the category of “common goods” into the Italian Civil Code and property law. I shall be returning to these commons studies below, particularly in Volume II.

The discussion surrounding the commons thus concerns a very much still-in-progress paradigm shift. In fact, it could be claimed that it is a three-tiered paradigm shift, or three types of paradigm shifts, occurring simultaneously. The first concerns the *commons as a construction* in law, the second concerns the *intellectual property paradigm* and its existence and function in the access-and-sharing-based digital knowledge society, and the third is an *international paradigm* that generally concerns the global access to resources, the level of openness, platforms and laws that can regulate openness and access to various types of resources.

In terms of commons as a construction in law, this paradigm has to do with the type of logic(s) that already exist in the legal sphere. Issues such as: “Can access to the commons be formulated as a right?”, “Or, as a new type of right?”, “Or, an obligation?”, “Or, a property?”, or “A heresy?”,³⁵ “Is it contract-based or statutory?” – these questions are continually discussed within this paradigm.

The second paradigm that this research touches upon is the future of intellectual property and the paradigm shift from industrial to digital economy society. There are certain assumptions that are very much industrial and based within the industrial society, entrenched within intellectual property law, such as that a work of art is presumed to be fixed and tangible, a commodity, that expression has to have an object-centric side to it in order to achieve the status of intellectual property, that the author is always a definable individual, that creation most often happens *ex nihilo*, etc. Still, it can be questioned whether the intellectual property law as a paradigm in its own right, is at all mature, or ready, to even conceive of the cultural commons as a concept as it challenges fundamental grounds of IP law, and if so, to which degree of openness can it be introduced into IP law without destroying or seriously denting the underlying property right?

The third paradigm that will be addressed within the setting of this research is connected to a more general international paradigm and the on-going discussion in terms of how access to resources has to be regulated and governed within the knowledge economy as well as the still very much present global economic crisis. In the first sentence of their book *Commonwealth*,³⁶ Hardt and Negri claim already in the preface that crisis such as war, suffering, misery and exploitation, increasingly characterise our globalising world.³⁷ Hardt and Negri’s writ-

³⁵ Filippo Valguarnera, ‘Commons: framtid eller rättsligt kätteri?’ in *Miljörättsliga Perspektiv och Tankeväндor: Vänbok till Jan Darpo och Gabriel Michanek*, (eds.) Lena Gipperth and Charlotta Zetterberg, (2013).

³⁶ Hardt/Negri, *Commonwealth*.

³⁷ *Ibid.* p. vii.

ings will be read with reference to the global Access to Knowledge movement (A2K) throughout this research. And, as Andrea Wulf manages to show beautifully, when it comes to the sharing of intellectual achievements on a global level, wars and crisis are certainly not a new phenomenon. However, this particular crisis has brought on a paradigm shift of its own, where it is a question of accessing *both* natural *and* intellectual resources. In this crisis, there seems to be a shortage of both.

This research project has in fact been written in a time of crisis: financial crisis, environmental crisis, employment crisis, technological crisis, legal crisis, *intellectual property crisis*... The crisis has particularly hit the global cultural industries. It has certainly also affected law. First it appeared as though we were entering the end of times.³⁸ Then it appeared as if the only way to exit the crisis was to *reclaim* what had been lost, the causes³⁹, the struggles, the influences, the territories, the streets, the spaces, the squares, the realms of power... To do that, law on a global level had to be approached differently. So law slowly, and perhaps unbeknownst to many of us, became something else, it became a territory, a machine. This project has indubitably been written with this crisis as backdrop. As such it tries to re-imagine jurisprudence and law in order to pose questions concerning the role of law in the discussion concerning *access to art* and *the legal concept of the cultural commons*.

To conduct a study of law in this setting certain conceptions have had to be (re)visited. Introducing or *reintroducing* the legal concept of the cultural commons means that the ideological concept and the conception of *ownership* of cultural works and scientific findings slightly fall outside the scope of this research. The research focuses instead on *access*.

My research has been conducted by studying cases that have then been translated into the Deleuzian theoretical matrix of concepts such as “encounters” [*recontres*]. This has been done in order to show current obstacles to access to cultural and intellectual creations such as for instance rights that restrict access e.g. on on-line distribution and sharing, reticent rights-owners that do not wish to make their artworks available to the public, institutions that limit access to artworks, digital rights management schemes that restrict digital use, etc. Here, the focus is thus particularly placed on artworks as a form of intellectual creation and knowledge. These “obstacles” to access will be presented through four case studies with the aim to closer analyse the following issues:

- 1) Access to the physical artworks
- 2) Access to inspiration
- 3) Access to artworks post mortem auctoris
- 4) Access through libraries and digitisation.

³⁸ Slavoj Zizek, *Living In The End Of Times*, Verso (2011).

³⁹ Slavoj Zizek, *In Defence Of Lost Causes*, Verso (2009).

In *access to physical artworks* I look at a case where a mural painted for a child's nursery during World War II was divided into pieces and the subsequent dispute that ensued between various parties claiming that the pieces of the mural rightfully belong to them. Stressing both the physical fragmentation of the work as well as the fragmented nature of the identity of its creator, the obstacle describes how a shattered identity or a shattered artwork become difficult to grasp and conceive of legally. Therefore, access to such works can become stifled and/or restricted.

In *access to inspiration* I study derivative works. I look particularly at a case where a trademark had been incorporated in a painting for the purposes of social commentary. Discussing the branded information society and the creative expressions that exist everywhere today, the case studies how already existing original works can inspire derivative ones, and the borderlands between possession of intellectual property and the privilege of freedom of expression in a global branded society. Access to inspiration means being inspired by other creative expressions that exist at the time as the derivative work is being created.

In *access to works post mortem auctoris* the focus is on works that have been left behind by, in this case, prominent authors. Discussing the role played by the heirs and estates that control works left behind by deceased authors, this case attempts to reveal 'gatekeepers' that exist after the original creator has passed away, both under the duration of copyright, as well as when the copyright term has expired. This particular case attempts to show that heirs and estates can sometimes have more control over works that are left behind than might have been legally intended, and the balance between the public interest in works left behind and the rights of family/heirs/estates is analysed in detail.

Access through libraries and digitisation studies the legal concept of orphan works and how access to these works can be enabled through libraries and/or digitisation. Orphan works are works that are still within the term of copyright but where the creator is unidentified or unknown. The lack of rightsholders means that many of these works remain locked up in e.g. libraries but no one can access them, as there is no one available to grant clearances and/or licences. Discussing the concept of orphan works in particular this case analyses which works fall within the definition and the possibilities in terms of access this concept potentially enables.

The four access issues have been, as already mentioned, analysed as *encounters* in the Deleuzian sense of the word i.e. something that *forces law to think*. What does that mean? Gilles Deleuze defined the concept of encounter in the following manner:

Do not count upon thought to ensure the relative necessity of what it thinks. Rather, count upon the contingency of an encounter with that which forces thought to raise up and educate the absolute necessity of an

act of thought or a passion to think. The conditions of a true critique and a true creation are the same: the destruction of an image of thought which presupposes itself and the genesis of the act of thinking in thought itself. [...] Something in the world forces us to think. This object is not of recognition but of an *encounter*. [...] In whichever tone, its primary characteristic is that it can only be sensed. In this sense it is opposed to recognition.⁴⁰

An encounter is something that the law meets but does not recognise *a priori*.

In legal research we have become quite accustomed to H.L.A. Hart's *rule of recognition*.⁴¹ In *The Concept of Law*, Hart argues that the legal system comprises of rules and is founded on rules. The rule of recognition is thus the meta-rule, (the *Grundnorm* in Kelsen⁴²) which *recognises* the foundation of law. Now, it may seem that the word 'recognition' here has two different meanings. Deleuze seems to be applying it in the sense of *recollection*, an object that we have met before, and we can recollect when we encounter it a second time and place it in the network of everything else we know. Hart on the other hand seems to be using the word in the sense of *authority* or *justification*, something that gives something else its validity. However, this very multi-meaning of the word is what provides us with the first connection between Deleuze and jurisprudence. What both Deleuze and Hart are implying is that recognition appears to be some kind of *reaching of a limit*. In Hart's case it is the limit of positive law, in Deleuze's case it is the limit of a recollection. In that sense the two are commensurable. A Hartian reading of recognition in law entails finding the limit of the legal system, and finding the rule that recognises and justifies its authority and existence. A Deleuzian reading of (non)recognition in law means finding an encounter that is unrecognisable within the dogmatic legal framework as outlined above and as such *problematic*. With an encounter we also find a legal problem. An encounter thus "forces [law] to pose a problem: as though the object of the encounter, the sign, were a bearer of the problem – as though it were a problem."⁴³

The encounter is thus read both as a problem and a *productive force*. Deleuze explains an "encounter" as a glimmer of light, as an event, a speed, a becoming. It forces law to think and recollect its own validity. With the encounter something is transformed, it becomes something else – therein is the productivity: production of the public sphere, production of knowledge, production of law, etc.

⁴⁰ [original emphasis], Gilles Deleuze, *Difference and Repetition*, (trans.) Paul Patton, Continuum, (2004 [originally published in 1968]) p. 139.

⁴¹ H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon, (1961).

⁴² Hans Kelsen, *Pure Theory of Law*, (trans.) Max Knight, The Lawbook Exchange, Ltd. (2009 [originally published in 1934]).

⁴³ Gilles Deleuze, *Difference and Repetition*, p. 140.

This concept will be developed further below in section 1.7.1, but it can briefly be stated here that a Deleuzian encounter is a productive force, an encounter with something entirely new, previously unencountered, which forces the scholar to go “beyond philosophy through philosophy”⁴⁴ or more exactly in terms of what this research aims to achieve to go *beyond law through law* as an epistemological endeavour. Thus, it will not indulge in the ontological question of *what law is*⁴⁵ but rather focus on law as a productive force as well as the production of knowledge and legal possibilities.

Charles Stivale describes the Deleuzian encounters as “becoming unhinged”.⁴⁶ Focusing on *access to art* instead of ownership of art this research is an attempt to challenge law as it has been known, or as it has been assumed to be, to become unhinged when faced with cases that can be described as Deleuzian encounters. And from there on, it goes on to discuss how the concept of the cultural commons can be conceived of in jurisprudence and law.

That widened possibilities in terms of access to art can and do affect ownership of the underlying resource seems to be a foregone conclusion. However, this research attempts to show how there is a possibility to form a conception of a legal cultural commons that does not necessarily have to affect the underlying ownership structure as well as the ownership paradigm (radically). That is not to say that current ownership paradigm and property based rights will not be criticised. But placing the critique within the theoretical framework of this project also means finding the possibility within jurisprudence and current law. Reading law in the proposed way, a concept of the commons does not have to (fundamentally) negate the underlying property structure.

1.2 THE DARK SIDE

Lately, the art world and the cultural industries as content creators and owners have seen a rapid development and unprecedented possibilities in terms of creating an ever-wider access to works through a fast dissemination of content through various digital platforms and alternatives. As is now widely known, the digital alternatives also came with a dark side that generated uncontrolled amounts and rapid soars in *illegal* downloading, piracy and counterfeiting. From a legal perspective, such development has been met with a defensive response, by creating incentives for an increasingly narrow, property-based regulation, with strict enforcement rights, longer durations of term of the exclusive right, and so forth. Enclose, and enclose quickly, seems to have been the buzzword

⁴⁴ Charles Stivale, ‘Introduction: Gilles Deleuze, a life in friendship’ in (ed.) Stivale, *Gilles Deleuze, Key Concepts*, p. 2.

⁴⁵ The ontological question is further discussed in chapter 2 below.

⁴⁶ Stivale, ‘Introduction: Gilles Deleuze, a life in friendship’ in (ed.) Stivale, *Gilles Deleuze, Key Concepts*, p. 6.

for the legislator. This in turn has had a negative impact on the public interest and the fair use principles in copyright law and other intellectual property legislations. The notion of the open public domain and other collective and network-based aspects of access to art had to be scaled down, not to say fully disregarded, for the benefit of enforcement rights in order to actively counteract the on-going illegal downloading issues.

Contrary to the development of knowledge society and the digital spheres themselves, which mostly revolve around a network-based sharing of knowledge and content, law developed in the completely opposite direction, focusing on strategies that provide stricter fences, and additional individually controlled enclosures. This is a dichotomy among a multitude of dichotomies that we shall meet throughout this research, namely the closed, individual enforcement right in copyright law *vis-à-vis* the open, network-based, multiple spheres of the digital alternatives.

The strengthening of the enforcement rights has not gone by unnoticed. Indignant voices of concern have been raised around the world, claiming, (shouting, tweeting, demanding, even occupying), that culture is little by little being colonised by the growing private domain,⁴⁷ that freedom of speech is diminishing for the benefit of commercial interests and the realm of creativity and knowledge is gradually being transformed into private property.⁴⁸ These tendencies of progressively emphasising the commercial and private in artworks, of strengthening the enclosed property right, this *second enclosure movement* to reiterate Boyle's terminology, will potentially result in future cultural losses, it has, perhaps rightly so, been pointed out.⁴⁹

1.3 PROBLEM AND PURPOSE

The problem of this research is the burning question that generates issues on a daily basis, namely, how to consolidate ownership and access to intellectual property based commodities, without losing the one (e.g. ownership) for the benefit of the other (e.g. access). This project focuses particularly on access to artworks and the creative expression as knowledge. Seen in that way, the project studies whether access to art can be enabled and whether a conception of commons can be conceived of in legal thinking when the concept of cultural commons is (re)introduced in law.

Intellectual property law can be in conflict with various rules and not just the principle of open access. For instance, it can be in conflict with article 27 Uni-

⁴⁷ Which includes, but is not limited to, the commercial and market aspects.

⁴⁸ See e.g. Lessig, *Free Culture*, and Fiona MacMillan, 'Commodification and Cultural Ownership', in (eds.) J Griffiths and Uma Suthersanen *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press (2005).

⁴⁹ Ibid.

versal Declaration of Human Rights (UDHR) – the right to freely participate in the cultural community, or constitutional laws such as freedom of speech, freedom of expression, etc. While intellectual property law encloses the creative expression, the other two (UDHR and constitutional rights) regulate the principle of public interest and democracy when it comes to the acts of access and communication in a free society or engagement in communication and cultural exchange. To put it differently, the rights of a private owner can be in a perpetual conflict with the interest of the public when it comes to cultural expressions.

This is the unending hurdle in dogmatic legal reasoning that appears insurmountable, namely that the one always has to benefit at the expense of the other, in a legal order where we assume⁵⁰ a hierarchical order according to a presumed binary logic this is the only logical way to approach conflicts of laws, principles or interests. In the “Deleuzeoguattarian rhizome-based logic” that I shall be introducing here we shall see how this particular approach allows for a study of law as an assemblage, legal reasoning as a map with multiple entryways.

The “rhizome” and the rhizomatic nature of jurisprudence are concepts that I shall be developing throughout this study, particularly in chapter 2. The rhizome is a concept that Deleuze and Guattari developed in their book *A Thousand Plateaus*⁵¹ and as a philosophical concept it denotes something that is connectable, i.e. a philosophical concept that instead of hierarchies and systematic organisation advocates *connectability*. This very notion of connectability shall be particularly explored here.

Deleuze/Guattari borrow the term rhizome from botany, used to indicate multi-centred plants, with horizontal roots with offshoots that form other individual organisms. It thus denotes a number of underground organisms that create a network of horizontally spreading roots. In order to create a reasoning that is similar to such an idea, i.e. that correlates to a network based, multiple, spreading biological rhizome, the philosophical concept of the rhizome was developed for the sake of creating connectivity and fluidity between various, often

⁵⁰ Håkan Gustafsson points out (my translation): “A critical legal epistemology exposes, with all necessity, that legal concepts and boundaries are *instable* and *contingent* – namely constantly exposed to discursive negotiations and power displacements – and can also actively contribute to a *destabilisation* by enhancing the ‘anomalies’ of knowledge, which signify the *otherness* of law.” [original emphasis], Håkan Gustafsson, *Dissens: Om Det Rättsliga Vetandet*, Juridiska Institutionens Skriftserie, Skrift 9, Göteborgs Universitet, (2011), p. 33. By using the word “assume” here I am aware that I am inadvertently causing certain destabilisation, to follow Gustafsson’s train of thought. This temporary act of destabilisation will hopefully contribute to the discussion in which the anomalies and otherness of law are approached as encounters that reveal the potential of jurisprudence and law.

⁵¹ Gilles Deleuze and Félix Guattari. *A Thousand Plateaus: Capitalism and Schizophrenia*, (trans. and foreword) Brian Massumi, London: Athlone, (edition from 2011 [originally published in 1988]).

dispersed, philosophical concepts. Here they shall also be connected to jurisprudence and legal concepts.⁵²

Using the concept of the rhizome as the main theoretical tool, the connection between ownership and access in law will not have to pose any problems. Allowing various interests and rights to be inter-connected at various levels, to form more or less temporary constellations, is one of the Deleuzeoguattarian rhizome theory's strongest benefits. On some levels there might be a conflict of interests, while on others what appeared as a conflict can form a productive alliance. What will be argued throughout this study is that in copyright law the private and the public have to compete, in a commons based setting they can work together to form the specific rhizomatic relationship that makes up the cultural commons.

The rationale behind a commons based concept in law, as I hope shall gradually become apparent, is to facilitate a wider access to artworks, to enable communication and flows of ideas and knowledge, and to ultimately avoid obstructions or bottlenecks created by law. Addressing issues such as the balance between the public and the private, between open and closed access, between rights and privileges, between invention and information, the project analyses how jurisprudence so far has conceived of commons as a concept as well as how the legal concept of cultural commons can be a potential interesting path or a hub that could soothe the most burning problems that these issues pose to jurisprudence and positive law. Thus, the research question is:

In order to advance and strengthen access to art and create legal pathways which facilitate that art can be communicated, accessed and shared, could legal thinking formulate a conception of the commons and could the concept of the cultural commons be introduced, applied and given a platform in law?

So as to conduct the study, and finally address the overall research question in the end, the research question has been broken down into three sub-questions:

- 1) How can the underlying binary reasoning in law that creates the opposite pairs such as e.g. private/public, open/closed, etc., which are hindering and/or complicating access to art as well as the creation of a legal conception of the cultural commons, be overcome?

For this question to be addressed the Deleuzeoguattarian concept of the *rhizome* will be applied. The concept of the cultural commons requires that we reimagine certain characteristics that have been taken for granted in order to conceive of the cultural commons. Some of those characteristics such as the binary op-

⁵² For a detailed discussion concerning the rhizome concept please refer to section 2.3. below.

posites as inside-outside, private-public, open-closed, have to be reassessed and formulated differently. It will be argued that the binary thinking that underpins dogmatic legal reasoning, particularly within the field of intellectual property law, creates obstacles to access of its own. Which brings us to the second sub-question, namely:

- 2) Is a dependence of a legal system, of a legal inside and a legal outside, a norm hierarchy, the only possible approach to law, and how does such a notion create obstacles to access?

The legal system creates other types of obstacles to access too, not only the dichotomy-based pairings. This research project also aims to explore those. To answer this sub-question a constructive exercise will be conducted in order to show how other cognitive constructions than a hierarchical legal system can be beneficial to legal reasoning. Law will be approached not as a system but as a Deleuzian “*Body Without Organs*” or more accurately “*Law Without Organs*”. The law without organs concept refers to, not the body of law, but the *organisation* of law. Various ‘realities’ that exist inside and outside law, but that are not necessarily always acknowledged, or that are sometimes excluded, within the dogmatic legal reasoning can be incorporated into a Law Without Organs in a new way. Instead of presenting traditional legal fields as ‘boxes’ such as e.g. intellectual property law or constitutional law or human rights law that are organised and placed in a hierarchical order, the project aims to answer this sub-question by assuming a linkage based reasoning, that is when the legal concepts are enabled to be interlinked, rather than to compete. And finally:

- 3) Can the concept of the cultural commons be divorced from property-based reasoning?

Ultimately, in order to formulate the concept of cultural commons the project poses this final sub-question that examines the incentives for development and rewards that intellectual property provides *vis-à-vis* access that open access projects promote and how the two can be interlinked and reconciled in a concept that focuses on *communication and access* instead of ownership. The project will answer this sub-question by demonstrating how law can enable communication within the cultural commons, without for that reason undermining certain underlying ownership structures.

Through Deleuzian and Deleuzeoguattarian theory, this project attempts to introduce a conception of the cultural commons in jurisprudence and the legal concept of the cultural commons in law, using the three sub-questions at hand as a guiding light throughout the analysis. This theory is necessary mainly because it reveals the particular binary reasoning and opposite based couplings that have stifled further constructive attempts concerning the cultural commons particularly within the legal setting. The overall research question will be an-

swered by committing to the three sub-questions above, underpinned by Deleuzian and Deleuzeoguattarian theory and method, namely, whether it is possible to conceive of commons in jurisprudence and how of the concept of the cultural commons could be given a genuine legal platform.

The ambition of this project is to broaden the theoretical understanding as to how a cultural commons may be introduced as a concept in law and how such a concept may function and be beneficial. Another ambition is to further discuss Deleuzian and Deleuzeoguattarian theory and keep bringing it within legal theory and jurisprudence. On a theoretical level, the rhizomatic jurisprudence and a wider conception of the cultural commons as a legal concept will open up (perhaps unexpected) theoretical alliances such as the one that Andreas Philippopoulos-Mihalopoulos has been exploring between Niklas Luhmann and Deleuze as well as a connection between Deleuze and Jürgen Habermas that still remains comparatively unexplored. I shall return to these theoretical discussions in the eighth and final chapter of this study.

What ties the entire research together is the search for the legal concept of the cultural commons, and in order to do that, we have to revisit certain conceptions of jurisprudence, law, art and obstacles to access from a rhizomatic point of view, we have to also theoretically approach the concept of the commons and place it within the rhizomatic study of jurisprudence.

That means that this research attempts to present certain concepts in a nuanced light, increasingly problematised, adding layers to them and connecting them to each other and other (philosophical) concepts and connections that are not necessarily always made or allowed for in dogmatic research. Admittedly, some of the connections may seem provocative, but that is done so as to reveal the potential of law and the benefits of a concept of cultural commons in law.

The study has been divided in two volumes. Volume I aims to explore the *possibilities of law* in terms of the access to art. The purpose of volume one is not to merely present a critique of the shortcomings of law and obstacles that law poses to access to art, but to also through a theoretical exercise emphasise how the commons can be conceived of in jurisprudence, while doing that the possibilities of law will be revealed when a problem or obstacle is encountered. Volume II aims to place that entire discussion inside a *cultural commons paradigm and how it may be introduced in law*. The purpose of Volume II is to theoretically construct a legal concept of the cultural commons. For that to be done, various previous readings of the commons are presented from different points of view, economic, social, cultural as well as legal. Volume II culminates in a connection between the theoretical analysis conducted in Volume I and the readings of the commons conducted in Volume II, introducing a legal concept of the cultural commons within the rhizomatic jurisprudence.

The research argues throughout Volume I and Volume II that the time is ripe to seriously discuss an introduction of a legal concept of the cultural commons particularly in a time of crisis that has spurred on various paradigm shifts.

New life conditions require new laws and legal concepts. That means that jurisprudence, law and existing legal concepts need to be inventoried and some concepts that we have become accustomed to, may in that vein have to be changed, some introduced, and other reintroduced.

1.4 DELIMITATIONS

The A2K movement is challenging the coherence of this account by formulating a series of critical concepts, metaphors and imaginaries of its own – concepts such as ‘public domain’ and the ‘commons’ and ideals such as ‘sharing’, ‘openness’ and ‘access’.⁵³

So far, this research has been introduced as a study that concerns access to art. This research can further generally be placed within the *Access to Knowledge* paradigm (A2K)⁵⁴. The A2K movement is described in two ways:

- 1) As a reaction to structural trends in technologies of information processing and in law, and
- 2) As an emerging conceptual critique of the narrative that legitimises the dramatic expansion of intellectual property rights that has been occurring lately.⁵⁵

It has been argued that these two occurrences taken together have led to an increasingly marginalised access to knowledge. The A2K movement concerns all areas covered by intellectual property rights including (but not limited to) patents, software, agriculture, medicine, entertainment, etc. The first delimitation of this project is that it shall particularly study access to *artworks* as knowledge sources and in that vein focus on primarily copyright law.

Intellectual property rights are thus understood as a set of conceptual tools provided by the legislator that allow ownership and control of intellectual works and information. As such, it is through intellectual property people own and control knowledge. This management of knowledge has implications for instance the economic growth, but also on human experiences, health, and ultimately, democracy.

Often the A2K movement is presented as an activist movement, a counter reaction to the neoliberal movement of the 1970s. My research acknowledges

⁵³ Amy Kapczynski, ‘Access to Knowledge: A conceptual genealogy’ in (eds.) Gaëlle Krikorian and Amy Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, Zone Books (2010), p. 18.

⁵⁴ See generally (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*.

⁵⁵ *Ibid.* p. 17.

the importance of this activist movement, particularly for the significant role it has played in the development of the research concerning the commons. However, the project equally attempts to reach beyond to activist aspect of the movement when discussing these concepts within jurisprudence and law.

Stated in reverse then, my project does *not* study:

- a) The ownership issue and the property rights connected to it. As I have already indicated above, that intellectual works are owned and governed by the instruments of property rights will be addressed, but the ownership structures will not be studied in detail. In order to reach the concept of the commons, some ownership issues will have to be addressed. This will be done particularly in chapter 5. However, this is done only in order to arrive at the concept of the commons that shall be applied from Volume II and onwards. A study of the legal concept of property rights will thus not be conducted.
- b) The non-aesthetic⁵⁶ works in which copyright or other intellectual property rights can subsist such as e.g. patents, software, medicine, agriculture, data bases, maps and various other assemblages and compilations of information, intellectual property that is created without an *a priori* aesthetic rationale. While the A2K movement was born from the access-to-medicine movement,⁵⁷ and much of the research that is conducted within the field has to do with access to patent-based commodities, this research project will not study those types of works and inventions. The A2K discourse guide the study, but the particular focus is on the access to the aesthetic work.
- c) Mere technological inventions, digital solutions or platforms (e.g. bit torrents, Spotify, The Cloud, etc.) will not be studied, even if these inventions and platforms do generate intellectual property, enable access, and can have certain creative functions. These technological solutions are instrumental in the process of dissemination of creativity and knowledge, but this research focuses on the *creative content* that is being disseminated rather than the technology, i.e. *content carriers* that enable such dissemination.⁵⁸ However, this statement will be slightly

⁵⁶ Or at least where aesthetic is not one of the main purposes of the work.

⁵⁷ See generally (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*.

⁵⁸ Lewis Hyde writes rather polemically: “Record companies don’t sell music; they sell the container, and thinking that the container is the music is like thinking that a shopping cart is food or that the wine bottle is the wine. Substituting the one for the other – the container for the contained – is an old trick of language; rhetoricians call it metonymy. [...] When concrete objects deliver abstract objects, a skin of scarce and exclusive property settles over the abundant and nonexclusive, stands in its stead, and makes it easy to manage rights-holders’ privi-

modified and nuanced in chapter 6 where it will be shown that a clear line between content and content carrier, or form and expression, is difficult to draw both theoretically and practically in the digital knowledge sphere.

The reason why particular focus is centred on the access issue and not ownership is precisely because of the A2K movement. The conception of access tends to be minimised in ownership discussions, even the ones that are critical of current intellectual property law, but are not within the A2K paradigm. However, within the A2K discussions there tends to be an overemphasis on patents, particularly medical, agricultural and technological inventions and the benefits and knowledge connected to those. Here, I am exploring how artworks as knowledge can further be connected to the aspects of access to knowledge. The cultural works are still rather unexplored or at least under-explored within the A2K discourse.

The term ‘access’ in A2K was first associated with access-to-medicine campaigns, but was then broadened.⁵⁹ Legally speaking both access to AIDS medicine, as well as access to the latest The Lumineers track are governed within the same legal field – namely, intellectual property law. Whether this is an apt or an uncomfortable categorisation, to bundle such disparate intellectual products together, may not be an irrelevant question, but one that will only obliquely be addressed here. Instead it is used as an argument to show how already today, in law, artworks as well as medicine seem to be considered as life-saving.

Seen in this way the discourse for art as well as for medication, is framed within the discourse of human rights, *the right to life – the right to a good life*.

1.5 INTELLECTUAL PROPERTY RIGHTS AND THE CONCEPT OF THE CULTURAL COMMONS IN INTERNATIONAL LAW

Unlike prior international intellectual property agreements negotiated under the auspices of the World Intellectual Property Organization (WIPO), TRIPs has teeth.⁶⁰

Aside from national legislation, the field of intellectual property is also governed by international agreements such as TRIPs,⁶¹ a number of treaties governed by

leges”, Lewis Hyde, *Common as Air: Revolution, Art and Ownership*, Union Books, (2012), p. 63-64. I shall return to the content/carrier distinction in chapter 6 below.

⁵⁹ Kapczynski, ‘Access to Knowledge: A conceptual genealogy’ in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 37.

⁶⁰ L. R. Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’, in 29 *Yale Journal of International Law* (2004) p. 1.

WIPO (World Intellectual Property Organisation),⁶² regional agreements such as various EU directives,⁶³ bilateral conventions⁶⁴ and agreements that are established outside the WIPO such as ACTA⁶⁵. There are also certain national proposals from e.g. the US that, even though they are national legislation pro-

⁶¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

⁶² e.g. WIPO Performance and Phonograms Treaty, WIPO Copyright Treaty 2002.

⁶³ e.g. The Information Society Directive (2001/29/EC 22 May 2001) – also known as the “EU Copyright Directive” (EUCD).

Enforcement of intellectual property rights (Criminal) (proposed)

Enforcement of intellectual property rights (Civil) (2004/48/EC 29 April 2004).

Harmonising the term of copyright protection (Copyright Term Directive) (93/98/EEC 29 October 1993)

Legal protection of designs (98/71/EC)

Database Directive (11 March 1996)

Patentability of biotechnological inventions (98/44/EC 6 July 1998)

Patentability of computer-implemented inventions (proposed, then rejected)

Rental and lending rights (92/100/EEC)

Directive on the legal protection of topographies of semiconductor products (87/54/EEC 16 December 1986)

Trademark Directive (89/104/EEC 21 December 1988)

Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC 27 September 1993)

Directive on the re-use of public sector information (2003/98/EC 17 November 2003)

Certain legal aspects of information society services, in particular electronic commerce, in the Internal Market directive (2000/31/EC “Directive on electronic commerce”, 8 June 2000 on EUR-Lex)

Coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors directive (2004/17/EC 31 March 2004 on EUR-Lex)

Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts directive (2004/18/EC 31 March 2004 on EUR-Lex)

Infrastructure for Spatial Information in the European Community directive (2007/2/EC INSPIRE directive 14 March 2007 on EUR-Lex)

Green Paper on Copyright and the Challenge of Technology COM (88) 172 and its follow up document: 5.12.1990, COM (90) 84

EC Treaty art. 30

Television Without Frontiers Directive (Council Directive 97/36/EC)

⁶⁴ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation, 1961

The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Genève 1971

Paris Convention for the Protection of Industrial Property 1883

⁶⁵ The Anti-Counterfeiting Trade Agreement (ACTA), that has been signed by among others the USA, EU, Australia, Japan.

posals, have garnered a lot of international attention (and concern) such as PIPA⁶⁶ and SOPA⁶⁷.

The general tendency that can immediately be shown is that the legislative acts have rapidly increased during the last couple of decades. Ever since 1880s *The Paris Convention for the Protection of Intellectual Property* and *The Berne Convention for the Protection of Literary and Artistic Works* there have been international conventions regulating this area of law on an international level. These two conventions, Paris and Berne, were placed under WIPO (which is a United Nations agency) in 1967. In the UN capacity WIPO does not have a mechanism for enforcement of the two conventions or intellectual property rights on a global level. With the TRIPS agreement this traditionally weak enforcement possibility changed as it was brought under the umbrella of WTO (World Trade Organisation).

TRIPS now implements a division of labour between WTO and WIPO:

To facilitate the implementation of the TRIPS Agreement, the Council for TRIPS concluded with WIPO an agreement on cooperation between WIPO and the WTO, which came into force on 1 January 1996. As explicitly set out in the Preamble to the TRIPS Agreement, the WTO desires a mutually supportive relationship with WIPO. The Agreement provides cooperation in three main areas, namely notification of, access to and translation of national laws and regulations, implementation of procedures for the protection of national emblems, and technical cooperation.⁶⁸

Apart from a couple of countries in the Middle East and Africa, the rest of the countries in the world have all signed the TRIPS agreement, including Russia and China that were never likely to sign the previous conventions. Another interesting aspect is that all developing countries are also signatories of the agreement.

One of the most frequent critiques of this agreement is the very fact that the developing countries are placed under same burdens as the developed countries. Also, since the developed countries are usually the owners of intellectual property and the developing countries are often *users*, there is a North-South divide that is created and perpetuated:

⁶⁶ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, (PIPA).

⁶⁷ Stop Online Piracy Act (SOPA).

⁶⁸ http://www.wto.org/english/tratop_e/trips_e/intel3_e.htm. Last accessed 15th March 2014.

To a large extent, the ‘North-South’ divide has merely become a leitmotif for a new transnational IP discourse framed more broadly as access to knowledge, or ‘A2K.’ This discourse, among other things, offers a counter-narrative that has systematically challenged the established IP orthodoxy, which has represented ever-stronger IP rights as a source of inescapable virtues for economic growth. Today, global public concerns about matters as varied as labor standards, environmental protection, gender equity, biodiversity and food security, set against a backdrop of vast social networks, all canvass around the A2K rubric, combining the claims of ordinary citizens worldwide with the longstanding demands of less industrialized countries for a global IP system that promotes technological, social and cultural progress. These are some of the critical issues at the frontier of future global IP norm-setting.⁶⁹

It is this tendency towards an increasingly monolithic legal framework that allows projects like this to address *intellectual property* law without necessarily having to specify *which* intellectual property law is being referred to – the harmonization that happened with TRIPS puts in place a global regime with a basic IP regulation that is the same all over the world. This may seem like a controversial statement, but in my view it is not controversial, even if it can be criticised.

There are of course national divergences and there are IP principles that differ depending on jurisdictions. However, with the TRIPS agreement, especially from a theoretical and A2K point of view, the differences are marginal. I shall, therefore, not dwell on either the history of intellectual property rights (IPRs) or on the differences between various IP laws and regulations in different countries. For the sake of clarity when intellectual property law (IP law) is being addressed throughout this project what is being referred to will be the harmonised IP law that is the result of the TRIPS agreement. This can be done because the TRIPS agreement represents a radical shift in at least three ways according to Amy Kapczynski.

- a) Although treaties on intellectual property are not new (and indeed are remarkably old), before TRIPS, such treaties were generally overseen by WIPO. WIPO had no enforcement capability and countries could choose to join treaties in a ‘à la carte’ fashion.
- b) As TRIPS is part of the WTO, a country is not able to join the WTO unless it adheres to the TRIPS agreement. WTO has a dispute resolution system and any violations of the TRIPS are punishable, and

⁶⁹ Ruth Okediji, ‘WIPO-WTO Relations and the Future of Global Intellectual Property Norms’, in *Netherlands Yearbook of International Law*, Vol. 39, 2008, p. 4.

- c) Intellectual property standards incorporated in the TRIPS are far more expansive than many of those that were in force in certain countries before the TRIPS, particularly in the developing countries. TRIPS requires for instance the member state to impose criminal penalties for pirated copyright goods.⁷⁰

It has further been claimed that the strong TRIPS agreement, with unprecedented enforcement possibilities, or with *teeth*, as Laurence Helfer referred to it, promotes an intellectual property right concept that is increasingly privatised, and where individual rights are primed over ‘public interest’, ‘faire use’ etc. This is where the TRIPS agreement will be linked to the concept of commons in this research project. So far, the most serious type of critique that has been delivered against TRIPS’ encroachment on other values that are not neo-liberal in nature have been for instance the Public Health⁷¹ types of critiques concerning access to medication, particularly in the developing countries.

Currently there appears to be a tug of war between the private commercial IPRs and the public, open access to the goods produced by IPRs. Theoretically, this very tension where the public and the private, and the open and the closed are pitted against one another is the very interest of this research project. Must they be each other’s opposites? Must the one benefit at the expense of the other?

As it will soon become apparent, this research argues that the questions are not posed correctly. By posing the questions in such a way where one is ultimately forced to choose between commercial and non-commercial, between the free market and governed market, the question becomes politicised to such an extent that the legal options get locked in. Here, I will explore how we can pose the question differently, particularly from a legal point of view where law’s possibilities can be revealed. By utilising the Deleuzian and Deleuzeoguattarian theory, it becomes possible to envision another type of legal approach to these matters. It does not necessarily have to do with *inventing* new solutions; rather, it has to do with *visualising the possibilities, which may be already there*.

⁷⁰ Kapczynski, ‘Access to Knowledge: A conceptual genealogy’ in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 25

⁷¹ see e.g. Ellen ’t Hoen, ‘The Revised Drug Strategy: Access to Essential Medicines, Intellectual Property, and the World Health Organization’, Sangeeta Shashikant, ‘The Doha Declaration on TRIPS and Public Health: An Impetus for Access to Medicines’, Spring Gombe and James Love, ‘New Medicines and Vaccines: Access, Incentives to Investment, and Freedom to Innovate’, Eloan dos Santos Pinheiro, ‘The Future of Intellectual Property and Access to Medicine’, all in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, see also the report from the UN High Commissioner for Human Rights *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of the High Commissioner*, U.N. ESCOR, 52nd Sess., U.N. Doc. E/CN.4/Sub.2/2001/13 (2001).

1.6 CULTURAL HERITAGE AND CULTURAL COMMONS

In the year of 1972 the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage was approved, and it came into force in 1976. Its ambit was to protect valuable world heritage from threats and deterioration – or even modernisation.⁷² Since then the UNESCO World Heritage community has been growing, progressively shifting from Western and Eurocentric conceptions of cultural heritage to increasingly broader approaches and definitions.⁷³ Interestingly, cultural and natural heritage have been placed in one and the same convention, something that I shall have the reason to be returning to throughout the course of this project – namely that both natural heritage⁷⁴ as well as cultural heritage⁷⁵ are protected and acknowledged within one and the same legal document – in this case an international convention. This convention has given rise to the so-called World Heritage List, which at the time of writing (April 2014) consists of 981 sites, of which 29 are transboundary, 44 that are in danger, 759 that are cultural, 193 natural and 29 mixed. There are 160 State Parties⁷⁶ and 190 States of the convention. In order to make the World

⁷² Aldo Buzio and Alessio Re, ‘Cultural commons and new concepts behind the recognition and management of UNESCO World Heritage Sites’ in (eds.) Bertacchini, Bravo, Marrelli and Santagata, *Cultural Commons*, p. 178.

⁷³ Ibid.

⁷⁴ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) (World Heritage Convention):

Article 2

For the purposes of this Convention, the following shall be considered as “natural heritage”:
natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

⁷⁵ Convention Concerning the Protection of the World Cultural and Natural Heritage (1972):

Article 1:

For the purposes of this Convention, the following shall be considered as “cultural heritage”:
monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

⁷⁶ “States Parties” are countries which have adhered to the World Heritage Convention. They thereby agree to identify and nominate properties on their national territory to be considered

Heritage List, sites have to be of outstanding universal value for “all the people of the world” and “be preserved as part of the world heritage of mankind as a whole”⁷⁷. The initial definition of cultural heritage focused on the *uniqueness* of the monuments and the sites, regardless of them being cultural or natural, and they had to have a *tangible component* that was unique in a manner that it could acquire a universal value in order to be deemed as heritage. Some of the first sites ever to be selected for the World Heritage List were for instance the Palace of Versailles and the sanctuary of Machu Picchu⁷⁸ - clearly unique and physical sites. Since the 1970s the conceptions of heritage, also in terms of UNESCO heritage conventions, have changed considerably and “move[d] in the direction of de-materialization of the conception of heritage [that had been] initially adopted by UNESCO”.⁷⁹ One of the first departures from the original conceptions of heritage was, according to Buzio and Re⁸⁰, the notion of landscape as heritage, “in order to reveal and sustain the great diversity in the interaction between humans and their environment and to protect living traditional cultures”.⁸¹ This was the first time when UNESCO introduced non-tangible elements into the notion of heritage, and after 1992 even some cultural *routes* were added onto the heritage list such as the “Main Andean Road”, the “Silk Road”, the “Venetian trade route”, etc.⁸² Buzio and Re write:

Cultural routes and serial sites are geographical representations of a cultural heritage that crosses national borders but still defines or used to define a *specific national community*. They are based on population *movement, encounters and dialogue*, cultural *exchanges* and cross-fertilization, taking place in both space and time.⁸³

Lately it has become increasingly significant to adapt the notions of cultural heritage to more dynamic notions of culture, which was exemplified by the intro-

for inscription on the World Heritage List. When a State Party nominates a property, it gives details of how a property is protected and provides a management plan for its upkeep. States Parties are also expected to protect the World Heritage values of the properties inscribed and are encouraged to report periodically on their condition.

<http://whc.unesco.org/en/statesparties/>. Last accessed 15th March 2014.

⁷⁷ Preamble, Convention Concerning the Protection of the World Cultural and Natural Heritage (1972).

⁷⁸ Aldo Buzio and Alessio Re, ‘Cultural commons and new concepts behind the recognition and management of UNESCO World Heritage Sites’ in (eds.) Bertacchini, Bravo, Marrelli and Santagata, *Cultural Commons*, pp. 180-181.

⁷⁹ Ibid. p. 181.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ [my emphasis throughout], Ibid.

duction of “cultural landscapes” and “cultural routes”⁸⁴ into the World Heritage List – which meant that aspects such as living heritage (as opposed to dead monuments) garnered more attention. Consequently, the intangible aspects of heritage eventually resulted in a new convention in the year 2003, namely the Convention for the Safeguarding of Intangible Cultural Heritage, in which five broad domains of intangible cultural heritage⁸⁵ were mentioned: oral traditions and expressions, performing arts, social practices, knowledge and practices concerning nature and universe and traditional craftsmanship. The convention particularly mentions the transmission of culture from generation to generation (Art. 2) as one of the core aspects of intangible heritage.

In this research it is particularly interesting to analyse artworks as culture – culture in the manner of it being both tangible and intangible, both material and immaterial. It is also significant that UNESCO has expressly mentioned the aspects of knowledge and transmission of knowledge that is embedded in culture. While I shall be presenting a more nuanced approach to certain UNESCO criteria such as community, identity and continuity the research nevertheless adopts a very similar notion of art as culture as the one presented in the UNESCO conventions. The specific connection between knowledge, practice and skills that is stressed in the UNESCO conventions are important for this research as they provide a counter-narrative to the intellectual property and the object-based, commodified notion of culture that is presented within that particular paradigm. In fact, commodification is one of the many factors that within the paradigm of cultural heritage is seen as threatening⁸⁶ to the authenticity and sustainability of cultural heritage and that leads to overexposure as well as creation of social dilemmas in terms of the safeguarding and management of

⁸⁴ Buzio and Re, ‘Cultural commons and new concepts behind the recognition and management of UNESCO World Heritage Sites’. in (eds.) Bertacchini, Bravo, Marrelli and Santagata, p. 182.

⁸⁵ Convention for the Safeguarding of Intangible Cultural Heritage, “Article 2: The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.”

⁸⁶ “Authentic and genuine values of the heritage may in fact be compromised in the process of making it more attractive to the tastes of consumers. [...] Heritage (tangible and intangible) may get standardized and homogenized in the local community’s concerted effort to present the heritage in a more understandable manner to tourists”, Buzio and Re, ‘Cultural commons and new concepts behind the recognition and management of UNESCO World Heritage Sites’, in (eds.) Bertacchini, Bravo, Marrelli and Santagata, *Cultural Commons*, p. 184.

the heritage.⁸⁷ Heritage that is somehow threatened by overexposure or in risk of being destroyed can be placed on the List of World Heritage in Danger as a counter-measure that can provide certain urgent tools in order to safeguard the heritage in question.⁸⁸

That cultural heritage has an economic, social and cultural significance for the territories in which it exists is doubtless. Buzio and Re stress for instance this particular significance for the developing countries⁸⁹ - but I shall be lifting this on to a global level. Placing this claim within the theory of the French philosopher Pierre Bourdieu and his concepts of economic, social and cultural capital will add on to these types of discussions. That will be done in chapter 3 below. In chapter 4 I shall present a number of cases that challenge certain underlying assumptions of the cultural heritage paradigm, namely that an artwork can always be attributed to a clearly definable cultural heritage of a named community and is valuable (economically, socially and culturally) for their identity. The notion of community and community identity will further be opened up through the writings of the French philosopher Jean-Luc Nancy and his concept of *being-in-common*, in chapter 5. All this will then be placed within the discussion concerning the concept of cultural commons in law that will be presented in the end of this study in chapters 6 and 7.

1.7 METHODOLOGICAL CONSIDERATIONS

In order to conduct the study, in order to fuse the paradigms of intellectual property and cultural heritage and for the two to be interconnected and linked to the legal concept of cultural commons, and in order to answer the research questions and refrain from a restraining binary legal reasoning, an encounter-based approach to this study shall be adopted.

⁸⁷ Buzio and Re, 'Cultural commons and new concepts behind the recognition and management of UNESCO World Heritage Sites', in (eds.) Bertacchini, Bravo, Marrelli and Santagata, *Cultural Commons*, p. 184. See also 2004 Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Cultural Heritage, as well as Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

⁸⁸ The old City of Dubrovnik was for instance placed on this list in November and December 1991, when it was seriously damaged by artillery fire in the armed conflict during the Yugoslavian war. Since then, the Croatian government has restored the facades of the Franciscan and Dominican cloisters, repaired roofs and rebuilt palaces with, notably, a contribution of US\$300 000 from UNESCO. Subsequently, the Old City was removed from the List of Heritage in Danger in 1998. It remains on the World Heritage List and is listed as a cultural site. Available at: <http://whc.unesco.org/en/news/147>. Last accessed 15th March 2014.

⁸⁹ Buzio and Re, 'Cultural commons and new concepts behind the recognition and management of UNESCO World Heritage Sites', in (eds.) Bertacchini, Bravo, Marrelli and Santagata, *Cultural Commons*, p. 187.

Deleuze himself, and other scholars reading Deleuze have positioned his method as an opposition to the Kantian method. Kant presumed an “ability to think the particular as contained under the universal”,⁹⁰ where the notion of the *universal* was a given. Deleuze’s method focuses on the *particular*, on the real experience. In that way it is empirical.⁹¹ His method can initially be summarised in a somewhat abridged manner, but which will be developed further down. Deleuze opposes that what he considered to be the Kantian approach, namely the assumption of the particular, something that can always be presupposed, or subsumed under a finite, closed, universal system. Alexandre Lefebvre cites *Critique of Judgment*⁹², whose organising problem, he claims, was (human) experience that “*must* constitute a *system* of possible empirical conditions, and do so in terms of both universal [transcendental] *and* particular [empirical] laws”.⁹³

This particular assertion, especially from a legal point of view, in assuming that law (as an instrument), or judgement (as a human experience), must constitute a system of both universal and particular laws, is very interesting. The Deleuzian method will provide us with the tools to challenge such an assertion. Can this dependence on a supposed unity in law be subverted, without undermining the seminal principals such as the rule of law and the ideas of predictability and foreseeability in jurisprudence? Would such an attempt only open up a possibility for arbitrary decision-making, discretion, and as such perform a thorough exorcism on any and all legitimacy that law has, rendering law, for the lack of a better word, useless?

The Kantian unity⁹⁴ (as well as the Dworkian unity for that matter, the one in which it is possible to subsume all cases, and the one that in theory can always be grasped by the omnipotent Hercules judge), is I shall be claiming further, following Deleuze, assumed,⁹⁵ *theoretical*, rather than a *de facto*, unity that we “must presuppose [...] in order to judge”.⁹⁶ This seems to be an empirical necessity that also Hans Kelsen adopted when labouring with his *Grundnorm*, how

⁹⁰ Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, Stanford University Press, (2008), p. 22.

⁹¹ The critique of Kant here is not mine but I follow Deleuze and Guattari.

⁹² Immanuel Kant, *Critique of Judgment*, (trans. and intro by) J. H. Bernard, Hafner Publishing Company, New York, (1951 [originally published in 1790]).

⁹³ [original emphasis], Lefebvre, *The Image of Law*, p. 29. Here Lefebvre is citing *Critique of Judgment*, First Introductions, 397, §4.

⁹⁴ Lefebvre writes: “Kant proposes a unique and necessary presupposition of our faculty of judgement: Empirical nature, together with diverse laws, must be judged *as if it were* a coherent unity.” [my emphasis], *The Image of Law*, p. 22. This precise presupposition that Kant proposes that we make, and that we act *as if it were* empirical, is what I, following Deleuze, am attempting to get at. Kant’s unity is assumed, but we have to presuppose it.

⁹⁵ For more on the metaphysical aspect of legal unity, see e.g. Costas Douzinas and Ronnie Warrington, *Postmodern Jurisprudence: The Law of Text and the Text of Law*, Rutledge, (1991).

⁹⁶ Lefebvre, *The Image of Law*, p. 33.

to justify the assumption of an hierarchical unity, with a foundational origin that can be traced all the way back to a Grundnorm: in order to create a system, that is logical, predictable, scientific, there must be, one must *assume*, a primal norm that ties it all together, that makes all the other norms fit within a perfect system, creating a unity.⁹⁷ The system is envisioned to be like a vertical tree with the Grundnorm as the root that grows upwards, creating a trunk that the tree stands on, on which it develops branches, shoots, and leaves.

Continuing the system-dependent thinking after Kelsen, Niklas Luhmann created a theory that incorporated subsystems (or hyper cycles in his disciple's Günther Teubner's terminology⁹⁸) that are able to communicate *inter se*, attempting to acknowledge the multiple levels of law and its various interactions with the "outside" society.⁹⁹ Or to be more accurate, this is how Luhmann himself described it:

But we do not use 'system' like some lawyers who mean by it a context of coordinated rules. We mean by 'system' a context of factually enacted operations, which have to be communicated because they are social operations, whatever defines them – and in addition to that – have to be communicated as legal communication. This means, however, that the basic distinction is not found in a typology of norms or of values but in a distinction between system and environment.¹⁰⁰

I shall return to the distinction between systems and environments and how they connect to the study of access to artworks and the legal concept of the cultural commons in chapter 8, but for now suffice it say that Luhmann in his theory envisions a closed system with subsystems within a clearly definable unit. How this can be fused with the Deleuzian theory will also be discussed in that chapter, the only reason that Luhmann is addressed already here is to indicate the differences between a system-dependent thinking, and the more open-ended Deleuzian rhizome-based, encounter-focused, thinking that shall be adopted in this study. In the final chapter these two will be fused.

The reason why the project attempts to break free from the system-based thinking using Deleuze and Deleuze/Guattari is to attempt to get beyond the distinction between a legal inside and outside in order to answer the above listed research question, and its subquestions, in order to discuss the conception

⁹⁷ See Håkan Gustafsson, 'Fiction of Law', in *Rechtstheorie* 3, (2010), s. 319-363.

⁹⁸ (ed.) Günther Teubner, *Autopoietic Law: A New Approach to Law and Society*, Berlin : Gruyter, (1988).

⁹⁹ Niklas Luhmann, *Law as a Social System*, (trans.) K. Ziegert, eds. F. Kastner, R. Nobles, D. Schiff and R. Ziegert, Oxford University Press, (2004).

¹⁰⁰ Luhmann, *Law as a Social System*, p. 78.

of commons in jurisprudence and the cultural commons as a concept in law. Commons, as a concept, in fact requires a theory that is able to for instance fuse intellectual property and cultural heritage, rights and access, open networks and closed systems, etc. It also requires that the dynamics that happen ‘outside’ law can always be incorporated into the commons as a legal concept. Whenever a system is envisioned, even a very advanced and multi-layered one as in Luhmann, one that is always able to incorporate the outside as well as communicate with that which is outside, we are, in Deleuzian terms within an “arborescent” type of thinking, i.e. we imagine the system as a tree. This type of reasoning is closed, hierarchy-dependent, binary and as such cannot imagine anything new. It will be argued that the theoretical conception of the commons as well as the legal concept of the commons is, in a manner of speaking, something new, even if there are a number of legal concepts that are similar to it in nature.

The one (the idea of a coherent system) does not necessarily cancel out the other (the critique of certain assumptions concerning systems, coherence and unity) in the Deleuzian theoretical approach. The two can both be upheld and connected to one another. I hope to be able to show how this does not have to be a contradiction. To be able to present that type of theory we need to delve deeper into the Deleuzian thinking and the concept of the rhizome and encounter that challenge such notion of systems and universals.¹⁰¹

By challenging certain underlying assumptions produced by traditional legal reasoning it shall be argued that jurisprudence can indeed conceive of commons and the legal concept of cultural commons can be introduced in law. Or to put it more directly, the particular encounter focused method applied here aims to accomplish the following:

- 1) *Expose* the inadequacies of traditional legal reasoning and its reliance on conventional dichotomies and hierarchy based binary thinking;
- 2) *Study* the possibilities of introducing the legal theoretical conception of cultural commons into jurisprudence;
- 3) *Demonstrate* how and why a concept of cultural common in a concrete way, by legislation or the conceptualisation of legal rules and principles, can free the potentialities in existing legislation; and ultimately

¹⁰¹ While it may not be an express aim of this study to fuse Deleuze, and Deleuze/Guattari, and Luhmann theoretically, it certainly emerges as a by-product when trying to approach the cultural commons theoretically. This by-product is interesting from a legal philosophical point of view, and one which may provide us with a possibility to get beyond the ontological questions and system-based reasoning. Therefore, this project has to discuss law as something other than a system, instead approaching it as a rhizomatic assemblage, a Law Without Organs. See section 8.1.5.2. below.

- 4) Hopefully also, *unleash* the legal reasoning itself to serve as a critique the entire edifice of the discourses based on the fissure between private/public, and by doing so, find a new way of understanding commons in legal theory.

1.7.1 THE DELEUZIAN ENCOUNTER

When engaging in a critique of dogmatic thought Deleuze developed the idea of the *encounter*¹⁰² and used it as a device to question the idea that everything can be subsumed within a perfectly constructed, universal system, such as (an assumed, closed) legal system. The concept of the encounter is also used to analyse that which is perceived to be a ‘problem’. Instead of approaching a problem like an obstacle (like would have been the case in this project to approach obstacles to access as problems) Deleuze is instead approaching problems as encounters, projections, that carry with them a potentiality. This is very significant for this study.

Deleuze’s main argument when discussing the concept of the “encounter” is that it is an occurrence that can challenge and break the dogmatic thought – *it is not a problem*. It is when faced with the encounter, with something previously unknown, that the notion of the universal can be truly challenged, Deleuze claims. For the purposes of this research four occurrences have been chosen, four instances of *obstacles to access to art*, and I will argue that instead of approaching them as problems or obstacles, by adopting the encounter concept, we will come closer to the legal concept of the cultural commons. The encounters are links between the rhizomatic jurisprudence that is able to conceive of the theoretical conception of the commons and the practical legal concept of cultural commons in law and legislation.

Within the four encounters there are 6 “cases” or “case studies”. However, some of them have been grouped together. So for instance in encounter one, Bruno Schulz and the lost mural, only that case that is analysed as one encounter. In encounter three, on the other hand, Dead Poets, there are two cases, the case of James Joyce and his personal diaries and the case of Franz Kafka and his

¹⁰² Naturally following Spinoza who conceived of nature as composed through encounters among elementary particles, see Hardt/Negri, *Commonwealth*, p. 43, Gilles Deleuze, Public Lecture, *On Spinoza*, Cours Vincennes from 24 January 1978, Benedictus Spinoza, *Ethics*, (ed. and trans.) G.H.R. Parkinson, Oxford : Oxford University Press, (2000, [originally written in 1632-1677]). That many of these ideas, not to say most of them, presented here stem from a Spinozian paradigm is obvious. However, in my use they have been filtered through Deleuze. So here for instance, when I am using the term “encounter” it is used as Deleuze, relying on Spinoza, used it. That is to say insofar I am using the word encounter it does not refer to the Spinozian “*occursus*”. Same goes for e.g. “affect” which is used below as Hardt/Negri employ it, even though their use arguably stems from the Spinozian *affectus* (n.b., not *affectio*).

manuscripts. The two are treated as one encounter because of the common denominators in the two cases. The same can be said of encounter four, Orphan Works, where two cases, HathiTrust and Banksy's mural, are treated as one encounter within the orphan works framework. The selection of the cases and encounters has been done in order to construct an encounter-based analysis. The encounters have not been selected on a quantitative basis, instead they have been selected in order to demonstrate instances where a problem can both serve as an obstacle as well as an encounter in the Deleuzian sense, i.e. carrying a potential.

Encountering something that is unrecognised and something that challenges the given fixed structures serves as Deleuze's core argument in his critique of dogmatism. I will therefore present cases that are analysed as encounters, namely, occurrences that appear as obstacles, problematic for law, that law initially does not seem to be able recognise, but that at the same time reveal the potentiality of law, beyond legal dogmatic thinking. The cases first appear to be questioning some of the fundamental dogmatic legal tenets, such as the legal subject, the concept of rights, legal coherence and hierarchy, etc., but read through the encounter concept they also reveal the legal potential. The cases have been selected keeping precisely this in mind, an occurrence, which challenges some of the fundamental assumptions in traditional, dogmatic legal reasoning.

Approaching the cases in this way, as encounters in the Deleuzian sense, is different from claiming that the selected cases are empirically representative. My view is that they are, however, it should be stressed that the selection of the ones that feature here is based on their very *difference*, on the fact that they have the ability to rupture the dogmatic legal thinking and to act as encounters.

That means, as we shall for instance see in the case of Bruno Schulz, that no traditional legal concept, neither in copyright law nor cultural heritage law, could in that particular case fully be applicable. This very instance, namely that which Lefebvre refers to as "running out of rules", formed the basis for the selection of the cases, i.e. a case was selected if it, or certain aspects of it, appeared to incorporate something that clearly demonstrated certain fundamental inadequacies or non-recognitions in law. Cases have also been selected on the basis where both decision makers such as courts, legislators, as well as parties, negotiators, attorneys, academics, have had to go *outside* law in order to find 'solutions', or where certain legal binary opposites locked the legal reasoning into paradoxes. It is this instance, when law appears to *run out of rules*, that I am wish to highlight and study, and that I analyse using the concept of the Deleuzian encounter, namely something *different, something new, something that challenges law but at the same time reveals law's potential*.¹⁰³

¹⁰³ These encounters differ from one another, some have occurred due to certain paradigm shifts, such as increased globalisation and migration, or technological progress, others have

Adopting the encounter-based approach means that the legal problems can at the same time be turned around, inverted, and as such not only act as problems but also have a positive, creative, function. Instead of a dogmatic approach that often just reiterates that which already is, without the ability or the will to imagine or create that which is new, the problem is not treated as an anomaly that ought to be extinguished, but rather as a possibility of law that ought to be explored further.

Lefebvre's comment on how Deleuze conceived of dogmatism is very concise and succinct and can be mentioned here:

The dogmatic image of thought is a key concept in Deleuze's *Difference and Repetition*. In that text, it signifies a set of implicit presuppositions operative throughout the history of philosophy about what it means to think and that comprise the true exercise of thought. Deleuze calls these presuppositions an *image* of thought because they are concepts and have not been discursively secured: instead, they are opinions about what it means to think [...]¹⁰⁴

Thus, when Deleuze comments on dogmatic reasoning, he refers to the *image* of what we assume it is to think and how we assume the thought progress functions. These assumptions naturally also exist in legal reasoning. One of the key characteristics of such dogmatic reasoning, as well as dogmatic legal reasoning, is that it relies on *recognition* of legal norms and criteria for legal validity as the vocation of thought.¹⁰⁵ This characteristic is key also for this study as it is imperative to reveal it in dogmatic legal reasoning. Lefebvre writes:

With recognition as its aim, thought is reduced to a task of identification. And, as a consequence of its drive to recognize, dogmatic thought threatens to *assimilate all its potential encounters* (with things, others, texts, etc.) into the concept and categories used to recognize them.¹⁰⁶

This study will show, particularly through the encounter-focused case studies in chapter 4, how the reliance on recognition in legal reasoning excludes and/or attempts to assimilate the potential encounters. Such activity, it will be argued, reduces and hides the potentialities that exist in law. The interesting aspect that will be studied is how legal reasoning 'reacts' when it cannot *a priori* recognise certain occurrences.

been brought forward because of pluralistic types of laws, e.g. they happen in between the layers of national, EU and international legislative acts.

¹⁰⁴ [original emphasis] Lefebvre, *The Image of Law*, p. 2.

¹⁰⁵ Ibid, p. 3.

¹⁰⁶ [my emphasis], Ibid.

The fact that that which is encountered cannot easily be put in one particular box in traditional legal reasoning, the fact that it cannot be clothed in pre-tailored clothes¹⁰⁷ so to speak, is exactly what makes it so interesting for jurisprudence. Lefebvre describes that which is unrecognised in an encounter as something that does not come predetermined by an inevitable law. He gives an example of a case where the court is caught unprepared in the sense that it cannot cancel out “the encounter with a ready-made rule up its sleeve”.¹⁰⁸ An example of such an occurrence is the Bruno Schulz case, where the facts of the case challenged most (not to say all) existing (national and international) legal rules. This occurrence forced settlements and solutions to happen *outside* of the legal sphere, i.e. through political agreements. Lefebvre writes further that the encounter in Deleuze is connected with an interruption – an encounter “interrupts recognition by suspending the spontaneous linkages between perceptions and recollections.”¹⁰⁹ The encounter is, simply put, the occurrence that not only challenges, but also interrupts and undermines, the rule and the system on which it rests. Lefebvre writes:

[W]e can enumerate the characteristics of the encounter: It is *unrecognized*; it is singular; it is *forceful*; it forces thought to think; it is the *transcendental* condition for thought, that which breaks thought away from routine recognition. In sum, we might say that the encounter is an *interruption*.¹¹⁰

In the case study chapter, I aim to use the cases *as encounters*, and to argue that these are instances where a *real* case¹¹¹ encounters and challenges the assumed underlying foundation of the legal system. It could be said that this is what makes the project not *problem oriented*, but instead by selecting and stressing certain encounters, it is *encounter-focused*.

In his reading of Deleuzian encounters, Lefebvre distinguishes two types of encounters: the easy legal case and the problematic legal case. It is in the “problematic case”, he argues, that we experience encounters. While I do think that such a distinction could be helpful, I will not argue here that the cases chosen for this analysis are necessarily “problematic” (as opposed to “easy”) in perhaps a Dworkian sense; instead I will stress certain *traits* that make them an encounter, i.e. something that is unrecognised, forceful, and something that interrupts dogmatic legal reasoning. Even if they sometimes are not a difficult or prob-

¹⁰⁷ See e.g. Henri Bergson, *Creative Evolution*, (trans.) Arthur Mitchell, New York: Dover, (1998, [originally published in 1907]) p. 48. See also, Lefebvre, *The Image of Law*, p. 59-60.

¹⁰⁸ Lefebvre, *The Image of Law*, p. 174.

¹⁰⁹ Ibid. p. 117.

¹¹⁰ [original emphasis], Ibid. pp. 174-175.

¹¹¹ NB. not *hypothetical case* to tie it together with Kant’s *Critique of Judgement*.

lematic legal case *per se* in a formal or dogmatic sense, such as the Darfurnica case (encounter number two), there might be *aspects* to the case that makes it an encounter nonetheless. Encounters in this study focus on the act of interruption, and not whether the case is easy or problematic within a dogmatic legal reasoning. This may be in line with what Lefebvre proposes, the point I want to reiterate here is that in this research, even the “easy case” may have encounter potential if there are instances. While the distinction between hard and easy cases is closely linked to legal dogmatic reasoning, the encounter-focused approach escapes this particular division as it part of the completely different *rhizomatic* legal reasoning. Instances of this will also be explored in my last case study that concerns orphan works, where I look at a mere legal concept as an encounter, *before* it has even lead to a conflict, and/or become a case in court.

It is this very approach to law that manages to introduce an inventive aspect to law and jurisprudence. Because “[i]n a way, law exists only through the case alone”.¹¹² For the purposes of this project, ‘cases’ are thus a much wider concept than mere ‘conflicts’ or ‘problems’ that end up in the courts of law or lead to a dispute.

1.8 SITUATING THE THESIS WITHIN ITS CANONICAL HEIMAT(S)

This is a theoretical research project. In order to place the concept of the cultural commons within this framework, the project therefore adopts a *meta* stance, examining jurisprudence, intellectual property law as well as the concept of the commons, from a theoretical perspective.¹¹³ Most studies devoted to the cultural commons are usually not placed within a larger theoretical matrix; the concept is often approached and defined as a form of communitarian ownership where certain access to the underlying property is granted to the public or where some type of co-ownership is created. This definition shall be questioned, and the concept of the commons will be studied and constructed theoretically and then placed within the setting of this project.

Using Deleuze and Deleuze/Guattari in order to conduct a study of this type and to analyse law must still be seen as a rather rare endeavour. I am not the first one to attempt to do it, by no means, but there are still very few monographs written that deal with Deleuzian and Deleuzeoguattarian theory *and* law, and *in* jurisprudence and law. This research will very much attempt to carry on with the already existing discussions that have been conducted in the last couple of years. I have already mentioned Alexandre Lefebvre and his study, and later on I will also introduce the writings of Edward Mussawir and the studies that he has conducted concerning Deleuze and jurisdiction(s).

¹¹² Lefebvre, *The Image of Law*, p. 13.

¹¹³ Whether that particular point of view takes place from above, below or from the side I shall leave as unaddressed.

On a broader level, the project was born from my theoretical interest in *Critical Legal Studies* (CLS), but then it developed through the influence of the researchers and the work from the field of *Law and Humanities*, and various other research projects that attempt to develop an *alternative jurisprudence*. These three strands have all in their unique way opened up different possibilities for this project. The Critical Legal Studies movement, the American as well as the British, opened up the possibility to develop a succinct and scientific critique of traditional dogmatic legal theories. The Law and Humanities movement influenced and opened up ways to introduce other theoretical fields into the study of law, and gave me tools to utilise the Deleuzian and Deleuzeoguattarian theory to the extent to which I have done. And finally, the alternative approach to jurisprudence and legal science freed the research project from certain constraining methods, definitions and structures both in terms of legal research in particular as well as scientific social and cultural research in general.

That means that there are certain themes that these three movements carry intrinsically that have in one way or another made their way into this research endeavour. The themes concern for instance the discussions regarding the unity and coherence of law, justice and welfare, the legal inside and the legal outside, and so on. The research thus adopts a critical approach and can in many ways be positioned within the tradition of Critical Legal Studies.¹¹⁴ Even though CLS initially was a largely American movement it has since its inception spread to Europe through its British branch sometimes referred to as “Brit Crit”, or Critical Legal Conference (CLC). CLC is in reality a conference held yearly, but it has also come to be used as an umbrella term for the European arm of the CLS. Even though it is called British, it consists of members from all over the world. CLC developed the European critical legal theory. It was firstly heavily influenced by Marxism, but later branched out (and moved away from Marxism) to also include areas such as race, gender, queer, post colonial studies, etc.¹¹⁵ The many approaches of the CLC have lately extended to other territories outside USA and Europe such as Australia, India, South Africa and various other countries across the world. Scandinavian researchers and academics have steadily been part of both the American and British driven critical traditions. Costas Douzinas and Adam Gearey articulated the main difference between the CLS and the CLC in *Critical Jurisprudence*:

CLS was a political movement with little politics. Its main intellectual activity was the critique of judicial institutions and reasoning, while the politics of the movement were largely exhausted in the intrigue of the academy and

¹¹⁴ See e.g. Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice*. Oxford: Hart Publishing. (2005) and James Boyle (ed.) *Critical Legal Studies*, New York University Press, (1992).

¹¹⁵ Douzinas/Gearey, *Critical Jurisprudence*, pp. 237 – 258.

the endless search for media exposure. European scholars found the pre-occupation of leading members of the American CLS with the internal (in)coherence of judicial reasoning a little bizarre. CLC on the other hand, is an intellectual movement with lots of politics. The annual CLC started in 1984 and has taken place without interruption since. In all these years of operation no officers or posts, chairmen or secretaries, committees or delegates were created. The conference was and remains just that: a conference and an umbrella name. CLC is a ‘community always to come.’¹¹⁶

According to Peter Goodrich, contrary to e.g. feminist legal studies and critical race theory, Critical Legal Studies do not have a “demographic” or an “affiliation”,¹¹⁷ which makes it particularly interesting and useful in the field of art and culture. Art as knowledge and how a democratic access to it can be facilitated through law fits right in in this type of framework. The field of Law and Humanities can be seen as a branch of CLS and CLC. It is historically tied with the rights movements as well as with discourses concerning fundamental rights. Whether and how access to art can be seen as a fundamental right, shall be discussed throughout this research. The use of Deleuze and Guattari in these settings is certainly nothing unusual.

As a consequence and by employing all of the above, this research studies the artwork as a knowledge source, and what role the law plays therein when it comes to creating and enabling access to the artworks within the cultural commons. This research deals with a number of political matters, but the research is not in itself a political project. In fact, I have tried to avoid the political arguments, and even though the theories that I use are loaded with politics I have tried to extract their operational value as tools.

This approach has enabled me to tackle the hotly debated legal issue, namely how do we act within the information society paradigm in terms of creating access to knowledge, which has given rise to the A2K movement. Various legal cases concerning e.g. downloading and the implications of new media and new technology utilised in accessing artworks (legally and illegally) testify to this. Sweden has seen the major Pirate Bay¹¹⁸ case – concerning illegal downloading by way of, at the time at least, the most sophisticated bit torrent technology and the implications it had on access as well as on the enforcement of copyrights.¹¹⁹ We are, on a daily basis, faced with a battle between individual owners/rightsholders and the public’s and consumers’ interests and demands.

¹¹⁶ Douzinas/Gearey, *Critical Jurisprudence*, p. 240.

¹¹⁷ Peter Goodrich, ‘The Critic’s Love Of The Law: Intimate Observations On An Insular Jurisdiction’, in *Law and Critique*, 10: 343–360, 1999, p. 345.

¹¹⁸ Jens Andreasson and Kristoffer Schollin ‘Goda och onda medhjälpare – Är du socialt adekvat, lille vän? Om Pirate Bay målets betydelse’, in *Svensk Juristtidning*, SvJT 2011 sid. 534.

¹¹⁹ Kristoffer Schollin, *Digital Rights Management: The New Copyright*, Jure (2008).

Prompting the ever-returning question concerning what role copyright law plays in the 21st century and how to generate wider access to knowledge, access to art, without infringing upon or compromising underlying ownership structures.

The position of this research is thus obviously within a critical tradition, but when Deleuze and Deleuze and Guattari's ambiguities are added on to it, then even the critique will have to be criticised. From a legal theory and legal philosophy point of view, this is done in order to get to the *potentiality* of law, and not get locked in within any one tradition, not even the critical one. The Deleuzian and Deleuzeoguattarian theory open up law and legal theory through a number of concepts such as the rhizome, plateau and encounter in order to *visualise* what traditional legal theories are not able to see.

In that vein, and in true nomadic and rhizomatic manner, there is not one *but several* (more or less temporary) Heimats where this research project can be placed. What they all have in common is that they are attempting to open up and challenge certain legal conceptions as well as concepts that have been taken for granted, which in turn have created gridlocks in terms of seeing the potentiality of law.

1.9 STRUCTURE OF THE THESIS: A RHIZOMATIC JOURNEY

The two volumes have been divided into four subparts: Law, Artwork, Commons and Commons & Communication. The first subpart maps out the LAW, the legal problem and the theory that underpins the project. The second focuses on the ARTWORK with an approach that centres on placing the conception of artwork within the context of this project. The third opens Volume II and develops the concept of the COMMONS by applying the theories that have been presented in the subparts LAW and ARTWORK and adds on commons related theories. The fourth and final subpart fuses all three previous subparts, all the theoretical approaches and the presented case studies, in order to discuss the legal future of for instance rhizomatic jurisprudence in COMMONS & COMMUNICATION.

The research consists of a number of theoretical exercises, in order to firstly achieve a contextualisation as well as a critique of current law and to then present the access issue in more detail, followed by a closer look at the commons and thereafter to conduct a constructive exercise in the end when addressing the commons and law together.

The project has been divided in eight chapters. Chapter 1 and 8 provide the entrance to and the exit from the study respectively. The remaining chapters form a serpentine journey that has been undertaken and the reader is invited to follow along in order to travel between chapters 1 to 8. Each of the chapters in the middle (namely chapters 2 through 7) have a mirroring chapter, so for in-

stance chapter 2 and chapter 5 mirror each other, as do chapters 3 and 6, and 4 and 7.

Therefore, the structure is as follows:

VOLUME I:

Part 1: LAW

Chapter 1: Introduction

Chapter 2: A Rhizomatic Jurisprudence

Part 2: ARTWORK

Chapter 3: The Rhizomatic Artwork

Chapter 4: Case Studies

VOLUME II:

Part 3: COMMONS

Chapter 5: Property, Space and Commons

Chapter 6: Commons v. Intellectual Property Law

Part 4: COMMONS AND COMMUNICATION

Chapter 7: Commons In The Digital Era: Contract Based

Chapter 8: Conclusion: Fixing The Commons In Law

1.9.1 SUMMARY OF THE EIGHT CHAPTERS

ENTER.

CHAPTER 1: Introduction

Provides the entrance to the study through an introduction, description of the problem and purpose, method and the delimitations of the study.

CHAPTER 2: A Rhizomatic Jurisprudence

Introduces the main Deleuzian concepts such as rhizome, line of flight, plateaus, (re/de)territorialisation. It is presented with reference to the critique of dogmatic jurisprudence. The chapter is structured as a critical exercise analysing certain jurisprudential conceptions such as the unity of law, foundations of law, coherence, structure, etc. particularly in terms of how these are presented and envisioned within dogmatic jurisprudence. The critique is conducted by and through Deleuze and Guattari's theory.

CHAPTER 3: The Rhizomatic Artwork

Develops the concept of the rhizome presented in chapter 2 and demonstrates the various plateaus of the artwork. Focuses mainly on three plateaus:

Plateau 1: Industrialism and the industrial approach to the artwork – Authentic or Mass produced artwork, according to the Frankfurt School of Thought.

Plateau 2: Postindustrialism and the post-industrial approach to the artwork – Economic, Social and Cultural Capital, according to Pierre Bourdieu.

Plateau 3: Knowledge Society and current approaches to the artwork – Rhetoric and Semiotic/network-based information, according to Jamie Stapleton.

This chapter demonstrates that the various plateaus exist simultaneously and do not necessarily disappear at each paradigm shift. The chapter discusses how to deal with this phenomenon.

CHAPTER 4: Case Studies (1): Encounters and Lines of Flight

Each case study is presented as a Deleuzian ‘encounter’, namely something that the law encounters but does not recognise. Something that is entirely new. Lines of flight within the case studies are also presented, that is, parts of each case that “flee” the legal framework are demonstrated.

Case 1: Bruno Schulz – the shattered artwork (access to the physical artworks)

Case 2: Darfurnica – the derivative artwork (access to inspiration)

Case 3: ‘Dead poets’ – the control of the death estate (access to artworks post mortem auctoris)

Case 4: Orphan works – abandoned and forgotten artworks (access through libraries and digitisation?)

CHAPTER 5: Property, Space and Commons

Presents and defines the commons as a phenomenon. The chapter approaches the commons from two angles:

Ownership: From immovable property thought to immaterial property (Hardt/Negri)

Space: From “public space” to “being-in-common” (Jürgen Habermas, Jean-Luc Nancy)

CHAPTER 6: Commons v. Intellectual Property Law

Confronts the concept of the commons with modern intellectual property law. Demonstrates the dichotomies of intellectual property law such as right-privilege, content-carrier, invention-information... The chapter analyses the market and capitalism, approaching them as deterritorialising forces that can understand the lines of flight of the artwork, while law struggles to do the same. This chapter also problematises the underlying dichotomies of IP law particularly in light of the fact that the artworks/the creative expressions are difficult to frame in a binary manner.

CHAPTER 7: *Commons In The Digital Era: (Case Study part 2)*

Commons in the digital era. Various commons projects such as the Creative Commons initiative are presented, mainly focusing on the Creative Commons (contract based solutions/licences). Addresses the Creative Commons as well as other types of contracts, focuses particularly on settlement agreements that came out of the case studies presented in chapter 4. Presents the legal concept of the cultural commons. Begins to wrap up the study.

CHAPTER 8: *Conclusion*

Concludes the study and opens up two new theoretical axes namely the Deleuze and Habermas axis, and, the Deleuze and Luhmann axis.

EXIT.

1.9.2 HOW THE CHAPTERS MIRROR EACH OTHER AND THE PURPOSE OF THE VOLUMES

Chapters 2-5: Theory of Law – Theory of the Commons (Focus on theory in the two volumes)

Chapters 3-6: The Plateaus of the Artwork – The Artwork in IP Law (Focus on the artwork in the two volumes)

Chapters 4-7: Case study *statutory law* – Case study *contracts* (Focus on the case studies in the two volumes)

The intention with Volume I and its subparts is to reveal and bring attention to certain underlying problems and consequences often stemming from law that stifle access to art but also to reveal the underlying potential of law. The intention with Volume II and the last two subparts are less descriptive and more constructive in terms of what the commons and law together not only could look like, but also how they could be approached in the future.

1.9.3 THE NOMADIC STRUCTURE AND ITS METHODOLOGICAL TOOLS

Volume I has been structured using some Deleuzian concepts such as *rhizome*, *plateau*, *encounter*, and *line of flight*. Volume II focuses on other Deleuzian concepts, namely *connectivity*, *de/re territorialisation*, *smooth and striated spaces*. The project attempts to have an overall *nomadic approach*. The nomadic approach comes with its own set of methodological tools. One of the more pertinent benefits of

such a method is that it provides rather open-ended theoretical concepts that can analyse the complex occurrences of the digital knowledge society in an advanced manner – where both the earlier paradigms as well as new paradigm shifts can be analysed simultaneously.

The jurisprudence and the conception of the artwork will both be approached as a rhizome. This overall concept will be used in order to get beyond the *ontological* questions such as what law is, and what the artwork is. Instead the six principles of the rhizome, namely, *connectivity*, *heterogeneity*, *multiplicity*, *asignifying rupture*, *cartography* and *decalcomania*, have been used when addressing the two seminal concepts for this research, namely jurisprudence and artworks. Approaching the two in this rhizomatic way, as open-ended, unfinished, moving, constantly changing concepts, that can never really be caught fully or fixed, will be imperative for this project.

Deleuze and Guattari developed the concept of the plateau. Writing in a non-linear fashion, they present various “plateaus” within their text, namely theoretical assemblages that make up the rhizome. Such clusters of themes form different aspects of the rhizome. That is why the concept of the plateau has been used particularly within chapter 3 that discusses the rhizomatic artwork, and various clusters of themes that exist simultaneously within the artwork. The plateaus that are explored are various types of artworks and how they have been approached in various eras, and the role they have played. All the different plateaus do not disappear, they exist side by side simultaneously. This is not necessarily always reflected in law, but ought to be.

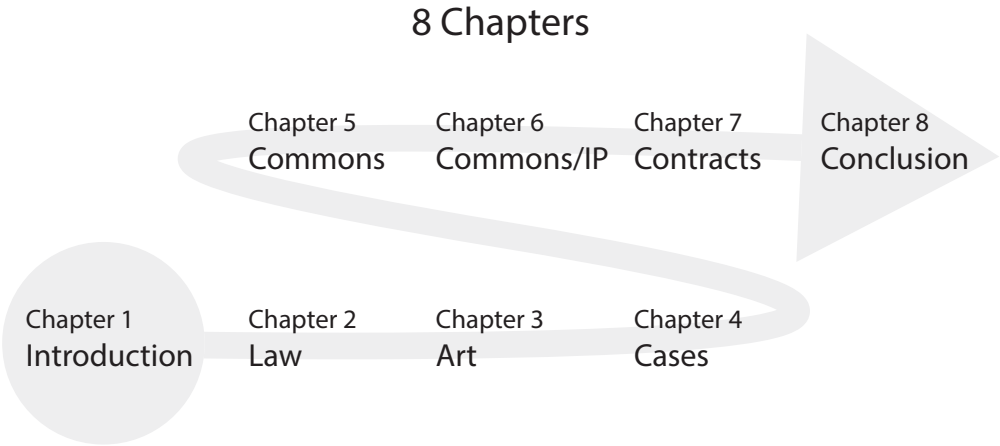
I have already introduced the concept of the encounter and how it will be used in order to analyse the cases. What remains to be addressed in this introductory section is the concept of the “line of flight”. Every encounter forces law to think. How this happens more concretely is that it shatters various concepts that are taken for granted in dogmatic reasoning. The encounter forces certain aspects of the traditional concepts to break free, and to become concepts of their own or in their own right. These are the *lines of flight*. Each encounter can give rise to a number of lines of flight. In my case study chapter I present the most pertinent ones in terms of law.

All this taken together, makes up the methodological approach of this research. This is part of that which Deleuze and Guattari call “nomadic thought”, which does not have the ambition to totalise the knowledge, but rather introduces the fluidity and movement, and explores the potentiality such movements give rise to. In that way, science that applies a nomadic approach is never homogenised – instead it keeps moving through all the multiplicities that it constantly encounters. Therein, it shall be argued, lies the potential of rhizomatic jurisprudence. The contribution to legal research and jurisprudence that I am attempting to make with this research project is to introduce cluster- or constellation concepts - into legal reasoning, concepts that require a cross-field reasoning, that require that what has previously been seen as opposites (e.g. individual

rights and open access) to be fused together, an example of such concepts is indeed the cultural commons. While these types of concepts in many ways stem from and are symptoms or results of the idiosyncrasies of the digital knowledge society and the paradigm in which we are now, they are in no way new to legal reasoning, which is also another contribution I hope to make with this research. Alternating between paradigms within the overall digital knowledge paradigm namely the intellectual property, the cultural commons, and international allocation of resources also shows the benefits of plateau and rhizome-based thinking, as it is very much called for in terms of cluster concepts. Deleuze and Guattari's theory further lends itself well to these endeavours as well as the linkages between the legal sphere and the societal spheres such as e.g. the market economy. These linkages open up a possibility to explain as well as to integrate encounters into legal conceptions as well as concepts, and follow the natural lines of flight that are constantly being created to be fused with the legal sphere. The rhizomatic jurisprudence and the nomadic method that this project discusses acts as a critique of the dogmatic legal binary reasoning – which results in certain underlying assumptions in e.g. intellectual property law, which directly leads to obstacles to access. The digital knowledge society requires that we reason in new ways, in ways that are network-based, in ways where legal concepts can be cluster-concepts that are dynamic and open-ended. In order to conduct this type of study the following structure has been applied:

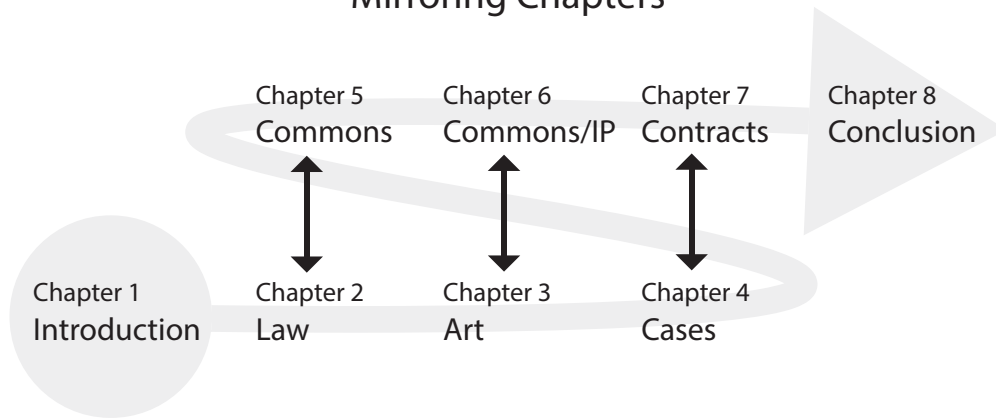
ILLUSTRATION OF THE STUDY

1. Eight Chapters



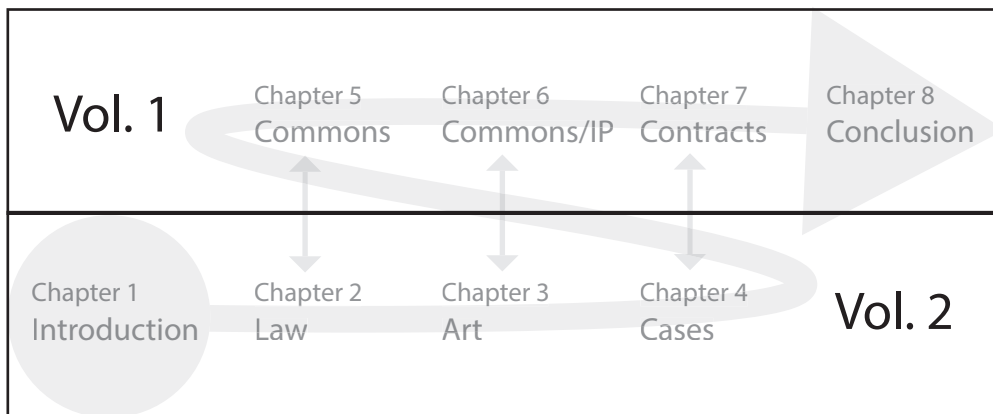
2. Mirroring Chapters

Mirroring Chapters



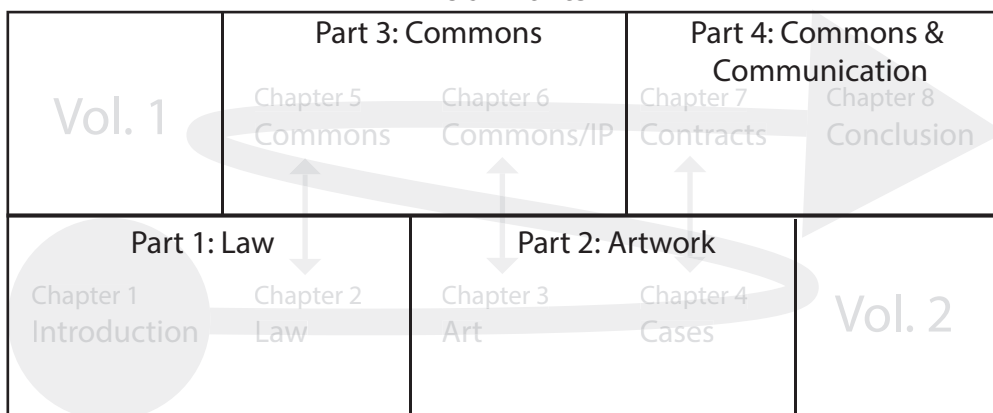
3. Two Volumes

Two Volumes



4. Four Parts

Four Parts



CHAPTER 2

A RHIZOMATIC JURISPRUDENCE

2 A RHIZOMATIC JURISPRUDENCE

2.1 INTRODUCTION TO DELEUZE

Virtually every book or article that deals with Deleuze and law, or Deleuze and the philosophy of law, begins by quoting the, by now legendary, utterance that Deleuze made in an interview with Claire Parnet: “Si je n’avais pas fait de philosophie, j’aurais fait du droit”.¹²⁰ Paradoxically, Deleuze never wrote a book on law and jurisprudence, and while it appears that law and jurisprudence are ever only marginally mentioned in his other works or *en passant*, there still appears to be a very strong connection that links Deleuze and law. But before we arrive at a closer study of Deleuze *and* Law, Deleuze *in* Law, and even further still, Deleuze *by way of* Law which shall be addressed in chapter 8; let me first take a few steps back and generally introduce this philosopher and place him in a context.

Gilles Deleuze, it is often claimed, is one of the twentieth century’s most important thinkers. Contemporary of Michel Foucault and Jacques Derrida, he belongs to, that which is sometimes referred to as, post-structuralism or the French postmodern philosophical tradition. He was born in 1925 and chose to end his own life at the age of seventy in 1995, after enduring a long illness, by jumping from his balcony. He studied philosophy at the Sorbonne in the 1940s and finished his doctoral thesis in the, certainly for Paris, iconic year of 1968. It was in fact during the events of 1968 that Deleuze met his friend and lifetime collaborator, the psychoanalyst, Félix Guattari.¹²¹ The spirit of a revolutionary *soixante-huitard* was therefore always present in Deleuze’s thinking, even if some internauts on blogs and websites go so far as to warn about making such a connection, writing: “Danger warning! Deleuzian ethics are unconventional in ways that tend to piss people off, especially Marxists!”¹²² That Deleuze is difficult to place in a philosophical tradition is undisputed. But it is precisely that which produces the potentiality in his philosophy.

Deleuze became a professor at the University of Paris VIII Vincennes/St. Denis, an experimental institution that had been founded by, among others,

¹²⁰ [eng.] “If I hadn’t become a philosopher, I would have studied law”. Original French quote taken from Gilles Deleuze, *L’Abécédaire de Gilles Deleuze, avec Claire Parnet*, Paris: DVD Editions Montparnasse (1994). The English translation taken from (eds.) Laurent de Sutter and Kyle McGee, ‘Introduction’, in *Deleuze and Law*, Edinburgh University Press (2012).

¹²¹ See e.g. Mats Hjelm, ‘Kring, konst och intelligenta maskiner – Humanistisk kritik i informationssamhället’ in (ed.) Sven-Olov Wallenstein *Nomadologin*, Skriftserien Kairos, nummer 4, Kungliga Konsthögskolan, Raster Förlag, (1998), p. 33.

¹²² See e.g. Ken Bauman, *The Beginner’s Guide to Deleuze*. Available at: <http://htmlgiant.com/random/the-beginners-guide-to-deleuze/>. Last accessed 15th March 2014.

Michel Foucault. The Parisian and international activists, anarchists and other intellectuals frequently visited the Tuesday seminars held there during the 1970s.¹²³ This formed Deleuze's philosophical trajectory and maturity. From his, albeit often peculiar and perhaps wayward, approach to the history of philosophy,¹²⁴ he developed firstly a critical approach that then morphed into a constructivist approach to philosophy. Later on in his career he wrote books on topics other than 'pure' philosophy such as: art,¹²⁵ cinema,¹²⁶ literature,¹²⁷ etc.

2.1.1 DELEUZE AND GUATTARI

Félix Guattari was one of the French psychoanalyst Jacques Lacan's first students. He was a practising psychoanalyst and an activist. His experimental approach as well as his critique of Lacan worked its way into the work he conducted together with Deleuze. Guattari worked his entire life at the *La Borde* clinic that was run by another Lacanian student, Jean Oury. The work at the La Borde gave Guattari certain insights in terms of therapy, as well as theory. He was, for instance, always rather derisive of the term 'postmodern' and 'post modernity'¹²⁸ particularly when it came to his work, something that Deleuze certainly agreed with. However there were still aspects that tied their work to the postmodern project, especially their critique of e.g. the holistic, hierarchical reasoning, the unified self, as well as their focus on the inhuman or the dehumanised processes that affect the subject. These were the influences from the postmodern thinker Jean-Francois Lyotard that Deleuze and Guattari incorporated and developed. The same can be said about their placement in the psychoanalytical tradition. While neither Guattari alone, nor Deleuze and Guattari together, ever fully distanced themselves from the Lacanian psychoanalytic theory, their critical approach to both Lacan and Freud formed the backbone of their collaborative works. That they explored the realms and existed within the *in-*

¹²³ See e.g. Mats Hjelm, 'Kring, konst och intelligenta maskiner – Humanistisk kritik i informationssamhället', in (ed.) Wallenstein *Nomadologin* p. 31.

¹²⁴ He wrote books on Hume, Kant, Spinoza, Nietzsche, Bergson, Leibniz, Foucault.

¹²⁵ See e.g. Gilles Deleuze, *Francis Bacon: The Logic of Sensation*, (trans.) Daniel W. Smith, Continuum, (2003 [originally published in 1981]).

¹²⁶ See e.g. Gilles Deleuze. *Cinema 1: The Movement-Image*, (trans.) Hugh Tomlinson and Barbara Habberjam, University of Minnesota Press, (2009 [originally published in 1983]) and Gilles Deleuze, *Cinema 2: The Time Image*, (trans.) Hugh Tomlinson and Robert Galeta, Continuum, (2010, [originally published in 1985]).

¹²⁷ See e.g. Gilles Deleuze, *Proust and Signs: The Complete Text*, (trans. Richard Howard), The Athlone Press, (2000 [originally published in 1972]), essay on Sacher-Masoch in Gilles Deleuze *Masochism: Coldness and Cruelty*, (trans.) Jean McNeil, Zone Books (1999 [originally published in 1967]); See also Gilles Deleuze and Félix Guattari, *Kafka: Towards a Minor Literature*, (trans.) Dana Polan, University of Minnesota Press, (1986 [originally published in 1975]).

¹²⁸ See e.g. Félix Guattari, *Cartographies Schizoanalytiques*, Paris: Galilée (1989).

*between*s of science and philosophy gradually became apparent during the course of their collaboration.

Guattari was born in 1930. He was a psychoanalyst, philosopher, political activist, and some even give him the epithet, a militant. He edited the Trotskyist newspaper *La Voie Communiste* (the *Communist Way*) and he was involved in various anti-government movements during the events of 1968. Some of Guattari's more influential works are *Chaosmosis: An Ethico-Aesthetic Paradigm* (1992), *Psychanalyse et transversalité* (1972) and *La révolution moléculaire* (1977).

He co-authored with Deleuze *Anti-Oedipus* (1972), *Kafka: Towards a Minor Literature* (1975), *On The Line* (1976), *A Thousand Plateaus* (1980), *Nomadology: The War Machine* (1986) and *What Is Philosophy?* (1991). He also co-authored with Suely Rolnik *Molecular Revolution in Brazil* (1986) and with Antonio Negri *Communists Like Us* (1985).

He was particularly interested in the concepts of schizoanalysis and the concepts of the *molar/molecular*. Both the concept of the schizophrenic as well as the molar/molecular were some of the driving forces behind Deleuze and Guattari's *Capitalism and Schizophrenia* project, which is the focus of this study (see below). While the meaning of schizophrenic in that context shall be developed further throughout this study, the concepts of molar and molecular have been largely omitted here and are discussed only obliquely. Guattari's terms molar and molecular can only be briefly presented here. They were borrowed from chemistry where they are used to denote a (large) unit of molecules dissolved in a solution, which is called a 'mole'. For the intents and purposes of this project suffice it to say that this was how it is understood that Deleuze and Guattari applied these two concepts:

For Deleuze and Guattari, 'molar' and 'molecular' form a paired concept: not exactly opposites, connected yet distinct, whose use is 'dependent on a system of reference' (whether an object is seen from its 'closed' or 'open' side) and scale (the cell is molecular in relation to the organism, the organism is molecular in relation to the social group etc.). To the extent that it refers to larger aggregates, the political meaning of molar tends to be associated with the level of governance, the state, political parties, but also social movements, policies, demands: what is extensive and can be measured. The molecular generally refers to the micro-political level, to processes which take place below the level of perception, in 'affects' (impersonal sensations which transform a body's capacity to act and be acted upon). To think of politics as composed of both molar and molecular transformations, and of the two levels as distinguishable by right but not distinct or separate in fact,

provides a model for thinking the complexity of relations through which political movement and struggle takes place.¹²⁹

Deleuze and Guattari developed their joint thought experiment mostly in *Capitalism and Schizophrenia*, that consist of two volumes *Anti-Oedipus* and *A Thousand Plateaus*. In this project they particularly expand on their *critique of psychoanalysis* in *Anti-Oedipus* (or as Foucault dubbed the book, “Introduction to the Non-Fascist Life”, in his introduction to the American edition) as well as their other tenets of *nomadism* and *multiplicity* in *A Thousand Plateaus*. In *Anti-Oedipus* and *A Thousand Plateaus* Deleuze/Guattari develop concepts such as “rhizome”, “nomadology”, “bodies without organs”, “territorialisation” (“de/re/territorialisation”), “plateaus”, “lines of flight”, “assemblages”, “machines”, “smooth and striated spaces”, etc. All these concepts have been instrumental for this project. Clearly, it is almost impossible to tell the two thinkers apart in their collaborative works, or to claim that the one contributed to this aspect while the other contributed to the other. Deleuze and Guattari contaminated, for the lack of a better word, each other’s thoughts, and this very contamination symbolised for instance their experimental style of writing, making it, as Paul Fry put it, “versatile” for the ones who like it, and “murky” for the ones who do not.¹³⁰ This research project is without a doubt inclined towards the former, rather than the later.

For some, to this author unexplained reasons, even the works that were written in collaboration with Guattari, are often referred to as Deleuzian. Throughout this research project I have tried, as far as that has been possible, to designate works and concepts as “Deleuzian” if they were created by Deleuze alone in his own writing (such as e.g. the “encounter” concept); “Deleuzeoguattarian” if they were developed in their joint writing (even if initially the concept in question may have stemmed from the one or the other such as e.g. the “rhizome”); “Deleuze/Guattari” where I refer to them as joint authors, and, finally I have used “Deleuze and Guattari” to designate where I generally refer to them as collaborators or when they jointly relate to issues outside their own philosophy.

What makes the Deleuzeoguattarian theory particularly *versatile* and intriguing is its unique way of relating to traditional philosophical concepts. As such, their philosophy is a constant *event*, a *becoming*, where philosophy and philosophical concepts are not created, but happen and affect one another, *contaminate* one

¹²⁹ Rodrigo Nunes and Ben Trott, in *Turbulence*, (2008/7), pp. 38-47. Available at: http://turbulence.org.uk/wp-content/uploads/2008/07/guattari_rolnik_nunes_trott_low_res.pdf. Last accessed 17th March 2014.

¹³⁰ Paul Fry in the lecture *The Postmodern Psyche*. Available at <http://oyc.yale.edu/english/engl-300/lecture-15>. Last accessed 17th March 2014.

another, through the various meetings, clashes and interlinkages that constantly take place.

2.1.2 DELEUZE, DELEUZE/GUATTARI AND POSTMODERNISM

Another philosopher that is closely connected to Deleuze is Michel Foucault. They were friends and mutually appreciative of each other's work. Deleuze wrote a book called *Foucault*. They also wrote together.¹³¹ Deleuze wrote a number of essays that in one way or another were directly influenced by or addressed Foucault, mainly the essay "Post-Scriptum sur les sociétés de contrôle" where he addressed the Foucauldian disciplinary societies. He also wrote the introduction to Foucault's *Discipline and Punish*. Foucault in return wrote the introduction to the American edition of *Anti-Oedipus*. In terms of production of knowledge, power, and the subject, Deleuze and Foucault often converged, even if, in *Foucault*, Deleuze engages in a reconstruction of Foucault's ideas.

It is in 'Post-Scriptum' where Deleuze engages with Foucault that he employs the term *societies of control*. Clearly, the two friends were interested in the institutions of discipline and control, be it the family, the university, the hospital, or prisons (physical as well as biopolitical). The interest in the enclosures and controls of the subject placed them within the tradition of the French revolutionary thinkers. The processes of individuation, becomings, production of truth, tied them together. As with Guattari, Deleuze and Foucault contaminated each other's philosophies. And while there is a lot of Foucault in Deleuze, there is a unique focus on certain Deleuzian concepts here that Foucault did not further engage with such as e.g. the nomadic thinking, something that from time to time could perhaps be ascribed to some of Foucault's discontinuous texts, but which was something that Deleuze developed on his own, and with Guattari. While so many studies on Foucault and law have been conducted, they are too numerous to even list here, it is the Deleuzian and Deleuzeoguattarian concepts that still remain rather unexplored, and so interesting for further research, especially from a legal point of view.

Another French contemporary of Deleuze's is Jacques Derrida. Deleuze and Derrida did not have the same intimate friendship as he shared with Foucault. They did not often refer to each other's work, but there was an undisputed mutual respect between the two.¹³² The conversation between Deleuze and Derrida, while it was perhaps always there, never really began until Deleuze's death.

¹³¹ Gilles Deleuze and Michel Foucault, 'The Intellectuals and Power: A Discussion Between Gilles Deleuze and Michel Foucault' in *Telos* 16 (1973), New York: Telos Press.

¹³² Gordon C.F. Bearn, 'Differentiating Derrida and Deleuze', in *Continental Philosophy Review* 33: 441–465, (2000).

In “I’m Going to Have To Wander Alone”,¹³³ Derrida’s eulogy for Deleuze, he wrote that he felt closest to Deleuze of all his contemporaries and that their conversation was only just then truly beginning. This conversation no doubt involved non-Hegelian philosophy of difference, inclination towards openness, diversity, heterogeneity, etc.¹³⁴

Gilles Deleuze was thus a French philosopher that existed in-between post-modernism, post-structuralism, who was essentially a constructivist thinker, which had become most obvious in his collaborative work with Félix Guattari *What is Philosophy?* (1991).¹³⁵ In it, they discuss concepts, formation of concepts and presuppositions in philosophy. This chapter presents Gilles Deleuze and the Deleuzian jurisprudence and takes a journey through Deleuze’s thinking and explores the theory developed by him in his individual works, as well as him and Guattari in their joint works.¹³⁶ Gilles Deleuze has written around thirty books (some of them essay collections) all together. Four of them were written in collaboration with Guattari,¹³⁷ one of them was written together with Michel Foucault.¹³⁸ All of these projects have formed the Deleuzian thought and the Deleuzian theory. The four written with Guattari formed the Deleuzeoguattarian thought and the Deleuzeoguattarian theory. They all move in an out of each other and they deal with a number of different subject matters. In this research I have chosen to focus primarily on Deleuze and Guattari’s *Capitalism and Schizophrenia* project.

Other than the two volumes of *Capitalism and Schizophrenia* that form the theoretical backbone of this study, I have also utilised Deleuze’s major works *Difference and Repetition* (1968) and *The Logic of Sense* (1969). In those two books Deleuze developed, among others, the concept of the encounter that was introduced in chapter 1, as well as the concepts of difference, repetition and ground-

¹³³ Jacques Derrida, *I’m going to have to wander all alone*, (trans.) L. Lawlor, in *Philosophy Today*, 42.1 (1998), p. 3.

¹³⁴ See e.g. (eds.) Paul Patton and John Protevi, *Between Derrida and Deleuze*, Continuum, (2003), p. 4.

¹³⁵ Gilles Deleuze and Félix Guattari, *What is Philosophy?*, (trans.) Hugh Tomlinson and Graham Burchill, London : Verso, (1994).

¹³⁶ I focus mainly in the two-volume *Capitalism and Schizophrenia*, which comprises of *Anti-Oedipus: Capitalism and Schizophrenia*, (trans.) and Robert Hurley, Mark Seem, and Helen R. Lane, foreword by Michel Foucault, Continuum (2004 [originally published in 1972]) and *A Thousand Plateaus*, and Deleuze’s own *The Logic of Sense* (trans. and eds.) Mark Lester with Charles Stivale, Constantin V. Boundas, New York : Columbia University Press, (1990 [originally published in 1969]), and *Difference and Repetition* in order to develop a legal Deleuzian theory.

¹³⁷ Deleuze/Guattari, *Anti-Oedipus*, Deleuze/Guattari, *A Thousand Plateaus*, Deleuze/Guattari, *What is Philosophy?*, and Deleuze/Guattari, *Kafka: Toward a Minor Literature*.

¹³⁸ Deleuze and Foucault, ‘The Intellectuals and Power: A Discussion Between Gilles Deleuze and Michel Foucault’.

lessness that shall also be used throughout the project, particularly in the *Darfurnica* case.

Difference and Repetition was Deleuze's doctoral thesis. It engages in a critique of representation. In its seven chapters, "Introduction: Repetition and Difference", "Difference in Itself", "Repetition for Itself", "The Image of Thought", "Ideal Synthesis of Difference", "Asymmetrical Synthesis of Sensibility" and "Conclusion: Difference and Repetition", Deleuze sets the stage for his future place in philosophy. There, he engages in a dialogue with philosophers before him and the history of philosophy. In the first part of the book he sets in motion a depersonalisation of philosophy (in chapters 1 and 2) and a prolegomena of philosophy in chapter 3. In the second part of the book he does philosophy "in his own name", creating an internal repetition in the book. That he provides a repetition of the Introduction in the Conclusion, and how his chapter 1 and 4 and 2 and 5 mirror each other have clearly inspired the structure of this book. As already mentioned, he discusses the concept of the "encounter" throughout, as well as "difference" and "repetition", concepts that this research also engages with.

The Logic of Sense (1969) is the other Deleuzian single work that has been significant for this study. In it Deleuze developed the concept of "becoming". Deleuze also explores "meaning" and "meaninglessness", "common-sense" and "nonsense" – those concepts are not applied in this study, nor are his other textual analysis of among others Lewis Carroll, F. Scott Fitzgerald, Émile Zola and Sigmund Freud.

2.1.3 DELEUZE AND LAW

Let us go back to the Deleuzian claim that if he had not become a philosopher he would have studied jurisprudence. This chapter takes up Deleuze on that very utterance and places most of these abovementioned Deleuzian and Deleuzeoguattarian concepts within a jurisprudential setting. Even though it still might be somewhat unusual to use this particular philosophy in conjunction with legal theory, it certainly is not the first time it has been attempted. On the contrary, many interesting works on Deleuze and Deleuze/Guattari and jurisprudence have been presented in the last couple of years. Several books and a couple of articles juxtaposing Deleuze and Deleuze/Guattari place their philosophy in the setting of jurisprudence. These shall be of particular interest here.¹³⁹

¹³⁹ Some of the key works addressing the relation of jurisprudence in Deleuze's work see, e.g. (eds.) Laurent de Sutter and McGee Kyle, *Deleuze and Law*, Edinburgh University Press, (2012), Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law*, Routledge, (2011), Edward Mussawir. 'The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence' in *Law, Culture and the Humanities* (2011) 7: 463, Alexandre Lefebvre, *The Image of Law*; Laurent de Sutter, *Deleuze: La Pratique du Droit* Paris: Michalon, (2009); (eds.) Rosi Braidotti, Claire Colebrook and Patrick Hanafin, *Deleuze and Law: Forensic Futures* Basing-

The vast body of secondary literature outside jurisprudence that comments on Deleuze, Guattari and Deleuze/Guattari, is too extensive to list here. Therefore, I will attempt to inscribe myself in the many discussions concerning these philosophers and jurisprudence mainly, borrowing some concepts, commenting on others. Throughout the study I will attempt to develop my own reading and application of the Deleuzian and Deleuzeoguattarian philosophy, as well as to discuss it under the headline of “rhizomatic jurisprudence”.

In my view, the two most significant works in the field of jurisprudence are Alexandre Lefebvre’s *The Image of Law: Deleuze, Bergson, Spinoza* and Edward Mussawir’s *Jurisdiction in Deleuze: The Expression and Representation of Law*. Both of these books will help me fuse my own analysis with e.g. concepts of *territorialisation* and *deterritorialisation*, as well as *smooth* and *striated spaces*, (chapters 5-7) and *nomadic* and *sedentary forms of possession* (chapter 7). The other research that fuses Deleuze and law, has so far been presented mostly in articles or chapters in anthologies, and as such will not be addressed as actively, but that type of research has also been tremendously important for this project, even when used obliquely or for the sake of clarity in certain instances. I will attempt to engage in a conversation mainly with the two monographs written by Lefebvre and Mussawir but also with some of the other recent works that connect Deleuze to law such as *Deleuze: La Pratique du droit*, written by Laurent de Sutter and the anthology *Deleuze and Law* that was edited by Laurent de Sutter and Kyle McGee.

Duly in accordance with Alexandre Lefebvre and his preface to *The Image of Law*,¹⁴⁰ when using Deleuze and his concepts in jurisprudence and in legal research, a study of Deleuze and jurisprudence does not so much have to do with “applying” the Deleuzian concepts, but rather using the thoughts and ideas “in coordination with law toward the creation of new problems and new concepts.”¹⁴¹ The same is true of Deleuze and Guattari and the Deleuzeoguattarian concepts. One of the overall aims here is to argue that Deleuze, and Deleuze/Guattari, can indeed be very beneficial to jurisprudence and legal reasoning, as well as provide a new type of explanatory values, and add to the study of law and the philosophy of law. Their philosophical concepts such as “territorialisation”, “deterritorialisation”, “reterritorialisation”, “rhizome”, “encounters”, “plateaus”, “lines of flight”, etc. shall be defined, applied and dis-

stroke: Palgrave Macmillan, (2009); Alexandre Lefebvre, ‘Critique of Teleology in Kant and Dworkin: The Law Without Organs (LwO),’ in *Philosophy Social Criticism* (2007) 33: 179–201; Nathan Moore, ‘Icons of Control: Deleuze, Signs, Law,’ in *International Journal for the Semiotics of Law* (2007) 20: 33–54; Alexandre Lefebvre, ‘We Do Not Yet Know What the Law Can Do’ in *Contemporary Political Theory* (2006) 5: 52–67; Alexandre Lefebvre, ‘A New Image of Law: Deleuze and Jurisprudence,’ in *Telos* (2005) 130: 103–126; Nathan Moore, ‘So You Love Me’ in *Law and Critique* (2004) 15: 45–64; Nathan Moore, ‘A Distant Hand Fell From His Shoulder’ in *Law and Critique* (2000) 11: 185–200.

¹⁴⁰ Lefebvre, *The Image of Law*, preface.

¹⁴¹ *Ibid*, p. xi.

cussed as well as placed inside a jurisprudential framework in order to demonstrate how valuable such ideas can be in the sphere of law, and particularly in the field of law and art – and ultimately these instruments will be the very tools that shall be used in Volume II in arguing how a concept of the cultural commons can be envisioned and introduced in law.

2.2 DETERRITORIALISING JURISPRUDENCE

A Thousand Plateaus may be one of the strangest philosophy books ever written.¹⁴² Deleuze and Guattari guide the reader through a ‘thousand plateaus’ – where each chapter of the book forms a plateau. Each plateau is marked by a date that represents something in the chapter, for instance year 1914 for the chapter ‘1914: One or Several Wolves?’. This chapter addresses Freud’s ‘Wolfman’¹⁴³ case. In the year 1914 the patient known as ‘Wolfman’ finished his therapy with Freud. The year 1914 was the year when Freud wrote *From the History of an Infantile Neurosis* in which he described the treatment of this patient as well as, obviously, the year when the First World War began. Deleuze and Guattari were very critical of the conclusions that Freud reached in this case, no wonder then that they chose the date that marked the end of the therapy sessions, the year in which Freud wrote the thesis based on this patient with the backdrop of a changing world. Another example is the year 1227 – the year Genghis Khan died. This year marks one of the most read and mostly quoted chapters in *A Thousand Plateaus* namely ‘1227: Treatise on Nomadology’ where Deleuze and Guattari develop what will come to be one of their more significant concepts: “nomadology” and “nomadic space”. Lars Marcussen writes:

In his account of the historical process, Deleuze introduces an agent called ‘the nomad’, unknown to Marxism, who runs counter to ‘the State’ in the sense that the nomad is aggressively creative, while the State plays the more passive role of consolidator: the State thrives by capturing nomadic innova-

¹⁴² Wallenstein, ‘Kommentar till nomadologin’ in *Nomadologin*, (1998).

¹⁴³ According to Freud this was how Wolfman described his wolf dream: “I dreamt that it was night and that I was lying in bed. (My bed stood with its foot towards the window; in front of the window there was a row of old walnut trees. I know it was winter when I had the dream, and night-time.) Suddenly the window opened of its own accord, and I was terrified to see that some white wolves were sitting on the big walnut tree in front of the window. There were six or seven of them. The wolves were quite white, and looked more like foxes or sheep-dogs, for they had big tails like foxes and they had their ears pricked like dogs when they pay attention to something. In great terror, evidently of being eaten up by the wolves, I screamed and woke up. My nurse hurried to my bed, to see what had happened to me. It took quite a long while before I was convinced that it had only been a dream; I had had such a clear and life-like picture of the window opening and the wolves sitting on the tree. At last I grew quieter, felt as though I had escaped from some danger, and went to sleep again.” in *From the History of an Infantile Neurosis*, (1918).

tions and transforming them to fit its own needs, precisely in order to consolidate a certain state of affairs. On the other hand, every consolidated state induces renewed nomadic aggression and inventions that the State must absorb and adapt to its consolidating tissue, which, thus enriched, opens up paths for amplified nomadic action, and so on.

In accordance with their philosophical style, Deleuze and Guattari *do not come up with a definition of the nomad*, but they put the word into play in different contexts, and as such it never acquires a definite meaning, but rather is intended to serve as a conceptual nomad: an agent in unfinished philosophical, political, artistic and other field.¹⁴⁴ As a matter of fact, Deleuze and Deleuze/Guattari almost never come up with any definitions or engage in defining their concepts. The very definition of concepts is in their understanding the grounding of a concept, a territorialisation of it, which strips it of its potential. Instead the concepts are used in various contexts, and as such they are always events, open-ended, unfinished, continuous. This mode of writing is both very helpful and obstructive for a scholar that uses Deleuzian and Deleuzeoguattarian concepts. On the one hand one is provided with a set of concepts that are open, imaginative, and lend themselves to a number of different uses. They are tools that allow the scholar to connect them to any discussion and context that they see fit. At the same time, they are difficult and obstructive in that that a scholar that attempts to use them is never given a definite definition of the concepts, never given any real leads as how to (and how not to) use them. Throughout this chapter I have as far as possible, without compromising the integrity of the concepts or Deleuze and Deleuze/Guattari, tried to be as transparent as possible as to (a) how I understand Deleuze and Guattari are using the concepts, and (b) how I propose they be used in jurisprudence. While this makes it difficult to provide a traditional definition of concepts and how they are used, it also opens up a new way of approaching jurisprudence that in turn opens it up to new possibilities. Another challenge is to decide where to begin or which concept ought to be presented first as they so often come in bundles and networks, and are so tightly connected to one another. Sven-Olov Wallenstein suggests that the Deleuzeoguattarian concepts ought to be understood as tools, local interventions in a given situation, they do not attempt to present a universal truth.¹⁴⁵ I have attempted to use them in that very manner, as tools or local interventions to be applied in jurisprudence in general, and various legal implications to access to art in particular. Therefore, instead of posing the “What is?” question the traditional scholarly approach to familiar legal and jurisprudential concepts such as

¹⁴⁴ [my emphasis] Lars Marcussen, *Deleuze and Space: The smooth and the striated*. Available at: http://www.architectureandspace.com/sider/deleuze-and-space-the-smooth-and-the-striated_89.aspx. Last accessed 17th March 2014.

¹⁴⁵ Wallenstein, ‘Kommentar till nomadologin’, in *Nomadologin*, p. 182.

“right”, “property” or even “Grundnorm”, I instead pose the questions what do these concepts do, what do they *perform*? This is the Deleuzian and Deleuzeoguattarian way to approach concepts, which may be new to jurisprudence, i.e. instead of seeking out static definitions to approach legal concepts as events, as conceptually open.

So I begin with the nomad above, mainly because it is so unique for Deleuze/Guattari, and the first explanation of the concept that is provided here comes not from Deleuze/Guattari, but from the architect Lars Marcussen.

The ‘thousand’ plateaus of the *A Thousand Plateaus* are divided in 15 chapters, and the authors claim that they can be read in any order, which is what makes them nomadic. But the authors also suggest that the first and the last chapter ought to be read first and last respectively, as a type of entry and exit to the book. Each plateau treats and uses a number of different subjects and theoretical fields such as philosophy, psychoanalysis, biology, music, literature, economy, mathematics, and so on. This is probably why the book is considered both strange and fascinating at the same time, and why the authors write in their particular experimental manner, not necessarily to define what the concepts are in an ontological way but rather to *guide* the reader’s journey through the plateaus.

There is one principle that binds the plateaus together, and that is that in each chapter of the book the authors are composing a so-called plane of consistency [*plan de consistance*] – i.e. a field where they create a resonance between various concepts. This is the philosophical matrix that they use, one that does not give rise to a closed circle, an “en-cyclopedia” (with an absolute centre point) but rather they work with these types of planes of consistency that remain open to all types of connections. This approach they refer to as *experimental constructivism*.¹⁴⁶

Legal reasoning often begins with an encounter, with a border. Where do we draw the legal line in terms of legality, is often one of the key questions that colours legal discourses. Instead of borders, Deleuze and Guattari speak of *territories*. The concepts of *territorialisation*, *deterritorialisation* as well as *reterritorialisation* were developed in *Capitalism and Schizophrenia*, firstly in *Anti-Oedipus* and then in *A Thousand Plateaus*. The concepts “provide an alternative to thinking of territories as bounded entities, and thus, to thinking of border as frontiers or as the boundaries of an entity.”¹⁴⁷ A territory for Deleuze and Guattari could be geographic, political, conceptual, or what ever else, and here I explore the *legal*. A territory is something that is constantly and continuously subject to change,

¹⁴⁶ See generally Wallenstein, ‘Kommentar till nomadologin’ in *Nomadologin*, p. 179.

¹⁴⁷ Antke Engel (Institute for Queer Theory, Berlin) Work Group 1: Borders Nicosia (Cyprus) 14-15 April, 2009, *Deterritorialization, Reterritorialization, and Lines of Flight*. Available at: http://wiki.manchester.ac.uk/eastbordnet/index.php/Deterritorialization,_Reterritorialization,_and_Lines_of_Flight. Last accessed 17th March 2014.

there are occurrences that flee the territory and the orders and structures of the territory. This is *deterritorialisation*, a concept that they began to explore in *Anti-Oedipus* as a comment on (or an attack on) psychoanalysis.¹⁴⁸ Deleuze and Guattari manage to show how this approach constantly produces *lines of flight*, which *deterritorialise* the territory, forming new *assemblages*. A deterritorialisation is thus something that has broken with an established configuration and where that has happened through *lines of flight*. This movement gives rise to new assemblages, while it is at the same time subject to *reterritorialisation* that hegemonises the formally provocative and/or subversive assemblage. Reterritorialisation stabilises, albeit provisionally, the new configuration.¹⁴⁹ The configurations, or assemblages are created from constellations of singularities and traits deduced from flows that result from lines of flight and deterritorialisation. The singularities and traits are (temporarily) selected, organized and stratified – artificially or naturally – to form a new constellation, an assemblage.¹⁵⁰ Deleuze and Guattari write that assemblages can both be small and large and constitute “cultures” or “ages” or any other type of constellation. They write also that the territory is the first assemblage, the first thing to constitute an assemblage. Therefore the notion of assemblage is fundamentally territorial,¹⁵¹ and spatial.

Already at this point we see how there are a number of concepts that are connected to one another, and in order to explain one, others are put into play and these too have to be explained at the same time. Therefore, territory is something that is bordered off – it can be both a physical territory, e.g. a national territory, a jurisdiction, as well as a conceptual territory such as for instance the (dogmatic) legal system, the field of intellectual property law, the field of public law, etc. Lines of flight that emerge from the territorialised and static order challenge the territories, for instance with the emergence of EU law or international conventions that challenge the physical territoriality and jurisdiction, or with technological progress that challenges the intellectual property concepts. These lines of flight induce deterritorialisation, a nomadic movement that confronts the given territory and its underlying systems and orders. The legal system e.g. encounters the question: which is the superior norm, the one that stems from EU law or the one that stems from the national constitution? When the lines of flight that have left the territory and its order assemble under new and different forms, a new assemblage is formed – i.e. new forms of more or less temporary constellations appear, such as if we are following the above ex-

¹⁴⁸ Deleuze and Guattari opposed the Lacanian understanding of desire in terms of negativity, lack and castration, and instead, by fusing Marx and Nietzsche, presented desire as *production of new realities*. When the concept of lack is abolished, they argue, a productive aspect is introduced in its place.

¹⁴⁹ [my emphasis] Engel, *Deterritorialization, Reterritorialization, and Lines of Flight*.

¹⁵⁰ [original emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 448.

¹⁵¹ Deleuze/Guattari, *A Thousand Plateaus*, p. 356.

amples, digital content directives like *The Information Society Directive*¹⁵² or the *Copyright Term Directive*.¹⁵³ Lines of flight are thus instances that flee the territoriality (physical or conceptual) of a given system. For instance, in chapter 4, it is presented how certain instances that the law encounters produce a number of lines of flight that flee the legal territory, again both physical and conceptual, and even create new constellations of their own. At the same time there are reterritorialising forces, such as the statutory law or the market forces, which we shall see in e.g. chapters 6 and 7, that move along with the lines of flight, follow them to the new assemblages, attempting to once again reincorporate that which has fled, once again within their own territorialising systems. This is the nomadic movement that is produced by lines of flight and new assemblages with constant de/reterritorialisation.

An assemblage happens when a line of flight breaks free from the territory. In ‘Treatise on Nomadology’ Deleuze and Guattari argue that capitalism is one of the more powerful deterritorialising forces that challenges previous territorialising notions of identity, traditions, symbolic orders, etc. but at the same time it gives rise to reterritorialising instruments that create new territories that are instead there to hold together not the territory but the capitalist production.¹⁵⁴ Hence the schizophrenic nature of capitalism, it both produces lines of flight, deterritorialisation, as well as reterritorialisation, and hence the title of the two volumes, *Capitalism and Schizophrenia*.

All these concepts that I have begun to list in this chapter and that I am introducing here will be used in order to analyse the territoriality of jurisprudence and law, and then follow the lines of flight that it gives rise to, and the assemblages that it produces. In Volume II I shall then be adding on the reterritorialising aspects that arise from the market forces and law, and how they affect the legal reasoning in terms of access to art and the legal concept of cultural commons.

The Deleuzian concepts are thus used as tools in order to describe and approach jurisprudence and law, but then other concepts that I shall be discussing below such as the rhizome will be used in order to reach beyond traditional legal reasoning and in order to get to the potentialities of law, one of them being the ability to imagine, conceive of and construct a concept of the cultural commons.

¹⁵² 2001/29/EC 22 May 2001 – also known as the “EU Copyright Directive” (EUCD).

¹⁵³ 93/98/EEC 29 October 1993.

¹⁵⁴ Wallenstein, ‘Kommentar till nomadologin’, in *Nomadologin*, p. 181.

2.3 RHIZOMATIC NOMOS

This section begins with the concept of the rhizome that Deleuze/Guattari developed in *Capitalism and Schizophrenia* and then works its way back to Deleuze's individual earlier works mainly *Difference and Repetition*¹⁵⁵ and *The Logic of Sense*¹⁵⁶. I shall start with the theory of the rhizome because the rhizome theory will span over the entire theoretical approach to law in this study, while the other parts of the Deleuzian and Deleuzeoguattarian theory will only serve specific purposes for specific parts of this project, for instance the Deleuzian concept of the "encounter" shall mainly be used to explain and analyse the case studies. A number of concepts have already been presented above since they are key in understanding the concept of the rhizome. Some other concepts such as *difference* and *repetition* I shall introduce later on and will use them specifically in the course of the analysis of one of the cases, namely the *Darfurnica* case.¹⁵⁷

The Deleuzeoguattarian "rhizome" in *A Thousand Plateaus* will thus be used in establishing my general understanding of the ever-so-disputed ontology of law.¹⁵⁸ The concept of the rhizome will be used to approach jurisprudence and law in a different manner than what is common in the studies of jurisprudence. I shall develop some, or reintroduce other, legal and jurisprudential concepts, by reading traditional legal philosophy and jurisprudence through the Deleuzian or the Deleuzeoguattarian theoretical matrix when applying the rhizome theory to law.

Deleuze and Guattari's address the rhizome in *A Thousand Plateaus* as follows: "The rhizome is reducible neither to the One nor the multiple." they write in probably the most quoted passage of the book, which then goes on:

It is not the One that becomes Two or even directly three, four, five, etc. It is not a multiple derived the One, or which One is added (n+1). It is composed *not of units but of dimensions*, or rather directions in motion. It has *neither beginning nor end*, but always a *middle* (milieu) from which it grows and which it overflows. [...] *Unlike a structure*, which is defined by a set of points and positions, with *binary* relations between the points and biunivocal relationships between positions, *the rhizome is made only of lines...*¹⁵⁹

Deleuze and Guattari call into question the notion of so called "arborescent" knowledge, or the *tree metaphor*, which is often used in describing a body of

¹⁵⁵ Deleuze, *Difference and Repetition*.

¹⁵⁶ Deleuze, *The Logic of Sense*.

¹⁵⁷ See section 4.2.

¹⁵⁸ Even if my aim is to resist falling back in the "What is" question, certain ontological matters cannot be fully circumvented in a study like this one.

¹⁵⁹ [my emphases throughout], Deleuze/Guattari, *A Thousand Plateaus*, p. 23.

knowledge: we conceive of knowledge as linear, rising from a clearly defined, singular origin, with a central trunk that then develops branches, leaves and shoots. Their theory of the rhizome is created to oppose such fictions of singular origins, often illustrated by a root, or a deep structure, where the body of knowledge stems from a certain point and then spreads upwards, chronologically, and thereby the image of knowledge is presented as having merely one single constituting source.¹⁶⁰ The tree metaphor creates a sense of unity and continuity, homogeneity, a dependence on coherence in order to gain legitimacy and describe the development and production of knowledge. Such an understanding of knowledge calls for a systematic approach and the epistemology becomes systemised and exclusory. This is where Deleuze and Guattari propose another understanding of knowledge, and as such knowledge gains a new experimental, strange status in Deleuze and Guattari's work:

They do not seek an encyclopaedic knowledge of the processes present in all situations and events, from a universal, dispassionate perspective, according to which one could take practical decisions leading to chosen ends. Nor do they seek a critical knowledge of social processes from a moral and superior perspective, so that a programme of transformation towards a better society can be ventured. Knowledge is no longer a question of being able to repeat the main points of as many books as possible in a library, nor is it a question of being able to criticize their weaknesses and failings; *knowledge is more like the capacity to direct oneself, through encounters with others, towards the most interesting and profound books in that library. Only through this knowledge can one awaken desire.*¹⁶¹

The *rhizome* is complex to outline by its very nature. Deleuze and Guattari introduce the concept in order to imagine knowledge differently, in a non-arborescent, non-encyclopaedic, way. The arborescent way of understanding territorialises knowledge and grounds it, they claim. Such knowledge is dependent on being fitted within the encyclopaedic structure that it can never imagine anything new, they claim further. Here, my aim is to approach jurisprudence, the same way as Deleuze and Guattari have approached knowledge and the image of thought. What I shall be arguing is that we have been approaching jurisprudence in an arborescent way – seeking to ground it, stratify it, systemise it, place it in a particular order. This approach oversees the potentiality of juris-

¹⁶⁰ Ashton Dyrk, *Using Deleuze: The Cinema Books, Film Studies and Effect*, open access. Available at: <http://etd.ohiolink.edu/send-pdf.cgi/Ashton%20Dyrk.pdf?bgsu1151342833>, pp. 58-59. Last accessed 14th July 2013.

¹⁶¹ [my emphasis], Philip Goodchild, *Deleuze and Guattari: An Introduction to the Politics of Desire*, Sage Publications, (1996), pp: 4-5.

prudence, and is not able to incorporate certain encounters that deterritorialise it, make it move, producing an unending and constantly unfinished project, a constant becoming.

The term 'rhizome' itself as we already saw above in chapter 1 has been borrowed from botany. Rhizomatic roots are able to give rise to new plants, even if a rhizome is broken or cut off from the rest of the root it can start up a new rhizome. When separated, fragmented or cut into pieces the rhizomes can thus give rise to new plants. Rhizomes are, so to speak, reproducible even when fragmented, they can give birth to themselves. The Greek term *rhizōma* means root but it often refers to genealogy and/or race – to stem from someone, within an infinite lineage, but such genealogical use of the term is something that Deleuze and Guattari were adverse to.

The rhizome cannot be approached as a system or structure – the only way to begin somewhere is to state that the rhizome is *connectable*. As such, it immediately challenges certain metaphors and images, often used and relied upon in jurisprudence and legal philosophy, for instance origin, unity, coherence and so on. Deleuze and Guattari argue, that the rhizome is a concept that does not stem from a root or a trunk, it can only be described as flows on *deterritorialised plateaus* that connect and link concepts together. We have above seen how Deleuze and Guattari approach deterritorialising movements, namely lines of flight that challenge territorial structures and make them evolve and move. Deleuze and Guattari based the entire *A Thousand Plateaus* on deterritorialised plateaus.

Deleuze and Guattari use several very similar concepts as synonyms to "plateau", namely 'plane of consistency', 'level of intensity' and 'plane of intensity'. For the purpose of this research they need not be separated, I read them as synonyms and the term I shall be using henceforward is plateau. Each plateau is thus something that subsists its own themes and concepts "which are interrelated with those other plateaus, but which finally are not reducible to any abstract system or 'plateau of plateaus'"¹⁶².

Plateaus, as clusters of themes and concepts, make up a rhizome. Deleuzeogattarian plateaus are thus clusters of inter-crossed themes and concepts, that span both over each other and various other disciplines. A plateau can include for instance, as we saw above, philosophy, psychoanalysis, economics, literary theory, separately, and all together, and within the plateau all aspects of these themes resonate, i.e. form a cluster. A plateau is a plane of consistency but not one that is closed off in a circular manner, producing an encyclopaedic knowledge, but one that remains open and connectable to other possible connections and

¹⁶² Roland Bogue, *Deleuze and Guattari*, Routledge, (1989), p. 125.

themes. One does not have to read *A Thousand Plateaus* in order to understand what Deleuze and Guattari mean when they refer to plateaus. Their own non-linear writing exemplifies how plateaus can work within a text, and how various theoretical assemblages make up rhizomatic knowledge. The clusters of themes in the plateaus are different aspects that make up the rhizome. This research approaches both jurisprudence and the artwork as rhizomatic in this way, as made up of plateaus. In this chapter I discuss the rhizomatic jurisprudence. In chapter 3, I discuss the rhizomatic artwork. Getting to the various clusters of themes that exist simultaneously, within jurisprudence and the artworks alike, open up the potentialities that this project aims to demonstrate.

Even though each plateau has its own theme, Deleuze and Guattari make a point of demonstrating that the plateaus interact and communicate *inter se*, but never establishing a vertical structure. Instead there is a horizontal connectedness. It means that there is “a multiplicity that cannot be understood in terms of the traditional of the One and the Many, of origins and genesis, or of deep structures in which any point can be connected with any other point, and any sequence of elements broken at any juncture.”¹⁶³

Proposing open trajectories, i.e. a rhizomatic understanding of jurisprudence that does not create closed boundaries like a systematic approach would have done, the theory is useful to apply e.g. when discussing the concept of the cultural commons that requires an open-ended approach. Challenging for instance the Luhmannian and Kelsian notions of closed systems and hierarchies, Deleuze and Guattari’s theory and the way of thinking that they propose open up alternative paths to approaching jurisprudence and law. In other, perhaps more familiar academic words, it signifies a multi/pluri- and interdisciplinary approach to jurisprudence and law.

Critical legal research has presented studies devoted to the plurality, multiplicity (and indeed pluricentricity¹⁶⁴) of law challenging the notions of systems, unity and singular origins in law ontologically. Some have even tried to fuse those ideas with Luhmann’s systems theory.¹⁶⁵ This research is very much part of such a “postmodern” or “alternative jurisprudence” tradition. Here I shall be stressing the significance, in line with the Deleuzian theory as I read it, of understanding law not as a static, vertical, hierarchical body of coherent regulation but rather as rhizomatic, fluent, horizontal, consisting of dynamic sets of plateaus, each with its own concepts and themes that can be interlinked and interdependent. For instance, instead of addressing how law is hierarchically ordered, in which fields and in which concepts, we focus on the connectedness

¹⁶³ Bogue, *Deleuze and Guattari*, p. 125.

¹⁶⁴ Håkan Gustafsson, *Rättens Polyvalens: En Rättsvetenskaplig Studie av Sociala Rättigheter och Rättssäkerhet*, Lunds Studies in Sociology of Law, (2002).

¹⁶⁵ See e.g. Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society*, Nomikoi, Critical Legal Thinkers, Rutledge, (2010).

between all of them. More exactly for this project, instead of e.g. approaching intellectual property law and certain constitutional laws, such as freedom of expression, as two different, often opposing legal fields, that have to be balanced against each other and that have two different hierarchal positions – I investigate how they can be connected, particularly within the commons setting. Such an approach acknowledges the deterritorialising lines of flight that challenge the assumed territoriality of law and the legal concepts, it examines whether law and jurisprudence can be approached as a nomadic rhizome, unfinished, moving, connectable, as opposed to an assumed territorialised system.

In *A Thousand Plateaus* Deleuze and Guattari apply this very manner of thinking and writing, they assemble, put together, juxtapose, in order to show as well as test the nature of the rhizome, but they do not rank, coordinate, impose structures nor, as it were, draw conclusions, they write:

A rhizome has no beginning or end; it is always in the middle, between things, interbeing, intermezzo. The tree is filiation, but the rhizome is alliance, uniquely alliance. The tree imposes the verb 'to be', but the fabric of the rhizome is the conjunction, 'and... and... and...'¹⁶⁶

I shall be arguing that law has certain possibilities that are often overlooked in dogmatic research that approaches law as territorised and grounded. Deleuze and Guattari claim that the image of thought and knowledge must be seen as rhizomatic. I am exploring the realms away from the ontological aspects, trying to reach beyond them. I am proposing that we approach law not *as* a system, but acknowledge its rhizomatic qualities. I am exploring what it is law does, how it works, and how it *could* work – i.e. its potential. The traditional dogmatic legal reasoning forces us to ask the question "What is it" – what is law, what is jurisprudence, what is the artwork, what is a right, etc. Such an approach automatically requires closed concepts, binary and dichotomy based reasoning (it is *either* this *or* that), and an approach that constantly reterritorialises the lines of flight that appear and challenge the territoriality of law.

Therefore, if law and jurisprudence are seen for their rhizomatic qualities in this sense, and if approached in such a way, certain traditionally difficult concepts, such as e.g. the cultural commons become a *possibility* that already exists within law and jurisprudence, and not just a collection of impossible, paradoxical, political and economical concepts that can only be formulated 'outside' law by e.g. contractual agreements. Relying on the rhizome theory, the legal concept of the cultural commons will in fact become the natural concept in law with which access to art can be formulated as a legal concept. I aim to show how this can be possible by applying this particular Deleuzeoguattarian theory in order

¹⁶⁶ Deleuze/Guattari, *A Thousand Plateaus*, p. 27.

try to get beyond what appears to be the eternal paradoxes in law when it comes to access to art, e.g. the tug of war between ‘high-brow’ and ‘low-brow’ art, ‘intellectual’ and ‘mass produced’ art, ‘private’ and ‘public’ art, ‘open’ and ‘closed’ access, and so on. All of these paradoxes or dichotomies force lawyers to argue for the destruction of the concept of capital and property when it comes to access to art in order to create accessibility, to argue against individual rights and private ownership in art, against the closed system of intellectual property law, because a concept of the private, enclosed artwork is always detrimental to the public interest in a culture that is democratic, and open to all. Alternatively, the same paradoxes force the more traditional and dogmatic lawyer to argue for the opposite.

The rhizome theory attracts legal attention as it disrupts the need for these kinds of opposites that often tie legal reasoning in knots and create mazes that are often impossible to logically exit from. Therefore, as some legal theories will have it, artworks can *either* be privately closed off, owned by one or more individual *or* be completely open, un-owned or publically owned and accessible to all. We have to choose one – both cannot do!¹⁶⁷

The core idea of the rhizome theory in law may be that it appears to be able to transcend these dichotomies as it is stressing not the hostile opposites, but rather interlinkage, the eternal and... and... and...¹⁶⁸ with an infinite number of potential formations inter se, alliance instead of opposition. Rhizomatic theory thus allows for all these various formations and perspectives to operate all at once – in a network – together.

2.3.1 THE SIGNIFICANCE OF “ASSEMBLAGES” AND “BODIES WITHOUT ORGANS” FOR THE RHIZOME

In order to manage the concept of the rhizome and apply it in jurisprudence we must look more closely at “Assemblages”, “Machines”, and “Bodies Without Organs” (BwO).

When explaining an assemblage Deleuze and Guattari use an example: literature. Literature, they write, is a form of assemblage, a *literary machine* as they also refer to it, something that can be plugged into and interlinked with or connected to other assemblages in order to function. An assemblage is created when deterritorialized lines of flight are clustered together in a new formation. As an assemblage it exists in connection with other “machines”. A simple example is that the reader brings his own machine into reading, and adds a dimension to the book that s/he reads and its subject matter that was not there before.

¹⁶⁷ Gustafsson, *Dissens*, p. 46.

¹⁶⁸ Deleuze/Guattari, *A Thousand Plateaus*, p. 27.

Deleuze and Guattari explain in the beginning of *Anti-Oedipus* what each person's machine refers to. They write:

Everywhere *it* is machines – real ones, not figurative ones: machines driving other machines, machines being driven by other machines, with all the necessary couplings and connections. An organ-machine is plugged into an energy-source-machine: the one produces a flow the other interrupts. The breast is a machine that produces milk, and the mouth is a machine coupled to it. [...] Hence we are all handymen: each with his little machine.¹⁶⁹

A reader's machine is thus both his/her specific physical predispositions as well as his/her intellectual predispositions, as well as everything it is connected to, everything it becomes a hybrid of, based on e.g. upbringing, education, background, experiences etc. Deleuze and Guattari argue that such a literary machine can both appear as an organism and as a signifying totality (e.g. a novel), with a determination *attributable* to a subject (e.g. the reader), but it does not have to have a subject in order to exist (a book exists even if it is not read). It is at the same time subject to lines of flight that constantly challenge its totality. In that similar manner, I shall now approach law, legal subjects, and legal concepts, in this multiplying manner with constantly added dimensions. This is relevant, as it not only introduced multiplicity in terms of law and jurisprudence that is required for the conception of the commons in jurisprudence, it is also a critique of certain dogmatic endeavours that territorialise law and the legal concepts.

Deleuze coined another term that he continued to explore in his writings with Guattari, and that is the concept of *Body Without Organs (BwO)*. BwO is something that is continually and constantly dismantling the totality, or the appearance of it. Such *dismantling* of the totality is continuous, relentless, perpetual, it goes on until it leaves nothing more than an empty name, Deleuze and Guattari conclude: a BwO is both a state prior to or after existence. A book can thus simultaneously be an existing corporeal totality as well as it is nothing more than a Body Without Organs, *a non-totality*. Literary assemblages have not one but several BwOs that they can face and interact with; this is the process of the “quantifying of writing” – seen in this way a book is understood as an event, but also as something continuous, unfinished, always able to be connected to other BwOs and *become* something else. Therefore, Deleuze and Guattari continue, the book, as a literary assemblage, has no object either.¹⁷⁰

The term BwO itself is borrowed from the French playwright Antonin Artaud who in a radio play wrote that a person becomes truly free when he has

¹⁶⁹ [original emphasis], Deleuze/Guattari, *Anti-Oedipus*, p. 1.

¹⁷⁰ Deleuze/Guattari, *A Thousand Plateaus*, p. 4.

become a Body Without Organs, that is, when all automatic reactions and bodily apparitions have been stripped from him and when he can experience affect and reason freely. Deleuze and Guattari develop the concept further and in detail¹⁷¹ in *Anti-Oedipus*.¹⁷² Bogue explains the concept of BwO that was introduced in Deleuze's *The Logic of Sense*:

[T]wo fundamental intuitions of the body: as a collection of dissociated body parts, dismembered, interpenetrating and mutually devouring; and as a miraculously solidified 'body without organs' [...] catatonic body 'without parts which does everything through insufflation, inspiration, evaporation, fluidic transmission.'¹⁷³

A BwO is a *constant becoming*, continuous, without limit;

We come to the gradual realization that the BwO is not at all the opposite of the organs. The organs are not its enemies. The enemy is the organism. The BwO is opposed not to the organs but to that *organization* of the organs called the organism.¹⁷⁴

The concept BwO is thus a concept that aims to get beyond the systemic organisation.

Can we go even further and ask whether law can be imagined as a *Law without Organs*?¹⁷⁵ Law without Organs as a concept opens up for the constant becoming of law and allows for a rhizomatic jurisprudence with nomadic tendencies that can refrain from territorialisation. It also acknowledges the dismantling forces that exist and constantly create lines of flight from the legal territory, forcing law to come face to face with its movement and non-totality.

2.4 THE LEGAL THEORY OF THE RHIZOME: DELEUZE IN LAW

The introductory chapter in *A Thousand Plateaus* is called "Introduction: Rhizome". There, Deleuze and Guattari propose that there are three types of liter-

¹⁷¹ Deleuze had himself already introduced it in 1969 in his book *The Logic of Sense*, but had not developed upon it any further in that book.

¹⁷² Deleuze/Guattari, *Anti-Oedipus*.

¹⁷³ Bogue, *Deleuze and Guattari*, pp. 74-75, Deleuze, *The Logic of Sense*, p. 108.

¹⁷⁴ [my emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 175.

¹⁷⁵ Alexandre Lefebvre, 'Critique of Teleology in Kant and Dworkin: The Law Without Organs (LwO)', in *Philosophy Social Criticism* (2007) 33: 179–201.

ary machines: the root book, the radicle system/fascicular root book, and finally the rhizome book.

With reference to the first one, *the root book*, they use, as we already saw above, the metaphor of a tree to describe it. The root book is like a tree in that it has a root e.g. in the book's language, tradition, geographical place, historical place, author and so on. It relies on an origin that acts as a root, a fixation, a substructure. The totality above the surface that we are able to see and examine is the book itself. In Freudian terms, the subconscious lies underneath the surface, the conscious on the surface, but both are nevertheless present. The root book, they argue, signifies unity, coherence, organisation, territorialisation, and it always has a singular origin. It is based on dialectical opposites and dependent on a dialectical and binary logic.¹⁷⁶ Deleuze and Guattari claim that traditional philosophical reflection is based on root book-type thinking. Root books instil discipline, unity, chronology, and coherence within a singular, and an organised body.

The root book in itself is a process of perpetual deferral as one concept is defined by another in an infinite self-referential regress.¹⁷⁷ A self-referential regress in legal theory can for instance be found in Kelsen's *Grundnorm* as well as in Hart's *rule of recognition*. The root book, with its binary logic, dominates science and scientific reason. Could it be argued that due to such an approach, the root book type of reasoning must be the prevailing one also in jurisprudence? In order to understand law and the legal system, we feel we must organise it, we presume a unity, coherence, opposites, and a hierarchical order.

The second type of book, *the radicle system/fascicular root book*, emerged as an alternative to the root book during modernity. There, the root has been aborted, and an infinite number and multiplicity of secondary roots developed instead of the one root.¹⁷⁸ This metaphor rests on the idea of fragmentation e.g. the cut-up techniques utilised in creative production or writing. Still, Deleuze and Guattari continue to argue, that even though multiplicity had been introduced, and regardless of the infinite number of fragments that may have been created using modern methods, there still exists a secret, albeit not directly discernable, unity even in these assemblages. The mode of reasoning had merely moved from the binary, linear logic to a "circular or cyclic dimension".¹⁷⁹ As examples of such methods Deleuze and Guattari mention James Joyce's writing or Nietzsche's philosophy. Joyce shattered the linear unity of words and showed how words do not have one, but multiple roots, of which we shall see an example and their legal ramifications, in chapter 4 below. Nietzsche, in his theoretical

¹⁷⁶ For a closer discussion regarding the binary logic with a focus on Scandinavian legal philosophy, see e.g. Gustafsson, *Dissens*.

¹⁷⁷ Bogue, *Deleuze and Guattari*, p. 75.

¹⁷⁸ Deleuze/Guattari, *A Thousand Plateaus*, p. 6.

¹⁷⁹ *Ibid.*

constructions, even went one step further than Joyce and shattered the linear unity of knowledge itself. Even still, these kinds of fragmentations were not satisfactory for Deleuze and Guattari. They maintained that such methods do not adequately break and do away with dualisms, opposites, binary logic, and after all, there still remains a notion of unity, albeit fragmentised and shattered. It is just a new type of unity, they write, a mystification of unity, and it makes the book “all the more total for being fragmented”.¹⁸⁰ If we assume that this is what modern and post-modern jurisprudence has been doing, moving jurisprudence away from a root-cosmos towards a radicle-chaosmos, in the words of Deleuze and Guattari, then we must assume that even postmodern jurisprudence has not gone far enough. It has not managed to truly break with the concept of unity and coherence, invoking infinite numbers of plurality and multiplicity, but still helplessly presupposing a secret, opaque unity, a new type of mystified unity, but a unity nonetheless.¹⁸¹ Postmodernism can in such a view be seen as a mirror image of modernism, reproducing the tenets of modernism, without ever breaking free from it, or getting beyond it.

2.4.1 THE SIX PRINCIPLES OF THE RHIZOME

Deleuze and Guattari propose the rhizomatic book as an alternative to the two previous ones (root and fascicle books). In *A Thousand Plateaus* Deleuze and Guattari define the rhizome by ascribing it six principles.

Principles 1 and 2: *Connection* and *heterogeneity*

The first principle refers to the fact that a rhizome can be connected to anything, and in that sense it differs from a tree or a root that has a fixed point and a hierarchical order. They write:

A rhizome ceaselessly establishes connections between semiotic chains, organisations of power, and circumstances relative to the arts, sciences, and social struggles.¹⁸²

In that way the fictional situations of an *ideal*, e.g. an assumed ideal speaker and listener or signifier and signified, are circumvented. Binary reasoning that is

¹⁸⁰ Deleuze/Guattari, *A Thousand Plateaus*, p. 7.

¹⁸¹ See e.g. Panu Minkkinen’s critique of the CLS movement and so called postmodern jurisprudence in general and Costas Douzinas and Ronnie Warrington’s *Postmodern Jurisprudence* in particular, developed in ‘Law, Science and Truth’, (ed.) Ari Hirvonen, *Policentricity: The Multiple Scenes of Law*, Pluto Press, London (1998). See also Håkan Gustafsson, ‘Begärets Dunkla Mål’ in *Retfærd*, 102 2003/3.

¹⁸² Deleuze/Guattari, *A Thousand Plateaus*, p. 8.

marked by homogeneity can be subverted and heterogeneity introduced with the rhizome as interlinkage can be achieved between various components that are connected to one another. A centre, a core, a single origin becomes futile as the connectivity manages to create new dimensions and connection – where the full potential of the assemblage can be actualised through linkage alone.

The significant trait of the rhizome theory that may be interesting in jurisprudence is that legal reasoning becomes connections: a jurisprudence where law is enabled to become a BwO, where law is not seen as a single, unified body¹⁸³ but as an assemblage of inter-connectable norms, that are not dependent of a binary logic. A plural law that enables alliances, not opposites. A rhizomatic jurisprudence becomes a collection of *potentialities*. In that shape the Law without Organs can be connected to other (more or less organised or unorganised) bodies such as the market, the society, art, etc. These types of connections are referred to by Deleuze and Guattari as “becomings”, and it is through the becomings that the potentiality in a rhizome can be fully actualised. In *A Thousand Plateaus* Deleuze and Guattari for instance mention the becoming-animal, becoming-woman, becoming-child, etc. in order to show the process of multiplicity and what happens when two ‘bodies’ are (more or less temporarily) interlinked.

However, the Deleuzeoguattarian becoming is *not* juridification in e.g. a Habermasian sense – when a societal issue or conflict is transformed into law – “the tendency towards an increase in formal (or positive, written) law”,¹⁸⁴ that which Habermas calls colonisation of the “lifeworld”.¹⁸⁵ No. Becoming in the Deleuzeoguattarian sense is a much more radical concept than so. A becoming refers to becoming something *else*. The concept of becoming is a concept of creativity, i.e. of connections and alliances that cannot be imagined within dogmatic reasoning. The Deleuzian becoming refers to production of something completely new, something that previously had been unimaginable. It is brought on by lines of flight and encounters.

In order to understand what that means let us firstly look at how Deleuze and Guattari describe the concept. Deleuze and Guattari describe *becoming* in the following manner:

A becoming is not a correspondence between relations. But neither is it a resemblance, an imitation, or, at the limit, an identification. [...] To become

¹⁸³ On law’s unity from a Scandinavian legal theory point of view see Gustafsson, *Dissens* or Alexander Peczenik, *Vad är Rätt?: Om Demokrati, Rättssäkerhet, Etik och Juridisk Argumentation*, Stockholm, Fritze, (1995).

¹⁸⁴ Jürgen Habermas, *The Theory of Communicative Action: Volume 2, Lifeworld and System: A Critique of Functionalist Reason*, (trans. Thomas McCarthy), Vol. 2, Boston: Beacon Press, (1985), p. 359.

¹⁸⁵ *Ibid.* pp. 356-363.

is not to progress or regress along a series. [...] Finally, becoming is not an evolution, at least not an evolution by descent and filiation. Becoming produces nothing by filiation; all filiation is imagination. Becoming is always of a different order than filiation. It concerns *alliance*.¹⁸⁶

This research project is particularly interested in the becoming of law, or the becoming of a rhizomatic jurisprudence, of a legal BwO. It is precisely the becoming of law that can conceive of a legal concept such as the cultural commons. The legal concept of the cultural commons may be difficult to conceive of in traditional jurisprudence, because it is often presented as an economical concept (it is a social dilemma), a political concept (it is allocation of resources), it destroys individual rights, it takes away the principles of ownership, it promotes public over private, etc... A becoming for Deleuze and Guattari has to do with achieving exactly these types of heterogeneity, where concepts such as law, economics, politics, etc. need not be each other's opposites or exclusory.

A concept of the commons in law, it will be argued here, manages to sustain fundamental individual interests as well as it manages to provide access to natural and cultural resources (as opposed to allocation of resources). As such it is not a question of pragmatism, it is a question of becoming.

This project is in search of the *becomings of law*, through which law's *potentiality* can be actualised, in order to discuss the possibility of introducing a concept of cultural commons in law. It is the very possibility of *alliance*, involution and connections of law that this research explores, rather than its "evolution" or "filiation". What happens for instance when law creates an alliance with the artwork, with the market, with the digital sphere? In those very connections, is there a type of becoming-artwork or becoming-law that might be interesting to look at from a jurisprudential point of view?

The concept of becoming is what allows heterogeneous connections, the first two principles of the rhizome theory.

Principle 3: *Multiplicities*

The third principle of the rhizome system is the principle of multiplicity, or rather *multiplicities*, a double plural.

Multiplicities are rhizomatic and expose arborescent pseudo multiplicities for what they are. There is no unity to serve as a pivot in the object, or to divide in the subject.¹⁸⁷

¹⁸⁶ [my emphasis], Deleuze/Guattari, *A Thousand Plateaus*, pp. 262-263.

¹⁸⁷ Deleuze/Guattari, *A Thousand Plateaus*, p. 8.

This is a radical idea. Deleuze and Guattari exemplify it with a puppet on a string, the rhizomes and multiplicities are here the puppet connected to an artist or puppeteer, but also to the artist's nerve fibres which form a dimension of its own, and then the artist's physical body, then his mental abilities, then his geographical place, etc. which all form new dimensions that are connected to the first and the second, and so on. This is how an assemblage is created. Deleuze and Guattari explain, in the "increase in the dimensions of a multiplicity that necessarily changes in nature as it expands connections. There are no points or positions in a rhizome, such as those found in a structure, tree or root. There are only lines."¹⁸⁸

It is this very multiplicity of dimensions that is particularly interesting for jurisprudence. But the increase in multiplicities does not require hierarchical structures according to Deleuze and Guattari, as:

[a]ll multiplicities are flat, in the sense that they fill or occupy all of their dimensions: we will therefore speak of a *plane of consistency* of multiplicities, even though the dimensions of this 'plane' increase with the number of connections that are made on it. Multiplicities are defined by the outside: by the abstract line, the line of flight or deterritorialisation according to which they change in nature and connect with other multiplicities.¹⁸⁹

In conjunction with law and jurisprudence, this is how Andreas Philippopoulos-Mihalopoulos suggests that law becomes a multiple plane of immanence that reaches beyond traditional boundaries:

The law becomes a plane of immanence, namely the term that Deleuze & Guattari reserve for the all-embracing sum of folds and falls and connections, where all causality is immanently contained within its boundaries. The plane of immanence is infinite. Its boundaries are virtually everywhere and actually including everything – not unlike a system whose boundaries are the world as the system knows it, potentially expanding to ingest more and more environment. The crucial point is that the law as a plane of immanence contains all there is to be contained. Its exteriority is always internalised but always powerfully appearing as a movement that pushes the boundaries ever further. This immanent exteriority is what Deleuze & Guattari call a *line of flight*, namely a line that traverses the plane and pushes the limits from within to further edges of creativity.¹⁹⁰

¹⁸⁸ Ibid. p. 9.

¹⁸⁹ [original emphasis], Ibid. p. 9.

¹⁹⁰ [original emphasis] Philippopoulos-Mihalopoulos, *Niklas Luhmann*, p. 55.

Postmodern jurisprudence has challenged the inside and the outside of legal boundaries. By adopting Deleuze's and Guattari's reasoning and focusing on the immanent reflexivity which produces lines of flight, the problems with exclusions from the legal realm could if not be overcome then at least minimised with this reasoning. The legal dimensions will always be connectable to another plateau for instance a new technological or digital development, new market initiatives and business models, globalisation – and as such the constantly moving reality (or rather realities) can be conceived of in jurisprudence and grasped by law and they can always be connected. This is what the rhizomatic jurisprudence opens up for. And whenever a line of flight occurs in society, we do not have to leave law, we just move to another plateau.

Principle 4: *Asignifying rupture*

Much like the concept of rhizome in botany, if a rhizome in Deleuze and Guattari's theory is broken or shattered it can start up again and give rise to a new "plant". In the theory of Deleuze and Guattari, each time the rhizome is broken the fourth principle, *asignifying rupture*, takes place – the rhizome starts up anew on a new or on an old line of flight.¹⁹¹ The rhizome has a recuperative nature, and it allows movements and flows to be re-routed or to be diverted. Deleuze and Guattari do not use genes but rather viruses as an example of how rhizomes are broken, spread, contaminate and are contaminated, and how they multiply, moving from body to body.¹⁹² The rhizome, they write, is antigenealogy¹⁹³.

While a reasoning based on binary logic has to appear as mimicking the world, the rhizome does not have to mimic anything. Law has always been obsessed with mimicry, of having to imitate reality, in order to bring the "real" into the legal sphere(s). The rhizome theory, however, allows for the real instead to *colour* or *contaminate* law¹⁹⁴, and vice versa, for them to be interlinked and communicate with one another, transforming hostile legal opposites (good-bad; true-false; legal-non legal, open-closed, private-public and so on) that have their origin in binary logic, into rhizomes that can be inter-connected to form more or less temporary *alliances* instead. Therefore, instead of seeing the legal concept of the cultural commons as either public or private, as either open or closed – we understand that it is an alliance between the public and the private, the

¹⁹¹ For lines of flight see particularly chapter 4 below.

¹⁹² Deleuze/Guattari, *A Thousand Plateaus*, p. 11.

¹⁹³ Ibid. p. 12.

¹⁹⁴ "Pink Panther imitates nothing, it reproduces nothing, it paints the world its colour, pink on pink; this is its becoming-world, carried out in such a way that it becomes imperceptible itself, asignifying, makes its rupture, its own line of flight, it follows its 'aparallel evolution' through to the end." Deleuze/Guattari, *A Thousand Plateaus*, p. 12.

opened and the closed, and whenever there is a break in a concept, an asignifying rupture, it can start up a new, create new alliances, make new connections.

Principles 5 and 6: *Cartography* and *Decalomania*

[A] rhizome is not amenable to any structural or generative model. It is a stranger to any idea of generic axis or deep structure.¹⁹⁵

What would happen if legal philosophy was to stray from the dependence on the (metaphor of) generic axis and deep structures in law? Deleuze and Guattari propose that such a structure-dependent reasoning can only achieve descriptions of a *de facto* state of being, and can only maintain a balance in the intersubjective relations, it is a method that comes “ready-made”, they argue. “The tree articulates and hierarchizes tracings; tracings are like leaves of a tree.”¹⁹⁶

That means that jurisprudence and law can never really fully be in contact with the real when a structural approach and the method of tracing are applied because in that case the reality can only be understood if ‘translated’ into the legal language that fits within the legal system. Through this act of translation, aspects of reality may be lost. Another aspect that gets lost is the potentiality of law. Instead, the rhizome theory invites us to make *maps*, as “[t]he map has to do with performance, whereas the tracing always involves an alleged ‘competence’”.¹⁹⁷

There is then, a distinction between a map, *cartography* and a tracing. Tracing assumes a notion of a closed off, structuralised, organised, (legal) body where norms exist in a hierarchical, binary order. If this is presumed then we are only conducting a tracing per such logic in the world of Deleuze and Guattari. Tracing means mimicking – but it is only partial mimicking as some aspects of reality always remain outside.

The body of law is also (like the root book) often described by using the metaphor of a tree, it begins with a root below the surface (deep structure) and then grows upwards with a trunk (legal culture), and then it branches out and creates offshoots (the legal surface).¹⁹⁸ Such reasoning calls for an assumption that something will always have to fall inside or be translated to otherwise fall inside the legal sphere (even if it is within the deep structure) and conversely that something else will fall outside (even outside the deep structure). This is the underlying binary logic that underpins traditional legal reasoning. Deleuze and Guattari write:

¹⁹⁵ Ibid. p. 13.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid. p. 14.

¹⁹⁸ See e.g. Kaarlo Tuori, *Critical Legal Positivism*, Aldershot, (2002).

An assemblage has neither base nor superstructure, neither deep structure nor superficial structure; it flattens all of its dimensions onto a single plane of consistency upon which reciprocal presuppositions and mutual insertions play themselves out.¹⁹⁹

We have to look closer at the contact with the “real” that a *mapping* calls for. Mapping according to Deleuze and Guattari means therefore that reasoning in general and here legal reasoning in particular always remain open and connectable to all other dimensions, like a map; such connectivity does not depend on an inside and an outside.

Boaventura de Sousa Santos also addressed the concept of legal cartography in 1987 in the article ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’. There he writes:

[L]aw and society have been conceived in the conventional paradigm, *as two separate and distinct realities or entities* which are then juxtaposed in order to investigate the extent to which they correspond or do not correspond. The most important ‘exemplars’ of sociological research on law have been developed from this conception (the study of the relations between law in books and law in action and the study of the impact of society on law or, inversely, the study of the impact of law in society).²⁰⁰

De Sousa Santos challenges this ‘conventional paradigm’, or what I here refer to as dogmatic legal reasoning. He argues instead for a legal cartography, where the concept of the map, even though it distorts ‘reality’, is still convenient to use.²⁰¹

In the modern era law has become the privileged way of imagining, representing, and distorting, that is to say, of mapping these social spaces and the capitals, the actions and symbolic universes that animate or activate them.²⁰²

While de Sousa Santos does not use Deleuze and Guattari nor reference the Deleuzeoguattarian mapping method, his article provides a connection between the critique of the dogmatic legal reasoning where law and reality are approached as two separate or distinct entities and cartography. This can help us

¹⁹⁹ Deleuze/Guattari, *A Thousand Plateaus*, p. 100.

²⁰⁰ [my emphasis], Boaventura de Sousa Santos, ‘Law: A Map of Misreading: Toward a Postmodern Conception of Law’ in 14 *Journal of Law & Society* 279, 1987, p. 280.

²⁰¹ Ibid. p. 283.

²⁰² de Sousa Santos, ‘Law: A Map of Misreading. Toward a Postmodern Conception of Law’, p. 286.

in further understanding the benefits of the Deleuze-guattarian mapping method.

Not only does the mapping method open up law to the changing reality, conceived to be ‘outside’ law in dogmatic legal reasoning, it also allows opposing legal fields to be inter-connected among each other, for instance private and public law, or civil and constitutional law, national and EU law. In law, the most difficult problems are often encountered when we are faced with a conflict of laws, principles²⁰³ or even interests. We have two valid norms, but they oppose (or cancel out) each other. One trusted legal method in such an instance has been to *organise* the norms hierarchically, in rank, in order to determine which one must prevail. For instance, constitutional laws trump ‘regular’ laws, statutory laws trump general legal principles and customs, specialised laws trump general laws, and so on. This type of reasoning can be explained by Dworkin’s *Riggs v. Palmer*²⁰⁴ classic schoolbook example. In *Taking Rights Seriously*²⁰⁵ Dworkin shows that law is made up not only of rules but also of principles. While rules, in a system that is assumed to be coherent, can never contradict each other, principles can be contradictory *inter se*. So Dworkin designates *Riggs v. Palmer* to be a clash of principles, and not a clash between a rule and a principle. In this particular case the principle of “one cannot benefit from one’s own wrongdoing” as argued by the majority prevailed over the principle “one should not be punished beyond the ways specified in the statute”.

Explained in such a way within the context of what this research is studying one interesting issue deals with the clash between the principle of *open access to art (knowledge)* and *the closed, individual-based intellectual property right*. Seen as in Dworkin and how he analyses *Riggs v. Palmer* this conflict can and does create clogs in the legal machinery as per such reasoning it should be impossible for principles to contradict rules. Here I argue that instead of seeing it as a paradox, the mere fact that both operate simultaneously, might instead be used in a productive manner as a force that exists, and flees and deterritorialises the law.

What is then the difference between mapping and tracing? Does not mapping also include a tracing aspect? Deleuze and Guattari write:

The tracing has already translated the map into an image; it has already transformed the rhizome into roots and radicles. It has organised, stabilised, neutralised the multiplicities according to the axes of significance and subjectification belonging to it. It has generated, structuralised the rhizome, and

²⁰³ Cf. Ronald Dworkin, *Taking Rights Seriously*, Cambridge, Mass. : Harvard University Press, cop. (1977).

²⁰⁴ *Riggs v. Palmer*, 115 N.Y. 506 (1889).

²⁰⁵ Roland Dworkin, *Taking Rights Seriously*.

when it thinks it is reproducing something else it is in fact only reproducing itself.²⁰⁶

That is, the act of stabilising and neutralising decreases the potential alternatives of actions, which in turn creates impasses, “bottlenecks” and blockages in the system. It means that the binary logic will perpetually be locked-in in a “One-Two” reasoning, a logic that can never be circumvented. The society of couples exists in a centre based system, whereas the rhizome is acentered (or multicentred) and the “communication runs from any neighbour to any other, the stems or channels do not preexist, and all individuals are interchangeable, defined only by their *state* at a given moment – such that the local operations are coordinated and the final, global result synchronized without a central agency.”²⁰⁷

The rhizome theory is at once a critique and a re-evaluation of the dogmatic legal reasoning that rests and depends on the idea of a root-foundation, of a *Grund*²⁰⁸. In such classic dogmatic reasoning knowledge and science are understood as arborescent, as we have seen, the tree is the image of the world.

2.5 NOMADIC NOMOS

2.5.1 LUFTMENSCH²⁰⁹: ON THE LEGAL PERSON AND THE LEGAL SUBJECT

As it has been noted above Deleuze and Guattari criticise the notion of the universals, and I have developed this chapter in attempting to show how the concept of universals is equally problematic for law. When we move on to the smaller subparts or fractions of law as for instance the various legal fields, or even smaller still, we eventually encounter the legal subject – the individual. In a similar manner as they critique the universals (and here the universal legal system), Deleuze and Guattari also present a critique of the concept of *in*-dividual. In order to incorporate the multiplicity and develop a critique of the notion of the undividable individual, the undividable legal subject, we must understand their idea of the individual as an ‘infinite multiplicity’.²¹⁰

²⁰⁶ Deleuze/Guattari, *A Thousand Plateaus*, p. 15.

²⁰⁷ [original emphasis], *Ibid.* p. 19.

²⁰⁸ Cf. Kelsen’s Grundnorm even if Gustafsson does not interpret it that way, see e.g. see Gustafsson, ‘Fiction of Law’.

²⁰⁹ Luftmensch, Yiddish = Rootless person. Interestingly, the word is also used to designate a person who is primarily concerned with intellectual pursuits rather than practical matters.

²¹⁰ “Thus each individual is an infinite multiplicity, and the whole of Nature is a multiplicity of perfectly individuated multiplicities [...] its pieces are the various assemblages and individuals, each of which groups together an infinity of particles entering into an infinity of more or less interconnected relations”, Deleuze/Guattari, *A Thousand Plateaus*. p. 280.

Deleuze and Guattari are attempting to show how the subject too is constantly in a state of becoming, and as such s/he remains unfinalised, but also multiple, iterant, continuous. Approaching the legal subject in this way reveals a certain potential and acknowledges the possibility for constant movement and development of the subject.

In *What is Philosophy* Deleuze and Guattari begin to develop the idea of the subject that they refer to as “conceptual personae”²¹¹. Already in naming the concept *personae* i.e. the plural of *persona*, they hint at the multiplicity in the concept of the person. Thus, for Deleuze and Guattari it is always a question of *individuation* – a constant multiplication, becoming, rather than a fixed subject. There are always other sides of the self that may be lost when the concept of the legal subject is applied in a dogmatic manner. In Deleuze and Guattari’s sense, on the other hand, the subject always remains continuous and unfinalised.

Edward Mussawir finds an interesting potential in the concept of legal person. Mussawir explains this particular potentiality. He cites Deleuze that claims that while philosophy could afford to do without the concept of “the subject” – it could look at law and jurisprudence “as an example of a discipline accustomed to dealing in cases and singularities”.²¹² Mussawir then claims that:

The jurisprudential creativity involved in fashioning a ‘legal person’ or a ‘juristic person’, however, is something not commonly acknowledged in modern accounts of jurisdiction. [...] Legal persons, as the formalized roles in the technology of civil governance in other words, are related to rights in a very different way than the ‘legal subject’ is. As an element in analytical legal philosophy, the legal subject is able to be related to rights in a universalized and abstract way. It is capable of simply ‘bearing’ rights – or indeed capable of bearing any imaginable right – and thus retains only the *potential* of acting. The legal person, on the other hand, has a determinate relation to a set of rights and capacities which it performs. If we are able of considering the juridical technology of legal personality independently of the deployment of the concept of a ‘subject of rights’, we notice that the legal person continues to be constructed precisely through crafting a non-universalized set of rights linked definitely to a particular office. The person in this sense remains a device invented in law to make a certain set of rights livable in and through a definite role, but – since the role does not exist outside the right that it is designed to institute – it is without any abstract, transcendental or confessional relation to moral responsibility.²¹³

²¹¹ Ibid. p. 61-83.

²¹² Mussawir, *Jurisdiction in Deleuze*, p. 23.

²¹³ [original emphasis], Mussawir, *Jurisdiction in Deleuze*, p. 24-25.

Mussawir acknowledges that the concept of the universal legal subject and particular legal person do not cancel each other out. I shall return to this discussion in more detail in chapters 5 and 8 where I discuss how an approach to a legal subject in this way fits within the commons (chapter 5) as well as how concept of the commons does not cancel out the concept of copyright or author (chapter 8). On a theoretical level what can be addressed already here, is that Mussawir's differentiation between the legal person and the legal subject is very interesting. In his reading of Deleuze Mussawir manages to show that there is an existing potential in law, that is always already there, but that we may not always acknowledge. In this particular instance he presents the concept of the legal person as a potentially much more 'multiple' concept than the static legal subject. Mussawir points out, for instance, how also corporations can indeed be legal persons even though they are non-human. This particular reading both offers a critique of subjectivity and the subject of rights according to Mussawir, but it is also constructive in its reading of the legal possibility.

The modern 'Law of Persons' typically does not divide persons into 'unfree' and 'free' [as had been done in Roman law], but rather into 'natural persons' and 'corporations'. This shift in perspective was accompanied also by a renewal in the theoretical approaches to legal personality as well as with a metaphysical emphasis on two categories: the human and the subject.²¹⁴

Further on in this study, particularly in the cases of Bruno Schulz and Franz Kafka that will be presented in chapter 4, I shall be looking at fragmented identities and how they influence firstly the construction of the artist as a legal person, and secondly how that particular construction affects access to art. On a more general level it has to do with how to deal with the 'individual' that requires a case-by-case approach and totality that is 'reality' or 'human experience' or 'law' that require universal principles applicable to everyone equally.

Here the noun 'individual' is transformed into the verb 'individuate'²¹⁵ – particularly used by Gilbert Simondon, who has influenced Deleuze's writing greatly. It was Simondon's "more-than..." philosophical concepts that laid the ground of that which later became Deleuze's and Deleuze and Guattari's unfinalised, multiple identity. In terms of the individual Simondon maintained that the individual was never completely determined and was always *more-than-identity*

²¹⁴ Ibid. p. 31.

²¹⁵ Gilbert Simondon, *L'Individuation Psychique et Collective : A la Lumière des Notions de Forme, Information, Potentiel et Métastabilité*, Editions Aubier (2007 [originally published in 1964]). See also Andrew Iliadis, 'A New Individuation: Deleuze's Simondon Connection' in *MediaTropes*, eJournal Vol IV, No 1 (2013): 83–100.

and *more-than-unity*²¹⁶. This leads into Simondon's other concept that also influenced Deleuze namely "transindividuality". Rather than relying on a collective subject, Simondon devised transindividual sharing, that could be more or less temporary, and that also contributed to the constant *individuation* and the constant development of the person. It takes place in the interaction with other individuals.²¹⁷

These concepts thus lay the ground for Deleuze and Guattari's and became general conditions for the concept of unfinished becoming, rather than the static being. What this particular approach reveals, and something that I shall be exploring further, particularly in the Schulz and Kafka cases, is the need for law to also acknowledge the legal subject as open-ended, multiple and constantly in the process of transformation. Using Deleuze' and Guattari's approach, what this project attempts to show is how the human complexity can be incorporated within legal concepts. Acknowledging interaction, the complexity of humans and the human experience, the unfinished, multiple, becoming subject can be used – it can become the nomadic subject and serve as the base from which one reads the legal subject.

In *A Thousand Plateaus* Deleuze and Guattari go one step even further than the nomadic subject and develop further upon the medieval concept of *haecceity*, namely the concept of particularity or 'thisness' describing the subject as a degree or as an intensity, that enters into composition with other degrees, other intensities, to form another individual.²¹⁸ This is in line with what we have already seen as the constant transindividuality, individuation – the constantly changing subject. Deleuze and Guattari comment further on it, writing:

There is a mode of individuation very different from that of a person, subject, thing, or substance. We reserve the name *haecceity* for it. A season, a winter, a summer an hour, a date have a perfect individuality, lacking nothing, even though this individuality is different from that of a thing or a subject. They are haecceities in the same sense that they consist entirely of relations of movement and rest between molecules or particles, capacities to affect and be affected.²¹⁹

²¹⁶ See generally Muriel Combes, *Gilbert Simondon and the Philosophy of the Transindividual*, (trans.) Thomas LaMarre, MIT Press, (2012).

²¹⁷ Riccardo Baldissoni Conference paper. *Dostoyevsky as a Legal Theorist? On the Role of Literature in the Reconsideration of the Human Subject of Rights*, Aidel International Conference 2012 Literature and Human Rights Verona, (15-17 November 2012)

²¹⁸ [original emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 279.

²¹⁹ Deleuze/Guattari, *A Thousand Plateaus*, pp. 287-288.

It is this very notion that shall be explored throughout this analysis is when persons cease to be subjects and become events²²⁰ – and instead of identity we shall be looking at individuation and haecceity. Seen that way, the person becomes a rhizome in his/her own right. To conclude in the words of Deleuze and Guattari, a “haecceity has neither beginning nor end, origin nor destination; it is always in the middle. It is not made of points, only of lines. It is a rhizome.”²²¹

2.5.2 LEGAL GROUNDLESSNESS: SANS FOND

Gustafsson writes in *Dissens* that the “fact that a perceptible ground is missing, does not detract from law’s legitimacy: law’s being groundless does not mean that it is *meaningless*.”²²² Before ending this chapter I shall here look at the last significant concept and how the Deleuzian theory can assist us in the analysis of it, namely the absence of origin, ground and the foundation (or lack thereof) of law. For Deleuze, jurisprudence means something different than, and also far more important than, only legal theory or the philosophy of law. Jurisprudence is more like the active and immanent plane *on which law navigates its groundlessness*.²²³

The concept of groundlessness and ungrounding (*sans-fond*) Deleuze develops mainly in *Difference and Repetition*.

By ‘ungrounding’ we should understand the freedom of the non-mediated ground, the discovery of a ground behind every other ground, the relation between the groundless and the ungrounded, the immediate reflection of the formless and the superior which constitutes the eternal return. Every thing, animal or being assumes the status of simulacrum [...]²²⁴

The point here is not to dwell on Deleuze’s understanding and use of the Nietzschean eternal return, but rather to show how he reads the ungrounding. To paraphrase McMahon reading Deleuze, law is thus always shadowed by the unthinkable as both its *raison d’être* and its impossibility, its ground (*fond*) and its “ungrounding” (*éffondement*)²²⁵. It is this particular occurrence that I refer to as

²²⁰ Ibid. p. 289.

²²¹ Ibid. p. 290.

²²² [original emphasis, my translation], “Det faktum att det saknas ett förnimbart ursprung, förtar ingalunda rättens berättigande: att rätten är grundlös betyder inte att den är *meningslös*.” Gustafsson, *Dissens*, p. 110

²²³ [my emphasis], Mussawir, *Jurisdiction in Deleuze*, p. 23.

²²⁴ Deleuze, *Difference and Repetition*, p. 67.

²²⁵ [quote modified]. Melissa McMahon “Difference and Repetition” in (ed.) Stivale, *Gilles Deleuze, Key Concepts*, p. 48. Her use of *thought* has here been replaced by *law*.

Ungrund here that may challenge Kelsen's notion of Grund but it is not, as would have been the case per binary reasoning, that the act of ungrounding is the Grund's opposite. On the contrary, it is its *raison d'être*.

The Deleuzian groundlessness is in line with the rhizomatic, nomadic thought, as opposed to the arborescent, *grounded*, dogmatic thought. The idea of groundlessness is also connected to the Deleuzian concept of *difference*. Difference in Deleuze challenges universal concepts and unified ideas. The groundlessness thus refers both the entire system, e.g. the entire legal system, as well as the smallest components that make up the system, e.g. the individual or the legal subject. Deleuze writes in *The Logic of Sense*:

No, singularities are not imprisoned within individuals and persons; and one does not fall into an undifferentiated ground, into groundless depth, when one undoes the individual and the person. The impersonal and pre-individual are the free nomadic singularities....²²⁶

Through the notion of difference as opposed to universality it is possible to get beyond the "What is?" question. This will be exemplified in chapter 4 where the legal concepts of intellectual property and freedom of speech are analysed with the help of the notion of Deleuzian difference. What the Deleuzian theory arrives at, is that even though the nomadic and territorialising nature of law can be shown, as well as its groundlessness, it does not mean that all legal acts are discretionary, or that anything goes. On the contrary, the principle of groundlessness connects law to the exteriority, and makes it more able to conceive of the multidimensional 'reality' or be connected to it without for that sake having to translate it into its own system.

All this taken together, nomads, territorialisation, de/reterritorialisation, bodies without organs, haecceities, sans-fond, etc. will make up the rhizomatic jurisprudence that shall be introduced henceforward and developed throughout this entire research project.

²²⁶ Deleuze, *The Logic of Sense*, p. 106.

PART 2

THE ARTWORK

“No wind is the king’s wind
Let every cow keep her calf.”

- Ezra Pound, Canto IV.16

CHAPTER 3

THE RHIZOMATIC ARTWORK

3 THE RHIZOMATIC ARTWORK

As is widely known, the concepts of “art” or “artwork” have had a number of various meanings and definitions historically and have come to designate different creative activities in different times. It can for instance be noted that even within the field of art history any given established definition of art differs from any other, e.g. definitions adopted when defining what constituted art in ancient Greece is not the same as in ancient Rome, in Renaissance Italy or in modern times. To then attempt to define art within a legal doctoral thesis might seem presumptuous,²²⁷ as law and jurisprudence neither have the knowledge nor the tools to define art in that way, but there has to be at least some indication as to how the concept is used within this project. The concept of “art” has evolved and changed through time. Because it is a concept that is constantly in transformation and in process the question “what is art” has often lead researchers and artists alike down the wrong path – a dead-end. So as to avoid dead-end reasoning, and as this research project is aiming to get beyond the ontological question, the same approach is applied to the artwork. The “What is” question becomes less central and secondary, while the more pertinent “What does it perform?” creates a dialogue and fuels the access discussion. For the purposes of this project then, the main goal is to look at the *knowledge potential* in artworks, regardless of what the definition of the artwork might have been at the time of its creation or how we may define those creative endeavours today. Therefore, for this project it does not matter how a work of art is defined, what matters is how it *functions*, what it *does*. Later, in chapter 6 I will explore how law can comprehend and handle the various concepts of art and its functions without simplifying it or acting as an obstacle to access.

Deleuze’s and Deleuze/Guattari’s approach to art was very similar to the one they adopted to philosophy and science, namely that all three (science, philosophy, and art) participate in the production of knowledge. They write:

[A]rt, science, and philosophy [...] cast planes over the chaos. These three disciplines are not like religions that invoke dynasties of gods, or the epiphany of a single god, in order to paint a firmament on the umbrella, like the figures of an *Urdoxa* from which opinions stem. Philosophy, science, and art want us to tear open the firmament and plunge into the chaos.²²⁸

²²⁷ Ever since Marcel Duchamp and the type of artworks that he made, the question has even gone one step further and the “What happened to the definition of art after Duchamp?” seems to often be the starting point in these types of discussions. Definitions, for better or for worse, appear to be if not difficult and constraining, certainly obsolete.

²²⁸ [original emphasis], Deleuze/Guattari, *What is philosophy?*, p. 202.

In that vein, as with science and philosophy, art is approached as something that creates while it is at the same time seen as a practice. With art, as with jurisprudence and legal science, ontological questions such as “is it true?” or “what is it?” are equally uninteresting here, claim Deleuze and Guattari. Instead they propose a more functional approach to art, – “what does it perform”. Seen in that way art becomes connected to knowledge.²²⁹

In this chapter I explore the performance of art, i.e. what it does and how does it functions in various guises, various rhizomes and plateaus, as we move from the critical perspective of the Frankfurt School to the knowledge based perspective of Jamie Stapleton.²³⁰ For the sake of clarity, however, it is important to begin somewhere. And here I have chosen to begin with one of the most basic approaches to art, the one presented by the German sociologist, philosopher and musicologist Theodor Adorno (1903-1969) and his colleague philosopher and sociologist Max Horkheimer (1895-1973).

Adorno and Horkheimer’s approach is very much based on a binary logic and on one particularly imposing dichotomy. For Adorno/Horkheimer, the significance of art is presented as twofold. On the one hand, they claim, art performs a ritual, a *magical*²³¹ social function that which they refer to as an *authentic* or *intellectual*²³² social function. Secondly, the other function of the artwork is presented as being *monetary* or *commercial*. In its second guise, the artwork is a token or a generator of wealth and social status.²³³ These are works that are “packaged” and adapted for some kind of exploitation (in the market place). Commodified and often object-centric, this second performance of the artwork is connected to wealth, of course wealth in its broadest sense, but wealth nevertheless, rather than participation, communication, action and reflection. This second type of artwork can comfortably be placed within the property paradigm – the artwork is seen as capital, or more accurately perhaps as a *resource*²³⁴ or an as-

²²⁹ Gilles Deleuze, *Negotiations 1972-1990*, (trans.) Martin Joughin, New York: Columbia Univ. Press, cop. (1995), p. 60.

²³⁰ Jamie Stapleton, *Art, Intellectual Property and the Knowledge Economy*, Doctoral Thesis, Goldsmiths College, University of London, (2002). Available at: <http://www.jaimestapleton.net/about.html>. Last accessed 17th March 2014.

²³¹ See e.g. Walter Benjamin, “Work of art in the age of mechanical reproduction”, in *Illuminations: Essays and reflections*, (ed. and intro.) Hanna Arendt, (trans.) Harcourt, Brace, Jovanovich, Inc., NY: Schocken Books (2007 [originally published in *Zeitschrift für Sozialforschung*, in 1935]).

²³² See e.g. Theodor Adorno, *Aesthetic Theory (Theory and History of Literature)*, (trans.) Robert Hullot-Kantor, Minneapolis: University of Minnesota Press (1998 [posthumously published in 1970, written between 1961 and 1969]).

²³³ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (trans.) Thomas Burger with the assistance of Fredrick Lawrence, Cambridge, MA: Polity, MIT Press, (1992 [originally published in 1962]), p. 8.

²³⁴ See e.g. Pierre Bourdieu, *The Field of Cultural Production: Essays on art and literature*, (ed. and intro.) Randal Johnson (various translators), Cambridge: Polity, (1993). See also Jens Andreas-

set. The significance of the artwork in its second shape is a private one and in order to fully exploit its potential value it needs to be packaged and commodified for exploitation. The information society, as will become apparent, does not allow for this type of division between social and commercial to be made as clearly as Adorno/Horkheimer proposed, as in the knowledge economy, the two functions are practically inseparable. In order to get from Adorno/Horkheimer to the knowledge society I shall be adopting a rhizomatic reasoning here. Firstly, let us look more closely at Adorno/Horkheimer division and the implications it has for the approach to the conception of art.

3.1 THE ORIGINAL FISSURE? HOW ART ALWAYS REACHED BEYOND THE “WHAT IS” QUESTION

Historically, the urban planning of the *polis* contained a centrally placed *agora*. The Greek city-state always had a natural focal point, a public space, where works of art could be placed as well as accessed, discussed, communicated and shared. The Parthenon for instance was not solely designated for worship or for ritual. It was built, on the one hand, to enshrine statutes in honour of Pallas Athena and to demonstrate the piety of the people, but on the other hand it was also a sign of wealth and power of the Athenian city-state²³⁵. The function an artwork performed inside the temple was consequently both a ritual and a religious one, serving as a place for meeting, discussion and communication as most parts of the temple were open to the public.

Other spaces that had a function similar to a public space where artworks could be accessed were burial grounds, war memorials and open-air theatres. Equally, stadiums in ancient Rome (e.g. the Colosseum) were built to showcase (communicate) the power of the empire. But, as it ought not to be forgotten, these were public spaces where entertainment could be provided in the guise of for instance games and plays.²³⁶ As so often is the case, so too in ancient times, entertainment and education of the people went hand in hand. Art entertains. Art educates.

Due to the fact that ancient art was positioned and kept mostly in the public sphere it meant that both entertainment and education could take place at the same time, as access to art during the Antiquity was one of the more open ones

son who discusses the intellectual resource as credit safety in *Intellektuella Resurser som Kreditsäkerhet: En Förmögenhetsrättslig Undersökning*, Juridiska institutionens skriftserie, Gothenburg University, (2010).

²³⁵ Most of the Parthenon statutes, as is well known, are currently held in the British Museum in London taken there by Earl Elgin and are more widely known as Elgin Marbles. About artworks as cultural heritage with impact on identity and belonging, see chapter 3 below.

²³⁶ Hugh Honour and John Fleming, *A World History of Art*, Seventh Edition, Laurence King Publishing, (2005), pp. 165-207.

historically. But, artworks were connected to their geographical places of origin. Even if some art was created for the private spheres such as decorative arts and luxury items for the home, the clear tendency was that the artworks were made to be open to the public and placed in the public sphere.

The artworks often also cultivated a divine-like public status by its very placement within or adjacent to temples and burial grounds. Such artworks will have been equally created for the eyes of Gods as for the eyes of Man.²³⁷ That means, in terms of their function, the ancient artworks were often created in order to *communicate* with others, but not necessarily with other people, it could equally be a matter of a communication with deities. The act of *lexis* (the mental faculty or power of vocal communication) is therefore most interesting, when it comes to art during Antiquity in that it can be read as fragments of discussions suspended in mid air, embodied in the artworks. It was sometimes a question of vertical one-sided communication between Man and Deity and sometimes a dialogue between Man and Man and thus the antique artwork performed an additional function through its communicative potential. Art entertains, educates, and it can also even perform a religious function.

That all these communicative functions embedded in the artwork were equally significant is obvious. Artworks were used in order to convey certain messages or spread the ideals that were significant for the city-states. For instance, statues were made using the ideal of *naturalism*, that is, to as far as possible stay true to every part of the human body when representing it artistically. That being said, this ideal was not always followed through fully, as the statues were at the same time built in order to *transcend* simple everyday appearances, thus certain features had to be vastly 'improved' and the artist often erased individual flaws that the models may have had in order to portray 'pure' beauty. There is a well-known myth that tells the story of five girls each known for their beauty who sat as models for a particular statute of Helen of Troy because, it was claimed, that merely one of their individual beauties was not enough to depict the splendour of Helen. Naturalism was therefore not a simple ideal; it was used both in order to create likeness as well as to create *appearance*. Art entertains, educates, it can perform a religious function, as well as an aesthetic function.

One could certainly entertain the thought that such thinking may have inspired Plato to develop his theory of Ideas, namely, that all perceptible objects that we encounter, were only mere imperfect copies of the ultimate Idea of the said objects and however close to depicting them we ever came, objects were nonetheless still only template-based shadows of their eternal idea. This would seem to be in line with Plato's mistrust of the art of appearance-making, as it incorporated a level of manipulation. In Book III of *The Republic*, for instance,

²³⁷ Walter Benjamin, *Illuminations*.

he placed poetry not in the hands of poets but in the hands rulers, and within the ambit of the ruler's power. That had to be done, he argued, for the *public good*.²³⁸ Plato in a way was the first one to go against the open-access approach to art of his time and on the contrary propagate the idea of fencing off the artwork, controlling it, placing it within the powers granted to the ruler. By placing poetry in the hands of the ruler as opposed to the bard, or the people, the result becomes an administrated form of poetry and art, and thus, by the same token all lexis that art might be able to generate is placed under control of the ruler.

Plato therefore argued that poetry, as an art form, ought only to be used to describe likeness particularly focusing on the ideal virtues that were seen as significant for the city-state, e.g. loyalty and bravery. His distrust of art and its potency can thus be studied as an attempt to narrow the access to knowledge or the potential of art by controlling an otherwise very open public sphere as well as the lexis inside it. Art entertains, educates, it can perform a religious function, an aesthetic function, as well as a political and ideological function.

Creation of appearances was, however, seen by Plato to be entirely legitimate if done by the ruler or the ruling class for instance in order to boost morale. Later on in Antiquity Alexander the Great was often portrayed as a God in statues in order to represent (and arguably embellish) his and the Hellenic power.²³⁹ Ever since Plato, we can clearly see that a discussion concerning access to art has existed, particularly concerning who can have access to art, when and on what/whose terms. For that do be answered, the question "What does it do" must be posed. What does art do and how it functions is evidently in no way a modern question.

The artworks in the Antiquity (image-based as well as written) were thus diverse and had multiple functions, but they did not only have a social and a political significance. Artworks had an equally remarkable commercial value. The Parthenon, for instance is an architectural construction that was built in order to convey ideas of virtue, piety and wealth by means of the various artworks inside it. But, it also served as a treasury where the gold reserve was kept. Gold reserves were stored inside some of its rooms. Today such an act would be considered progressive indeed, imagine housing some of the reserves of the Bank of England in the British Museum! Art entertains, educates, it can perform a religious function, an aesthetic function, a political and ideological function as well as a commercial function.

Other examples of art's commercial potential are various metal and pottery works that were exceptionally popular Athenian exports, being sold to Egypt, Assyria and Persia.²⁴⁰ The high-end and sought after Greek craftsmanship was renowned for its luxury items such as jewellery and vases. The Greek term *techné*

²³⁸ Plato, *The Republic*, Book III.

²³⁹ Honour/Fleming, *A World History of Art*, pp. 165-207.

²⁴⁰ Ibid.

was used to designate this type of craftsmanship that had gone into the creation of the artworks. This term is still used in contrast to *episteme* implying that *craftsmanship based art* (techne) is related to but nonetheless separated from *knowledge based art*²⁴¹ (episteme). That means that we can already here discern two types of art, the one deemed to have some kind of knowledge function or potential (the one that could be found in the agora, poetry which was feared by Plato, etc.) and one without knowledge potential but with a commercial value (luxury items, etc.). This fundamentally binary schism seems to have haunted our perceptions and approach to art ever since.

All this can theoretically be condensed into the dichotomy we began with, namely authentic/mass produced art in the manner of Horkheimer and Adorno.²⁴² According to Adorno and Horkheimer's approach to art, artworks could *either* be authentic/intellectual, and as such have a function as for instance knowledge (with a connected magical/religious/aesthetic function), or be mass-produced, and as such be commodified, packaged, simplified with no, or next to no, knowledge function (but on the other hand this type of art is commercial, it can also serve an ideological function in the hands of the state).

This authentic/mass-produced dichotomy and Adorno/Horkheimer's writings on the culture industry are central to this initial part of the study. Stripped from everything else, these writings clarify the involuntary, inherent paradox of this entire research project, namely, if we were to create a concept which opens up access to artworks, what might we gain (e.g. a more democratic access to knowledge) and what do we stand to lose (e.g. the commercial potential of art)?

In this chapter I am attempting to present three rhizomes that will assist me in addressing this paradox. This requires an approach that acknowledges and incorporates the numerous multiplicities of the artwork. Rootlessness, movement, dimensions and variation define multiplicity. Deleuze and Guattari address it in the following manner:

A multiplicity is not defined by its elements, nor by a centre of unification or comprehension. It is defined by a number of dimensions it has: it is not divisible, it cannot lose or gain a dimension *without changing its nature*. Since its variations and dimensions are immanent to it, *it amounts to the same thing to say that each multiplicity is already composed of heterogeneous terms of symbiosis, and*

²⁴¹ See e.g. Rudolf Löbl, *Techne: Untersuchungen zur Bedeutung dieses Wortes in der Zeit nach Aristoteles Band III - Die Zeit des Hellenismus*, Königshausen & Neumann (2008/2009).

²⁴² This dichotomy is admittedly forced for a number of reasons, one being that it is not the only dichotomy available (e.g. private/public, which is another one) and because it is virtually impossible to place an artwork on a scale as *either* being social *or* commercial, or to argue that a particular artwork belongs on the one *or* the other end of such a spectra.

that a multiplicity is continually transforming into a string of multiplicities according to its thresholds and doors."²⁴³

I will attempt to show this change in nature that happens as artworks enter into new paradigms, and how these multiplicities are continuously challenging and transforming the notion of the artwork, and the functions it performs. Multiplicity is one of the six founding principles of the rhizome.

Each of the rhizomes presented in this chapter consists of plateaus. All rhizomes, it will be argued, exist simultaneously and can be interconnected. I will begin with the Frankfurt School rhizome, that represents the industrial context and approach to artworks, and the culture industry in which the artworks exist(ed). In the industrial paradigm, the artwork is understood either as knowledge (authentic artwork) or commodity/capital (mass produced artwork). There are a number of plateaus that make up the industrial rhizome that will be examined in order to arrive at the next rhizome in which we encounter the artwork, namely the post-industrial context. Within the post-industrial framework, the concepts of commodity and capital have become diversified. I shall be using the theory of Pierre Bourdieu to present a broader, more diversified, notion of capital. Capital is presented as economic, social and cultural. The artwork is embodied in all three forms of capital and it has economic, social and cultural values simultaneously. Within such a post-industrial approach, all three types of capital are shown to also have knowledge potential. The post-industrial paradigm has its own plateaus that make up the post-industrial rhizome. Finally, the last rhizome that we will enter into is the knowledge society rhizome, and the dematerialised artwork that exists there. Within the digital knowledge society, the artwork has been dematerialised, freed from its material form. The last rhizome is discussed using the theory of Jamie Stapleton where he presents rhetoric-based and semiotic/network-based artworks. This approach is particularly fitting for the knowledge economy as Stapleton shows.

This chapter aims to demonstrate the complexity in art and the difficulty in defining art when it comes to discussing access to it. The mirroring chapter, chapter 6, will then continue to further explore the artwork and intellectual property law together. My intention here is to present the artwork as Deleuzian rhizomes, and to introduce the artwork's rhizomatic qualities and its various plateaus, into the study and to simply present art within the broad Deleuzian network of contexts. Thereafter, in chapter 6, the aspects of art presented herein will then be interconnected with the law and the market, focusing particularly on the functional approach, namely what do the law and the market do to the artwork, what do they perform, how do they function.

²⁴³ [original emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 275.

3.2 RHIZOME 1: INDUSTRIALISM – THE FRANKFURT SCHOOL

Works of art are ascetic and unashamed; the culture industry is pornographic and prudish – Theodor Adorno and Marx Horkheimer²⁴⁴

One of the broad rationales behind this project is to examine the production of knowledge and the role artworks play in the general production and dissemination of knowledge. The Frankfurt School's division between intellectual and mass-produced art is therefore used in order to illuminate and illustrate one of the intrinsic and basic contradictions that are easily detectable when discussing this. Such, as one might call it, *founding dichotomy*, ought to be acknowledged before it can be criticised, and before access to art can be studied further.

The Frankfurt School, it should generally be kept in mind when reading this study, opened up the path for critical legal studies through critical theory and as such there is a wider connection between it and jurisprudence.²⁴⁵ The reason for using only some of the Frankfurt School's fundamental ideas, very narrowly, that deal with culture and the culture industry, is to illustrate basic difficulties and needs when conceiving of cultural commons in jurisprudence and developing the concept of the cultural commons constituted in law, and when discussing access to art and the protection of *both* the commercial and knowledge aspects of it.

Writing in the beginning of the twentieth century the Frankfurt School theory focused on industrial capitalism, and thus in Adorno's and Horkheimer's works we find the approach to artwork very much within an industrial setting. Before we look more closely at their approach to art, let us firstly be reminded how Deleuze and Guattari presented the concept of rhizome in order to present this first, industrial, rhizome. We saw in chapter 2 how this concept is something that challenges the hierarchical, and binary images of reason and knowledge. Deleuze/Guattari present it as an alternative to system-based, organisational and structural thinking that is not able to imagine anything truly new. Here, we begin with the rhizome that marks the industrialism and the ideas of Adorno and Horkheimer with regards to culture and the culture industry. Industrial production of art, they wrote, resulted in commodification of art, repressed and reduced the intellectual, knowledge aspects of art, and increased the number of passive, reified, commodified, mass-produced artworks.²⁴⁶

The Frankfurt School scholars developed a critique of consumer society. In it, the culture industry acts as a generator of cultural losses because it reduces the number of autonomous, intellectual artworks. Such critique is indispensable

²⁴⁴ Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment*, (trans.) John Hummings, London: Verso (2007 [originally published in 1944]), p. 140.

²⁴⁵ See generally, Douzinas/Gearey, *Critical jurisprudence*.

²⁴⁶ Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-1950*, University of California Press. (1973), p. 88.

and still to this day a very astute observation specifically when discussing the processes that take place when artworks are commodified e.g. the tendency to standardise works when they are placed inside the property paradigm and when works are made to fit the structures and frameworks of e.g. the entertainment industry. This type of standardisation or “pseudo-individuation” as Adorno et al. also referred to it was explained in the following manner:

By pseudo-individuation we mean endowing cultural mass production with the halo of free choice or open market on the basis of standardization itself. Standardization of song hits keeps the customers in line doing their thinking for them, as it were. Pseudo-individuation, for its part, keeps them in line by making them forget that what they listen to is wholly intended for them or predigested.²⁴⁷

The Frankfurt School claimed that modern society is becoming a “machinery of bureaucratic administration” where the human soul is often lost in the throes of the industrialised world; people have a poor quality of life, in a standardised, mechanical society.²⁴⁸ Adorno, however, did not see the possibility of liberating the individual from domination neither in the rise of new oppositional groups, nor in sexual liberation, but rather in the work of the “authentic” artist, who confronts the given reality with imaginations of what it could be. Authentic art has therefore a subversive potential, and Adorno contrasts it, as a superior form of cognition – a future-oriented pursuit of truth – with science, which only reflects the existing reality.²⁴⁹ The Frankfurt School thus criticises individualist capitalist society that by commodification, reduces many genuine (knowledge-based) artistic works to merely a fraction of their potential. Through this, a pattern can be discovered where repetition and standardisation become part of the mass culture being produced and thus, through industrialisation and mass production, any aspects of diversity in cultural works of art are in fact lost.

Stressing the dialectical nature of art as mass-produced and as such “passive and undialectic” on the one hand and on the other as that which is authentic and “expresses alienation”²⁵⁰ allows us to distil and expose the knowledge potential in artworks, even if it initially creates (an uncomfortable) binary pairing.

Adorno and Horkheimer argue that if we are looking for knowledge in artworks then we really only ought to be looking at the intellectual/authentic

²⁴⁷ Theodor Adorno, ‘On Popular Music’, in *Studies in Philosophy and Social Sciences* (1941), Vol. IX, No. 1, pp. 17-18.

²⁴⁸ Martin Jay, *The Dialectical Imagination*, p. 83.

²⁴⁹ Tom Bottomore, *The Frankfurt School*, Tavistock Publications, London/NY, (1984), pp. 41-42.

²⁵⁰ Theodor W. Adorno, ‘On The Social Situation of Music’, in *Telos* 35 (1978 [originally published in 1932]).

works. The mass-produced works, they claim, were at best to be considered as diversion or simple entertainment. Therefore, all artworks that were the products of the entertainment and culture industry could easily be disregarded, at least when it comes to knowledge potential. What benefits are there to lifting and placing this type of reasoning within the information and knowledge society? Can such reasoning that is very much based on the industrial paradigm be beneficial within the realms of e.g. the digital sphere, where art has become dematerialised, abstract and network-based? In order to answer that, we must look a little closer at the Frankfurt School concept of “culture industry”.

3.2.1 PLATEAU 1: THE CULTURE INDUSTRY

“The culture industry” is a complex term in the writings of the Frankfurt School. It is described as a wide phenomenon with various significances and roles. The definition of culture industry that Horkheimer and Adorno coined in *The Dialectic of Enlightenment* can nonetheless be a useful one. There, the concept “*culture industry*” portrays the industrial setting, based on the common traits of the capitalist industry, in which mass culture, mass-utilisation and mass-exploitation of art²⁵¹ occurs. The term is used in order to theoretically manage and understand the phenomenon of the culture industry during the industrial era as well as to place access to art in that particular context. It was not used to refer to production *per se* but rather to standardisation or “pseudo-individualisation”²⁵² of cultural products.²⁵³ Here, it is argued that it is worth revisiting, and even reevaluating these, perhaps slightly out-dated, concepts and their functions and roles in the digital era in order to show how even though both production and consumption of artworks has changed, some industrial characteristics still linger both within the entertainment industry as well as in law that can be connected to other newer phenomena. It will assist in discovering the layers of norms that interact within the legal sphere.

The Frankfurt School criticised the industrialist capitalist society, which through commodification reduced genuine and socially significant artistic works, with an important knowledge potential, to a fraction of their true aptitude.²⁵⁴ The market not only standardised complex artworks so that they could be packaged and sold, it also generated *gatekeepers* that managed to keep certain works outside the market place and effectively bar them from dissemination because gatekeepers prevented or posed obstacles to works being circulated and accessed, as no genuine access possibilities exist outside the market place and the property paradigm. These commercial processes and business models often

²⁵¹ David Held, *Introduction to Critical Theory: Horkheimer to Habermas*, Polity Press, (1990), p. 90.

²⁵² Adorno/Horkheimer, *Dialectic of Enlightenment* p. 155.

²⁵³ Held, *Introduction to Critical Theory* p. 91.

²⁵⁴ Jay, *The Dialectical Imagination*, p. 89.

affect, Adorno and Horkheimer claim, the authentic artwork negatively, in that that the authentic artwork does not lend itself to commodification, and therefore, it has less potential of entering the property paradigm. It is constantly held outside, barred from distribution.

The nature of the authentic work is that it is not always (only) entertainment, it is often more complex than that. Consequently, few such works are produced inside the culture industry in comparison to the more easily manageable mass-produced products of entertainment. This second type of works, mass-produced, has less, to no, knowledge potential, according to Adorno/Horkheimer, it is simply made to provide entertainment for the masses and as some argue govern the masses.²⁵⁵ This is a line of reasoning that goes back all the way to Plato as we saw above and this is roughly how Adorno/Horkheimer framed their aesthetic theory. If we make industry out of art, we will only ever get fewer authentic works, with less complexity, the works will be very similar to each other as that is the only way that they can be adapted for the consumer demand and the industry. In such a society, there will always be a deficiency of knowledge.

Through this critique of the culture industry a pattern was established demonstrating that repetition and standardisation as a process in packaging artworks for the market gradually becomes an integral part of the culture industry itself. As in any other industry, and accordingly, through industrialisation and mass-production, a number of significant traits such as e.g. diversity in artworks, politically uncomfortable subject matters, and so forth, are gradually excluded and eventually lost. At the same time, it means that less knowledge is disseminated.

That means, therefore, if the Frankfurt School theory is followed to its natural conclusion, that only a standardised type of knowledge will be available to people. Consequently, the commodification of art has a wider implication than just access to a variety of artworks.

3.2.2 PLATEAU 2: THE DICHOTOMY BASED LOGIC, AND BEYOND

When Adorno/Horkheimer drew up this division between the intellectual artwork and the mass-produced artwork they did so as a step towards exposing the relation between the existing cultural works and power structures in society. The mass-produced artwork was held up as the product of the culture industry and as such was meant to generate profit, and not knowledge.

In the essay “The Culture Industry: Enlightenment as Mass Deception” this type of argumentation was developed. It is often claimed that Adorno and Horkheimer appeared to have had a clear highbrow/lowbrow approach to art

²⁵⁵ But I shall not go into that particular governance discussion here.

when they discussed the culture industry as the only disseminator of culture. In order for the product to have an as wide appeal as possible and in order to enable large sales and to fully exploit the work financially, they argued, the work had to be stripped down and simplified. Thus they wrote:

When jazzing up Mozart he changes him not only when he is too serious or too difficult but when he harmonizes the melody in a different way, perhaps more simply, than is customary now. No medieval builder can have scrutinized the subjects for church windows and sculptures more suspiciously than the studio hierarchy scrutinizes a work by Balzac or Hugo before finally approving it. No medieval theologian could have determined the degree of the torment to be suffered by the damned in accordance with the *ordo* of divine love more meticulously than the producers of shoddy epics calculate the torture to be undergone by the hero or the exact point to which the leading lady's hemline will be raised.²⁵⁶

Studying this short passage can be quite revealing both in terms of the reason for which their writings can be useful and instrumental, as well as why Adorno and Horkheimer's theory at the same time can be treacherous when it comes to understanding the function of art today. Their writings on the culture industry are useful in one way and that is that they manage to demonstrate that something happens to artworks when they have to be packaged, closed off, commodified for the exploitation on the market. When artworks are moulded to serve as entertainment, passed off as commodities and when they have to be adopted to fit the tastes of an as large number of potential customers as possible, there is an aspect to art that will always have to be lost.²⁵⁷

²⁵⁶ Adorno/Horkheimer, *Dialectic of Enlightenment* pp. 127-128.

²⁵⁷ Adding a legal dimension now onto this means looking at how e.g. copyright law enables these particular processes: the packaging, the marketing and the standardisation, and the tools that law places in the hands of, ultimately, the entertainment industry, rights owners and producers in order for them to be able to transform works from art into entertainment. However, first, if we study the above quoted Adorno and Horkheimer passage further we can also see the clearly 'elitist' approach to what is presumed to be a genuine, *authentic*, and as such significant, work of art. Such presumptions need to also be revealed and discussed. Adorno/Horkheimer assume that for instance "jazzing up" Mozart inadvertently is an act that is somehow negative, that the "jazzed up" work is artistically less valuable than Mozart's original composition, and that a transition, or a shift, of format from music to film is by that reasoning, something undesirable and negative too. Interpreted in that way Adorno and Horkheimer's intellectual/mass dichotomy can be very problematic, but, as I hope to be able to show, the mere problem itself allows me to illustrate precisely that which I am attempting to argue here, namely the significance of enabling all possible linkages between the various already existing norms. If we are to discuss, not ownership, but more interestingly how access to artworks can be enabled, these types of "elitist" approaches have to also be subverted. In a time

The above quoted passage from Adorno and Horkheimer also raises other issues, for instance the question of preservation of cultural heritage as e.g. Mozart's music. Enabling creative incorporation of works into derivative ones is important, but it is equally important to safeguard access to the original, the fully unaltered, unedited, work. This will be discussed further in chapter 4 below.

Adorno and Horkheimer studied the artworks that were being disseminated through the culture industry and also examined the disseminated ideology stemming therefrom. The intellectual work was held as something that did not lend itself for ideological purposes, it could not be governed and that it on the contrary served as a critic and challenger of power structures. These issues, albeit relevant in many parts of this research, are not directly studied, or applicable, here. Such an analysis can be difficult to conduct in a digital society, as most "commercial" mass-produced artworks can be at the same time equally valuable as knowledge bearers as well as generators of profit, because of the distribution and dissemination possibilities that exist today. It can also be argued that the mass-mediated culture does not even exist any more, that it has been replaced by the network-based information society hybrid, virtual artwork.²⁵⁸ The dissemination of art is simply not as dependent on the culture industry today as it was then. We see for instance numerous alternative distribution possibilities outside the traditional culture industry channels (e.g. user generated content on YouTube). We already have functioning business models where artworks fully manage to generate profit and be distributed outside the industry through various self-administrated (e.g. online) distribution possibilities. The industrial factory-type company e.g. a record label does not play the same role in the dissemination of culture any more.²⁵⁹

What is instead interesting to study in the information society is that, despite the digital possibilities, it can still be difficult to gain access to certain works, due to various new types of acts of exclusion and new types of gatekeepers that generate and create obstacles to access. Because of the obstacles to access, certain knowledge potential remains unattainable even though a number of new channels that allow for more flexible dissemination of art than before have come into fruition.

When describing the intellectual authentic artwork Adorno/Horkheimer also implied that the work created by a great artist was always more valuable (as knowledge) than the works that had been mass-produced or produced by non-

of format shifting, collage-based artworks, cut and paste techniques, dematerialised digital works, Adorno and Horkheimer's division simply cannot be accepted fully.

²⁵⁸ See e.g. Yochai Benkler, 'The Idea of Access to Knowledge and the Information Commons: Long-Term Trends and Basic Elements' in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 222.

²⁵⁹ See chapter 6.

established, lesser renowned, artists.²⁶⁰ More than anything else, when Adorno addresses the intellectual work he conjures up a work of art that not only has knowledge potential but also a work that in itself is able to create, as well as *become*, a world of its own:

Authentic artworks, which hold fast to the idea of reconciliation with nature by making themselves completely a second nature, have constantly felt the urge, as if in need of a breath of fresh air, *to step outside themselves*.²⁶¹

This potential of stepping outside itself that the intellectual artworks have according to Adorno, namely to create new worlds and to imagine new realities, is particularly interesting from a commons and access to art perspective. It means that the work performs more than one or two functions; it can also create and imagine something new, it produces knowledge. It can be part of a democratic, on-going, discussion – therefore it has to be communicated.

A juxtaposition of the art that exists today, in the information society, with the mass-produced art studied by Adorno/Horkheimer, reveals the difficulty in attempting to define artworks through various opposites-based pairs (authentic/mass, intellectual/proprietary and so on). This goes against the rhizomatic logic, it is an arborescent type of reasoning. It is simply not possible to create such dichotomies in an adequate manner and that is why more flexible approaches are required for the purpose of catering to this complexity. By beginning with the Frankfurt School analysis of art in the industrial society and the notions they developed that still to this day linger in terms of classification of and approach to the artwork concept, by looking closer at the dichotomy authentic/mass, there is a potential that is discovered that the rhizomatic theory can add on to, namely connecting those particular notions to other cognitive constellations in terms of the artwork.

3.3 RHIZOME 2: POST INDUSTRIALISM – ECONOMIC, SOCIAL AND CULTURAL CAPITAL

It is what makes the games of society – not least the economic game – something other than simple games of chance offering at every moment the possibility of a miracle.²⁶² – Pierre Bourdieu

²⁶⁰ Again, even if this too is problematic here, the mere problem serves as a springboard. When conducting this research the aspects of small-scale creation, collective creation, and the importance of inspiration that stems from other artworks that exist around the artist, as well as various network based means for production and dissemination can be equally valuable when it comes to access to art (and knowledge).

²⁶¹ [my emphasis], Adorno, *Aesthetic Theory*, p. 63.

Within the Frankfurt School theory the culture industry was criticised for treating artworks as capital, something commodified, bought and sold. It is certainly not as simple today to claim that the mass-produced, commodified artwork will always have less value, or have less knowledge potential, than the so-called intellectual artwork. Following that particular train of thought, we then move into this section where the artwork as capital is presented.

One way of doing so is to begin where the Frankfurt School left off, namely in the dichotomy that art can function as knowledge *or* capital. We need to take a closer look at the notion of capital, that in itself also needs to be diversified. Once again not asking what capital is, but what it does.

We turn to the French sociologists and philosopher Pierre Bourdieu (1930-2002), and particularly his use of the notion of capital as a far wider phenomenon than traditionally assumed. Bourdieu defines capital very broadly and approaches it in “all its forms and not solely in the one form recognised by economic theory”.²⁶³

Bourdieu listed three forms of capital: *economic capital*, *social capital* and *cultural capital*. Capital in his writings²⁶⁴ is thus not reducible to economic capital only²⁶⁵ it can also be:

- *Cultural*, which includes academic capital (stemming from formal education). In the essay *Language and Symbolic Power*²⁶⁶ Bourdieu also stresses the linguistic capital as a part of the cultural capital concept, or
- *Social Capital*, which is for Bourdieu based on creating values that stem from people’s networks and connections, acquaintances, recognitions, memberships and so on.

All these capital forms generate value, he argues, adding a more complex notion of capital than previously allowed for by e.g. the Frankfurt School approach. This is the post-industrial critique of the industrial thought, and a new rhizome that generates plateaus of its own.

²⁶² Pierre Bourdieu, *The Forms of Capital*, in (ed.) John D. Richardson, *Handbook of Theory of Research for the Sociology of Education*, (trans.) Richard Nice New York, Greenwood 241-258 (1986 [originally published in “Ökonomisches Kapital, kulturelles Kapital, soziales Kapital.” in *Soziale Ungleichheiten* (Soziale Welt, Sonderheft 2), (ed.) by Reinhard Kreckel. Goettingen: Otto Schartz & Co. pp. 183-98. (1983)]).

²⁶³ Ibid. p. 246.

²⁶⁴ Ibid. p. 241-258.

²⁶⁵ Randal Johnson in ‘Editor’s Introduction: Pierre Bourdieu on Art, Literature and Culture’, in Pierre Bourdieu, *The Field of Cultural Production*, p. 7.

²⁶⁶ Pierre Bourdieu, *Language and Symbolic Power*, (trans.) Gino Raymond and Matthew Adamson, (ed.) John B. Thompson, Cambridge, Polity, (1991).

3.3.1 PLATEAU 3: THE FORMS OF CAPITAL

Economic capital, according to Bourdieu, in itself does not need much further explanation – its significance remains as a monetary or proprietary capital form that can be managed by property rights.²⁶⁷ Bourdieu argues that the two other capital forms can both perform similar, as well as additional, functions than the economic capital. Like economic, the other forms of capital can also be unequally distributed among e.g. social classes (however classes are defined). Bourdieu is indeed duly in line with traditional Marxist theory when he analyses capital in this way. However, the social and cultural capital forms are acquired completely differently than the economic capital, and the other two forms cannot be transferred or exploited in the same manner as the economic capital. It is very important to introduce the Bourdieuan forms of capital; as such an approach challenges the notion of the “altogether bad” or “altogether good” notion of capital. This schizophrenic nature of capital is of course in line with Deleuze/Guattari and their ideas on capitalism.

Arguably, for the Frankfurt School, both authentic and mass-produced art exist within the property paradigm, and therefore fall within the narrow definition of economic capital. Bourdieu describes²⁶⁸ cultural capital as *a form of knowledge* that we can internalise, and that with time can even have a pure economical significance.

Bourdieu’s study of capital began as a theoretical hypothesis during one of his studies, attempting to explain “the unequal scholastic achievement of children originating from the different social classes”.²⁶⁹ Given that the scholastic and educational investment, much like any other monetary investment, could indirectly be converted into economic capital, Bourdieu argues that the underlying social and cultural capital that the bourgeois children have, always gives them an advantage in schooling circumstances. This he calls the “domestic transmission of cultural capital”²⁷⁰ and Randal Johnson describes it as “an internalised code or a cognitive acquisition which equips the social agent with empathy towards, appreciation for or competence in deciphering cultural relations or cultural artefacts.”²⁷¹

Studying cultural capital as a phenomenon more closely Bourdieu divided it into three states, the embodied state, the objectified state, and the institutionalised state. The embodied state is where the accumulation of cultural capital

²⁶⁷ Pierre Bourdieu, *The Forms of Capital*.

²⁶⁸ Ibid.

²⁶⁹ Ibid. p. 247.

²⁷⁰ Ibid. p. 248.

²⁷¹ Johnson, ‘Editor’s Introduction: Pierre Bourdieu on Art, Literature and Culture’, in *The Field of Cultural Production*, p. 7.

takes place internally through cultivation, *Bildung*. This is a process of embodiment or incorporation of knowledge – which requires labour, costs in terms of both money and time and as such it is something that needs to be invested in. This is self-improvement [*on paie de sa personne*]. Such embodied cultural capital, Bourdieu continues “cannot be transmitted instantaneously (unlike money, property rights [...]) by gift or bequest, purchase or exchange.”²⁷²

What signifies the embodied state is that the notion of time passing is required for the acquisition of cultural capital to take place and be transformed into (internal) knowledge. The cultural capital is subsequently materialised into objects and media such as writings, paintings, monuments, instruments etc. in order to be able to be transmitted materially. Bourdieu acknowledges his own understanding of the dual nature in artworks writing, “[t]hus cultural goods can be appropriated both *materially* – which presupposes economic capital – and *symbolically* – which presupposes cultural capital”²⁷³.

A painting can be bought with economic capital, but a painting can only be fully appreciated and appropriated with cultural capital. This material/symbolical division is both a new dichotomy, as well as a new dimension that adds on *and can be connected* to the Frankfurt School theory. It does not negate the Frankfurt School theory.

Finally, the institutionalised state is where the cultural capital acquires the form of academic qualification. This concerns mostly academic capital, as mentioned above, but can be equally applicable to a more narrow sense such as academic education in art theory in particular. The academic capital therefore gives an official recognition of cultural capital as knowledge, as a qualification acquired on educational merits and as such it can be measured, compared, valued and so forth.

Bourdieu’s capital categories are helpful here, because they reveal knowledge potential in more areas than just the “intellectual” artwork. Bourdieu raises many, often overlooked points, such as the passing of time in acquiring cultural capital as well as that it is directly tied to future profit-making potential of the individual and his place in society. These are the various dimensions that I want to collect, in order to show the evident flaws and inadequacies of the binary structures and arborescent reasoning.

3.4 RHIZOME 3: KNOWLEDGE SOCIETY – RHETORIC BASED AND SEMIOTIC/NETWORK BASED ART

The definitions and approaches to art submitted here follow the plateau thinking and the rhizomatic logic, and we can see how all the various rhizomes have

²⁷² Bourdieu, *The Forms of Capital*, p. 248.

²⁷³ [my emphasis], *Ibid.* p. 250.

their own plateaus, that is, their own spheres and themes and how they can be interconnected with one another. What we have defined as a Frankfurt School industrial approach to artworks by dividing art into authentic and mass-produced was then problematised by the use of Bourdieu's post-industrial capital forms, challenging the property paradigm in which both authentic and mass-produced works are placed, and challenging the notion of capital by introducing a knowledge value even in capital. Bourdieu's theory is used to show, that even when it comes to mass-produced works, very much within the property paradigm, it is not as simple as straight away disregarding them, as they too contain knowledge value. When studying capital value, knowledge potential also in "entertainment" is revealed. The last dimension that I shall add here is to place all of this into the information and knowledge society rhizome.

In this context I shall turn to, in part, an analysis conducted by Jamie Stapleton in *Art, Intellectual Property & The Knowledge Economy*.²⁷⁴ Stapleton conducted a study of artworks in conjunction with intellectual property and the knowledge economy by creating a distinction between what he refers to as the "rhetoric based" and "semiotic/network based" artworks.

The *rhetoric-based* artwork, to Stapleton, is founded upon the idea of a (rights) creating individual and of an artistic work that is produced by his hand. Most "traditional" art can be placed within such a concept, he claims. The notions of rhetoric-based art were fully challenged with the advent of modernism, Stapleton writes further. The *semiotic/network based* artwork followed from modernism and onwards. The semiotic/network-based works differ from the former because they are dematerialised/object-less works of art. They are also de-subjectivised, art that is no longer necessarily created by only one individual artist, or even by a human being's hand. Instead, the artist has to be positioned inside a context in which he practises and creates. The ontology of art is subverted once again, focusing instead on the function of the artwork that is located in the *network* of the existing technology and other works, and on the communication that happen inside and outside the (creative) community.

In subsequently reflecting upon his thesis, the writing of which commenced in 1997, Stapleton writes that the idea of the *commons* remained unaddressed in his research, which was due to a number of reasons.²⁷⁵ What I aim to do is to add a commons-based dimension and discuss further some of his concepts in such a setting.

3.4.1 PLATEAU 4: RHETORIC-BASED ART

Stapleton traces rhetoric based art and its existence with reference to intellectual property law all the way back to the "state privileges that regulated the printing

²⁷⁴ Stapleton, *Art, Intellectual Property and the Knowledge Economy*.

²⁷⁵ Stapleton, <http://www.jaimestapleton.net/about.html>. Last accessed 17th March 2014

industry of 15th century Venice”.²⁷⁶ Rhetoric based art in his study is closely linked to the legal concept of the intellectual property rights, which in turn is based on the notion of “invention” and “originality”. Cognate of the ancient art of rhetoric²⁷⁷, the rhetoric based artworks exists from the 15th century and onwards. Stapleton adds to it further by discussing the idea of the “genius” creator who is seen as the inventor a work, a work is assumed to have been created *ex nihilo*. This formed the basis for the future intellectual property law, that at that point was yet to come.

This model is based in the art of rhetoric in that a work of art is seen to be *addressing* the viewers, speaking to them as if attempting to describe or represent (a? *the?*) reality. This act of “speech” or of “speaking”, *rhetoric*, can be followed all the way from Antiquity through to the present day. What is interesting with the rhetoric-based work of art is that it speaks in a structured, rhetorical, manner. Furthermore, the act of speech is embodied in and closely connected to the *object* or the tangible, material artwork that has been created by the *genius* artist. Individuality and invention are therefore traits that signify these artworks. The works are *movable* as they are in fact material objects.²⁷⁸

This type of art is highly dependent on the individual creative labour and the work is based on “traditional” composition. The *raison d’être* of this type of art is to tell stories – rhetoric-based art is founded on the notions of (linear) narrative. These concepts, Stapleton argues, affected the early intellectual property laws and as such placed the discourse of rhetoric in the artworks and made them fit inside the property paradigm. The rhetoric based artwork is the artwork that can easily be connected to an individual artist, his/her labour, and that generates individual rights. Stapleton writes that “[a]s a practical theory, the rhetorical conceptualisation of creativity centred on the labouring capacity of individuals.”²⁷⁹

As such the concept lends itself to codification in private law as it transformed creativity into individual fruits of labour – and then, profit.

The conception of creativity as rhetoric-based is founded on the *original-invention-composition* model and it has remained relevant to this day when dealing with art and how art is approached in law. An example of a rhetoric based work is for instance a Turner painting, it is fairly easy to identify an individual author, the originality in his creation made by his hand, invented by him, and the rights generated in such a creation.

These artworks can quite easily be studied within the framework of the Frankfurt School writings. Crudely, it could be stated that rhetoric based works

²⁷⁶ Stapleton, *Art, Intellectual Property and the Knowledge Economy*, p. 32.

²⁷⁷ Ibid. p. 28.

²⁷⁸ Ibid. p. 12, movable at least theoretically, e.g. buildings are not necessarily easy to move from one place to another, but can in theory be taken down and reassembled elsewhere.

²⁷⁹ Ibid. p. 83.

connect to some extent to authentic art as these are unique, intellectual works that tell stories and transmit knowledge. That the semiotic/network-based artworks have some traits in common with mass-produced art, however, is a comparison that can be problematic and cannot be made sweepingly. I shall explain in the next section.

3.4.2 PLATEAU 5: SEMIOTIC/NETWORK-BASED ART

Semiotic/Network-based artworks cannot be as comfortably compared to “mass-produced art” as the Frankfurt School definition would have it. What they have in common is that both the semiotic/network based works and mass produced works are the results of attempting to understand artworks that came with the new technology of industrialisation and modernism, that were subject to faster dissemination and the blurring of the line between the copy and the original that came with the mechanical (re)production of art.²⁸⁰ When describing the semiotic/network based works Stapleton writes that while the rhetoric based artworks had “stressed the training of individuals for particular creative tasks, the new model approached the view that creativity occurred not within individuals, but in the relational *spaces* between human (and non-human) ‘actors’.”²⁸¹

Thus, as with the mass produced work, the new modes of creating art moved away from the importance that had been placed on the “unique”, material, singular artwork and focused instead on work that was created when human and non-human (machines!) actors were combined. This particular phenomenon is a particularly interesting find as the previously prevailing notions of “author/creator” within the old ideology of creativity were here being questioned. An example of semiotic/network based artwork could for instance be John Cage’s “music” or rather “audio” piece *4:33* that consists of 4 minutes and 33 seconds of silence. It could perhaps also be user generated content created online where the consumers at the same time become co-creators, or a prosumer²⁸² (producer and consumer in one). Commons-based peer production may also fall within this category.

The new ways of producing art brought about by modernism, and with it new ways of producing and accessing knowledge, can both be seen as indicators of the revolution that happened when society transformed from having been industry-based, then post-industrial, and then graduated towards becoming digital and knowledge-based. Therefore when studying the semiotic/network based

²⁸⁰ See generally Benjamin, ‘Work of Art in the Age of Mechanical Reproduction’ in *Illuminations*.

²⁸¹ [my emphasis], Stapleton, *Art, Intellectual Property and the Knowledge Economy*, pp. 83-84.

²⁸² The term “prosumer” was coined by Alvin Toffler already in 1980. See e.g. Alvin Toffler, *The Third Wave: The Classic Study of Tomorrow*, New York: Bantam (1980).

artworks a heavy focus is placed on the processes of dematerialisation and dematerialisation functions within a legal context. The legal definitions of art (and artist) have largely been founded upon the rhetoric based art and the “genius inventor”, and statutory law is still not fully equipped to deal with semiotic/network-based works. This will be discussed further in chapter 6 but it can already here be stated that this means that in law, artistic creation is always assumed to take place *ex nihilo* or as James Boyle puts it: “Copyright is about sustaining the conditions of creativity that enable an individual to craft *out of thin air an Appalachian Spring, a Sun Also Rises, a Citizen Kane.*”²⁸³

This can be seen as the traditional ontological approach to the artwork in intellectual property law and the ground on which it ultimately rests. It seems that legally, in order to apply copyrights and other intellectual property rights on works, we must assume, that they have been ‘invented’ out of thin air.

3.4.3 PLATEAU 6: A MIXTURE OF THEM ALL...

When studying both rhetoric-based and semiotic/network-based concepts of art and when adopting Stapleton’s way of categorising and defining art, we soon realise that it is not as straightforward as claiming that the former is art created before modernism and the latter is mass-produced modern and post-modern art. It can quite clearly be shown that today both types of works exist side by side, simultaneously, and at times they might have different functions but at other times they can be quite similar. One such example is the work of Jackson Pollock. Stapleton places Pollock’s work in the semiotic/network based category.²⁸⁴ My view is that this is a slightly heavy handed categorisation for many reasons, one of them being that Pollock worked on canvas and also his “name” and his “hand” played a significant part in valuing his works, both socially and commercially. That is, *some* rhetoric-based concepts still played a role in his creation process such as e.g. individuality, originality and invention. None of those rhetoric-based traits were completely absent in his work even if his mode of painting was new and innovative, and arguably not based on traditional notions of rhetoric and linearity. Pollock had, after all, *invented*, the unique drip technique in painting as well as the process of painting from above while the canvas lay on the floor, that had thither not been the norm. His paintings are also abstract and not dependent on a classic narrative, but still he is hardly the sole modern painter to diverge from classic, linear narrative. Therefore, while it is true that Pollock’s style of painting radically challenged the notions of for instance composition, subject matter, narrative and so forth his works still arguably comprised of a number of rhetoric-based attributes (unique, original, mate-

²⁸³ [original emphasis], Boyle, ‘A Politics of Intellectual Property; Environmentalism on the Net?’ p. 99.

²⁸⁴ Stapleton, *Art, Intellectual Property and the Knowledge Economy* p. 95.

rial, artist-genius and so on). For me, it seems that his work is more appropriately defined as a mixture of the rhetoric-based and semiotic/network based categories.

Moving from (and connecting) the seemingly different Frankfurt School theory, to Bourdieu's theory, through to a knowledge-based theory that Stapleton has presented has opened up the rhizomatic approach to the artwork. Utilising this way of tackling something that is as abstract as art and still attempting to somehow manage it scientifically, indicates just three of the many rhizomes that law has to be prepared and able to handle.

In combining Frankfurt School, Bourdieu and Stapleton this research thus studies artworks that can be approached as:

- a) Rhetoric based artworks that “speak” – monologue, AND
- b) Semiotic/network based artworks that “interact” – dialogue, AND,
- c) A mixture of 1 and 2, AND
- d) ETC (i.e. any other new rhizomes that may come up in the future)

Once again then, for this study it does not matter how a work of art is defined, what matters is how it *functions*, what it *does* and how law can comprehend and handle it without simplifying it or acting as an obstacle to access.

3.5 RHIZOME 4: THE ASSUMPTIONS ENTRENCHED IN LAW

What happens when, for instance, works enter digital spheres where e.g. convergences of various media are commonplace and when works stop being separate, individual “works” and instead become coproduced by users, when there is no separation between a work and a public space for creation that encapsulate knowledge? The digital knowledge society naturally produces and turns spaces where works are accessed into *cultural commons*, something that exists slightly outside the public-private dichotomy, and as we shall see, outside the property paradigm.

What role, if any, does the conception of art have and how does it affect the role law plays in the constitution of the cultural commons where access to art is taking place? Particular focus must be given to the dematerialised, digital and virtual realms that constantly enable access to intellectual, aesthetic works that function as knowledge. These are the *modern day equivalents of “salons” and “coffee houses”* where unfettered critical exchanges of ideas and social participations take place. This is a key argument, particularly when examining that which can broadly be referred to as the cultural industry and cultural economy²⁸⁵ and the sphere(s) of cultural production.

²⁸⁵ Bourdieu, *The Field of Cultural Production*.

We have seen above how the capital value that is generated in the cultural economy can be differentiated. In discussing the various forms of capital it was presented how Bourdieu argued that *capital* is a far wider phenomenon than traditionally assumed. Such a wide understanding of capital is applied here, that is, “all its forms and not solely [...] the one form recognised by economical theory”.²⁸⁶ All Bourdieu’s capital forms produced different values, and taken together they form the cultural economy.

In the information society aesthetic intellectual works are produced, packaged and marketed within the paradigm of private property and cultural economy, which is driven by economic capital. What counts as public space, somewhere where non-commercial values can be created and where artworks as knowledge can be accessed, communicated and shared, can directly be linked to the pure financial values of those works and their exploitation potential on the market. However, it can also have implications on the broader values of the works for instance the social and cultural functions that they may have, such as knowledge potential.

In law, exclusive rights, and the enabling of packaging and enclosure of products have been necessary processes for the (industrial) economy and the commercial exploitation of products. Such processes for exploitation have been the same for both tangible and intangible works. In the digital era on the other hand, and particularly when it comes to dematerialised artworks, these processes are no longer necessarily valuable, nor are they easily either described, grasped or applied. Therefore, as it will be apparent, it can be complicated to discuss what constitutes public and what constitutes private in the virtual, abstract realms of the digitised spheres.

Before we arrive at the public spaces and the cultural commons of the 21st century and the information society, and before the digital realm was even created, other inventions that had similar effect on the cultural industry emerged, such as lithography and photography, with their inherent mass production potential and reproduction possibilities. Photography and lithography enabled, what looked like at the time, an unhindered mass production and dissemination of artworks. With the introduction of the industrial machine and the possibility to produce artworks, and here particularly images *en masse*, previous notions that had dominated art theory and law such as “original work” created by an “artist genius”, the work’s “uniqueness” as the chief artistic merit, etc. were thus challenged. When those mass-produced images, not long thereafter, started moving, first silently and subsequently accompanied by sound and colour, the awareness of images and their potency also came under scrutiny. Editing techniques granted the possibility to control and manipulate images in new ways as well as the narratives and the perceptions of images.

²⁸⁶ Bourdieu, *The Forms of Capital*, p. 46.

Cinema and modern art are discussed here as semiotic/network based works and film is also seen as a “dematerialised work”. Dematerialised works, are seen, following Lippard, as works where “the idea is paramount and material form secondary, lightweight, ephemeral, cheap, unpretentious and/or ‘dematerialized’”²⁸⁷. This is done in order to crystallise the knowledge value contained in the images. With dematerialised artworks the notion such as “object” or “original” directly becomes less significant. Material uniqueness more often than not serves a secondary (or no) purpose in terms of value of for instance the camera based image. The metaphysical film, the “idea”, the story, the narrative is the focus there rather than the tangible “copy”, or carrier, onto which the work is shown or projected, in terms of film e.g. a print, a tape, a DVD or indeed any (digital) platform.

When it comes to dematerialised artworks the carrier and the content have to be separated, as shall be discussed further in chapter 6 below. The same cannot always be said of object based, material, works such as for instance paintings or sculptures that are inherently interlinked with the object/carrier by necessity (even if they are not necessarily always one and the same thing). Jamie Stapleton addressed the intangible, non-material works: “In other words” he writes “dematerialization still presented objects to the viewer, but objects that were stripped of the ‘ideology of materiality’ and ‘objecthood’”²⁸⁸. The dematerialised artwork in this context is exactly such a work, a work that will have been stripped of the ideology of materiality and objecthood, but one that nonetheless has knowledge potential and broader values outside the commercial ones.

The impossibilities of enclosure of such dematerialised works is key to discuss and it is particularly relevant for modern artworks and the image based works because these works themselves are overwhelmingly object-less and thus, potentially, un-enclosable. The mechanical reproduction necessary for the image, as Walter Benjamin noted, separated the artwork from its basis in cult and therefore it shook the creation of images to its core. Benjamin notes:

When the age of mechanical reproduction separated art from its basis in cult, the semblance of its autonomy disappeared forever. The resulting change in the function of art transcended the perspective of the century; for a long time it even escaped that of the twentieth century, which experienced the development of the film.²⁸⁹

²⁸⁷ Lucy Lippard, *Six Years: The Dematerialisation of the Art Object*, University of California Press, California, (1997), p. vii.

²⁸⁸ Stapleton, *Art, Intellectual Property and the Knowledge Economy*, p. 87

²⁸⁹ Benjamin, ‘Work of Art in the Age of Mechanical Reproduction’, in *Illuminations*, pp. 226-227.

The metaphysical aspects of “uniqueness” and “cult” became seemingly irrelevant.

From modernism and onwards the previous terms for production, dissemination and access to art changed drastically because of the growing presence of the dematerialised work. In a setting where the mass-produced work was prevalent and the works of art were more and more dematerialised as well as desubjectivised,²⁹⁰ art and spaces where works could be accessed needed to be reviewed and reconsidered. The new types of works and production of works, referred to by Jamie Stapleton as semiotic/network based, required new theoretical approaches in order to both understand and analyse the settings in which they existed.

Jamie Stapleton differentiates between rhetoric based and semiotic/network based artworks, as was shown above. The rhetoric based artwork according to him is traditionally founded on the idea of a (rights) creating individual and the material and tangible artwork produced by his hand: most ‘traditional’ art can in that vein be placed within the rhetoric based concept. What is interesting with the rhetoric based work of art is thus that it speaks in a structured, rhetorical, manner. Furthermore, the act of speech is seen as embodied in and closely connected to the notion of the *object* or the tangible, material work that has been created by the *genius* artist. Individuality is therefore a trait that signifies these artworks.

As we already saw above, Stapleton traced rhetoric based art and its existence vis-à-vis intellectual property law back to the “state privileges that regulated the printing industry of 15th century Venice” that is, rhetoric based art in his study was closely connected to concepts of “inventions” and “originality”. In Renaissance Italy for instance, where a system was in place with artist guilds and artist’ *bottegas*, the creative labour took place in reality within a network, but focus was nevertheless placed on the master and his labour. It was in this setting that the first rights creations in the form of privileges started emerging.

Rhetoric based art is therefore highly dependent on the individual creative labour and labourer. The focus on individual labour, Stapleton argues, was embedded in the early intellectual property laws, and was compatible with the property paradigm. Stapleton writes notes further that “[a]s a practical theory, the rhetorical conceptualisation of creativity centred on the labouring capacity of individuals”²⁹¹ and as such it lent itself to codification in private law as it transformed it into individual fruits of labour – and profit. The semiotic/network based works thus vastly differed from the former as they were dematerialised, object-less pieces of art created within a network where the audience was much more active in participating and creating the significances and values of the artwork.

²⁹⁰ Lippard, *Six Years: The Dematerialisation of the Art Object*.

²⁹¹ Stapleton, *Art, Intellectual Property and the Knowledge Economy*, p. 83.

It could be argued that traditional ‘classical music’ or in fact any musical composition for that matter, anything from a Beethoven composition to a Rihanna song, could be seen as equally “dematerialised” as John Cage’s silence piece. However, the difference between the two kinds of music, albeit a theoretical one, is that the first two can be “performed” or transmitted via a carrier such as e.g. a CD, while it is not equally possible for the second. The score is in the first sense independent of the audience as well as of the composer. With Cages piece on the other hand, the silence is *filled* by the audience itself adding to the performance, the score can never be an independent composition as such nor is it ever one and the same, changing as the audience changes. The surrounding sounds of whoever chooses to listen to the work, or happens to be there, will always have to be taken into account. In that way, the audience is an integral part of the work, and can never be separated from the work in-itself. In *Six Years of Dematerialisation* Lippard quotes Robert Berry in claiming that “[f]or years people have been concerned with what goes on *inside* the frame. Maybe there’s something going on *outside* the frame that could be considered an artistic idea.”²⁹²

By that account the dematerialised art is art that takes into account also that which happens to take place outside the framework and outside the traditional, enclosed, concept of the artwork as we are used to understanding it. Naturally, as Stapleton shows, this has to challenge the traditional notions of art as they may still be understood in law.

Semiotic/network based artworks are furthermore desubjectivised, not necessarily linked to merely the singular artist, not always created by one identifiable person, or even by a human being’s hand. Instead, the artist and the work are seen to exist inside a context of the art community in which art is practised and created. The ontology of art is always located in the *network* of people, the existing technology, other works, and on the communications that happened within the (creative) community. Stapleton claims:

Dematerialisation can be presented in a number of ways: as a shift from object to idea, inspired by Duchamp’s readymades of the early teens of the 20th century; as a defiance of the commodity status of the art object; as an attack upon the notion of the masterpiece and its allied notion of genius; as a rejection of ‘Bernsonite’ connoisseurship and the Romantic fetish made of the artist’s hand.²⁹³

²⁹² [original emphasis]. Lippard, *Six Years of Dematerialization* p. xii

²⁹³ Stapleton, *Art, Intellectual Property and the Knowledge Economy*, p. 86

Stapleton did not expressly mention cinema when he addressed the dematerialised semiotic/network based artwork, but arguably, following Lippard,²⁹⁴ in his definition of semiotic/network based art focusing on the (collective) *labour, ideas being disseminated* and that the rejection of the *artist's hand* renders it also applicable on e.g. film, especially when discussing film as a knowledge source that can be communicated within a commons. Stapleton's writings can furthermore be placed within the context of Deleuze's cinema writings in order to discuss the values of film and other dematerialised works.

Cinema embodies certain new tendencies in art such as dematerialisation of the previously tangible works as well as it serves as an example of the mass produced and mass disseminated works that were no longer produced by the hand of one individual artist but rather by a network of people and machines. Initially it was fiercely debated whether camera based images (the still as well as the moving) could or ought to at all be considered as artwork due to their primary documentary nature. Film was seen as captured moments of reality that we could go back to and re-watch. There was no 'invention' as such, it was merely a question of reproduction or reality. However, the various opinions around this issue were in themselves representative of the evolution that was taking place in art and art theory. Early photographers such as Robert Frank, Edward Weston, Tina Modotti, as well their later peers such as Diane Arbus, were pioneers in utilising the camera-based image within a truly artistic context. Nonetheless, their work was not always seen as art, at least not initially.

The idea of documentation and the depiction or reproduction of reality rather than artistic expression was the prevalent critique expressed by the opponents who saw the camera image as something documentary rather than artistic. The counter argument by the proponents was that the narrative composed by the camera image and the notion of what counted as fact and what counted as fiction in the image could be controlled and manipulated. It was argued that the fact that aesthetic consideration lay behind the camera images illustrated the artistic basis onto which photography stood. All that taken together with the fact that a photograph could be staged, edited, cropped, and otherwise directed in order to tell a story and manipulate 'reality' testified that it was a matter of art rather than documentation (even if the one did not necessarily preclude the other, of course).

What counts and does not count as art is precisely the interesting detour that this research project is attempting to avoid in discussing access to art. The still lingering definitions of art can be quite telling in that regard, as the mere definition marks what can be accessed and what cannot be accessed. Various defini-

²⁹⁴ In *Six Years of Dematerialization* Lippard names a number of films as examples of dematerialised works, such as various moving image works by Ed Ruscha, p. 12, Christine Kozlov's films, p. 31, Michael Snow's films, p. 34 and so on. All these works can be seen as experiments in dematerialising the moving image and challenging the concepts of film itself.

tions of art can be detected when studying art inside the legal sphere and how it is approached within a legal setting. The camera image and other visual media in particular are specifically not altogether uncontroversial and easily handled in law. One interesting recent case, in which this issue was apparent, was when responding to a VAT question the European Commission reversed a decision made in a UK tax tribunal (No. C00266), and refused to classify installations by prominent video and light artists Dan Flavin and Bill Viola as “art” instead oddly branding the works as “lighting fittings”. Did that mean that these works fell outside e.g. intellectual property law, did copyright not subsist in those works as light fittings can by no means be deemed to be artistic in any way? The fact that the Tax tribunals and the European Commission ultimately have to make such calls is illustrative, showing that the legal framework cannot even envision certain, perhaps semiotic/network based, types of artworks.

In Swedish legislation also, the issue and uncertainty as to whether e.g. camera based images can fully be deemed as artworks that can subsist copyright protection is also traceable. Indeed, for a long time camera based images were completely exempt from the Swedish Copyright Law Statute (Upphovsrättslagen, URL),²⁹⁵ regulated instead in the so called Photograph Statute,²⁹⁶ where works were granted a shorter duration of term, namely 25 years post creation to be exact, under a “copyright-light” protection. The Photograph Statute regulated all camera works, regardless of their artistic merit. Nowadays, photographs in Swedish law are treated either as falling under copyright law if they are deemed to be “photographic works” (1 chapter 1§ point 5 URL) and as such enjoy full copyright protection (namely, 70 years post mortem auctoris, etc.). However, if deemed to be “photographic images” instead, they fall under the neighbouring producer rights (5 chapter 49a§ URL)²⁹⁷ with a mere duration of 50 years post creation.²⁹⁸ Even though the general requirements for copyright to subsist fully in works are generally very low for all other artistic creations, the division into *photographic works* and *photographic images* testifies to the existence of certain dated attitudes towards art still linger in (Swedish as well as in other) intellectual property laws where a type of quality merit is still being upheld in the case of the artworks that are not rhetoric-based, produced by a machine, network based etc. By that reasoning, how come a pen scribble on paper is seen as a worthy artistic creation that could be given full copyright protection, while an amateurish snapshot of a tree is not? That is of course a contrived, rhetorical question, but

²⁹⁵ Swedish Copyright Law, full citation: *Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk*, hereafter “URL”.

²⁹⁶ [my translation], full citation: *Lag (1960:730) om rätt till fotografisk bild*.

²⁹⁷ Malin Bonthron and Peter Danowsky, *Comments to Swedish Copyright Law*, p. 112. Swedish citation: *Lagbokscommentaren*, Norstedts Juridik, Göteborg, (2001).

²⁹⁸ Cf art. 7.4 in the Berne Convention that allows the Member States to grant shorter protection times for photographs, however, not lower than 25 years. Henry Olsson, *Copyright: Svensk och Internationell Upphovsrätt*, 7th ed. Norstedts Juridik, (2006) p. 377.

one that illustrates the difficulties encountered in copyright law when art has to be defined. Evidently, it affects the way various works are categorised, which in turn can affect access to these works, as certain works are given more protection than others.

Such blurring of the line or the disappearance of a clear division between what is seen or not seen as art came with the advent of modern art and camera image. The industrial transformations changed how art was produced and the impact the mechanical (re)production could have on the creative production was re-evaluated, but that transformation was not altogether mirrored in law. It also testifies that law to this day struggles with modern and postmodern art, particularly camera based and digital artworks,²⁹⁹ and that it did not know from the start (and is still not quite sure) how to treat such works. Uncertainty can have implications on both protection of and access to works. These older attitudes towards art mean that legislation is always lagging when compared to the development taking place outside its boundaries and therefore it cannot be applied equally to all artworks.

3.5.1 PLATEAU: DELEUZE AND ART

When we look more closely at Deleuze's writings on cinema, as we shall do below, we will see that the semiotic/network based artworks such as cinematic works have certain values that exemplify that which positive law is still not able to address. Deleuze addresses e.g. time, space and memory depicted and presented in cinema, and as such these notions can be equally valuable as any other commercial or other values of cinema. By using Deleuzian theory the cracks in the positive law will start to appear and we can study what it is in law that leads to commodification and as such results in enclosures, obstacles and restricted access to other values that are not per se commercial in nature or generally that still cannot be conceived of legally.

In the *Cinema* books Deleuze addresses cinema both in the context of it being a cognitive medium as well as a phenomenon, which has social and historical implications. Generally, Deleuze distinguishes the pre- from the post world war images by dividing them into two groups that he referred to as *movement-images* and *time-images*. The two were separated then roughly by WWII as well as by the birth of neo-realism as a movement in art theory. Such a division is vastly interesting as Deleuze dealt with, on a philosophical level, how the rapidly transforming outside world and the fast paced changes in production modes could influence the social, cultural and commercial significances and values of art. That could also have implications on access to art, as we soon shall see.

²⁹⁹ As well as other art forms that are not mentioned here such as e.g. dance, conceptual art or performance.

Cinema was understood by Deleuze as the ultimate mass-producing art form, both due to the fact that it comprised of a multitude of images and the fact that the notion of the one unique original in cinema was utterly non-existent; the entire mode of film production was based on multiplication. Cinema's chief values lay not in the object that was produced, the print of the film, but on the narrative, the *ideas* communicated, the reality presented or reinterpreted.

Deleuze begins with the movement-images. It is through these images, he argues, we connect with, experience, and make sense of the world.³⁰⁰ Movement-images thus rest on their documentary-like foundation. What a movement-image accomplishes is a way to describe reality, even if the image itself is staged and/or edited. Deleuze understands the movement-image as a continuous depiction of movement where time is represented chronologically, namely where time is represented as human beings are used to understanding it, creating a documentary-like sensation, a sensation that reality is being "represented". Deleuze also describes movement-images as composites of two sides. Its two sides relate on the one hand to the object in question that is being portrayed and on the other to the whole,³⁰¹ that is, a linear and chronological representation of time passing. In the movement-image Deleuze appreciates editing and montage as that "which constitutes the whole, and thus gives us the image of time" and it is that which creates reality-like images.³⁰²

With movement-images the camera functions as the human eye, even if it is mechanical. When a human being perceives and understands impressions around him/her in real life, even if the information is fragmented, the brain conducts an 'editing process' of its own, it organises and categorises the perceived images into our consciousness so that we ultimately understand them linearly. The movement-image likewise links notions initially perceived (Frame 1: the close up of the shooting gun, Frame 2: wide shot of the falling body) to each other (The human brain concludes: the person was shot and killed by the gun). The mind connects it to other images from memory and organises them so that we can make sense of them, as well as it links us as human beings to the world around us.³⁰³ Movement-images thus function in the same way as the human process of thought,³⁰⁴ namely, their value lies in their ability to describe the reality and make it understandable.

Most films were arguably based on movement-images. Or more accurately, most "commercial" films with a traditional linear narrative were based on movement-image logic. The movement-image based cinema is over-represented

³⁰⁰ Dyrk, *Using Deleuze*, p. 119.

³⁰¹ Deleuze, *Cinema 1*; see also Deleuze, *Cinema 2*, p. 33.

³⁰² Deleuze, *Cinema 2*, p. 33.

³⁰³ Dyrk, *Using Deleuze*, pp. 135-136.

³⁰⁴ *Ibid.* p. 137.

in e.g. Hollywood films, but Deleuze also gave some other examples of the movement-image films that were of a far more experimental nature than Hollywood studio films, for instance Dziga Vertov's *Man With a Moving Camera*. These works, had social, cultural as well as commercial functions. Hollywood's ability to act as life-style creating machinery was a perfect example of a social value. With its ability not only to generate value in terms of box office returns, the commercial cinema also generated socially and culturally significant capital. Even if there is a lot to be said, and a lot has indeed been said, of the kind of "ideology" and life styles Hollywood cinema disseminates, it need not be discussed in this context.³⁰⁵ What is of far greater interest for the context of this research project is, of course, access to *all* types of artworks. Cinema is particularly interesting as it comes with its own public space, i.e. the cinema theatre. The early film could mainly be watched in cinema theatres as, bar for some wealthy exceptions, most people did not have projectors in their private homes. Film could thus only be watched in a public setting. That entailed various acts of communication, both inside and outside the cinematic framework. There was a social aspect involved in going to the cinema also a collective appreciation of the work when watching it with others, which added additional values and functions to the cinematic experience. Film was one of the main modern artistic expressions that attempted to create an "experience" outside the work itself for the viewer, and was thus moving away from traditional rhetoric based notions and 'objecthood'. The drive-in cinema for instance became a social institution rather than a place where film was, or is, watched. There, the watching of the film becomes more often than not a secondary activity.

The fact that cinema (both the making of it and the watching of it) is overwhelmingly a collective process, both created and disseminated by the means of machines indicates that film represents a branch of semiotic/network based art. It also allows us to clearly see how the commercial, social and cultural capital forms exist side by side, and how works can require public spaces in order to be viewed and experienced. Although, as we shall see in chapter 5, public spaces in the digital era are not necessarily always public in the physical sense, meaning open to everyone to physically enter into.

As cinema developed, the approach to film making changed and the visual languages of classic cinema also challenged. The movement-image based film was no longer a satisfactory means of expression. In terms of *time-images*, in contrast to movement-images, Deleuze finds that a clear split between the linear object/whole that could be found in movement-images was not likewise achievable for time-images. When it came to time-image based cinema it was not possible to succinctly define it as merely something that corresponded to or attempted to describe reality. That meant that the time-image based cinema could not as straightforwardly be deconstructed or analysed, Deleuze notes, as it

³⁰⁵ But do see Slavoj Žižek, *The Pervert's Guide to Cinema*, (film), (2006).

presents the past, the present and the future, all at once. Deleuze stresses e.g. Orson Welles' *Citizen Kane* (1941) as an example of a time-image work where the ideas of time and memory were intermingled through various "regions, strata, and sheets: each region with its own characteristics, its 'tones', its 'aspects', its 'singularities', its 'shining points' and its 'dominant' themes."³⁰⁶ All these individual regions appear as both separated and simultaneous, and all of them create the artistic value of these works.

The new way of making cinema might have been a symptom of the psychological turmoil and the internal malaises people were going through post WWII, brought on by the occurrences of the first half of the twentieth century. The modes of expression were therefore changing which meant that the earlier linear and chronologically coherent movement-images did no longer adequately manage to satisfy, approach or depict the post-war reality that was being experienced as much more dire, complex, shattered and thus not equally linear as it had been understood before the wars. As such, it was much more problematic to deal with in art theory. The time-images thus took over from where the movement images ended.

The time-image, Deleuze writes, "always gives us access to that Proustian dimension where people and things occupy a place in time which is incommensurable with the one they have in space."³⁰⁷ The time-image was not so much depicting reality as it was *creating and imagining* a new reality - it was constructing a fourth dimension! Such abstract themes and the deconstruction of traditional subject matters, as I shall develop further below, could only be expressed through certain types of modern and postmodern artworks.³⁰⁸

Evidently Deleuze distinguishes classic cinema from modern cinema when he makes a distinction between movement-images and time-images. For him the violence and the uprooting that had occurred during WWII meant that time had been distorted and that it no longer could fit within the traditional (movement-image) linear narratives. For instance, fragmented memory had for a long time already been explored elsewhere in literature by e.g. Proust and Duras³⁰⁹ and Deleuze stresses here how the same tendency is addressed in the image-based arts such as cinema and what that means. Alain Resnais' *Last Year in Marienbad* (1961) is held up as an example of a time-image based film. Time-image

³⁰⁶ [original emphasis], Deleuze, *Cinema 2*, p. 96.

³⁰⁷ Deleuze, *Cinema 2*, p. 38.

³⁰⁸ Theodor Adorno had also been writing about the phenomenon of modern art: "[...] while the concept of subject matter remains a concern in art, in its immediacy, as a theme that can be lifted over from external reality and worked upon, it has, since Kandinsky, Proust, and Joyce, incontrovertibly declined." Adorno, *Aesthetic Theory*, p. 149.

³⁰⁹ As well as all the other authors being published by *Edition Minuite* publishing house. See also Deleuze, *Proust and Signs*.

cinema accordingly utilises film and its possibilities not in order to depict reality but rather to create or imagine alternative realities.

The value in cinema thus lay, not in the commercial capital only, or the ornamental, romantic or pretty objects being created, but rather in the ideas, or perhaps more accurately imaginations, of a new world. The modern artwork communicated from an empty place, *a crisis*, where the world had to be re-invented, re-imagined, re-built and where all idealistic notions of society had been destroyed. What appeared to have been central and most valuable for these works was the study of time itself, artists were attempting to understand what time was, and whether it was at all possible to live life forwards at a time when people were waking up to a devastated post war reality:

It is here the reversal is produced: movement is no longer simply aberrant, aberration is now valid in itself and designates time as its direct cause. 'Time is out of joint': it is off the hinges assigned to it by the behaviour in the world, but also the movements of world. It is no longer time that depends on movement: it is aberrant movement that depends on time.³¹⁰

In this passage Deleuze aptly summarises the entire essence of the time-image, and what separates it from the movement-image. In a somewhat sombre tone, no doubt affected and coloured by the memory of the occurrences that had taken place in the world after WWII, he explains why there was a need for an altogether different visual language,³¹¹ a new understanding of time and how it could be portrayed. In order to describe how artists were dealing with a post war reality by the means of camera image Deleuze wrote that they were moving away from American 'over-objective conception', the Hollywood narration that we saw above, to an 'automatic subjectivity' that is a subjectivity that was not human but automatic, connected to something a-human such as a machine. At this particular juncture, when moving away from objecthood is discussed, it is here where Stapleton's semiotic/network based works and Lippard's dematerialised works can be connected to Deleuzian cinema theory. They all acknowledge art as moving away from objecthood towards being dematerialised and desubjectivised, requiring participation and an active audience, or as we saw above, *prosumers*. The value of the cinema is thus no longer only commercial or social (as going to the cinema theatre or the drive-in). It is no longer simply depicting reality. Instead, it is portraying amnesia, hallucination, madness, nightmares, dreams,³¹² *memory* and so on. It was addressing that which was unuttera-

³¹⁰ Deleuze, *Cinema 2*, p. 39.

³¹¹ "Language" in this context refers to the wider French term *langage* that Deleuze applies which focuses on all utterances, also the non-verbal ones, rather than the narrower *langue* that refers to the language system itself, see Deleuze, *Cinema 2*, p 28.

³¹² Deleuze, *Cinema 2*, p. 53.

ble: that which no-one could put into words. The main significances and values were now the ones embodied in the ability to provide the tools that help people *cope with the reality* of transitional times. The therapeutic significance that the camera image can have was of course interesting from a public access point of view and it shows why access to cinema was necessary.

By adopting Deleuze's cinema theory, juxtaposed with Stapleton's and Lip-pard's writings, we can demystify and extrapolate all the different capital values (commercial, social, cultural and perhaps even *therapeutic*) and the knowledge encapsulated in art, and then go on to discuss why such values ought to be made accessible to the public, even outside the commercial sphere. That artworks are valuable in terms of knowledge potential is obvious, however, as we already have seen, the fact that the medium of film does not have the same attributes as traditional art resulted in the above mentioned debate, namely, was the camera image to be considered as art at all, and if so, what functions did it have? Deleuze's writings on cinema, both movement and time-images help us not only to identify many additional functions of cinema and images, and to understand the medium of film, but it can also serve as a theoretical tool in conducting a critique of law. Using Deleuze's argumentation aids in illustrating how law only focuses on that which is tangible in art, inside the legal sphere art is commodified and packaged as entertainment which is mainly commercially valuable. But how film and all its additional social and cultural capitals ought to be treated and whether law, especially in the information society, should address all the other functions that are not commercial in nature remain to be discussed.

Current positive law can result in the rather awkward situation where the more commercial value a work has, the more tangible and object-like it can (pretend to) be, the more it will be apt to fit inside the legal sphere as a cultural commodity and intellectual property. In such a case, access to the ideas and the knowledge potential in artworks are not being treated as (equally) valuable as the commercial potential. In terms of modern artworks, movement-image based cinema for instance has historically lent itself more easily to fit within a commercial paradigm even though it is a collective art form. Commercial cinema is adaptable to law as it uses traditional legal and economical tools (e.g. contracts, but also in the way it is marketed and exploited). It can be commodified even though it is not directly envisioned as art within intellectual property sphere. But, the same is not always true of e.g. the time-image based cinema. Not only does the time-image based cinema not have a chronological, traditional narrative and expression that can be packaged for the market, it is also far more complex to define, *as anything*, let alone a commodity.

However, what the time-image based cinema lacks in commercial potential when compared to its movement-image counterpart it more than makes up for in social and cultural capital. As the commercial potential of it is smaller, the access to such works shrinks too. And ironically, as Deleuze very well points out:

“This is the old curse which undermines the cinema: time is money.”³¹³ And it is evident, the more money (economic capital) a work generates the more it can be fitted inside the construction of private and commercial law such as copyright law, and there a wider access to the commercial works will be enabled by the marketing and distribution structures, while the less commercial works will more often than not be pushed back by the same legal and market structures into the oblivion.

3.5.2 PLATEAU: ACCESS 2.0

With the digital advancement and with an augmenting number of distribution platforms that are comparatively inexpensive to build and uphold, all camera based artistic works can nowadays be accessed in entirely new platforms and more easily than before through e.g. VOD,³¹⁴ pay-per-view and DTO³¹⁵ (as well as through various illegal platforms). The reliance on objecthood and expensive marketing and distribution structures in order to exploit works and make them accessible is not equally pronounced in the digital era. Still, the point that is made here is that when such dematerialised works (e.g. films), or access modes (e.g. legal or illegal digital platforms), are indefinable in one way or another, as the definitions may be connected to earlier paradigms, and if the work does not have a clear strong commercial potential, it can be rendered weak in terms of access, regardless of any at the time available digital possibilities. The selection of works that can be accessed is still very much conducted by the market and is prevalent in terms of what generally can be accessed even in the digital era. Digital alternatives could be used (more) productively in terms of accessing artworks more widely, provided, of course that the digital alternative is not fully commodified too.

In law, the digital alternatives are in principle approached as a threat, a mode for potential illegal dissemination of copyrighted works. That assumption remains to be subverted. Such an assumption also locks in the social and cultural capital of the artworks, which are still to be understood and genuinely given a value. The artistic *content* needs to, at least initially, be separated partly from its economical value and partly from the platforms (*carriers*) through which it is accessed, so that it is possible to determine what requires further (legal) attention and why in terms of access.

When enclosures of products and traditional packaging, marketing and distribution processes are discussed, it has to be kept in mind that they are to a certain extent connected to the industrial paradigm, and adapted for commercial exploitation that looked differently than the one that is happening in the digital

³¹³ Deleuze, *Cinema 2*, p. 75.

³¹⁴ Video on Demand.

³¹⁵ Download to Own (or Permanent Electronic Licence).

sphere. These are the paradigm shifts that need to be acknowledged. The consumer attitudes are vastly different from what they were in the industrial economy. The audiences require and are used to open access, but the legal framework remains rather unfamiliar with openness as opposed to enclosure. Today enclosures are seen as unnecessary obstacles to access. Further still, even the most sophisticated technical fences raised in order to restrict access are often eventually circumvented. That means that modes of exploitation and access have been challenged in the digital knowledge society. Law has to follow and acknowledge this change.

The digital space itself can be problematic in relation to law; in reality it is a complex bundle of digital elements that we refer to with the unifying umbrella term “the digital space”. It comprises of both carriers (platforms) and content (ideas/knowledge). For the purpose of access enabled within a cultural commons the digital content will always be far more interesting to study than the platform through which the content is distributed, accessed, communicated and shared, be it through lawful channels or by way of infringement. Even if, the separation between content and carrier is not as straightforward always, which will be discussed further below.

3.5.3 PLATEAU: ORIGINALITY AND FIXATION

One of the reasons the dogmatic reasoning behind copyright law as we know it is problematic is that in most copyright legislations a work of art will subsist copyright if it is deemed to be somehow *fixed*³¹⁶ and the ontology of art in copyright law is, as we have seen, often grounded in, a rhetoric based notion of works, that is, works are assumed to be invention/original, created by the hand of an author/genius. The two basic prerequisites of copyright that the work has to be an *original* and that it has to be somehow *fixed*, that is not an idea but an expression of an idea, will be used to further indicate how copyright law very much rests on the notions of rhetoric based art³¹⁷, and as such it experiences semiotic/network based artworks as problematic.

The idea of originality that is required in copyright law is complex. It could be understood either as a “quality requirement”, i.e. the work is an original in that that it is not a “copy” or created from an “infringing activity”. Originality can also be understood as a synonym for “unique”, something that has a “personal touch” of the artist and that is created as a result of his individual labour

³¹⁶ i.e. that is not an idea but an expression of an idea. Swedish law does not have a direct fixation requirement, instead Swedish law distinguishes idea from expression at the point of creation (“verkets tillkomst”) – the creation in turn can have various stages – sketches, models, drafts etc. in all of which copyright naturally subsists. Mogens Koktvegaard and Marianne Levin, *Immaterialrätt*, Norstedts Juridik, (2006) p. 66.

³¹⁷ Stapleton, *Art, Intellectual Property and the Knowledge Economy*, chapter 1.

(physical as well as spiritual). In Swedish law for instance, the requirement for originality seems to be inferring the latter, namely that the work is created by the author himself as an expression of his individuality³¹⁸ or as “the result of individual spiritual activity”³¹⁹. Such reasoning is true in continental law too most notably in French law where the notion of the artist’s sprit and the artist’s “soul” are perhaps strongest in European legislation. Which is also evident linguistically from the French expression for copyright “*droit d’auteur*” – author’s right, as opposed to, of course, “copyright” – the right to copy/the right in the copy. Anglo-Saxon law in turn focuses instead on the activity of copying, which is something vastly different from, and not necessarily equally tied to, a rights-creating individual artist. Nonetheless, the reliance on originality remains, in one way or another entrenched in law. But how does that affect works that inherently multiply in the digital sphere, or that are created in participation and within a network, rather than by one author’s individual spiritual activity? “Fixation” is another complex matter in intellectual property law. An expression is achieved when an idea takes a *tangible* form or when an idea is somehow executed and *fixed*.³²⁰ The focus on objecthood and tangibility is apparent, “ideas” are excluded from copyright law – a work subsist copyright only when it has progressed from the stage of idea to a fixed, tangible expression.

Bearing in mind everything that has been addressed so far, if artworks as knowledge sources are being disseminated, it becomes evident that there is a difference between access to the platform (both legal and illegal) and access to the content (but can access to ideas and knowledge ever truly be said to be illegal?). In copyright law, in order for it to be able to understand and handle a dematerialised artwork in the digital realm, the focus has to be placed on the platforms and the way they are constructed and how they enable distribution,³²¹ and not, as Deleuze would have it, how ideas are linked, grouped and interconnected to make up artworks that express, imagine or create something. In order to successfully claim copyright infringement when artworks are disseminated digitally there has been a concentration on the modes of access, focusing on the smallest digital components (e.g. bit torrents) in order to find the required “fixation” and “tangibility”. That can be treacherous, as that which is that is being

³¹⁸ See e.g. Koktvegaard/Levin, *Immaterialrätt* p. 75.

³¹⁹ [my translation], Olsson, *Copyright*, p. 66 “resultatet av en individuell andlig verksamhet”.

³²⁰ See e.g. Olsson, *Copyright*, p. 84, the protection of expressions of ideas rather than ideas themselves stems from the Berne Copyright Convention, see e.g. David I. Bainbridge, *Intellectual Property*, (6th ed), Pearson, Longman, (2007), p. 46.

³²¹ The difference between eBay, Google and Pirate Bay can be addressed here. While they may seem very different when the E Commerce directive (2000/31/EC) for instance attempts to define the digital spaces, the three become confused, and it can be very difficult to discern why the one is different from the other when adopting a strict legal reading of the directive’s structures.

expressed³²² is then ignored, as are the social and cultural capitals being disseminated, and knowledge being communicated and shared.

The increasingly stronger enforcement legislations have led to more enclosures and more restricted access. Copyright protection encloses works through the exclusive right, and thus, access to works can only happen in commercial and private spheres. There is social and there is cultural capital, which are at the same time also being territorialised, grounded, enclosed. The social and cultural capital encapsulated in works will remain locked inside an old paradigm that cannot understand them, because there are no paths other than the industrial one that enables dissemination of artworks. These broader values and other capital forms on the other hand, have to do with who we are and how we understand ourselves, our communities, our time and the collective and individual memories to which we are subject. Understood in such a way, the additional need for a commons where (lawful) access, communication and sharing of knowledge can happen outside the industrial paradigm is obvious.

3.5.4 PLATEAU: ART AS BEING

How could law imagine a cultural commons as a potential sphere for access, communication and sharing of knowledge in artworks? The French philosopher Jean-Luc Nancy wrote that “[t]here is no meaning if the meaning is not shared, and not because there would be an ultimate or first signification that all beings have in common, but because *meaning is itself the sharing of Being*.”³²³ Law has to be responsive to the developments, the changes from material to dematerialised, from analogue to digital, and it has to genuinely understand the growing digital sphere as an asset rather than a threat. Discussing cultural commons within the framework of law can be the first step.

In Deleuze’s cinema writing two basic concepts are the idea that everything can be an “image” and that time is not necessarily linear or chronological but has a paradoxical form where “past, present and future all co-exist and only exist in every immeasurable instant of the present.”³²⁴

The images, the ideas, the information, the knowledge that we gain constantly at a hyper speed in the digital spheres, as well as those images that we encounter and have been exposed and subject to in the past are integral to who we are. They need to be read and understood so that we can place them in a con-

³²² This has e.g. been the case when platform providers such as Napster, Grokster and indeed Pirate Bay have been sued for contributory infringement, when the original infringers have not been traceable. In constructing contributory infringement cases, the courts have focused on the platform itself and the way it is structured in order to locate the infringing activities.

³²³ Jean Luc Nancy, *Being Singular Plural*, (trans.) R. D. Richardson & A. E. O’Byrne, (ed.) W. Hamacher & D. E. Wellbery, Stanford University Press, (2000) p. 2.

³²⁴ Dyrk, *Uzing Deleuze*, p. 61.

text and grasp their real social, cultural as well as commercial values and structures. For that to happen we need the cultural commons and an unfettered access to works that is not solely based in the economic capital. The notion of time-images for instance that Deleuze discussed and the passing of time is thus an *example* of how certain traits in art, which are very valuable socially and culturally, often remain unaddressed by e.g. copyright law as they are too abstract, not material enough and, dare I say, not sufficiently commercial in the sense of economic capital. Copyright law, at least the way it stands today, requires a reified, tangible object-based artwork that potentially has an economical value, and everything else has to be treated as a little less significant, as it does not conform to the given legal framework. Yes, it is true that there is a theoretical public interest ambit built in within copyright law's own structure, but the deeper we step into the digital age, and with the strengthened enforcement rights, the more it becomes evident that the public interest is weakening, and that it can only be upheld where there is a genuine commercial potential in the underlying work. All of that ought to be considered when assessing the legal framework around access to art in a digital sphere and in the information society.

This is the reason Deleuze's writings on cinema were interesting here, maybe as a detour – in order to illustrate what it is that copyright law is currently excluding, what it is lacking and how it is creating obstacles to access. Deleuze interpreted cinema as the organ for perfection of a new reality that came with industrialisation, and then after the World Wars, cinema was seen as broadening of vision, of being able to see further than with the naked human eye... Carnera conducts a similar argumentation citing the Swiss painter Paul Klee who said: "Art does not reproduce what is visible but makes things visible."³²⁵

It is this *making things visible*, the seeing further than the naked eye that was, and still is, of course, of interest, *public interest* as it were, and access to it is necessary regardless of the works' economical potential or its physicality or fixation. All this has, however, remained unaddressed to such an extent that it has so far been impossible to articulate and grasp theoretically and even less so legally how the social and cultural capitals function, where the knowledge potential is, and where the spheres are in which artworks can be communicated and shared for purposes other than the industrial ones.

In the digital information society there are platforms and possibilities to (inexpensively and instantly) constantly communicate and share ideas and knowledge. But these possibilities are not yet the commons proper. Access to artworks needs to be approached slightly differently in the digital knowledge society. So far, artworks have been approached as mainly individuality-based, tangible and material. Were artworks to be approached as for instance semiotic and

³²⁵ Alexander Carnera, *Magten over livet og livet som magt, Studier i den biopolitiske ambivalens*, Copenhagen Business School, Institut for Ledelse, Politik og Filosofi, (2010), p. 290 citing Patsch: *Klee*. Taschen. Köln. (2007).

network based, certain ontological points of departure in modern copyright law would be side-stepped such as the notions of “originality” and “tangibility” that law relies on today. As a consequence, copyright’s exclusion of “ideas” from its ambit is sensible for the intents and purposes of a commercial exploitation of intellectual works, but in terms of the work’s social and cultural capital such exclusions can be challenged. The originality, fixation and tangibility requirements still being upheld are obviously not always appropriate as tools with which to navigate through the digital sphere.

There already exist some, still not easily definable, concepts that are very similar to a cultural commons, that are constantly being created and negotiated in the digital spheres, but they are not legal. In the realm of art the constant creation of these concepts is remarkable. Nevertheless, we still do not really know how they function, whether they ought to exist at all and how to use them productively (and in accordance with law). It might be that it is a threshold over which we are entering in an even newer era in terms of access to artworks and their communication and sharing. In that case, art in the digital era can no longer, naturally, be described, treated and understood as merely a rhetoric based art form, but rather it has to be approached as an art form that is equally based on communication, networks, abstraction, and sharing, by its nature. It is increasingly virtual, plural, dematerialised, and this is so because of the network-based, connected, online, digital society in which we live.

The difficulties that copyright law experiences today have to do with precisely this, that law has painted itself in a corner by not really knowing how to handle the digital alternative. It thus focuses on codes and platforms and not the content and meanings, communication and sharing of ideas and knowledge. Perhaps copyright law is not the appropriate tool with which to approach a discussion on cultural commons for communication and sharing, due to its fundamental construction and its individual-rights-based nature? Artworks in the information society have had to be forcefully made tangible and object-based in order to be understood and grasped in copyright law. As a result of that, superfluous gatekeepers and fences have been created e.g. longer durations of copyright, compromised fundamental rights such as freedom of speech, all this in order to get to the fixation or to the bottom of illegal dissemination, which in turn has resulted in the shrinking of the public domain, and so on. This has been tied to the processes of the second enclosure that have been needed in order to exploit the intellectual works commercially.

Enclosure, evidently, is something else in the digital realm and the enclosures that were appropriate for the industrial era are no longer applicable. The industrial commercial processes required various acts of enclosure. As long as the artwork meant for the market has to be enclosed, even in the digital sphere it will always have to be provisionally and artificially enclosed, it will always be forced to be reified, made tangible, in order to be exploited and accessed. By treating works only as commodified and packaged products, means that only

the economical value of the work will be catered for and the social and cultural capital forms will be, at best, left to the vague principle of public interest. However, economic *as well as* social and cultural capital forms are in reality dependent on each other, and a number of problems that e.g. the entertainment industry has encountered during the last decade, has arguably been due to the fact that artworks have been fenced off in a way that is not compatible with general attitudes of the public that is used to open-access when it comes to the digital spheres and digital content. That has meant that works have been taken out of their social contexts in order to eliminate infringing activities brought on by the digital possibilities.

It is well known that artworks can at best be maladroitly and artificially enclosed in the digital spaces. But any further and additional justification of enclosures disregards the social and cultural capitals that the digital spaces and their contents have inherently. The trouble seems to be that contrary to the tendency in the technical sciences and their development that has more and more been incorporating the aspects of networks and sharing, law has manically maintained the traditional definition of what might constitute an artwork (the original/tangible/individual based concept) as defined in copyright law, as well as what constitutes spaces in which these works can be accessed: physical places where commodity-like works are sold and otherwise commercially exploited. And that has been, and is, problematic on so many levels, one of them being that law requires that we can always point to a fixed, original work that is created by a definable, human being, a tangible expression of an idea and that can be packaged, enclosed and traded with. That is so very difficult, or maybe impossible, to achieve in a digital world and with certain works, that are in fact prevalent nowadays such as e.g. semiotic/network based artworks.

“What we are looking for there, like in the photographs, is not an image; it is an access”³²⁶ writes Nancy. The access to artworks is thus equally significant as the work itself in the digital era. Instead of clumsily attempting to define what the artwork might be in the digital world, e.g. an individual work/invention built up by a collection of codes that is accessed through (legal or illegal) digital platforms, perhaps it would be far easier to focus on the significance of the access to knowledge via a commons that is constituted and upheld through legislation? Access to the artwork *including* the theoretical concepts and values mentioned above such as the ideas, *movements* (whatever that may be, both literal movement and movement in terms of ideas) as well as *time, space* and *memory* contained in the works could in that case all be catered for and considered as valuable as the industrial, economic capital value. The challenge is, as challenges go, to create spaces where that is possible and can be achieved while at the same time upholding the structures such as copyright law that do enable the commer-

³²⁶ Nancy, *Being Singular Plural*, p. 14

cial exploitation of the works, something that is equally valuable. The one does not have to cancel out the other.

Legal structures have predominantly been placing art inside the property paradigm. In the property paradigm economical reasoning (enclosure, packaging) and (private) economic capital³²⁷ dominate. That means that all other functions and social and cultural capital forms that an artwork has, are being side-stepped. In the digital era omissions of such values can no longer be disregarded. By not understanding the concepts imperative for artworks and their existence today in the information society there might be serious implications on access to artworks in the future, as there is indeed in the present. That means that access to knowledge could be equally impaired.

When the artwork is no longer dependant of physical, tangible, material forms, and as it often exists in a de-materialised form, within the realm of the virtual the discussion concerning the cultural commons and its place in law is inevitable. Even though Deleuze himself referred to the Proustian rather than the digital sense of the virtual when he discussed images, his writings on cinema can be of particular interest, especially when it comes to understanding the various social and cultural capital forms of art and in reassessing what it is that law does when it seeks to categorise artworks ontologically. The industrial processes of enclosure must specifically be kept in mind. And even further still, Deleuze's writings on images can be used in conducting a critique of certain principles of copyright as not being altogether modern in some of its parts in a time of the digital artwork that is abstract/virtual/network-based/fragmented etc. and in a world where artworks exist inside the continuously evolving creative communities and spaces that are based on instant communication and open access.

A general critique of copyright is thus unavoidable as it, in the way it is currently constructed, still places artworks largely within the property paradigm, which is not always commensurable with the information technology paradigm that requires a comparatively open, easily accessible commons and spaces where knowledge and ideas can be communicated and shared. So now what? If intellectual property laws like copyright are creating private property out of artistic and intellectual works and if that is seen as inappropriate what could then be an appropriate approach instead? Perhaps it could indeed be a commons based legal concept?

Enabling a wide access to artworks and how that could work *in conjunction with* current copyright law today is what we are discussing here. Even if current copyright law obviously can be and is problematic in parts when seen from an open-access and commons point of view, one ought to look at both its drawbacks and benefits when assessing it and discussing additional commons-based structures. A commons-based structure is capable of handling the private and the public simultaneously. Before that can be further discussed, we shall first

³²⁷ Bourdieu, *The Field of Cultural Production*.

look at obstacles to access in the next chapter, and then at the general concept of commons, before discussing a legal concept of the cultural commons and how it works with current intellectual property law.

CHAPTER 4

CASE STUDIES (PART 1): ENCOUNTERS AND LINES OF FLIGHT

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The complexities in terms of access to art in the present day are not always apparent. Finding an encounter is an act that comes prior to articulating the problem itself. The sheer creativity of jurisprudence actually always stems from encounters with previously unencountered problems. It is then when law truly comes face to face with something that it has never seen before that we are forced to move, develop, create. An encounter is almost a violent act. The French philosopher Henri Bergson wrote:

The truth is that in philosophy and elsewhere it is a question of *finding* the problem and consequently of posing it, even more than of solving it. For a speculative problem is solved as soon as it is properly stated [...] *But stating* a problem is not simply uncovering, it is *inventing* [...] The effort of invention consists most often in raising the problem, in creating the terms in which it will be stated. *The stating and solving of the problem are here very close to being equivalent*; the truly great problems are set forth only when they are solved.³²⁸

In this chapter then let us embark on the journey of finding the problem.

4.1 ENCOUNTER 1: THE LOST MURAL OF BRUNO SCHULZ

This chapter begins with a story. The story is about a man, an artist, a writer, called Bruno Schulz and particularly it is about one of his works of art that was lost and then found, many, many years after his death and after its original inception. By opening with the Schulz-case we begin to discern one crucial aspect of the problem, namely *access to physical works*.

Bruno Schulz lived between 1892 and 1942. He was born in a town called Drohobych that during his lifetime belonged to Poland. Drohobych is today on Ukrainian territory. On the surface Schulz was quite an ordinary man, a man who made his living by teaching drawing at the local high school. In reality, he was extraordinarily multitalented and his passion was his own work, his writing, his painting, his drawing. As an author, and during his short life, he only managed (as far as we know) to finish two short story collections one called *Cinna-*

³²⁸ [original emphasis], Henri Bergson, *Creative Mind: An Introduction to Metaphysics*, (trans.) Mabelle L. Adison, New York: Citadel Press, (1974. [originally published in 1938]), p. 51.

mon Shops (that is translated into English as *The Street of Crocodiles*)³²⁹ and the other called *The Sanatorium Under the Sign of the Hourglass*.

This case study is about a work that was initially one of Schulz's lesser known works but which, in time, has become probably his most talked about and disputed pieces – a mural painted for a little boy's nursery.

Painted in 1942, lost for nearly sixty years, rediscovered in 2001, disputed over and mystified, the pieces that once made up the mural painted by Bruno Schulz are today scattered and divided between two countries. Some parts remain in Schulz's hometown Drohobych, Ukraine, while others are in the Holocaust Memorial, Yad Vashem, in Israel. A work created during WWII, it embodies the uncertainty of its time and it is a living testament to the horror, despair and suffering that plagued the lives of ordinary people in Europe. Its subject matter is a fairy-tale, yet it is impossible to disregard the anguish and despair encapsulated within it. Mirroring its own time, while acting as a shared memory and allowing current day audiences to gain a glimpse into their collective history, the work also reflects apparent issues of ownership, control and access to an artwork. The mural is probably one of the most conflict-ridden lost artworks of the last decades. To consider this case is, for the research conducted herein, inevitable, imperative.

When WWII, erupted the lives of all people, especially people like Schulz, changed irrevocably. Born into a Jewish family, he would have normally needed to wear the Star of David on his outer garments, but thanks to his artistic skills he avoided this fate. Everyone who, like Schulz, was deemed to be a “necessary Jew” by the Gestapo evaded being branded in such a way because these skilled workers were needed and as a consequence they were kept away from all round-ups and transports. As fate would have it, a Nazi officer called Felix Landau, who had a keen interest in the arts, took to Schulz and chose him to be his artist-protégé, his own “skilled Jew”, and commissioned several works from him. One such commission that Landau assigned to Schulz was to paint the walls of his son's nursery.

Creating for a young boy, under what can only be described as duress and fear for his life, meant that Schulz had to depart from his own usual style, which was normally dark, mystical, and employed an extensive use of overtly sexual visual vocabulary. In order to stay true to himself and his storytelling he decided to use symbolical imagery that still could tell the stories he wanted to tell, but that would remain unnoticed by Landau and be appropriate for a child. This work kept him alive for some time, but there was an increasing sense of fear in him and the Drohobych Jewish community. On November 19th 1942, one of Landau's rivals within the Gestapo used a commotion that erupted in the Jewish ghetto and shot Schulz to death. A couple of days prior to that Landau had

³²⁹ Bruno Schulz, *The Street of Crocodiles and Other Stories - Tailors' Dummies*, (trans.) Celina Wieniewska, New York: Penguin Classics, (2008 [originally published in 1937]).

killed the same rival's Jewish dentist. The rival, upon shooting Schulz, at least so the story goes, truthfully or not, retorted to Landau by saying: "You killed my Jew – so I killed yours". After that day, the mural in the nursery that Schulz had been working on fell into oblivion. Only sixty years later, in 2001, did a German documentary filmmaker, Benjamin Geissler, travel to Drohobych specifically in order to locate the mural.³³⁰ Astonishingly enough, he managed to find it.

When Geissler and his crew found the mural it was unquestionably a monumental cultural find. However, where the work should be kept, who the rightful owner was and who should be able to access and control it were obviously questions that emerged as soon as the first traces of the mural were uncovered.

In legal research, questions like these are not uncommon and they are constantly being discussed. How do we deal legally with problems which arise when a significant artwork and cultural heritage is (re)discovered? These questions become even more difficult when discussing works created in wartime, or under coercion, and where territorial belonging is contested.

Disputes often end up in the courts of law but the law is not always equipped to deal with all the complex issues that arise with such cases: the delicate political and diplomatic questions, the aesthetic dimensions, the matters of preservation and up-keep, the conflicts of interest. It very soon becomes apparent that it is far from just about a balance between the private (the work as property) and the public (the work as cultural heritage).

Regardless of the difficulty that these disputes concerning ownership and control of artworks pose to law, they are nonetheless, quite commonly settled, and adjudicated upon, in the courts of law. Often, the heirs or beneficiaries of the artwork argue that it belongs to them by blood-line or testament, and that they, therefore, ought to be given the status of legal owner, able to fully and unrestrictedly control the work by any means; to keep it, sell it, destroy it, and so on. If deemed in such a way, the work is legally interpreted as mainly property, a private asset. Legal instruments, such as for instance property laws and copyright law, fence it off. Placed inside the private sphere, the work is in those types of cases made accessible only to the owner or the people that the owner approves of, or designates.

The counter argument is often brought by libraries, artistic or cultural institutions, museums, or even nation states as we shall see in this chapter, who argue that these artworks must be seen as cultural heritage, owned by the people, and that only a public institution can adequately tend to certain works that represent an entire people collectively. In this instance, the work is interpreted as having a legally defined public interest that outweighs and overrides the private interest. The work functions as a symbol of identity for a people or a nation,

³³⁰ Benjamin Geissler, *Finding Pictures*, Documentary Film, Benjamin Geissler Filmproduction, (2002).

and it is placed inside the public sphere – made accessible to all through a state or a public institution such as a library or a museum.

Some works, however, fall through the cracks of law. These works cannot be deemed as either mostly private or predominantly public. They simply defy the straightjacket imposed by various definitions such as: whether it is property or heritage, which territorial belonging or nationality can be ascribed to it, where it ought to be kept, and so on. This Schulz case, on the facts of it, was a perfect storm when it comes to questions like these.

After Geissler unearthed the lost and practically forgotten mural in 2001 the controversy surrounding the ownership, control and access to it that ensued was inevitable. Five fragments of the mural, which had already been rudimentarily restored by Polish conservationists, were, depending on which side of the story is told, either smuggled or rescued by Yad Vashem representatives and taken to Israel. This removal of the five pieces resulted in international ire.

A settlement was reached in the end between the state of Ukraine and Yad Vashem through diplomatic (and contractual) channels allowing the pieces that were taken to Israel to remain in Yad Vashem on a “long term loan”³³¹. Nonetheless, it still is one of the most interesting recent examples where an artwork defies law and legal definitions³³². For now, let us go back and retrace what initially happened to the work and then go on to analyse the legal problems and the lines of flight that challenge law as they arise.

As soon as Geissler and his crew had discovered what seemed to be traces of the mural in the old Landau house they immediately alerted the Ukrainian authorities, and Polish and Israeli art preservationists to help them with the excavation. The excavations of the mural began. However, before the entire work had been lifted from underneath the layers of paint and wallpaper that covered it, some five recovered pieces that had already been somewhat restored by Polish conservationists, were taken away by Yad Vashem representatives.

This removal of the restored pieces led to a *dispute*. The involved parties, the community and art experts could not agree whether this was the right thing to do or not. Questions such as: “Who could rightfully control this newly rediscovered, work?” sprung up. Was it truly Yad Vashem, because Schulz was a Holocaust victim and because it is an institution with the means and knowledge to preserve the work properly? Or was it Poland, because Schulz had been a Polish citizen? Or was it the Ukraine, on whose territory it had been found, and who were at the time planning to open a Bruno Schulz museum in his hometown of Drohobych?

This case illustrates some of the problems surrounding issues of access to art and cultural heritage. Not only was it unclear which nation had the strongest

³³¹ A loan with the duration of twenty years, with a built-in option to extend the term consecutively five years at a time, after the first twenty years have run out.

³³² The settlement agreement shall be more closely examined in chapter 7.

grounds for claiming ownership, the case was even further complicated by the fact that the mural also embodied knowledge and information, as Schulz had incorporated social commentary and criticism in the painting. He had for instance painted un-Aryan features on the queen in the painting, something that was unheard of, even forbidden, when Schulz painted it. On one part of the mural a dwarf's face appears to bear the artist's own self-portrait and this dwarf can be seen at the reins of a carriage. This is very important to note, because at the time Nazi laws prohibited Jews from both riding in and driving carriages. Schulz's mural was thus at once a timeless and unusual act of disobedience and social criticism, a historical document, as well as a disputed object of cultural heritage.

The object of the case study is thus a mural that is a significant work of art for all Jewish people as it is a part of their history, while it at the same time, appears equally significant for the Polish people, especially when considering the fact that they are trying to deal with their pre war Jewish heritage and its past and present relationship with its own Jewish population. It also embodies a piece of European history. A traditional approach to identity is therefore problematic as at the core of this issue undoubtedly lies a question of justice and how law could deal with such conflicts, and whether it is possible to at all approach this case legally. In this case I ask whether law is able to confidently rule and designate the legitimate owner.

Having to weigh the fact that Schulz, influenced by Judaism, its teachings and traditional Jewish methods of storytelling, at the same time as he was a Polish citizen and that he was, essentially, culturally secular, is very illustrative, particularly in order to reveal the plateaus of the artwork that then need to be fitted into the rhizomatic legal reasoning. There is an identity implication, or more accurately, *haecceity*, which shall be analysed below. This term, as was mentioned in chapter 2 is used instead of identity, as it focuses on the actual properties of a subject rather than imagined/assumed identity traits. As such also the legal subject is approached differently. Deleuze and Guattari explain haecceity:

A degree, an intensity is an individual, a *Haecceity*, that enters into composition with other degrees, other intensities, to form another individual. [...] In short, between substantial forms and determined subjects, *between the two*, there is not only a whole operation of demonic local transports but a natural play of haecceities, degrees, intensities, events, and accidents that compose individuations totally different from those of the well-formed subjects[...] However, depending on their degree of speed or the relation movement and rest into which they enter, they belong to a given Individual, which may itself be part of another Individual governed by another, more complex, relation, and so to an infinity. There are thus smaller and larger infinities, not by virtue of their number, but by virtue of composition of the relation into which their parts enter. Thus each individual is an infinite mul-

tiplicity, and the whole of Nature is a multiplicity of perfectly individuated multiplicities.³³³

When Deleuze described the notion of the encounter he addressed it as something that forces us to “think [t]his something is an object not of recognition but of a fundamental encounter”³³⁴ (*rencontre*³³⁵). This is how I propose we approach the Schulz case, as an encounter, as something previously unencountered in law, and as Deleuze goes on to say such an encounter is perplexing “in other words it forces [us] to pose a problem.”³³⁶

The access issue is of course the one that we focus on here, namely from a legal perspective, how do we approach this case and access to this particular work after the death of the creator, but also after the death of the commissioner, heirs, after copyrights have expired and after wartime? Schulz’s mural is obviously particularly problematic and, as I shall be developing further below, when it comes to this specific piece of art it is unusually difficult to find any *terra firma* to stand on, or anything onto which to build the legal argumentation upon.

4.1.1 LINE OF FLIGHT: IDENTITY

The first complexity that must be analysed further is the identity of the creator. The mural, which was initially intended to adorn the walls of a nursery, now appeared to be a work of art that had been created with the intent to wordlessly illuminate the story of the Drohobych Jewish community at a time during which it was painted, detailing the struggle of the Jewish people, expressed utilising religious symbols/devices. Even though Bruno Schulz was highly influenced by the Jewish religion he was still a secular man and there are many testimonies that confirm that he considered himself to be, first and foremost, a Pole. He probably never saw the Polish people as his oppressors and his Polishness undoubtedly also influenced his work greatly, defined him as an artist and as a person, and ultimately played a great role in his life. The problem concerns the fact that if the work is deemed Jewish in some way (e.g. Jewish

³³³ Deleuze/Guattari, *A Thousand Plateaus*, pp. 279-280.

³³⁴ Deleuze/Guattari, *What is Philosophy*, pp. 139-41, Andreas Philippopoulos-Mihalopoulos, ‘The Autopoietic Fold: Critical Autopoiesis between Luhmann and Deleuze’. See also Fredrika Spindler, ‘Filosofin i Tänkandets Våld: Eller Coming out of the Ball Park’ in special issue: *AILOS + GLÄNTA: DELEUZE*, (2004) and Deleuze, *Difference and Repetition*, p. 189.

³³⁵ As opposed to recognition – see e.g. H. L. A. Hart.

³³⁶ Deleuze/Guattari, *What is Philosophy*, p. 139-41, Philippopoulos-Mihalopoulos, ‘The Autopoietic Fold: Critical Autopoiesis between Luhmann and Deleuze’. The attempt here is to read the encounter as something ordinary, and not as fetishized or as an apocalyptic moment. Andreas Philippopoulos-Mihalopoulos, Workshop presentation, *Take A Walk: Law, Bodies, Space*, Lund University (21st May 2012).

folk art) and in giving prominence to the one side, Jewishness, it has to be asked whether the other aspects of “identity”, Polishness, Europeanness, are simultaneously being negated, and if so whether it is at all possible for Bruno Schulz and his work to belong to both the Jewish and the Polish people at the same time while remaining in Israel and still being European? Or can it belong to mankind as a whole? Traditional legal approaches no doubt struggle to deal with this question.

The kernel of the issue centres not only on the people the work rightfully belongs to, but also consequently where it should be kept and who should be able to access it. That too turned out to be an enigma, at least from a legal perspective. To answer that, one is put in the uncomfortable situation of having to *define* what Schulz was, and what he was *not*. Who was Bruno Schulz – a Polish Jew, or a Jewish Pole, or simply a European artist who was a victim of Nazism?

The question of not only the artist’s identity but also the artist’s *Heimat*, thus becomes inescapable. In these cases it is evident that the law appears stale and inadequate because it seems to be presupposing certain notions of archaic monocultural societies and easily definable nationalities. But issues concerning the lack of identity, or perhaps more accurately multi-identity, are far less unusual today than they were at the turn of the century. There are many artists that are creating in today’s multicultural, globalised world with on-going and increasing disputes, migration that is constantly taking place, where national identities are blurred and many territorial borders still remain problematic and undefined. So the concept of haecceity lends itself nicely for the analysis here, and becomes a much more appropriate tool, that allows for a more sophisticated reading of what is commonly referred to as identity.

I will argue that the reason we (the lawyers, the legal philosophers, the scholars, *the people...*) perceive Schulz’s mural as an insurmountable problem is because there appears to be an incongruity between the notions of what art is (supposed to be), who the artist is (supposed to be) and what they *de facto* are in the eyes of the law.

The positive, dogmatic law in the guise of e.g. IP legislations has to, and indeed does, simplify, assume and presuppose certain concepts in order to cover a wide plethora of complicated and complex issues that make up the ‘reality’. In other words, in intellectual property law as it stands today, we find a founding assumption that cultural works are created under uniform and clear conditions and that concepts such as: a) work of art, b) artist c) identity etc. really exist and can be articulated and defined definitively. These assumptions, that all of those concepts inherently form a unity are obviously problematic when it comes to the absence of such unity or in the presence of pluralism and multi-centricity in terms of the works of art. When the laws, national as well as international, provide little or no help towards a genuine answer to the question of how art should be accessed and where it should be kept, it can of course lead to conflicts, and it undoubtedly does.

Existing legislation is currently not yet of help when it comes to identifying and clarifying issues of ownership, preservation, and most interestingly access, to *all* works of art. It has to be acknowledged that works of art play a significant role in the development of societies and need to be preserved regardless of any remaining archaic notions in law, and regardless who the creator is, and where he/she might or might not belong. That this is still an issue that we struggle to understand is apparent with the Bruno Schulz case:

Born a subject of the Austro-Hungarian empire and later a citizen of independent Poland, Schulz found himself living briefly under Soviet occupation at the beginning of the war and was murdered because he was a Jew in the Third Reich [...] Remarkably, this is the story of a man who spent most of his life in one place.³³⁷

Eerily echoing Paloff's expression, Deleuze and Guattari describe *the nomad* in the following manner: "the nomad is on the contrary *he who does not move*."³³⁸

In Roman law, there exists a division between property that is deemed to be fixed land, realty, and property deemed to be chattel, personalty, movable objects, not fixed to land. This is a division that to a great extent still exists today. Furthermore, in Roman Law objects, as well as living beings that were not citizens, *strangers*, were historically deemed to be chattel as they could not own land and were subject to a landowner's protection. As a consequence of such legal reasoning, animals, women, slaves as well as Jews³³⁹ were legally treated as chattel as they were, quite simply, not attached to land. Created on Polish territory under German occupation, that later became the Ukraine, Schulz's work no longer has a land, if ever it did. If we must suppose that the work legally is merely chattel then it must belong to the landowner.

Morally it is impossible to ever claim that the occupying power or the Landau family and their heirs are the legal owner. But owning something is not the same as belonging to someone? So to whom does Schulz's mural *belong*? Is it really as simple as saying that Schulz's work belongs to the Jewish people exclusively and that by such reasoning Yad Vashem, in Israel, is the only legitimate representative of *all* Jews? Or the Ukraine, Schulz's hometown, and the work's original place of creation? Can it be argued that the work, on the contrary, ought to be passed down by copyright or inheritance laws and thus maybe it be-

³³⁷ Benjamin Paloff, *Who Owns Bruno Schulz? Poland stumbles over its Jewish past*, Boston Review, (December 2004/January 2005). Available at: <http://bostonreview.net/BR29.6/paloff.html>. Last accessed 20 April 2010.

³³⁸ [original emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 420.

³³⁹ See e.g. David Menahem Shohet, *The Jewish Court in the Middle Ages: Studies in Jewish Jurisprudence According to the Talmud, Geonic and Medieval German Responsa*, New York: Commanday-Roth Co., (1931).

longs to Schulz's nephew, his only surviving heir? And how about Poland and the Polish people, what legal interest, if any, do they have in the mural, since Schulz was a Polish citizen? If deemed to belong to any of the abovementioned peoples, states, institutions or private persons the access issue is directly and severely affected – it is for this reason that the issue of “belonging” must be discussed in order to understand its access implications. Belonging is a much more interesting concept than ownership here, one that contains the issues of identity, haecceity, as well as the nomadic aspects that also influence this discussion.

What we are left with is a work not tied to (a) land, it has immense knowledge and cultural heritage potential and it is still surrounded by intense and ongoing discussions regarding its belonging, and how to define its legal status. To determine the legal status of such a work and to appoint a legitimate owner, given the circumstances in which the work is created and the fate it has had since it was found, is legally a task that can only be described as a nightmare.

But are we not, once again, looking at it all wrong, and not posing the question correctly? Are we not posing the question in reverse, already presupposing a given answer? The fact that the work cannot be defined, the fact that the artist does not have a clear belonging, the fact that this work cannot simply be seen as a financial asset, or movable property that can physically be fenced off and kept in a single, more or less closed-off environment, all that ought not to be seen as problems but rather as an immense *potential*.

These issues are also in line with the discussions on the topic of international conventions that regulate works of traditional cultural heritage, intangible cultural heritage and folklore. Cultural artefacts have been discussed widely in recent years.³⁴⁰ They are generally excluded from copyright and so too under Ukrainian Copyright Law (Section 10(b)). This means that works of art that are deemed ‘heritage’ or ‘folklore’ are considered almost as above or beyond the monopoly of copyright and the personal moral rights. Cultural heritage, as we saw in chapter 1, is usually described in physical terms i.e. the cultural heritage definition is broken down into “monuments,” “groups of buildings”, and “sites”. Schulz's mural does not (directly) fall within this definition. The other types of works that UNESCO also acknowledges as cultural heritage is intangible cultural heritage that is defined in the following manner:

The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts

³⁴⁰ See e.g. Eva Hemmungs-Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization (Studies in Book and Print Culture)*, University of Toronto Press (2004), Fiona Macmillan, ‘Commodification and Cultural Ownership’, in *Copyright and Free Speech: Comparative and International Analyses*, Fiona Macmillan, ‘Copyright, the World Trade Organization, and Cultural Self-Determination’, in *New Directions in Copyright Law: Volume 6*, (ed.) Fiona Macmillan. Cheltenham UK: Edward Elgar Publishing. (2007), see also Merima Bruncevic, ‘Cultural Property Rights’, in *Intellectual Property Quarterly*. (4) (2009).

and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”³⁴¹

Schulz’s mural does not (directly) fall within this definition either.

Finally, folklore has been defined by UNESCO as:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.³⁴²

Schulz’s mural does not (directly!) fall within this definition, *either*. There seem to be no rules that cover the conflict brought about by this artwork.

The problem in this case is that neither the concepts of cultural heritage, intangible cultural heritage nor folk art were wide enough to provide tangible answers for the Schulz mural because it *could not be deemed as anything* other than maybe a tangible object as any other. Even the principles of copyright, while the work was still in term, particularly moral rights, were difficult to apply on this artwork, as we shall see below.

However, even though the mural does not directly fall under any heritage or folk art definitions it is still worth lingering there for a moment for the sake of argument. In Roman law, for instance, we find the concept of *res communes*—things that cannot be owned and are open to everybody by their sheer nature.³⁴³ This concept is reminiscent of what we today consider as folk art. Folk art indicates works of art that collectively belong to a group, works that depict the history and culture of the people they stem from, something that is worth protect-

³⁴¹ 1970 UNESCO Convention For The Safeguarding Of The Intangible Cultural Heritage, I General Provisions, Art 2.

³⁴² UNESCO 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore.

³⁴³ These Roman law concepts shall be revisited in chapter 7.

ing both in the short and the long term, independent of the copyright aspect and its commercial uses.

Schulz created a work of art in order to beg silently for change and, if he had asked for change more vociferously, it would inevitably have meant an instant end to his life. How can such issues be captured in law as they are, at the core, issues concerning human suffering and justice? How can the ownership, or indeed belonging, of a work of art that is influenced by Judaism as well as Polish culture and that was created under Nazi occupation, on occupied territory, be reconciled in law today?

4.1.2 LINE OF FLIGHT: FRAGMENTED AND AURA OF THE WORK

Schulz's mural can be approached as crime scene evidence, i.e. a work that is an evidence of an historical occurrence, that is deserted and made for the purpose of establishing evidence. It challenges the viewer. Albeit rather unusual as crime scene evidence, it serves as a crucial testimony of the events that took place at that particular time in history. Much like ordinary crime scene evidence, it reveals stories that might initially not seem accessible or understandable. However, these stories can gradually be elicited through careful analysis and once understood they provide detailed accounts of the victim, offender and the circumstances in which the crime was committed.

Adorno, as we saw above, focused on artworks like this one, deemed to have some kind of social or cultural function. He argued that authentic art embodies the ability to free itself from the restraints and fetters of its own time. Although difficult to define, Adorno maintained that the authentic work of art is essential in a democratic rule since it remains autonomous in an otherwise administrated society and as such provides indispensable insights into the totality of the society from which it stems.³⁴⁴ He privileged therefore these artworks as particularly important, and claimed that they were often overlooked sources of social knowledge and social commentary.³⁴⁵ This line of flight assists in understanding Schulz's mural, it is not just a pretty painting, it is also a document. Could it be said that, by virtue of being knowledge-based and socially significant, such works attain a higher 'dignity'? In that case, there must be a higher public interest in it than in other works of art. Contrary to mass culture, if we are to follow Adorno's reasoning, the general public *needs* to have access to such works because they incorporate certain democracy aspects, such as freedom of information and freedom of speech.

³⁴⁴ Benjamin, 'Work of art in the age of mechanical reproduction', in *Illuminations*, p. 93.

³⁴⁵ See e.g. Douglas Kellner, 'T.W. Adorno and the dialectics of mass culture' in *Adorno: A critical reader*, (ed.) Nigel C. Gibson and Andrew Rubin. Oxford: Wiley-Blackwell (2001).

The approach to Bruno Schulz's mural thus folds³⁴⁶ in on itself—its outer contours are defined by its original context, that is as an artwork with a number of 'authentic' qualities, which was created for a nursery that belonged to the son of a Nazi officer. But on the inside it equally must be acknowledged as a distorted, fragmented piece of art that is divided between two countries and whose belonging is disputed and unclear.

Studying the mural from a public interest perspective, access to this work becomes further complicated: the work has been destroyed, fragmented and it cannot be viewed in (any) one place in its entirety, it is thus constantly also exhibited elsewhere, always away from its 'original' context, away from itself. What happens to such works of art when they are taken out of their original context, fragmented, broken, taken elsewhere? Does the work of art lose its knowledge value, or potential, and become reified; does it lose its authentic qualities all together? And how can law handle a fragmented work? Walter Benjamin writes:

We know that the earliest art works originated in the service of a ritual—first the magical, then the religious kind. It is significant that the existence of the work of art with reference to its aura is never entirely separated from its ritual function. In other words, the unique value of the 'authentic' work of art has its basis in ritual, the location of its original use values. The ritualistic basis, however remote, is still recognisable as secularised ritual even in the most profane forms of the cult of beauty.³⁴⁷

We can thus add a new line of flight to this piece, namely the concept of the 'aura' of the artwork that Walter Benjamin discussed, i.e. the sense of veneration and admiration experienced when confronted by a piece of art through the ritual function of an exhibition. For Benjamin, the *location* and the *origin* of the work of art play a significant role for the sensation of the aura, and that is of course interesting here. The implication for the authentic aspects in the work of art and its 'aura' when taken out of such context is a question where opinions differed within the Frankfurt School itself.

Adorno/Horkheimer saw the aura as an inherent aspect of a work's authenticity; the powerful aura of an authentic work of art, they claimed, violently grabs hold of the spectator and demands of him not only contemplation but also praxis.³⁴⁸ Benjamin, on the other hand, stressed the potential not in the aura

³⁴⁶ Philippopoulos-Mihalopoulos, 'The Autopoietic Fold: Critical Autopoiesis between Luhmann and Deleuze', see also Gilles Deleuze, *The Fold: Leibniz and the Baroque*, (foreword and trans.) by Tom Conley, London: Athlone, (1993 [originally published in 1988]).

³⁴⁷ Benjamin, 'Work of art in the age of mechanical reproduction' in *Illuminations*.

³⁴⁸ Jay, *The Dialectical Imagination*, p. 179; Theodor W. Adorno, *Prisms*, (trans.) Samuel and Sherry Weber, Cambridge, MA: MIT Press. (1981 [originally published in 1955]), p. 225.

itself but rather in the act of destroying and shattering it, and thus freeing the work of art from the magic and ritual aspects of it, revealing the authentic qualities through brutal and violent acts such as copying or fragmentation. Benjamin wrote that this could also be done through mechanical reproduction (and perhaps, it could be argued, even digital) reproduction. In doing so, shattering the aura in one way or another can be a creative act that unleashes the potentiality locked inside the work as both the ‘context’ and ‘uniqueness’ of the work become radically questioned and, Benjamin claimed, not only is the dissemination of the work to the wider public facilitated, thus democratising access to it, but the act of copying and fragmentation itself also reveals additional layers of meaning and significance trapped within the artwork.

In the case of Bruno Schulz this is particularly relevant in relation to the issue of whether the five pieces, by being taken to Yad Vashem, were rendered ‘soulless’ and ‘inauthentic’, whether they became reified, or, on the contrary, whether the act itself shattered the aura of the work and freed it from the burdens of its past, its original location, and unleashed its true potential, emancipating it from its given and perhaps vastly constraining context. This is significant for the legal study of the access to the work, particularly from a public interest perspective. It can be argued that by taking the mural to Yad Vashem the mural attained another, or maybe its ultimate, potential in that it can be studied independently of its original context, it is placed in a new setting, in a new (Old) land, it can be viewed by larger numbers of people, be properly preserved and can also be understood as relevant from additional aspects. Arguing in such a way means that Yad Vashem, after all, might have had some legitimate claims of the mural. So the question is not *what is Bruno Schulz’s work*, it is rather *what function does it perform, in its present fragmented state...*

However, Yad Vashem is not the sole claim that exists on the mural. The multiple claims (from other countries, as well as heirs that I do not study here) further add to the concept of this particular encounter, what we are witnessing is the fact that law, or what we assume law to be, is being attacked with various encounters at once, that cannot be handled easily or fully dealt with or even understood by the dogmatic legal methods and tools available. Law is here, quite simply, *running out of rules*.

4.1.3 LINE OF FLIGHT: (COLLECTIVE?) MORAL RIGHTS

As access to authentic works of art such as this one must be seen as significant, the problems with current law and issues concerning control and (legal) protection and access to these works of art must be presented at this point. In Schulz’s case, the inherent dichotomy in works of art is illustrated— i.e. the social significance of art vis-à-vis the proprietary structure that is facilitated by IP law. This renders the ownership and access issues particularly interesting in cases where works of art, which are important for reasons other than commercial

ones, are in question. It is an issue that requires weighing up and balancing the interests and intentions of the original creator, rights owner, potential subsequent owners, as well as the public interest in an accessible and unfettered cultural heritage and, with that, a healthy and growing cultural commons.

To search for answers within positive law itself by solely utilising traditional dogmatic legal methods proved instantly unhelpful in this case. The work was created in the course of employment or under commission. The first problem that confronts the lawyer is in which jurisdiction and in which legislation to search for solutions. Polish law from the 1940s? Current Ukrainian law? International law?

In modern Ukrainian law similar issues are generally handled on a national level. Much like most other European legislations, Ukrainian Law on Copyrights and Related Rights stipulates in Article 16.2 that works of art created during employment or by commission are to be vested in the employer. Interestingly though, Ukrainian law, unlike most other European IP legislation, goes further in its protection of the creator and also protects *moral rights* of the author in the course of employment. Let me return to that in a moment.

In a press statement Yad Vashem issued the following statement after the removal of the five pieces from Ukraine to Israel:

Unfortunately it is a fact that from the around 3.5 million Jews who lived in Poland before the Shoah, today there are only a few thousand Jewish inhabitants. Despite the fact that today most of the Holocaust survivors live in Israel, the remnants of the vibrant Jewish life and the suffering both of the victims and the survivors are scattered all over Europe. Therefore Yad Vashem has the *moral right* to the remnants of those fragments sketched by Bruno Schulz.³⁴⁹

The term “moral right” catches legal attention particularly in the way it was used in the press statement by Yad Vashem. From an IP law perspective this is an interesting choice of words, as the legal concept “moral right” is not (directly) applicable here. Moral right, as a legal concept, was intentionally separated from the proprietary aspect of copyright law and is considered as fundamentally different from the general copyright. Moral right is considered to be non-commercial, serving to protect certain ‘softer’ aspects of the artistic creation. It is closely linked to the author, for example through the right of integrity. In contrast to proprietary copyright, moral rights were created in order to protect the personality and reputation of the creators themselves.³⁵⁰ Moral rights are not only non-assignable but they also generally *die with the author*; to be exact, the

³⁴⁹ [my emphasis], Yad Vashem’s press statement from 2001. Available at: <http://www.jim-magazine.lviv.ua/inform/info-eng/yv-en.htm>. Last accessed 17th March 2014.

³⁵⁰ See also Merima Bruncevic, ‘Cultural Property Rights’.

right cannot be inherited post mortem auctoris. Simply put, moral rights protect the sides of the work of art that are part of the creator's self, his 'soul', and are as such inalienable from him/her. The author in the Ukrainian Copyright Act is today narrowly defined as 'an individual who created a work by his creative effort'.³⁵¹

Attempting to determine the ownership and the right of access to a work of art after the death of the author, the employer, particularly when the nationality or belonging of the author is being disputed, as well as the fact that the work had been created under undue circumstances, is almost impossible to do. The strongly protected non-proprietary, inalienable moral right in Ukrainian legislation brings forth an interesting argument that is not only relevant in this case, but that also serves to illustrate a variety of other lines of flight that flee intellectual property legislation, particularly when it comes to dealing with works of art such as this one, internationally, culturally and historically significant works that fall outside the traditional margins of copyright law.

In the Schulz case, for example, moral rights are claimed post mortem not by the creator himself, *obviously*, but rather by an institution decades after his death when both the copyright and moral rights have expired. The grounds for claiming moral rights appear as non-legal but were they irrelevant and otiose? If claims seem to fall outside positive (dogmatic) laws as we know them or when the traditional legal method cannot provide a solution it appears precisely then as though law has run out of rules.

Contrastingly, by way of example, a similar case appeared in front of the Indian courts in 1995. A renowned sculptor by the name Amar Nath Sehgal was commissioned in 1959 by the Indian government to create an artistic piece for a significant and central part of a government building in the capital of India. Mr Sehgal's work resulted in a 40-foot high mural representing Indian customs, daily life, celebrations, clothing etc. The work won acclaim not only in India but also across the world because of its delicate depiction of Indian culture and, ultimately, became a cultural landmark.

In the 1970s the building that had housed the work was due for renovation and in 1979 builders not properly trained to handle artistic works, dismantled and took the mural off the walls and put it into storage.³⁵² Mr Sehgal brought a lawsuit against the Indian government for violation of his moral rights on the grounds that the dismemberment of the homogeneous blend of the pieces of each tile in the mosaic constituted an act of mutilation; that the action was prejudicial to the artist's honour and reputation; obliteration of the artist's name on

³⁵¹ Section 1, Ukraine Law on Copyright and Related Rights

³⁵² Binny Kalra, 'Copyright in the Courts: How Moral Rights Won the Battle of the Mural', in *WIPO Magazine*. (April 2007) Available at: http://OMPI.ch/wipo_magazine/en/2007/02/article_0001.html. Last accessed 20 April 2010.

the work, etc.³⁵³ Mr Sehgal won his claim and all the rights in his work reverted to him, but the damage his mural had suffered and the loss to Indian cultural heritage, it was argued, could unfortunately not be rectified.

The difference between the Indian case and the case of Schulz is of course that Schulz was not alive at the time when the mutilation, dismemberment, and destruction of his work took place and was thus unable to bring an action himself. Nor were there, more importantly, any questions of belonging/nationality present in the Sehgal case. One could also discuss further whether the Sehgal work can be deemed to have 'authentic' qualities: while it was highly important for Indian society, it could be argued that it lacks the additional knowledge in order to be elevated to the status of 'authentic' and that it served a more 'decorative' function. Nevertheless, the Indian example contrastingly illustrates how difficult the case of Bruno Schulz is to approach legally, and it is useful in demonstrating the complicated issues concerning works of art that come into existence during the course of undue or conflicting circumstances e.g. works created in wartime.

Interestingly enough, had Bruno Schulz been alive today he might have been able to bring an action for breach of moral rights due to the mutilation, fragmentation and destruction of his work. Dissimilarly, the Sehgal work illustrates a work that fits the folk art definition (as well as falling within the ambit of both copyright and moral right). The Schulz mural, therefore, simply falls through the legal cracks. As a result, it is rendered vulnerable and left unprotected as it is problematic (or undesirable?) to deal with it in law.

Yad Vashem as an institution was created in order to honour the people who lost their lives in the WWII and to preserve the memory of the victims, so that the Holocaust would never be forgotten. Could it be argued then, that by virtue of being able to protect and preserve the works of the victims of the Shoah, certain rights ought directly to be extended to, for example, Yad Vashem or similar institutions, where there are grave circumstances present at the time of the creation, such as exploitation, incarceration, coercion or worse still—genocide? What would such a solution mean for the principle of public interest in works such as Schulz's mural? Copyright law, and the concept of moral rights, evade these particular questions. However, in circumstances like these, they cannot be escaped— particularly in light of the international conventions surrounding cultural heritage, for example, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

Intellectual property law regulates the sphere of the private domain. Therefore, it has to be asked, in view of all of the above, whether it should be at all possible to 'own' works of art such as Schulz's mural, i.e. in the traditional sense of private, individual ownership. Ought, for example, a notion such as *force*

³⁵³ Kalra.

majeure be incorporated into law when it comes to ownership, control and access to works of art that have been created under difficult circumstances and that, through disputing the ownership, the work itself runs the risk of destruction or peril, something that undoubtedly is a collective loss. Moral rights, extended or otherwise, are probably not the appropriate tool to make provisions for this problematic but they do reveal and draw attention to the stiffness and inadequacy of law in these situations. The question of ownership might therefore not be interesting at all, as determining who can have access to the work is far more acute. The question of ownership and access are of course tightly linked, but they differ from one another.

We have already seen how Schulz's mural does not fit into any legal concept neatly, neither the copyright concepts nor heritage concepts, demonstrating that works of art that are not covered by IP legislation or by folk art conventions in international law could be in danger by, in one way or another, being excluded from all existing legal protection.

4.1.4 LINE OF FLIGHT: DIGITAL REPRODUCTION OF THE WORK, A MOVABLE PIECE, NOT MERELY CHATTEL

The case of Bruno Schulz's mural does not even end there and it keeps challenging many of the most fundamental legal principles, some of which date all the way back to Roman law. On top of everything that we have seen so far, if we then place the study in the context of Benjamin Geissler's mobile installation *The Picture Chamber of Bruno Schulz – The final work of a genius* additional issues emerge. There, Geissler recreates the mural virtually in an installation that takes the work into the 21st century. The installation can be described as follows:³⁵⁴

The viewer enters into a constructed chamber created as a true-to-scale reconstruction of the Landau nursery in which the mural was originally painted. There are images being projected on the four walls, and the images change continuously, they do not only show the mural. All the phases – from the moment of discovery to the various moments of destruction of the wall, to the moment of reconstruction with all the known fragments – drift past, slowly fading in and out, accompanied by music composed exclusively for the installation. Ten visual presentation boards in A1 clip-on picture frames for multi-lingual texts allow the viewer to learn more about Bruno Schulz, Drohobych, the origin of the mural, the virtual reconstruction, the meaning of the fragments and the significant influence of Schulz as a source of inspiration to artists all over the world. Out-

³⁵⁴ The presentation of the installation here is mainly taken from the exhibition catalogue for *Die Bilderkammer des Bruno Schulz – das letzte Werk eines Genies – Mobile Installation von Benjamin Geissler*, Umweltbibliothek, Grosshennersdorf, (2012). The installation has been created and is described in the catalogue by Benjamin Geissler.

side the installation there are films being shown that were inspired by Schulz work, lectures on Schulz etc.

That Schulz's work challenges territoriality³⁵⁵ is obvious and this is wonderfully captured in Geissler's installation. As a nomadic, travelling, movable, digitised space that reconstructs the mural and places the original into a present day context, the installation is a subversive act of defiance in its own right. It *deteritorialises* the mural even further and functions as a genuine alternative that challenges the dichotomies inside/outside, here/there, movable/immovable, material/immaterial, all of which are often taken for granted as well as perpetuated in the traditional concept of law. The installation constitutes an itinerant space where the mural can be experienced in a simulated, yet true-to-scale environment. It enables access to the work while it evades and challenges the provisional settlement that has been reached between the Ukraine and Yad Vashem concerning the ownership and control aspects. This is achieved by Geissler's clever usage of digital media technology. The work is simulated, projected onto walls of the mobile chamber inside the travelling installation that can take the work around the world while remaining physically in Yad Vashem and the Ukraine.

The installation reconstructs the room where it was originally painted and as it does so it also re-imagines it, moves it, and opens up a portal through time for the audience to enter into the world of Bruno Schulz and his work – a truly modern approach in terms of exhibiting works of art in the 21st century and in the information society.

The installation by Geissler elevates Schulz's mural onto an additional plateau, it connects it to other rhizomes such as the dematerialised digital art of the 21st century, and adds a new dimension to its significance. Geissler adds post-post-industrial, aspects to it. From the physical work as it once was in the Ukraine, to the broken, dispersed and fragmented work of the beginning of the 21st century, the technology of our time has allowed us to, with some imagination, now have it digitally recreated and simulated, in a mobile environment. It is like picking up the broken pieces of the work and reassembling them when entering the installation. It is as if taking the pure essence of the mural and freeing it from all burdens of physical bodily fixation, definitions and territories.

Legally this is a very interesting discussion concerning access with the added complexity of a digitised derivative work. How to provide adequate legal protection while still encouraging creations of this kind and similar spaces where works of art can be accessed virtually and where also a creative communication and sharing of art can take place is the interesting issue here. Incontestably, these spaces challenge traditional legal reasoning and the binary logic: the work

³⁵⁵ For a more detailed study of the Bruno Schulz case with a full legal analysis see: Merima Bruncevic, 'The Lost Mural of Bruno Schulz, A Critical Legal Perspective on Control, Access to and Ownership of Art', in *Law and Critique*, 2011, 22:79-96.

clearly does not have to only be either a private asset or public heritage, not have to be deemed as either fixed land or mobile chattel, or something that either belongs to a people or does not, something that has to be either here or there.

As we are experiencing new conditions, new needs, new demands, new types of works, the legal sphere has to become more flexible and allow for various combinations that transcend the simplified pairs or opposites that mark the legal binary logic.³⁵⁶ A space like Geissler's mobile installation is a room but not realty; it is movable but it is not chattel. With *The Picture Chamber* it is evident that we are experiencing two generations of artworks, Schulz's physical mural, and Geissler's digital, virtual, mobile installation where both the artworks and the artists have been dematerialised. Legally, however, it may still be difficult to fully make a distinction between the two. Yet, if law is approached in a dogmatic manner, both works can only be treated as objects, movable property: chattel – invented by an individual human being. This happens because certain underlying assumption in law that are becoming clearer, for instance, a work must be assumed to be whole, created by a definable 'genius', and as such it must be able to be connected to a legal subject, at least as an object, as chattel. Current legal structures envision artworks as chattel categorised under the subsections of copyright, heritage or folk art law. If the artwork in question then has e.g. a creator with an unidentifiable identity, or another form of multiple belonging, both in terms of ownership as well as the broader belonging in terms of heritage, or if it is a question of creation that concerns transmission of knowledge across generations, or if the work is fully or partially dematerialised, it becomes problematic for law.³⁵⁷

4.1.5 LINE OF FLIGHT: THROUGH TIME AND SPACE, JOURNEYS TO THE UNKNOWN

Benjamin Geissler's installation provides an open space where much wider access to the original work is enabled. As such, it is a new and certainly radical approach to exhibiting art. It defies the prevailing ideas, in law and elsewhere, that a work of art always has to be created by one singular, definable individual, that creation of art is a linear process with a beginning and an end. Open spaces where access to artworks is enabled such as Geissler's installation can today be equally significant as the original work of art itself. Such more or less temporary places for events, encounters, communications and conversations subvert the restraints, difficulties and fences, being – often unnecessarily – erected by law.

³⁵⁶ See e.g. Gustafsson, *Dissens*.

³⁵⁷ Closer analysis of the legal assumptions, particularly in IP law, will be conducted in chapter 6.

This installation by Benjamin Geissler serves as a perfect example of such a space.

Law must be responsive to these aspects of art and start treating communication and sharing of artworks that happen in open spaces as a *potential* rather than as a threat to underlying property rights. This can only be done by moving away from the established, restricting binary legal logics, where a work is either made openly accessible or closed off, either falls under copyright law or cultural heritage, and so forth. It involves looking at the law and seeing its potential to be more flexible and complex, where the one does not have to be the other's opposite, where two legal phenomena can temporarily stop being opposites and instead become interlinked with a potential to create something new or re-imagine something old.

The fate of Bruno Schulz's mural is a chilling, sobering story with a strong native subject matter, but in it "native" is simultaneously challenged as it transcends all definitions of the word. The mural recounts a story of a violently dehumanising force that seized Europe in its grip; it is a voice from beyond the grave, reminding all of us about the darkness of our shared history. It is about the struggle of people. Current law, understood in a traditional way, seems to be able to read this work only partially or in its most simplified, reified, form. But the work cannot be understood partially, particularly not in the light of what happened to it. Geissler's installation contributes with yet another piece towards understanding the work in its entirety.

Bruno Schulz's mural has become a symbol. Currently it cannot be legally classified or defined, and legally it seems not to be possible to determine with full certainty to whom it belongs the most and by the same token, who ought to control it and have access to it. It is a work of art that is defiant in all senses of the term – it even resists the constraints of space and time. The work is at the same time private as it is public, it is historical and contemporary, it is affirmative in its fragility, it stays put in one place while travelling the world; but most importantly, it presents a powerful, *almost Messianic*, imagination of a world that is *yet to come*. The work is continuous, it is a journey, a truly movable piece, and it proves once and for all that it does not fit a common legal definition of cultural heritage and that it is, without a doubt, much more than merely chattel...

That the mural of Bruno Schulz is an *encounter* in a Deleuzian sense is quite clear. The instances surrounding the inception, discovery and exhibition of the work all bring into question certain fundamental legal concepts such as the legal subject, jurisdiction in a globalised world, as well as the legal territoriality. It also brings into question other, less fundamental, but here interesting legal concepts such as cultural heritage, moral rights, the scope of copyright, etc. The fact that Bruno Schulz was born and lived in a contested territory colours and contaminates the entire access discussion further and affects all of the legal concepts, where it appears that law has run out of rules – that is – law has been confronted with something that can be explained as a Deleuzian encounter.

4.2 ENCOUNTER 2: DARFURNICA

The Bruno Schulz case study introduced the difficulties that increasingly appear in terms of access to physical artworks, about locating the artwork, preserving it and other issues regarding its whereabouts, storage and control. It culminated in Benjamin Geissler's creation of a derivative work, a work in which Geissler incorporated the already existing work (Schulz's mural) into a new original work (Geissler's mobile installation) while at the same time shifting format (Geissler used digitalised photographic images and did not use actual pieces of the mural nor any replicas). This second case study focuses on a similar type of activity, namely the creation of a derivative work as a means of commenting on a current issue. This second case study focuses on *access to inspiration*.

The study examines the Danish artist Nadia Plesner's so-called *Darfurnica* case. It concerns one of Plesner's illustrations on t-shirts and posters that she sold for the benefit of the organisations dedicated to helping the victims of the conflict in Darfur. Her illustration was displayed on her website, www.nadiaplesener.com.³⁵⁸ Plesener had within the illustration incorporated an image of the Louis Vuitton (LV) *Audra* bag. Her work depicts a small, emaciated black child with a Chihuahua dog and an LV bag in his hands. It is part of Plesener's *Simple Living* series, aimed at raising awareness about poverty, famine and the dire circumstances of African children. The work, from 2008, makes a reference to Paris Hilton, famous for her penchant for Louis Vuitton bags, small Chihuahua dogs and her reality series, named "The Simple Life". The artist herself commented on the work by explaining:

Since doing nothing but wearing designer bags and small ugly dogs apparently is enough to get you on a magazine cover, maybe it is worth a try for people who actually deserve and need attention. If you can't beat them, join them! This was why I chose to mix the cruel reality with showbiz elements in my drawing 'Simple Living'.³⁵⁹

Louis Vuitton opposed the use of their intellectual property (copyright, trademark and design right) as well as the association that Plesner's work was making to their bag. They applied for an injunction against Plesner's T-shirt sales on the basis of their Community Registered Trademark.³⁶⁰ After having sent a cease-and-desist letter to her, the company requested from the French Court, the Tri-

³⁵⁸ Lucie Guilbault, The Netherlands: 'Darfurnica, Miffy and the right to parody!' in 3 (2011) *JIPITEC* 236, para 1.

³⁵⁹ Quote taken from an unofficial translation of the Plesner judgement from May 4th, 2011, fully reprinted in Guilbault. Guilbault writes that the translation was made by attorney Kennedy Van der Laan, working for the firm that represented Nadia Plesener. The quote is on p. 3 of the translation of the judgement, and on p. 241 of the article.

³⁶⁰ *Ibid.* para 2.

bunal de Grande Instance in Paris on 25 March 2008 to issue an injunction. The Paris court imposed an (ex parte) injunction and awarded damages of a symbolic 1 Euro with an additional threat of a 5,000 Euro fine for each day of non-compliance with the injunction.³⁶¹ Nadia Plesner removed the t-shirts from her website and stopped selling them.

However, Plesener did not stop using the Louis Vuitton brand altogether. She later created a large painting modelled after Picasso's *Guernica*, again featuring the illustration of the child with the Louis Vuitton bag. She called the painting *Darfurica*. Louis Vuitton once again made another ex parte application regarding the use of their brand in the painting *Darfurnica*. This application was however rejected by the court in Hague.³⁶² It is these two court cases that we shall turn our attention to in this section. Let us begin with the latest one, the Dutch ruling.

Both Louis Vuitton and Plesener chose to base their argumentation and rely upon certain fundamental (human) rights set out in the European Convention on Human Rights. Plesener claimed a defence under freedom of expression (Article 10 of the Preamble³⁶³). Louis Vuitton invoked Article 1 of the first Protocol relating to protection of property.³⁶⁴ Regarding the claim for protection of intellectual property under the protection of human rights, the Court wrote:

³⁶¹ Rosie Burbidge, 'Louis Vuitton Attempts to Ban Darfurnica', at *Art and Artifice: A weblog dedicated to everything concerning art and the law*, (24th March 2011). Available at: <http://aandalawblog.blogspot.com/2011/03/louis-vuitton-attempts-to-ban-darfurnica.html>. Last accessed 17th March 2014.

³⁶² *Nadia Plesner Joensen v. Louis Vuitton*, Dutch Civil Court, The Hague, 389526/KG ZA 11-294. The full minutes in Dutch from the hearing and the decision is available on line: http://www.mediareport.nl/wp-content/uploads/2011/05/kvdl-727526-v1-vonnis_d_d__4_mei_2011.pdf. Last accessed 17th March 2014.

³⁶³ The unofficial translation referenced in Guilbault. See p. 7 of the translation of judgement, and on p. 245 of the Guilbault article.

ARTICLE 10

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³⁶⁴ ARTICLE 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

That the concept ‘property’ in the last mentioned provision should also include the rights of intellectual property has been confirmed by the European Court of Human Rights in the *Anheuser / Busch* decision [...] and, moreover, *has not been disputed by Plesner*.³⁶⁵

Plesener’s claim that her work falls under the freedom of expression provision prevailed this time and was a successful defence in the Hague court. The court wrote that given the circumstances, the artist’s interest to continue to be able to express her artistic opinion outweighed the interest of Louis Vuitton in the peaceful enjoyment of their possession.³⁶⁶

This case is particularly interesting and serves as an encounter, in the Deleuzian sense, for several reasons, the chief reason being that while the freedom of artistic expression did prevail in the second court ruling, the binary opposites: freedom of expression and freedom of property were very clearly pitted against one another. A reading of this ruling through Deleuzian theory demonstrates the problems concerning the assumption that intellectual property can always be equated to property, something that even the Dutch court almost invites us to question, when they write that the concept ‘property’ includes the rights of intellectual property, and that this fact had not been disputed by Plesner.³⁶⁷ What if Plesner had disputed the fact?

What happens when a brand like Louis Vuitton is associated with the conflict in Sudan and the Darfur situation? What happens with the underlying Picasso piece, why has that not been addressed anywhere? Plesener has claimed that she used the LV brand as an “eye catcher” in order to generate discussion. Was that why LV chose not to appeal? What would have happened to their goodwill if they had? But before I address the Darfurnica case in more detail I need to provide a background concerning derivative works, collages and freedom of speech in such cases.

4.2.1 LINE OF FLIGHT: DERIVATIVE WORKS

The issue of collage³⁶⁸ or the assemblage of various artworks into a new, derivative, one is particularly interesting to analyse here.³⁶⁹ Before we go back to ana-

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

³⁶⁵ [my emphasis], The unofficial translation referenced in Guilbault. See p. 7 of the translation of judgement, and on p. 245 of the Guilbault article.

³⁶⁶ Ibid. para 4.6.

³⁶⁷ Guilbault, p. 7 of the translation of judgement, and on p. 245 of the Guilbault article.

³⁶⁸ See Bruncevic ‘Cultural Property Rights’.

³⁶⁹ Ibid.

lyse the Plesener case and her derivative work let us first look at another type of derivative works namely digital music samplings³⁷⁰ and mash-ups³⁷¹. These types of works founded on incorporation and re-usage of already existing copyrighted material into derivative ones are particularly popular in the DJ culture and are often based on either sampling or mixing of works or musical genres. Here we shall look at the so-called *Grey Tuesday* that took place in February 2004. On that day, the music industry was exposed to the up to that date largest case involving *unauthorised sampling*.

A New York/Atlanta DJ Brian Burton, otherwise known as DJ Danger Mouse, had sampled Jay Z's Black Album³⁷² with The Beatles' White Album. His derivative work was created by using the mash-up and sampling techniques and it was named *Grey Album*. The *Grey Album*, audacious in its execution as it was, generated an enormous interest in music circles and the recording industry; journalists and fans started referring to the rumoured tracks on the album (that everybody was yet to hear) as revolutionary and ground braking.

Just days before the album's release DJ Danger Mouse was served with a cease-and-desist letter from the remaining members of The Beatles and their record company EMI. The group and EMI who are extremely restrictive with regards to licensing of The Beatles' content declined to enter into a settlement agreement with Danger Mouse. A settlement would have enabled the *Grey Album* to be released as if clearance had been obtained beforehand. This was not granted to Danger Mouse.

Regardless of the culturally valuable music that was so representative of the *zeitgeist*, regardless of the potential public interest in the album, or any other argument to that effect, all of it was trivial for the exclusive rights owners of the master. This case is illustrative because it demonstrated an instance where copyright was used as a gatekeeper³⁷³ or formed an obstacle, acted as *censorship*³⁷⁴ im-

³⁷⁰ Taking small parts, loops or hooks from one song and incorporating it into another, see e.g. Tyron McKenna, 'Where Digital Music Technology and Law Collide - Contemporary Issues of Digital Sampling, Appropriation and Copyright Law', in *Journal of Information Law and Technology*, (JILT), 2000 (1).

³⁷¹ Sampling usually means playing two songs or part of songs at the same time, altered to fit in one another; mash-up means that two musical works are not at all altered rather merely played in such a way that they within each other, when played simultaneously.

³⁷² This album had been released with the intention for DJs to use as they saw fit as it only consisted of a-capella rap.

³⁷³ See e.g. Fiona Macmillan, 'What Might Hans Christian Andersen Say About Copyright', in (ed.) Helle Porsdam, *Copyright and Other Fairytales*, Edward Eldgar, (2006).

³⁷⁴ More on copyright and censorship see e.g. Martin Cloonan, *Banned!: Censorship of Popular music in Britain: 1967-92*, Arena, (1996), and Guy Osborne and Steve Greenfield, 'Copyright Law and Power in the Music Industry', in (ed.) Simon Frith, *Music and Copyright*, 2nd ed. Edinburgh University Press, (2004).

posed by the owners, an act of prohibition able to deter certain derivative creative works from reaching the public.

For this reason, and due to several other similar cases³⁷⁵, clearances for the use of other works for sampling, mash-up or collage purposes became increasingly difficult to obtain and generally resulted in expensive legal negotiations that artists, beatmakers and DJs still have to go through in order to be granted the use of various different sounds necessary for their music making. Providing that they can afford such costly negotiations and procedures, if not, they do not get to argue their cause.

Even if it for a second seemed as though the digital alternative and the internet had placed many aspects of art making on its head and challenged many contemporary structures through which artworks had to pass in order to reach their audiences, the DJ Danger Mouse case showed just how complicated access to inspiration can be. Everybody could not always have access to anything - there were limitations. Tougher legislations were not lagging either, and with the Digital Millennium Act and PIPA, ACTA, SOPA, IPRED³⁷⁶, and all other acronyms of laws that govern and will govern the digital sphere in the future, the world *wild* web simply was no more. The much-quoted Naomi Klein passage³⁷⁷ can once again be presented, even if it was written more than a decade ago, however its words ring ever more ominously as time goes by:

When Beck, a major-label artist, makes an album packed with hundred of samples, Warner Music clears the rights to each and every piece of the audio collage and the work is lauded for capturing the media-saturated, multi-referenced sounds of our age. But when independent artists do the same thing, trying to cut and paste together art from their branded lives and make good on some of the info-age hype about DIY culture, it's criminalized—defined as theft, not art.³⁷⁸

Naomi Klein's book was written more than a decade ago, but from a legal point of view we still have not come much further. Arguably, the art that ever really reaches the broadest global audiences, in the analogue and in the digital spheres

³⁷⁵ Other famous mash-ups that have had trouble gaining clearance are: Rob Kerr's *A Stroke of Genius* (The Strokes *Hard To Explain* and Christina Aguilera's *Genie in a Bottle*) – it was never cleared and never released. DJ Erol Alkan's *Can't Get Blue Monday Out of My Head* (New Order's *Blue Monday* and Kylie Minogue's *Can't Get You Out of My Head*) released as an authorised B-side only after Kylie Minogue herself liked it and performed it on the Brit Awards. That performance persuaded the record label to authorise the sample.

³⁷⁶ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (also known as “(IPR) Enforcement Directive” or “IPRED”).

³⁷⁷ Bruncevic, 'Cultural Property Rights'.

³⁷⁸ Naomi Klein, *No Logo*, Flamingo, (2000), p.179.

still is, as it has always been, the one with a strong financial backing in the guise of a record label, a film studio, a gallery or an art collector, somebody that has the means to commodify the work, market it and make it sellable. Those are the people that are ultimately allowed to create and speak, and on the others law seems to be imposing invisible gag orders.³⁷⁹

Plesner's case is in many ways different from these music cases, not just because her work is a different artistic genre and does not concern the use of already existing sounds, but already existing designs. The Dutch court did allow her to speak, even though she at the time was young and not widely established as an artist. Nonetheless, for the purposes of this study, these cases can be treated as almost exactly the same. The main reason being, that even though the outcomes were different, the dichotomy private intellectual property as opposed to public freedom of speech were pitted against one another in the legal reasoning as each other's opposites.

4.2.2 LINE OF FLIGHT: POSSESSION AND EXPRESSION

In section 4.3. of the Dutch adjudication in the Plesner case the Court notes:

Since the case concerns fundamental rights that are *on an equal footing but conflicting*, according to established case law of the European Court of Human Rights, a fair balance should be sought between the general interest and the interests of the parties involved.³⁸⁰

While the Court clearly puts the two fundamental rights on equal footing they add in their reasoning that the two are conflicting. It is of course undesirable as per this type of dogmatic reasoning that some parts of law should conflict with others, because that arguably creates incoherence, which in turn is equally undesirable. Thus, the only way to deal with this conflict of rights is to pit the two rights in question against one another so that they in the end have to form an oppositional pairing. This is the "oppositional identity"³⁸¹ of law, which Andreas Philippopoulos-Mihalopoulos refers to, that allows law as a system to maintain its internal boundaries. Such oppositional identity constantly requires compromises and balancing acts like the one in the Plesner case between e.g. the notion of property as opposed to the notion of freedom of expression.

³⁷⁹ As opposed to the other more visible gag orders put on e.g. media that span from celebrity transgressions such as infidelity or dealings with prostitutes, to more serious matters of national security.

³⁸⁰ [my emphasis], The unofficial translation referenced in Guilbault. See p. 7 of the translation of judgement, and on p. 245 of the Guilbault article.

³⁸¹ Philippopoulos-Mihalopoulos, 'The Autopoietic Fold: Critical Autopoiesis between Luhmann and Deleuze'.

The additional aspect here is the clear assumption that intellectual property without any reservation always falls inside the property provisions. In *Anheuser v. Busch*³⁸², cited by the Dutch court, the European Court of Justice did indeed address the question whether a trademark constitutes a “possession” within the meaning of Article 1 of Protocol no. 1 ECHR. Writing that “while intellectual property as such *incontestably* enjoyed the protection”³⁸³ of the ECHR provision, in the particular circumstances of the case at hand it was deemed that it did not constitute a possession. The circumstances of that cited case involved the beer giant, Budweiser, the respondent, who relied on an application for a trademark it wanted to have protected, not on a *de facto* registered trademark. The European Court of Human Rights thus concluded in their ruling that: “while it was clear that a trademark constituted a ‘possession’ within the meaning of Article 1 of Protocol No. 1, this was so only after registration of the trademark [...]”³⁸⁴

The courts were thus compelled to construct a reasoning that was able to measure degrees of possession, as the concept of trademark, something intangible, does not lend itself to straight forward traditional framework of a ‘possession’.³⁸⁵ That does not mean that a trademark is not a possession, it only means that such a way of defining and approaching possessions will always create a conflict between various differing (human) rights. *Possession* will be seen as something that is and must be enclosable, exclusive, private, and *expression* as its opposite, namely something that is open, non-exclusive, public. This reasoning also assumes that the two rights will always be comparable and commensurable in a conflict or a dispute. I shall return to a closer study of the intellectual property construct in chapter 6 below and the notion of possession as put forward in intellectual property law, but already here the following question may be warranted, are possessions and expressions really commensurable? Can we ever really measure what is possessed against that which is expressed and the freedom to speak? Yet, that is exactly what is being done here, a comparison that might be impossible, but nonetheless, courts of law are making it.

The idea of *difference*, of acknowledging the existence of difference and how that is represented in law is interesting to address here. Due to the generality and universality of the rules that dogmatic law requires by nature, the concept of particular differences in law is thus only “an empty form of difference”³⁸⁶ in Deleuze’s words. What that means is that while it might seem as though every situation can be subsumed within the universal web of law, in reality, in order

³⁸² European Court of Human Rights 11 October 2005, IER 2007/46.

³⁸³ [my emphasis], The unofficial translation referenced in Guilbault. See p. 16 of the translation of judgement, and on p. 254 of the Guilbault article.

³⁸⁴ Ibid. p. 17 of the translation of judgement, and on p. 255 of the Guilbault article.

³⁸⁵ i.e. a traditional notion of possession of a tangible object.

³⁸⁶ Deleuze, *Difference and Repetition*, p. 2.

for that to happen the situation at hand has to firstly be applied to the rule that can be generalised. It means that every form of expression must be

- a) assumed to be comparable and commensurable with any other form of expression, and
- b) that expressions that incorporate other already existing intellectual property rights; that are derivative works, will always conflict with the prior original work as a possession.

The particular case at hand, Plesner's case, has to thus be summarised under the 'abstract universalities' of law, namely, the concepts of freedom of expression and freedom of property. What cannot enter law, however, are certain aspects of this particular case. It is precisely here we encounter the border. These are the boundaries of law, the ones that separate the relevant legal facts, that fall inside the law, from the irrelevant, non-legal, facts that must be expelled or externalised. Thus we are left with almost a platitude, that we are talking about, as the Dutch court phrased it is: 'fundamental rights that are on an equal footing but conflicting'.³⁸⁷ What does that mean? Such a statement presupposes that the concepts of expression and possession can be comparable and commensurable every time and that they can be repeated in a general manner each time.

Following this reasoning, a number of aspects fall *outside* the legal concepts (here freedom of expression, or indeed also possession) and cannot even be imagined. That was arguably why the two courts (Parisian and Dutch) ruled differently on more or less the same issue. Questions like the abovementioned: "What happens when a brand like Louis Vuitton is associated with the conflict in Sudan and the Darfur situation?", "What happens with the underlying Picasso piece?", "Why did LV chose not to appeal?", "What would have happened to their goodwill if they had?", have all been excluded. The way the two courts of law defined the concept freedom of speech and what they conceived as falling inside it, differed in the two cases and thus resulted in two different rulings. In order to rule in the case, they both had to eliminate certain aspects, which they individually deemed to fall outside the concepts of freedom of speech and possession, and assume by the same token that other aspects fall inside the concept. Thus the court begins with the ontological, Platonian in nature, questions, namely: *What is freedom of speech?* and *What is a possession?*³⁸⁸ These are the questions that set the dialectic in motion³⁸⁹ claims Deleuze, but it does not stop there. He continues:

³⁸⁷ The unofficial translation referenced in Lucie Guilbault. See p. 16 of the translation of judgement, and on p. 254 of the Guilbault article.

³⁸⁸ Deleuze, *Difference and Repetition*, pp. 188 aa.

³⁸⁹ Ibid. p. 188.

The question ‘What is X?’ gives way to other questions, otherwise powerful and efficacious, otherwise imperative: ‘How much, how and in what cases?’ The question ‘What is X’ animates only so called aporetic dialogues – in other words, those in which the very form of the question gives rise to a contradiction and leads to nihilism [...]³⁹⁰

These types of questions stem from taking Socratic irony too seriously, Deleuze claims, which has meant “the dialectic ceased to be the science of problems and ultimately become confused with the simple movement of the negative, and of contradiction”.³⁹¹ Deleuze thus proposes that in order to exit the permanent state of contradictions *the questions must be posed differently* and focused not merely on the general, but instead on what he refers to as the singularities of a problem, the particulars. These are the coordinates suggested by the questions ‘Who...?’, ‘How...?’, ‘Where...?’, and ‘When...?’. These questions form the conditions of actuality of a problem.³⁹² It is this very line that law in its dogmatic essence has to toe, between that which is general and the particulars of every case. The general is that which law can predict and envision, and the particular is that which actually has occurred in the case at hand. Sometimes, what has actually occurred cannot be thought of, or fitted in law, before it has actually happened. This is the point of a Deleuzian encounter.

This brings us to the second Deleuzian concept that he connects to difference namely, *repetition*. Commonly, difference would impede repetition, as that which differs from something previous cannot and is not repeated *per se*, it is something new. Deleuze, however, claims that difference inhabits repetition.³⁹³ Central to the concept of repetition for Deleuze is that it is subject to time, it is also subject to the law of the identical and to a previous model of time, i.e. “to repeat a sentence means, traditionally, to say the same thing twice, at different moments. These different moments must be themselves equal and unbiased, as if time were a flat, featureless expanse”.³⁹⁴

The arguments I have presented here are neither a critique of the adjudication in that Plesner was not allowed to speak, nor that the legal sphere was not able to provide a solution to the case. In fact, the type of encounter that this case study is meant to show is perhaps the one that is closest to Deleuze’s idea of encounter, namely the encounter with the process of ‘simplification’ that forces the legal practitioner into the trap of opposites, which locks the reasoning into contradictions. It also demonstrates the inherent differences (in the

³⁹⁰ Deleuze, *Difference and Repetition*, pp. 188 aa.

³⁹¹ Ibid. p. 188.

³⁹² McMahan ‘Difference and Repetition’, in (ed.) Stivale, *Gilles Deleuze, Key Concepts*, p. 46

³⁹³ Deleuze, *Difference and Repetition*, p. 76.

³⁹⁴ Jon Roffe, *Gilles Deleuze (1925-1995)*. Available at: <http://www.iep.utm.edu/deleuze/>. Last accessed 17th March 2014.

Deleuzian sense) that exist in the concepts such ‘possession’ or ‘property’ or ‘expression’. These simplification processes, and generalisations, also act as obstacles to access.

This is particularly clear here, when we read the Dutch adjudication carefully or when we compare the reasoning conducted in the two court rulings with each other. In both, the same conditions, the same case, could both constitute *and* not constitute possession and expression. The same circumstances once constituted an infringement of intellectual property and were once held to be democratic freedom of speech. In a binary system property and freedom of speech conflict and are at odds with one another, and same circumstances result in two different rulings. In a binary based system that constitutes a contradiction. In the Deleuzian universe that constitutes an *encounter* with the border. This is where we find the potential and creativity of law and legal reasoning. For Deleuze, thought occurs here, at the ‘edges’ of a system as the principle of its initiation and revolution: thought occurs not ‘naturally’, but when it is *forced to think*. We could say, putting it in another way, that whereas the image of LAW as re-presentation assigns a passive or speculative role to the LAWYER as *spectator*, for Deleuze the LAWYER is an *actor*, with all that this implies of being at the juncture of an *event* and being engaged in a *drama*.³⁹⁵

4.3 ENCOUNTER 3: DEAD POETS

This third case study concerns the control exercised by the death estates over cultural works and *access to artworks post mortem auctoris* (pma), and how such control functions as an encounter. A particularly interesting circumstance is what happens to original documents and/or previously unpublished works that are bequeathed to various categories of heirs of the author. Should someone be responsible for ascertaining that these artworks are preserved and that they indeed reach the public? This type of encounter exemplifies clashes of legal rules and principles that create obstacles to access, but happens pma.

In the present case study, heirs to prominent literary figures have declined access to works left behind such as letters, drafts and even entire, previously unpublished works. This case study concerns the documents left behind by Franz Kafka and James Joyce. Taking into consideration art. 27 Universal Declaration of Human Rights (UDHR) and placing it in light of the question of access to artworks and the trans-generational transmission of knowledge this case study discusses how access to artworks pma functions in conjunction with the definition of art. 27 UDHR. Since the two authors studied here play a particu-

³⁹⁵ [original emphasis, quote modified], McMahon ‘Difference and Repetition’, in (ed.) Stivale, *Gilles Deleuze, Key Concepts*, p. 46. Where I have written LAW she writes ‘thought’ and where I write LAWYER she writes ‘thinker’.

larly important role in literary history, their works can also be connected to the wider implications of art. 27 UDHR.

4.3.1 AWAY-FROM-HERE

Franz Kafka wrote once in a diary entry:

I have not shown the faintest firmness of resolve in the conduct of my life. It was as if I, like everyone else, had been given a point from which to prolong the radius of a circle, and had then, like everyone else, to describe my perfect circle round this point. Instead, I was forever starting my radius only constantly to be forced at once to break it off. (Examples: piano, violin, languages, Germanics, anti-Zionism, Zionism, Hebrew, gardening, carpentering, writing, marriage attempts, an apartment of my own.)³⁹⁶

The two cases at hand concern access to works by two authors that, as Kafka notes above, were constantly starting new radiuses and breaking them off. Particularly by their trans-nationality, by their non-belonging in the languages in which they chose to write, the two authors created works that challenged literary canons and shaped global literature and Western modernism. Both of the authors' works have also been commented upon by Deleuze and Guattari, which makes them also specially fitting within the theoretical framework of this project. Deleuze and Guattari argue for instance that Kafka's entire body of work was to be considered as a rhizome because it had "no privileged point of entry, no direct *chef d'oeuvre*, no extra-literary texts and no intrinsic hierarchy of fragments and completed works".³⁹⁷ Deleuze and Guattari argued that as such, as a rhizome, all Kafka's diaries, letters, short stories, novels, etc. played an equally pivotal role for his writing machine. I shall not engage in Deleuze and Guattari's readings of Kafka's works here more than to connect it with the claim that this is an author that writes in a *trans*-language, as a *trans*-identity. Addressing Kafka's writings as "minor literature", a term that they coined to denote a literature that deterritorialises a language, that is political and that has a collective value, Deleuze and Guattari claim that it engages in a linguistic dis-possession. Kafka was writing in German at the same time as he was challenging German, deterritorialising it, inventing it, enriching it "artificially, to inflate it with all the resources of symbolism, oneirism, esoteric meaning, hidden signifiers".³⁹⁸ Yiddish was never absent from his writing either, even though it is a language that is only spoken, a language in continuous flux, according to

³⁹⁶ Diary entry from 1922, quote taken from Judith Butler, 'Who Owns Kafka', in *London Review of Books*, Vol. 33 No.5, 3 (March 2011).

³⁹⁷ [original emphasis], Bogue, *Deleuze and Guattari*, p. 107.

³⁹⁸ Deleuze/Guattari, *Kafka: Toward a Minor Literature*, p. 34.

Deleuze and Guattari.³⁹⁹ On this particular subject Judith Butler has also comments, writing:

We find in Kafka's correspondence with his lover Felice Bauer, who was from Berlin, that she is constantly correcting his German, suggesting that he is not fully at home in this second language. And his later lover, Milena Jesenská, who was also the translator of his works into Czech, is constantly teaching him Czech phrases he neither knows how to spell nor to pronounce, suggesting that Czech, too, is also something of a second language. In 1911, he is going to the Yiddish theatre and understanding what is said, but Yiddish is not a language he encounters very often in his family or his daily life; it remains an import from the east that is compelling and strange. So is there a first language here? And can it be argued that even the formal German in which Kafka writes – what Arendt called 'purest' German – bears the signs of someone entering the language from its outside? This was the argument in Deleuze and Guattari's essay 'Kafka: Toward a Minor Literature'.⁴⁰⁰

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Deleuze and Guattari approached James Joyce's work in a similar fashion, namely as an exercise in challenging a language, in this instance the English language. In their view, Joyce was assaulting the English language with Irishness, deterritorialising it, making it move. In one of the first pages of *A Thousand Plateaus* Deleuze and Guattari address Joyce's writing as "words, accurately described as having 'multiple roots', *shatter the linear unity of the word, even of language*, only to posit a cyclic unity of the sentence, text or knowledge."⁴⁰¹

Deleuze and Guattari did not devote as much attention to Joyce as they did to Kafka, but they often return to Joyce in *A Thousand Plateaus*. At one point they even reference Joyce's letters, as examples of how people are segmented.⁴⁰² Joyce, it can be understood, was an author that was segmented, and one of his segments were his letters. Interestingly, it is access to his letters that will be studied here. Deleuze and Guattari write, "[w]e are segmented in a *circular* fashion, in ever larger circles, ever wider disks or coronas, like Joyce's 'letter': my affairs, my neighbourhood's affairs, my city's, the world's..."⁴⁰³

³⁹⁹ Bogue, *Deleuze and Guattari*, pp. 118-119.

⁴⁰⁰ Judith Butler, 'Who Owns Kafka'.

⁴⁰¹ [my emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 6.

⁴⁰² Ibid. p. 230.

⁴⁰³ Ibid. p. 230.

So are Joyce's private letters to be considered as his other works, as his artworks? For Deleuze and Guattari this is obviously the case. They are part of Joyce's segments, the larger circles, the rings on the water-surface, part of his artistic rhizome. As mentioned, I will not further dwell on Deleuze and Guattari's analysis of these two authors and their oeuvres. Instead let us look at two brief summaries of the two cases at hand before we analyse the various lines of flight that together produce an encounter.

4.3.1.1 THE KAFKA CASE

The case of Franz Kafka's manuscripts, unlike Schulz's mural, resulted in court action. The dispute concerning Schulz's mural has (so far) not ended up in court. But the case of the Kafka manuscripts differs on other key points as well.

In October 2012, a judge ruled that a collection of documents that Franz Kafka had left behind and just before his death given to his friend and publisher Max Brod, should be handed over to Israel's National Library from the private hands of the family of Esther Hoffe. Hoffe, now deceased, who in her lifetime had been a friend and secretary of Brod's. Brod in his turn had left Kafka's documents to her. Her estate, controlled by her two daughters, was in the possession of the documents.

Max Brod had kept all Kafka's documents, manuscripts, letters, drafts etc. after Kafka's death and he had taken them along when he fled from Prague to Palestine in 1939. After Kafka's death in 1924 Brod decided to publish a posthumous edition of Kafka's novels. *The Trial* came out in 1925, followed by *The Castle*, that came out in 1926 and *Amerika*, in 1927. This edition was published notwithstanding the letter that Kafka had written to Brod before his death. The publishing of these works took place even though Kafka had asked for the contents of his documents to be destroyed after his death. A letter had been found in Kafka's desk with the following directions to Brod: "My last request: Everything I leave behind me... in the way of diaries, manuscripts, letters (my own and others'), sketches and so on, to be burned unread."⁴⁰⁴

Brod continued to publish and exploit Kafka's work posthumously. As a matter of fact, it is thanks to Brod that most of Kafka's works ever were published and made public. The contents of the Kafka documents that had been left to Brod and kept in a suitcase thus became the subject of a very drawn out legal battle, that was adjudicated upon in October 2012, but that is at the time of the writing this dissertation still being appealed. The facts of the case were the following:

⁴⁰⁴ Kafka case – this translation from Hebrew has been taken from:
http://www.nytimes.com/2010/09/26/magazine/26kafka-t.html?pagewanted=all&_r=1&
Last accessed 17th March 2014.

While Brod was still alive (already in 1952) he had written a “gift-letter” to Esther Hoffe. In that letter, he had pronounced that he was giving a large number of Kafka’s documents outright to her to keep, take care of and guard. Two-thirds of the documents left by Kafka had already ended up in Oxford’s Bodleian Library, and the remainder that had been kept by Brod himself were there-with signed over to Hoffe, his secretary, friend and presumed lover. Esther Hoffe, sold off part of the contents, and left the remainder to her daughters when she died 101 years old in 2007. The Hoffe daughters argued in court that the collection, which has since been kept in safes in Tel Aviv and Zürich, was a private gift from Brod and as such their own private possession, bequeathed to them by their mother, the rightful owner.

Having refused all access, scholarly or otherwise, to the collection throughout her life, and after only selling the official original manuscript of *The Trial* to the German Literature Archive in Marbach, a legal action was brought against Ester Hoffe’s estate by, among others, the National Library of Israel, contesting Brod’s gift-letter where the collection had been handed over to Esther Hoffe, awakening thus the public interest in the contents of the collection. The library contended the Hoffe estate’s argument that Brod had left the Kafka manuscripts to Hoffe as an *executor*. The library claimed instead that Brod had left the documents to her as a *beneficiary*, which means that, after Hoffe’s death, the papers would have to be reverted to the Brod estate. Brod’s official will states that all his literary estate be left “with the library of the Hebrew University of Jerusalem, the Municipal Library in Tel Aviv or another *public* archive in Israel or abroad.”⁴⁰⁵ The Municipal Library in Tel Aviv renounced its claim to the estate, making the Hebrew University Library — today, the National Library of Israel — the only claimant specifically named by Brod.⁴⁰⁶ The gift-letter from 1952 challenged the National Library’s claim. The Hoffe sisters were able to show and present to the court a two-page photocopy of this letter. The National Library, then in turn, “produced a photocopy of a four-page version of the letter, of which the two missing middle pages appear to clarify the limitations of Brod’s gift. When the court ordered a forensic examination, the sisters were unable to produce the original letter.”⁴⁰⁷

The court chose not to accept the Hoffe sister’s argumentation, and it was ruled that the collection of the documents should be handed over to the National Library of Israel.

There are several issues that are particularly interesting with this case within the framework of my study. I will return to the actual court decision in chapter 7, but before I do that I shall be stressing some very interesting lines of flight that this case has given rise to:

⁴⁰⁵ [my emphasis], *Ibid.*

⁴⁰⁶ Kafka case, NY Times translation.

⁴⁰⁷ *Ibid.*

- the fact that even though Kafka had been born in Prague, he was deemed to be part of Israel's national heritage. This challenges the concept of the author as a coherent unity with a singular belonging. It also challenges the notion of the national, local, religious and cultural communities as described in art. 27 UDHR. Here, the belonging of the author and his works, form a line of flight and in itself it challenges the notion of community, belonging and personal unity. Both art. 27 UDHR and intellectual property law presuppose these to be definable and unified in order to be applicable.
- the fact that there was an express wish of the author that his works be destroyed after his death. This deals with among others the concept of privacy and moral right in one's intellectual work that is addressed in section 2 of art. 27 UDHR as well as in intellectual property law. But how does this comply with public good argument? Can a work or a body of work ever reach such a stature that can outweigh the last wish of the original author and his/her moral rights?

Both of these are continuations on some of the issues that were addressed above in the Schulz case, but the difference here is partly that they resulted in a court decision, and partly that there was an estate that controlled and owned the work, and as such it also controlled the access issue more directly.

4.3.1.2 THE JOYCE CASE

Carol Shloss, the professor writing a book on James Joyce's daughter Lucia wrote:

The history of modernism is especially prone to [...] constructed silences, its dead zones managed and manipulated by the practices of active literary estates.⁴⁰⁸

The Joyce case is about James Joyce, his daughter Lucia, his letters that described their relationship, her writings, and a professor's struggle to get access to these documents for the purposes of research of what would eventually be-

⁴⁰⁸ Carol Loeb Shloss, 'Privacy and the Misuse of Copyright, the Case of Shloss v. The Estate of James Joyce', in *Modernism & Copyright*, (ed.) Paul K. Saint-Amour, Oxford University Press (2011), p. 243.

come the book *Lucia Joyce: To Dance in the Wake*.⁴⁰⁹ The book describes Lucia Joyce's dancing, but it also contains facts concerning the dramatic and creative relationship between father and daughter, and the many complexities of their life such as the issue of her mental illness.

The documents that eventually became part of the dispute between professor Carol Shloss and the Joyce Estate, represented by Joyce's grandson Stephen Joyce, were mainly letters. Up until then, not much was known about Joyce's daughter who had inspired him greatly. Nobody had explored her story in detail. Neither had it been studied how Joyce's observations of her made their way into his writings, particularly into *Finnegan's Wake*. Shloss writes:

This is a story that was not supposed to be told. [...] Like Lucia herself, the evidence of what happened to her seemed to some people to be shameful or dangerous. It was something better left under lock and key, erased from records, and expunged from memory.⁴¹⁰

There had been many restrictions on quotations that were imposed on scholars; the alleged destructions of Lucia Joyce's writings⁴¹¹ as well as the extreme demands in terms of approval of quotes and clearance for use of those and other Joyce materials.⁴¹² One of those restrictions concerned the edition of the book *Letters of James Joyce* by Richard Ellman. Ellman, who is Joyce's biographer, had come across certain letters Joyce had written to his partner Nora Barnacle.

⁴⁰⁹ Carol Loeb Shloss, *Lucia Joyce, To Dance in the Wake, Tragic muse and wild beauty: the Story of James Joyce's Only Daughter*, Bloomsbury, (2004 [British Edition, the American Edition was published in 2003]).

⁴¹⁰ Loeb Shloss, *Lucia Joyce, To Dance in the Wake*, p. 11.

⁴¹¹ Tara Pepper, 'Portrait of the Daughter: Two works seek to reclaim the legacy of Lucia Joyce' in *Newsweek International* from 8 March (2003).

⁴¹² Carol Shloss' case is not the only one that the Joyce estate had initiated litigation against: Full chronological list of judicial opinions and related materials involving the Joyce Estate are: *Sweeney v. Nat'l Univ. of Ireland Cork, Trading as Cork University Press*, No. 10497P/2000 (Irish High Court, 9 October 2000). Litigation involving the planned inclusion of Joyce extracts in a Cork UP anthology, *Irish Writing in the Twentieth Century: A Reader*. Court grants injunction in favour of the Joyce Estate. *Sweeney v. Macmillan Publishers Ltd.*, Case No. CH 1997 S 3257, [2001] EWHC Ch B66 (Chancery, 22 November 2001). Litigation involving Danis Rose's "Reader's Edition" of *Ulysses*. Court grants injunction in favour of the Joyce Estate with respect to one of its copyright claims, but rejects the Estate's "passing off" claim and finds that Rose's use of lifetime-published material by Joyce is protected by the UK compulsory licence for revived-copyright works. *Carol L. Shloss, Plaintiff, v. Sean Sweeney, et al., Defendants*. No. C 06-03718 JW, United States District Court for the Northern District of California, San Jose Division. ___F. Supp. 2d___, 2007 WL 2924056. 9 February 2007. 2007. [Court denies the Joyce Estate's Motion to Dismiss and most of its Motion to Strike, and discusses copyright misuse and other important issues] *Settlement Agreement*, 2007. Non-confidential agreement of 16 March 2007 between the Estate of James Joyce and Carol Loeb Shloss related to her use of copyrighted materials omitted from her biography of Lucia Joyce.

Joyce's letters, as is widely known today, were extremely sexually explicit, and only meant to be read by Nora. Stephen Joyce condemned the publication of the letters as they were "[i]ntimate very personal private letters, which were never meant for the public eye, have been sold, pirated, and published. I condemn and deplore this intolerable shameless invasion of privacy as would my grandparents, were they standing beside me here today."⁴¹³

The Joyce estate is well known for their onerous demands in terms of access to the Joyce documents under their control. The estate often places conditions on access e.g. conditions regarding approval of content and/or editing. These conditions are also frequently placed on academic scholarly work and research, something that potentially is contrary to some permitted acts and statutory defences to copyright infringement (or exclusions from infringement, depending on the jurisdiction) such as public interest, education and research. This was brought forth in the dispute between Shloss and the Joyce estate.

Relying on many primary sources, Shloss' work focuses on the life of Lucia Joyce, her unacknowledged artistic talent, her tragic life spent mostly in mental institutions, and the unrecognised influence she exerted over her father's work. Upon learning of Shloss' scholarship, the Joyce Estate — controlled by Joyce's grandson Stephen James Joyce — denied her permission to quote from any of the materials the Joyce Estate controlled and repeatedly threatened her with a copyright infringement suit.⁴¹⁴

Eventually, Stephen Joyce and the Joyce Estate entered into a settlement agreement enforceable by the court that allowed Shloss to publish her material electronically as well as to publish a printed supplement to her book *Lucia Joyce: To Dance in the Wake*.⁴¹⁵ I will return specifically to the litigation process between Carol Shloss and the Joyce Estate in chapter 7. Here, as with the Kafka case the lines of flight this case gave rise to are being studied, particularly privacy rights that were challenged by the notion of public interest and scholarly research.

4.3.2 LINE OF FLIGHT: DEAD AUTHORS AND ART 27 UDHR

The right of everyone to take part in and enjoy the benefits of scientific and cultural knowledge has been recognised in the human rights setting and through human rights instruments such as mainly art. 27 UDHR, as well as art. 15 of the

⁴¹³ Loeb Shloss, 'Privacy and the Misuse of Copyright, the Case of Shloss v. The Estate of James Joyce', in *Modernism & Copyright*, p. 246.

⁴¹⁴ Stanford Law School Press Statement, that I was kindly provided by Mr. Anthony Falzone, although it is publically available at: <http://cyberlaw.stanford.edu/files/blogs/Shloss%20Press%20Release.pdf>. Last accessed 17th March 2014.

⁴¹⁵ Stanford Law School Press Statement.

International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴¹⁶. This section discusses the two paradoxes or conflicts that these regulations give rise to:

- 1) Between intellectual property legislation, particularly the rules stemming from the TRIPS agreement and art. 27 UDHR. This has to do with cultural works that have been deemed to have a very significant role in the production and transmission of knowledge. As such it creates tension between commercial IP rights and heritage-based human rights. This conflict can potentially affect access to such works.
- 2) Between section 1 and section 2 of art. 27 UDHR, namely, the individual right to the intellectual creation and the public's right to participate in the cultural life and "share in scientific advancement and its benefits"⁴¹⁷. This concerns the internal tension within art. 27 UDHR itself, between public and private provisions that figure in the two sections of the same article.

Art. 27 UDHR has been formulated in the following manner:

- (1) Everyone has the right freely to *participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
- (2) Everyone has the right to the *protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*⁴¹⁸

Here in this chapter art. 27 UDHR is being discussed with reference to documents held by literary estates. The literary estates control some of the most highly valued (economic, social and cultural capital, in Bourdieu's words) literary works and other content and documents left behind by the creators. The estates control both access as well as dissemination of the works.

Under copyright provisions the heirs and estates are usually granted the privilege of 70 years pma to control the intellectual property in the works. Thereafter, other strategies can be – and are indeed – often utilised in order to control (further) dissemination and access. When the UN promulgated the UDHR with

⁴¹⁶ Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 27, U.N. Doc. A/RES/3/217A (1948) [henceforward UDHR]; International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 15, U.N. Doc. A/6312 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976) [henceforward ICESCR]. See also generally Aurora Plomer, 'The Human Rights Paradox: Intellectual Property Rights and Rights of Access to Science' in *Human Rights Quarterly*, Volume 35, Number 1, February 2013, pp. 143-175.

⁴¹⁷ Art. 27 s(2) UDHR.

⁴¹⁸ [my emphasis throughout]

art. 27 granting every individual the universal *human* right to participate in the cultural life of the community and to enjoy the arts, they probably did not envisage the question of access to unpublished works of dead authors.

The encounter aspect here is the following: By addressing participation in and enjoyment of culture, the UN “introduced the idea that culture was an aspect of human rights, although it did not elucidate the specific relationship between individuals, communities, and nations, and did not clarify how conflicts among these three entities could or should be resolved”⁴¹⁹. Here, problems in terms of access have arisen as a consequence of restricted access to documents by the estates that hold valuable literary works and furthermore the implications of preservation, archiving⁴²⁰ and assemblage of the documents for access to literary works.

I will first address the reason why the issue of deceased authors and literary estates is pertinent for the encounter in question and for this research. The two authors whose works are discussed here are not only interesting because of their literary importance or the fact that access to their work resulted in legal disputes, but also because there were certain identity matters that are particularly interesting for this type of study and the notions of community that are presented within the legal realm. This needs to be connected with how these two authors who wrote in-between languages and cultures, and how juxtaposing their works with access to cultural heritage or indigenous art and transmission of knowledge becomes particularly interesting for this study. In Volume II of this study, this encounter and its lines of flight will be connected to the concept of haecceity discussed above in chapter 2 as well as the concept of the cultural commons.

The conflict that exists between human rights and intellectual property rights, as well as within human right provision itself, between individual and public based rights, are well known, established and acknowledged in research. The UN Sub-Commission on Human Rights has for instance addressed the constitution of economic, social and cultural rights and their potential clash with TRIPS, stating that “actual or potential conflict exists between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights, in particular the rights to self-determination, food, housing, work, health and education, and in relation to transfers of technology to developing countries.”⁴²¹

⁴¹⁹ Helaine Silverman & D. Fairchild Ruggles, *Cultural Heritage and Human Rights*, Springer, (2007), p. 4.

⁴²⁰ For further discussion see Jacques Derrida, *Archive Fever: a Freudian Impression*, (trans.) Eric Prenowitz, Chicago: University of Chicago Press, (1996).

⁴²¹ Intellectual Property and Human Rights, adopted 16 Aug. 2001, Res. 2001/21, U.N. OHCHR, Sub-Commission on Human Rights, 26th meeting, p- 11 (2001), see also Plomer, p. 147.

This is a very common approach where these types of discussion are often carried within the framework of health and food, leaving access to artistic and cultural works slightly in the shadows. But how do art. 27 UDHR, TRIPS and these discussions work in conjunction with access to cultural works left behind by authors now deceased? Is there a theoretical difference between a living and a dead artist, if the work is still within the term of copyright, or not?

The first section of art. 27 UDHR is usually approached as a right of indigenous people to have access to their cultural works and their traditional knowledge.⁴²² Looking back at the drafting of this particular article it can be noted that the main proponents for the provision were some South American countries, with vast indigenous communities on their territories.⁴²³ While indigenous culture and knowledge had traditionally been open and part of the public domain, it was also open for appropriation by private interests, and the knowledge that it encompasses could e.g. be patented, or included in new works that subsist copyright. This meant that enclosures were constructed around what had previously been (perceived as) works and cultural expression open and available to everyone, that the indigenous community could no longer take part in and were in many ways excluded from it. While acknowledging indigenous knowledge as something worth protecting a paradox was created. It seems to be generally considered that “when indigenous culture is analyzed from a human rights perspective, intellectual property rules are seen as one of the problems facing indigenous communities and - only perhaps - as part of a solution to those problems.”⁴²⁴

In order to acknowledge the importance of the indigenous culture it was brought into the realm of art. 27 UDHR. Then, in section 2 it grants a provision of individual ownership and protection of these works. But how is indigenous knowledge really to be defined and addressed in the post-colonial era? In a globalised society, where we are increasingly moving away from “defining” people according to race and nationality, does the notion of indigenous knowledge change? How do we treat works created trans-nationally, by people that defy national and local definitions, that do not fit in within any of these large structures constructed on a supra-national level? Some aspects of this discussion were already introduced above in the Bruno Schulz case, and others are emerging from the Kafka and Joyce cases here.

⁴²² See also Draft Declaration on the Rights of Indigenous Peoples, and Principles and Guidelines for the Protection of the Heritage of Indigenous People.

⁴²³ See generally Plomer.

⁴²⁴ Helfer, ‘Human Rights and Intellectual Property, Conflict or Coexistence’, p. 54.

4.3.3 LINE OF FLIGHT: DEBRIS

The Kafka and Joyce estates both have in common the fact that they are guarding and controlling access to some of the most sought-after literary works. Could a legal type of access be discussed or established as stemming from the public interest in all these works in view of art. 27 UDHR in particular, and if so, could it be argued that the public has a legal claim to the access to these works? How can conservation and preservation of these works function with a potential (unrestricted) legal access to these works?

The main issue that lies behind the demanding and the very restricted terms of access to documents left behind, in the case of the Joyce estate, seems to be family issues, tragedies, illnesses and private problems, which the estate has an interest in keeping private. But to what extent can that happen without seriously endangering the principles of public interest in access to knowledge and participation in culture? Many of the documents in question here are letters, and they might have an even wider knowledge potential than only artistic value. Even though the literary value that they embody is enormous, these can also be approached as historical records that document both the time in which they were written, a mental illness, as well as the development of two artistic minds and a novel that would come to define Western literary modernism.

The Kafka case concerns the problem with the reclusiveness of the author and how works that the creator expressly did not wish to publish ought to be treated after his death. The issue whether these documents at all fall within the ambit of art. 27 UDHR is interesting. Even if the National Library of Israel did not expressly rely on art. 27 UDHR in their reasoning, they certainly framed their (winning) argumentation in that vein when they contested the Hoffe estate's possession of the documents. Brod, in his will, never meant for these documents of tremendous value for Jewish and Western culture, heritage, history and people, to be kept locked in a safe and to be published and exploited as two private persons saw fit. The intention of his gift-letter was only meant to last the life of Esther Hoffe, provide her with security, and after that the contents were intended to befall a public institution, for all people to access. Two thirds of the Kafka documents had already ended up in the UK, so was it not only fair that the rest be stored in a public library in Israel?

Even if we were to assume that these works could be such heritage within the scope of art. 27 UDHR, and even if the act of accessing them could be framed as taking part in culture or access to traditional knowledge in the sense that art. 27 UDHR puts forward, do we really and truly have the right to forcefully access works when the author (a) explicitly expressed a wish not to ever have them published and (b) is no longer around to say *no* with regards to privacy or moral grounds? Clearly, in both of these cases, it is not as simple as having to weigh the rights holders and their heirs' privacy against the public interest in the works left behind.

Furthermore, the estates do not only keep the works private and away from the probing, critical – albeit sometimes even hysterical – public eye. When something is released and published with the estates' authorisation, there are often requirements and conditions attached in exchange to granting access, not only in terms of price but also in terms of content, edits and changes, all of which are valid and pertinent issues that have to be acknowledged and taken into consideration when discussing the public interest in access to these works.

All these various alterations and restrictions, not only deconstruct and reconstruct (parts of) the original (as well as derivative) works, they also, frequently give rise to, in the best case scenarios double meanings unintended by the original author, and in worst case scenarios, indubitably lead to changed or imposed meanings in the works. It of course warrants the query as to when the private protection of e.g. a family's good name or an author's dying wish start to interfere with the public interest in prominent literary works and access to and trans-generational transmission of knowledge.

One of the most interesting aspects of these cases is that while they encompass many features of cultural heritage, they are not (expressly) necessarily deemed as such – how could they be? And even if they were to be deemed as heritage it is problematic for these particular works discussed here because of their *nomadic* nature, both in terms of the lives the authors lived as well as in the way they wrote. On a principal legal level when it comes to art. 27 UDHR it is imperative that it be discussed who is responsible for the safekeeping of cultural heritage, particularly the heritage that is trans-national, trans-communal, trans-generational... On a more specific level for this study, the interesting aspect is what role the estate, as the right owner, can have vis-à-vis enabling access to these works.

A literary estate's status as a legal subject adds further dimensions, lines of flight and plateaus to the already shattered legal status of authors like Joyce or Kafka. The fact that their works were scattered and shattered to begin with, and that they are difficult to place in any given traditional national or local cultural heritage paradigm makes access to these works intriguing theoretically. How do we enable legal access to something that is impossible to catch, to define? These are the debris of works that from the outset were broken, before anyone even attempted to assemble them and frame them into rights, right subjects, communities, identities, etc.

4.3.4 LINE OF FLIGHT: RECLUSES AND PRIVACY

The flip side of the discourse concerning access to these works is the difficulty in establishing a stance in terms works that have come into existence as private expressions of intimate thoughts, created sometimes during (self-imposed) reclusiveness of the author, or for the eyes of only one specific person, and to

what extent this ought to be kept in mind and *respected* after the author has passed away.

Can public access ever outweigh and override individual privacy in these instances? In Kafka's case for instance, as we saw above, had not his friend, publisher and literary executor Max Brod disregarded – perhaps disrespectfully so – Kafka's dying wish to destroy his manuscripts and documents after his death, the world would have been bereft of most of Kafka's work that had not been published during Kafka's life. The world would have been poorer for it in terms of knowledge.

In the Joyce case, his letters, as well as the writings of Lucia Joyce, were in many ways private expressions of wishes and desires, not meant for the public eye. While these documents add insight into the mind and reasoning of one of the most important modernist writers, there seems to be an imperceptible line where the search for scientific knowledge can easily turn into exploitation, sensualisation, gossip. In an era of sensationalist journalism, where such information can be a priced commodity, the notions of privacy are being brought within the realm of commercial exploitation. These types of matters have been addressed in legal journals ever since the turn of the 19th century. Samuel D. Warren and Louis D. Brandeis wrote for instance in *Harvard Law Review* already in 1890 that “[g]ossip is no longer the resource of idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.”⁴²⁵

These cases repeatedly bring us back to the question: when does a literary work achieve such stature that it has to be seen as having broken away from the ambit of the private sphere's and entered the realm of e.g. cultural heritage or the public domain that *everybody* in the words of art. 27 UDHR ought to have access to? Can this happen before the 70 years after the death of the author have passed as in the Joyce case?⁴²⁶ And what happens when even after 70 years pma, the physical copies and contents are still being kept in secret, private, vaults, where all access is prohibited, even when copyright has long since expired from the underlying works? And who is responsible whether or not documents like these ought to be saved, published and kept for posterity, like in the Kafka case? Or burned and destroyed, like in the James and Lucia Joyce's case?

The commercial aspect too must be kept in mind. Admittedly, some of these estates, as in the Kafka case, appeared to have been holding out for the highest bidder in their admitted possessiveness.⁴²⁷ When that is the case, it can be dis-

⁴²⁵ Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy', in *Harvard Law Review* 4 (1890): 193.

⁴²⁶ Joyce's copyright expired in January 2011 while the Shloss litigation was still on going.

⁴²⁷ Although Esther Hoffé and her family always maintained that there was no financial but rather *moral* obligation in having the works under their protection, see e.g. Christoph Schult,

cussed what the implications of bidding wars and high price tags might be with regards to the preservation and access to these and other similar literary works that lie in the hands of estates, particularly in a democratic society that has an interest in safeguarding the free flow of knowledge and information dissemination in general – and again, in the words of art. 27 UDHR – the right of everybody to participate in the cultural life of the community and enjoy the arts, in particular?

4.3.5 LINE OF FLIGHT: MEMORY-MAKING AND PRODUCTION OF HISTORY

Generally, when art. 27 UDHR is discussed the focus often lies on cultural heritage from indigenous people or on preservation of ethnically and/or politically significant cultural items (e.g. from minorities).

In their insightful essay, Helen Silverman and D. Fairchild Ruggles⁴²⁸ discuss the selective and exclusory processes that exist in the use and identification of cultural items in order to e.g. (re)construct the past. They particularly study the complexities connected to the issues when archaeological finds are purposely left unacknowledged when they do not correspond with certain (political or commercial) ideals or notions of communities. These and similar activities are referred to in their article as “production of history”⁴²⁹. Production of history is exemplified with for instance the acts of colonial powers hiding or altering indigenous cultural artefacts in Africa and the Americas in order to construct colonial legitimacy. Silverman and Ruggles’ essay strengthens the argument that abuses or alterations done to cultural works can have significant impacts not only on the future but also on the past.⁴³⁰ The interesting argument is that their discussion can be taken one step further and placed within the realm of this case study.

Possessing the power to distil information, alter and in the end produce history and memories is a powerful tool and an act that understandably can have severe implications on the understandings of the past, the present and naturally of the future. It can be a direct exercise of power. But what do such actions lead to in the short run, and result in, in the long run? Drawn to its extreme – if the actions are enabled within an unregulated, or legally confused sphere – we might end up in a situation where, to rephrase a famous ancient Russian prov-

‘The Trial, Fight for Kafka’s Papers Winds through Israeli Courts’, in *Spiegel*, (28th September 2009). Available at: <http://www.spiegel.de/international/world/0,1518,651859,00.html>. Last accessed 17th March 2014.

⁴²⁸ Silverman & Ruggles, *Cultural Heritage and Human Rights*.

⁴²⁹ Ibid.

⁴³⁰ Silverman & Ruggles, *Cultural Heritage and Human Rights*. p. 11.

erb, *nothing becomes as unpredictable as the past*.⁴³¹ That is arguably the reason why access to culture was incorporated in the human rights realm in the first place.

Evidently, it is not sufficient and satisfactory to merely focus on the war torn territories, indigenous cultures and minority art when discussing the practical uses of art. 27. This case study, and the lines of flight that it gives rise to, initiates the particular discussion as to the peculiar opposition between *privacy* and *access*, and between *IPRs* and *human rights*. Additionally the dimension of the production of history is added when we are discussing not only the literary works but also other documents that belonged to the authors, such as letters, but documents that cannot be attributed to any one particular cultural heritage.⁴³²

4.3.6 LINE OF FLIGHT: BEYOND THE CLASHES OF HUMAN RIGHTS AND IP RIGHTS

Three opposing dogmatic legal principles are thus pitted against one another, firstly, the principle of *privacy*, secondly, the principle of *private property and trade*, here mainly regulated in TRIPS, as well as alluded to in section 2 of art. 27 UDHR, which both have to be upheld and justified in a domain where, thirdly, universal *human rights*, such as art. 27 section 1, must also be respected and taken into account.

The problem of course being that the circumstance of unpublished works from dead authors is not entirely simple to deal with, primarily because when we think of art. 27 UDHR and human rights, an unrestricted access to sealed safes and old unpublished documents is perhaps the last thing we associate with it. The international regulation that deals with culture and cultural heritage does not end with the scope of art. 27 UDHR, it is far more extensive. Keeping in mind e.g. International Covenant on Economic, Social and Cultural Rights, the Convention for Safeguarding Intangible Cultural Heritage (ICH) as well as various other conventions such as WIPO's The Protection of Traditional

⁴³¹ The original Russian proverb reads: "The future is certain, only the past is in doubt", taken from Faith Wigzell, *Reading Russian Fortunes, Print Culture, Gender and Divination in Russia from 1765*, Cambridge University Press, (1998).

⁴³² Note that UNESCO now also safeguards historical documents. Apart from world heritage and intangible heritage they now also focus on the so-called "documentary heritage" deemed to have universal value through *Memory of the World Register*. As with tangible heritage and intangible heritage sites, this register also lists and preserves documents of universal value. The register can be accessed at:

<http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/memory-of-the-world/register/>. Last accessed 17th March 2014.

Knowledge, Draft Objectives and Principles⁴³³ it becomes instantly apparent that the issue of what counts and does not count as cultural heritage, and how the custodianship of it ought to be governed and regulated in law, is far easier posed than answered.

What falls within the definition of cultural heritage and how is it defined in law? Should a line be drawn somewhere? Could a single poem be defined as heritage? And how about a letter? Or a note? Or a scribble in the margins?⁴³⁴ Following a rhizomatic reasoning the answer is *all of them*.

The issue with definitions, the ontological question that this study is adamantly attempting to reach beyond and steer clear of, is logically, that while a clear definition is helpful in the commonplace practice and practical application of law, they are at the same time exclusory and act as boundaries. A definition is a fence raised up so as to distinguish one fact from another, one property from the other, someone's access from another's privacy, and arguably someone's heritage from someone else's (dis)inheritance. Defining someone's heritage means at same time disinheriting someone else or indeed entire groups of people that are not defined as beneficiaries.

Both European and international law focus strongly on individual private ownership and the fruits stemming from creative labour⁴³⁵, which is framed as a property right, that can be inherited after the death of the author. This means that the said fruits of labour do not only benefit the creator by the act of regulation, the law equally names the family of the creator as the beneficiaries of such work and such heritage.

Without questioning the rationale for the possibility of inheritance of intellectual property assets, it perhaps warrants widening the discussion slightly. Namely asking whether such inheritance rights ought to only apply to the, by the law named, natural family (or others, by the will of the creator, named, beneficiaries and executioners)? Or, whether such regulation always ought to only be in the private hands, or be exempt from further legal limitations? If we break down the problem in order to have a legal claim on access to works a public interest/knowledge interest needs to be construed in order to justify the circum-

⁴³³ For a very clear and comprehensive overview over the international framework in the area see e.g. Tushiyuki Kono, 'Convention for the Safeguarding of Intangible Cultural Heritage, Unresolved Issues and Unanswered Questions', in (ed.) Kono, *Intangible Cultural Heritage and Intellectual Property*, Intersentia, (2009).

⁴³⁴ Matilda Arvidsson, Conference paper, *Marginalanteckningar*, Rätt & Kultur, School of Business, Economics and Law, Gothenburg University, (8-9 April 2010)

⁴³⁵ For a superb description of immaterial labour in the consumer society see Michael Hardt and Antonio Negri, *Multitude: War and Democracy In the Age of Empire*, New York: The Penguin Express, (2004) pp. 180-188.

vention of, firstly, copyright infringement claims and, secondly, other regulations such as e.g. breach of confidence or breach of privacy claims.⁴³⁶

In the cases of Kafka and Joyce human rights such as the one stipulated in art. 27 UDHR can be seen to be in constant discordance with other human rights such as e.g. the rights that recognise personal privacy or the enjoyment of possessions.⁴³⁷ This discordance is brought on by certain dogmatic principles that the binary reasoning gives rise to and that cannot be fully upheld here as the one does not necessarily exclude the other. At the same time, art. 27 UDHR also appears to be in a discordance with itself, namely section one with section two.

All these discordances in law and in legal argumentation, paradoxes, tensions, opposites, or clashes of interests, are common in all legal areas and are not particularly human rights-centric, or IP-rights-specific, and this case study is intentionally highlighting them in order to then analyse them within the Deleuzian rhizomatic theory, utilising encounters and lines of flight as tool for the analysis. In these cases the traditional legal approach to problems requires a balance of interests, which is almost always impossible to strike. An encounter based approach on the other hand clearly illustrates the limit of traditional rules, where they run out of possibilities, and the need for a wider discussion with regards to functions and effects of current legal concepts and their relevance from a human rights perspective, as well as their influence on access to culture and art.

What comes out of this encounter particularly, is the need, and analytical tools to reassess the notion of (cultural) community as well as the need for further discussion of legal concepts that are constellation- or cluster based that allow for both the private and the public, both access and privacy...

4.4 ENCOUNTER 4: ORPHAN WORKS

The last case study differs slightly from the three first. While the first two studies analyse very particular cases and use their very particularity as an encounter, the third looks at two cases and treats them as one and uses the pma as an encounter, this last case study analyses one general legal concept namely *orphan works* as an encounter and then looks at some cases in particular in order to illustrate the orphan work concept. This is done in order to conduct a different type of discussion, to demonstrate certain issues with legal concepts and how these legal constructs can constitute an encounter. This case study discusses abandoned and forgotten artworks and *access through libraries and digitisation*.

⁴³⁶ In UK law, see e.g. *Hyde Park Residences Ltd v Yelland* [2000] RPC 604.

⁴³⁷ Richard Arnold QC, 'The Protection of confidential information in the human rights era: two aspects', in *Journal of Intellectual Property Law & Practice*, 2007, VOL. 2, No.9.

4.4.1 ORPHAN WORKS UNDER THE MICROSCOPE

The EU Directive 2012/28/EU defines orphan works in the following manner:

works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located — so-called orphan works⁴³⁸

Outside the EU, the US copyright office defines orphan works similarly:

works that remain subject to copyright law but whose owners cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.⁴³⁹

The framework of the concept of orphan works as it is currently constructed in law deals with abandoned or neglected intellectual property that is still, technically, within the duration of copyright. This is a very intriguing legal construct as, when analysed in more detail, it allows us to also understand (the problems with) other constructs within copyright law such as for instance “the author”.

Let us look more closely at the EU directive that deals with orphan works in order to firstly understand the concept better. The EU Directive has been chosen to represent the European legal framework concerning orphan works in general, and on principle level it is very similar to e.g. the US definition.

Here a type of work is analysed, a work that is still within copyright, but where the author (or authors) cannot be identified or located. The first definition and concept quoted above from the EU Directive, which is provided in the preamble of the directive, is then developed further in Article 2:

A work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a *diligent search* for the rightholders having been carried out and recorded in accordance with Article 3.⁴⁴⁰

Article 3 states in more detail how this ‘diligent search for the rightholders’ ought to be conducted, since no works may be deemed to be an orphan work

⁴³⁸ Directive 2012/28/EU, preamble (3). The directive must be implemented in national legislations by 29th October 2014. In Swedish law, a proposal has been put forward on 2nd October 2013, see *Herrelösa verk i kulturarsinstitutionernas samlingar*, Ds 2013:63.

⁴³⁹ Register of Copyrights, U.S. Copyright Office, Report On Orphan Works 15 (2006). Available at: <http://www.copyright.gov/orphan/orphan-report.pdf>. Last accessed 17th March 2014.

⁴⁴⁰ [my emphasis]

unless such a search has been carried out. The Directive directly designates⁴⁴¹ (in Art. 1) particular institutions such as libraries and museums to be responsible for these types of searches. There is also a direct reference to the public interest that governs the spirit of the Directive.

This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.⁴⁴²

The public interest is for instance mentioned in Article 6 where the permitted uses of orphan works are described. Article 6.2 is particularly interesting to look at:

The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their *public-interest missions*, in particular the preservation of, the restoration of, and the provision of cultural and educational *access to*, works and phonograms contained in their collection. The organisations *may generate revenues* in the course of such uses, for the exclusive purpose of covering their costs of *digitising orphan works and making them available to the public*.⁴⁴³

The particularly interesting aspects for this project are the above emphasised:

- a) public interest mission, and
- b) access, and
- c) revenue, and
- d) available to public

An incisive study of the composition of these four aspects in one and the same legal act will show that this is in fact a rather progressive legal construct. As will be demonstrated in more detail below in chapter 6, the way intellectual property legislation is generally structured, is that it does not necessarily envision *both* revenue *and* public access together but rather *either* revenue *or* access. As a matter of fact, in copyright law, these two are almost seen as each other's opposites as the first one focuses on the individual rights owner and his/her rights while the other one takes a utilitarian approach: per the classic utilitarian maxim 'the greatest amount of good for the greatest number' of people. In such a case then, the needs of the single rights owner may and can be put aside.

⁴⁴¹ But does not define further. More detailed definitions and restrictions have to be provided in the national legislations, see e.g. Ds 2013:63, p. 31.

⁴⁴² Article 1.1. of the Directive.

⁴⁴³ [my emphases throughout], Article 6.2 of the Directive.

So what does it mean and what implications does it have that all of these four aspects have been placed in the one and the same legal act or even within the construction of a legal concept? I shall be arguing, that this is an example of where constellation- or cluster based legal concept are increasingly required and which expressly reveal the legal potential to cater for these types of concepts, but before I do that, let us first study the concept of orphan works closer.

4.4.2 THE RAISON D'ÊTRE OF THE CONCEPT ORPHAN WORKS

The concept of orphan works aims to allow good-faith users of copyrighted content to move forward in cases where they wish to license the use of a work but cannot locate the copyright owner after having conducted a diligent search. The term appears to first have come into use during the 1990s in the US to designate “neglected film footage that was at serious risk of loss due to degradation in the physical medium over time. In the film preservation context, the term ‘orphan’ applied to films whose copyright owners could not be located but it also encompassed films with other characteristics.”⁴⁴⁴

Lydia Pallas Loren writes that the 1993 report on film preservation issued by the Librarian of Congress used the term “orphan” in describing the category of films that were in need of preservation:

If there is a single division that separates most of the preservation issues discussed in this report, it is between *two categories of films*: those that have *evident market value* and owners able to exploit that value; and the other films, often labelled “*orphans*,” that lack either clear copyright holders or commercial potential to pay for their continued preservation. In practice, the former are primarily features from major Hollywood studios; the latter—numerically the majority—include *newsreels and documentaries, avant-garde and independent productions, silent films* where copyright has expired, even certain Hollywood sound films from now defunct studios.⁴⁴⁵

The report being referred to by Loren is *Librarian Of Congress, Film Preservation 1993: A Study Of The Current State Of American Film Preservation*.⁴⁴⁶ In this instance the term orphan is used for the first time, but its meaning is slightly different than what would later become the legal concept of “orphan works”. The films labelled orphans in this study refer to works that:

⁴⁴⁴ Lydia Pallas Loren, ‘Abandoning the Orphans: An Open Access Approach to Hostage Works’ in *Berkeley Technology Law Journal* [Vol. 27:1431], p. 1438.

⁴⁴⁵ [my emphases throughout], Pallas Loren, ‘Abandoning the Orphans: An Open Access Approach to Hostage Works’, pp. 1438-1439.

⁴⁴⁶ Available at <http://www.loc.gov/film/study.html>. Last accessed 17th March 2014.

- lack clear copyright holders, or
- lack commercial potential, where
- copyright has expired.

For a work to be deemed an orphan it had to thus either lack clear copyright holders *or* lack commercial potential, *together with* the fact that copyright has expired. The study claims that these works make up the numerical majority of films examined, mostly newsreels and documentaries, avant-garde and independent productions, silent films, while the other category, the minority, is made up of feature films from major Hollywood studios. Already here we can see that the term orphan is not being used to designate the same types of works that it would later on come to encompass when it became a *bona fide* legal concept. For instance both *b* (lack of commercial potential) and *c* (expired copyright) are not required when we talk about orphan works as a legal concept.

Orphan works is a comparatively new concept, and it did not garner further scholarly attention before the 2000s.⁴⁴⁷ Why did this concept then evolve from in principle designating films that were out of copyright (often unfinished fragments that were not even completed) to encompass any and all works where a copyright owner could not be located after a diligent search? What a diligent search will come to mean in the digital information age, can only be mentioned here in passing, specifically if it is a question of (sometimes a small part of) a digital code that is being circulated virtually.

The orphan works concept today is thus envisioned to be a cluster concept that has a built-in *public interest* remit, there to enable *access* to the works that otherwise would have remained locked in libraries, and if these works are then used successfully and/or incorporated into derivative works that subsequently generate *profit*, that there is no problem with that per the new EU directive and the legal concept of orphan works. As a construct it aims to both further the interests of the public *and* of the individual owners (even if they are unknown).

Getting access to works that exist in libraries but that cannot be made public due to the fact that rights holders may not be known is sometimes much more complicated than it might seem. Even if, as we shall see below, the libraries attempt to categorise or digitise these works, they are not able to do so under current copyright laws. It involves assessing risk liability in every single case as copying and (digitally) disseminating a work naturally requires the rights owner's consent:

The problem is pervasive. Our study recounts the challenges that publishers, film makers, museums, libraries, universities, and private citizens,

⁴⁴⁷ Pallas Loren, 'Abandoning the Orphans: An Open Access Approach to Hostage Works', p. 1431.

among others, have had in managing risk and liability when a copyright owner cannot be identified or located. In testimony before the Senate, a filmmaker spoke of the historically significant images that are removed from documentaries and never reach the public because ownership cannot be determined. In testimony before the House, the U.S. Holocaust Museum spoke of the millions of pages of archival documents, photographs, oral histories, and reels of film that it and other museums cannot publish or digitize.⁴⁴⁸

These types of works are historical documents, newsreels, archival documents etc. and that they embody knowledge and knowledge potential is evident. But, even creating the concept of orphan works has not been enough in guaranteeing access to these types of works.

4.4.3 LINE OF FLIGHT: ORPHANED? THE PLAY WITH METAPHORS

In the article ‘Abandoning The Orphans: An Open Access Approach To Hostage Works’ Lydia Pallas Loren examines and questions the use of the word *orphan* to designate these particular works that are still within copyright, but where the rights owner is unknown and/or cannot be located. She writes “that it relies on the metaphor of the romantic author, the works he creates are his children, born of his labor and genius.”⁴⁴⁹ As such the romantic author is the one who is meant to control, and protect, his children.⁴⁵⁰ The question is whether this is an apt metaphor. To invoke a notion of a human being who has abandoned his/her children. I shall return to the discussion of parent-child metaphor in chapter 6 below.

Here, as Pallas Loren suggests, it might be worth connecting the concept to something else. She suggest for instance abandoned, neglected or derelict property⁴⁵¹ claiming that if the connection to abandoned or neglected property is used instead, it can then be argued that these works have value that is being *wasted* by the absentee owner. She claims further that, “[i]n the area of *tangible property*, the common law developed a variety of doctrines designed to minimize the waste that results from abandoned or neglected property.”⁴⁵²

Pallas Loren’s mistrust of the use of this particular metaphor ‘orphan’ can be juxtaposed with Stefan Larsson’s *Metaphors and Norms, Understanding Copyright in a*

⁴⁴⁸ <http://www.copyright.gov/orphan/OWLegislation/>. Last accessed 17th March 2014.

⁴⁴⁹ Pallas Loren, ‘Abandoning the Orphans: An Open Access Approach to Hostage Works’, p. 1435.

⁴⁵⁰ Ibid.

⁴⁵¹ Pallas Loren, ‘Abandoning the Orphans: An Open Access Approach to Hostage Works’, p. 1439.

⁴⁵² [original emphasis], Ibid. p. 1439.

*Digital Society*⁴⁵³ where he explores how metaphors can have serious impact on how we live our lives, as well as how metaphors function within the legal sphere. He writes:

The problem, however, is that metaphors can be both informative and deceptive. They can be borrowed from a context where they function well, only to be used in another context where they deceive and distort. The metaphors reveal the concepts behind them, the mental structures that form, for instance, debates on legal solutions and shapes. By looking at the linguistic labels (the metaphors) one can determine how phenomena are conceptualised in a given context.⁴⁵⁴

Pallas Loren has provided an interesting comment on orphan works where she has managed to demonstrate the deceptive nature of the ‘orphan’ metaphor applied to these works. The word orphan implies that there exists a ‘parent’, a single creator, who in turn can be tied to the romantic notion of the author, which is often not the case with the orphan works as we saw above, as many of these works are in fact joint works, news reels etc.

Assuming that it is appropriate to link intangible works such as orphan works to concepts from the realm of tangible property opens up to a host of new alternatives. Pallas Loren subsequently goes on to apply other concepts from the tangible realm and see whether they may fit instead, including treating these works as abandoned property⁴⁵⁵, neglected property, adverse possession, and prescriptive easements, concluding, that what these works ought to be referred to is *hostage works*:

When viewed as a “hostage work problem” it becomes clear that these works do not need foster parents or protection against inappropriate exploitation—the end result of an orphan metaphor. Nor do these works need new owners—the end result of a metaphor of abandoned or neglected property. What these works need are *‘special forces’* that can free them from the constraints placed on them by the combination of the regulatory effects of copyright and the lack of a locatable owner who can grant permission to avoid the consequences of the regulation.⁴⁵⁶

⁴⁵³ Stefan Larsson, *Metaphors and Norms, Understanding Copyright in a Digital Society*, Board Book, (2011).

⁴⁵⁴ *Ibid.* p. 193.

⁴⁵⁵ For further discussion on orphan works as abandonware see e.g. Dennis W. K. Khong, ‘Orphan Works, Abandonware and the Missing Market’, in 15 *International Journal of Law & Information Technology*, 54 (2007).

⁴⁵⁶ [my emphasis], Pallas Loren, ‘Abandoning the Orphans: An Open Access Approach to Hostage Works’, p. 1452-1453.

The ‘special forces’ proposed by Pallas Loren is an interesting point of entry to the various issues of orphan works. Before we continue to discuss the orphan works metaphor, the de facto orphan works concept in law, and how it works, let us look at two recent cases, the first one involves directly millions of orphan works, and the second does not directly involve an orphan work but it illustrates the metaphor problematic.

4.4.4 LINE OF FLIGHT: GOOGLE BOOKS AND HATHI TRUST

Lately, the issues of orphan works came under scrutiny when the Google Books project attempted and planned the very ambitious project to scan *every book ever published*.⁴⁵⁷ When the project began its digitalising process⁴⁵⁸, it transpired that many of the authors of the works that had within the project initially been dubbed (potential) orphan works by the American organization HathiTrust Digital Library⁴⁵⁹ were in reality not unknown and the authors could rather easily be located.⁴⁶⁰ A diligent search had therefore not been conducted before dubbing the works (potential) orphan works.

The infrastructure of the digital book revealed many a legal problem, but one of the more prominent ones turned out to be how a vast digitisation of works would correspond with the orphan works and how orphan works ought to be handled in such cases. Kelu L. Sullivan writes:

Books historically have been defined as sets “of written, printed, or blank sheets bound together into a volume,” and while theoretically the value of the book is not the cost of the paper, but the content of the words, that maxim has never before been tested in any rigorous sense. The e-book model marks a sea of changes for print media, as the content of an e-book exists separately from any physical form. *Free from the tangibility-constraints* that both benefited and hindered paper books, e-books strain copyright laws’ ability to accommodate this new media and the conventions it entails. Similar to many advances in technology that decrease the costs of reproduction

⁴⁵⁷ James Grimmelmann, ‘Orphan Wars’, in *Educause Review Online*, (23rd January 2012). Available at: <http://www.educause.edu/ero/article/orphan-wars>. Last accessed 18th March 2014.

⁴⁵⁸ That led to a large class action suit brought on by the American Author’s Guild. The suit was not about orphaned works *per se*, and it is too detailed and lengthy to be discussed here. However, it was claimed there that orphan works in particular cannot be made public (not even excerpts) without the express consents by the authors and/or copyright owners.

⁴⁵⁹ <http://www.hathitrust.org/>. Last accessed 18th March 2014.

⁴⁶⁰ Interestingly, a book by the quite well renowned American author Walter Lippmann called *The Communist World and Ours* was on these lists. The author’s estate could easily be tracked down.

and distribution of intangible works, the development of e-books require a reassessment of the proper legal protection for creators.⁴⁶¹

When Google Books in 2004 began the digitalisation project, which entailed scanning millions of books, including some deemed to be (potential) orphan works, American Author's Guild brought a class action against Google for copyright infringement.⁴⁶² By copying and digitising, still-in-copyright books, it was claimed that Google was committing large-scale copyright infringement. A settlement agreement was reached between the parties, which was first approved by the Southern district Court of New York in 2009, but then rejected in March 2011.⁴⁶³ The court argued that the settlement agreement was going too far and resulted, particularly when it came to orphan works, in "the involuntary transfer of copyrights [...] as copyrighted works would be licensed without the owners' consent."⁴⁶⁴ Google defended their action as fair use, claiming that any author that did not want to be part of the scheme could easily opt out.⁴⁶⁵

However, given the fact that the rights owners for orphan works are in fact missing or unknown, Google would not only obtain an indirect transfer of copyright, they could also carve out a loophole for using orphan works and no other person or entity would thereafter be able to use these works. This would be the case due to the fact that the original rights owners could not be identified or located, and with the act of digitisation Google would obtain rights in the digital copies that would befall them. Had the settlement agreement been granted by the court it would have also given Google the right to use these digitised orphan works and provide Google with a constructive monopoly over the market for orphan works.⁴⁶⁶ Google's fair use defence was difficult and complicated to uphold, to say the least, for this and several other reasons. Three particular actions were held up:

- Scans: a whole copy of each book would go into its digital database;

⁴⁶¹ [my emphasis], Kelu L. Sullivan, 'Orphan Works At The Dawn Of Digitization', in 18 *Richmond Journal of Law & Technology*, 1 2011-2012, p. 2-3.

⁴⁶² *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011).

⁴⁶³ *Authors Guild*, 770 F. Supp. 2d. at 671.

⁴⁶⁴ *Authors Guild*, p. 673.

⁴⁶⁵ Steven Hetcher, 'The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable', in 13 *Michigan Telecommunication & Technology Law Review*, 1, 65-66 (2006).

⁴⁶⁶ See e.g. Randal C. Picker, 'The Google Book Search Settlement: A New Orphan-Works Monopoly?' in 10 *University of Chicago Law & Economy Online Working Paper*, No. 462, 2009 and Robert Darnton, 'Google and the Future of Books', *New York Review of Books*, 12th February 2009. Available at:

<http://www.nybooks.com/articles/archives/2009/feb/12/google-the-future-of-books/>. Last accessed 18th March 2014.

- Copies: snippets from the its digitized copies of books would be displayed online; and
- Provides: access to these works to libraries participating in the Google Library⁴⁶⁷

Each of these, technically, goes beyond the fair use exception provided in the US copyright law. The commercial nature of Google and its project further complicated the matter. To the question whether Google can be seen as library in the context of orphan works as a legal concept was not addressed, and in my view, even if it had been addressed, the commercial nature of Google would have hindered Google to be added to the named institutions in e.g. the EU directive. The merit of this reasoning shall not be discussed here.

This case is only being presented topographically and as an overview here, in order, not to study it in particular, but rather to provide a case-based framework for the general orphan works discussion. Irrefutably, it could be concluded, that while US copyright law and the interests of actual and potential authors prevented the Google Books project to expand to the extent Google had envisioned, it also meant that the orphan works at hand remained locked up in libraries where they were, and still are, waiting for their proper owners to claim them, and where they are still being held away from the public and the public's access to them.

4.4.5 LINE OF FLIGHT: THE LOST MURAL OF BANKSY

Another case that shall be discussed briefly is not a case that concerns orphan works *per se*. At least the issue of orphan works has never been brought forward, even though it is about a work that was abandoned by its creator, and where the creator cannot be identified or directly located. Street art can be defined in the following manner:

Street art is art, specifically visual art, developed in public spaces — that is, 'in the streets' — though the term usually refers to *unsanctioned* art, as opposed to government sponsored initiatives. The term can include traditional graffiti artwork, sculpture, stencil graffiti, sticker art, wheatpasting and street poster art, video projection, art intervention, guerrilla art, and street installations. [...] Some people consider street art a crime; others consider it a form of art. It is a borderline issue. Street artists may be charged with vandalism, malicious mischief, intentional destruction of property, criminal trespass, or antisocial behavior and there different legal restrictions depending on

⁴⁶⁷ Alessandra Glorioso, 'Google Books: An Orphan Works Solution Note' in 38 *Hofstra Law Review* 971 (2009-2010), p. 983.

whether it's private or public property [sic]. In some cities, it is unlawful for landowners to allow any graffiti on their property if it's visible from any other public or private property. A 2012 research paper from Hacettepe University tried to define street art as a type of crime, then examined it using criminological perspective with criminological and deviance theories, in order to understand and explain it better using an example.⁴⁶⁸

This case looks at street art per this maybe not-so-scientific, but pertinent, Wikipedia definition, and a particular work of art that was made by arguably one of our times most well known British street artists that goes under the pseudonym Banksy⁴⁶⁹, whose high-quality street art has for more than a decade divided critics, the general public and the public authorities as to how it ought to be treated and branded. On the one hand, his work generates million dollar sales, and has been sold to Hollywood stars such as Brad Pitt, on the other hand it is (or more accurately *used to be*) considered as vandalism of property, graffiti, a criminal act and his work used to be taken down by the city councils around the world, and most notably in London where he supposedly lives.

From a tongue-in-cheek street art commentator, a vigilante of social issues, which he discusses with the backdrop of public places and the urban spaces as his canvas, he has risen to international fame, and has had both films and books devoted to him and his work.⁴⁷⁰ With an army of representatives that communicate with the artworld and press on his behalf, his identity remains equally an enigma today, as it was the first time his work appeared in the streets of Bristol in the 1990s. Today, far from removing his work from properties, the *lucky* property owners often choose to put protective frames over the works so as to

⁴⁶⁸ http://en.wikipedia.org/wiki/Street_art, see also Susan C. Haedicke, *Contemporary Street Arts in Europe: Aesthetics and Politics*, Pallgrave, Macmillan, (2012).

⁴⁶⁹ See generally in his own words:

Banksy, *Banging Your Head Against a Brick Wall* (2001) ISBN 978-0-9541704-0-0

Banksy, *Existencilism* (2002) ISBN 978-0-9541704-1-7

Banksy, *Cut It Out* (2004) ISBN 978-0-9544960-0-5

Banksy, *Wall and Piece* (2005) ISBN 978-1-84413-786-2

Banksy, *Pictures of Walls* (2005) ISBN 978-0-9551946-0-3

Banksy, *You Are an Acceptable Level of Threat* (2012) ISBN 978-1908211088

Random House published *Wall and Piece* in 2005.

Books about his work, authored by others:

Ulrich Blanché, *Something to s(pr)ay: Der Street Artist Banksy. Eine kunstwissenschaftliche Untersuchung*, Techtum Verlag (2010). Martin Bull, *Banksy Locations and Tours: A Collection of Graffiti Locations and Photographs in London*, PM Press (2010), Will Elsworth-Jones, *Banksy: The Man behind the Wall*, Aurum Press (2012), Paul Gough (ed.), *Banksy: The Bristol Legacy*, Redcliffe Press (2012), Steve Wright, *Banksy's Bristol: Home Sweet Home*, Tangent Books (2007).

⁴⁷⁰ The most recent one is Williams Ellsworth-Jones, *Banksy*, where the author explores Banksy's rise to fame.

protect them and their value. A Banksy work on a property can today significantly increase the value of a property.

In 2011 a mural entitled *Slave Labour* that Banksy had done in the area Turnpike Lane in London was chopped off from the building onto which it was painted and disappeared. Some time later, the chopped-off piece of the wall showed up at a small auction house in Miami called Fine Art Auctions Miami. Whether the painting had in fact been stolen and how the provenance of this artwork needed to be treated by the auction house, naturally, caused a number of problems.

The auction house claimed that the artwork had not been stolen. For how does one steal a piece of a building, how does illegal art get stolen? A private collector had consigned the piece of the wall with the stencilled work to the auction house, and the auction house claimed further that they were very careful as to the provenance of the works that they subsequently put on sale. However, at the last minute, after vociferous protests from the UK, it was pulled from the auction (having previously given the work an estimated price tag of €700 000). Haringey Council, where the work had originally been created, claimed that it belonged to their community. However, as the work was less than 50 years old, it was not subject to export control of cultural works, and the British Art Council could not retrieve it in that way. Banksy and the company that handles the sales of his works, the aptly named *Pest Control*, never commented on this issue. Banksy had abandoned the work. He could not care less if it was on the wall in Haringey or chopped-off and sold to a private owner through a gallery. At least that was what the lack of public response communicated. If anything the act of chopping-off was a comment on ownership of art in its own right.

The work was pulled from sale and returned to its “owner”, i.e. the private collector who had approached the auction house in the first place and put it up for sale. Haringey Council, and its community, could not have it back. It remains locked up with an anonymous private collector, held away from the public.

4.4.6 LINE OF FLIGHT: ORPHANED ANTIQUITIES

In a discussion concerning who owns street art,⁴⁷¹ the online blog *Itsartlaw* claimed that as with antiquities at the turn of the century, that gained real attention when it became clear that they could have financial value, street art too gained mainstream acknowledgement when it became clear that it could have financial value. It went from potentially cultural and sometimes also social capital, to becoming actual economical capital per Bourdieu. Something, that previously had been considered to be litter, old derelict objects, criminal damage, etc.

⁴⁷¹ <http://www.itsartlaw.com/2013/03/part-i-who-owns-street-art.html>. Last accessed 18th March 2014.

precipitously gained real, economical value. Will Ellsworth-Jones notes in the very first sentence in the introduction of *Banksy, The Man Behind the Wall*, that this “is the outlaw who has been dragged reluctantly, but relentlessly, ever closer to the art establishment.”⁴⁷² As an artist, Banksy keeps mocking the establishment, playing with the exception of what art is, what it is expected to be, who the artist is and how s/he is supposed to present him/herself, how art should be marketed and accessed.

Let us be reminded then how orphan works as a legal concept was defined in the EU directive Art. 2: “a work where the rightholder cannot be identified or, even if he is identified, he cannot be located despite a diligent search”. How do we deal with an graffiti artist that has become mainstream, very much part of the art establishment, albeit reluctantly, a Robin Hood⁴⁷³ of the arts who does not want to be identified, and who is intentionally *in hiding*. He makes public art, available to everyone to behold, but he also sells his work to the highest bidder. He despises capitalism, writes Ellsworth-Jones, yet he seems to be a capitalist himself – although a reluctant one.⁴⁷⁴

Furthermore, once the economical value of the work has been established, it shifts from public (open to everybody in the public space) to private (framed, bought/sold, excluded from the public realm). This transition may seem imperceptible but within the framework of the orphan work concept it is very pertinent. Within the context of art. 6 of the EU directive in that orphan works may be used in order to achieve public-interest missions and preservation or restoration of works. The directive further states that certain cultural organisations may not only facilitate access to these works but also generate revenue in the course of such uses in order to cover the costs of digitising the works and making them available. If there is a public interest in London, or in Turnpike Lane, for the work that overrides the one of the private collector and if there is a need to return the work to the building onto which it was originally painted in order to preserve or restore it, then there may an argument in the orphan works concept that Haringey Council may have overseen. Furthermore, whether this is a movable work, chattel or part of a building, land, can only be asked in passing here. A similar discussion was also evident from the Schulz case above.

This case is precisely an encounter because the orphan work principle has not been devised with street art in mind, and street art in turn, is normally not seen as something that necessarily has a public interest mission or potential financial value as economic capital. If we then return to the first case of this chapter, namely the Bruno Schulz case, where we towards the end saw Benjamin Geissler’s digital, true-to-scale, reproduction of the Schulz mural, it certainly opens up undeniable possibilities. The interesting issue to stress here is to

⁴⁷² Ellsworth-Jones, *Banksy*.

⁴⁷³ Some claim that before he became Banksy, the artist called himself Robin Banks.

⁴⁷⁴ Ellis-Jones, *Banksy*, p. 16.

demonstrate that orphan works are not necessarily *only* abandoned music, old films and newsreels. The wording of the directive may be open to a wider reading, but currently, it only poses as an encounter, in that works of art such as this one are *neither* cultural heritage (as it is less than 50 years old) *nor* a true orphan work, they can neither be made accessible through digitisation or libraries *nor* are they works that anybody seems to want to claim as their own.

--- INTERMEZZO

Approaching the theory of the rhizome is not the simplest of all endeavours. As we have seen so far the Deleuzeoguattarian concept of the rhizome is presented in the introduction chapter of *A Thousand Plateaus*. It is often stated, that a text is *seen* before it is *read*. So far I have approached the concept of the rhizome the other way around. I have read it, before I looked at it, before I studied it visually. Before we go on to Volume II, let us once again remind ourselves what a rhizomatic reading of jurisprudence can be. To do that, after we have *read* the rhizomatic theory in this first volume, we now need to *look* at Deleuze and Guattari's introduction to the rhizome.

A bizarre looking image of jumbled, creased, notes on a graphically represented musical score sheet open up their introductory chapter, not words. Looking more closely at the image it can be discerned that this is *XIV piano piece for David Tudor* written by the avant-garde composer Sylvano Bussotti. However, it does not look like a normal musical score, it rather looks as if someone has taken the notes written on a music sheet, stretched them all out, broken them, jumbled them and then haphazardly thrown the mess back on the paper. The image almost looks three-dimensional. Like that, it also appears to be a graphic representation of an instrument and not a carefully composed, meticulous musical score: it does not have anything in common with a neat musical note sheet one is used to seeing – it looks like an anti-composition. So can this image that opens *A Thousand Plateaus* divulge the secret of what the rhizome theory really is all about?

Plateau: *Was the theory somehow created to comment on Sylvano Bussotti and composers and artists like him?*

Bussotti is one of Italy's most well known composers. He was born in a cosmopolitan Florentine family in 1931. He is a classically trained violinist, and was a student and later also the lover of Heinz-Klaus Metzger who in turn was one of Theodor Adorno's most brilliant music students. The connection between Deleuze and Adorno is thus augmented.

Plateau: *Is the rhizome theory a philosophical homage, a connection between Deleuze and the Frankfurt School?*

Bussotti was for a time the artistic director of *La Fenice*, the opera house in Venice. A post from which he officially resigned at the Venice Biennale in 1991 by bringing a prostitute and a pornographic star to deliver the keynote address, one that he himself was supposed to give. This was done as a protest against the

corruption that he felt reigned within the art world. That Bussotti mixed “high-brow” and “lowbrow” art in his music and adopted it as part of his own public persona, and that he challenged the traditional cultural industry, as well as Adorno’s definitions of it, is apparent.

Plateau: *Can the text be connected to La Fenice?*

La Fenice, the ill-fated, Venetian opera house, that burned down to the ground twice, first in 1836 and then once again in 1996.⁴⁷⁵ Eerily, its own name, *la fenice*, the Italian word for the mythological bird *the phoenix* that famously burns down and rises out of its own ashes, echoes the faith the opera house was to have, over and over again. La Fenice represents classical as well as Italian *art*; it is a monumental *symbol* of Venice, but it also simultaneously represents tragedy, violence and perhaps even corruption.

Plateau: *Is it a text about Venice then?*

A sinking city. One of the most mystical and mythical places in Europe and perhaps in the world. A city like no other, on water, it has *canals* instead of streets, it has secret alleys, hidden houses and it is filled with artistic heritage and treasure. In Venice, nothing is what it appears to be on the (water) surface. On the contrary there are subterranean undercurrents that carry the city on its shoulders. It is a city that is not built upwards but sideways, and not on soil but on water. It is a city that is not situated on a firm ground, but that *flows on water*. A city confined to the rules and strengths of the sea and not of land. A city dependant of the fickle mood shifts of tides as it alternates between ebbs and flows.

Plateau: *“The average rise and fall of the tide is about three feet”, wrote Ruskin in The Stones of Venice but “it is enough to cause continual movement in the waters”.*

A connected city – but a city dependent on fluent, moving, temperamental water that in turn is connected by slow canals and not by hard roads or fast transportation. A city that is difficult, if not impossible, to fully represent on a *map*, as it is constantly moving and changing.

⁴⁷⁵ For a brilliant account of the 1996 fire, La Fenice, and of the residents of Venice, see: John Berendt, *The City of Falling Angels*, The Penguin Press, (2005).

Plateau: *How can then this concept of the rhizome, most importantly, be fruitful for legal research and jurisprudence?*

The first volume of this research project has read jurisprudence in this very manner, moving from plateau to plateau, exploring the connectivity and possibility of various plateaus of law, art, and obstacles to access. The project has refrained from reading jurisprudence and art as a tree, a structure, but rather as a rhizome made up of fluent plateaus. The legal machine, and positive law or dogmatic legal reasoning have served as a counter current – one that grounds and territorialises the rhizomatic law.

Whenever legal concepts are territorialised or, attempted to be territorialised, sooner or later lines of flight will occur, lines of flight that flee the striated territory, force it to move. I have studied the lines of flight that emerged from the obstacles to access in chapter 4 that closed Volume I. The lines of flight studied there are not only instances of territorial law but they also reveal the potential rhizomatics in jurisprudence and law. Before we can arrive at further legal potential we shall now move onto Volume II.

Volume II mirrors Volume I but then additional aspects are added on. Chapter 5 mirrors chapter 2. It is also a theoretical chapter, but it does not study rhizomatic jurisprudence it studies de/reterritorialising law. It studies the concept of the commons within rhizomatic jurisprudence. Chapter 6 mirrors chapter 3. It too deals with the artwork, but the artwork is now placed inside a territorial, striated intellectual property law that attempts to ground it, territorialise it. The territorial intellectual property law gives rise to its own deterritorialising movements, that will be followed. Chapter 7 mirrors chapter 4. It returns to the case studies, but there the cases do not serve as encounters that produce lines of flight, instead, we study how the cases have been at least partially or sometimes wholly solved, reterritorialised, and these attempts serve as (re)territorialising aspects that striate and ground the concept of the commons.

This approach mirrors the Deleuzeoguattarian approach. It moves between plateaus, evolving from the rhizomatic jurisprudence to de/re/territorialising law...

VOLUME II

THE PERFORMATIVITY OF THE COMMONS

PART 3

THE COMMON

“Smooth space is a field without conduits or channels. A field, a heterogeneous smooth space, is wedded to a very particular type of multiplicity: nonmetric, acentred, rhizomatic multiplicities that occupy space without ‘counting’ it and can ‘be explored only by legwork’”

– Gilles Deleuze and Félix Guattari

CHAPTER 5

PROPERTY, SPACE AND COMMONS: FROM ROMAN LAW TO THE BEING-IN-COMMON

5 PROPERTY, SPACE AND COMMONS: FROM ROMAN LAW TO THE BEING-IN-COMMON

It has so far already been established that the focus of this research project lies in access to art by way of a legal concept of the cultural commons. In order to arrive there we have had to explore, in Volume I, obstacles to access created by the existing jurisprudential and legal concepts (chapter 2), existing conceptions of art (chapter 3). These obstacles were analysed through case studies presented as encounters in (chapter 4). In chapters 2 and 3 it was discussed how certain jurisprudential and legal concepts, in the way they are currently constructed and envisioned, can create obstacles to access, e.g. the construct of the intellectual property right. But also other types of legal constructs were shown to stifle access as well as the conception of the concept of the commons in jurisprudence. One such example is, for instance, the individual rights construction in itself – that requires a notion of the private, individual, enclosed, etc. So what can the concept of the cultural commons in law bring forth in this discussion? The case study chapter above presented obstacles to access, at the same time it also demonstrated certain *potential* in jurisprudence and law that emerged from the said obstacles.

This research project is, as has been established, attempting to reach beyond the ontological questions. This ambition extends equally to the concept of the commons. Therefore, the concept must be presented in a rhizomatic manner. It is in this instance pertinent to begin with the definition provided by Garrett Hardin in his famous 1968 essay ‘Tragedy of the Commons’ – where a notion of the commons was constructed with the underlying idea of the human being as a *homo oeconomicus* – a rational, self-interested individual, where the ideals of individualism and private ownership were put forward as ideological assumptions. After that, we shall look at the definition provided by Nobel laureate in economy, Elinor Ostrom whose theory of the commons began as a critique of Hardin. In her study of some existing (natural) commons she manages to empirically show that the assumptions made by Hardin were inaccurate and that commons as a resource can in fact be thriving even without the private ownership right. Discussing issues such as commons-based and intergenerational management of resources, Ostrom adds further dimensions to the notion of the commons. A notion of the commons will be discussed as the one presented in the Bailey, Farrell and Mattei study,⁴⁷⁶ and particularly within the context of the Rodotà Commission in the review of the Italian Civil Code. Finally, the concept of the commons will be brought into the digital knowledge society. Using mainly Michael Hardt’s and Antonio Negri’s approach to the commons, the concept will then be divided into natural commons (with finite resources) and artifi-

⁴⁷⁶ Bailey, Farrell & Mattei (eds.), *Protecting Future Generations Through Commons*.

cial/human commons (with, potentially, infinite resources). The artificial commons is connected to the wider A2K project and for the purposes of this particular study artworks are studied as knowledge sources. The study has up until this point provided a legal philosophical critique of current jurisprudential and legal constructions and their functions, as well as their possibilities. At the same time, it has also pointed out the legal potential in conceiving of, constructing and dealing with constellation- or cluster concepts such as the commons. From this chapter on we thus move on from a critical to a constructive part of the study, to the *clinic*,⁴⁷⁷ namely creating a jurisprudential approach to the legal concept of the commons, and more precisely the cultural commons.

A certain critique of the existing commons definitions will also be presented. The definition provided by Hardin for instance, it will be argued, focuses too heavily on the economical individual and on nature-based commons. Ostrom's (and Ostrom and Hess') approach to the commons can also be criticised within the context of this study as it is in a way too open and can be destructive to underlying ownership rights, as well as it particularly focuses on the ownership issue, and envisions the commons as a communal resource which is owned and managed in common. The definition presented in the Bailey, Farrell and Mattei study⁴⁷⁸ presents the commons within the property law paradigm, which shall also be discussed. The rhizomatic approach to the commons, as it has become apparent, attempts to find a way beyond all these types of either/or definitions and argues for an "and... and"⁴⁷⁹ approach, creating connections between all of them. Taking into account that the concept of the commons is from the beginning an economical concept, one that can have certain 'tragedy' inscribed in its very nature, it will then be linked through rhizomatic theory to various legal concepts.

Therefore, discussing the commons inadvertently means that property, forms of ownership and property rights must be mentioned and placed within the access context of this analysis. Ultimately the discussion about the commons is also a question about what is owned in private, public and/or what is managed in common.

Studies of the commons are habitually also framed as issues that concern the public spaces and what can be openly accessed in the public sphere for citizens. This chapter will in its second part study the commons within the context of the public spaces and in its third part arrive at the commons paradigm as proposed here, within the rhizomatic context of this research project.

⁴⁷⁷ See Gilles Deleuze, *Essays Critical and Clinical*, (trans.) Daniel W. Smith and Michael A. Greco, London, Verso (1998).

⁴⁷⁸ Bailey, Farrell & Mattei (eds.), *Protecting Future Generations Through Commons*.

⁴⁷⁹ Deleuze/Guattari, *A Thousand Plateaus*, p. 27.

5.1 PROPERTY AND COMMONS

In the book *Common as Air*, Lewis Hyde writes that “[h]ow we imagine property is how we imagine ourselves.”⁴⁸⁰ This chapter begins precisely there i.e. the imagination of property and how such conceptions affect how we imagine the commons.

There are a number approaches to property and property rights that have been applied historically in jurisprudence as well as in property law. Since this project utilises Hardt and Negri’s concept of the commons, I have chosen to follow their particular description and division of property. That is not to say that property or property rights are a focus of this work, on the contrary, in order to arrive at the concept of the cultural commons, and the wider theoretical concept the commons, it is imperative to present a succinct theoretical framework and how Hardt and Negri arrive at their commons concept.

In his search to define the commons Michael Hardt arrives at it by simultaneously analysing the dominant forms of property throughout history. Hardt begins with *immovable property* (land, agriculture, rural economy) the historically dominant form of property of agricultural societies, and moves on to *movable property* that dominated the industrial society (chattel, commodity, industrial production), and eventually arrives at what he refers to as *immaterial property* that he claims dominates today’s digital information society (intellectual and biopolitical production). Hardt⁴⁸¹ divides *property* in three categories:

- Property in the agricultural society: Immovable property (land);
- Property in the industrial society: Material movable property (chattel); and
- Property in the digital knowledge society: Immaterial property (intellectual and biopolitical resources)

I shall be using this trinity, following Hardt, in order to initiate the discussions regarding the commons. I also want to examine and give more prominence to, that which Hardt only mentions in passing namely the fact that a dominant legal field simultaneously strengthens and enables the existence of the said dominant property, enabling its dominant position.

While this is a historically chronological overview, because it is how Hardt presents it, and also because there is a didactic benefit in presenting the dominant properties and laws chronologically and to follow the changes in legal reasoning throughout time, it is applied only briefly in order to present Hardt’s argument.

⁴⁸⁰ Hyde, *Common as Air*, p. 26.

⁴⁸¹ Hardt, ‘The Common in Communism’.

When *the commons* is discussed Hardt claims that there are usually one of two, quite different, concepts that are being referred to:

- 1) Either the NATURAL COMMONS that comprises of goods such as land, water, air;
- 2) Or the HUMAN COMMONS that comprises of language, knowledges, ideas, images, as well as, affects in this second, man-made, category⁴⁸².

The notion of the commons, it could be claimed, is a sphere or a space, physical as well as virtual, that somehow affects people and their quality of life, a space that we as human beings share, and need to share, in order to function and lead a *good life*. As it has already been argued in chapter 1 above, access to resources and access to knowledge within the context of the A2K movement are both firmly associated with the commons. Equitable access to resources and knowledge thus allows human beings to not only survive but to also have a

⁴⁸² Hardt, 'The Common in Communism?'. Hardt, in his Marxist analysis, is not the only one to make such claims that as the society develops so do the forms of property. See also Lawrence C. Becker, 'Review: Too Much Property The Right to Private Property. by Jeremy Waldron; A Theory of Property. by Stephen A. Munzer' in *Philosophy and Public Affairs*, XXI (1992) 196-206 and Sukhinder Panesar 'Theories of Private Property' in *Modern Property Law, Denning Law Journal*, 15 Denning Law Journal (2000). Since Hardt and Negri's writings are used throughout this chapter, I am here focusing on Hardt's analysis for the sake of consistence. There have been other definitions of the commons, one of the more prominent ones is the one introduced by Charlotte Hess and Elinor Ostrom which they describe as a complex bundle of rights that include access rights, extraction rights, management rights, exclusion rights and alienation rights see e.g. (eds.) Charlotte Hess and Elinor Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice*, MIT Press, (2007), see also Hyde, *Common as Air*, p. 28. I will return to Hess/Ostrom below. Here I have chosen to concentrate on Hardt and Negri's definition because the clear distinction between natural and artificial commons, which is very appropriate for the purpose of this particular project. Lewis Hyde also defines the commons in a very interesting way as:

The Right to Use (Action, the right to act)

The commoner who acts on that right (Person)

The land where the right is exercised (Physical Place)

The notion of the *right to act* in Hyde is very appealing, and that a commons is a kind of property in which more than one person has a right of action, and he then adds complexity to it and asserts that commons is not just that but a social regime for managing a collective resource. Hyde, *Common as Air*, pp. 40-44. I shall be returning to Hyde's writings, even though I am tempted to problematise his notion of the "person" and "physical place" as well as "property", which I shall refer from doing further than for instance in the case of Bruno Schulz. There, I problemise the notion of a unified "person" or "legal subject", as well as the "physical place". Hyde himself is of course aware of this, and he only begins in the agrarian commons to later on continue to explore art and ideas. Other than the very interesting action right, my view is that also Hyde's approach to the commons is very similar to Hardt and Negri's.

quality of life. Such an Aristotelian notion, i.e. the ability to live a good life, a life of dignity, forms the backdrop of this chapter.⁴⁸³

5.1.1 IMMOVABLE PROPERTY AND LAND LAW

The significance of immovable property in Europe and European legislation dates all the way back to Roman law. Ever since, there exists a powerful division in law, a seemingly insurmountable jurisprudential divide.

Only free men were able to own land in Roman law. As was already hinted in the Bruno Schulz case above, according to those legal principles human beings who were not free male citizens, much like objects, were deemed to be chattel because they were not able to own land, and legally they were seen as attached to the land of the landowner. They had to be subject to a landowner's protection in order to be granted the status of a legal subject.⁴⁸⁴

Immobile property is characterised by the paradigm of agricultural and rural society where the economy relies on the land and its natural resources. The immobile property is a static form of property, which is based on (Occidental, if we are to briefly interject with Deleuze and Guattari) notions of cultivation and exploitation of land and the wealth that stems from it. Immobile-property-dependent economies are therefore often referred to as agrarian economies and the rural paradigm around which the entire society is structured dominates.

If the phenomenon is studied historically, it can be discerned that the landowners generated profit from the agrarian exploitation of land and by renting estates to tenants.⁴⁸⁵ The production of wealth is thus organised by relying on income structures stemming from the exploitation of land, and tending the land with manual labour. More often than not, manual labour meant labour provided by slaves, who were, once again, deemed to be *chattel*, attached to land as any other tool, machine or object. Generally, it is the access to these kinds of proportions of manual labour based on slavery that underpins the entire expansion and the context of the Roman Empire as well as Roman law.

This is explained by the so-called "occupational theory"⁴⁸⁶ something, which was initially developed in legal doctrine by Hugo Grotius⁴⁸⁷ and then by Samuel

⁴⁸³ For further comment on Aristotle and the notion of the commons see Anna Di Robilant, 'Property and deliberation: a new type of common ownership' in (eds.) Bailey, Farrell and Mattei, *Protecting Future Generations Through Commons*, pp. 74 aa.

⁴⁸⁴ On the legal subject see chapter 2 above, section Luftmensch.

⁴⁸⁵ Dennis P. Kehoe, *Law and the Rural Economy in the Roman Empire*, The University of Michigan Press, Ann Arbor, (2007).

⁴⁸⁶ Although the occupational theory can be developed further and is very interesting particularly in terms of indigenous people's rights to land, it will not be further developed here. But see e.g. *Mabo v. Queensland (No.2)* (1992) 66 Australian Law Journal Review 408 in which the High Court of Australia recognised the communal native title of the Meriam people to land on Murray Island.

Pufendorf⁴⁸⁸. It presupposes a quasi-religious notion of land initially owned in common and then given to man ‘on loan’ by the will of God. Blackstone comments on it in the following manner:

[t]he earth... and all things therein, are the general property of mankind, exclusive of other beings, from the immediate gift of the Creator... all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.⁴⁸⁹

Thus, as per the occupational theory, the individual who is the first to occupy a part of the common (land), or who occupies territory and people (enslaves others, making them unfree), will always be seen as the rightful owner of that which has been passed on from God to man.⁴⁹⁰ By the act of enclosure man creates ownership of land and chattel attached to it. One additional principle can also be discerned, namely that of the *invested labour*.⁴⁹¹ Of course this can be framed within the Lockean understanding of property and labour, and it is a diversion that will be elaborated upon in 5.1.2 below.

The paradigm of immobile property is based on exploitation of land and is dependent on rent, instead of one-off “profit” or “growth”. Hardt concludes his analysis of immobile property by summarising that in the rural paradigm the person who is the investor in such an economy will always be external to the production and the organisation of production forces and labour. The focus lies on extracting the value from *land* and its resources that are already there, by nature. This logic is based on “primitive accumulation”, namely occupation by enclosure or labour, as opposed to extraction of value from and organisation of *labour* that later dominated the industrial paradigm.

The dominant legal field that regulated, and still regulates, this occupational form of ownership and that closer attention ought to be paid to is *land law*. Here we shall look at the general principles of land law in the paradigm of the Western legal systems in order to discern legal principles of interest in terms of the

⁴⁸⁷ Hugo Grotius, *On the Law of War and Peace*, Book 2. Ch.2, 1,4-5, (trans.) Kelsey, Oxford, Clarendon Press, (1925 [originally published in 1625]).

⁴⁸⁸ Samuel Pufendorf, *Of the Law of Nature and Nations*, (1703). Available at: <https://archive.org/details/oflawofnatureat00pufe>. Last accessed 20th March 2014.

⁴⁸⁹ Sir William Blackstone, *Commentaries on the Laws of England*, Vol. II. para 1, 4 vols., Oxford University Press, 1765-9; rep. University of Chicago Press, (1979), quoted in Panesar ‘Theories of Private Property’, p. 116.

⁴⁹⁰ This is of course classical property theory, that we can see also in e.g. John Locke, *Two Treatises On Government* (1690) Book II; In common law see the principal case *Pierson v. Post 3 Caines*. R.175 (N.Y. Sup. Ct, 1805) that appears to distinguish two principles of occupation, the act of enclosure and invested labour.

⁴⁹¹ See. e.g. *Pierson v Post 3 Caines*.

commons, particularly principles such as the rights of passage, wayleaves⁴⁹², as well as, conversely, *trespassing*.⁴⁹³ Other interesting legal principles to comment upon from an immovable property and land law paradigms are tenancy, easements, servitudes and the like, all of which could be beneficial to bear in mind when discussing the cultural commons and immaterial property below. I will also consider the different forms of exclusions and enclosures of certain spaces by e.g. fencing, whereby parts of the land that were initially held in common become owned by the act of occupation and can thus only be privately accessible (e.g. by a right of way). That it is possible to find indispensable knowledge in land law, and the realm of the natural commons, and their general principles that spill over from the natural commons into the artificial commons will, if it is not already so, become obvious.

I want to keep making these connections using Deleuze and Guattari's rhizomatic theory and nomadic method, following the discussions carried out above in Volume I. Establishing all these various connections will carry the discussion forward, onto other plateaus, and show that what we are really discussing when we are studying the cultural commons, might not be as foreign for the legal sphere as it might initially seem, particularly if we are making connections between various relevant concepts. The idea of the commons is in fact not that new and unexplored as a legal phenomenon, as it may have been assumed, it is just a matter of acknowledging its potentiality. Even if it is, primarily, a medieval principal, the discussion really ought to begin in Roman land law, and continue all the way to the present day and the digital knowledge society in searching for the many legal justifications for a cultural commons.

I also want to discuss the passage of time and the evolution of the property forms that are consecutively enabled by law. Therefore, the natural commons must be where we begin in order to, firstly, show the *already existing* legal logic that stems from land law, and also where I draw inspiration from, in terms of how to later distinguish the artificial commons that might be more difficult to broach.

In his analysis of property forms and the commons Hardt is obviously conducting a Marxist reading of property. In accordance with Marx he concedes that the dominance of immobile forms of property stretched from the Roman Empire and did not really end until the mid nineteenth century⁴⁹⁴ when the dominant form shifted after the industrial revolution to the industrially produced mobile property took place.

⁴⁹² Cf. the concept of "*allmansrätten*" in Swedish law, see also the Swedish Supreme Court decision NJA 1996 s. 495 and Swedish statutory law 2 kap. 18 § 3 st Regeringsformen, 7 kap. 1 § Miljöbalken.

⁴⁹³ Cf. Wirtén, *No Trespassing*.

⁴⁹⁴ Hardt, 'Commons in communism', p. 347.

5.1.1.1 RIGHT OF WAY AND RIGHT OF PUBLIC ACCESS

Before arriving at the movable property and the commodities paradigm of the industrialisation let us consider the legal reasoning behind the creation of certain conditions for ownership of land so that the natural commons can be catered for. Particularly the principles of way rights and easements ought to be stressed where access to the commons is enabled without, for that sake, (seriously) denting the underlying ownership of land and demonstrate how there already are existing legal tools developed for this more complex, and not at all binary, logic.

Legally, it has never been a problem to limit the property rights in land when it comes to various rights of passage and rights of way. Quite the contrary, it has been argued, historically even in our day, that it is a sensible, logical, inconvenience on the part of the owner, one that does not diminish his enjoyment of his land or the economical worth therein. This is common(s) sense, if we are all to enjoy the good life we must be accustomed to resources that are held in common, to be able to build roads, enjoy nature, fresh air, and so forth, interests that have always been premiered in law, while nonetheless managing to uphold the strength of the underlying ownership of land. Professor Eric T. Freyfogle even phrased it as such that the public access to nature must be seen as the underlying primary right, or as the *de facto* state of nature, while the private ownership of land must be seen as an encroachment on such a primary state.⁴⁹⁵ The private right is thus understood as a social construction put in place to regulate the already given openness and to delimit the already existing state of nature that is open to all, and *not the other way around*.⁴⁹⁶

Some argue that these way-right or easement interests are so called ‘soft values’ that are incorporated to balance the ‘hard’ property right. These are values that mainly promote public health and recreation.⁴⁹⁷ The aim here is to show that while this might be true to a certain extent, these are not the only values that can be generated with a commons-based legislation. I will attempt to demonstrate, that there are some certainly ‘hard’ economical benefits that can be achieved with a commons solution if the focus is placed on the commons and access to the private property is granted, as opposed to creating shared, communitarian or even self-governed ownership of property. This was particularly apparent when the right of way was established in order to e.g. build motorways on private property. Strengthening the public infrastructure and building motorways generated an increase of wealth both on a social level as well as

⁴⁹⁵ The Common Core of European Private Law, Annual Meeting in Torino, Italy, November 2013.

⁴⁹⁶ Professor Eric T. Freyfogle in his keynote address, The Common Core of European Private Law, Annual meeting in Torino, Italy, November 2013.

⁴⁹⁷ See e.g. Åsa Åslund, *Allemansrätten och Marknyttjande, Studier av ett Rättsinstitut*, (PhD thesis), Linköping University, Sweden, (2008), p 22.

on the individual, private level. I will attempt to transport (pun intended) this type of reasoning that lies behind the principle of the rights of way to land when discussing the rights of access to artworks in the artificial commons. The discussion will conclude in the amount of inconvenience that can be deemed to be the *appropriate scope of inconvenience* that granting such access might entail, and the legal ability in creating and upholding it.

The access-based analysis is not necessarily one of creating usufructs⁴⁹⁸; instead it will be a discussion concerning exclusions, enclosures, stints and the span of privileges that come with an exclusivity rights structure.

5.1.2 MOVABLE PROPERTY AND PROPERTY LAW

It was not until the industrial revolution, Hardt claims, that a paradigm shift was possible and the dominance of immobile property shifted to a new form of property: mobile property. The industrial production strengthened the economical as well as legal significance of chattel, so that it could be exploited in a new way. Naturally, it also meant that the feudal structures slowly merged into bourgeois structures and the monetary institutions obtained a strengthened symbolical significance. With the new organisation of industrial labour everything could be calculated in monetary terms, even time.

While the immobile property paradigm had been permeated with the notions of parochialism and stasis⁴⁹⁹ (a “sedentary form of possession” in Deleuzian terms⁵⁰⁰), ownership of movable property constituted a new form of movement, one that also generated a new type of wealth, based on commerce (“nomadic form of possession” in Deleuzian terms⁵⁰¹). The profit-incentive in the new paradigm was no longer necessarily tied to extracting as much wealth as possible from the immobile land, but rather extracting wealth from *labour* and investing it into mobile commodities. Though we saw above that occupational theory can be used to explain the ownership of land, when we move into the industrial paradigm, the theory of labour becomes more pertinent.

John Locke⁵⁰² and the ideas that had coloured the revolutions before industrialism sought to argue that there was a natural connection between objects, the labour people invested in appropriating them, and ownership. Thus, Hannah Arendt writes:

⁴⁹⁸ A legal concept that stems from common law and means something similar to a right of enjoyment that enables a holder to derive profit or benefit from property that either is titled to another person or which is held in concurrent estate, as long as the property is not damaged or destroyed.

⁴⁹⁹ Hardt, ‘Common in Communism’, p. 347.

⁵⁰⁰ See chapter 7.

⁵⁰¹ See chapter 7.

⁵⁰² John Locke, *Two Treatises On Government* (1690) Book II.

Locke, in order to save labour from its manifest disgrace of producing only ‘things of short duration’ had to introduce money – a ‘lasting thing which men keep without spoiling – a kind of *deus ex machina* without which the labouring body, in its obedience to the life process, could never have become the origin of anything so permanent and lasting as property, because there are no ‘durable things’ to be kept to survive the activity of labouring process.⁵⁰³

Here, ownership becomes linked to labour through money and a natural law idea, an idea of a right to private property that human beings have as a result of the sheer fact of being human. However, the only distinction between owning land and owning things was that when it comes to the second type, appropriation does not necessarily happen by the act of occupation but instead by investing labour into objects that were initially held in common and then entering into commerce with them.⁵⁰⁴

Following the Lockean understanding that if labour is the only way through which we can appropriate things that are not fixed to land, it becomes clear that man cannot appropriate objects endlessly, since there are limitations due to scarcities in nature. That which exists on Earth is what can be appropriated and shared. The notions of scarcity and with that also exclusivity of things are two guiding principles of the industrial production. However, the significance of money acquires a new role, there were no similar scarcity limitations on money as there had been for natural goods, money could, in theory, be produced endlessly.

Physical labour therefore became the chief amenity being traded with during the industrial era. As the large-scale industry eventually replaced agriculture as the hegemonic form of economic production, Hardt explains,⁵⁰⁵ it once and for all prevailed over the rural economy as the dominant form of production. It meant that the new form of production now *over-spilled and coloured* the older form of production. Agriculture had to become more like industry in order to still generate wealth, it had to become industrialised in order to still derive profit and it also had to adhere to and adopt to the “regimes of mechanisation” that marked the industrial paradigm such as discipline, work rhythms, working days/hours, other industrial temporalities such as leisure/holiday times, and so forth.⁵⁰⁶

⁵⁰³ [original emphasis], Hannah Arendt, *The Human Condition*, 2nd Ed, The University of Chicago Press, (1998, [originally published in 1958]), p. 102.

⁵⁰⁴ Locke, *Two Treatises On Government*, *Second Treatise of Government* Ch. 5. para.26.

⁵⁰⁵ Hardt, ‘Common in Communism’, p. 348

⁵⁰⁶ Ibid.

The tendency that is interesting is this very *colouring* that occurs when one form of production overtakes another, forcing the old paradigm to adopt certain traits previously unnatural to it. However, what Hardt does not expressly claim, but that is equally fascinating is that the opposite might also be correspondingly intriguing to study. It is interesting to query whether, in a transitional period, as the new form of production and a new dominant form of property is emerging, the new form is initially organising itself in a similar fashion to the old paradigm, by pretending, or assuming to be, more like the previous production form than it is in actuality. For instance, the early industry depended on natural resources such as mining and forests that thither had been subject to the agricultural economy. As one dominant form of production gradually morphs into another, lines become blurred and become impossible to draw as to where the one production form ends and the other begins. It can be observed that such paradigm shifts also produce hybrid forms of production, that are somewhere *in between*, it can either be that the new form colours the old, or that some traits of the old linger and remain embedded in the new.

While Hardt and Negri are following a Marxist logic in their description of the development of property, they are also using some Deleuzian concepts. Deleuze's understanding of space can then be connected to this. Deleuze and Guattari divide space between smooth space (unterritorialised, free, space) and striated space (territorialised, ordered, governed, space):

[...] the sea is the smooth space par excellence, and at the same time the first one to be confronted by the demands of a more strict striation. The problem does not arise in proximity to the land. In contrast, it is during deep sea navigation that the striation of the sea occurs. The maritime space is striated through two inventions, one astronomical and the other geographical: *the bearing*, obtained through a set of calculations based on the exact observation of the stars and the sun; and *the map*, which intertwines the meridians and parallels, longitudes and latitudes, plotting known and unknown regions onto a grid. [...] It is as if the sea had been, not only the archetype of the smooth space, but also the first of these spaces to undergo a gradual striation, gridding it in one place, then another, on one side and then on another. The commercial cities have participated in this striation, and were often innovators, but only nation-states could bring it to completion, raise it to the global level of a 'politics of science'. A dimensionality is increasingly established and subordinates directionality, or superimposes itself on it. [...] It is without doubt for this reason that the sea, the archetype of the smooth space, has also been the archetype of all the striations of smooth space: the striation of the desert; the striation of air space; the striation of the stratosphere. [...] It was at sea that smooth space was first sub-

jugated and one found a model for the laying-out and the imposition of striated space, a model that has since been used elsewhere.⁵⁰⁷

The smooth and striated spaces shall be further discussed in chapter 7, but it can already be stated here that with an unexpected occurrence, through a line of flight, something happens in the transition between two property paradigms. A deterritorialising act (here e.g. industrial revolution) takes flight into the new, unregulated, *smooth space* (previously unknown economic form of production), but through acts of reterritorialisation (the industrialisation of agriculture and the agricultural dependence of the industry) the line of flight is then moved back into the striated space and once again territorialised, at least for the time being.

Let us then shift the focus back to law. We are beginning to see the practical potential of the Deleuze/Guattarian theory as well as the tendencies, the lines of flight, that are appearing more clearly. Thus, the dominant legal fields of the industrial society provide further insights.

The property law evolved away from focusing mainly on land ownership and placed larger importance on personalty (in common law) or movables/movable property (in civil law). The industry was creating commodities and it was no longer just about the question of who owns the land, or who owns the industrial production but indeed who owns that which is industrially produced and then sold on to consumers. Various sales of goods acts started to emerge at this time, and the exploitation of chattel became underpinned by a strengthened significance of the free, unfettered contract, which became an increasingly significant legal instrument. It is through entering into contracts that labour could be exploited and it was the very legal instrument through which employers and employees could agree upon the terms, and ownership, of labour. It is the same instrument that facilitated commercial exploitation of chattel as consumer products.

5.1.3 IMMATERIAL PROPERTY AND INTELLECTUAL PROPERTY LAW

We are still not quite sure which dominant form of property might be *the* dominant today or which type of ownership has succeeded the industrial paradigm. Maybe they are several. However, many argue that it might be the finance or information based property paradigms. Hardt, together with Negri, concurs with this claim, but refers to it instead as *immaterial and biopolitical property production*. Among other things, they point to the fact that fewer people work in factories, that the labour market is more global, and that the type of goods being sold are

⁵⁰⁷ [original emphasis throughout], Leif Dahlberg. 'Pirates, Partisans and Politico-Judicial Space', in *Law & Literature*, Vol. 23, Issue 2, pp. 262-281, and Deleuze/Guattari, *Thousand Plateaus*, pp. 529-530.

increasingly less industrial and more immaterial. The new type of goods that currently seem to dominate, and that arguably might have dominated for quite some decades now, are based on “knowledge, code, language, social relationships, affects, and the like”.⁵⁰⁸

This is not a controversial statement, quite the contrary, this seems to be the point that everybody more or less seem to be able to agree upon that at least there is “a tendency for immaterial or biopolitical production to emerge in the hegemonic position, which industry used to hold.”⁵⁰⁹ Defining immaterial and biopolitical products could be a research project in its own right, and the point here is not to engage in such an analysis. The products that are studied here, i.e. artworks, are unquestionably one example of immaterial products and the legal rights connected to them are within the sphere of the intellectual and intangible. I shall continue using the approach to artworks that has been presented in chapter 3, and treat artworks as immaterial products in the sense how Hardt and Negri use the term.

The traits that the immaterial products do have, and that Hardt also points to, is that they are based on *ideas, images, information*. These products can be privatised, materialised and certainly also controlled by the institute of property. Conducting the same form of analysis that I undertook above, it is also here apparent that the “over spilling” or “colouring” of the two dominant forms of ownership and the creation of a hybrid form in the breaking point between two paradigms takes place. While it is possible to privatise, materialise and control certain aspects of the immaterial products, it is not as simple or straightforward as it was to privatise the industrial commodity products. The same actors are still present in more or less the same guises as when they emerged during the industrial paradigm: the large scale factory, the labourer, the consumer... However, there are some other actors that are unaccounted for in this round-up of the usual suspects that cannot be fitted as easily in the old paradigm, the inventors, the artists, the hackers, the bloggers, the occupants, the public, the pirates...

Therefore a conflict with this form of property and the problem keep growing and multiplying, creating a grid-lock whose only solution seems to be to fine or even incarcerate consumers when they step over or challenge the boundaries of immaterial product based property and the laws that fence it off and enclose it. The difficulty in safeguarding, enforcing and policing the ownership rights tied to immaterial products is evident. In analysing this tendency closely we can once again, not only see that the industrial paradigm is colouring the immaterial/biopolitical production paradigm, but that also the reverse is happening, namely that even “traditional” industrial production is now forced to adopt

⁵⁰⁸ Hardt, ‘Common in Communism’, p. 349.

⁵⁰⁹ Ibid. See also Manuel Castells, *The Rise of the Network Society*, 2nd Ed., Oxford: Blackwell, (2000).

some of the emerging paradigm traits such as informationalisation, dependence on knowledge/code, and also incorporation of aspects such as affects, experience and care. The notion of “experience”⁵¹⁰ is treated as an additional trait to tangible as well as intangible products, regardless of them being a car, a TV, a cup of coffee, a holiday, an event or any form of entertainment.

5.2 SPACE

As Hannah Arendt has shown, in early Greece and Rome only those who loved an active, public life were thought to have entered their full humanity. Private life was where the demands of necessity were met, especially biological necessity. In private we are born and die, get fed and get clothed, and are nursed from sickness into health. Public life arises from this ground – the life of art, philosophy, and politics, all those activities proper to social beings and impossible for the solitary.⁵¹¹

5.2.1 PUBLIC SPHERES: HABERMAS

In the *Dialectic of Enlightenment*, Adorno and Horkheimer discussed the difference in terms of communication between a radio and a telephone⁵¹² - the first a one-sided monologue-type of communication and the other a two-sided (at least) dialogue-type of communication. When Habermas wrote about the public sphere and the public spaces he must have taken his first steps somewhere in this very analogy⁵¹³, namely, for communication to happen in more or less open public space at least the smallest component is required, a dialogue between two people will always be necessary. *Communication* is the bedrock of society in his democratic theory.

In *The Structural Transformation of the Public Sphere*, Habermas traces the constitution and the development of various versions of public spheres. He begins with the Greek *polis* and its *agora*, a public space peopled by propertied, educated, free men that could take part in learned exchanges of ideas with each other. He ends up in the Western European media age where advertising and journal-

⁵¹⁰ On the notion of experience see e.g. Slavoj Žižek, *First as Tragedy, Then as Farce*, London, Verso, (2009): “[W]e primarily buy commodities neither on account of their utility nor as status symbols; we buy them to get the *experience* provided by them, we consume them in order to render our lives pleasurable and meaningful” [my emphasis], p. 52.

⁵¹¹ Hyde, *Common as Air*, p. 183.

⁵¹² Adorno/Horkheimer, *Dialectic of Enlightenment*, p. 122.

⁵¹³ Although it is well known that neither Adorno nor Horkheimer supervised Habermas doctoral thesis, where he first discussed the public sphere. They did not find it to be sufficiently critical and as a result Habermas had to submit his thesis to Wolfgang Abendroth in Marburg instead, see e.g. ed. Craig Calhoun, *Habermas and the Public Sphere*, Cambridge, Mass. ; London : MIT Press, (1992) p. 4.

ism frame the public spaces in a wider sense and where debates on larger scale take place. Habermas' writings on media in particular, such as film, television and radio understood as public spaces are thus most relevant here. He shows that what is seen as monologue and what is seen as dialogue is far more difficult to define in the media age than it has been historically.

The underlying principle of Habermas' study of the public sphere was firstly to demonstrate that often when the concept of public is being addressed; it is in fact the bourgeois public, very much dominated by bourgeois values and imperatives that is being referred to. His study sought to counterbalance such tendencies by introducing a wider notion of the public sphere that could be placed within the paradigm of the Marxist theory. Habermas did not focus on the governed subject that was overwhelmed by the administrated mass culture that Adorno and Horkheimer had been writing about (and painting black when looking back at the rise of fascism), but rather on "an account of intersubjective communicative processes and their emancipatory potential".⁵¹⁴ Habermas was arguing that public discourse, what he would later refer to as *communicative action*,⁵¹⁵ was equally relevant in the coordination of human life as were the state powers and the market economies.⁵¹⁶

Habermas was also fascinated by how the private individuals integrated and acted within the public spheres. In *The Public Sphere and Encyclopaedia Article* from 1964 Habermas wrote that the public "is the realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens".⁵¹⁷ The public sphere is formed, he continues, when private individuals assemble to form a public body. That means that the communication that happens within the public sphere will always be connected to some of the fundamental rights, such as the right of assembly, right of information, freedom of speech and so forth. Habermas did not equate the public, meaning the state governed [*Öffentlichkeit*], with public in his sense, which is generated by individuals that communicate inside the public sphere. The public sphere that Habermas addressed is not an institution as such *but a space for communication*.

In order to guarantee the existence of the public sphere there were norms and modes of behaviour that had to be ensured, he argued, such as:

⁵¹⁴ Calhoun, *Habermas and the Public Sphere*, p. 5

⁵¹⁵ Habermas, *The Theory of the Communicative Action*.

⁵¹⁶ Calhoun, *Habermas and the Public Sphere*, p. 6

⁵¹⁷ Jürgen Habermas, 'The Public Sphere and Encyclopedia Article', in *New German Critique*, No. 3, pp. 49-55, (trans.) Sara and Frank Lennox, (1974 [originally published in 1964]), pp. 220-226.

- General *accessibility* to it
- *Elimination of all privileges* in terms of access and participation, and
- Discovery of *general norms* and legitimisations that govern it⁵¹⁸

Were we to follow this Habermasian logic legally, it would mean that there are certain inherent inequalities built in within the notion of the public sphere. Those ought to be addressed legally, for instance by enabling wider participation in order to guarantee democratic accessibility to the public sphere in which ideas can be communicated and opinions formed without any restrictions or obstacles to the accessibility.

Habermas examined two types of social models in which the public sphere exists: *the liberal model of the public sphere* and *the public sphere in the social welfare state mass democracy*. The first model stems from the eighteenth century, which is the time around which, Habermas argues, the first liberal public sphere administrated by law with a demonstrable political function was constituted.⁵¹⁹ With an increasing importance of the commodity exchange, constitution based states had been emerging where new national constitutional laws were guaranteeing certain *individual rights*. The precondition for this, Habermas continued, was the developing market that tended to be increasingly liberalised with a necessity for private people to be left to their own practices, free from state intervention, to independently act as legal subjects. In that sense there was a growing private sphere that came to be governed by the commercial trading laws. Laws were being adapted for the market. That also meant that social relations assumed “the form of exchange relationships”.⁵²⁰ Legal transactions were contract-based and the growing body of private law encouraged this. Within the liberal paradigm, it was largely assumed, and this would come to linger for a long time, that the contracting parties were equal and that they were acting with equal competences. Law enabled this type of activity.⁵²¹

The liberal market-based sphere had traits that were both private (in that it was governed by private law) and public (in that it happened outside the traditional private sphere, *oikos*) and it rested on a foundation of fundamental rights and civil liberties. States could not meddle in the private affairs of people. Habermas clarified this by stating that “the codifications guaranteed the institutions of private property and, in connection with it, the basic freedoms of contract, trade, and inheritance”⁵²² remained free from state influences and interference. Those concepts of contract, trade and, indeed, inheritance are very in-

⁵¹⁸ [my emphasis] Jürgen Habermas, ‘The Public Sphere and Encyclopedia Article’, p. 50.

⁵¹⁹ See e.g. Habermas, *The Structural Transformation of the Public Sphere*, p. 73.

⁵²⁰ Ibid. p. 74

⁵²¹ Ibid. p. 75.

⁵²² Ibid.

teresting for the purposes of this research project as we can see how the property paradigm grows over the course of history at the same time as it colonises certain aspects of the public spaces or even life in general, the colonisation of the lifeworld in Habermas' terminology.⁵²³

While the commercial private sphere was on the rise, the public sphere did not disappear – it merely changed forms and moved into comparatively closed off spaces e.g. salons, but also to less hierarchical realms such as coffee houses,⁵²⁴ town squares and other similar places. The ability to discuss and communicate with each other arguably also elevated the quality of the artworks that were exposed to public discussions and public commentary.

The new society brought with it a new form of public sphere,⁵²⁵ but interestingly, the public sphere could increasingly be found physically indoors as opposed to the Greek and Roman forum-based public spaces that were outside in the open. Side by side, as trading grew, followed by commercial competition and commercial conflicts, the trading sphere moved outdoors while it at the same time required a private legal framework in order to function. The public spaces now existed indoors but still promoted an open communication and sharing of ideas, opinions and knowledge while the private spheres existed outside in the squares and markets but promoted closed off individuality, confidentiality, secrecy and so on.

As the nation states were changing in form, driven by the transformation from the Liberal State into the Social-Welfare State that many European nations were experiencing, so too did the public spaces get assigned with a new role in the new society. As the mode of state governance and constitutions were changing so did, yet again, the private and public spaces as well as law and the legal rights that constituted them:

The injunction-like character of liberal rights corresponded to the following ideas: these rights protected from state interference and encroachment those areas that in principle were the preserve of private people acting in accord with the general rules of the legal system.⁵²⁶

That means that these were negative rights that ensured a minimal protection of the individual from any intrusion from the state. With time, positive social

⁵²³ Habermas, *The Theory of the Communicative Action*.

⁵²⁴ See e.g. Merima Bruncevic & Philip Linné, 'A Taste of Law and Coffee – From Macrocosm to Microcosm', in *Non Liquet: The Westminster Online Working Papers Series, Law and the Senses Series: The Taste Issue*, 2013, 11-30.

⁵²⁵ Calhoun, *Habermas and the Public Sphere*, p. 7.

⁵²⁶ Habermas, *The Structural Transformation of the Public Sphere*, p. 223.

rights⁵²⁷ developed with a notion of a different type of state, one that was active and nurturing – and that meant that the *bourgeois* (owner of goods) became *citoyen*⁵²⁸ or *homme*⁵²⁹ (a human being among other human beings).

Again, contrary to Adorno/Horkheimer, when Habermas discussed culture dissemination in the public spheres of both the Liberal and in the Welfare model he did not paint an equally bleak picture of it like Adorno/Horkheimer who depicted it as part of the fully administrated culture industry, arguing that culture was more often than not only utilised in order to control and discipline people. Even though Habermas too recognises that culture can be an intricate and powerful aspect of the public sphere, he rather concentrates on the spaces in which it exists: salons, the media and various cultural institutions through which art as knowledge can be disseminated, thus also stressing the *positive potential* of art and culture. Habermas acknowledges that there are inequalities built in within these structures too, and what constitutes a cultural public space has to be continuously revisited as time goes by. Culture and the cultural artefacts can be, but are not necessarily always, commodified and consequently the spheres in which they exist and can be accessed need to be multiplied in order follow the lines of flight of culture that occur through time.

Even though Adorno had scorned *The Structural Transformation* already when it was first published, the critics of Habermas have still maintained that the last part of the book is nevertheless largely dependent on Adorno and Horkheimer's concept of the culture industry. Whether or not this is due criticism need not be discussed at this point, as we know that the culture industry concept itself has also been vastly criticised (as briefly mentioned above as e.g. elitist, exaggerating the manipulative powers and controls of this industry and so on⁵³⁰). Habermas does use the phrase "refeudalisation"⁵³¹ when he analyses the mixture of advertising and mass culture "[b]ecause private enterprises evoke in their customers the idea that in their consumption decisions they act in their capacity as citizens, the state has to 'address' its citizens like consumers."⁵³² That probably indicates that even if he does not use Adorno and Horkheimer's cultural industry concept *per se*, his understanding of the entertainment and culture industry was, if nothing else, similar or comparable to the one of his two predecessors.

⁵²⁷ Although, as Gustafsson asks, is not the concept "social right" a paradox or an anomaly in itself? "Social" denoting something collective and in common while "right" denotes something individual, Gustafsson, *Rättens Polyvalens*, p. 23.

⁵²⁸ Habermas, *The Structural Transformation of the Public Sphere*, p. 225

⁵²⁹ Ibid. p. 55

⁵³⁰ See e.g. Nicholas Garnham 'The Media and the Public Sphere', in Calhoun, *Habermas and the Public Sphere*, p. 360.

⁵³¹ Habermas, *The Structural Transformation of the Public Sphere*, p. 195

⁵³² Ibid.

Habermas' theory is useful here because of its flexible understanding of what constitutes the public. Even if, in times of the digital knowledge society, 'public' may not be an equally appropriate term as commons, the study of the commons must at least also consider the notion of the public space and map out the various models and transformations of the concept of what has historically constituted the public and how it has changed so that it can correspond to a more complex concept of the commons today.

Each era has its own type of public sphere, and conversely, to tie it with the first section of this chapter, each era produces new types of ownership rights, as for instance Peter Drahos and John Braithwaite clearly have shown:

Era	Emergent Property Right
Primordial/Ancient	Patriarchal. Men over women and children
Feudalism	Lord over land and vassals
Centralized State	King over taxes
Imperialism	Major powers over colonies, slaves
Industrial Capitalism	Capitalists over labour and surplus value
Finance Capitalism	Bankers and investors over securities, bonds derivatives, interest
Information feudalism	Infogopolies, biogopolies over abstract objects

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What is particularly interesting is that Drahos and Braithwaite show that there is a type of feudalism that reappears in the information age and the digital knowledge society. This can be connected with Habermas' assertion that even in the welfare state model there is a refeudalisation of the public sphere that occurs, or *reterritorialisation* of the smooth spaces in the terms of Deleuze and Guattari.

This particular meeting point of ownership structures and public sphere structures leads inevitably to the commons.

5.3 THE COMMONS

Having followed and distinguished the particularities of private ownership and public spaces we now must consider the commons in more detail. There are a number of scholars that have addressed the issue of the commons from various

⁵³³ Entire table taken from Peter Drahos with John Braithwaite *Information Feudalism, Who Owns Knowledge*, Earthscan Publications Ltd, London, (2002), p. 199.

perspectives⁵³⁴, but as already mentioned I shall be using Hardt and Negri's definition⁵³⁵ and approach to the commons, namely:

By "the common" we mean, first of all, the common wealth of the material world – the air, the water, the fruits of the soil, and all nature's bounty – which in classic European political texts is often claimed to be the inheritance of the humanity as a whole, to be shared together. We consider the common also *and more significantly* those results of social production, [...] such as knowledges, languages, codes, information, affects and so forth. This notion of the common does not position humanity separate from nature, as either its exploiter or its custodian, but focuses rather on the practices of interaction, care, and cohabitation, in a common world, promoting the beneficial and limiting the detrimental forms of the common.⁵³⁶

The distinction between what is one's own, private, (*idios*) and what is held in common (*koine*) can be linked to the other pair private (*oikos*) and public (*polis*). In the *oikos*, the private sphere of the home, we exist as private people. In the *polis*, the public sphere, we exist as citizens. Our rights, duties and responsibilities are different depending on in which sphere we happen to be. As an ironic twist of the etymological fate the Greek word for private, *idios*, also gave rise to the modern word 'idiot' as the act of dwelling in the private sphere was considered to be *idiotic*.⁵³⁷ Deleuze and Guattari also addressed this private Idiot in *What Is Philosophy*. They write in the chapter "Conceptual Personae" the following:

[I]t is the Idiot who says 'I' and sets up the cogito but who also has the subjective presuppositions or lays the plane. The idiot is the private thinker, [...] the private thinker forms a concept with innate forces that everyone

⁵³⁴ For the two most significant, in my view, in terms of natural commons, see Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press (1991 [edition from 2011]), and Garrett Hardin, 'The Tragedy of the Commons' in *Journal of Natural Resources Policy Research*, 1:3, 243-253 (2009, [originally published in 1968]). In terms of cultural commons see e.g. Carol Rose, 'Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age', Lawrence Lessig, *The Future of Ideas*.

⁵³⁵ And while I do use a defined concept here I am in full accordance with Ugo Mattei's claim that "You don't define bene comune [commons], you fight for them!" <https://www.youtube.com/watch?v=aAi4wwirTYU> (2:04-2:07). See also Saki Bailey 'The architecture of commons legal institutions for future generations', in (eds.) Bailey, Farrell and Mattei, *Protecting Future Generations Through Commons*, p. 112.

⁵³⁶ [my emphasis], Hardt/Negri, *Commonwealth*, p. viii.

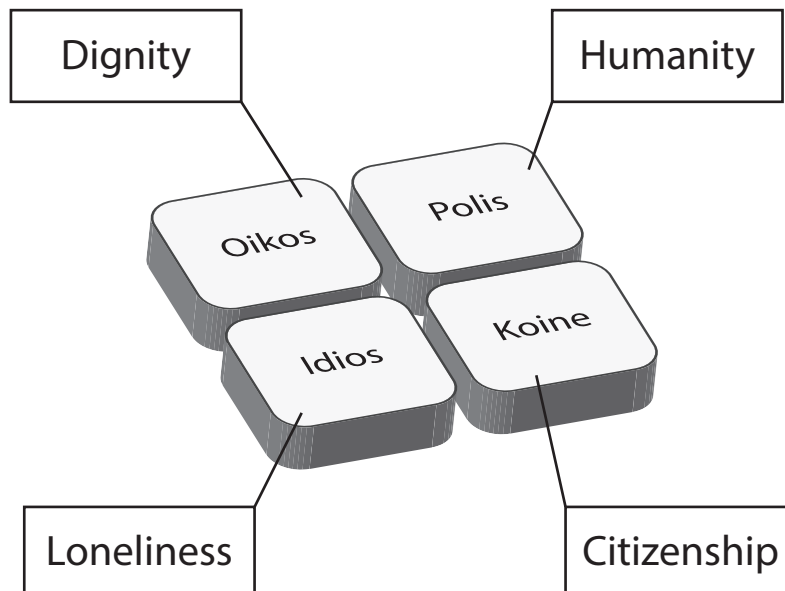
⁵³⁷ Arendt, *The Human Condition*, p. 38. See also Hyde, *Common as Air*, p. 183.

possesses on their own account by right ('I think'). The idiot is a conceptual persona.⁵³⁸

Using the rhizomatic approach that was introduced in Volume I further connections will be established between the public and the private, challenging various binary pairs it gives rise to, here for instance I am consciously linking two sets of pairs to show how they form a *plateau* in order to define the commons, and it could be illustrated as follows:



This is a simple construct, but it can instantly be made more complex. We can add lines of flight to this plateau, using e.g. some of Hannah Arendt's writings in *The Human Condition*:



⁵³⁸ Deleuze/Guattari, *What is Philosophy*, pp. 61-62.

Hannah Arendt herself recognises that that which is in the common interest is not necessarily referable only to the public or the private. She writes:

The medieval concept of the ‘common good’, far from indicating the existence of the political realm, recognizes only that private individuals have interests in common, material and spiritual, and that they can retain their privacy *and* attend to their own interest. What distinguishes this essentially Christian attitude towards politics from the modern reality is not so much the recognition of a ‘common good’ as the exclusivity of the private sphere and the absence of that *curiously hybrid realm where private interests assume public significance* what we call ‘society’.⁵³⁹

It is this hybrid realm that commons covers. She makes a clear distinction between the private and the public, but infers that the common good requires *both* (and not either/or). Thus, we thus keep breaking with binary thinking and continue to build upon what we shall see below in Hardt and Negri in terms of the singularities that make up the common, and thus it cannot be stressed enough that *the private is not destroyed for the benefit of the common*.

Elsewhere, in a footnote Arendt criticises the French historian Fustel de Coulanges for stating in his book *Ancient City* that the fact that in Greek cities, citizens were obliged by law to share their harvest and consume it in common, whilst each of them had the absolute uncontested property of his soil, was a “singular contradiction”. But is it, though? It is only a singular contradiction if a binary based logic is assumed. Arendt concludes her note by indeed writing “it is no contradiction, because these two types of property had nothing in common in ancient understanding”.⁵⁴⁰

What is being proposed here is to continue with such understandings of property, where it is understood that there are various different types of property. And just because somebody somehow once owns them, it does not mean that all types of property are commensurable or that they contradict other types of access and sharing of it. On the contrary, some types of property can be *incommensurable*, and by comparing them we make such claims that laws, like the ancient Greek ones, or for that matter current fundamental rights as in the Darnford case above, are (on equal footing but) contradictory. That is why the overview above in this chapter began with various types of ownership, went through public spaces and now the aim is to diversify the concepts of both ownership and public space with a discussion of the commons.

Before we go on then, we can look at a summarising chart in which the difference between the natural and the artificial commons is schematically present-

⁵³⁹ [my emphases throughout], Arendt, *The Human Condition*.

⁵⁴⁰ Ibid. p. 30.

ed. What was claimed at the beginning of this chapter as the difference between the two types of commons is that the natural commons comprises of natural resources such as land, water, air, and that the human or artificial commons comprises of language, knowledge, ideas, images, affects. The first one is natural, the second one is man-made, artificial.

Type of commons	Natural	Artificial
Definition	The Earth and resources associated to it	That which results from human labour/ knowledge/ creativity
Comprises of...	Land, forest, water, air, minerals... For instance: Diamonds, Oil, Lithium, Water	Ideas, language, knowledge, affects For instance: Art, software, medicine, but also indigenous knowledge, genes
Type of dispossession	Theft	Piracy
Profit Type	Sale-based Real Economy - Proximity	Rent-based Finance Economy - Distance
Ownership	Object Exclusive possession Scarcity	Right/ Privilege Exclusive right Can be shared No scarcity
Type of Appropriation	Primitive Accumulation Accumulation by Dispossession Capturing something that exists	Appropriation of subjectivity/ Social relations Creating something new

Most current discussions concerning the commons, the way it is defined, constituted, governed and developed begin with a reading of Garrett Hardin's famous essay *The Tragedy of the Commons*⁵⁴¹ in which he begins by envisioning a pasture, where animals graze, that is open to all shepherds. Such an open pasture eventually prompts the egotistic shepherds to overpopulate it and overuse it, Hardin argues. These egoistic shepherds will be driven by the unlimited access to the pasture that will benefit them. This will lead to overgrazing of the pasture, which in turn will result in the destruction of an otherwise fertile land. Hardin thus concludes in a much-quoted passage:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.⁵⁴²

Hardin was not the only one to analyse the commons in such a way and stress the tragedy aspect that may be inherent to it. In Elinor Ostrom's *Governing the Commons*⁵⁴³ she lists various other similar statements, among them Aristotle, who wrote, more than two thousand years before Hardin:

What is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest.⁵⁴⁴

And Thomas Hobbes too, wrote:

Men (in the state of nature) seek their own good and end up fighting one another.⁵⁴⁵

Clearly, what Hardin and before him Locke and Hobbes, and perhaps even Aristotle, are referring to is the natural commons. As we saw in the table above, the various ownership forms of the natural resources are ultimately limited by scarcity. There is scarcity in nature, and there is no scarcity, as such, in the artificial commons, culture and artworks.

⁵⁴¹ Garrett Hardin, 'The Tragedy of the Commons'.

⁵⁴² Ibid. p. 246.

⁵⁴³ Ostrom, *Governing the Commons*.

⁵⁴⁴ Ibid p. 2.

⁵⁴⁵ Ibid.

5.3.1 THE NATURAL COMMONS

When Elinor Ostrom was awarded the Nobel Prize in Economy in 2009 for “her analysis of economic governance, especially the commons”⁵⁴⁶ the commons as a viable economical concept was fully launched into the mainstream. Even though the concept of the commons has medieval roots it was not until 1968 when Hardin had written ‘The Tragedy of the Commons’ that the concept was re-introduced as an alternative for “economic governance”, albeit as a non desirable one in Hardin’s essay. Hardin only presented it in its “tragic” guise. As an ecologist, interested in controlling human population growth, Hardin was intent on discussing what will happen when humans destroy all their resources.⁵⁴⁷ Lewis Hyde writes:

Population, as Malthus said, naturally tends to grow ‘geometrically’, or, as we would now say, exponentially. In a finite world this means that the per capita share of the world’s goods must steadily decrease. Is ours a finite world? A fair defence can be put forward for the view that the world is infinite; or that we do not know that it is not. But, in terms of the practical problems that we must face in the next few generations with the foreseeable technology, it is clear that we will greatly increase human misery if we do not, during the immediate future, assume that the world available to the terrestrial human population is finite. ‘Space’ is no escape.⁵⁴⁸

Hardin links in this way overpopulation and the fact the goods of the Earth will decrease as its population rises. His essay illustrates this particularly by focusing the analysis on fisheries. There, Hardin argues, a common resource can exist only insofar as the number of “commoners”, i.e. number of people who exploit the commons, is limited. Then, and only then, can the common property be a beneficial resource. However, if the number increases, or becomes unlimited, *then* the common will crumble, he argues – mainly due to overexploitation. Hardin presented this theory as a “social dilemma”, if a natural resource, such as e.g. fisheries is subject to a commons, it will eventually become overexploited and destroyed through extensive usage.

But, as Lewis Hyde argues, the type of commons presented in Hardin’s essay is an “*unmanaged* common pool resource”.⁵⁴⁹ In fact, even the medieval commons were of stunted nature, namely, there were limitations in place in terms of use. In economical theory, Elinor Ostrom was one of the first scholars to show

⁵⁴⁶ <http://www.riksbank.se/en/Press-and-published/Notices/2009/Economics-prize-2009/>. Last accessed 18th March 2014.

⁵⁴⁷ Hyde, *Common as Air*, p. 34.

⁵⁴⁸ [my emphasis] Hardin, ‘The Tragedy of the Commons’, p. 244.

⁵⁴⁹ Hyde, *Common as Air*, p. 35.

that a commons does not necessarily have to lead to a tragedy.⁵⁵⁰ Far from being a place of “no law” she argues that the commons could function without the individual private right or state intervention.⁵⁵¹ She discusses in particular already existing examples such as pastures in a Swiss village, Turkish fisheries and access to irrigation water in Valencian *huertas*.⁵⁵²

Ostrom was one of the first economical theorists to challenge the ‘prisoner’s dilemma’ when it comes to the commons and provide a solution as to how the commons may be governed and managed as an institution. She makes a distinction between common *property* and common-*pool resources*. Common property, she argues, is a legal regime that governs jointly owned legal set of rights. Common-pool resources, on the other hand, are shared resource systems, economic goods, independent of property rights.⁵⁵³ More specifically she explains the common-pool resources to be:

A common-pool resource, such as a lake or ocean, an irrigation system, a fishing ground, a forest, or the atmosphere, is a natural or man-made resource from which it is difficult to exclude or limit users once the resource is provided, and one person’s consumption of resource units makes those units unavailable to others⁵⁵⁴

Ostrom begins her influential book *Governing the Commons*⁵⁵⁵ by presenting the common approaches to the commons: as a tragedy, as a prisoner’s dilemma, as a collective action, or as “Leviathan”/”privatisation”. These approaches are often presented “as the only way” she argues – i.e. solutions to the commons which may be tragic, but that are the least of all evils. Ostrom then claims further that first of all, attempting to claim any one approach to the commons as the ‘only’ approach is the first mistake that is made:

The ‘only way’ to solve a commons dilemma is by doing X. Underlying such a claim is the belief that X is necessary and sufficient to solve the

⁵⁵⁰ See generally, Ostrom, *Governing the Commons*.

⁵⁵¹ See e.g. Ugo Mattei, ‘Future Generations now! A commons-based analysis’ in (eds.) Bailey, Farrell and Mattei, *Protecting Future Generations Through Commons*, p.20.

⁵⁵² Ostrom, *Governing the Commons*, pp. 62-63. See also Filippo Valguarnera, ‘Commons: framtid eller rättsligt kätter?’.

⁵⁵³ Hess/Ostrom. (eds.) *Understanding Knowledge as a Commons*, p. 5.

⁵⁵⁴ Elinor Ostrom, ‘Coping With Tragedies Of The Commons’, in *Annual Review of Political Science*, (1999). 2:493-535, p. 497.

⁵⁵⁵ Ostrom, *Governing the Commons*.

commons dilemma. [...] If one recommendation is correct, the other cannot be. Contradictions cannot both be right.⁵⁵⁶

She presents a “fifth” approach to the commons. One of the most interesting aspects of her study, that are relevant for this research project, is partly the above quoted critique of the notion of “one” solution, and partly the fact that she advocates various mixtures between public and private rights when it comes to common property resources. She also makes a number of findings in terms of governing the commons as an institution in *Governing the Commons* that I shall only mention here, albeit briefly:

- 1) Clearly defined boundaries should be in place – i.e. individuals have the right to withdraw resources from the common pool of resources,⁵⁵⁷
- 2) Rules in use to be matched to local needs and conditions – i.e. appropriation rules restricting time, place, technology and/or quantity of resource units to be related to local conditions and provisions requiring labour, materials, and/or money,⁵⁵⁸
- 3) Collective choice arrangements – i.e. individuals affected by the operational rule to participate in the modification of the same rules⁵⁵⁹ and the right of the community members to devise their own rules must be respected by external authorities,⁵⁶⁰
- 4) Monitoring – of e.g. member’s behaviour,⁵⁶¹
- 5) A graduated system of sanctions must be available,⁵⁶²
- 6) A low cost conflict-resolution mechanism provided for community members,⁵⁶³ and
- 7) Nested enterprises – i.e. appropriation, provision, monitoring, enforcement, conflict resolution, and governance are organised in multiple levels of nested enterprises.⁵⁶⁴

⁵⁵⁶ Ostrom, *Governing the Commons*, pp. 13-14

⁵⁵⁷ Ibid. p. 91

⁵⁵⁸ Ibid. p. 92

⁵⁵⁹ Ibid. p. 93

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid. p. 94, see also Hess/Ostrom, *Understanding Knowledge as a Commons*, p. 7.

⁵⁶² Ibid.

⁵⁶³ Ibid.

Her particular findings in *Governing the Commons* are partly created bearing the natural commons paradigm in mind, partly within economical theory, which make them difficult to apply in more detail on this legal research project. However, I will return to some of them in chapter 7 and further discuss how this research project fuses her findings with the artwork as a resource and access to art in the cultural commons.

5.3.2 THE ARTIFICIAL COMMONS

The main components or resources that make up the artistic commons differ from the ones of the natural commons mentioned above. Artistic expressions and aesthetic ideas⁵⁶⁵ make up the artificial, man-made, commons. Hyde explains:

John Locke assumed that ‘every man’ acquired property through the ‘labour of his body, and the work of his hands.’ Whatever a man removes out of the state of nature’ and ‘mixe[s] his labour with’ becomes his to own. Fair enough, perhaps, but how are we to translate such notions into the cultural realms, where there is no ‘state of nature’, where all materials already come from the hands and minds of others.⁵⁶⁶

There is a scarcity that exists in terms of ‘regular’ commodities such as cars, timber, oil etc. At some point the resources needed to produce such commodities will be exhausted. This is the old Lockean adage⁵⁶⁷ that still colours our relationship to things. There are only so many cars that can be made before we run out of rubber, steel, or before there is no more room on Earth for cars. This gives rise to the exclusivity principle; the individual who owns a thing is the exclusive owner. I drive my car, and as a consequence you cannot drive it at the same time. For cars, it is foremost a question of biophysical exclusivity, a car cannot be at two places at the same time. The same goes for food, as in the example that Hardt and Negri provide, if I consume an apple it ceases to exist,

⁵⁶⁴ Ostrom, *Governing the Commons*, pp. 94 aa. see also Hess/Ostrom, *Understanding Knowledge as a Commons*, p. 7.

⁵⁶⁵ In law there is a fixation requirement for an artistic expression to constitute a work. But how can we possibly ‘see’ a beat or John Cage’s 4:33 that consists of 4 minutes and 33 seconds of silence? The idea and the expression can no longer be divided in this way, as we shall see from the discussion below.

⁵⁶⁶ Hyde, *Common as Air*, p. 119.

⁵⁶⁷ Locke, *Two Treatises On Government* (1690) Book II.

nobody else can eat it after me.⁵⁶⁸ For artworks, interestingly, we have created a similar type of exclusivity through copyright.

The notions of scarcity and with that exclusivity of things has spilled over on art. In *What is Literature*⁵⁶⁹, Sartre wrote that an artistic creation, like a novel, is not completed until it has been communicated to others through reading, or connected to other machines in the words of Deleuze and Guattari. Therefore enclosures and the exclusivity principle are basically foreign for art, as exclusion ultimately renders the works void, unable to be communicated. Hess/Ostrom write in the Introduction to *Understanding Knowledge as Commons*:

Most types of knowledge have, on the other hand, traditionally been relatively nonsubtractive. In fact the more people who share useful knowledge, the greater the common good.⁵⁷⁰

Hyde puts it in yet another way, by quoting Benjamin Franklin's explanation as to why he refused to apply for a patent on his wood stove:

If I own a can of tomato juice and spill it in the sea... do I thereby come to own the sea...?⁵⁷¹

Production in our time is obviously completely different from the old industrial production even when production of art is discussed. In fact most goods today, not only artworks, are based on knowledge, aesthetics, code, language, social relationships, affects, communication, sharing, and so on.⁵⁷² None of those are scarce. Even where the artwork itself has a material aspect, it is also brimming with knowledge and ideas that need to be communicated and shared. As focus has been placed on the material within the industrial paradigm, one must not forget the immaterial in the digital paradigm. Therefore, approaching this immaterial aspect of production and the immaterial goods is an endless task. Artworks can be wholly or partly material (like a painting, or a pickled shark in a tank), but they do not have to be (music, films, performance, dance). Suffice it to say here that artworks are an example of immaterial products as they are first and foremost based on ideas, skills and knowledge, but furthermore, and most importantly, they require communication and interaction in order to be fully

⁵⁶⁸ Hess and Ostrom refer to it as subtractive resource, i.e. one person's uses reduce the benefits of another person, Hess/Ostrom in the Introduction to *Understanding Knowledge as Commons*, p. 5.

⁵⁶⁹ Jean-Paul Sartre, *What is Literature*, (trans.) Bernard Frechtman, London : Rutledge, (2001 [originally published in 1949]), p. 58.

⁵⁷⁰ Hess/Ostrom in Introduction to *Understanding Knowledge as Commons*, p 5.

⁵⁷¹ Hyde, *Common as Air*, p. 120.

⁵⁷² Hardt, 'The Common in Communism', p. 349.

appreciated and for them to reach their full potential and value. Although it has been made possible to privatise, materialise and control immaterial products *as if* they were commodities through e.g. copyright, it is now apparent that in the digital knowledge society it is no longer as simple or straightforward, as it had been with the industrial commodity, to commodify. Though scarcity and exclusivity have reigned over the object-based industrial commodities, it cannot be the case with the immaterial products. At least not to the same extent.

One step towards ceasing to treat artworks as if they were either like nature or like other commodities is to admit that copyright, as a legal concept driven by the cultural industry and the commercial sphere of entertainment, is problematic as a legal construct in terms of the commons, but the next, and the far more difficult step, is to think of alternatives. How do we cater for a wider access and sharing of all types of works without destroying the commercial worth and the possibility of exploitation? While the public has a claim on access and diversity, the artists (or other rights owners) in return arguably have a legitimate claim on some kind of reward for their work, ingenuity, creativity and even financial investment, for having created products that add on to our common pool of knowledge.

In order to continue to explore the cultural commons further let us first look at the current binary scheme that makes up the principles governing the commons. Hyde claims that they are either based on public recognition or private reward:

PUBLIC RECOGNITION	PRIVATE REWARD
Principles governing status and reward in academy	IP system
Quality of scholarship	Reward
Teaching	Privilege-based
Service to the institution	Near-term
Reputation system	Gain
System of virtue	Financial reward
Altruism	Egotism
FREEDOM TO...	FREEDOM FROM...
POSITIVE LIBERTY	NEGATIVE LIBERTY
Liberty to communicate	Must always be limited
Belongs to communities	Belongs to individuals
Commonwealth	Private wealth

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The recognition/reward schism is exactly the way through which we can build on the idea of the commons. In the commons reward and recognition do not have to compete, as the reward will be tied to the ownership and recognition to the access to the works.

5.4 COMMON NOT PUBLIC

The common, as is becoming quite apparent, goes beyond the private-public dichotomy. Hardt and Negri have made another important observation in the differentiation between the “common” and the “public”, a distinction that is fitting in the context of cultural commons and access to art. Whereas the term “community” (or indeed “public”), they write, is often used to denote a “moral unity that stands above the population” the “common” on the other hand does not refer to traditional notions of either the community or the public; it is based on the *communication* among singularities and emerges through the collaborative social processes of production.⁵⁷⁴

⁵⁷³ Table is based on Hyde, *Common as Air*, pp. 135-161.

⁵⁷⁴ All the quotations in this paragraph: Hardt & Negri, *Multitude*, p. 204. Whether the commons as a legal construction ought to be subsumed under property law is for instance discussed by the (eds.) Bailey, Farrell and Mattei study. Mattei for instance insists, “that, in order

Communication and sharing instead of community is thus the main value of the commons. It is this very notion that allows us to continue Habermas' discussion regarding public spaces and communicative action, but with another type of focus on communication.

Hardt and Negri write in *Commonwealth* that the concept of 'private', used in opposition to 'public', tends to often lump together all types of 'possessions'. Therefore, they continue, the term 'public' bears a connotation to hierarchical control as opposed to what is horizontally managed (n.b. not owned!) in common. For instance we manage our clean air in the natural commons, and we transfer through generations that which makes up parts of the artificial commons such as nursery rhymes, fairy tales, fables and other cultural heritage.⁵⁷⁵

Hardt and Negri propose an 'alternative legal strategy and framework' altogether, claiming that in order to understand the complexities of the conception of privacy and the private as well as that which is shared and managed in common, one has to argue for additional commons-based solutions, particularly in the knowledge society. Whereas the concept of 'public' tends to amalgamate all the various intellectual and cultural expressions into some kind of public unity, the common in their view on the other hand focuses also on the *alterity*, difference and singularities (each person's difference, each different entity) that exist inside the public and that participate in the commons.⁵⁷⁶ In that case, the private has to be upheld too, at the same time as the necessary collective communication, communicative action and access and sharing are enabled. This means that the binary opposite public-private becomes redundant, as the two are part of the one and the same thing – the commons.

Hyde, for instance, gives the example of voting to illustrate this unique public and private alliance that the commons produces. The right to vote, he claims, is a right we have as private people, but that we exercise together, in order to manage democracy in common. He writes:

If you want a viable democracy, you cannot sell your vote. If you want a lively cultural commons, you can't allow corporate media to enclose the private domain. If you and your neighbours own land over an aquifer, none of you should be allowed to sink a well and sell the water to some thirsty distant metropolis. Each of these is a constraint on some but at the same time each of these is the foundation of others: the freedom to live in a democracy, to partake in cultural inheritance, to enjoy a constant flow of potable water. Inalienability of this sort will frustrate the formation of pri-

to recuperate all the potential legal wealth stemming from a transgenerational approach, it is first necessary to get rid of the individual-centred scheme imbedded in our law of property."

⁵⁷⁵ Mattei, 'Future Generations now! A commons-based analysis' in (eds.) Bailey, Farrell and Mattei, *Protecting Future Generations Through Commons*, p. 12.

⁵⁷⁶ Hardt/Negri, *Commonwealth*, pp. 203-204.

vate, choosing, subjective selves, but at the same time make possible the formation of the civic, extended, or common self. They allow a way of being.⁵⁷⁷

It is this formation of constraints of freedoms that at the same time mark the foundations of other freedoms in order to form a common self, a way of being together. Following that, a genuine and sound diversity of the cultural commons is beneficial because it generates democratic societies. The commons exists through a mixture of private geniuses and the sharing, communication and inspiration that stem from the historically and publically available⁵⁷⁸ knowledge and encouragement to learn. The two, private and public, as well as singular and plural, communicate and that can only be achieved by safeguarding the *communication* by basing communication itself in the commons.

The singularities are the building blocks in the edifice of the cultural commons, and as such they cannot be ignored or destroyed either. That is why the notion of the common is far more appropriate than the public, or communitarian, as it does not demolish the individual-private subject (artist, artwork or indeed enterprise), nor does it impose a notion of the community. It still enables the network and plurality based activities to progress and continue. *This is a true rhizomatic reasoning, forming alliances rather than opposites.* For that reason, commons-based concepts could also safeguard copyright as a legal tool. Individuality that copyright promotes is seen as an integral part of the commons and does not dissolve in favour of an often potentially paternalistic and homogenous “public” or “community” – it just enables communication and sharing through a comparatively open access.

This can be described further by Bourdieu’s three levels of *legitimacy of art*, i.e. the basic principles as to why, according to Bourdieu, art is at all created. These legitimacies can be helpful here in better understanding the commons from Hardt and Negri’s perspective. Bourdieu divides the legitimacy of art in the following manner:

- 1) The *recognition* granted to the artist by other artists – the artwork is created for its own sake: art for art’s sake
- 2) The second legitimacy corresponds with *bourgeois taste* – Bourdieu lists various institutions such as salons, public state-guaranteed tribunals such as Academies representing the “taste of the dominant” class, and the artworks created for and inside such institutions; and finally

⁵⁷⁷ Hyde, *Common as Air*, p. 168.

⁵⁷⁸ Even if, arguably, the width of the public domain and what constitutes it, is shrinking with new claims on rights through e.g. digitisation, translation, adaptation etc.

- 3) The last principle of legitimacy is, according to Bourdieu, that of the “popular” taste, i.e. artworks created for and chosen by ordinary customers and mass audiences.⁵⁷⁹

Bourdieu’s three levels illustrate the reason why the concept of public (second principle) is just *one part* of the commons where art is accessed and shared. Arguably, the bourgeois and the popular may not always be two separate entities in the digital spheres, within the information society. Without dwelling too much on the details of Bourdieu’s complex analysis here, I use his legitimacy principles in order to build on this discussion and stress the significant differences between the public and the common. Whereas the public generally can be and *is* placed in something that resembles Bourdieu’s second legitimacy principle, i.e. artworks created for institutions, governed top down, state/publically funded, and often politically driven, the common on the other hand rests on the basis that artworks exist within (at least) all three of Bourdieu’s legitimacies, and many more hybrid instances, simultaneously. If we look at it as rhizomes, it becomes clear how an artwork is able to be both commercial and have social significances within all the Bourdieuan categories.

The commons is thus based on the idea of sharing and communicating, and therefore the value of the commons is to cater for artworks so that they can move and exist unrestrictedly between all the legitimacy categories and communicate upwards or downwards without the restrictions from unnecessary gatekeepers. The commons has to be managed horizontally, which means, it can inherently function inside the digital network based realm, as it very much resembles the structure of e.g. bit torrents or peer-to-peer based software.

5.5 THE BEING-IN-COMMON(S) NOT COMMUNITY

One of the more significant problems with the concept of the public is that it presupposes a homogeneous or at least an, at any given point, definable community. In chapter 4 we saw several instances where this was impossible to achieve, or at least where such community assumptions proved to be problematic. The French philosopher Jean-Luc Nancy’s writings on community are illustrative and form a continuation of Habermas and Hardt/Negri, and his writings also assist in placing these theories in the global digital knowledge society and its information, access and communication based discourses.

Nancy has a vast philosophical body of work that I shall not be commenting further on here. I will only briefly mention *The Inoperative Community*⁵⁸⁰, and *Being*

⁵⁷⁹ Bourdieu, *The Field of Cultural Production*.

⁵⁸⁰ Jean-Luc Nancy, *Inoperative Community*, (trans.) P. Connor, (ed.) C. Fynsk, Minneapolis: University of Minnesota Press, (1991).

*Singular Plural*⁵⁸¹, where he deals with the question of what constitutes a community or a “We” and the components that make it up. He goes into more detail than Habermas did when he addressed the open community that shares ideas and opinions, at the same time as the two theories can be used together when discussing the commons.

In *Being Singular Plural*, Nancy argues that *being* as we understand it will always be a concept of “being-with”, which means a collectivity of “I:s” forming a co-existence into a “We”. For Nancy, “being with” does not necessarily constitute a traditional community or a public space in a Habermasian sense *per se* which is defined by enclosure forming an inside and an outside of an existing group. Nancy rather adds to Habermas by presenting various hybrids that allow for mutual entrances and exits into the community, without the necessity of enclosure, at least not as we are used to defining enclosure. During Nancy’s study of “being with” he discusses a number of issues such as political and multicultural concepts, which are of course more relevant than ever in a society like the one today where mixture and migration is the rule, rather than an exception. What constitutes a community and how it is managed is an idea that Nancy devoted a great deal of time to.

Nancy at the same time provides an alternative reinterpretation or a challenge of the concept “community” as well as of the Cartesian subject. Consequently, Nancy does not only present an alternative way of viewing community, he also provides a complimentary understanding of how the individual, the subject, the “self”, can be understood as concepts today and he develops his theory on the notion of *singularity* as opposed to individuality or subjectivity. Another reason for briefly referring to Nancy here is because of his rather influential contributions towards art and culture studies, which means that even when it comes to his theoretical studies of community he will never stray too far away from the artwork and its significance for the community.⁵⁸²

This particular understanding of community that Nancy presents is very helpful particularly in connection with the concept of haecceity which was introduced in Volume I. Connected, the two demonstrate how neither the individual, nor the community in which the individual or the legal subject exists are some unified, static concepts, but rather concepts that are constantly in a state of becoming. Seen in that way, the participation and communication within the commons is only one aspect of the unfinished project that is the individual and the communities in which individuals exist.

Nancy, in the same vein as Deleuze and Guattari, also challenges the Occidental idea of community arguing against the dominant idea of imagining the

⁵⁸¹ Even if Nancy’s most significant work on the status of art today, *Les Muses*, Galilée, (2001) is not directly referenced here, it has been influential for this research in understanding art and placing it within a legal context. See also, Jean-Luc Nancy, *Being Singular Plural*.

⁵⁸² Nancy, *Les Muses*.

community as being self-enclosed (or a tree with a singular origin, roots, and so on). Instead he proposes imagining a “being-together” as a project of “being-in-common”. Nancy argues that any community which attempts to become communal, in such an arborescent way of imagining a community, “loses the in of being-in-common” and it loses the “with or the together that defines it”.⁵⁸³ Therefore, contrary to all traditional models, Nancy dismisses a number of unifying ideas and “attempts to depict community as something that cannot be forced, but is instead a shared experience of finitude, which gives rise to an affirming ‘Being-with’.”⁵⁸⁴

Nostalgia towards an archaic community is a symptom of such assumed community, he argues, and it generates more or less imaginary concepts of homogeneous communities that may or may not have existed. Such communities, if they indeed ever existed, have been replaced by a multi-pluralistic alterity.⁵⁸⁵ Today, it is problematic to see the community as an independent unit, or a homogenous whole that has a common goal. For Nancy, community is instead the multi-pluralistic alterity marked by the existence of a “being-in-common”.⁵⁸⁶

It is this state of being-in-common, which is of interest here. The being-in-common can add to Habermas and Hardt/Negri. Nancy maintains that the being-in-common does not denote a uniformity that binds separate individuals; it is rather based on a “shared experience”. That means that the being-in-common necessitates sharing, and here it is linked with the idea of the cultural commons. Nancy’s community thus “requires a new conception of the individual to understand this ‘sharing’ and, accordingly, for this ‘being-in-common’ to exist”.⁵⁸⁷ The classic concept of the subject is in this theory replaced by the concept of a *singular being* and fits together in a scheme where individuality is approached as individuation, a project, a constant state of becoming, *a haecceity*. Nancy’s singular being confronts the notion of the Cartesian individual, that is a clearly definable individual within the external world, where there is a definable “inside” as well as an “outside”, therefore Nancy experiments with terminology such as “being self” and “being separated”.⁵⁸⁸

⁵⁸³ Catherine Kellogg, ‘Love And Communism: Jean-Luc Nancy’s Shattered Community’, in *Law and Critique* (2005) 16: 339–355, p. 29.

⁵⁸⁴ Charles Prestidge-King, ‘A Sketch For A New Community: The Inoperative Community And Modern Politics’, in *Cross-sections: Volume I* (2005), p. 26

⁵⁸⁵ Nancy, *The Inoperative Community*, pp. 9-10, Prestidge-King, ‘A Sketch For A New Community: The Inoperative Community And Modern Politics’ p. 83.

⁵⁸⁶ Nancy, *The Inoperative Community*, p. xxxvi., Prestidge-King, ‘A Sketch For A New Community: The Inoperative Community And Modern Politics’ p. 87.

⁵⁸⁷ Prestidge-King, ‘A Sketch For A New Community: The Inoperative Community And Modern Politics’ p. 87.

⁵⁸⁸ Prestidge-King, ‘A Sketch For A New Community: The Inoperative Community And Modern Politics’, p. 87 and Nancy, *The Inoperative Community*, p. xxxvii.

It is these very social interactions that constitute the plural being-in-common, he argues. What Nancy achieves by way of the being-in-common construction is to radicalise the idea of equality, where he does not refer to “a class of belonging definable with some common properties that should distinguish it from others”.⁵⁸⁹ On the contrary, a community for him is based not on inclusion into an exclusive or enclosed group, but rather on sharing [*partage*] of the “emptiness of sense that is the being itself of the singularity together with the plurality, that no predicate can fill up”.⁵⁹⁰

When applying Nancy’s writings to the concept of the commons I wish to be able to place artworks within his idea of being-in-common. The network that he creates will then be placed inside a theory of rhizomatic jurisprudence. The use of Nancy also enables me to develop the aspects of Adorno and Horkheimer’s theory that I find pertinent, for instance that the market creates a lessening of authentic works. Arguably that also happens in other spheres that are not the market, such as for instance the bourgeois public space, even if it can be a matter of different types of works that are promoted and “lessened”, while a being-in-common, a commons, may not have these effects of exclusion. Quite the reverse, the commons may not only enable an alternative platform for access, it can also enable us to communicate as well as envision alternative conceptions of communities.

⁵⁸⁹ Perin Matteo, ‘The Sense Of Freedom. The Surprise Of Being-In-Common’, in *Law and Critique* (2005) 16: 315–338

⁵⁹⁰ *Ibid.* 331–332.

CHAPTER 6

COMMONS V. INTELLECTUAL PROPERTY LAW

6 COMMONS V. INTELLECTUAL PROPERTY LAW

In ‘A Politics of Intellectual Property; Environmentalism on the Net?’ James Boyle writes:

The more one moves to a world in which the message, rather than the medium, is the focus of conceptual and economic interest, the more central intellectual property becomes. Intellectual property is the legal form of the information age.⁵⁹¹

The Latin noun *plaga* refers to a hunting net⁵⁹² used for capturing animals. Such netting was called *plagium*. Analogically, the word has acquired a connotation to kidnapping of children and kidnappers where thus called *plagiaries* in Latin. The poet Marcus Valerius Martialis (40-100 AD) used to be displeased when somebody copied his poems that he likened the copying to the abduction of children – his poems, he argued, were his spiritual children. This was how the word *plagium* was used for the first time, namely to denote the act of ‘kidnapping’ intellectual works. The word was introduced into the English language during the seventeenth century, first in use for “kidnapper” (abductor of children), but it later developed into *plagiary* used to mean “the practice of stealing the ideas or words of others and passing them off as one’s own”.⁵⁹³ Centuries later, Daniel Defoe commented on plagiarism as “every jod as unjust as lying with their Wives, and breaking-up their homes.”⁵⁹⁴ Curiously, “plagiarism” as a legal phenomenon is still not very clearly defined – normally, it is used to indicate the more severe cases of copyright infringement, where a work is not only copied maliciously and in bad faith, but also where the original author is not mentioned or the work is being passed off as an original work of the infringer.⁵⁹⁵

Already in 1997 James Boyle wrote that in the information age, ownership and control of information are the most important forms of power.⁵⁹⁶ Additionally, he claimed that this, as a statement, is now so well accepted, that it has

⁵⁹¹ Boyle, ‘A Politics of Intellectual Property; Environmentalism on the Net?’.

⁵⁹² The word net has lingered to this day: inter-net....

⁵⁹³ <http://wordinfo.info/unit/3424/ip:8/il:P>. Last accessed 18th March 2014. See also Koktevegaard/Levin, *Immaterialrätt*, p. 26.

⁵⁹⁴ See e.g. Hyde, *Common as Air*, p. 81-82. See also Daniel Defoe *An Essay on the Regulation of Press*, (1704).

⁵⁹⁵ See also generally Koktevegaard/Levin, *Immaterialrätt*, p.26.

⁵⁹⁶ Boyle, ‘A Politics of Intellectual Property; Environmentalism on the Net?’.

even become a cliché and that one could “get away with saying in a *law review article* without footnote support”.⁵⁹⁷

When discussing the concept of the cultural commons with regards to intellectual property law, copyright law and doctrine, these strands, i.e. plagiarism and control/ownership of information, will have to be interwoven. How can the concept of the cultural commons be envisioned without at the same time *kidnapping* the spiritual children of the creators? Furthermore how can a democratic power balance be upheld in society if ownership and control of information is not fairly distributed? The latter, of course, is partly a theoretical question, one that borders on Foucault’s discussion in *Discipline and Punish*⁵⁹⁸, an issue which Deleuze too analysed. Deleuze wrote in his *Postscript on the Societies of Control*:⁵⁹⁹

In the societies of control [...] what is important is no longer either a signature or a number, but a code: the code is a password, while on the other hand disciplinary societies are regulated by *watchwords* (as much as from the point of view of integration as from that of resistance). The numerical language of control is made of codes that mark access to information, or reject it. We no longer find ourselves dealing with mass/individual pair. Individuals have become “*dividuals*” and masses, samples, data, markets or “*banks*”. [...] The disciplinary man was a discontinuous producer of energy, but the man of control is undulatory, in orbit, in a continuous network.⁶⁰⁰

It is an insightful observation, particularly bearing in mind that it was written in the beginning of the 1990s. This quote is particularly interesting as Deleuze is pointing out that in the society of control – arguably a society that very much resembles the knowledge society, which is also very much code-based – we have moved beyond the mass/individual pairings and individuals have become dividuals, banks of data, containers of mass information. Certainly, a similar line of reasoning has been adopted here in terms of the rhizomatic artwork, that is, the movement that has taken place from the industrial paradigm discussed by Adorno/Horkheimer and the authentic-mass pairing, to the network-based digital realms as per Stapleton where the artwork evolved from an object to a container of mass-information. As it is quite obvious, however, this particular research project addresses these questions slightly differently, even different from

⁵⁹⁷ [original emphasis], Boyle, ‘A Politics of Intellectual Property; Environmentalism on the Net?’ p. 87.

⁵⁹⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (trans.) Alan Sheridan, Penguin Books, (1991 [originally published in 1975]).

⁵⁹⁹ Gilles Deleuze, ‘Postscript on the Societies of Control’, in *October*, Vol. 59, Winter, (1992 [originally published in 1990]). pp. 3-7.

⁶⁰⁰ [original emphasis], *Ibid.* p. 6.

Deleuze's attempt above, which was based on Foucault's writings on the society of discipline. The focus of this project lies not in who the individual is (or *dividual* for that matter) or how he can be controlled, or on the singular artist and what he can or cannot do,⁶⁰¹ but on the *artwork* as information and knowledge in itself, and the potential of wider access beyond the biopolitical critique of society. Thus, 'ownership' and 'control' of information have been substituted for the milder (and arguably less normatively loaded) *access*. Boyle, Foucault and Deleuze all seem to be in accordance that when it comes to the particular issue of control and participation in the knowledge society, *access* is a key term in terms of governance of any society that is based on code.

This chapter begins with the digital information society, in the knowledge economy. Here, we find intellectual property legislation as a sophisticated legal construct, one that has been around for at least 600 years.⁶⁰² It governs some of the most important aspects of our society namely knowledge, power, information, market, and per default, economy and democracy. However, the idea this far into the analysis is not to chart the evolution of intellectual property or indeed copyright law in order to arrive at the concept of the cultural commons. Rather, the intent is to use the theoretical approach laid out in chapter 3 where the rhizomatic artwork was presented, and adding the concept of the commons that was introduced in the previous chapter, in order to read intellectual property law rhizomatically, and follow its lines of flight and processes of deterritorialisation and movement. The purpose is *not to present a critique* of current intellectual property law, but to follow its *potentiality* and *connectability*, specifically towards the concept of cultural commons. This can mean at points having to look back at the legal history of intellectual property law (like it was done with the commons in chapter 5) but not in order to describe the evolution of intellectual property law, but rather to reveal the existing creative potential that is (*always*) *already there* within the current legal construct.

The titles of the subsections of this chapter have been formulated as dichotomies in order to keep revealing the problems of binary reasoning and to follow the already established research method that aims to get beyond legal dichotomies.

⁶⁰¹ For an interesting approach to copyright and communication where the artist plays a focal point of the discussion see generally Craig, *Copyright, Communication and Culture*.

⁶⁰² Counting from the first Venetian privileges of the 15th century, that are commonly accepted as the first forms of IP law. There are other instances of IP-like laws that date back thousands of years BC also, but it is generally accepted that the Venetian privileges were the predecessors to the modern IP laws.

6.1 STINTED COPYRIGHT V. DETERRITORIALISING CAPITALISM

A property right appears in a natural way and does not require either legislation or jurisprudence.⁶⁰³

[S]tructural tendencies in our patterns of thinking and discourse about intellectual property [...] lead us generally to ‘over’ rather than ‘under’ protect, and that partly as a result we are currently in the midst of an intellectual land-grab, an unprecedented privatization of the public domain.⁶⁰⁴

Once we accept that houses and ideas may be lumped together as the same kind of property, and that their owners have *natural* property rights – the kind that supposedly exists prior to all human law – then there is little to argue about. We are in the realm of first principles and belief, not of public deliberation over contending values.⁶⁰⁵

The stunted copyright v. deterritorialising capitalism dichotomy may be approached in the various ways as represented by the quotations above. The first one, where it is argued that ownership comes prior to law, the second one, where it is claimed that the ownership paradigm is increasingly taking over the public domain, and the third one, where ownership of tangible objects is diversified from ownership of immaterial works. All three aspects are nonetheless privy to the structures of capitalism and its evolution as well as its rhizomatic nature. In the digital knowledge society, Jeremy Rifkin even argues that capitalism has moved into a (new?) stage: *hypercapitalism*, i.e. capitalism has rapidly entered into a new phase, namely the ‘age of access’. The age of access has meant shifting from ownership and control oriented models towards an increasing number of “paid access to inter-connected supplier–user networks”.⁶⁰⁶ Therefore, the binary pair stunted copyright v. deterritorialising capitalism must directly be problematised, as exploitation of goods in the capitalist digital knowledge society, (as we also saw above in chapter 5), has shifted from exclusive ownership of material things towards non-exclusive access to more or less immaterial things/assets/knowledge/information.

Let us look the tendencies of capitalism in Deleuze and Deleuze/Guattari. This is how Charles Ramond presented this very issue as he analyses the Deleuzeoguattarian approach to capitalism (and its schizophrenic nature):

⁶⁰³ [my translation]: “Äganderätt uppstår på naturlig väg och förutsätter varken lagstiftning eller rättsvetenskap.” Kocktvegaard/Levin, *Immaterialrätt*, p. 25.

⁶⁰⁴ Boyle, ‘A Politics of Intellectual Property; Environmentalism on the Net?’, p. 95.

⁶⁰⁵ Hyde, *Common As Air*, p. 215.

⁶⁰⁶ Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where all of Life is a Paid-For Experience*, New York: Penguin Putnam, (2001). See also Frédéric Vandenberghe, ‘Deleuzian capitalism’ in *Philosophy Social Criticism* 2008 34: 877, p. 893.

This unexpected association of “capitalism”, “schizophrenia” and “revolution” shows indisputably the authors’ recognition of there being a positive dimension to capitalism. The point at which the authors realise that their position with regards to capitalism is “*ambiguous*” becomes quite clear from that which has been stressed.⁶⁰⁷

Ramond directs our attention towards this unexpected association that Deleuze/Guattari make between capitalism and schizophrenia. They, Ramond claims, seem to have a position vis-à-vis capitalism that can be described as *ambiguous*. In the article *Deleuzian Capitalism* Frédéric Vandenberghe seems to be arriving at a similar conclusion:

Capitalism explores and anticipates the de-territorializing lines of flight to capture them from without, enter into symbiosis with them, and redirect them from within, like a parasite, towards its own ends. Capitalism is inventive; its creativity knows no limits – “it is of the viral type”.⁶⁰⁸

However, Vandenberghe then continues:

Needless to say that I am not claiming that Deleuze’s libertarian critique of capitalism was anti-critical or phoney from the start and that Deleuze is somehow the Giddens of the 1970s: a neo-liberal disguised as a libertarian, or Thatcher on LSD. What I am claiming is, rather, that capitalism has *progressively integrated the critique of capitalism into its mode of functioning*, with the result that capitalism appears stronger than ever, whereas the critique of capitalism seems rather disarmed.⁶⁰⁹

Or as William E. Connolly explains it elsewhere:

To put it another way, we still don’t know what capitalism can become, even though its density and fragility give us reason to worry about the worst. Deleuze pursues this issue through a multi-tiered conception of time

⁶⁰⁷ [my translation and my emphasis], “Cette association inattendue du “capitalisme” de la “schizophrénie” et de la “revolution” indique incontestablement la reconnaissance par les auteurs d’une dimension positive du capitalisme. [...] On voit bien, dans l’expression que j’ai soulignée, à quel point les auteurs se rendent compte que leur position vis à vis capitalisme peut elle-même être considérée comme ‘*ambiguë*’.” Charles Ramond, ‘Deleuze, Schizophrénie et Mondialisation’, in *Capitalismes: en sortir ?*, Dossier de la revue *Cités*, no. 41, coordinated and presented by Gilles Campagnolo, Charles Ramond and Jacques de Saint-Victor, p. 99-113., (2010), p. 110.

⁶⁰⁸ Vandenberghe, ‘Deleuzian capitalism’, p. 879.

⁶⁰⁹ [my emphasis], *Ibid.*

as becoming, with periodic forks in climate, asteroid showers, religious movements, new instruments of investment, technological developments, invasions, and state priorities, etc. engendering a capitalist assemblage in which we can intervene but never master. To the extent either Marx or Habermas was tempted by the mastery project, *Deleuze breaks with each*.⁶¹⁰

Stripped of the radical project (or is it perhaps, conversely, its most radical form, depending on how one chooses to read Deleuze/Guattari here) this way of understanding capitalism in the digital knowledge society with its access-based knowledge production opens up a path towards a reconciliation between the age old division “Every Free-Man... shall have... the Honey that is found in his Woods”⁶¹¹ and “S’il existe pour un homme une véritable propriété, c’est sa pensée”⁶¹² on the one hand and the public interest/fair dealing principles that copyright must be balanced against, on the other. It is not a question of pragmatism. It is Deleuzeoguattarian constructivism. It extends an invitation to continue to explore that which Connolly refers to as ‘an uncertain degree of pluripotentiality’ of capitalism. What appears to be an intriguing idea is to visit the Deleuzeoguattarian approach to capitalism in order to attempt to discuss how the two (property and public interest) may, or must, be reconciled in the cultural commons. This can be done within the Deleuzian matrix, as Philip Goodchild argues:

This image of thought is closely related to the cultural milieu of Integrated Global Capitalism (as Guattari prefers to call it in his later works), one of the most frequent operations of capital is to create temporary relations between workers and sites of production that irrevocably separate workers from their previous environment. Everything becomes mobile: images, consumer products, and people are cut off from their conditions of production and circulate around the globe, resting in juxtaposition with others of entirely different origins, before attaining an ultimate egalitarian status in the garbage dump, old age or oblivion. Deleuze and Guattari call this kind of movement deterritorialization. Their thought differs from the operations of capital insofar as it makes deterritorialization an end in itself instead of merely a means for the increase of capital.⁶¹³

⁶¹⁰ [my emphasis], William E. Connolly. ‘Habermas, Deleuze and Capitalism.’ in *Theory & Event* 11.4 (2008). Project MUSE. (28 Nov. 2012.).

⁶¹¹ Hyde, *Common as Air*, p. 76.

⁶¹² Travaux préparatoire for French Patent Law of 1791.

⁶¹³ Philip Goodchild, *Deleuze and Guattari: An Introduction to the Politics of Desire*, Sage Publications, (1996), pp. 2-3.

The intellectual property law of today rests on the same common structural feature as capital namely that it is constructed (and understood⁶¹⁴) as capital and property that can be possessed with a corresponding private rights construction – intellectual property rights qua individual rights, part of private law. Acquiring copyrights means acquiring rights *as property*. At least that is how current law, read dogmatically, envisions the exploitation of intellectual and aesthetic products. However, if we follow the Deleuzeoguattarian analysis of capitalism it becomes obvious that capitalism in itself is not as binary and as structured, or striated, as law (pretends to be). In fact:

The tendency of capitalism is to substitute for fixed and limiting relation between men and things an abstract unit of equivalence that allows the free exchange, and the aleatory substitution, of everything for everything. Not only are equivalences established between goods in an open market, but bodies, actions, ideas, knowledges, fantasies, images function as commodities which can be translated into other commodities, as deterritorialised schizophrenic flows that escape social coding.⁶¹⁵

That means that capitalism itself does not necessarily pose the idea of property and the idea of public interest as each other's opposites, because within the capitalist sphere they are both one and the same: commodities. In fact, also within the open market there is a constant connection that happens between the goods and, as Hardt and Negri put it, "bodies, actions, ideas, knowledges, fantasies, images" etc. That does not mean that capitalism is unproblematic, it just means that it too is far more complicated than usually described, *and not necessarily adverse to a concept of the commons*. Capitalism functions both as a territorialising and a deterritorialising machine. Hence its schizophrenic nature. Hence Deleuze's and Guattari's ambiguous relationship to it:

The capitalist machine, however, does not simply decode flows but constantly reterritorializes them through an axiomatic (i.e. a single system of interrelated mathematical axioms) "of the social machine itself, which takes the place of the old codings and organizes all the decoded flows, including the flows of scientific and technical code, for the benefit of the capitalist system and in the service of its ends".⁶¹⁶

The capitalist reterritorialisation of the scientific and technical code is particularly interesting to study in the context of intellectual property law in the digital

⁶¹⁴ See Darfurnica Hague case above, see also European Court of Human Rights cases that it refers to.

⁶¹⁵ Bogue, *Deleuze and Guattari*, p. 100.

⁶¹⁶ Ibid. See also Deleuze/Guattari, *Anti-Oedipus*, p. 233.

knowledge society. This is the second enclosure movement.⁶¹⁷ The last decade has seen a fast development of enclosures of network-based, peer-to-peer based digital products, the existence and development of which, as well as the business models that rest on such inventions, have been rendered quite difficult by the exclusory nature of the intellectual property rights. And *I* too could now get away with saying that in a legal doctoral project without footnote support.⁶¹⁸ Territorialising intellectual property laws thus ground the capitalist project also, they slow it down, delimit its possibilities and alternatives.

The reason for this state of affairs is that the artwork as an industrial product (intellectual-mass dichotomy per Adorno/Horkheimer) developed firstly into capital (economic, social and cultural per Bourdieu) and then into a decoded, deterritorialised, resources and immaterial asset (semiotic, network-based as per Stapleton), in the digital knowledge society. Each of these ‘developments’ can be analysed as lines of flight in their own right that have, consecutively, deterritorialised the concept of the artwork from its given paradigm. All these transformations are therefore understood as deterritorialising lines of flight but each of them also became re-territorialised by the capitalist machine as well as the legal machine and placed within its restrictive ambits. One such concrete instance is access to music, that evolved from live public performance, to recordings in tangible form, via the file sharing peer-to-peer network-based access, to streaming of content:

- firstly music could only be enjoyed at a concert or at a live public performance;
- then it became commodified into a tangible object (a long play disc);
- then into a lighter, less cumbersome version (cassette⁶¹⁹, then CD);
- then it became digital (tied to a no particular carrier) and then uncontrollable illegal file sharing happened with e.g. Napster⁶²⁰, Grokster⁶²¹, Pirate Bay;
- which in turn resulted in business models such as Spotify;
- these business models are still comparatively weak, and cannot generate equal amount of growth and return as traditional sales of material product

⁶¹⁷ See section 1.1. above as well as Boyle, ‘The Second Enclosure Movement and the Construction of The Public Domain’.

⁶¹⁸ But as I am not of the same confident nature as James Boyle, so do see e.g.: Boyle, Shiva, Lessig, among others, and all their quoted works here!

⁶¹⁹ *Sony Corp. v Universal City Studios* (1984) (US).

⁶²⁰ *A&M Records et al v Napster Inc* (2001) (US) 9th circuit (Napster Case) as well as *MGM v Grokster*, (2005) (US) 9th circuit (Grokster Case).

⁶²¹ *Ibid.*

- etc...

All these instances in the (r)evolution of access to music each represent their own deterritorialising lines of flight that happen in society and within the capitalist and the legal systems. As was discussed in chapter 2 above, legal reasoning encounters lines of flight when it reaches a border. But, instead of borders, Deleuze and Guattari have proposed that we imagine the legal and the capitalist systems as *territories*. As a territory law, or indeed the market, is constantly moving and is subject to an unending change. These occurrences happen for instance when a new technology is invented and introduced, and it forces certain legal and capitalist aspects to flee the previous territory. As Vandenberghe writes:

The basic principle of rhizomatic sociology is that society is always *en fuite*, always leaking and fleeing, and may be understood in terms of the manner in which it deals with its *lignes de fuite*, or lines of flight.⁶²²

Because of its rigid nature, traditional IP law as well as the dogmatic legal theory that frames it, have even more so than capitalism resisted to acknowledge this societal leakage, these lines of flight, and each time as they have occurred they have caused the traditional legal structures to become unsettled, resulting in disputes, litigations and additional (often rather confused) legislative acts⁶²³, which are not able to catch up with the fast paced development in society and all its leakage that the lines of flight give rise to. This in turn gives rise to a law that can be seen as a patchwork that constantly has to repair its cracks, that constantly has to be sown and pieced together so as to keep up with the rapid lines of flight generated both within the capitalist sphere and in society in general, while at the same time keeping up with the restraints of its own internal structures.

Capitalism has proven that it is quite able to cope with and adapt more easily to such changes, while law always treats natural lines of flight that occur as unimagined encounters that each time appear to upset the entire legal system anew. This leads to a “fundamental conflict between the efficiency with which markets spread information and the incentives to acquire information”⁶²⁴ or “[t]here is always something that flees and escapes the system, something that is not controllable, or at least not yet controlled”.⁶²⁵

⁶²² [original emphasis] Vandenberghe, ‘Deleuzian capitalism’, p. 878.

⁶²³ E.g. IPRED.

⁶²⁴ Sanford J. Grossman & Joseph E. Stiglitz, ‘On the Impossibility of Informationally Efficient Markets’, in 70 *American Economy Review* 393, 405 (1980).

⁶²⁵ Vandenberghe, ‘Deleuzian capitalism’, p. 878.

These occurrences are acknowledged and to a certain extent also explained within the intellectual property law doctrine itself. James Boyle writes for instance:

An alternative method for smoothing over the tensions in the policy analysis is to acknowledge the tension between efficiency and incentives, point out that there are some limitations imposed on intellectual property rights, to conclude that there are both efficiency-promoting and incentive-promoting aspects to intellectual property law, and then to imply that an optimal balance has been struck. (This is rather like saying that because fishermen throw some fish back, we can assume over-fishing does not occur.)⁶²⁶

In the age of digital knowledge, the so-called balance that needs to be struck is virtually non-existent and the public domain is being swallowed up by the ever increasing (rights-)claims⁶²⁷ stemming from the second enclosure movement while the free market remains burdened by illegal access to content that does not generate profit (at least not to the same extent as exploitation of material products used to be). It is a lose-lose situation that creates a gridlock where law holds back both the public interest *and* the free market.

Before we continue, let us look at a table from James Boyle's 'A Politics of Intellectual Property; Environmentalism on the Net?' that shows this particular clash between the efficiency (market) and incentives (artists), between information (public) and invention (private):

⁶²⁶ Boyle, 'A Politics of Intellectual Property; Environmentalism on the Net?', p 97.

⁶²⁷ Ibid. p. 113. See further: Jessica Litman, 'Mickey Mouse Emeritus: Character Protection and the Public Domain', in 11 *University of Miami Entertainment & Sports Law Review*, 429 (1994) (arguing that the protections afforded by copyright law should not allow copyright holders to lock up the raw materials needed to develop new works); Jessica Litman, 'Copyright as Myth', 53 *University of Prrr Colleges Law Review* 235 (1991) (discussing the discrepancies between the popular perception and the reality of copyright law); Jessica Litman, 'The Public Domain', 39 *Emory Law Journal* 965 (1990) (suggesting that the copyright system would be unworkable if it did not allow access to the raw material of authorship), and more recently: David Bollier, *Silent Theft The Private Plunder of Our Common Wealth*, Rutledge (2003), James Boyle, *The Public Domain: Enclosing the Commons of the Mind*.

Subject matter	Information	Invention
Economic Perspective	Efficiency	Incentives
Paradigmatic <i>conception</i> of the problem	Transaction Costs. Barriers to the free flow of information lead to the inhibition of innovation and inadequate circulation of information.	Public Goods Problems. Inadequate incentives for future production lead to the inhibition of innovation and inadequate circulation of information.
Reward (if any) for...	Effort/Investment/Risk.	Originality/Transformation.
View of the Public Domain	Finite resources for future creators.	Infinite resources for future creators.
Vision of the Productive Process	Development based on existing material. "Poetry can only be made out of other poems; novels out of other novels.... All of this was much clearer before the assimilation of literature to private enterprise...."	Creation <i>ex nihilo</i> . "Copyright is about sustaining the conditions of creativity that enable an individual to craft <i>out of thin air</i> an <i>Appalachian Spring</i> , a <i>Sun Also Rises</i> , a <i>Citizen Kane</i> ."
Normative Starting Point	Free speech/Free circulation of ideas and information.	Property rights: the creator's "natural" right, the reward for past creation, the incentive to produce again.

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Arguably, current intellectual property legislation can be placed in the right-hand column above, namely *Invention*. From here on let us try to examine the binary couplings created by this division keeping the concept of the cultural commons in mind and linking it with the left-hand column, namely *Information*.

6.2 THE BALANCING ACT: LEARNING V. OWNING

Lewis Hyde writes in *Common as Air*:

The commercial advantage which the inventor gains is his reward, *not for having made the invention, but for having disclosed it to the public* so that when the

⁶²⁸ [original emphases throughout], Boyle, 'A Politics of Intellectual Property; Environmentalism on the Net?' p. 99.

limited period of his patent has expired, the public gains the free use of the new idea. “It was not the person who locked up his invention in his scrutoire that ought to profit from such invention,” Mansfield wrote, “but he who brought it forth for the benefit of mankind.” [...] While it may not be obvious at first glance, copyright can be described in similar terms, as a grant whose purpose is not so much to reward creators as to enrich the cultural commons.⁶²⁹

Let us consider this in light of what was discussed in chapter 3 above with regards to Stapleton and how he traced the rhetoric-based art mainly to the 15th century Venetian Republic and its privilege system.⁶³⁰ During the Renaissance the focus shifted away from approaching the artwork itself as something divine and spiritual, something that was made for the spirits equally as for men, to rather seeing the *artist* himself and his skill and genius⁶³¹ as something *sublime*. The artist had always had an elevated place, even during the Antiquity, but the importance of the genius was arguably at its peak during the Renaissance, and it is as such that we find it in the privilege system of the Venetian Republic. In Renaissance Italy where a system was in place with artist guilds and artist *bottegas*, the creative labour took place in a network, but the creation was attributed solely to the master as a product of his creativity. It was in this setting that the first rights creations in the form of privileges began to emerge.

At that time, what is widely believed to be one of the first patents ever to be recorded, was granted to Franciscus Petri, from the island of Rhodes, giving Petri and his heirs exclusive rights for fifty years to build, alter, and reconstruct a water mill that he had designed and erected.⁶³² Other privileges that were given were for instance the five-year monopolies to conduct book printing granted to Giovanni di Spira (Johann von Spayr) who introduced book printing to the Venetian Republic. In Sweden, the first exclusive privileges arose during the latter half of the 17th century, and these were usually also granted to book printers. The early privileges were often granted to a printer, as opposed to the author.

The privileges awarded to book printers enabled the safeguarding of profit and return. The emergence of rights constructions testified to the growing importance of the individual rights creating subject – be it the master artist or the

⁶²⁹ [original emphasis], Hyde, *Common as Air*, p. 51.

⁶³⁰ Stapleton, *Art, Intellectual Property and the Knowledge Economy*, p. 32.

⁶³¹ Bourdieu refers to the same as ‘unique creators’ in *The Field of Cultural Production*.

⁶³² Paul A. David, Conference Paper. *The Evolution Of Intellectual Property Institutions And The Panda's Thumb*, paper prepared for presentation at the Meetings of the International Economic Association in Moscow, (24-28 August 1992)

Available at:

http://www.wipo.int/ip-development/en/economics/pdf/wo_1012_e_ch_2.pdf.

Last accessed 18th March 2014.

printer, or even the printing enterprise. During the Renaissance, and the reign of the artist as genius, another figure can be identified as featuring on the art scene ever more frequently, namely the *art patron*, the prosperous investor who with his wealth *enables* the production and completion of artworks and provides for the artist's living so that he can devote all his time and effort to the creation of art. This development together with the emerging privilege system meant that art, more than ever before, became a vocational⁶³³ activity and a bona fide profession. In Florence, the commissions made by e.g. the Medici family⁶³⁴ were one of the first signs of *privatisation* of art on a larger scale, and also one of the first steps towards *collecting* art.⁶³⁵ Thus, owning art in Renaissance Italy became a symbol of a high social standing. The value of art increased gradually by the act of enclosure and the increase of collection of artworks for the private domain.

Still, artworks created under commission were nevertheless often placed in comparatively public spaces such as courts, churches and cathedrals. It could be said that Renaissance art was still relatively open to the public. However, the issue of access further changed with the advent of the *canvas painting*. Canvas paintings embodied the first lightweight “enclosable” artwork, one that in principle could be exhibited anywhere, easily stored or moved from one place to another, that is to say, it had an even wider access potential and could be exhibited and accessed in other places than just its place of origin.

This is the same type of line of flight that we saw above with music, namely to first make the artwork *tangible* and then to make it *movable*, then lighter and less cumbersome, *reified* (and ultimately, in the knowledge society: dematerialised, immaterial, *digital*). It also meant, conversely, that artworks could now be *removed* or *taken away* and without greater difficulty placed and kept away from the public sphere. With the light version of the artwork the access to it becomes a privilege, a token of social standing, a luxury.

It should also be kept in mind that the commissioned artwork was the dominant type of work during the Renaissance, due to the investments granted by the art patrons. The patrons also ensured that the art they invested in would become the most envied and prestigious. This was achieved by ingenious marketing strategies e.g. by weaving myths around the artists that had been commissioned, their artistic character as well as their skills and ability. These were the first signs of marketing connected to the exploitation of artworks. The patron-

⁶³³ In fact, one of the keynote addresses at the Critical Legal Conference 2012 delivered by Angus McDonald was titled “Critique as Avocation”.

⁶³⁴ For further reading see e.g. Paul Strathern, *The Medici: Godfathers of the Renaissance*, Pimlico, (2005).

⁶³⁵ The first person to ever be connected to patronage activities was Gaius Cilnius Maecenas (April 70 BC – October 8 BC), the political adviser of Octavian and patron to Virgil among others. His name Maecenas would come to serve as a synonym with patronage.

commissioners therefore played their role in raising the value of the commissioned ventures by privatising art and making it exclusive, something made by the select few for the select few.

Access to artworks, into which enormous amounts of investment had been placed, had to be limited in a new way, not like earlier by the artwork's geographical position as we saw with art of Antiquity, but rather by the possibility of *enclosure*.⁶³⁶ With the increasing importance and power that the artist himself had gained as well as the extensive promotional machinery with the sophisticated myth-building and financial structures that came with it through patronage, it was possible for the patrons to secure their investment and thus a discernable division was created by the fact that artworks were now seen to be in the domain and under the control of the patrons and those who invested in it. Having consecutively been made less public and more private, and with the growing privilege systems, the artworks became subject to the new bourgeois, commercial trade economy that was spreading across Europe. That meant that artworks were instinctively included within the burgeoning capitalist property paradigm and came as a result to be governed by private law. The products of culture were, to put it bluntly, very fashionable and highly desirable for the new trading classes⁶³⁷ not to be exploited on the market.

From having been a privilege in the Venetian Republic, gradually a need arose to assert the previously imperceptible link between the social significance of art and its commercial significance as investment and capital. Thus, it was for the first time firmly established and cemented in private law with the creation of copyright as a legal concept in 1710 in the UK through the *Statute of Anne*. Before that, there had been earlier attempts to codify copyright-esque laws such as the abovementioned customary practices in the Venetian Republic, but the Statute of Anne is still seen as the first genuine copyright law even if it initially focused on literature only and excluded other creative endeavours.

Driven by the printers who were suffering losses from counterfeiting activities by rivalling publishing houses the Statute of Anne's significance lay in articulating a private rights construction in law, instead of the vague privilege handed out at the doge's discretion in Venice. An individual right was therefore created and it was granted, at least *ab initio*, to the artist and not the publisher or the patron who might have paid for the work. The rhetoric of early copyright law was that the new legal concept had been created as "An Act for the Encouragement of Learning...", which could be achieved "...by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies..."⁶³⁸

⁶³⁶ The acts of enclosure can happen in various different ways. One example, albeit rather ironic and perhaps counterproductive: the framing of Banksy's graffiti art, where frames are placed on his street art in order for it to be preserved. See chapter 4, above.

⁶³⁷ Habermas, *The Structural Transformation of the Public Sphere*, pp. 28-29.

⁶³⁸ Statute of Anne (1710).

Arguably, the means for encouragement of learning came inadvertently to be linked to publishers and their commercial activities and they were still ultimately the ones who acquired copyrights *contractually* from authors and thus the rights were indirectly, and in reality, being placed in the hands of investors and their interests, the only difference was that now their interests were strengthened in law. It means that from the outset we can detect a certain built-in paradox, a binary pairing of sorts, or even a *balancing act* within the law itself, namely from the outset there was no real distinction between the interests of the public (in the guise of encouragement of learning) and the private (the vesting of copies in authors and purchasers) in copyright law. As a matter of fact, the legal codification was an interesting paradigm shift.

New technology, first book printing, and then e.g. lithography, and even later on in history photography and film, were liberating the creation of art and enabling what had until then been a slow, costly and cumbersome process of production and dissemination of works. At the same time, it was releasing the line of flight that was the copy of the work, and with that also the counterfeited work.⁶³⁹ The mass production possibilities that were enabled by new technologies meant that the number of artworks increased steadily and the intellectual circles that consumed art also multiplied. Significant institutions sprang up: museums, concert halls, *salons*, and so on. In public space terms these were hybrids of public spaces, partly closed off externally and comparatively open (and often governed by democratic principles⁶⁴⁰) internally. There, art was enjoyed, bought and accessed under, once again, public albeit limited, stinted and externally fenced off conditions.

The industrial revolution brought with it a surge of new knowledge: of technological, scientific, political, philosophical and artistic nature. In Europe, copyright and other intellectual property laws now existed to some extent in the UK and in France.⁶⁴¹ Sweden introduced a rather provisional first copyright law as part of its constitutional law in 1810: “right of ownership of writing”.⁶⁴² Germany was comparatively late in legislating in field of copyright due to the fact that it was yet to become a nation state, and did not introduce copyright law until 1837.

⁶³⁹ For an interesting discussion on counterfeiting in conjunction with “passing off”, see Stapleton, *Art, Intellectual Property and the Knowledge Economy*, p. 48.

⁶⁴⁰ Bruncevic & Linné, ‘A Taste of Law and Coffee – From Macrocosm to Microcosm’.

⁶⁴¹ In fact, earlier privileges were abolished in France and the new copyright law was enacted in 1789, during the Revolution.

⁶⁴² [my translation]: “eganderätt till skrift”, mom. 8 first paragraph in 1810 “Tryckfrihetsförordning” /”The Fundamental Law on Freedom of Expression”, i.e. it was introduced into the Swedish constitutional law.

The German legal historian, Eckhart Höffner, conducted a research project⁶⁴³ that studied what this difference in terms of when copyright laws were enacted in Europe and which effects it had. He also examined which consequences an introduction of copyright law had for the general dissemination of knowledge to the public. He found that whereas the UK, at the time the leading and the most wealthy nation in Europe, that already had a well functioning copyright law, produced around one thousand works per year, Germany, much less developed and still agrarian in large parts, produced more than fourteen thousand books per year. This enormous volume of books comprised mostly of works that were of a technical nature or handbook-type but that meant that Germany could develop very rapidly and soon be as industrially developed as the UK. In the UK on the other hand the type of books that were being written and printed were not handbooks but rather literature, philosophy, theology and other vastly academic canons, targeting not the general public but more or less only the academics and *the leisurely classes*.

Such a difference in the number of works that were being produced and disseminated had to do with, Höffner argues somewhat surprisingly, the fact that there was no copyright law in Germany until much later. This, according to him, meant that the publishers, in order to out-live plagiarism, had to keep their prices very low, which ensured high access, which in turn meant that reading was not equally class-dependent in Germany as it was in the UK. Knowledge could thus be disseminated faster and in larger numbers. Furthermore, Höffner finds in his large empirical study, that the authors' earnings too were far higher in Germany, without copyright law, than they were in the UK, with copyright law. As a finding, even though its conclusion might seem radical, it illustrates that a fast changing society and growing capitalism do not necessarily always benefit from private individual rights constructions and a tightly controlled exploitation of works that encompass knowledge potential.⁶⁴⁴

Habermas had identified museums, concert halls and *salons* as the main institutions where access to art happened during the late 18th century. All of these institutions were naturally within a bourgeois public sphere but during the 19th century there was also a fast growing, corresponding, *public sphere for the factory workers and labourers*, e.g. the coffee houses.⁶⁴⁵ In the new industrial cities both the bourgeois and working class public spheres, were developing side by side, without really affecting one another. Industrialism brought with it new class differences, new lines of flight, new encounters, that had to be categorised in new ways, and after all the revolutions that had taken place an increasingly literate

⁶⁴³ Eckhart Höffner, *Geschichte und Wesen des Urheberrechts* - Band 1&2, Verlag Europäische Wirtschaft, (2010).

⁶⁴⁴ Höfner, *Geschichte und Wesen des Urheberrechts*.

⁶⁴⁵ Ibid.

working class was creating a public sphere of its own, where mass production was not only necessary, it was more or less imperative.⁶⁴⁶

The conditions in which people lived and worked called for a redefining of the public and the private. Even private homes changed and their traditionally public spaces such as lounges in (bourgeois) homes were transformed into e.g. individual bedrooms. Urban planning also changed. Even though some of the traditional public spheres were changing, new ones were being created. One such example is the large city park. The cities were also equipped with additional squares and other smaller green spaces. All these places served as a focal point where people could meet, chat or rest. Such physical public spheres would serve as entirely novel open spaces where people could communicate and share ideas, as they also brought forth the fashionable Romantic longing for nature into the city. These developments further show how public spaces and communication of ideas are linked and constantly evolve and change over time as society changes.⁶⁴⁷ They also demonstrate how the concepts of the (enclosed) owning and (open) learning exist side by side.

With industrialism the hand of the artist genius could no longer be seen as the one single method for creating and disseminating art, the notion of the public sphere was in transformation too, and as there were new production possibilities that could speed up creation and multiplication of works. The new needs as well as the new reproduction possibilities could not be ignored. This had an impact on access, as it was no longer the invention of the artist genius, but rather the *machine*,⁶⁴⁸ that was seen to be the most potent creator of art.

We can already at this point start to draw parallels with what would come to take place a couple of centuries later, today, when new technology first enabled the creation of mechanical and then of digital artworks.

Law still to this day, centuries later, continues to be weighed down by the initial lack of clarity that we first saw in the Statute of Anne, whose principles spread to most other jurisdictions in Europe (and the world⁶⁴⁹). The confusion as to which interests copyright was meant to serve – the public encouragement of learning (the public sphere) *or* the private ownership of the investment in the physical production (the commercial sphere), or *both*, in fact still remains to be satisfactorily resolved.

Mirroring the same type of argumentation that Martial had presented almost more than a thousand years before him, Daniel Defoe published a pamphlet

⁶⁴⁶ Ibid.

⁶⁴⁷ Höfner, *Geschichte und Wesen des Urheberrechts*.

⁶⁴⁸ This was naturally further explored in the Futurist movement with Filippo Tommaso Marinetti as their chief ideologue, although they as a group went on to have far right, fascist, extreme views.

⁶⁴⁹ Through e.g. the Berne Convention for the Protection of Literary and Artistic Works, (1886)

around the time of Statute of Anne trying to defend the author's private right as more important than the public, learning aspect. He wrote:

A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, 'tis as much his own, as his Wife and Children are his own.⁶⁵⁰

This particularly male reading of property is obvious, and maybe even comical when read today (did Defoe ever intend to sell his wife and his children?). Still the parody of it has somehow been lost, leaving intellectual property law with the normative starting point that Boyle distinguishes in the right hand column above, *Invention*, namely that intellectual property rights are assumed to be the creator's "natural" right, the reward for past creation, the incentive to produce again and the vision of the creative process is assumed to be a type of creation *ex nihilo*.

Copyright is about sustaining the conditions of creativity that enable an individual to craft *out of thin air* an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*.⁶⁵¹

This idea that creative production happens out of thin air was probably always forced given what we have seen so far, and it certainly gave rise to the assumptions on which intellectual property still depends today. But in the digital knowledge society, such assumptions and starting points appear out-dated and almost impossible to uphold, not just to the lawyer that attempts to read intellectual property law critically, but to any lawyer that has to work with intellectual property law today. The binary opposite *learning v. owning* might have been flawed from the outset; the two are so inseparable and simultaneous that they can never be parted.

6.3 THE TYPE OF OWNERSHIP: PRIVILEGE V. RIGHT

So far it is obvious that the two legislative strategies that have been employed have been to construct the concept either as a privilege *or* as a right. The two are obviously vastly different, and both affect access in their own particular way.

⁶⁵⁰ Hyde, *Common as Air*, pp. 81-82.

⁶⁵¹ [original emphasis] Boyle, 'A Politics of Intellectual Property; Environmentalism on the Net?', see the table above.

6.3.1 PRIVILEGE

It is probably not merely an exercise in semantics when asking whether an interest in one's creation is deemed to be a privilege or a right. I have already in the brief and topographic outline above been able to conclude that even as this concept has evolved through history, it has not always been evident how one is supposed to understand it or what legal status it has. Above, we saw that the first regulations of the interests in the intellectual creation came in the form of a privilege. This rights construction is a comparatively recent one and originally, an Anglo-Saxon, model.

Tom W. Bell⁶⁵² argues that while copyright certainly has some property-like attributes that *privilege* might be a far more correct description of what it actually is, and that the legal concept should in that vein be called intellectual *privilege* as opposed to intellectual property. As per such reasoning, copyright should be called *copyprivilege*, he argues further.

Bell draws up the following figure:

Property Theory	Privilege Theory
Intellectual Property	Intellectual Privilege
Copyright	Copy Privilege
Owner	Holder

That the figure is based on a binary understanding of what a right is, and what a privilege is, as well as what they do, is obvious. Bell's use of the concept is furthermore a critique of the Hohfeldian use of the term "privilege". Bell suggests that Hohfeld's use of the term mistakenly makes a connection between a privilege and a *liberty*.⁶⁵³ While his may be an interesting theoretical exercise in itself I shall leave it at that here. However, for the sake of clarity I shall follow Bell's reasoning for a moment in order to crystallise the two:

Interestingly, and as obliquely picked up by Jessica Litman already in 1996, when privilege is discussed in this context, it is usually the author's privileges and not the public's privilege to information and access⁶⁵⁴ that are being referred to. She writes:

Most notably, since any use of a computer to view, read, reread, hear or otherwise experience a work in digital form requires reproducing that work in a computer's memory, and since the copyright statute gives the copyright

⁶⁵² Tom W. Bell, 'Copyright as Intellectual Property Privilege', in 58 *Syracuse Law Review*. ___ (2007).

⁶⁵³ Ibid. p. 9.

⁶⁵⁴ Jessica Litman, 'Revising Copyright Law for the Information Age', in 75 *Oregon Law Review* 19 (1996)

holder exclusive control over reproductions, everybody needs to have either a *statutory privilege* or the copyright holder's permission to view, read, reread, hear or otherwise experience a digital work, each time she does so.⁶⁵⁵

The detailed bright lines have evolved, through accident of technological change, into all-inclusive categories of infringers with tiny pock-marks of express exemptions and *privileges*, and undefined and largely unacknowledged free zones of people-who-are-technically-infringing-but-will-never-get-sued, like your next-door neighbor who duplicates his wife's authorized copy of Windows ® rather than buying his own from the computer store. The brightness of the current lines is illusory.⁶⁵⁶

Keeping in mind that the article was written in 1996 Litman can be forgiven for thinking (perhaps naively) that the phenomenon of “people-who-are-technically-infringing-but-will-never-get-sued” was going to be everlasting. In the age of Digital Millennium Acts, ACTAs, IPREDs and their national peers, we now *know* that rights owners do not have any ‘pangs of consciousness’, when it comes to suing the private infringers, i.e. their own consumers. A very recent example from the film industry involves Voltage Pictures who in May 2010 initiated a lawsuit against 5000 John Doe defendants for illegally distributing the film *The Hurt Locker*. Voltage Pictures then amended its original complaint in April 2011 bringing the total number of defendants to around 24 500 (24 595.2 to be exact!). By the end of 2011 more than 250 000 individuals had been sued for similar alleged acts.⁶⁵⁷ James DeBriyn comments on this by concluding that it is “unfathomable when one considers that these lawsuits only involve a micro-fraction of the intellectual property being illegally traded on the Internet.”⁶⁵⁸ He claims that unexpected incentives arise by suing a large number of consumers that have illegally downloaded a work. If all (or most) of them settle out of court for comparatively small sums, new revenue streams are created for film productions the moneys can then be used towards recoupment and profit. So not only do “people-who-are-technically-infringing-but-will-never-get-sued” not exist as a concept, on the contrary, these very people provide unexpected revenue streams for content owners.⁶⁵⁹

⁶⁵⁵ [my emphasis], *Ibid.* p. 21.

⁶⁵⁶ [my emphasis], Litman, ‘Revising Copyright Law for the Information Age’, p. 42.

⁶⁵⁷ James DeBriyn, ‘Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages’ in 19 *UCLA Entertainment Law Review* 79 (2012).

⁶⁵⁸ *Ibid.*

⁶⁵⁹ “While [statutory] damages are beyond an average defendant’s means, the purpose of each lawsuit is not to seek the full damages through a trial, but rather to pressure a defendant to settle claims for around \$3000. Had Voltage Pictures only sued the 5000 Does named in the original complaint, and 75 percent of the defendants could be identified, were sued, and chose to settle for \$2900, the litigation would generate \$10.9 million. Reports suggest that the plaintiffs

Thus, when privilege *v* *ownership rights* are discussed then the concept is not strong enough in comparison with these types of rights constructions that can provide the strong enforcement possibilities and incentives that can generate such direct and indirect revenue. And when privilege as befalling the *public* and not the *author/rightsholder* is discussed then it is too strong of a grant as it, conversely, does not allow for the abovementioned type of enforcement, as the ownership of property is not clean, it comes with a burden of a public privilege.

Privilege, as such, can therefore not be understood as a clear concept. Privilege to intellectual works must be first and foremost understood as a concept that spans over several different interests, the artist, the public, the industry, the state etc. Somebody must grant the privilege at the expense of someone else, as Lord Macaulay phrased it “[f]or the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.”⁶⁶⁰ Lord Macaulay clearly expressed that with the current copyright construction in mind; however one might attempt to structure it, some evil will always need to be endured. The question is whether this ‘evil’ that Lord Macaulay is referring to is the property and the rights construct. The fact that the notion of property has migrated even into the intangible realm means that the demarcation between a privilege and a private property based copyright is blurred. Discussing this very topic, the American Supreme Court wrote in *Ruckelshaus v. Monsanto Co.*⁶⁶¹ that intangible interests very well can be seen to constitute property (this particular case concerned ‘trade secrets’ as property):

It is conceivable that [the term ‘property’ in the takings clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.⁶⁶²

We saw the same type of reasoning above in e.g. the Nadia Plesner case in chapter 4 where the ECHR provisions concerning *possessions* was also interpreted in a similar manner, namely, that intangible interests are unquestionably to be

will receive 30 percent of the \$10.9 million-\$3.3 million. This creates such strong incentives to litigate that one may question whether an enforcement-based business model can be reconciled with the purposes of copyright law”, DeBriyn, ‘Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages’.

⁶⁶⁰ See Wendy J. Gordon, ‘An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory’ in 41 *Stanford Law Review* 1343 (1988-1989).

⁶⁶¹ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

⁶⁶² Gordon, ‘An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory’.

deemed as possessions, property. Nonetheless, the court in Hague in the second Plesner case ruled that the concept of *right* of peaceful enjoyment of one's possessions weighed (in that particular case) less than the *privilege* of unrestricted freedom of speech. Adding the dimension of privilege to discussion carried out above in chapter 4, we reveal further rhizomatic connections that occur within this sphere. The rights concept is *connected* to the *privilege* concept, the two are not each other's opposites, and they do not cancel out each other.

6.3.2 RIGHT

Chapter 5 above made a connection between the Lockean notion of acquisition of property and the rights-based construction in law. To recapitulate briefly, I presented the Lockean⁶⁶³ idea that there is a natural connection between object-labour-ownership. Thus, the person who invests labour into something becomes the owner of the said object. Carys J. Craig makes a similar link in her book *Copyright, Communication and Culture*.⁶⁶⁴

The Lockean justification for copyright rests upon the assertion that the original author is entitled to the exclusive right in her work, having exerted mental labour in its creation. The assertion depends upon the 'root idea' of Lockean theory that "people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry".⁶⁶⁵

By applying Hardt/Negri to the paradigm of immaterial property it was argued that while it clearly is possible to privatise and materialise ~~also~~ intellectual intangible works within the institute of property, it is often a somewhat forced endeavour, especially in the knowledge economy. Yet the idea of holding as property that which a person, or a group of persons for that matter, produces by her own initiative, intelligence and industry cannot be fully negated. The rights construction that surrounds copyright law today, to return to the beginning of this chapter, is fully capable to be understood within the capitalist machine, but within the legal sphere it constantly creates anomalies that force the concept of right and the concept of privilege to compete. The problem with the "capitalist machine" on the other hand, is that it empowers the private interest to such an extent that the public interest in its turn gets negated, the public sphere shrinks, and so law becomes powerless to shift this balance as it cannot incorporate the deterritorialising lines of flight-

⁶⁶³ Locke, *Two Treatises On Government* (1690) Book II.

⁶⁶⁴ Craig, *Copyright, Communication and Culture*.

⁶⁶⁵ Ibid. p. 71. She is quoting Lawrence C. Becker *Property Rights, Philosophic Foundations*, London, Rutledge, (1977).

In *Commonwealth* Hardt and Negri wrote that capitalism is becoming biopolitical.⁶⁶⁶ The claim in this project goes one step further and claims that capitalism is becoming (or probably always was) *nomadic*⁶⁶⁷ in Deleuze-Guattarian terms. The exclusive rights construction that allows ownership of intellectual production forms a part of such process. With a rights construction based copyright in law the nomadic capitalist machine has been enabled to encroach (strip and reterritorialise) that which we are looking for here, namely the commons. Slavoj Žižek develops that further, he writes that privatisation involves a violent act that overtakes:

- *the commons of culture*, the immediately socialized forms of ‘cognitive’ capital, primarily language, our means of communication and education, but also the shared infrastructure of public transport, electricity, the postal system, and so on;
- *the commons of external nature*, threatened by pollution and exploitation (from oil to rain forests and the natural habitat itself);
- *the commons of internal nature* (the biogenetic inheritance of humanity); with the new biogenetic technology, the creation of a New Man in the literal sense of changing human nature becomes a realistic prospect.⁶⁶⁸

Žižek’s take on the commons is evidently wider than the one adopted in this research project, which deals with (a fraction) of his first type of commons, namely the commons of culture and the artworks within it. Nonetheless, Žižek links the “inappropriateness of the notion of *private property* to [...] ‘intellectual property’”.⁶⁶⁹ What Žižek describes here is not an indication of the biopolitics of capitalism but a *nomadology* of capitalism, the new capitalism, the capitalism that keeps evolving rhizomatically, by itself, through and with societal lines of flight. In the knowledge economy capital ownership of knowledge has been enabled by the exclusive rights construct, particularly the intellectual property rights. Interestingly, Žižek’s “commons of culture” is similar to and commensurable with Bourdieu’s definition of capital. The cultural commons is incorporated within the realm of economic capitalism and privatisation; it includes cultural capital (e.g. language) as well as social capital (e.g. means of communication). This means that Žižek’s and Hardt/Negri’s readings can be nuanced with Deleuzian (re/de)territorialisation, through Bourdieu’s reading of capital. Reading capitalism as a ‘territorialising machine’ adds the schizophrenic nature to the biopolitics presented by Žižek and Hardt/Negri.

⁶⁶⁶ Hardt/Negri, *Commonwealth*, p. 131.

⁶⁶⁷ See e.g. Deleuze/Guattari, *A Thousand Plateaus*, plateau 1227: ‘Treatise of Nomadology – The War Machine’, pp. 387-467.

⁶⁶⁸ [original emphasis], Slavoj Žižek, *First as Tragedy then as Farce*, p. 91

⁶⁶⁹ [original emphasis], *Ibid.*

What this analysis then adds to all of it is that it provides an exit from the paradox either capital or commons. In Deleuzeoguattarian terms, through Bourdieu's forms of capital and Zizek's and Hardt/Negri's biopolitical approach to the commons of culture, we have gone a full circle. We have reached the instance of capital AND commons.

6.3.3 RIGHT AND PRIVILEGE

In order to continue the discussion concerning the right and privilege balance, or lack thereof, I have proposed a Deleuzeoguattarian link between right and privilege in the cultural commons. Already above in the Boyle figure we could see that the right hand column *Invention* imagined the creator as an inventor, creating the work *ex nihilo*. In the left hand column *Information* Boyle distinguished the paradigmatic conception of the creation in the following manner:

Development based on existing material. "Poetry can only be made out of other poems; novels out of other novels.... All of this was much clearer before the assimilation of literature to private enterprise...."⁶⁷⁰

Lewis Hyde explains a similar type of conception of the creative effort, first providing a quote from Rimbaud, that I take the liberty to re-quote here:

Right now I'm debauching myself as much as possible. Why? I want to be a poet, and I'm working to make myself a *seer*... It's a matter of getting to the unknown by the derangement of *all the senses*... The suffering is tremendous, but one must be strong, to be born a poet, and know that's what I am. It's not at all my fault. It's wrong to say: *I think*. One should say: *I am thought*...

I is someone else. Too bad for the wood that discovers it's a violin...!⁶⁷¹

Hyde then reads this passage as the inversion of the Cartesian "I think therefore I am", and in the inversion a "non-I" is revealed. The creator here is almost like a vessel or in Picasso's words, a thief, "All artists borrow; great artists steal."⁶⁷²

⁶⁷⁰ Boyle, 'A Politics of Intellectual Property; Environmentalism on the Net?' p. 99.

⁶⁷¹ Hyde, *Common as Air*, p. 201.

⁶⁷² Ibid. p. 202. As a matter of fact, it is disputed to whom this quote really can be attributed and there are a number of variations of it. Some claim that T.S. Elliot said "Immature poets imitate; mature poets steal"; and that it was Picasso who said that "Good artists copy. Great artists steal." Or it might have been Stravinsky who said "Lesser artists borrow; great artists steal." For more variations see Quote Investigator:

<http://quoteinvestigator.com/2013/03/06/artists-steal/>. Last accessed 18th March 2014.

Reading Hyde's analysis in this setting means presenting Rimbaud's and Eliot's utterances as representing Boyle's left hand column, *Information*. Why is that interesting for this analysis?

First of all, it is important to problematise the notion of the *ex nihilo* creation, which is the pervasive one in current intellectual property law that we have seen ever since chapter 3 above. Scholars such as Boyle and Hyde have already shown how this is the case. Second of all, what my study adds to this, is that the juxtaposition of the two models *Invention* and *Information*, the I and the non-I, as each other's opposites also becomes problematic.

As we saw in chapter 3 above, Jamie Stapleton presented two types of artworks, the rhetoric-based and the semiotic/network-based ones. We saw also how the semiotic/network-based artwork is constantly excluded from the ambit of the individual rights based legal construct; it is the outcast, when it comes to modern-day intellectual property rights. The semiotic/network-based artwork falls more into the *Information* than the *Invention* paradigm. As a matter of fact, these types of artworks are precisely based on the very challenging of the *Invention* paradigm, with all its inherent individuality, materiality and its object-centric nature.

When fusing the *Invention* and the *Information* paradigms, connected by the notion of the concept of the author as not (only) a unit, a legal subject, but *something else*. It also becomes clear how the notions of right and privilege are connected. An author that does not think, *but that is thought*, an author that does not invent, *but that steals*, requires both private rights and access privileges in order to create. This very movement must be acknowledged legally.

In the next section we shall move from the author and continue to examine one last binary pair, which is created from the dogmatic reasoning namely, namely *the content*, attempting to differentiate (but not separate) it from its objectivity and materiality, namely its *carrier*.

6.4 CONTENT V. CARRIER

The discourse concerning access to art often seems to confuse two concepts: content and carrier. Even if the two are not always uncomplicated to differentiate it could be said that the first one, the *content*, is that which is being expressed and the second one, *carrier* or form, refers to how that is being expressed or communicated, and through which channels. The dichotomy *content v. carrier* may appear to be a new one, but the dichotomy *content v. form*, or *expression v. form*, is certainly an ancient one.

Already in chapter 1 above, in the delimitation section, I wrote that this project focuses on content primarily and not on the carrier. But now when we have reached this far into the analysis that particular statement needs to be both fur-

ther explained and nuanced. In his description of the first sale doctrine in US law Lewis Hyde describes this from another, less theoretical, angle, he writes:

‘First sale’ is a limitation on an owner’s exclusive right such that once you have bought a book (or CD, or video disc, or map...) you may do almost anything with it that you want. You may return to it multiple times, read it to your child, copy bits into a journal, give it to a friend, loan it to a student, sell it to a stranger.... You may not print and sell copies, that is true, but all these other things you may do. The right of first sale creates an *object specific*, down-stream public domain; the copyright owner’s control ends at the point of purchase.⁶⁷³

In a setting where the object specific, or object-centred as I call it, work of art is absent, both the content and the carrier get mixed up and become in a way one and the same, and the differentiation of expression and form thus becomes equally difficult, or at least it is not as obvious as it has previously been. In order to merge the two in a legal concept of a cultural commons we need to do this theoretical exercise and show how content and carrier, or expression and form, may be approached in a rhizomatic setting, or as Deleuze/Guattari call it, in the *rhizosphere*.

6.4.1 DIGITAL RIGHTS MANAGEMENT⁶⁷⁴

In order to fully understand the content and carrier discussion we can go back to the initial example of music that I mapped out above in 6.1 and look at it closer by adding the aspect of content and carrier to it:

⁶⁷³ [my emphasis], Hyde, *Common as Air*, p. 66.

⁶⁷⁴ Schollin, *Digital Rights Management: The New Copyright*.

	Content	Carrier	Object-Centric?
Concert / live public performance	Preformed	Live	No
Music on a Long Play Disk	Physically inscribed on object	Long Play Disk + Stereo	Yes
Music on Cassette	Physically inscribed on object	Cassette + Walkman	Yes
Music on CD	Physically inscribed on object	CD + CD Player	Yes
Digital Download: peer-to-peer	File	Downloaded Immaterial file + Computer	No but can be downloaded on a carrier such as a CD
Digital Download: Bit Torrent	Parts of file	Downloaded Immaterial part of file + Computer or portable device such as mobile phone or tablet	No but can be downloaded on a carrier such as a CD
Digital Streaming: e.g. Spotify	File	Streamed immaterial file + Computer or portable device such as mobile phone or tablet	No, cannot be downloaded, but portable

In the digital knowledge society we have seen that the digital work becomes less and less object-centric and becomes increasingly difficult to enclose, as well as to keep from being infringed upon. Kristoffer Schollin presents digital rights management as the ‘new copyright’ or a regime that could rescue the digital problems copyright has been encountering in the digital spheres.⁶⁷⁵ Schollin describes the term digital rights management in the following manner:

- any technology or combination of technology for monitoring, identifying usage and enforcing usage terms of...

⁶⁷⁵ Schollin, *Digital Rights Management: The New Copyright*.

- intellectual assets. This includes created artistic works, catalogues and databases, know-how, business secrets, photos, etc...
- in digital forms.⁶⁷⁶

Clearly, his approach to the type of content that can be governed by digital rights management per this definition spans much wider than traditional ‘intellectual property’. Schollin writes:

This means that such things such as works in the public domain or other intellectual resources that cannot for some reason be protected under an intellectual property are also [digital rights management’s] subject.⁶⁷⁷

In Schollin’s study digital rights management is presented as a much more flexible form that could govern that which copyright often struggles to govern (and enforce) in the digital sphere. We can connect this to two examples that Lewis Hyde provides. He describes the electronic publication of Lewis Carroll’s 1865 book *Alice in Wonderland* (arguably in the public domain), with the copyright notice that prohibits (using digital rights management) the copying, printing, lending of the book, but also precludes the book from being *given to someone else* and *read aloud*.⁶⁷⁸ Hyde’s other example is the electronic version of the U.S. Constitution (again, arguably within the public domain) offered on sale via Amazon.com, which makes it *impossible to readers to print it more than twice a year* and directly expresses that hacking of the code (digital rights management) enforcing this restriction is illegal.⁶⁷⁹ To link it with the second enclosure movement:

[I]ntellectual property rights have become *broader* (covering more kinds of information, *deeper* (giving rights holders greater power), and *more punitive* (imposing greater penalties on infringers). Supplemental measures have also been introduced to increase the technological control of rights holders and to counter the way digital technologies facilitate copying. Anticircumvention laws have been introduced [...]. This shift has been called a ‘*second enclosure movement*’ [...]⁶⁸⁰

⁶⁷⁶ Ibid. p. 149.

⁶⁷⁷ Ibid.

⁶⁷⁸ Hyde, *Common as Air*, p. 67

⁶⁷⁹ Ibid.

⁶⁸⁰ [my emphases throughout], Kapczynski, ‘Access to Knowledge: A conceptual genealogy’ in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 24.

Therefore, and as a consequence of the second enclosure movement and as a construct digital rights management has been placed predominantly within the property paradigm.

Property is here defined as the right of a single individual to be the gatekeeper with respect to a resource and to act autocratically with respect to decisions about its use. This vision of property is sustained by the notion that only the individual owner, and not the state, community, or nonowners, may make decisions about the price or terms of transaction of that property.⁶⁸¹

Amy Kapczynski refers to this type of property and ownership as a *despotic dominion*, quoting Peter Drahos, as a type of “*dominium* over the abstract object of intellectual property [which goes a long way toward maintaining the] *imperium*.”⁶⁸²

Seen from a Deleuzeoguattarian point of view it is a construct that territorialises and striates the smooth space (and the potential) of the digital spheres. As such it can be detrimental to exploitation of works commercially in the long run, particularly if access to information is seen as an ingredient in the creation of content as opposed to approaching content as being created *ex nihilo*.

Nonetheless, there is a large *potential* in the digital rights management construct in the creation of a legal concept of cultural commons. And as it is becoming all the more apparent, Deleuze and Guattari’s theory provides us with appropriate tools to unleash this potential in a manner than transcends binary opposites between open and closed, market-state, even capitalism-non capitalism, freedom-fetter, as Jeffery Atteberry writes:

Perfectly aware of the potentially duplicitous character of bourgeois freedom, Gilles Deleuze and Félix Guattari have described the process of capital’s development in terms of a ‘generalised decoding flows’ and a dynamic of ‘deterritorialization’. The current informantionalist regime and the discourses attending to it – including that of the A2K movement – fit nicely within Deleuze and Guattari’s paradigm. The informationist mode of production represents a new order of decoded flows. The freeing of information promises to restructure the relations of production, replacing verti-

⁶⁸¹ Ibid. pp. 26-27.

⁶⁸² Ibid. p. 26. Quote taken from Peter Drahos, ‘Global Property Rights in Information: The story of TRIPS at the GATT’, in *Prometheus* 13, no 1 (1995), p. 16.

cally integrated structures of production within horizontally networked ones.⁶⁸³

By reading principles from current intellectual property law I have been able to discuss how the notion of the mass/authentic artwork is impossible to maintain in the IP law of the knowledge society, even if, this division still exists and underpins many aspects of current IP law, e.g. in the notion of author as a ‘genius creator’ that invents the work *ex nihilo*. By connecting Hardt/Negri to Žižek and Bourdieu it could be demonstrated how various notions of capital are in fact (already) part of the cultural commons, especially if the de- and reterritorialising nature of capitalism is taken into account. Finally, by revealing the double nature of the artwork as both *invention* and *information*, and the author as both a creator and a borrower, we could see how Stapleton’s rhetoric-based artworks could be fitting for the invention paradigm while the semiotic/network-based artworks conversely fitted inside the information paradigm. Both of these paradigms must be accounted for and connected in law, as well as in capitalism, if we purport to discuss the legal concept of the cultural commons seriously.

⁶⁸³ Jeffery Atteberry, ‘Information/Knowledge in the Global Society of Control: A2K Theory and the Postcolonial Commons’, in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 341. Atteberry is quoting Deleuze/Guattari in his quote, *Anti-Oedipus*, p. 224.

PART 4

COMMONS AND COMMUNICATION – FIXING THE SHADOWS

“After all, democracy is democracy.”

– Lewis Hyde

CHAPTER 7

COMMONS IN THE DIGITAL ERA (CASE STUDY PART 2)

7 COMMONS IN THE DIGITAL ERA (CASE STUDY PART 2)

We have been made so stupid that we can only understand the world as private or public. We have become blind to the common. – Lewis Hyde⁶⁸⁴

The construction of various commons types where access to resources of different kinds is enabled is evidently not a particularly new phenomenon. We have already seen how the notion of sharing within commons-like-settings has existed for many a century, but it was not before the advent of the internet and the access and sharing that happened on-line that the notion of the *cultural* or artificial commons in particular entered into the every-day realms of discussion. For the last couple of decades legal research has grappled with this phenomenon.⁶⁸⁵ How to strike a fair balance between that which is open and available for anyone to access and that which is private, and enclosed, without creating a *tragedy of the commons* that Garrett Hardin so appropriately warned us about already in the 1960s.

The most noteworthy commons project and the one that I shall particularly pay attention to in this chapter is the one carried out under the umbrella term *Creative Commons*.⁶⁸⁶ Creative Commons will serve as an example that is typical of a commons project from the 21st century. Even if these projects admittedly differ *inter se*, for the intents and purposes of this analysis, and for the sake of clarity, I have chosen to focus on the Creative Commons, which is the largest and the most established one and encompasses many of the basic principles of the commons projects in general.

The discussion about the Creative Commons commenced when it became apparent that in the digital sphere it was increasingly difficult to draw a line be-

⁶⁸⁴ Hardt, 'The Common in Communism', p. 352.

⁶⁸⁵ It is impossible to account for all the books, articles, conferences, work-shops and discussions on this topic that have been going on in the last couple of years, here in a note. Throughout this project I have been referring to some of the most notable ones such as the books written by e.g. Lessig and Vaidhyathan that in their turn refer to many other projects. But this is not solely a "critical" discussion, also within the field of more dogmatic studies as well as in course books, these types of discussion have not been circumvented, see e.g. Nichola Lucchi, *Digital Media & Intellectual Property Management of Rights and Consumer Protection in a Comparative Analysis*, Springer, (2006), William Cornish, *Intellectual Property*, Oxford University Press (2004), not to mention the election of various "Pirate" Parties into the European Parliament.

⁶⁸⁶ <http://creativecommons.org/>. Last accessed 20th March 2014. Other noteworthy commons projects that can be mentioned in passing are Icommons, Wikimedia Commons and Science Commons. The last one is a project under the larger umbrella of the Creative Commons.

tween where aesthetic inspiration stopped and where infringement of intellectual property began. A similar discussion has already been presented throughout this analysis and it was particularly discussed in chapter 6 above. Throughout all these discussions it has been pointed out and argued that intellectual property law in many ways *impedes creativity*.⁶⁸⁷ Simultaneously, it has been claimed that it, intellectual property law, as such *does not afford appropriate protection to the artist*. References to these very much different discussions have recurred in various stages of this analysis. What we arrive at here are the “solutions” or “compromises” that have recently been presented in the guise of various *commons projects* where attempts to make the rights of the individual creator have been made more flexible in order to benefit a more open access and encourage sharing of works. This has been done so in order to achieve a more democratic distribution of culture and knowledge. Some of these projects even offer the possibility for the rights owners to abandon⁶⁸⁸ all or most of their copyrights for the “common good”.

This chapter adopts the same approach to the commons as was presented in chapter 5, but it will be further embedded in the Deleuzian/Deleuzeoguattarian paradigm. This will be done in order to show the contrast between the two. From then on, the Creative Commons, its structure and its contractual licence solutions will be considered, in more general terms. The focus will thereafter return to the three of the case studies presented in chapter 4 above in order to show *other types* of contractual solutions in terms of access, that are not necessarily, or at all, tied to a commons project, and the implications of such solutions in terms of the commons. The return to the cases will also further the contractual government of access to art that takes place outside of intellectual property law and its realm. In essence, this chapter fuses the theoretical aspect of this study with the discussions concerning the creative commons projects, which constitute the *contractual commons* before arriving at the final discussion on the *legal*⁶⁸⁹ concept of the cultural commons.

⁶⁸⁷ “But the service will still be essentially one-way, and the freedom to feed back, to feed creativity to others, will be just about as constrained as it is today. These constraints are not the constraints of economics as it exists today—not the high costs of production or the extraordinarily high costs of distribution. These constraints instead will be burdens created by law—by intellectual property as well as other government-granted exclusive rights. The promise of many-to-many communication that defined the early Internet will be replaced by a reality of many, many ways to buy things and many, many ways to select among what is offered. What gets offered will be just what fits within the current model of the concentrated systems of distribution: cable television on speed, addicting a much more manageable, malleable, and sellable public.” writes Lawrence Lessig in Lessig, *The Future Of Ideas*. See also Vaidhyathan, *Copyrights And Copywrongs*, See further Lessig, *Free Culture*, and Boyle, *Shamans, Software, And Spleens*, Drahos & Braithwaite, *Information Feudalism*, Vaidhyathan, ‘Remote Control: The Rise Of Electronic Cultural Policy’, in 597 *Annals Am. Acad. Pol. & Soc. Sci.* 1 (2005).

⁶⁸⁸ See both case study concerning orphan works above and section 7.2. below.

⁶⁸⁹ Here I propose we read ‘legal’ as ‘statutory’.

7.1 THE COMMONS INSIDE THE DELEUZIAN FORMS OF POSSESSION

The concept of the commons adopted herein is not presented in the sense of ‘the opposite of private’ or as equal to ‘public’. Lawrence Lessig commented on the commons in a similar manner:

Commons may be rare. They may evoke tragedies. They may be hard to sustain. And at times, they certainly may interfere with the efficient use of important resources. But *commons also produce something of value*. They are a *resource* for decentralized innovation. They create the opportunity for individuals to draw upon resources without connections, permission, or access granted by others. They are *environments* that commit themselves to being open. Individuals and corporations draw upon the value created by this openness. They transform that value into other value, which they then consume privately.⁶⁹⁰

What is relevant to delve deeper into at this point are the Deleuzeoguattarian modes of possession that can potentially handle this constellation of private and public together. In keeping with the Deleuzeoguattarian theory, we saw in Volume I how jurisprudence could conceive of the commons, and now it was suggested that one might approach the legal concept of cultural commons by further analysing and then applying Deleuze/Guattari, particularly their two models of possession, namely *the sedentary model* and *the nomadic model*.

Within this study, and within the Deleuzeoguattarian theory, possession ought not to be equated to ‘ownership’. Rather, the modes of possession are used in a more flexible manner, where to possess does not necessarily mean ‘to own’. As Leif Dahlberg explains with reference to digital media content:

[T]he concept of property is complex, and possession (*possessio*, *occupatio*, *usucapio*, or *detentio*), for example, does not automatically or necessarily lead to an exclusive and absolute ownership (*dominium*). Whereas in ancient Rome this distinction between possession and ownership generally applied to property in land, today it also bears on the ways in which media users may use the digital media content they have acquired or purchased.⁶⁹¹

It is therefore imperative to look at the Deleuzeoguattarian modes of possession in more detail as well as joining it with the discussion concerning the commons according to Hess and Ostrom. Hess and Ostrom presented and nu-

⁶⁹⁰ [my emphasis throughout], Lessig, *Future of Ideas*, p. 85

⁶⁹¹ [original emphasis], Dahlberg, ‘Pirates, Partisans and Politico-Judicial Space’, p. 264, see also Justinian, *Digesta*, 41.2.12.1. (Ulpian). See further Peter Birks, ‘The Roman law concept of *dominium* and the idea of absolute ownership,’ in *Acta Juridica* 1-37 (1985).

anced the type of goods that may be managed (and not necessarily owned) in the commons. In the grid below Hess and Ostrom show the type of goods that are more or less difficult to make exclusive, or to enclose, or to manage in common. In their analysis, the easier a good can be made exclusive the more difficult it will be to incorporate it within the commons.

		Subtractability	
		<i>Low</i>	<i>High</i>
EXCLUSIVITY	<i>Difficult</i>	Public goods Useful Knowledge Sunsets	Common-pool resources Libraries Irrigation Systems
	<i>Easy</i>	Toll or club goods Journal Subscriptions Day-care centres Cinemas	Private goods Personal Computers Doughnuts

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As it may already be evident, but perhaps not yet explicitly stated, the concept of the cultural commons in my analysis spans over all of these four types of goods that Hess and Ostrom present and which I have reproduced above – even the private, enclosable goods. That means that if the concept of the cultural commons is placed inside their table, it could be illustrated in the following manner:

⁶⁹² Figure based on Hess/Ostrom, *Understanding Knowledge as a Commons*, p. 9.

		Subtractability	
		<i>Low</i>	<i>High</i>
EXCLUSIVITY	<i>Difficult</i>	CULTURAL COMMONS Public goods Knowledge (e.g. A2K)	CULTURAL COMMONS Common-pool resources Libraries (e.g. for orphan works)
	<i>Easy</i>	CULTURAL COMMONS Toll or club goods Cinemas (e.g. access to semiotic/network based artworks)	CULTURAL COMMONS Private goods Paintings (e.g. Schulz/Darfurnica /Banksy)

While it may be easier to make the connection between what they call ‘public goods’, ‘common-pool resources’ and ‘toll or club goods’ with an idea of the commons and how these resources could be fitted into various commons-based schemes, they are not the only goods that are appropriate for access within a concept of the commons. I have also attempted to show that when it comes to cultural resources the fourth type of goods, namely private goods, or perhaps more accurately physical private goods, also very much have to be taken into consideration and placed inside the commons discourse. The examples that I have put forward are for instance the Schulz mural and the Darfurnica painting. Both are doubtlessly physical goods, at least one of them is private, but they both embody knowledge potential, that regardless of their corporality and physicality ought to be made available for access in the commons and conversely, the commons needs to be available in order for the creation of these types of works to occur. These artworks illustrate e.g. the difficulty when it comes to placing the physical (private) good within a cultural commons, as it can, strictly speaking, only be at one place at the time. However, the fact that an artwork may be private, physical or easy to enclose does not mean that commons-based access to it should per default be ruled out. The concept of the cultural commons here, it cannot be stressed strongly enough, does not *only* concern the digital, immaterial, or dematerialised, cultural works, it also takes physical works into consideration.

Therefore, when it comes to artworks, tangible as well as intangible, the concept of the cultural commons can prove to be the answer to many a (legal) dilemma, provided it is not simplified or flippantly applied. The Deleuzeoguattarian method that I propose has already so far opened up both the notion of jurisprudence and what it can and could do (chapter 2), the notion of the artwork (chapter 3), the notion of what is framed as a problem (chapter 4), the notions of property and space (chapter 5) and the notion of capitalism (chapter 6), and what they all can or could do – i.e. the Deleuzeoguattarian method reveals inherent potentialities.

7.1.1 THE SEDENTARY AND NOMADIC FORMS OF POSSESSION

Stable or territorialised relations construct that which Deleuze and Guattari refer to as the *sedentary model of possession* in their writing. Edward Mussawir argues that in law the sedentary possession is based on the principle of “seisin” – namely possession that is not that of actively “seizing” but rather one of “being seated”, “set down”, “sitting down” or even “presiding”.⁶⁹³ The legal concept of seisin stems from feudal fiefdom, when the king was the one who could own and divide land, while the subjects had tenure in fiefs. This sedentary model presupposes *enclosure*; in order to possess for instance realty, or any other type of space or property certain plots of land have to be enclosed. Chattel within the sedentary model is, as we have seen above in for instance chapter 5, then tied to and belongs to the person who owns the space/land.

Mussawir develops this further as he writes “one cannot possess without dividing up a field into plots as closed or exclusionary spaces.”⁶⁹⁴ The notion of enclosure, and fencing off, in order to possess, as we keep experiencing over and over again, is thus in Deleuze/Guattari connected to the sedentary type of possession. This model of possession is then contrasted to the second form of Deleuzeoguattarian model of possession, namely, *the nomadic model*. Contrary to the focus on enclosure and exclusivity (*rivalrous* resources in Lessig’s terminology⁶⁹⁵) that are both tightly connected to the sedentary model, the nomadic model does not imply any such exclusion or stable territory-based possession.⁶⁹⁶ Mussawir writes further:

Under the nomadic model, however, possession implies a different kind of relation that *cannot sustain any of these elements of establishment, exclusion and lack.*

⁶⁹³ Mussawir, *Jurisdiction in Deleuze*, p. 107.

⁶⁹⁴ Ibid.

⁶⁹⁵ See e.g. Lessig, *Future of Ideas*, p. 94.

⁶⁹⁶ Mussawir, *Jurisdiction in Deleuze*, pp. 107 aa.

Since possession does not imply division, exclusions or stable territory, one requires other factors altogether [...] ⁶⁹⁷

This “lack of lack” shall be revisited further on in order to show how it adds to the legal concept of the commons. But for now the focus remains on the two models of possession.

Mussawir, for the purpose of understanding the two Deleuzeoguattarian models, maps them out and presents four main characteristics of each model. He then uses the four characteristics in order to analyse the territorial possession of the indigenous people of Australia. Here however, I propose that a similar type of theoretical approach may be used when the legal concept of the cultural commons is being discussed.

This is how Mussawir presents the two Deleuzeoguattarian models of possession:

THE SEDENTARY MODEL

1. Space is divided in order to be possessed,
2. What you possess is always a plot/lot/portion (closed space), for example a *house*,
3. You possess only by remaining the same person (that is, as an *individual*), and
4. Possession implies exclusion and displacement.

THE NOMADIC MODEL

1. Space is possessed without being divided,
2. What you possess is always flows/movements/intensities (open space), for example *the ocean* or *the desert*,
3. You possess only by being plural (that is, as a multiplicity or a pack), and
4. Possession implies population and flight. ⁶⁹⁸

Both the notions of law and art have been presented in the context of the sedentary model, but in the guise of encounters and lines of flight, inferring a nomadic model, and the sedentary underlying assumptions have been challenged throughout. I shall attempt to demonstrate the versatility, usefulness, and ultimately, creativity of the two models of possession that Mussawir has drawn up

⁶⁹⁷ [my emphasis], Mussawir, *Jurisdiction in Deleuze*, p. 107.

⁶⁹⁸ [my emphasis], *Ibid.* p. 107-108.

from Deleuze/Guattari. In order to apply Deleuze/Guattari such schematic models as the one drawn up by Mussawir can prove to be very helpful.

7.2 THE RES ISSUE

Lawrence Lessig approaches the notion of the cultural commons as *layers*, an approach that could fit quite well within this Deleuzeoguattarian understanding of possession. But here the legal concept of the cultural commons has been approached as plateaus that are created out of rhizomatic jurisprudence and capital, out of the encounters and lines (of flight), that occur. Or, yet more accurately, this research approaches the commons as *societal flows*. This fluid approach to access and sharing that happens in the commons that exists in a society that is always leaking (*en fuite*) within the theory of nomadology becomes more, for the lack of a better word, concrete, when we can draw on everything that has been presented so far.

Edward Mussawir questions what he refers to as the Deleuzian critique of the legal rights-construction connected to possession; something that he claims has almost become a knee-jerk reaction within critical legal thinking, that is – to criticise the individual rights-construction. He argues that is not as simple as dismissing rights-constructions *altogether* as “ideological operators of legal liberalism”.⁶⁹⁹ Mussawir argues that the rights-construction as such plays a pivotal role for e.g. certain minorities and their interests. Challenging rights-constructions altogether might mean, according to Mussawir, pulling the rug out from under these minorities and their interests that have been hard fought.⁷⁰⁰ He is of course referring to the subject of his thesis namely the Aboriginal people’s land rights. But also on a theoretical level, I would like to claim, he is right in defending rights. In order to have commons in law, we do not have to do away with rights altogether, or at all.

Mussawir’s claim, and my concurrence, may seem like a direct critique of the stance that Deleuze and Guattari have adopted in *A Thousand Plateaus* and particularly if one reads the *Apparatus of Capture* where they develop an extensive argument in linking the rights-constructions in law to capitalism and private property. They write:

[P]rivate property in itself relates to rights, instead of the law relating it to the land, things, or people (this raises in particular the famous question of the elimination of ground rent in capitalism). *A new threshold of deterritorializa-*

⁶⁹⁹ Mussawir, *Jurisdiction in Deleuze*, p. 93.

⁷⁰⁰ Ibid.

tion. And when capital becomes an active right in this way, the entire historical figure of law changes.⁷⁰¹

However, Mussawir's analysis does not, in fact, criticise Deleuze/Guattari. Instead he reads the nomadic theory in a very interesting way, claiming that "[f]or Deleuze, the idea of a 'right' is worthless if it does not invent *a way of doing something*; a way of *navigating* a situation."⁷⁰² Mussawir ties the rights discussion to the notions of possession. I have already conducted my own reading, following Hardt and Negri (following Deleuze and Guattari), regarding how law and the construction of individual rights can be connected to ownership rights (in chapter 5). It has already been indicated that on a theoretical level the notion of rights and the notion of the commons do not have to compete. I agree with Mussawir that we may be able to use Deleuze and Guattari's theory in such a way where we do not have to question rights altogether but instead make them *navigate the situations* of access and *do something*.

Before that can be done let us see how the notions of possession are tied to certain legal principles of Roman law. In Mussawir's discussion he proposes to tie the notion of rights to Roman law via Hegel and Savigny.⁷⁰³ However, for the purpose of this analysis that I conduct here, it is worth to instead make another type of connection, not via Hegel and Savigny, but rather via Carol Rose's oft-quoted article 'Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age'⁷⁰⁴ and Leif Dahlberg's article 'Pirates, Partisans and Politico-Judicial Space'.⁷⁰⁵

Carol Rose described, among a number of *res* categories, also the category *res divinis juris* in Roman law, as one interesting legal category that one might be interested in keeping in mind when discussing the commons. In fact, Rose presents five non-exclusive types of possessions from Roman law that she then attempts to place within the information age and the knowledge society. The five types are presented and explained as follows by Rose:

1. *Res Nullius* – Things belonging to no one

[T]his first category of *res nullius* consists of things that are not by their nature nonexclusive; they have simply not yet been appropriated by anyone. Fish and game animals are frequent examples in the literature, as is abandoned property and, interestingly and perhaps horribly, enemy property. With all these resources, the reduction of the 'thing' to exclusive property is

⁷⁰¹ [original emphasis], Deleuze/Guattari, *Thousand Plateaus*, p. 500.

⁷⁰² [my emphases], Mussawir, *Jurisdiction in Deleuze*, p. 94

⁷⁰³ Ibid. pp. 93-113

⁷⁰⁴ Rose, 'Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age'.

⁷⁰⁵ Dahlberg, 'Pirates, Partisans and Politico-Judicial Space'.

simply a matter of human desire, time, and effort and nonexclusive property simply results from the lack of those qualities with respect to the thing in question.⁷⁰⁶

2. *Res Communes* – Things open to all by their nature

Res communes encapsulates what might be called the Impossibility Argument against private property: The character of some resources makes them incapable of ‘capture’ or any other act of exclusive appropriation. [...] The usual Roman law examples of *res communes* resources were the oceans and the air mantle, since they were impossible for anyone to own.⁷⁰⁷

3. *Res Publicae* – Things belonging to the public and open to the public by operation of law

The classic examples of *res publicae* for Roman law were roads, harbors, ports, bridges, rivers that flowed year-round, and lands immediately adjacent thereto.⁷⁰⁸

4. *Res Universitatis* – Property belonging to a (public) group in its corporate capacity

The standard ‘owner’ for the Roman *res universitatis* was a municipality, and its belongings were such public facilities as theaters and race-courses; but both private and public groups could own property in common, including lands or other income-producing property. The chief limitation on *res universitatis* in Roman times was that, at least in theory, the relevant corporate bodies required the authorization of the state.⁷⁰⁹

5. *Res Divini Juris* – Things that are unowned by any human being because they are sacred, holy or religious

The things classed under this rubric in Roman law-temples, tombs, religious statuary-were considered to belong to no one because they were dedicated to the service of the gods, or because an offense to them was considered to be offensive to the gods. Such things were a class of *res nullius* because although they are physically capable of appropriation, they are still unowned; the impediment to propertization is not natural but divine.⁷¹⁰

⁷⁰⁶ Rose, ‘Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age’, p. 92.

⁷⁰⁷ Ibid. p. 93.

⁷⁰⁸ Ibid p. 96.

⁷⁰⁹ Ibid. p. 105.

⁷¹⁰ Ibid. pp. 108-109.

In the article ‘Pirates, Partisans and Politico-Judicial Space’, Leif Dahlberg also addresses these categories in Roman law. He writes that “[i]n Roman law, one finds several categories of things that cannot be owned by an individual person, but that instead belong to all people (*res communes*), to the state (*res publicae*), to the city (*res universitatis*), or to the gods (*res sanctae, res religiosae, res sacrae*).”⁷¹¹ Dahlberg and Rose both present the Roman law categories slightly differently from one another, but nonetheless they both write about the *res* categories from Roman law as particularly interesting. Dahlberg’s last three types *res sanctae, res religiosae, res sacrae* seem to be comparable to Rose’s single term *res divinis juris*. While Rose begins with the category *res nullius*, this category seems to be excluded from Dahlberg’s analysis. Even though he does not refer to it in his article, I believe that it is a pertinent concept that we must not forget. I will use it within the Kafka analysis below, but it is also relevant to the concept of orphan works that was discussed in chapter 4 above. What is, however, particularly interesting with both of these discussions is that they both argue that when access to knowledge in the digital era is discussed, the categories of (exclusive) rights and (individual) possession that we have been using and become accustomed to, appear cumbersome and difficult, but when we widen the field to also include categories such as the ones from Roman law, then suddenly there appears as though there is a number of alternatives, a number of *potentialities*, that are already there that we may want to pay closer attention to.

While Rose devotes attention to the commons and how it may be connected to these categories in Roman law, Dahlberg only mentions the commons directly en passant when he addresses the Napster case.⁷¹² However, Dahlberg instead addresses the artistic content as *something liquid*⁷¹³ and the sphere in which it exists and moves as *oceans*⁷¹⁴. He also connects his discussion to Deleuze and Guattari’s concept of smooth spaces. Taken together, both these articles make a strong case for this particular connection with the presented Roman law categories. Rose and Dahlberg connect it expressly to the (cultural) commons and the artistic content. These articles also provide us with an entrance into the legal concept of the cultural commons, which is done here by way of Mussawir and Deleuze and Guattari’s sedentary and nomadic models of possession, the smooth and striated spaces, via Roman law.

⁷¹¹ [original emphasis], Dahlberg, ‘Pirates, Partisans and Politico-Judicial Space’, pp. 262-281.

⁷¹² Ibid. p. 281. For more on the Napster issue see *A&M Records et al v Napster Inc* (2001) (US), see also Joseph Menn, *All the Rage: The Rise and Fall of Shawn Fanning’s Napster*, Crown Business NY, (2003) and John Alderman, *Sonic Boom: Napster, P2P and the Future of Music*, Fourth Estate London, (2002).

⁷¹³ Dahlberg, ‘Pirates, Partisans and Politico-Judicial Space’, p. 265.

⁷¹⁴ Ibid. See also Leif Dahlberg, ‘Pirater, Partisaner och Ekollon’, in (eds.) Jonas Andersson & Pelle Snickars, *Efter The Pirate Bay*, Mediehistoriskt Arkiv, 19, Kungliga Biblioteket, (2010), pp. 153-172.

7.3 COMMONS (1): INITIATIVE BASED CREATIVE COMMONS

In recent years the contract-based alternative to copyright has proven to be vastly popular as an addition to the statutory intellectual property law. Licenses (optional, compulsory, as well as statutory) have been used in order to facilitate mass-utilisation where single rights clearances would be far too cumbersome and/or costly, for instance when it comes to background music for live broadcasting.⁷¹⁵ Both licence-models and business-models that are based on access to intellectual works are underpinned by various *contract solutions* where aspects of copyright (or other intellectual property rights) are negotiated to fit within more flexible (often non-exclusive) access needs of the digital knowledge society.

As it has been previously mentioned, I have chosen to focus the analysis on the initiative called Creative Commons and its license and business model, which is a hybrid of the two, namely, it is both a licence-model *and* a business-model (albeit a non-profit one, Creative Commons is formally an NGO), and it is widely accepted and established.

7.3.1 CREATIVE COMMONS

Driven by the Copyleft⁷¹⁶ and Open Source movements⁷¹⁷ from the end of the 1990s and the beginning of the 2000s, the Creative Commons project was founded by Lawrence Lessig in 2001. Taking on board some of the most renowned experts in intellectual property law and cyber law, as for instance James Boyle, the project was born as both an alternative *and* a supplement to copyright law. Having written, criticised and commented on the restrictive nature of copyright law, the project, helmed by Lessig, became a hub where artistic content could under rather flexible terms be accessed and shared.

The Creative Commons initiative provides various ready-made licences that users can sign onto and that from then on apply to their works. It provides six different ready-made licence types ranging from non-restrictive to more heavily restrictive ones. The licences are *non-exclusive*, which means that the rights owners ultimately retain their copyright and the works are not abandoned or left in the public domain. This is stated in the so-called “baseline rights”:

⁷¹⁵ See e.g. European Convention on Transfrontier Television (2002)

⁷¹⁶ “Copyleft is a play on the word copyright to describe the practice of using copyright law to offer the right to distribute copies and modified versions of a work and requiring that the same rights be preserved in modified versions of the work. In other words, copyleft is a general method for making a program (or other work) free (libre), and requiring all modified and extended versions of the program to be free as well. This free does not necessarily mean free of cost (gratis), but free as in freely available to be modified.

Copyleft is a form of licensing and can be used to maintain copyright conditions for works such as computer software, documents, and art.” <http://en.wikipedia.org/wiki/Copyleft>. Last accessed 19th March 2014.

⁷¹⁷ See e.g. Open Source initiative, <http://opensource.org/>. Last accessed 19th March 2014.

Every license will help you: retain your copyright; announce that other people's fair use, first sale, and free expression rights are not affected by the license. Every license requires licensees to get your permission to do any of the things you choose to restrict; to keep any copyright notice intact on all copies of your work; to link to your license from copies of the work; not to alter the terms of the license... Every license allows licensees, provided they live up to your conditions, to copy the work; to distribute it; to display or perform it publicly; to make digital public performances of it; to shift the work into another format as a verbatim copy. Every license applies worldwide; lasts for the duration of the work's copyright; is not revocable.⁷¹⁸

The Creative Commons licences are thus six different types of worldwide, royalty-free, non-exclusive, perpetual licences, that can be more or less restricted, depending on the wishes of the original creator, and that the creators freely can choose from.

Looking closer at the six licence types offered by the Creative Commons one finds the following options:

1. Attribution (CC BY) – allows others to *distribute, remix, tweak, and build upon the work, even commercially*, as long as they credit the original creation. According to the Creative Commons, this is the most accommodating of licences offered and they are recommended for maximum dissemination and use of licensed materials.



2. Attribution ShareAlike (CC BY-SA) – allows others *remix, tweak, and build upon the work even for commercial purposes, as long as they credit the original creator and license their new creations under the identical terms*. According to Creative Commons, this licence is often compared to the “copyleft” free and open source software licences. All new works based on the original work will carry the same licence, so any derivatives will also allow commercial use. This is the licence used by Wikipedia, and is recommended for materials that would benefit from incorporating content from Wikipedia and similarly licensed projects.



⁷¹⁸ http://wiki.creativecommons.org/Baseline_Rights. Last accessed 19th March 2014.

3. Attribution No Derivatives (CC BY-ND) – allows for *redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the original creator.*



4. Attribution Non-Commercial (CC BY-NC) – allows others to *remix, tweak, and build upon the original work non-commercially*, and although their new works must also acknowledge the original creator and be non-commercial, they do not have to license their derivative works on the same terms.



5. Attribution Non-Commercial Share Alike (CC BY-NC-SA) – allows others to *remix, tweak, and build upon the original work non-commercially, as long as they credit the original creator and license their new creations under the identical terms.*



6. Attribution Non-Commercial No Derivatives (CC BY-NC-ND) – This licence is the most restrictive of the six main licences, only allowing others to *download the original works and share them with others as long as they credit the original creator, but they cannot change them in any way or use them commercially.*



⁷¹⁹ [the Creative Commons licence text has not been fully copied, and all emphasis are my own]

Clearly, and as Maritza Schaeffer also has pointed out, the Creative Commons licensing regime does not propose any outrageous or revolutionary additions or changes to copyright law.⁷²⁰ It offers a ready-made licence structure, within the

⁷¹⁹ Creative Commons Licences, <http://creativecommons.org/about/licenses/meet-the-licenses>. Last accessed 19th March 2014. See also generally Maritza Schaeffer, 'Contemporary Issues In The Visual Art Realm: How Useful Are Creative Commons Licenses?' in 17 *Journal of Law & Policy*, p. 360 2008-2009.

⁷²⁰ Schaeffer, 'Contemporary Issues In The Visual Art Realm: How Useful Are Creative Commons Licenses?', p. 387.

possibilities of copyright law, that potentially cuts down costs that the users would have had, had they needed to draft and negotiate their own licences. It is a mix of the copyright regime (all rights reserved) and the open source model (no, or very few, rights reserved).

The project has spread around the world and many have adopted its licensing scheme. Creative Commons has hundreds of millions licences used not just by individual creators, but also by gigantic organisations such as Google, Flickr, Al Jazeera, The World Bank, Wikipedia, Whitehouse.gov, etc.⁷²¹ This further demonstrates how the idea of the commons is nothing new, revolutionary, radical or even foreign to creators, users, the market or the law. I could even go so far as to say, that the digital knowledge society *requires* these types of solutions when it comes to access to knowledge. But that is a statement that has been rehashed both throughout this project and in the recent decades by people like Lawrence Lessig. What we are able to do now, however, that was not possible in the beginning of the 00s is both to assess where the commons project currently stands, and how we can go further and keep developing it.

It goes without saying that the Creative Commons is a tremendously successful and important project, one that truly (re)introduced the notion and the concept of the commons and demonstrated how it can fully function as an addition to copyright laws. Still, for all its popularity it has its downsides too, and it has equally been subject to some substantial critique.⁷²²

7.3.2 THE PROBLEM WITH THE CREATIVE COMMONS

Hyde comments that:

Authors who do not wish to be owners must invent complicated schemes such as issuing a license to the public at large (and even that may not work: the law includes a ‘termination of transfer’ provision whereby rights revert to the creator after a certain number of years no matter what licenses or contracts have been signed).⁷²³

The types of critique directed towards Creative Commons have varied, some of it claims that the Creative Commons project stifles creativity as it removes the

⁷²¹ <http://creativecommons.org/who-uses-cc>. Last Accessed 19th March 2014.

⁷²² Séverine Dusollier, ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’, in 29 *Columbia Journal of Law and Arts*, 271 (2006), Lydia Pallas Loren, ‘Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright’, in 14 *George Mason Law Review* 271, (2007), Niva Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’, 74 *Fordham Law Review*, 375, (2005).

⁷²³ Hyde, *Common as Air*, p. 58.

incentive to create (the strong individual right, the exploitation possibility). Other types of critique assert that it forces the creator to give up some or all of his rights in order to participate in the commons project, that it is creating ‘ideological fuzziness’, some that it does not allow the creator to easily abandon all his rights, and so on. Maritza Schaeffer provides yet another aspect to the critique, namely, she queries whether a Creative Commons licence is truly of any use when it comes to tangible works and that which she calls “visual art”.⁷²⁴ While the quality of critique directed towards the Creative Commons project has varied in recent years, this particular point that Schaeffer raises, which questions the Creative Commons licences’ applicability on tangible works is a particularly pertinent one.

At the beginning of this chapter it was pointed out how vital it is that we not forget the tangible, physical work when we are discussing the commons concept. This critique is in line with that assertion. Having examined the Creative Commons licence structure Schaeffer arrives at the following conclusion vis-à-vis commons and tangible works:

Despite the two examples in which the licenses would likely work well for today’s artists-works in a digital media and works created by appropriation artists-overall *there is not a general need for the licenses in the visual art realm* from the perspective of the artist. Creative Commons licenses *tip the balance in favor of the user, rather than the artist*, since it is the user who benefits from the work being licensed freely under the specified terms. Unless artists *intend to benefit from spreading a message or gaining popularity specifically through use of the internet*, or uses Creative Commons as a branding point, *there is not an obvious benefit or incentive* to use the licenses for their works of art.⁷²⁵

Séverine Dusollier arrives at a similar conclusion in her article ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’. She writes that “[i]n sum, if the interest pursued by the creator is the hope for remuneration, the Creative Commons scheme is not very helpful.”⁷²⁶

I do not agree with the general conclusions presented in either Dusollier’s or Schaeffer’s article, namely that there is no obvious benefit or incentive for visual artists to be part of a commons project in general and the Creative Commons in particular, or that the creator should not hope for any remuneration, other than perhaps free promotion. It is safe to say that the organisations listed above as using Creative Commons licences such as e.g. Google nonetheless manage to

⁷²⁴ She is using the definition of ‘visual art’ that provided in the US Copyright Act 17 U.S.C. § 101 etseq. (1976).

⁷²⁵ [my emphases throughout], Schaeffer, ‘Contemporary Issues In The Visual Art Realm: How Useful Are Creative Commons Licenses?’ p. 401

⁷²⁶ Dusollier, ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’.

receive remuneration for their activities. Granted, this may not be the same when it comes to smaller or less established artists or companies, but the principle that I aim to show here is that a commons project does not preclude profit and remuneration, *as such*. That is not to say that the Creative Commons scheme is unproblematic, it is the reason why I have devoted this section of the analysis to pointing out some of the problems with the Creative Commons and its current licensing structure. I believe that what the two articles found to be particularly problematic here is not the idea or concept of the commons itself but rather the way the Creative Commons as such is structured. I claim that the benefits and incentives are not ‘merely’ restricted to the augmenting of knowledge and democracy, but that there are also many financial benefits directly connected to the commons project and that in fact go hand in hand with global capitalism. Also, when it comes to artists themselves, I have shown, e.g. with the Nadia Plesner case, how important it is for artists, even the ones working in the tangible mediums, to be part of the commons, in order to both be able to express themselves the way they wish to, to have access to their inspiration points, as well as to gain further exposure in order to generate more remuneration. Nadia Plesner could neither exhibit nor sell her work, *because of* somebody else’s intellectual property rights. Had the LV brand been a part of a commons structure, Plesner would have been able to sell her work, and a licence fee would have gone out to LV.

The entire Creative Commons project is based on their particular underlying licence structure, it is thus dependant of the contract as a legal concept, in order to function. Dusollier writes:

Relying on the private ordering scheme of property rights and licensing contracts, Creative Commons does not operate differently than some of the copyright industries that it repudiates. This reliance on private ordering means results from an ambiguity that is at the core of the Creative Commons project and might even reinforce the rampant commodification process that is at work in copyright today.⁷²⁷

Similarly, Niva Elkin-Koren addressed the same issue in her article ‘What Contracts Cannot Do: The Limits Of Private Ordering In Facilitating A Creative Commons’ where she claims in her analysis that:

[R]eliance on contracts alone is risky. It entails support of strong copyrights and freedom of contract. It requires adjusting the law of contract, allowing enforcement against third parties. The legal regime that would validate Cre-

⁷²⁷ [my emphasis], Dusollier, ‘The Master’s Tools v. The Master’s House: Creative Commons v. Copyright’, p. 292.

ative Commons' licenses would also enforce contracts that restrict access to creative works.⁷²⁸

This research is not within the field of contract law but a couple of general problems with the contract-based solutions will be mentioned below. Firstly though, I will examine some other contract-based solutions, taken from the case studies in chapter 4, that are not (directly) tied to a commons project and then return to the commons and contracts discussion.

7.4 COMMONS (2): CONTRACT BASED CULTURAL COMMONS – GOING BACK TO THE CASES

This section returns to the cases presented in chapter 4, with the added dimension of commons and other types of contract-based solutions. This is done in order to look at how the issues of access that amounted to the encounters and lines of flight in Volume I were dealt with and how those solutions in turn affect(ed) access.

7.4.1 SCHULZ – THE LONG TERM AGREEMENT

We have already gone through the facts concerning the Schulz case, namely, to remind ourselves briefly, that Yad Vashem was interested in the find that Benjamin Geissler and his team had made in Drohobych, and that Yad Vashem representatives subsequently took five pieces of the mural to Israel. An agreement was reached between the state of Ukraine and Yad Vashem that the pieces would be kept in Israel on a long-term loan. We know that the particulars of the matter differ depending on which side is consulted, but that is generally what took place in 2001.

In this section,⁷²⁹ I aim to present not the *legal shortcomings* in solving this problem that was done in chapter 4, but instead to look at the various *agreements* that were entered into along the way, particularly the long-term agreement between the state of Ukraine and Yad Vashem.

The first agreement (A1) that I have come across is the oral consent to remove the pieces of the mural given to Yad Vashem representatives by the people in whose house the mural was found.⁷³⁰ According to the official infor-

⁷²⁸ Elkin-Koren, 'What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons'.

⁷²⁹ Many of the facts presented here come from an analysis conducted by a Ukrainian lawyer and it was reported to professor Thomas Hoeren, Humbolt University, Germany. The analysis was then forwarded to Mr. Benjamin Geissler, who in his turn forwarded them to me. The analysis is from here on referred to as the Hoeren-report.

⁷³⁰ I have not been able to find out whether there was any consideration given to the house owners for this to take place, or whether money changed hands.

mation provided by Yad Vashem (press release by Iris Rosenberg, 29th May 2001) one member of their foundation (Mark Schrabermann) was responsible for removing the pieces of the mural and taking them to Israel. This was done, further, with the consent (A2) given by the City Council (Aleksej Radzievskij, Taras Metuk and the head of the Cultural Centre for the City of Drohobych).⁷³¹

These two (oral) agreements were then challenged by the state of Ukraine that asserted that regardless of the two consents that had been given, the consenting instances (owners of the house and the City Council respectively) did not have the *required authority* to give this type of consent on matters concerning cultural heritage found on Ukrainian soil. The Ukrainian Law on the Protection of Cultural Heritage supports this claim.⁷³² According to 1 Art. § 1 Law on the Protection of Cultural Heritage (LPCH), anything excavated on Ukrainian soil must be deemed to be cultural heritage of the Ukraine (§1 LPCH). According to §§ 5 aa cultural heritage may only be removed with the consent of certain named bodies of authority that are the sole competent bodies that may give consent. The competent bodies of authority that deal with the protection of the cultural works are named as following:

According to §5 para 1. No 25: *the supreme authority of administration* - in this case it would have been the Minister of Culture, and

According to §6 para 1. No 16: *the district authorities* - in this case it would have been the district capital – here, Lvov.

Relying on this regulation the state of Ukraine challenged the two consents that had been given, claiming that they lack the required authority.

Since none of the two consents for removal had been given in due procedure, it was argued that the oral agreements that were entered into were thus invalid and void. A person or people who are convicted of removal of pieces of cultural heritage from Ukrainian territory without due consent for removal commit the criminal offence of *smuggling*, according to § 201 of the Ukrainian Criminal Code.⁷³³

In the aftermath of the removal of the pieces, the last and most interesting agreement was entered into, namely the already mentioned final long-term agreement (A3), between the state of Ukraine and Yad Vashem. This agreement acknowledges that the pieces of the mural are in fact Ukrainian cultural heritage, currently held on loan in Israel. The interesting legal question is whether this *subsequent* agreement that arose *post facto*, after the pieces had been removed

⁷³¹ Hoeren-report. Same here, I have not been able to find out whether there was any consideration given to the city council of Drohobych for this to take place, or whether money changed hand.

⁷³² Law on the Protection of Cultural Heritage.

⁷³³ Ukrainian Criminal Code.

from Ukraine to Israel, but which was nevertheless entered into with due competence, can make up for the initial lack of appropriate consent and authorisation.

The Ukrainian Committee that signed the long-term agreement was composed of the head of the civil service in matters of transfer (or migration) of the cultural treasures - Vladislav Kornienko, First Secretary of the Embassy of Ukraine in Israel and Museum Director Vladimir Ilarianov "Drohobutschuna" Zenovij Bervetzkuj. According to § 5 Paragraph 1 of the LPCH No. 25 these are indeed the competent bodies that have the authority to give permission for removal.

Arguably, an agreement with relevant authority was entered into *this time*. However, it can be argued that the initial removal of the five pieces of the mural and their transfer to Israel could not be pardoned by this subsequent act and was still not covered by A3 and thus potentially remains illegal or void. Perhaps then, the agreement between the Ukraine and Yad Vashem only concerns the retention of the pieces of the mural in Israel, *and not their removal and transfer out of the country which would in that case still remain illegal in terms of consent given with due competence*.

A further complication with the agreement between Yad Vashem and Ukraine is that it may be in conflict with the Ukrainian Constitution.⁷³⁴ According to art 9 of the Ukrainian Constitution all international agreements that are entered into must be in accordance with the Constitution. The agreement at hand (A3) may be in conflict with §53 of the Ukrainian Constitution. According to §53 para 5 of the Ukrainian Constitution the State guarantees the protection of historical and cultural heritage, *ipso facto*, the State must ensure that the historical and cultural heritage of the Ukrainian people, which is located outside of Ukraine, be *returned* to the Ukraine. Ukraine has thus, without compensation, dispensed of its cultural heritage.

It means that as the State acts as a guarantor in terms of preservation of Ukrainian heritage, it is responsible for it not to be taken out of the country without due consent and/or if it is outside the country to be returned. When the Ukrainian constitution is read in that manner, it can be argued that a contract that allows Ukrainian cultural heritage to remain in another country for an unspecified period of time, which the A3 indeed allows, due to the consecutive automatic renewal periods, such a provision may be in conflict with this principle of the Ukrainian Constitution that stipulates the return of cultural heritage.

There is an exception to this particular rule and that is if entrance into these types of agreement has been done in pursuit of a "higher purpose". It is very difficult to define what would constitute such a higher purpose here. It could be e.g. security and safekeeping of national heritage that cannot be done within the source country and that the transfer out of the country serves a higher purpose

⁷³⁴ Ukrainian Constitution.

and as such makes up for the removal of cultural heritage. The safeguarding can in those cases override the home territory principle. Yad Vashem does moreover acknowledge, openly, (in A3) that the five pieces of the mural are part of Ukrainian cultural heritage. Yad Vashem's status as a cultural and memorial institution also means that they do have the means and knowledge to keep the pieces of the mural safe and provide for any and all necessary restoration and up-keep.⁷³⁵ All this could possibly mean that the higher purpose that the Ukrainian Constitution requires has been met.

As we saw above, the fact that Ukrainian law deems the mural to belong to the cultural heritage of the Ukraine, is not at all unproblematic. We have seen that Poland is also asserting rights in the works left behind by Schulz, arguing that he ultimately was born on Polish territory, and that he was a Polish citizen who, significantly, wrote in Polish. This fact may also challenge the long-term agreement with Yad Vashem, as it is, *after all*, not entirely straight forward whose (national/religious/cultural) heritage the mural ultimately is. The fact that Yad Vashem acknowledges that the pieces that they hold are Ukrainian cultural heritage does not necessarily have any legal bearing.

Another problem with the A3 agreement is that it is not sufficiently defined particularly regarding the terms concerning the return of the mural, but also regarding the automatic extensions of the term and the penalties that are included within the agreement. All these clauses appear uncertain and not sufficiently defined. This taken together means that there is a risk that the pieces will never be returned to the Ukraine, even after the term of the agreement has expired. In fact, the term of the agreement could carry on in perpetuity, since there is no real expiration of the term.

7.4.2 THE YAD VASHEM AGREEMENT – A SEDENTARY MODEL OF POSSESSION?

The uncomfortable contractual solution of the problem concerning the belonging of, and more pertinently for this project access to, Bruno Schulz' mural is very much a result of the sedentary approach to this work. Our traditional understandings of the laws of persons and the laws of things have not only fundamentally been questioned with this case, it also demonstrates the difficulty in

⁷³⁵ As a matter of fact, before Geissler's find, and before Schulz garnered new attention, there are claims that many of his works had already been destroyed in the Ukraine, such as for instance certain oil paintings. David Goldfarb, Conference Paper. *Schulz, the Pre-Raphaelites and an encounter with Dante*, Colloque international interuniversitaire 'Schulz lu et interprété en Europe Centrale : entre modernisme et modernité. Poétique, réception, regards croisés', INALCO, Sorbonne, Paris, (21-23 March 2013).

circumventing those lock-ins created with various forms of contractual agreements.

It is therefore necessary to include the various *res* concepts from Roman law as well as Mussawir's description of the Deleuzeoguattarian forms of possession in order to understand (the shortcomings) of the contracts that were entered into as a way of circumventing the legal difficulty in terms of belonging and access, and the lines of flight that this case gave rise to.

The approach to possession and access in this case is based on a sedentary form of reasoning where in order to possess we have to: divide and exclude. Certain plots have to be assigned to certain individuals, and the individual has to be one and the same person or legal subject, i.e. a definable (unified) entity such as a nation state, or a cultural institution, or a private person. To possess within the sedentary model of possession the notions of exclusion and displacement are required. All of these are present in the case of Schulz and the agreements entered into along the way, particularly the final agreement that the state of Ukraine entered into with Yad Vashem.

Since Schulz' mural could not be grasped, or understood by statutory law, the work had to be captured, striated, territorialised and set down by a legal instrument that is the contract, even if it, conversely, means that the work has to remain constantly fragmented, divided and displaced. With the contract solution there was at least one agreement in terms of who would, from then on, possess which pieces. But did it solve the conflict or do anything constructive in terms of the access to this work?

There are a number of similarities between this particular work and the Kafka files that shall be discussed below, and not merely because both of them ended up in Israel in the end. However, there are also certain fundamental differences between Schulz' mural and the Kafka files. Some of them have already been addressed earlier. The cases are similar in that that they both rely on and are made difficult by the fact that the artist's belonging cannot be framed and contextualised easily, that their 'territorial' belonging is contested and in constant flux. They differ in terms of the physical scope of the works (wall mural vs. a suitcase filled with documents), how they have to be kept in order to be preserved, the fact that there was no estate in the case of Schulz, and that there is, so far, no legal decision in the Schulz case, only a contract for a long-term loan. Here, I shall focus on that which is specific for the Schulz case and leave the more detailed discussion concerning belonging and territory for the Kafka case below, so as to avoid repetitions.

At this point one must look in further detail the concept of *res divini juris*. Carol Rose exemplifies the concept in the following manner:

It is the canon, the classics, the ancient works whose long life has contributed to their status as rare, extraordinary-*and also a little wild, never quite capable*

of complete domestication even by the most erudite pedant. And lest we forget that all things godlike may be accompanied by lesser gods (or even false ones) and their representations, we might wish to include here too the iconography of modern commercial culture, the Mickeys and Minnies and Scarletts.⁷³⁶

Rose is referring to the music of Bach, the Mona Lisa and the modern day Disney icons. Fair enough perhaps. And while Schulz' mural arguably has not reached the status of these works (yet?), maybe it is one of those lesser or even false ones. And as such there are still aspects of this category from Roman law that challenge the sedentary contract at hand, which governs the possession of and access to Schulz' mural.

Rose also provides some potential examples from the realm of nature, and the natural commons as being *res divini juris*:

[T]he great wilderness parks, deserts and seashores, with their sense of the sublime and the vast, may in some ways fill the role of *res divini juris*. Such places suggest to the visitor the majesty of creation, the vastness of space, the untamed-ness of something outside human capacity to grasp. If there is a role for *res divini juris* as tangible public property in our modern jurisprudence, surely this is one place where it resides.⁷³⁷

The interesting aspect with Schulz's mural is that it is so connected to physical space. It was quite literally part of a house. It is being reconstructed by Benjamin Geissler as virtual space within a physical space, as a 360° experience that one enters into. Far from being an object, it is a space, one that can be approached as Deleuzeoguattarian smooth space, that has been reterritorialised by legal instruments.

But can it really be pinned down, striated, territorialised?

7.4.3 KAFKA – THE WILL VS. THE JUDICIAL DECISION

In her ruling of the Kafka case, that itself perhaps was a little Kafkaesque in nature, the Israeli Judge Talia Pardo-Kupelman wrote:

This case complicated by passions, was argued in court for quite a long time *across seas, lands, and times*. Not every day, and most definitely not as a matter

⁷³⁶ [my emphasis] Rose, 'Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age', p. 109.

⁷³⁷ [original emphasis] Ibid.

of routine, does the opportunity befall a judge to delve into the depth of history as it unfolds before him in piecemeal fashion [...] ⁷³⁸

Judge Pardo-Kupelman continued to assert that this trial had opened “a window into the lives, desires, frustrations and the souls of two of the greatest thinkers of the 20th century [Kafka and Brod].” ⁷³⁹ The language that she chose in her ruling is clearly not *traditional* legal language, *dogmatically* used in adjudication. But how could she have used dogmatic language?

When encountering a case of this type, passions, time, desire, frustration, concepts that are usually considered to fall *outside* the scope of the law, that are excluded and considered to be extra-legal, were at the heart of the case in front of judge Pardo-Kupelman. There was no way of circumventing or excluding them. But there was also a genuine legal question that was presented before the judge, namely who was to be deemed to be the rightful owner of the manuscripts that Kafka had left behind.

In more precise detail the dispute between the parties (Israel National Library and the Hoffe Estate) concerned:

- the question of the interpretation of the will of the late Max Brod and the identity of the heir to his literary estate and whether the daughters of the late Esther Hoffe, *as stipulated in her will*, or the public library as *stipulated in his will*, were the heirs of his estate; and
- the question as to what is included in the literary estate of the deceased and in particular, whether it includes the writings of Kafka. In this regard, the daughters of the late Esther Hoffe claimed that Kafka’s writings were not part of the literary estate of Max Brod since Brod had given Kafka’s writings as a gift to their mother during the course of his life. In order to support this claim, the daughters provided various letters in evidence. The daughters also claimed that Kafka’s writings were not even included in their mother’s estate as she gave the letters to them, her daughters, as a *gift during her lifetime*. ⁷⁴⁰

The issue was not easy, and the judge acknowledged this in her ruling:

⁷³⁸ [my emphasis]. This translation of the decision was taken from <http://www.haaretz.com/jewish-world/jewish-world-news/israel-court-orders-kafka-manuscripts-be-transferred-to-national-library.premium-1.469870>. Last accessed 19th March 2014.

⁷³⁹ Haaretz translation.

⁷⁴⁰ [not quoted in its entirety, my emphasis added] <http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=53792>. Last accessed 19th March 2014.

Due to the strict *requirements of proof* required, I do not believe that the plaintiffs have met the requirements... the gift was never carried out to completion... One can determine that the Kafka manuscripts, like the Brod estate, were not given to the plaintiffs as gifts.⁷⁴¹

The judge transformed the issue from a material legal question (who is the rightful owner?) into a question of burden of proof (have the sisters managed to show, as the burden of proof was theirs, that the gift had been issued in their mother's lifetime?). Evading the legal question and after having analysed the arguments and the evidence presented in the case, the judge in the end conceded to the position of the executor of the Max Brod estate, Advocate Ehud Sol. Her ruling states:

Indeed, letters providing for a gift were written. However, when examining the conduct of Brod and the late [Esher Hoffe], a doubt arises as to whether this is a *gift for delivery of the object or a gift of certain rights* ... both Brod and the deceased [Esher Hoffe] wrote letters as to giving gifts but they reserved the rights of ownership to themselves... on one fact I have no doubt, that Brod viewed these writings *as his property* and treated them as an owner, also after he wrote the letters of gift.⁷⁴²

It is no doubt interesting to see how the delivery of the object, i.e. the physical manuscripts, were separated from the immaterial aspects of the documents, namely the intellectual rights in the writings, as well as whether Brod designated Esther Hoffe as an *executor* of this part of his literary estate (the claim put forward by her daughters) or as *beneficiary* during her lifetime (the claim put forward by National Library of Israel). However, in her ruling, the judge disregards the delivery of the object, the documents were clearly in the possession of the Hoffe family, and had obviously been handed over from Brod to Hoffe. There was a gift-letter, but the interpretation of it was contested. Therefore, the judge focused on the rights aspect in the contents, concluding that a gift of the rights had not been given:

[T]he Kafka manuscripts, like the Brod estate, were not given to the plaintiffs as gifts [and] should be handed to the archive, [of, as Brod's 1948 will stipulated] the library of the Hebrew University in Jerusalem or the Tel

⁷⁴¹ [my emphasis] Haaretz translation.

⁷⁴² [sic] [my emphases throughout],

<http://www.theworldlawgroup.com/index.cfm?cm=Doc&ce=details&primaryKey=53792>.

Last accessed 19th March 2014.

Aviv municipal library, or (that of) any other public institution in Israel or abroad.⁷⁴³

Finally judge Pardo-Kupelman concluded the case, expressing her own *sentiment* and *hope*, writing “I *hope* that the inheritance of the late Brod will finally find its place according to the wishes of the deceased.”⁷⁴⁴

7.4.4 GALUT – THE KAFKA DECISION AND THE NOMADIC FORMS OF POSSESSION

My people, provided that I have one. – Franz Kafka

There are several points in how the judge has chosen to word her ruling that warrants a deterritorialising, nomadic, analysis of the case at hand, particularly where she asserts that the manuscripts ought to be stored in any public institution in Israel *or abroad*. The issue of where Kafka is belonging, whether that is at all a relevant question, has already been touched upon elsewhere in this study. Judith Butler also comments on this very issue claiming that the Kafka trial showed how he now has become a commodity because of the various parties claiming that they own piece(s) of him and what he left behind. But, Butler claims that “Kafka does not belong to these women, but rather to the ‘public good’ or else to the Jewish people, where these sometimes seem to be the same.”⁷⁴⁵

In order to rule on the case, as well as morally argue for where the Kafka documents that the Hoffe family had in their possession belonged, the legal argument became transformed into a question of ‘assets’. The Kafka files are an asset, not necessarily only a financial asset, economic capital in Bourdieu’s terms, but an asset in all the senses of the word (cultural, social, political, scientific, literary, etc). The question was – who can be granted the possibility to capitalise on this asset?

Butler concludes that Kafka, as an author, and not just the documents left behind, have become commodified and can now only be deemed to be *chattel*. “Now Kafka has himself become property, if not chattel (literally, an item of tangible movable or immovable property not attached to land), and the debate over his final destinations is taking place, ironically, in family court.”⁷⁴⁶ Any-

⁷⁴³ Alison Flood, ‘Huge Franz Kafka archive to be made public’ in *Guardian Online* (15th October 2012). Available at: <http://www.guardian.co.uk/books/2012/oct/15/franz-kafka-archive-public>. Last accessed 20th March 2014.

⁷⁴⁴ [my emphasis] Haaretz translation.

⁷⁴⁵ Butler, *Who Owns Kafka*.

⁷⁴⁶ *Ibid*.

body wanting to access the documents from now on, provided that the decision holds up on appeal, will have to travel to Israel. Butler also discusses this complicated issue:

It matters that Israel comes to own the work, but also that the work is housed within the established territory of the state, so that anyone who seeks to see and study that work must cross Israel's border and engage with its cultural institutions. And this is also problematic, not only because citizens from several countries and non-citizens within the Occupied Territories are not allowed to cross that border, but also because many artists, performers and intellectuals are currently honouring the cultural and academic boycott, refusing to appear in Israel unless their host institutions voice a strong and sustained opposition to the occupation. The Kafka trial not only takes place against this political backdrop, but actively intervenes in its re-configuration: if the National Library in Jerusalem wins its case, to have access to the unpublished and unseen materials of Franz Kafka one will have to defy the boycott and will have implicitly to acknowledge the Israeli state's right to appropriate cultural goods whose high value is assumed to convert contagiously into the high value of Israel itself. Can poor Kafka shoulder such a burden? Can he really help the Israeli state overcome the bad press of the occupation?⁷⁴⁷

The Butler article was written before there was a decision in the case. The British author Will Self presented a similar line of argument when he commented on the case:

There's enough of what Milan Kundera terms 'Kafkaology' about as it is: seldom has a writer been as profitlessly anatomised – and that largely as a function of writings other than his fiction – as Kafka. This evolution will surely result only in more of this: more unread and unreadable doctoral theses, more bowdlerised applications of this or that critical theory to the Kafka corpus [...] Brod himself was intent on canonising Kafka as a Zionist saint, and the Israeli state holding the papers ensures that this falsification will continue apace – still, it matters not, the works are out there in all their contrariety, sparking different and heterodox sensations as legion as their readers.⁷⁴⁸

⁷⁴⁷ Butler, *Who Owns Kafka*.

⁷⁴⁸ Will Self quoted in Flood, 'Huge Franz Kafka archive to be made public'.

The discussion regarding this particular case and the posthumous legal appropriation of Kafka perfectly illustrates the nomadic forms of possession that the Deleuze-Guattarian theory describes and which I am attempting to apply here.

However, what is more interesting and pertinent for the purpose of this section is to fuse all these lines of flight that the Kafka case provides us with in terms of belonging and the difficulty concerning legal concepts and definitions that were discussed in chapter 4, and how they correspond with the particular contracts that are entered into along the way. Here, there are (at least) three of them, agreements that is, the final wills of Kafka, Brod, and Esther Hoffe. All these wills had an express aim to *limit* wider access possibilities. In a traditional way of reasoning it can be argued that none of these wills have been (fully or at all) respected. However, such reasoning requires and presumes that a will is a binding contract and that an artist must have some type of belonging in order for posterity to designate the rightful owner of their work, as well as the rightful group of people who may access it. Belonging is then defined in an exclusory manner i.e. Jewish, or Zionist, and the group of people becomes stunted: an Israeli library, the people who are in Israel or have the possibility to be in Israel.

The public good, in the reasoning of the Israeli court, overrides the contract. The public good of the Israeli people overrides the will(s) as contracts. The public good or else the Jewish people here seem to be the same in terms of these contracts.⁷⁴⁹ If ever there were any contracts at all, that is.

This type of reasoning, as it is apparent by now, is not how this project is proposing that we analyse such cases. Going back to Carol Rose's arguments and the *res* categories presented above from Roman law, adding the nomadic forms of possession as well as a haecceity-based approach to the belonging of the author that Deleuze/Guattari have presented, adds a number of dimensions to legal reasoning that has not been available before. When contracts cannot do anything, and positive law runs out of rules, which are the legal principles that can be used in such cases? So for instance, maybe Kafka's documents can be deemed to be *res nullius*? Things that belong to no one and as such are by their nature nonexclusive. Roman law mentions fish and game as examples of *res nullius*. These are things that exist within the natural commons, but how about things that exist in the artificial commons?

Or can the Kafka files be approached as *res communes* things open to all by their nature, like air and oceans? These are the things that are incapable of capture. We have seen how impossible it is to capture Kafka and his work. We have also seen how Dahlberg connected artistic content, through Roman law and Deleuze/Guattari to oceans and liquid matter – and ultimately, smooth space. When it comes to the Kafka documents there seems to be nothing that prevents that they be made open to all, and nonexclusive in e.g. a digitised or

⁷⁴⁹ Judith Butler, *Who Owns Kafka*.

printed form. Nothing other than profit perhaps, as things always seem to be more expensive the more rare and the more exclusive and elusive they are...

7.4.5 SHLOSS – THE SETTLEMENT AGREEMENT

22nd March 2007 Stanford Law School issued a press release entitled: *Stanford Scholar Wins Right to Publish Joyce Material in Copyright Suit Led by Stanford Law School's Fair Use Project James Joyce Estate Agrees to Settle*⁷⁵⁰. In it, the University announced that:

Professor of English Carol Shloss [had] won the right to publish her scholarship on the literary work of James Joyce online and in print based on a settlement agreement with the Joyce Estate.⁷⁵¹

The Fair Use Project and Cyberlaw Clinic who had filed the suit on her behalf had assisted Shloss. Anthony Falzone, fellow at Stanford and attorney, had led the case and the litigation. However, Falzone was not the only lawyer acting on Shloss' behalf, other prominent lawyers such as Lawrence Lessig and several others had also played a pivotal role in the case and provided *pro bono* services including Mark Lemley, Stanford Law professor and counsel at Kecker & Van Nest, Robert Spoo and Bernie Burk and their colleagues at Rice Nemerovski Canady Falk & Rabkin, P.C.⁷⁵²

⁷⁵⁰ Stanford Law School Press Statement.

⁷⁵¹ Stanford Law School Press Statement.

⁷⁵² Ibid. According to the press statement these are all the participating attorneys that assisted in the case, additional to Falzone and Lessig:

Mark Lemley is the William H. Neukom Professor of Law at Stanford Law School, and the director of the Stanford Program in Law, Science and Technology. He teaches intellectual property, computer and Internet law, patent law, and antitrust. He is of counsel to the law firm of Kecker & Van Nest, where he litigates and counsels clients in the areas of antitrust, intellectual property, and computer law. He is the author of six books and 65 articles on these and related subjects, including the two-volume treatise IP and Antitrust.

David Olson acted as a supervising attorney while he was a resident fellow with the Center for Internet and Society. Olson has litigated numerous high-profile intellectual property cases in federal courts across the country.

Certified law students John Polito and William Ridgway worked extensively on this case as part of the Cyberlaw Clinic.

Robert Spoo, a Joyce scholar and copyright lawyer, is co-counsel for Shloss on this case. Formerly a Professor of English and the Editor of the James Joyce Quarterly, he now practices law full time and has written extensively on Joyce and copyright law. Spoo is an attorney with the law firm of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation. Bernard A. Burk, a director of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, acted as co-counsel for Shloss. Burk engages in litigation and counselling in the media, technology, publishing, and entertainment industries and has represented a wide range of clients including PC World Communications, CMP, Media, various academic jour-

This victory, resulting in the right to publish her scholarship, was made possible, not by a court decision, but rather by a *settlement agreement* that was entered into between Shloss and the Joyce estate.

Studying the settlement agreement more closely it can be discerned that the Joyce estate agreed not to sue Shloss for infringement of copyright and allowed her to publish the supplement to her book that had been the subject of the dispute. This was agreed upon with the caveat that the excluded supplement could only be published digitally, on a website that is accessible only within the United States with computers with a US internet protocol address.⁷⁵³ The site where this content has been made available is: <http://www.lucia-the-authors-cut.info>. Being based outside the US I have chosen not to attempt to circumvent the settlement agreement in order to view the content.

In the settlement agreement (clause 3a) the Joyce Estate asserts that they remain the sole and beneficial owners of the copyrights in all of the works of Lucia Joyce. Further down, in clause 10 it is stipulated that the settlement agreement does not in any way amount to an admission of liability, rather, in order to avoid potential expense, uncertainty and inconvenience of litigation, the Joyce Estate agreed to enter into the settlement agreement.

As we noted earlier, the Shloss case is not the only case involving scientific research that the Joyce Estate has initiated court proceedings against due to alleged copyright infringement. Shloss on the other hand, unlike others who have been less successful, was able to negotiate this settlement agreement. She won the right to publish the supplement. As we have seen this victory was (probably only) made possible by the impressive team of lawyers and the resources of the Stanford University as an institution that acted on her behalf. For Shloss as a scholar to gain *access to her own research* and be able to publish and enable public access to it came thus at a very high price (financially speaking, but no doubt, culturally, socially, and not to mention probably also emotionally and personally). It goes without saying that scholars in the same type of situations but with less financial and legal aid and other supporting resources at their disposal may not have been as lucky and not as able to have the same type of success with the Joyce Estate.

The victory aspect or success of this settlement agreement can also be nuanced. What the Estate agreed to was in fact a very limited territory, the US, where this research could be published. The online possibility to subsequently publish something that the scholar had been forced to remove from her book, was thus heavily stunted, and the online access was also controlled and limited. This is problematic from various points of view. It can be questioned whether this truly was a victory for access to documents and scholarly work. It can fur-

nals, Lee Mendelson Film Productions, Major League Baseball Properties, Clint Eastwood, and Green Day.

⁷⁵³ Settlement agreement, p. 2.

thermore also be queried if this type of access to works, held by estates to prominent authors that often come with a price-tag, threat of litigation, will in the future deter researchers from even attempting to access these types of documents for the fear and risk of not being able to use or publish their scholarly works and findings.

7.4.6 CONTRACT BASED ACCESS TO KNOWLEDGE – SEDENTARY AND NOMADIC MODELS PUT TOGETHER

The notions of sedentary and nomadic forms of possession have now been placed in the context of this study and connected to certain concepts of Roman law. This last Shloss case is in a way a hybrid between the sedentary and nomadic forms of possession – which is interesting, but it is also problematic in that that access to the documents has been severely stunted by the settlement agreement. It now remains to relate this case to Carol Rose’s last two concepts of Roman law that might be interesting pertaining to the creation of the cultural commons namely, *res publicae* and *res universitatis*.

Res publicae as a concept, referring to things that belong to the public and are open to the public by the operation of law, is exemplified in Rose’s article as roads, harbours, bridges and ports. Rose devotes meticulous attention to this concept and particularly connects it to space: tangible space, internet as space, and the general intellectual space. All of these can be approached as *res publicae*, she argues.⁷⁵⁴ The tangible space that makes up *res publicae* from the classic examples from Roman law were as mentioned harbours, for instance. The internet as *res publicae* borrows the same metaphors from the tangible space in terms of harbours, ports, (pirates!), etc. and functions in a similar manner metaphorically. However, it is not a space where anything goes, but it is a space that enables transport and communication, where there are rules, enclosures and exclusions applied to its architecture.

The general intellectual space:

[as] *res publicae* has a primarily temporal character rather than a geographic one. One of the most interesting features of intellectual property law is that over the longer run, it does turn all once-propriety intellectual achievements into *res publicae*.⁷⁵⁵

Rose is referring to the public domain as *res publicae*, i.e. when the term of the intellectual property rights has expired the work then enters into the *public do-*

⁷⁵⁴ Rose, ‘Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age’, pp. 96-105.

⁷⁵⁵ [original emphasis], Ibid. p. 104.

main, a space free from intellectual property fetters – where works can be appropriated freely. All of the aspects of the *res publicae* that Rose presents are relevant for the concept of the cultural commons and many of them are present in the Shloss case here. Interestingly, even though James Joyce’s copyright expired in 2011, and the work entered the public domain, the US website where the additional edit has been published, still remains locked for the users from outside the US.

The Shloss case can also be connected to the concept of *res univertatis*. These are things managed by public institutions such as municipalities, and where both private and public groups could own this type of property in common. These owners often formed corporate bodies – and of course the concept later gave name to today’s “universities” - which in medieval times referred to a corporate body of students and teachers dedicated to education.⁷⁵⁶ Rose writes that “[s]uch limited common property regimes may be commons on the inside, but they are property on the outside, that is, vis-à-vis non-members.”⁷⁵⁷

That both the production of Shloss work, as well as the later access to it, happened within and with the help of the resources of a university-setting is obvious. These types of private-public hybrids are of course tremendously interesting for the concept of the cultural commons. Access to the work generated even within this hybrid is here being exemplified by the stipulations listed in the settlement agreement.

Res univertatis regulates resources that are too cumbersome to govern and own individually – that is why they have to be managed in a group. Access to scholarly work and research results produced in universities is a wide topic of discussion and one that is not entirely irrelevant for the analyses conducted herein, however I shall not engage in a further discussion about it here, as it slightly falls outside the scope of this research and the issue of access to artworks.⁷⁵⁸ *Res univertatis* “unlike individual intellectual property, [...] focuses attention, first, on *encouraging the group interactions* that greatly foster creativity, and second, on *policing the boundary of behaviors that are disruptive to creative groups*.”⁷⁵⁹

We have seen with the Shloss case here that a settlement agreement can disrupt such encouragement of group interactions, where the behaviour of the estate and the settlement agreement also disrupted the creative groups of researchers and students alike.

⁷⁵⁶ Rose, ‘Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age’, p. 105.

⁷⁵⁷ Ibid. p. 106.

⁷⁵⁸ Do however see Caroline Pamp, *Intellectual Property in Science*, Stockholm : Jure Förlag, (2010).

⁷⁵⁹ [my emphasis], Rose, ‘Romans, Roads, And Romantic Creators: Traditions Of Public Property In The Information Age’, p. 108.

7.5 THE PROBLEM WITH THE CONTRACT BASED SOLUTIONS

There are certain things that the contracts cannot do, and having addressed the shortcoming of the contract-based solutions stemming from the cases, and having addressed some overall shortcomings of the Creative Commons initiative, I shall now present a more general critique of contract-based solutions in the digital age. I have divided this critique in three points. The three main difficulties with the contract-based access to artworks are the problems and obstacles created by: private ordering, bargaining power and law and politics.

7.5.1 PRIVATE ORDERING – ENCLOSURE 2.0

Niva Elkin-Koren refers to instances of “self-regulation voluntarily undertaken by private parties”⁷⁶⁰ as *private ordering*. She distinguishes this type of private ordering from *public ordering*. She writes:

Public ordering refers to rule-making processes, which are designed by the State and its apparatus. Its norms reflect the outcome of collective action mechanisms, which are formulated and applied from the top down by public institutions. *Private ordering*, by contrast, concerns bottom-up processes, where each party voluntarily chooses to undertake the norms that will govern its behavior. This definition captures the fundamental justifications for the enforcement of norms created by private ordering: their self-imposition by the parties is considered morally justifiable and economically efficient.⁷⁶¹

Private ordering is thus regulation of access within the realm and with the tools of contract law. It is obvious that the governance of copyright law is shadowed by a regulation that is framed by the contract law parameters. In many instances, particularly within the various commons projects, these are the very tools that have been used in order to regulate a wider access to creative works. Elkin-Koren writes further:

These self-help mechanisms for governing information challenge the norms designed through collective action (copyright) and require reconsideration of the type of desirable government intervention. Questions arise as to whether the state should enforce privately created norms when they are inconsistent with copyright, and what is the justification for enforcing such terms in the first place.⁷⁶²

⁷⁶⁰ Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’, p. 376,

⁷⁶¹ [original emphasis], Ibid.

⁷⁶² Ibid.

We have seen instances in the previous sections of this chapter that are examples of this very “self-help” or even self-governing mechanism, mainly within the setting of the Creative Commons project. Content and platform providers often unilaterally draft the terms of access;⁷⁶³ they have their own limitations, and do not, after all, always enable the desired type of access to creative works. On the contrary, the contract-based solutions create additional difficulties, as well as add levels to copyright not originally intended. This can for instance mean that with unilateral licensing structures, and/or with DRM, owners are enabled to build stronger fences than what would not have been possible with ‘only’ copyright law, e.g. enclose content that is technically in the public domain or hinder acts that otherwise would have been permitted by copyright, due to for example fair dealing or fair use principles. A situation is created where “content providers can set the terms of access in the digital package that wraps the content, so the terms literally become part of the product”.⁷⁶⁴

This type of private ordering does not only govern the terms and conditions on which we may access online based, digital, consumer products, but it also governs commons and open access projects, e.g. the General Public License (GPL) project designed by the Free Software Foundation (FSF).⁷⁶⁵ In her distinction between the public ordering and private ordering types of governance in terms of access, Niva Elkin-Koren argues that solutions enabled by contract, must be looked upon with scepticism. One of the arguments that she brings forth is a fundamental and legal question as to whether such licences and terms and conditions are at all to be considered as contracts. She shows that a number of court cases have indicated that these may in fact be viewed as “unilateral statements drafted by rightholders, [and] are often enforced even in the absence of assent by end-users. Courts have held online contracts enforceable based on very minimal evidence of assent (ProCD Inc., 86 F. 3d 1447).”⁷⁶⁶ As such:

It is often suggested that these online contracts are in fact a property license, which is not a contract. It is a unilateral legal action, through which a property owner can exercise her rights and define the scope the authorized use. The binding force of a property license does not derive from exercising autonomous will and therefore it does not require consent by the user. The binding force of the licenses stems from the property rules, in this case copyright law.⁷⁶⁷

⁷⁶³ Ibid.

⁷⁶⁴ Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’, p. 376.

⁷⁶⁵ <http://www.gnu.org/licenses/gpl.html>. Last accessed 20th March 2014.

⁷⁶⁶ Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’.

⁷⁶⁷ Ibid.

The critique that must be stressed in terms of the tendencies emerging from private ordering and certain unilateral regulations do in fact affect access to works, particularly within the digital sphere and within commons or open access projects. Within the context and the theoretical framework of this research project, it is not, nor will it be argued, that the private ordering ought to be replaced with the public ordering. Rather, it will be argued that a functioning cultural commons within a legal setting can and *must*, accommodate for both.

7.5.2 BARGAINING POWER (INCLUDING FINANCIAL POWER)

As it has been stated and perhaps most clearly in the Shloss case, securing access through a contract-based settlement can sometimes require an arsenal of highly skilled lawyers and undoubtedly costly legal aid. The bargaining positions and the financial power of a party seeking to gain access to a work must also be addressed. The difference in the bargaining position and power between a professor writing an academic book with the backing of some of the world's most renowned lawyers in the area, and a consumer or an internet user is obvious. That the two differ and may not always be on equal footing does not always have to pose a problem, but the underlying structural problem that can be addressed here is that there is an unbalance in terms of users depending on their financial power.

A similar issue has been addressed with reference to Grey Tuesday, where it was shown how established musical artists, with the backing of record labels and with stronger financial means, were enabled to access and clear larger number of rights that they wanted to (re)use and incorporate into new derivative works, while lesser know or unestablished artists were not able to do the same.

Bargaining position and bargaining power in entering various entertainment contracts has been addressed before⁷⁶⁸ and the process of bargaining and the significance of inequality of bargaining power⁷⁶⁹ must be kept in mind and addressed when it comes to contract-based solutions to access of cultural works. Boon, Greenfield and Osborn address bargaining power in the case of artists signing to a record label. They write:

The majority of new artists do not have the bargaining leverage to negotiate individual terms within these agreements. This both encourages the use of standard form contracts and ensures that the terms agreed are very similar

⁷⁶⁸ See e.g. Guy Osborn and Steve Greenfield, *Contract and Control in the Entertainment industry. Dancing on the edge of heaven*, Dartmouth Publishing, (1998), Andy Boon, Steve Greenfield and Guy Osborn, 'Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts' in *International Journal of the Sociology of Law* 1996, 24, 89–115.

⁷⁶⁹ Boon, Greenfield and Osborn, 'Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts'.

to those in the standard form. Moreover, it is reasonably easy for the major players to 'keep in step' and to effectively impose on artists those terms which they are likely to be offered elsewhere (Beale 1986). The globalization of commerce and the ability to specify the *lex fori* has led to the migration of terms across jurisdictions so that the individual companies in the major record producing countries have very similar agreements.⁷⁷⁰

Similar line of argument may be presented as a critique to the contract-based solutions to access here. The majority of users do not have the bargaining leverage to negotiate the individual terms of licences drafted on the rightsholders' unilateral discretion. The standardisation that occurs in these instances, with for instance Creative Commons licences, create a situation that while *in theory* access can be agreed upon contractually, *in reality* this can only be achieved by strong market actors, or users with substantial bargaining and financial power. Boon, Greenfield and Osborn write further:

In certain kinds of business, the practice of using standard form contracts is both efficient and expedient. However, it is arguable that standard terms are inappropriate to 'transactions' where the commodity is individual creativity rather than goods.⁷⁷¹

While courts have been protecting artist/creators in terms of uneven bargaining power as Boon, Greenfield and Osborn show, it is worth to continue a discussion concerning user/creators and their protection when it comes to standardised contracts or bargaining power that concerns access to artistic works. As the Shloss case particularly shows, this is not only interesting to keep in mind when it comes to standardised contracts, but also individual contracts that are entered into with rightsholders. That particular case shows what type of bargaining and financial power is required in order to gain access to works of renowned authors such as Joyce.

7.5.3 LAW AND POLITICS

The last critique that shall be particularly presented here with regards to contract-based solutions is a problem that is quite apparent particularly in the Schulz case, as well as, in a certain sense, when it comes to the Kafka files and the Banksy mural. That the restitution of cultural property has always been primarily an affair of the states, and of disputes between states, with each state claiming sovereignty or ownership over cultural property of major signifi-

⁷⁷⁰ Boon, Greenfield and Osborn, 'Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts'.

⁷⁷¹ *Ibid.* p. 102.

cance⁷⁷² is a fact very significant to address here. While we in the former section saw how bargaining and financial power can affect access and who manages to get access to works and on what/whose terms, within the ambit of that which Elkin-Koren refers to as private ordering, we shall lastly look at some difficulties with that which she refers to as public ordering. The public ordering is something that she associates with the state apparatus, as opposed to the market apparatus of the private ordering. She writes about governance by general rules that stem from the public ordering:

General rules adopted by society through collective action mechanisms are arguably more distant from temporary interests of particular parties. Public rulemaking processes allow a choice to be made behind a Rawlsian ‘Veil of Ignorance’. That, of course, is if we momentarily put aside the deficiencies of governments, especially those identified by public choice theory.⁷⁷³

Elkin-Koren places private ordering and public welfare on two opposite sides, but stresses the deficiencies of governments identified by public choice theory. The governments identified by public choice theory will lack a democratic dimension since the approach to political life there is the same as the economical life. In the Schulz case we saw for instance how traditional general rules, provided by *various* states, did not suffice to provide satisfactory solutions to the access issues, leaving it up the states to negotiate on a diplomatic level how access to the work can happen.

The diplomatic negotiation, particularly attached to access to works that are somehow deemed to be cultural heritage brings with it, not an uneven playing field when it comes to private bargaining power, but rather larger stakes that are involved in international politics and negotiations being carried out on diplomatic levels. The consents and agreements that happen in this sphere can end up in contracts that regulate the access issue, but these contracts can simultaneously be very problematic, as we saw with the agreement between the state of Ukraine and Yad Vashem.

This type of problem can be an obstacle to access to cultural works particularly if there is an international dimension to the work, where it is impossible to decide *which public* the work belongs to and *which public* should be allowed to access these works. In the international relations and diplomatic settings there are no (real or imaginary) veils of ignorance, on the contrary, there are the states

⁷⁷² Marie Cornu and Marc-André Renold, ‘New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution’ in *International Journal of Cultural Property* (2010) 17:1–31, p. 4.

⁷⁷³ Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’.

that are very much aware of everything and negotiations are often underpinned by political leverage, not necessarily connected to the cultural work in question.

Other than the cases presented here there are innumerable examples where cultural heritage, repatriation of cultural heritage or the whereabouts of the cultural heritage have stood in the middle of international diplomatic disputes as well as negotiations. That those types of situations affect access is obvious, and equally as with bargaining power above it can also mean that the more powerful international players are involved they will always have a greater chance of securing these works for their own benefit.

These processes have led to that quite often, in order to reach political agreements in terms of access, the parties have had to frame cultural heritage within a property paradigm. Disputes are then settled within the diplomatic framework, where the cultural work is seen as something that is 'owned' by one party:

Alternative means of settling conflicts of interest in the *ownership* of cultural *property*, which coexist with the traditional tools (such as bilateral or multi-lateral treaties), take many forms: unilateral decisions or agreements that may involve various forms of intermediary (namely, mediation, conciliation, or arbitration). In the last few decades, these consensual arrangements have become increasingly popular, both in terms of form and substance, in line with changing sensitivities regarding the restitution of cultural property.⁷⁷⁴

This means that the political angle and the political leverage is also an important factor in terms of access to works, and affects, doubtlessly, all contract-based solutions that are negotiated on an international or multinational level.

⁷⁷⁴ [my emphasis throughout], Cornu and Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution', p. 3.

7.6 COMMONS (3): THE LEGAL CONCEPT OF CULTURAL COMMONS

Rip, mix, burn. After all it's your *art*.⁷⁷⁵

Lawrence Lessig claims that the first instinct when battling infringement of copyright on a large scale was to wage the so-called “copyright war” against infringement. The second response was to create alterations within the digital architectures of the network, to build DRMs and content IDs in order lock down distribution of culture beyond permissions granted by the rights owners. This second wave response came with a renewed optimism, as the first wave response had not provided satisfactory decrease of infringement activities. To be able to perfectly control re-use would disenable infringing activities.

It proved difficult, not to say impossible, to achieve perfectly controlled and controllable re-use. Subsequently, the digital infringing activities continued. Lessig argues that the only way to understand and approach access to art is to find the right mix between what he calls law, norms, market and architecture. Lessig defines law as statute, norms as rules that exist ‘outside’ the legal sphere, market as free liberal market, and architecture he refers to the architecture of internet – both technical and legal – that create and enable the online digital environment. I shall return to this particular mix, and these four modalities, further down in chapter 8.

7.6.1 NOMADOLOGY: SMOOTH AND STRIATED SPACES AND THE LEGAL CONCEPT OF THE CULTURAL COMMONS

Deleuze/Guattari write in *A Thousand Plateaus* that “the nomads do not precede the sedentaries; rather, nomadism is a movement, a becoming that affects sedentaries, just as sedentization is a stoppage that settles the nomads.”⁷⁷⁶ When Deleuze/Guattari discuss the nomadic space they do so in connection to their basic principle of ‘smooth’, heterogeneous space. The nomadic space and the

⁷⁷⁵ Modified Apple Inc.’s advertisement slogan, the word *art* in italics replaced the original “music”. The original slogan reads: “Rip, mix, burn. After all it’s your music”. See Lessig, *Future of Ideas*, pp. 9-11. On Wikipedia, the slogan is described in the following manner: “Rip. Mix. Burn.’ (2001) used to promote iTunes desktop CD burning capability, somewhat controversial as it was seen by some as advocating piracy”. See:

http://en.wikipedia.org/wiki/List_of_Apple_Inc._slogans. Last accessed 20th March 2014. However the terms and conditions for use of this very iTunes desktop together with current intellectual property laws and DMR solutions make it, as Lessig wisely points out, impossible to in fact rip, mix or burn... He writes: “Try to ‘rip, mix, [and] burn’ Disney’s *102 Dalmatians* and it’s your computer that will get ripped, not the content. Software, or *code*, protects this content, and Apple’s machine protects this code. It may be your music, but it’s not your film. Film you can rip, mix, and burn only as Hollywood allows. *It* controls that creativity—it, and the law that backs it up.” [original emphasis], Lessig, *Future of Ideas*, p. 11.

⁷⁷⁶ Deleuze/Guattari, *A Thousand Plateaus*, p. 475

nomadic forms of possession cannot simply be presented in opposition to striated space and the sedentary forms of possession. They write:

[W]e must remind ourselves that the two spaces in fact exist only in mixture: smooth space is constantly being translated, transversed into striated space; striated space is constantly being reversed, returned to smooth space [...] and the two can happen simultaneously.⁷⁷⁷

It is this very continuity, the constant movement from one form to another, the unfinished transitions from one form to the other, that must be understood and it is imperative that it be kept in mind when discussing the concept of the commons. The concept of the (natural as well as cultural) commons can never be approached as a static concept, yet at points it becomes striated too. As society develops, it too becomes subject to lines of flight, that move it, force it into new nomadic territories, and so on, as we have seen with e.g. the Creative Commons initiative. Even though it initially and most probably was a result of nomadic lines of flight and became a smooth space in its own right that fled the striated space of copyright law, it too became striated with time.

Deleuze/Guattari claim that the distinction between the two types of spaces is that in the smooth space we encounter “free action” while in the striated space we encounter “work”. The combination between free action and work when it comes to the production of cultural works is particularly obvious, and this theoretical framework allows for both free action and work in the cultural commons. With the Creative Commons project in particular it can be shown how it both challenges and exists within the capitalist structures. This is entirely in line with the mixture of smooth and striated spaces that Deleuze/Guattari present, particularly within capitalism:

world capitalism, a new smooth space is produced in which capital reaches its ‘absolute’ speed, based on mechanic components rather than the human component of labor. The multinationals fabricate a kind of deterritorialized smooth space in which points of occupation as well as poles of exchange become quite independent of the classical paths to striation. What is really new are always new forms of turnover.⁷⁷⁸

My research has especially discussed the TRIPS agreement in the first chapter as the legal document that harmonises and governs the global turnover of intellectual property. The current IP regime can thus very well be read within the concept of “world capitalism” as Deleuze/Guattari describe it. Thus, when discuss-

⁷⁷⁷ Deleuze/Guattari, *A Thousand Plateaus*, p. 524.

⁷⁷⁸ [original emphasis], *Ibid.*

ing the concept of the cultural commons within this regime, it is imperative that the deterritorialising nature of capital on a global scale be kept in mind:

The present day accelerated forms of the circulation of capital are making the distinctions between constant and variable capital, and even fixed and circulating capital, increasingly relative; the essential thing is instead the distinction between *striated capital* and *smooth capital*, and the way in which the former gives rise to the latter through complexes that cut across territories and states, and even the different types of States.⁷⁷⁹

Accordingly we arrive, through nomadic and sedentary forms of possession, smooth and striated spaces, to smooth and striated capital. This particular distinction applied to current intellectual property is very pertinent as it allows us to see the two inherent characters that exist within the cultural work as capital (economic, social and cultural) – the striated capital with sedentary forms of possession (e.g. commodity based type of exploitation) and smooth capital with nomadic forms of possession (e.g. global, knowledge-based, network-based forms of management of IP, commons projects, open access projects etc.). How then can it all be connected to a legal concept of cultural commons?

We have seen, since chapter 2, where the rhizomatic jurisprudence was presented, legal concepts within the Deleuze/Guattarian theoretical matrix gain certain potential that in turn caters for these particular movements from smooth to striated, from sedentary to nomadic (and vice versa). In fact, Deleuze/Guattari go from the section where they treat smooth and striated capital into a section that they call “The Aesthetic Model: Nomad Art”⁷⁸⁰. However, the nomad art that is referred to by them is not ‘nomadic’ – as in non-static, not-striated, fluid, continuous, etc. – but literarily they are referring to the art created by ancient people that led *nomadic lifestyles*. They write:

On one side, Egypt had its Hyksos, Asia Minor its Hittites, China its Turco-Mongols; and on the other, the Hebrews had their Habiru, the Germans, the Celts, and Romans their Goths, the Arabs their Bedouins. The nomads have a specificity that is too hastily reduced to its consequences, by including them in the empires or counting them among the migrants, assimilating them to one or the other, denying them their own ‘will’ to art. [...] Moreover, it does not have that role in the guise of a ‘will’; it only has a becoming, it invents a ‘becoming-artist’.

⁷⁷⁹ [original emphasis], Deleuze/Guattari, *A Thousand Plateaus*, p. 543.

⁷⁸⁰ Ibid.

By using the cases that were presented in chapter 4, and further elaborated upon here, I have on the other hand, or perhaps even further still, attempted to show the nomadic tendencies, i.e. not in the literal but in the theoretical sense, in art today. The particular becoming that I have been interested in is the very becoming of law, or becoming of jurisprudence. How does a concept of cultural commons *become* law? I shall return to this in the final remarks and discussion on the becoming of law and Law Without Organs below. But before arriving there I will conclude this penultimate chapter with some last remarks on the construction of the legal concept of the cultural commons.

In order to that, let us first be reminded how Deleuze/Guattari end their own penultimate chapter, before they reach their conclusion of *A Thousand Plateaus*, by writing:

Even the most striated city gives rise to smooth spaces: to live in the city as a nomad, or as a cave dweller. Movements, speed and slowness, are sometimes enough to reconstruct a smooth space. Of course, smooth spaces are not in themselves liberatory. But the struggle is changed or displaced in them, and life reconstitutes its stakes, confronts new obstacles, invents new paces, switches adversaries. Never believe that a smooth space will suffice to save us.⁷⁸¹

7.6.2 THE NO-LACK

A legal concept of the cultural commons constituted by way of Deleuze/Guattarian theory and their ambiguity towards schizophrenic capitalism opens up a potential, an a-political alternative, a framework that can theoretically introduce the cultural commons into the rhizomatic jurisprudence. The legal concept of the cultural commons also has, in turn, an a-political nature:

Almost the entire range of liberal traditions, from laissez faire to progressive liberalism or social democracy, can find information based cooperation attractive. The left, too, can find in these practices one way out of the dead end that state socialism proved to be. Libertarianism, of both right-wing, market-oriented, and left-wing, anarchistic varieties, likewise finds attractive narratives to tell about cooperation in the networked commons. Adherents to this broad range of views can then, as a practical matter, ally with market actors who eschew political views altogether and who are focused on survival, innovation, and growth in an increasingly competitive global economy where learning and adaptation are imperative. Needless to say some of this

⁷⁸¹ Deleuze/Guattari, *A Thousand Plateaus*, p. 551.

congruence is temporary and ad hoc. Some, however, represents a real change in conditions and intellectual alignments.⁷⁸²

And put yet in another way in the words of Lawrence Lessig:

The struggle against these changes is not the traditional struggle between Left and Right or between conservative and liberal. To question assumptions about the scope of “property” is not to question property. *I am fanatically pro-market*, in the market’s proper sphere. I don’t doubt the important and valuable role played by property in most, maybe just about all, contexts. This is not an argument about commerce *versus* something else. The innovation that I defend is commercial and noncommercial alike; the arguments I draw upon to defend it are as strongly tied to the Right as to the Left.⁷⁸³

This can also be done from a legal side, to imagine a legal concept in this way that the entire ideological range can find attractive. The Deleuzian and Deleuzeoguattarian theory has demonstrated how it is not a question of Either (inflexible copyright) Or (more flexible contracts and self-governance) but BOTH, or AND, AND... This type of reasoning as we have seen throughout this study is suited for such a concept as the cultural commons. Atteberry writes:

The solution to this problem of the continued colonialist distribution of wealth, therefore, will not be found simply in a *cultural* commons, although a *cultural* commons will surely have an important role to play. When faced with the dynamic of deterritorialization, Deleuze and Guattari ask, could it be that the revolutionary path is to ‘go further still, that is, in the movement of the market, of decoding and deterritorialization? For perhaps the flows are not yet deterritorialized enough’. The questions for the A2K movement then become what function the *cultural* commons serve in the globalized economy, and how might we accelerate the process that it promises by finding ways to resist its potential neo-colonial reterritorializations?⁷⁸⁴

⁷⁸² Benkler, ‘The Idea of Access to Knowledge and the Information Commons: Long-Term Trends and Basic Elements’ in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 231.

⁷⁸³ [my emphasis] Lessig, *Future of Ideas*, p. 6.

⁷⁸⁴ [my emphasis, quote modified], Atteberry, ‘Information/Knowledge in the Global Society of Control: A2K Theory and the Postcolonial Commons’, in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*. The quote has been modified here, the words “cultural” in italics have replaced Atteberry’s original “informational”.

The final section of this chapter finally merges the theoretical approach of this thesis to the A2K movement.

Already in 2002, and soon after the adaptation of the Doha Declaration that resulted in TRIPS, there came an influential report from the UK Commission on Intellectual Property Rights (CIPR). Even though it was a national report, it had a significant impact, because the commission consisted of international members, also including members from developing countries, experts, representatives from the industry and academia. This was the first time a “one size fits all” in terms of intellectual property rights and management of IP rights was called into question:

[I]n terms of its content, the CIPR report captured very accurately the growing trend of opinion that distanced itself from both a maximalist discourse that promoted the absolute benefits of intellectual property and a discourse that was unequivocally critical of intellectual property as a matter of principle. It thus recognized both the benefits and costs of intellectual property protection, emphasizing the need to ensure that the costs do not outweigh the benefits [...]⁷⁸⁵

This project has been a theoretical exercise that has attempted to show how this critical approach to intellectual property still is, simultaneously and adamantly, able to recognise the benefits of an intellectual property protection. Particularly legally, the concept of cultural commons as an addition to current IP legislation has been discussed, but other than on a contractual or a licence-level, a full step has never been taken towards a full-scale commons concept in law. However, the movement itself, A2K, as well as the discussions in terms of reforms of current intellectual property rights are not new.

The time is ripe to *seriously* discuss a construction of a legal concept of the cultural commons.

Yet, other than on policy levels, or initiative level, such as e.g. Creative Commons and various other initiatives that govern access to art e.g. the Andy Warhol Foundation,⁷⁸⁶ the issues concerning a legal framework of the cultural commons have so far not been discussed extensively. That being said, the policy

⁷⁸⁵ Ahmed Abdel Latif, ‘The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing Country Delegate’, in (eds.) Krikorian and Kapczynski, *Access to Knowledge in the Age of Intellectual Property*, p. 102.

⁷⁸⁶ The Andy Warhol Foundation takes the following stand in terms of the works that Andy Warhol left behind (including the tangible paintings) that illustrates precisely these types of hybrid initiatives that allow for both access and revenue. The Andy Warhol Foundation’s motto is: “We’re Lessig when it comes to artists and scholars [and] Disney when it comes to commercial use.” It means that certain interests are not on a par, and there is nothing that says that they cannot be treated differently in terms of access.

and initiative driven projects can now be evaluated and lessons from those projects can be borne in mind when discussing legal alternatives.

This project has attempted to show the theoretical possibility and potential to successfully fuse a legal concept of the cultural commons with intellectual property law, as well as with the free market and global capitalism.

One of the theoretical breakthroughs that the Deleuzeoguattarian theory provides here is that what I refer to as the “lack of lack” above. On a most basic level it can be read in conjunction with the unlimited nature of the intellectual products, and on a theoretical level it can be connected to nomadic form of possession, and smooth capital. The way in which nomadic forms of possession can be grasped legally, that traditionally envisions possessions to be based on sedentary principles, is to understand and approach law in its rhizomatic guise and understand the smooth attributes of capital forms and the potentialities the rhizomatic reading of jurisprudence opens up to. This has to be done without falling into the trap of the regime of arborescent conjunctions, the “either...or”, concepts that fundamentally hinder the creation of a legal concept of the cultural commons.

On the side of the nomadic assemblages and war machines, it is a kind of rhizome, with its gaps, detours, subterranean passages, stems, openings, traits, holes, etc. On the other side, the sedentary assemblages and State apparatuses effect a capture of the phylum, put the traits of expression into a form of code, make the holes resonate together, plug the lines of flight, subordinate the technological operation to the work model, impose upon the connections a whole regime of arborescent conjunctions.⁷⁸⁷

So in order to advance and strengthen access to art and create legal pathways which facilitate that art can be communicated, accessed and shared, could the legal thinking formulate a conception of the commons and could the concept of the cultural commons be introduced, applied and given a platform in law?

Yes, as long as we adopt a Deleuzeoguattarian approach to the concept and way of seeing things, by plugging the endeavour of creating a legal concept of the cultural commons into all the plateaus of the abstract machines, by allowing for encounters and lines of flight, by traversing smooth and striated spaces, *by engaging in rhizomatic jurisprudence.*

⁷⁸⁷ Deleuze/Guattari, *A Thousand Plateaus*, p. 458.

CHAPTER 8

*CONCLUSION – FIXING THE CONCEPT OF THE CULTURAL COMMONS IN
LAW*

8 CONCLUSION – FIXING THE CONCEPT OF THE CULTURAL COMMONS IN LAW

In *Future of Ideas* Lawrence Lessig poses the question: What do we gain by keeping resources free? Free in this sense does not mean without cost, but free – as in – *not hostages*. This question marks the end of a discussion that shows that “resources held in common, *sometimes* create more wealth and opportunity for society than those same resources held privately.”⁷⁸⁸

Following Carol Rose’s article ‘Romans, Roads, And Romantic Creators’ Lessig gives examples of the types of resources that sometimes create more wealth when they are held in common, such as *roads* and *town squares*. While I am fully in accordance with Lessig and Rose that certain resources gain their value by their openness, I have attempted to show here that an aspect of stints, that can control the fluidity (*fluidité*) of common resources, are equally significant. The aspect of movement and nomadology have therefore been integral when it came to (re)addressing law, art, capitalism and ultimately the legal concept of cultural commons without opening any of them up altogether, making them entirely free, *in all senses of the word*. So Lessig’s statement above and the emphasis on the word *sometimes* must not be underestimated also when we are imagining new, or reintroducing old, legal concepts. Resources held in common seem to, indeed, *sometimes*, create more wealth than when they are held *solely* privately. The knowledge economy has certainly attested to such tendencies.

I have addressed and analysed a multitude of jurisprudential conceptions and legal concepts in arriving at the concept of the cultural commons. Deleuze/Guattari write in the opening segment of *What Is Philosophy* that a concept is like a combination [*chiffre*] – a multiplicity⁷⁸⁹, “[c]omponents, or what defines the *consistency* of the concept, its endoconsistency, are distinct, heterogeneous, and yet not separable. The point is that each partly overlaps, has a zone of neighbourhood [...]”.⁷⁹⁰ The rhizomatic approach that this project has suggested be adopted in jurisprudence and law, and the legal concept of the cultural commons, manifests the potentiality of jurisprudence and law and their genuine capability do deal with the multiple, complex, *concepts*, or constellations of concepts, cluster concepts, such as the cultural commons. This final chapter opens up the discussion about the wider implications of this type of rhizomatic jurisprudence, what it does and what it could do.

⁷⁸⁸ [original emphasis], Lessig, *Future of Ideas*, p. 86.

⁷⁸⁹ Deleuze/Guattari, *What is Philosophy*, p. 15.

⁷⁹⁰ [original emphasis], *Ibid.* p. 19.

8.1 SUMMARIES AND CONCLUSIONS

8.1.1 SUMMARY AND CONCLUSION: VOLUME I

In summary, this research project has attempted to address the legal and socio-cultural problems to access to art. It has proposed the legal concept of the cultural commons as a way of exiting what has appeared to be a never-ending schism, the struggles of the private and the public, open and closed approaches in law and elsewhere. Utilising the theories and methods developed by Gilles Deleuze and Félix Guattari the project has attempted to show how jurisprudence and law have the potential to reach beyond such opposites-based reasoning and earnestly enter into and govern the unfinished and continuous paradigms constantly being created by the digital knowledge society in a world that is still in a process of globalisation.

Volume I of the study focused in particular on the very “getting-beyond” as a theoretical endeavour. The research began by placing the concept of the commons within the A2K paradigm, divorcing it from the discussion concerning ownership of art and intellectual assets. Aiming to achieve a Deleuzian approach that *reaches beyond law through law* as an epistemological undertaking, Volume I did not indulge in the various What is? questions, not What is Law? or What is art?. Instead, Volume I introduced the Deleuzeoguattarian concept of the rhizome as an alternative approach to (the ontology of) law and art. Refraining from approaching law (and art) as a collection of “boxes” placed inside one another forming a system or a body, the project instead experimented with Deleuzeoguattarian plateaus, that when connected with each other form a rhizome. The concept of plateaus that make up the rhizomes was approached as more open to temporary alliances, connections, constellations – constantly unfinished, moving, iterant, able to change and create new formations. It was argued that such an iterant/nomadic/movement-based approach is particularly appropriate within the global knowledge society and its market(s).

By introducing the Deleuzian and Deleuzeoguattarian concepts and making them operative tools, as well as structuring the presentation and the lay out of this study and its findings within the same framework, Volume I then moved into a case study chapter. The case studies were presented as Deleuzian “encounters”, that is, previously unrecognised occurrences that challenge the dogmatic legal reasoning and break with it: occurrences that force the dogmatic reasoning to think, as Deleuze and Guattari put it. Presenting the cases as encounters and not as “obstacles to access”, the project could at the same time also demonstrate a creative *potential that emerges* from these cases, that initially seem only problematic and difficult. The case study chapter presented four different encounters that deal with and illustrate four different access issues, namely:

- 1) Access to the physical artworks
- 2) Access to inspiration
- 3) Access to artworks post mortem auctoris
- 4) Access through libraries and digitisation.

The case chapter culminated in and expressed the need for a rhizomatic approach to the access issue, particularly keeping in mind the aim that purports that access and ownership do not have to cancel each other out.

Conclusively, Volume I answers one part of the overall research question. I hope that I have managed to show that access to art and additional ways to access, communication and sharing of creative works can be introduced and given a platform in law. This conclusion has been reached through studying the first sub-questions of the study namely through engaging in a critique of the binary reasoning in law and by utilising the Deleuzian encounter-focused (as opposed to problem-oriented) approach. The critique of binary reasoning was mainly conducted in chapter 2 where the rhizomatic jurisprudence was introduced. There, it was shown how binary opposites such as inside-outside, private-public, open-closed could be transcended with the use and application of this theory. Reading law not as a “tree” but as a horizontally spreading rhizome opened up the possibility to introduce legal spatiality, legal territories, and how the legal territory is constantly spreading and making connections to new occurrences through lines of flight that also are constantly deterritorialising it.

In order to show how a wider access to art can be enabled through law the Deleuzian method was applied. By approaching the case studies that were presented in chapter 4 as Deleuzian encounters, the problems with binary reasoning that often result in obstacles to access could be presented, at the same time as a creative potential could be extracted from each case. This opened up to additional legal possibilities that could enable access, and freed legal reasoning from the binary opposites of mainly opened-closed.

8.1.2 SUMMARY AND CONCLUSION: VOLUME II

Volume II introduced the concept of the commons, first on a theoretical level (chapter 5), then in conjunction with intellectual property law (chapter 6), and finally together with contract-based commons projects and solutions (chapter 7). The theoretical approach to the commons began in the theory of Michael Hardt and Antonio Negri, who in their turn have relied on Deleuze and Guattari theoretically. Utilising Hardt and Negri’s approach to understanding the theoretical framework of the commons, could also be connected to the rhizomatic jurisprudence that was presented in Volume I, it formed an additional plateau. Adding on the commons and developing the two together created the approach to the legal concept of the cultural commons that this research has been after to study. For that to be done the three chapters in Volume II

achieved a particular purpose, namely, to bring the study closer towards the legal concept of the cultural commons.

Chapter 5 outlined the general concept of the commons by beginning in the ownership and property paradigm as described by Hardt and Negri, and contrasting the concept of commons to ownership-based models. It then went on to contrast the concept of the commons with various (striated) types of public spaces, in order to arrive at the being-in-common model, i.e. a concept of the commons that does not rely on an underlying communitarian form of ownership but is rather connected to the principle of communication. This chapter also contrasted the concepts of the natural commons and artificial commons. While it was made clear that this research project was within the realm of artificial commons, the natural commons were nonetheless also described topographically in order to demonstrate how and why they function differently, particularly when it comes to the difference between finite and infinite resources. This distinction between the natural and artificial commons has been the prerequisite and had to be acknowledged before moving on to chapters 6 and 7.

Volume II then moved into chapter 6 where intellectual property law was discussed, its constructs and connections to the market and why many intellectual property concepts are problematic within a commons based setting. Analysing the numerous binary opposites that underpin intellectual property law and the dogmatic legal reasoning connected to it, chapter 6 argued that this was the very core that needs to be addressed if a legal concept of the cultural commons is to be discussed seriously before any attempts to introduce it within the legal sphere are made. Chapter 6 also demonstrated the nomadic and deterritorialising aspects of the market and capitalist structures themselves, and argued that law also has to be able to adapt to such itinerant and floating tendencies. It was argued that the binary opposites created by dogmatic legal reasoning in intellectual property law not only stifle further development of cultural commons, but also potentially stifle the market and the inherent movements that it is subject to on a global level.

The seventh chapter of this study carried the discussion of the cultural commons concept into the digital era. This chapter discussed two types of already existing commons types enabled by various contract-based solutions. Firstly the vast and very popular Creative Commons initiative was presented, and then, secondly, a number of individual agreements were also brought in from the case studies in chapter 4 and analysed as commons. More exactly, the second type of solutions were not directly named as commons solutions as such but in the context of chapter 7 they were addressed as commons due to the fact that they underpinned the discussions dependent on a communication-based access discourses required within a democratic society. Both of these types of (commons) solutions that pertain to wider access to artworks were then placed within the Deleuze-Guattarian theoretical matrix, and particularly the models of sedentary and nomadic forms of possession. After having discussed the prob-

lems with these contract-based commons solutions, the chapter finally presented *the legal concept of the cultural commons*. This model is based on this research project's particular theoretical framework and approach to law, as well as this research project's subquestions and aims.

Volume II answers the second part of the research question, namely how a constructive approach to a legal concept of the cultural commons could be adopted and how it can enable further access to art through law. Beginning to conduct a rhizomatic *linkage* (subquestion 2) between various legal concepts, such as ownership-public space-commons in chapter 5 and between various binary opposites from intellectual property law such as right-privilege, invention-information, content-carrier, the research demonstrated that the constructive approach to the cultural commons lies in these very exercises of linkages that the Deleuzian and Deleuzeoguattarian methods opened up for. The “and” in the rhizome theory was shown in the second Volume of this study and how it can subvert the “or” of the dogmatic legal reasoning.

The penultimate chapter of this study finally arrived at the constructive discussion of the cultural commons, demonstrating that a legal concept of the cultural commons is not only possible but also *desirable* if we are to take this concept seriously and introduce it to law. Chapter 7 shows how contract-based solutions hinder the communication aspect (subquestion 3) of the commons, and are problematic in their own right, particularly in terms of the private ordering, bargaining power, and the political aspects. As one of the last conclusions drawn in this study was that the legal concept of cultural commons does not enable communitarian ownership but is rather an access based democratic possibility to communicate and share knowledge.

8.1.3 OVERALL CONCLUSIONS

The overall conclusion of this project is that a legal concept of the cultural commons must be developed further and be made operative. By placing it inside the A2K paradigm, within the research question and the three subquestions of this project, a theoretical framework has been added and additional emphasis has been placed on artworks as knowledge, which are often side-stepped or marginalised within the A2K field.

One of the largest arguments that has been brought forward in this study has been to argue that a Deleuze-inspired approach to jurisprudence may open up new research possibilities, in the field of access to art and cultural commons, but also more broadly on a jurisprudential legal philosophical level. For instance, the six principles of the rhizome – that have guided the theoretical approach of this study, namely *connection*, *heterogeneity*, *multiplicities*, *asignifying rupture*, *cartography*, and *decalomania* can be very instrumental in modern jurisprudence,

particularly in terms of global influences and the paradigms of the knowledge society and their impact and effect on jurisprudence and law.

The notion of connectivity and heterogeneity has guided this entire research project and has been imperative for the introduction of the concept of cultural commons in law. The ability to establish connections between, to quote Deleuze/Guattari, “semiotic chains, organisations of power, and circumstances relative to the arts, sciences, and social struggles”⁷⁹¹ now in the end of this research project acquire a more practical meaning. This research studied the *semiotics* of law in general and of intellectual property law in particular, for instance in the use of the term ‘orphan’ as a metaphor, or the concepts of ‘right’ and ‘privilege’ as legal tools, the ‘romantic notion of the author’ as a symbol that underpins law and what they all denote in terms of who the creator of the artwork is (or assumed to be) in law and how access happens. The project has also studied various *organisations of power*, e.g. the state governed forces such as freedom of speech and freedom to information, market forces and the incentives of profit and gain, etc. All of this was then connected to the *arts*, (legal) *science* and even *social struggles* e.g. the A2K movement that is still very much framed within a social struggle paradigm. In the connection of all of these heterogeneous occurrences the project attempted to show various ‘becomings’ i.e. creative alliances that show the potential of jurisprudence and law.

The third principle of the rhizome, multiplicities, has also played a pivotal role for this project. Instead of presenting law as a delimited body with an inside and an outside, using the Deleuzeoguattarian concept of multiplicities the project has attempted to show that traditional structures of traditional legal reasoning exclude certain multiplicities that a rhizomatic jurisprudence can cater for. For instance, the concept of cultural commons must be connected both to legal principles, such as e.g. copyright, as well as to market structures that in a dogmatic approach would fall “outside” the legal sphere. By approaching law as all-embracing in that way, i.e. as something that is able to contain all there is to be contained,⁷⁹² not just the market forces but even further also affects, emotions, multi-identities etc. as we saw for instance in the Schulz and Kafka cases, the research demonstrated how the notion of multiplicities could be incorporated as a critique of boundaries of jurisprudence and law. In a Deleuzeoguattarian rhizomatic jurisprudence, where the attempt is to reach beyond the ontological question of what law is, this approach is necessary and carries within it the legal potentiality.

The fourth principle of the rhizome, asignifying rupture, has been used to show how when a rhizome is broken with a line of flight, it starts up anew elsewhere. This has particularly been used in the case studies both in chapter 4 and chapter 7, where it was demonstrated how an encounter causes a number of

⁷⁹¹ Deleuze/Guattari, *A Thousand Plateaus*, p. 8.

⁷⁹² Philopopoulos-Mihalopoulos, ‘Critical Autopoiesis: The Environment of Law’, p. 54.

lines of flight that take on lives of their own, so to speak. The project has followed their deterritorialising nature, the reterritorialising aspects that are then added on by the positive law and the capitalist structures, but also their potential in that new alliances are constantly being formed elsewhere within (old and new) lines of flight.

Finally, the fifth and sixth principles of the rhizome have assisted in approaching the spatiality of law differently and to further discuss the cartography of law. Instead of mimicking reality, which is constantly changing, rendering law constantly lagging, the Deleuzeoguattarian theory has introduced the mapping approach. While these two last principles of the rhizome may not have been equally expressly addressed throughout the study, as have the other principles, they have been pivotal in addressing the deterritorialising and reterritorialising tendencies of law and its lines of flight. The mapping method that Deleuze and Guattari utilise provided the tools that show how law does not have to be described as static, and that it can very much be adaptable to the constantly changing reality that it indeed can stand to be connected to.

This connectivity of law has also been illustrated by presenting the case studies as encounters. It is warranted, in the end of this project, to also specifically address these encounters here, as there are certain conclusions that have particularly emerged from the cases.

8.1.4 THE CASES-SPECIFIC CONCLUSIONS

The cases presented in the case-study chapter, and then further developed in chapter 7, have been instrumental for this research project. However, I have consciously limited their scope, so as not to overshadow the commons concept that had to be at the forefront.

The Bruno Schulz case – Access to *the physical artworks*

When I discussed the Schulz mural as a Deleuzian encounter I had to focus on extracting the most illustrative lines of flight that emanated from it. I selected six lines of flight as particularly interesting for this project namely identity, fragmented artwork, moral rights, cultural heritage/folk art, digital reproduction, and space/time. All these lines of flight challenged certain dogmatic legal concepts. There were a number of conclusions that arose from this case, such as the problem with the notion of a unified identity of the artist that underlies many legal concepts, which becomes very difficult to defend and uphold in these types of cases. The same could also be detected in the Kafka case. A similar underlying assumption, namely that an artwork is always assumed to be unfragmented, i.e. whole, was also emphasised, and the critique could both be connected to the knowledge value of the artwork through the writings of e.g. Walter Benjamin, but also to some intellectual property concepts as e.g. moral

rights. Demonstrating how the particular concept of moral rights requires a living, definable, unified artist, the line of flight indicated a number of arguments in line with moral rights, but differing on some key aspects, brought forward by Yad Vashem as an institution on a collective level.

The critique of the moral right as a legal concept and its inability to be enforced on a collective level was connected to the notions of heritage and folk art. These concepts in their turn required a definable community, and a work of art that more directly than Schulz's mural manages to do, references the culture of a clearly defined community. Finally, one of the main finds and conclusions that emanated from the Schulz case was that even when digital technology and the alternatives of the information society have been introduced the problems in terms of access remain, even though the digital alternative opens up new possibilities. One of the main arguments in terms of this case was to show how access to physical works could still be restricted even though there were digital alternatives. The conclusion from this particular encounter is that Bruno Schulz's mural and the access issues connected to it very much challenged many, not to say most, of the relevant dogmatic legal concepts, illustrating a number of the shortcomings of dogmatic legal reasoning and positive law that could be deployed and placed within the matrix of the cultural commons. The case also opened up a potential in law to follow these particular lines of flights and discuss them further.

The Darfurnica case – Access to *inspiration*

With the Darfurnica case the aim was to particularly illustrate access to inspiration as an encounter. This case served to challenge the notion of the artwork as something that an artist creates *ex nihilo*. Instead, this case presented the artwork as a rhizome, based on inspiration from various other artworks, artist, other types of sources available in society, including other (commercial or artistic) creative expressions. In such cases, in order to create new artworks, artists need to have access to all these other artworks, brands, creative expressions, etc. In order to discuss access to inspiration, the encounter was framed around the legal concepts of derivative work, intellectual works as possession and/or expression.

The concept of derivative work is a concept that emanates from intellectual property law. When it came to the Darfurnica case the two courts of law that had to rule on this case, had to take into account the difference between possession and expression – more exactly between the Louis Vuitton brand as an intellectual property, a possession, and Nadia Plesner's work, as a social comment, an expression, a derivative work.

One of the main conclusions that could be drawn from this case emerged from the expression that the Dutch court chose in its ruling, where they uttered, that possession and expression were fundamental rights, on equal footing, but

conflicting. Being able to demonstrate this instance where within the traditional legal reasoning two rights can be on an equal footing but conflicting, allowed the project to draw the conclusion that there were shortcomings in the way we currently approach fundamental rights, but also a potential in the possibility of connecting fundamental rights with each other in various new constellations. Another conclusion from this case that could be drawn was that the reading of the Deleuzian concept *difference* could be of interest, where it could be shown on a theoretical level that even though two rights might be on an equal footing that does not necessarily mean that they are commensurable – nor that they ought to be moulded into identical types of commensurable ‘fundamental rights’ forms. Whenever that is done in terms of access to inspiration a conflict between possession and expression will always exist and create these types of obstacles to access.

This case called for an insertion of the Deleuzeoguattarian *and* when it comes to access to inspiration and derivative works.

The Dead Poets case – Access to *artworks post mortem auctoris*

The third case study dealt with access to works left behind by deceased authors but where an estate or heirs control access. The discussion was framed within the paradigm of art. 27 UDHR and two access cases were used, namely access to the works of Franz Kafka and James Joyce. More precisely, the cases focused on the heirs to these prominent literary figures that decline access to works left behind such as letters and drafts.

Using art. 27 UDHR as the guiding legal concept, but contrasting it partly to certain intellectual property provisions, stemming mainly from the TRIPS agreement, as well as pointing to its internal double nature, one of the main conclusions of this case could echo the previous two, in terms of opposite based reasoning, trans-nationality, non-belonging and fundamental rights, *that are on equal footing but conflicting*. However, this case study as an encounter added two additional dimensions, namely that of *privacy* and what is, in heritage studies, referred to as *memory making* and *production of history*.

The two cases that were framed as one encounter could lead to an additional conclusion and that was that the notions of privacy are very rarely discussed in terms of access, and because of that, they form an obstacle to access that may not be apparent. Posing the questions whether last wishes of deceased authors or family issues are always enough to act as a shield to access, the case study concludes that in conjunction with art. 27 UDHR such a practice is not evident. The case argued that documents that can be instrumental in collective memory making must be placed inside art. 27 UDHR discussions more often. A pertinent question emerged from this case study namely when does a literary work achieve such stature that it ought be seen as having broken away from the ambit

of the private sphere and entered the realm of e.g. cultural heritage or the public domain that *everybody* ought to have access to?

The Orphan works case – Access through *libraries and digitisation*.

The last encounter that I presented in chapter 4 differed from the three previous ones. I focused on one particular legal concept as an encounter namely *orphan works*. On a broader note that case study discussed abandoned and forgotten artworks and access to such works *through libraries and digitisation*.

In order to conduct the study orphan works as a legal concept was scrutinised in detail – i.e. by studying how the concept itself has been formulated in law it could be shown that the construction of this particular concept both could serve as an obstacle to access as well as it was an instance when the jurisprudential creativity demonstrates its rhizomatic potential. By presenting four particularly interesting aspects of the orphan work concept: public interest mission, access, revenue, and availability to public – the rhizomatic quality could be shown by demonstrating how access and revenue do not have to be framed as opposites in law. The orphan works concept has been envisioned as a concept that has a built-in public interest remit – which is there to enable access to the works that otherwise would have remained locked up.

Most of the orphan works exist in libraries and gaining access to them could be made easier, but access cannot be granted due to the fact that rights holders are not known and cannot grant permissions for use. This tension between the unknown rightsholders and public access was further developed by placing the discussion within the metaphor used for this particular legal concept, namely “orphan”. By examining whether this particular term is at all an apt metaphor for description of these works, and what kind of legal ‘reality’ it constructs and projects, it could be concluded that by naming the concept an orphan it also indicated that there per such reasoning has to also be a ‘parent’. But could the concept have been called something else and could another term to designate these works be used, e.g. the much more provocative *hostage work*?

Lastly, two orphan work related cases were presented, one that involves *de facto* orphan works i.e. the case of Google Books and the HathiTrust, and the second one that is not directly named as involving orphan works, i.e. the case of Banksy’s Slave Labour mural. The two cases further assisted in the discussion concerning access to works through libraries and digitisation that has been prevented through the legal concepts that counteract orphan works, as well as how rhizomatically the term orphan works could be extended to also include other works that are not necessarily envisioned as orphan works such as graffiti.

8.1.5 THEORETICAL CONCLUSIONS

The Deleuzian and Deleuze-guattarian approach to jurisprudence revealed its rhizomatic nature and opened up to new questions, new theoretical approaches and new research possibilities. I will only briefly mention two potential theoretical paths that this project has particularly culminated in, and it has to do with two theoretical connections: Deleuze and Habermas, and, Deleuze and Luhmann.

8.1.5.1 THE DELEUZE/HABERMAS – AXIS

Deleuze and Guattari were wary of the idea of communication. As a matter of fact, already in the introduction to *What is Philosophy* they had voiced their dislike of it:

Philosophy does not contemplate, reflect, *or communicate*, although it must create concepts for these actions or passions. Contemplation, reflection and communication are not disciplines but machines for constituting Universals in every discipline. The Universals of contemplation, and then reflection, are like two illusions through which philosophy has already passed in its dream of dominating other disciplines (objective idealism and subjective idealism). Moreover, it does no credit to philosophy for it to present itself as a new Athens by *falling back on Universals of communication* and the media (intersubjective idealism). Every creation is singular, and the concept as a specifically philosophical creation is always a singularity. The first principle of philosophy is that Universals explain nothing but must themselves be explained.⁷⁹³

This passage serves as a severe critique of Habermas and his communicative action and intersubjectivity. But how can a Deleuzian communication be envisaged without assuming the Universal of communication or without fetishizing the intersubjective idealism that Deleuze and Guattari refuted?

Today, this may not be as far fetched as it appears. A Deleuzian-Habermasian synthesis is, in fact, possible. If communication is given a rhizomatic function, as within the context of this project, communication in that case functions as the very linkage between two (or more) singularities such as for instance an artist and an enterprise, or a consumer and a public institution, between rights and open access, etc. In order to conduct such a reading of communication one must read Deleuze/Guattari very carefully. Their apprehension to communication seems to refer to the reification and indeed commodification of the communication itself. In the introduction to *What is Philosophy* they write further:

⁷⁹³ [my emphases throughout], Deleuze/Guattari, *What is Philosophy*, pp. 6-7.

Finally, the most shameful moment came when computer science, marketing, design, and advertising, all the disciplines of communication, seized hold of the word *concept* itself and said: ‘This is our concern, we are the creative ones, we are the *ideas men!* [...] How could philosophy, an old person, compete against young executives in a race for the universals of communication for determining the marketable form of the concept, *Merz*?’⁷⁹⁴

Clearly, the concept of communication is presented merely within its commercialised, commodified nature. But as we have seen so far, Deleuze and Guattari are not that forthright in their reasoning. Even though they were sceptical toward capitalism, they remained, as we have seen, ambiguous to it. The same can be argued about communication. Or to rephrase Connolly’s formulation once again “[t]o put it another way, we still don’t know what *communication* can become, even though its density and fragility give us reason to worry about the worst.”⁷⁹⁵

What does then a Deleuzian/Habermasian synthesis, albeit disjunctive, entail within the realm of this project? While the concepts of the rhizome, plateaus and lines of flight have helped us open up jurisprudence, law, art and capitalism, arriving at the *potential* in them all to accommodate for the legal concept of the cultural commons, the last piece in that puzzle is the communicative aspect. The concept of the commons relies on the communication of knowledge; it is its very *raison d’être*. Without communication, there is no, nor can there ever be any, commons.

This section connects Deleuze and Habermas that can be explored further in future research projects. In a way, it is a study in its own right, to connect the two thinkers, since they have such two vastly different approaches to philosophical concepts. But, here it is presented as one of the outcomes of the Deleuzeoguattarian rhizomatic jurisprudence that lends itself for further research in the future:

The Habermas exploration of potential capitalist *crises* also opens a door to *productive engagements between him and Gilles Deleuze*. The two differ in their philosophies of time, nature, ethics and reason. And, yes, these differences do make differences. But Habermas’ explorations of convoluted relays between economic rationality, motivation and legitimation processes resonate with the Deleuze/Guattari conception of an unstable capitalist ‘axiomatic’

⁷⁹⁴ [original emphasis], Deleuze/Guattari, *What is Philosophy*, p. 11.

⁷⁹⁵ [quote modified, my emphasis], “To put it another way, we still don’t know what capitalism can become, even though its density and fragility give us reason to worry about the worst.” Connolly, ‘Habermas, Deleuze and Capitalism.’

ensconced in a larger assemblage of intercoded elements with its own tendencies to instability.⁷⁹⁶

I have been exploring the notion of crisis from the beginning of this study; it gave rise to the deterritorialising forces of this study. It has also opened the possibility to engage in a productive connection between Habermas and Deleuze. In a way, the shadow of the crisis has been present throughout this entire project. But how serious is this crisis? It has been accentuated on various levels, and particularly if a Bourdieuan approach to capital is adopted then the crisis multiplies affecting economic, cultural and social capitals equally. A crisis forces the earlier paradigms to clash with the new paradigms. The technological advancements also played a pivotal role in the crisis. In the end, the crisis also reached law, and jurisprudence. Laurent de Sutter also finds the notion of crisis in jurisprudence when he reads Deleuze:

It is as a result of a wider development on the becoming of the contemporary world and the crisis of law which characterises it, that Deleuze develops it [the second thesis]. [...] In defining the society of control Deleuze formulates the crisis. The crisis is marked by a limitless deference, which is best illustrated by the special status it accords to human rights. With the second thesis, Deleuze proposes a way of actualising a description of the crisis situation at the same time as presenting the same formula as a way of overcoming it. And therefore, before exploring the issue of the critical further, one must consider the clinical.⁷⁹⁷

But what is crisis? What is a *legal crisis*? And to think about it clinically? Andreas Philoppopoulos-Mihalopoulos describes it in the following manner:

[A] legal critique begins from the current state of the law and crosses the boundary that distinguishes the latter from a ‘better’ state of the law. In its urge to cross, *critique announces a crisis* (a judgement, a distinction), a crisis of crossing (critique cannot leave itself out) as well as a crisis than can only be observed through this crossing.⁷⁹⁸

⁷⁹⁶ [my emphases throughout], Ibid.

⁷⁹⁷ [my translation] “Lorsque Deleuze la formule [la second thèse], c’est en effet au cours d’un développement plus large sur le devenir du monde contemporain, et sur la *crise du droit* qui le caractérise. [...] C’est cette crise que Deleuze formule lorsqu’il définit la société de contrôle marquée par un atermolement illimité, lequel se trouve le mieux exprimé par la faveur dont y jouissent les droits de l’homme. En formulant sa seconde thèse, Deleuze la pense donc comme une manière de réaliser une description de cette situation de crise qui soit en même temps une manière d’en sortir. Plutôt que poursuivre plus avant la critique, il faut passer à la clinique.” de Sutter, *Deleuze: La pratique du droit*, pp. 63-64.

⁷⁹⁸ [my emphasis], Philoppopoulos-Mihalopoulos, *Niklas Luhmann*, p. 13.

This project has not directly addressed the concept of crisis, because the main object has been to focus on potentiality, rather than the impossibility, or rather, as Philoppopoulos-Mihalopoulos calls it, *improbability* of law. However, at this stage in the study, where a conclusion of sorts is necessary, the sense of crisis ought to be at least acknowledged. While crisis in many ways drives the societal ebbs and flows that I have been exploring with the help of Deleuze and Guattari's rhizome theory and lines of flight, it is as such also a *creative force that creates previously unthought-of alliances*. This project has attempted to capture the crisis as a creative force.

Connolly suggests that it is precisely here that Habermas and Deleuze and Guattari can be connected to one another, that is, in the crisis of capitalism in Habermas and the instability of capitalism (economic, social as well as cultural) in Deleuze and Guattari. Adding Philoppopoulos-Mihalopoulos' reading of crisis in law ties them to this particular project, *it makes them communicate* – it facilitates a reading that guides us towards a 'better' state of the law. Deleuze writes that “[i]f our law is hesitant, is itself in crisis, it's because we are leaving one in order to enter into the other.”⁷⁹⁹

There is another connection between Habermas and Deleuze namely the Habermasian notion of the public space, that was rhizomatically connected to the notion of the commons, and the being-in-common in chapter 5. These two connections have enabled this project to further develop the legal concept of the cultural commons.

Alexandre Lefebvre also made a connection between Habermas and Deleuze but in a sense where Habermas (together with the likes of Hart and Dworkin) was approached as a predecessor to Deleuze. On the other side of that spectrum Lefebvre placed Bergson and Spinoza, as the thinkers who acknowledge and envision the creativity of law in line with Deleuze. Deleuze identified an “orphan line of thinkers”⁸⁰⁰ that inspired him to find his own place in the history of philosophy. He commented that he had found a “secret” link between Lucretius, Hume, Spinoza, Nietzsche, and Bergson in that their philosophy was in opposition to the major State philosophy.⁸⁰¹ This secret link was “constituted by the critique of negativity, the cultivation of joy, the hatred of interiority, the exteriority of forces and relations, the denunciation of power.”⁸⁰²

The point of this study has been, on a theoretical level, to see new connections, secret links as it were, getting beyond the traditional binary divisions, in this case beyond positivism, dogmatism, but also, critique. Thus, Connolly writes “[t]o the extent either Marx or Habermas was tempted by the mastery

⁷⁹⁹ Deleuze, 'Postscript on the Societies of Control', p. 5.

⁸⁰⁰ Brian Massumi, 'Translator's Foreword' to *A Thousand Plateaus*, p. x.

⁸⁰¹ Ibid.

⁸⁰² Ibid., quote originally from: Deleuze, 'I have nothing to admit', in *Semiotext(e), Anti-Oedipus* 2, 3, (trans.) Janis Foreman, Semiotext(e)(1977). p. 12.

project, Deleuze breaks with each.”⁸⁰³ Deleuze interrupts the “mastery project” that Marx and Habermas strived towards – i.e. a project that not only purports to explain why things are as they are, but that also gives a solution (e.g. classless society in Marxism or communicative action in Habermas). But this very interruption of the mastery projects is precisely where the creative potential lies. It does not mean that Habermas and Deleuze are two different thinkers on the opposite sides of the spectrum, it means that when the two are connected, the potential of law and future legal theory is revealed – opening up the possibilities to not only provide a postmodern *critique of law* but also a plethora of constructivist *solutions to these problems* that the mastery projects from modernism have given rise to. This is one of the biggest advantages with the rhizomatic jurisprudence, as it opens up the theoretical possibility for these exercises as we have seen throughout this project. This connection between what has previously been considered to be two opposites, marks, once again, an encounter as “[a]ccording to Deleuze, only an unanticipated and violent encounter can stimulate thought past the purview of recognition and *force it to think*.”⁸⁰⁴ The connection between Deleuze and Habermas could be one such forceful encounter.

8.1.5.2 THE DELEUZE/LUHMANN – AXIS

It is often stated that when we are adopting a critical research approach we are assuming a type of *prescription* (a *de lege ferenda* approach) and when the more traditional dogmatic approaches to law are utilised then we are providing *descriptions* of law (a *de lege lata* approach). In a Deleuzian and Deleuzeoguattarian matrix where we do not speak of a body of law but rather about a law without organs, and the becomings of law – the two, prescription and description, are constantly intertwined. Through this approach we have simultaneously been able to trace both the production of law, *poiesies* – and self-generation and self-production of law, *autopoiesies*, but also the challenges, encounters, deterritorialisation of law, that demonstrate the potentiality of law. Deleuzian becomings and Luhmannian autopoietic system, ultimately, are not each other’s opposites. Philopopoulos-Mihalopoulos writes:

The term ‘system’ in Luhmann’s theory is a misnomer because it gives the impression of systematicity, of normative promise and unfailing consistency, of a method, itself systematic, that produces systematised units of perfectly formed totalizing boundaries. But this system is nothing of the sort. If, faithful to its etymology, the term denotes a *syn* (‘together’) and *histanai* (‘to set up’, ‘to stand’), a togetherness that has been set up (is this setting up arbitrary? And who has set it up? Itself? Without discernible origin?), a tran-

⁸⁰³ Connolly. ‘Habermas, Deleuze and Capitalism.’

⁸⁰⁴ [my emphasis] Lefebvre, *The Image of Law*, p. 72.

sitive infinitive that stands alone and alone it *consists* itself; if a system denotes a togetherness without *content*, without *periechon*, a *compearance*, an assemblage of sorts without promise of future form, consistent boundaries, identifiable characteristics or positive functions; if a system is a *machine* in the Deleuze-Guattari sense that is nothing but connections and operations in a constant process of what they call *deterritorialization*, namely the relentless becoming other than itself, always at another stage which engulfs and is engulfed by its otherness; if a system is that, that is, if a system *is* not, then a Luhmannian system is indeed a system.⁸⁰⁵

Theoretically this is another connection that cannot be explored much further here but one where we end up in in the end of this research project. The system misnomer, but perhaps in reality, an assemblage, a body without organs – a law, a ‘system’ in the Luhmannian sense, without organs – in the Deleuzeoguattarian sense. Deleuze and Guattari write of BwOs as we saw in chapter 2 that “[w]e come to the gradual realization that the BwO is not at all the opposite of the organs. The organs are not its enemies. The enemy is the organism. The BwO is opposed not to the organs *but to that organization of the organs* called the organism.”⁸⁰⁶

This focus on organisation of organs in terms of the BwO enables Philopopoulos-Mihalopoulos to create the Deleuze-Luhmann matrix on a theoretical level. On a more practical level, and for the particular purposes of this project it means that a legal BwO is not an opposite to organs (such as for instance IP rights as an organ of a legal body, that is organised to form an opposite to the organs freedom of expression, public domain etc.) but it rather opposes their organisation in a manner where they are forcefully placed in a binary order. Instead, it becomes a matter of spatiality:

The legal system is waking up to its spatiality – and this does not refer merely to some legal branches, such as the obvious property or environmental law, but the law on the whole and in all its particular manifestations.⁸⁰⁷

Which brings us back to the critique of the attempts to search for the ontology of law – which is impossible when law is approached as a BwO, constantly changing, unfinished, in an endless stage of becoming:

⁸⁰⁵ [original emphases throughout], Philopopoulos-Mihalopoulos, *Niklas Luhmann*, p. 8.

⁸⁰⁶ [my emphasis] Deleuze/Guattari, *A Thousand Plateaus*, p. 175.

⁸⁰⁷ Philopopoulos-Mihalopoulos, ‘Critical Autopoiesis: The Environment of the Law’, p. 56.

A becoming is not a correspondence between relations. But neither is it a resemblance, an imitation, or, at the limit, an identification. [...] To become is not to progress or regress along a series. Above all, becoming does not occur in the imagination [it is] perfectly real. [...] Becoming produces nothing other than itself.⁸⁰⁸

And, to continue on Philopopoulos-Mihalopoulos' line of reasoning, if a Luhmannian autopoietic system is *that*, that is, if an autopoietic system is something that *produces nothing other than itself*, then a Deleuzeoguattarian becoming fits indeed within an autopoietic system, since:

“[A] line of becoming has neither beginning nor end, departure nor arrival, origin nor destination; to speak of the absence of an origin, to make the absence of an origin the origin, is a bad play on words. A line of becoming is only a middle.”⁸⁰⁹

This corresponds to the *groundlessness, sans-fond* or *Ungrund* that was addressed in chapter 2, it also corresponds with Philopopoulos-Mihalopoulos' reading of Luhmann “[i]f there were to be a *Grundnorm* in the autopoietic legal system, that would be the paradox.”⁸¹⁰ A line of becoming is nothing like a Grundnorm.

Furthermore, Philopopoulos-Mihalopoulos addresses the Luhmannian notions of system and environment. He writes that described in a generic, contextual way, an environment could be said surrounds the law without touching it. However, if the autopoiesis of law is to be read even more radically instead another approach to the (legal) environment can be proposed:

If, however, one wants to be radical about the environment, one is expected to plunge headlong into the vicissitudes of what this environment may be, how to understand it without colonizing it, how to employ its appearance without forcing its presence. The environment must be taken literally. By this I mean that no representation of the environment should be offered, conveniently packaged for the law to ingest, instrumentalize and use. Instead, the environment must be understood as a disturbance for the law, as a space of unsettling whispering or even stentorious arguing, of unresolved conflict, of intense questioning. The environment of the law is the law's worst fears *and*, at the same time, law's avenue of potentially becoming more just.⁸¹¹

⁸⁰⁸ Deleuze/Guattari, *A Thousand Plateaus*, p. 262.

⁸⁰⁹ Deleuze/Guattari, *A Thousand Plateaus*, p. 323.

⁸¹⁰ Philopopoulos-Mihalopoulos, 'Critical Autopoiesis: The Environment of the Law', p. 59.

⁸¹¹ [my emphasis], *Ibid.* p. 45.

In many ways, this research project has attempted to reach precisely this, law's worst fear, in discussing the legal concept of the cultural commons. Interrupting the symmetry: law inside–environment outside, as Philoppopoulos-Mihalopoulos suggests we do, has been done by employing the Deleuzian and Deleuzeoguattarian theory and method in order to engage in a more operative connection between “law” and that which is “outside”. However, the “inside” and the “outside” dichotomy, “law” and “society”, have been questioned from the start by using the connectability that the notion of the rhizome and rhizomatic jurisprudence opened up for:

The environment is right in the middle of the various self-assured systems. Deleuze and Guattari bring up precisely the space of the *middle* as the point of beginning. In so doing, they revolt against the habitual conceptualization of beginning that goes along the need for origin, but also concepts such as centre and boundary.⁸¹²

The Deleuzian middle connected to Philoppopoulos-Mihalopoulos argument of law's environment as “space, bodies and structures that surround and indeed constitute the law”⁸¹³ is a relevant outcome. Philoppopoulos-Mihalopoulos approach to environment and this critical understanding of Luhmannian autopoiesis has called for a connection with the Deleuzeoguattarian notion of Bodies Without Organs and then further discussion of the legal concept Law Without Organs:

[A]utopoiesis can no longer be thought without its bodily functions. Rather tellingly Luhmann writes: ‘the difference between corporeality and noncorporeality has (at least for our present societal system) no social relevance’. This fits rather well with a Deleuzian definition of a body: ‘a body can be anything: it can be an animal, a body of sounds, a mind or idea; it can be a linguistic corpus, a social body, a collectivity’.⁸¹⁴

Finally then, we arrive at a Law without Organs. Alexandre Lefebvre has addressed this concept on various occasions⁸¹⁵ but never fully developed it. He writes for instance in the article ‘Critique of teleology in Kant and Dworkin: The law without organs (LwO)’ could be or might become a “a critical concept:

⁸¹² Philoppopoulos-Mihalopoulos, ‘Critical Autopoiesis: The Environment of the Law’, p. 50.

⁸¹³ Ibid. p. 46.

⁸¹⁴ Ibid. p. 57.

⁸¹⁵ See e.g. Lefebvre, *The Image of Law*, p. 150 and 152, see also Lefebvre, ‘We Do Not Yet Know What the Law Can Do’, Lefebvre ‘A New Image of Law: Deleuze and Jurisprudence’, *Telos* 130: 103–26. (2005).

the *Law without Organs* (LwO) [...]. By relating the BwO's critique of judgment to Dworkin (now characterized as a teleological legal theorist), I propose a concept that allows Deleuze's texts to have critical purchase on [...] law and jurisprudence. While the LwO is not positively developed in this article, it results from the characterization of Dworkin's theory of adjudication as teleological (and evoking natural purposes) and in this way can prefigure how Deleuze can be used to advance a theory of law and judgment as they might be freed from teleology."⁸¹⁶ Which gives rise to the natural question, what is then law and judgment freed from teleology? Positivism? Legal dogmatism? *No*. The law without organs is a critical concept that fosters the rhizomatic jurisprudence as has been explored throughout this project, a concept that allows for the various becomings of law, that enables its connectivity, creativity, and activates its potentialities... It is precisely when law becomes a LwO that a multidimensional, cluster-based, polyvalent, concept such as the cultural commons can be conceived of in jurisprudence and given a platform in law.

8.2 THE FUTURE OF RHIZOMATIC JURISPRUDENCE

As we have seen, the fundamental idea in the Deleuzian philosophy is the Nietzschean conception of the never-ending becomings, multiplicities, and interconnected forces.⁸¹⁷ Let us briefly be reminded of Giorgio Agamben's §10 in *The Open* where he discussed the writings of Baron Jacob von Uexküll, who incidentally was the very biologist that began constructing a rhizomatic concept in the first place. In Uexküll's world we find the "*Rhizostoma pulmo*" – the jellyfish – a concept that would come to inspire Deleuze/Guattari. Agamben wrote:

Where classic science saw a single world that comprised within it all living species hierarchically ordered from the most elementary forms up to the higher organisms, Uexküll instead supposes an infinite variety of perceptual worlds that, though they are uncommunicating and reciprocally exclusive, are all equally perfect and linked together as if in a gigantic musical score [...] like two notes on the 'keyboard on which nature performs the supratemporal and extraspatial symphony of signification' though it is impossible to say how two such heterogeneous elements could ever have been so intimately connected.⁸¹⁸

⁸¹⁶ [original emphasis] Lefebvre, 'Critique of teleology in Kant and Dworkin: The law without organs (LwO)', p. 181.

⁸¹⁷ Cf. Bogue, *Deleuze and Guattari*, p. 150.

⁸¹⁸ Giorgio Agamben, *The Open: Man and Animal*, (trans.) Kevin Attell, Stanford University Press, (2002 [originally published in 1942]) pp. 40-41.

Dogmatic legal reasoning has not been able to grasp such understanding of multiple worlds, that is, traditional legal reasoning only allows us to see the world it itself paints. However, there are a number of other ‘perceptual’ worlds that, nonetheless, can all be fully reconcilable, and communicate *inter se*. We have for instance seen the various perceptible worlds when reality is presented in one way in law (e.g. private and public must always be each others opposites), when in reality there are a number of other constellations and variations to the particularly ‘legal’ understanding and rendition of reality. And many other examples presented here in this research project, such as the assumptions regarding unified identity of authors, the un-fragmentised artworks, the work as an invention created *ex nihilo*, etc.

In this project, I have provided a critique of the fact that traditional legal reasoning rests upon an underlying understanding of being a hierarchically ordered system, corporeal (‘the body of law’), a static body of coherent regulation, dependent on a centre, an origin, a genesis, and ultimately of a binary logic. In order to get beyond that, I have had to get away from the reasoning that presupposes law to be “hierarchically ordered from the most elementary forms up to the higher”⁸¹⁹ laws. These hierarchies create the ‘reality’ that always has to correspond with law, a unified, coherent, ordered reality – and everything within it subsumable under law. When law cannot do that, when it encounters something that it cannot easily subsume under its system, when it encounters something that it cannot understand “with a ready-made rule up its sleeve”⁸²⁰, it is precisely then when the rhizomatic jurisprudence can step in, and out of the impossibility create a potentiality.

It became clear that ‘reality’, is everything but clear-cut, anything but hierarchical, unified, ordered. That is why we always lose an element of its complexity; it becomes much less sophisticated, when it has to be translated into ‘law’, or dogmatic law, dogmatic legal reasoning. With rhizomatic jurisprudence we have been experiencing a need to approach law differently, instead of seeing it as fixed, it can be seen as fluent, instead of vertical it can be inspiringly horizontal, it does not have to be static, it can be creatively dynamic. This project has been an exercise in reimagining law itself, not as a body but as an assemblage of norms and worlds (rhizomes, plateaus, lines of flight) that do not necessarily have to be pitted against one another in hostile pairs that always have to act as each other’s opposites in order for the system to be seen as legitimate.

What Deleuze and Guattari argue for is the seemingly paradoxical *disjunctive synthesis* – paradoxical in the sense that disjunction divides and synthesis does the very opposite, it unites.⁸²¹ Deleuze and Guattari discuss an affirmative, non-restrictive, inclusive disjunction that remains disjunctive, and that still affirms

⁸¹⁹ Agamben, *The Open*, p. 40.

⁸²⁰ Lefebvre, *The Image of Law*, p. 174.

⁸²¹ Bogue, *Deleuze and Guattari*, p. 94.

the disjunctive terms, without restricting one by the other or excluding the other from the one.⁸²² On the overall level of the entire project the aim has all along been to get to the creative possibilities, the potential of law, and show how it could affirm the disjunctive terms, constantly challenging and dismantling the legal body, but how through those types of processes a legal concept of the cultural commons emerges and could exist without restricting the private ownership/individual rights, and *vice versa*, coming together ultimately in a legal concept of the cultural commons.

8.2.1 DELEUZE AND DELEUZE/GUATTARI BY WAY OF LAW

It has been claimed in the introductory paragraphs of this research project that the discussion surrounding the commons, and cultural commons in particular, concerns some very much still-in-progress paradigm shifts. This has become obvious throughout the study. The study has attempted to illustrate the three-tiered paradigm shift, or three types of paradigm shifts, that were all mentioned in the first chapter. These three paradigm shifts are occurring simultaneously. The first concerns the *commons as a construction* in law, the second the *intellectual property paradigm* and its existence and function in the access-and-sharing-based digital knowledge society, and the third has to do with an *international paradigm shift* that concerns the global access to resources, the level of openness and platforms and law that can regulate access to various types of resources.

The rhizomatic jurisprudence adds to yet another paradigm shift, namely the one that has to do with the future and the exegesis of the Deleuzian and Deleuzeoguattarian philosophy. By constructing and introducing a legal concept of the cultural commons and by placing certain Deleuzian and Deleuzeoguattarian concepts in law and jurisprudence, the project adds to their philosophy *by way of law* and it too becomes something else.

This project has attempted to inscribe itself in the broad discussion concerning the use and application of the concepts such as the rhizome, re/de/territorialisation and plateaus, bodies without organs, etc. These particular concepts that essentially stem from the Deleuzeoguattarian *Capitalism and Schizophrenia* project have remained under-explored from a legal point of view. As such, this study placed them in an unusual setting, yet one that was in no way unfamiliar with Deleuze and Guattari, nor are Deleuze and Guattari, conversely, unfamiliar to jurisprudence and legal philosophy. This aspect of placing their philosophy in a new setting develops it, forces it to move.

This study has also engaged in the on-going conversations that concerns the philosophies of Deleuze, and Deleuze/Guattari for instance with Lefebvre and Mussawir. It is through these conversations that the Deleuzian and Deleuzeoguattarian jurisprudential concepts were developed, and as such addi-

⁸²² Deleuze/Guattari, *Anti-Oedipus*, pp. 76 and 90, see also Bogue, *Deleuze and Guattari*, p. 94.

tional meanings and contexts could be added to them, such as the concept of rhizomatic jurisprudence or the nomadic legal method. The focus of this study has been rhizomatic jurisprudence. Whether that particular use of the rhizome adds to the understanding of the rhizome, as a philosophical concept, remains to be discussed, hopefully.

What has not been addressed at all here are many of Deleuze's earlier works as well as the *Critical and Clinical*⁸²³ project, which was his final work. Guattari's works without Deleuze have not been addressed either. Because of this, the concepts from *Capitalism and Schizophrenia*, and their placement within a jurisprudential setting, have acquired an unusual meaning as they have often been ostracised from the wider Deleuzian and Deleuzeoguattarian contexts. As we saw in chapter 2 when using Deleuze and Deleuze/Guattari and their concepts in jurisprudence and in legal research, it is not a question of application, but borrowing of the ideas, of setting them in motion "in coordination with law toward the creation of new problems and new concepts."⁸²⁴ The rhizomatic jurisprudence has functioned in such a manner here, arriving at the legal concept of cultural commons. This research has thus *borrowed* the concepts and the language of Gilles Deleuze and Félix Guattari, arguing that law and jurisprudence can be rhizomatic, open-ended, connectable, multi-dimensional, able to create and uphold constellation concepts and handle clusters of concepts. It has been argued that law can be (if it is not already) nomadic, deterritorialised, and able to float and to allow for travel. For it to happen, it calls for creativity. This borrowing-of-concepts and perhaps violent (dis)placements of them in new settings also augments their meaning, makes the Deleuzian and Deleuzeoguattarian philosophy encounter something that it is not used to encountering, forces *it* to think. It adds additional levels and dimensions to the Deleuzian and Deleuzeoguattarian philosophy.

The principles of the rhizomatic jurisprudence have thus been applied on a theoretical, jurisprudential level. As such, this study has argued that creativity is not problematic for law, nor is it extra-legal activism, or even accidental, as Lefebvre refers to it. On the contrary, creativity is very much *called for* in the spheres of jurisprudence and law. As such the point of view of this study has not been to approach creativity as something that comes from outside law, *but something that is always already there*. The Deleuzian and Deleuzeoguattarian theory contributed to and allowed for such an approach to law and jurisprudence.

In conclusion, Deleuzian and Deleuzeoguattarian philosophy allowed this author to free herself from certain shackles of traditional legal reasoning and to describe law not as a body but instead as an assemblage, an abstract machine, without organs and jurisprudence as a rhizomatic movement that exists not due

⁸²³ Deleuze, *Essays Critical and Clinical*.

⁸²⁴ Lefebvre, *The Image of Law*, p. xi.

to, but through, paradigm shifts. As such it does not represent, or reproduce reality, it envisions it, creates it! This creation, creation of reality, creation of itself, *autopoiesis*, remains to be explored further, beyond the humble attempts of this particular project. And maybe Foucault was right, perhaps, not only the century but also the law and jurisprudence will one day be(come) Deleuzian.⁸²⁵

The diagramic or abstract machine does not function to represent, even something real, but rather constructs a real that is yet to come, a new type of reality. Thus when it constitutes points of creation or potentiality it does not stand outside history but is instead always prior to history.⁸²⁶

– Deleuze and Guattari

⁸²⁵ Foucault wrote: “[O]ne day, perhaps, this century will be called Deleuzian.” Quote taken from Michel Foucault ‘Theatrum Philosophicum’, in *Critique* 282, p. 885. Also in Michele Foucault, *Dits et écrits 1954-1988, Vol II*. Paris: Gallimard, (2001).

⁸²⁶ Deleuze/Guattari, *A Thousands Plateaus*, p. 157.

EXIT.

Ever since he wrote *Code and Other Laws of Cyberspace*⁸²⁷ in 1999 and as late as in May 2013 in his inaugural lecture⁸²⁸, when he was made honorary doctor at the Lund University, Lawrence Lessig has been addressing the four modalities that he asserts all need to be accounted for when we are discussing improvement and effects of law particularly in terms of the cultural commons, namely: law, norms, market, and, architecture. Lessig defines law as statutory law, norms as rules that exist ‘outside’ the legal sphere, market as free liberal market, and architecture refers to the architecture of the internet – both technical and legal – that creates and enables the online digital environment.

All these four modalities have in one way or another been relevant and required during the course of this research project and for the understanding of how current law works, and equally, where it fails. Lessig argues that without all of the four modalities put together current laws do not, and perhaps cannot, function in the knowledge society. Only by understanding the interaction and connections between all four can we improve law. Thus, according to Lessig, we need to understand all four modalities equally well, and in order to that, we must also, sometimes, step outside the law.

This particular research project has been attempting even to go one step further than that. The project has firstly challenged the notions of an inside and an outside of law. This distinction, it has been argued, is unnecessary, as long as law, *whatever law is*, can be connected to anything that is deemed to be both ‘inside’ and ‘outside’ it. When Lessig lists law, norms, market, and architecture as four *different* modalities he assumes that there exist such occurrences as a definable law, norm, market, and architecture, and that they can be analysed, separated, and even found. He is probably at least partially right in claiming so, but in claiming that, it will also always be *problematic* to draw a line between the four, to find their limits and borders, to denote where the one ends, and conversely where the other begins. And it brings us back to the ontological question. Such reasoning will always lead us back into the traps of the treacherous binary reasoning, back to the world of paradoxes and hostile binary opposites, in the world where all four of Lessig’s modalities experience a constant *stalemate*. I have throughout this study endeavoured to show that, even if we multiply the binary reasoning, and make quadruple modalities, like Lessig proposes that we do, we will have not gone far enough in the project of *going beyond* the ontology of law, *seeing the potential of law*. Reasoning entirely like Lessig suggests we do, means that there are possibilities that will always be deemed to fall outside the

⁸²⁷ Lessig, *Code and Other Laws of Cyberspace*, and second edition Lessig, *Code 2.0 and Other Laws of Cyberspace*.

⁸²⁸ Lawrence Lessig, Honorary Lecture, Pufendorfsalen, Lund University, 30th May 2013.

law, to exist in one of the three other modalities, and as such to also fall outside the legal reach and its possibilities.

That being said, revealing the four different modalities as a starting point in the commons projects has been vital for the global commons projects that have been evolving since the beginning of the 21st century. Lessig himself, and the Creative Commons project, have been pivotal in this process, but as we have entered a new decade, it is warranted to ask what does Creative Commons of the future, look like? Can it stay as popular and manage to reinvent itself?⁸²⁹

The regulators⁸³⁰ have been ignoring the instinct that they might have had, Lessig argues further, that copyright, as a legal concept, may be problematic in the digital age. Nonetheless, the regulators have adamantly so far refrained from introducing any significant additions, reforms or changes to it. The reaction of the regulators has thus been, Lessig claims, inappropriate. I agree with Lessig when he reaches that conclusion. Then, Lessig argues further that when we did not seize the opportunity ten years ago to legislate, with the momentum of for instance Creative Commons and other global and local digital commons initiatives, to regulate the commons in law and/or reform copyright law more radically, it might now be too late. I do not agree with this conclusion.

To circumvent today's stalemate, where entertainment industries within a capitalist paradigm are burdened with piracy and where a generation of young people within an open access paradigm are being branded as criminals, now is *precisely the right time* to suggest substantial additions or changes to law, as now is the first time we can evaluate previous commons initiatives that have been running for over ten years in various contract-based guises, and conceive of new ones, such as the ones with a platform in law. Lessig argues that we ought to have a system where professionals that create intellectual content *can be compensated*, but where amateurs, at the same time are *allowed to be inspired, to create and share*, without being burdened by, for instance, the unnecessary regulations of copyright law.⁸³¹ This is where the legal concept of the cultural commons fits right in. This project has been a theoretical exercise in precisely getting at this particular phenomenon. In order to envision the concept of the cultural commons in law, and to do so on a theoretical level, the project has had to make an inventory of the various existing commons initiatives and solutions and then

⁸²⁹ Even as late as in December 2013 the Creative Commons has reached out globally through various channels including Twitter (<https://twitter.com/creativecommons>) to the public and their supporters to donate funds in order for the project to be able to continue in 2014. This means that the future existence of the project, at least in its current guise, is by no means guaranteed.

⁸³⁰ Lessig uses the word regulator, not only to denote the 'legislator' but a wider band of people such as policy makers, lobbyists, other decision makers etc. – anybody involved in somehow shaping the law, the understanding or interpretation of law, etc.

⁸³¹ Lessig, Honorary Lecture, Pufendorfsalen, Lund University, 30th May 2013.

place them within the theoretical framework, and ultimately tie it to the rhizomatic jurisprudence.

The conclusion of this study means, furthermore, that we cannot do away with copyright law. Lessig argues that the solution lies in finding the perfect balance between the four modalities: law, norms, market and architecture. I would like to argue that the solution lies in finding a possibility within law that *connects it* to norms, market and architecture at any given point, as well as makes it able to shift connections as any of the other modalities, *now known or hereafter devised*, (to use a common copyright licence language) change. This is not just semantics; it is a radically different approach from what Lessig is arguing for.

Using Deleuzeoguattarian theory throughout this project I have argued for how it can be possible to conceive of the concept of the cultural commons as connectable, and how there is no direct need to refer to an ‘outside’ of law any longer. I have claimed that this connectedness and connectability is not something that needs to be *invented* – it needs only to be discovered. When Lessig claims that the lessons of *Code Is Law* have not been learned, the notion of law can be challenged, as well as the claim that code *is* law. Not challenge it in the sense to say that code *is not* law, but challenge it within the framework of this research project, namely that *what law is* is irrelevant, as long as it can communicate with everything else that affects it. Code is code, and law is, *always already, something else*.

This is not only a semantic claim either. This is the very *potential* of law, that it is adaptable to the deterritorialising and fluid (and fleeing) tendencies of society. We live in a connected society that constantly communicates and is dependant on communication (in all its guises), and that is connected through the internet, through travels, through common interests etc. The natural and artificial commons form a central part in this connected society, and there, it is obvious, law has to accommodate for connection and communication.

There are of course many problems with the internet and the digital alternatives. We have been reading about them and studying them for over two decades now. I have attempted to present some of these problems. Lessig notes that with the arrival of the internet there is a lot to worry about, and digitisation has brought with it plenty of bad, despite much of the good it has given us. Ditto about the law.

In the context of copyright both Lessig and many other scholars together with him have for a long time claimed that that the regulators and policy makers have been regulating in the last couple of decades as if the internet did not exist. This very stance has meant that sharing became piracy – i.e. infringement of IP rights. This resulted in large-scale litigations as for instance in the Napster case. In the short term, these legislations managed to destroy organisations such as Napster, but in the long term – it resulted in a multitude of Napster-like entities, Pirate Bay being the last prominent one.

When Galileo Galilei was forced to recant his belief that the Earth moves around the sun in front of the Inquisition, he is supposed to have followed up the recantation by uttering the words: *Eppur si muove / And yet it moves*. The same can be said about current policies and legislations. The internet, not only exists, it floats and it *leaks*. So, regardless of how many underlying sharing structures have already been recanted, taken down, and more recently, how many underlying structures that enable leaks have been disabled, and regardless of how many law professors recant the possibilities of law – the digital knowledge society is here to stay.

Which brings this project to its end. The use of Deleuzian and Deleuzeo-guattarian theory has been utilised to describe societies and laws that are constantly moving, fleeing, *and leaking*. This must be acknowledged theoretically in jurisprudence as well as practically in the everyday practices of law. Such a fundamental acknowledgement is something Lessing has called for on a practical level and this research project is calling for it on a theoretical as well as practical level. There will be sharing, and this tendency ought not to be fought by law. Lessig argues that the implications of sharing should be balanced by compensating artists differently, as sharing will happen – it is inevitable. I have throughout this research project argued that such compensations must be discussed further, but one potential step towards new compensation schemes is to seriously discuss the legal concept of the cultural commons.

If sharing during the last twenty years happened via digital downloading (legal as well as illegal) of cultural content, then the sharing of the future, it can be argued, now happens within the realm of up- and downloading of information. It is no longer just a matter that concerns cultural content, it has spread to also include wider types of information and knowledge that is being shared and where further access regulation on a legal level is no doubt called for. Sadly, this is where this project ends and another one can begin. It can be concluded, by connecting the sharing of digital content and the entire internet infrastructure to the liquidity of the Deleuzeo-guattarian smooth spaces. Interestingly, it is precisely where we have ended up here, in the sharing of the future, which also provides an answer as to why the Deleuzeo-guattarian theory is now more pertinent than it ever has been before, as we have now fully entered, quite literally, the fluid society... *and yet*, it leaks.

Thanks to art, instead of seeing one world, our own, we see it multiplied and as many original artists as there are, so many worlds are at our disposal...

— Marcel Proust

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