Journal of Cultural Economics **19:** 177–185, 1995.

On the Construction of Property Rights in Aesthetic Ideas

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Abstract. The paper attempts to formulate concrete proposals for a change in laws of intellectual property, based on a communication-oriented theoretical analysis of the issue. The particular role of collection societies is investigated. The proposals arrived at suggest a strengthening of non-negotiable, non-hereditary authors' rights, and a "refinancing fee" collected for copies of works of art with classical status and distributed to members of currently active art circles.

Key words: Intellectual property rights, cultural economics

1. Introduction

Patent and copyright protection was scorned for a long time because of its monopoly nature. The theoretical emphasis on dynamic processes has led to a shift in attitude. Industrial and intellectual property rights are now seen as an effective means of channeling *venture capital* into scientific and artistic innovation.[1] Kitch (1977), for instance, emphasized in the case of patent law that patent rights allow agents to deal with a higher degree of uncertainty: riskier projects come into the decision horizon. Similar arguments are made in the case of copyright law (Besen/Raskind 1991), and they lead to the position taken above.

We are, in fact, dealing with situations of potential positive external effects. The signs and ideas used in a future economy cannot be found without the constant exploration and experimentation that characterizes scientific and artistic work.

The problem, then, does not lie in a lack of good reasons for instituting rights to intellectual property. It lies in the difficulty of designing such titles in a satisfactory manner. We are faced with a case of market failure because of that. I will therefore try to determine what kind of a construction of rights is recommendable, and what its introduction is contingent upon.

2. Theoretical Considerations before Designing Rights to Aesthetic Ideas

2.1. Aesthetic Reproduction

In this section, I will consider only aesthetic ideas and the design of rights to the use of such ideas. The challenge consists in establishing a connection between

the economy and an outside source of further innovation, namely the arts. If a theoretical treatment of rights to intellectual property is to be successful, then it has to model the communication nature of art.[2]

Art works are information goods. But they do not function like a set of given messages. They function rather like a source of infinite possibilities for communication, depending on the interpretations that are understood within a circle of receivers. Such sources may dry out after a season, after a generation, or not at all. But as long as they are the topic of re-interpretation, new kinds of benefits, aesthetic and economic, can be drawn from them.

The works gain their effect on individual consciousness because of their multiple use of sensory input channels: ears, eyes, skin and noses. In consequence, the shape of art works may consist of sounds, of words, of pigments, of coded magnetic tape or of material substance.[3] Through these media, the works engage in plays of fine distinctions, guided by a basic belief that it makes sense to distinguish between beautiful and ugly.[4]

Plays of fine distinction, and this is a decisive feature, take place in rather small circles, between a few dozen, never more than a few hundred people. At the core, we find the continuity of the art works themselves: every work responds to previous work, and it poses questions for future work. That continuity becomes observable when a specific style or tradition has been named and the name is accepted.[5] Around the continuity of a style, we find a closely knit web of interpretations and evaluations. It consists of contributions by artists, collectors, gallerists, conductors, lectors, critics etc.

To be sure, all this communication takes place in the *environment* of those constellations of signs that are considered as art works. Yet, only the combination of the reproducing system itself and its environment leads to a sustainable process of development. As a consequence, not the single artist is the source of a new work in this perspective, but the entire circle in which the creation has become possible.[6]

Aesthetic reproduction becomes relevant to economic considerations when works of art become the object of commerce: money is paid to see or hear or read the good. The commercialisation of art work depends on the ability to reproduce a product or an event whose desired communication effects on buyers and their environment can be expected with sufficient confidence. Such effects may be called entertainment, they may be the signalling of a positive image, or they may be attention for some advertisement. If certain aspects and patterns of works of art, like the smile of Fra-Angelico madonnas, or the bass line of *Brown Sugar*, can be taken out of context and still be understood by a group of potential buyers, then it pays to organize the reproduction of goods containing such effects in a for-profit firm – as in an advertising agency. The progress in the mechanical and digital reproduction of sounds, texts and images has brought such enterprises into the realm of technical feasibility. As the competence for reading aesthetic signs increases, the predictability of art effects increases concurrently. With increased

predictability, a larger proportion of the population become potential users. The volume of the market for aesthetic goods grows exponentially. This observation holds for the planetwide marketability of industrial entertainment products, from Elvis Presley records to Mickey Mouse items, and it holds for the marketability of original art works, from Warhol prints to opera festivals.

2.2. Property Construction: Copy or Author?

Commercialization depends crucially on the ability to define property rights. Rights to non-material property emerged among a multitude of privileges in the 12th century:[7] First, such rights addressed coal deposits – physical sources of energy. Then, they addressed the commercial products of certain inventions – the source is psychic, and it lies in the ingenuity of a scientist-entrepreneur. Now, we consider the right to determine the terms under which an original work of any shape is reproduced or copied – the source of energy is the constant stream of works with new connotations.

From access to a stock of energy, to new kinds and processes of material products, to figments of communication – the path of development which the concept of property has taken is rather breathtaking. It is not surprising that the adequate construction of such rights runs into severe conceptual difficulties.

Material property has a physical object as its reference. That object exists only once. In consequence, rights to the property emphasize the protection of the object from the taking by others. Intellectual property has ideas, shaped into specific media, as its reference. A work of art is not taken or invaded; it *re-emerges* somewhere by being copied. The shift from the world of physical objects to the world of semantic events implies a radically different type of "taking" or "invading." In consequence, rights to intellectual property emphasize the control over the dissemination of the original work or event. In terms of transaction cost analysis, one might say that the emphasis is on exclusivity rather than transferability.[8] But protection of exclusivity has become much more difficult since the capacity for copying has become available to everybody.

The communication nature of the property to be protected leads to a very basic alternative in defining such rights. A right to intellectual property has to connect a person considered to be its source or inventor with the property itself. The property has to be defined in terms of the world of semantic events. Lawmakers have to decide on a specific distinction between some form of signs and their environment. In dealing with signs, they have a choice: they can focus on "copy," i.e. on a specific constellation of signs, like a performance of *Lohengrin* or the text of *Ulysses*. In that case, the author appears in the environment of the work. They can also focus on "author," i.e. on a specific artistic source held responsible for the interpretation of the work.[9] Now, the copy appears in the author's environment. In this case, the connection between the right holder (author) and the item of property (author's sign) implies that the rights connected with a work of art can never be completely

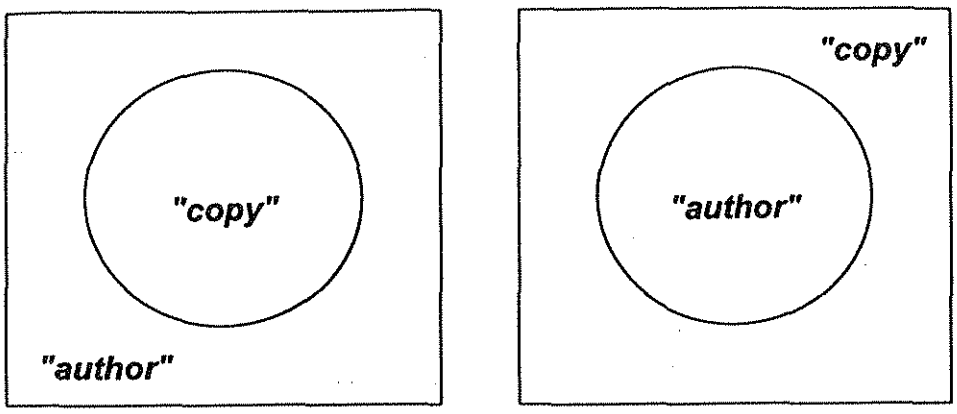

Fig. 1.

transferred to other holders. Figure 1 tries to show the difference in graphical terms.

This alternative is reflected in the two basic legal constructions, namely copy rights and authors' rights. In practice, however, the differences are not so large. No matter from which side the distinction is approached, some of the aspects of the "other side" are taken into consideration. We find a recognition of authors' rights in recent English copyright law (Towse 1994), and we find far-reaching transferable rights in German *Urheberrecht.*

Beyond that basic choice, there are a number of further considerations that open up choices for rights' design. A few of them will be discussed.

a. Every law of property has the problem of dealing with succession. Biological persons die, and it has to be determined socially who or what is considered to be the next holder of the rights. The traditional solution is, again, biological: the next of kin are ajudged to be the successors. In terms of heritage tax, the rights are treated like other estimated values. Yet, it should be noted that such treatment constitutes a choice. It is open what rights remain "author's rights" for the successors; it is open according to what rule rights are split between family members; and it is open whether biological or legal persons are the desirable successors.

b. The adequate time span of intellectual property rights is extremely difficult to determine. The traditional norm of 50 years was a compromise that corresponded vaguely to the life expectancy of individual owners. The successful attempt to increase the span to 70 years in countries of the European Union was not driven by concerned artists' families, but by companies who live indefinitely and therefore gain with every lengthening of the time span. Such indiscriminate lengthening increases the expected value gained by the large sellers at the expense of new, unestablished works.

c. Communication effects spread at their own speed and with their own indeterminacy. Like external effects in the natural environment, we find the effects of works of art within receivers outside of the original circle. In consequence, the copying activity is not carried out by one industrial licensee or buyer of the copyright, but by many of thousands of small commercial and private copiers. In that

case, it proves efficient to establish an organisation that functions as a collector of royalties from those using the copy and as a protector of author's rights. Such collection societies exist in all industrialized countries, under widely varying legal statutes.[10]

In terms of theory, collection societies pose difficult questions. They are organizations, and that makes them separate, self-organising actors, leading, as one consequence, to a principal-agent problem. The problem is sharpened by the fact that an organization founded for the simple task of collecting and distributing royalties is now charged to represent its members in collective negotiations with the executive authorities or with committees of parliament, in precedent-setting court action or in dealing with other lobby organizations.

As soon as the sum of funds to be distributed reaches relevant dimensions, we should observe internal conflict about the representation of members in decision making boards and committees. The legal status of such private associations in negotation with public parties is ill-defined, and any further growth of their economic involvement will demand concurrent action in the legal field.

3. Towards a Policy of Property Rights for Art Circles

3.1. Repeating the Argument

Economic activities shift continously towards industries whose business it is to copy ideas, either onto computer monitors or onto video screens. There is a growing demand for the "software" used in consuming the products and services of the communication industries. Aesthetic ideas are one of the sources from which new software products, particularly for entertainment and differentiation purposes, can be drawn. The question is: How does a society generate monetary investments in ideas? In particular, how does it generate investments in ideas that take artistic shape?

A market for rights to the monetary returns of selling copies of an original work of art (i.e. an idea that took artistic shape) is similar to a market for oil field claims: the returns are highly uncertain. But the situation for "art claims" is worse: Industrial buyers are fewer, the skewedness towards a few stars is greater, companies, and thus negotiation partners, on both sides of the market are often ill-defined. All in all, these are sufficient reasons for market failure, and explain why copying costs are not a significant share of the median consumer's expenditure, although many activities in modern households depend on a stream of new communication through the media mentioned.

Copying rights are, to a considerable extent, free goods. They are worthwhile to negotiate and control for bestsellers and blockbusters, and they have led to the establishment of private toll agencies – the collection societies discussed above – to participate on a few general uses of originals, as in the case of libraries or radio airplay. For the rest, transaction costs are too high. The rights are hard to define, and violations are not detected.

3.2. Introducing Circle Rights

According to the argument in section II, property is defined in terms of constellations of signs, and the source of such works are circles of art communication, consisting of a continuing stream of art works and their interpretative environment. If such art circles can be sustained, aesthetically as well as financially, then there will be investments both of human capital and of monetary wealth, and future aesthetic ideas are more likely to emerge.

From this follows a basic policy recommendation: *Rights to intellectual property should preferably be ajudged to art circles.*

This recommendation, however, is made in clear awareness of the status quo of copyright law. In discussing changes we are always implying marginal changes, shifts in emphasis away from the existing institutional constellation, towards the preferred constellation. Given these premises, two concrete proposals are forwarded:

Proposal 1: Strengthening of Authors' Rights

Authors' rights are here understood as non-negotiable rights. They cannot be transferred to another right holder.[11] One variety of such a right is the right of a playwright to determine limits in the staging of his work. A second variety is the *droit de suite*. The author or artist, after having sold the transferable copyrights, has claim to a share of the financial gain in all subsequent transactions of the work. A third variety is the right to information and "citation of source" when the idea of a work of art has been used.

The position of authors and artists could be strenghtened by enacting and enforcing all three of these rights. In the case of death, the rights would lapse, or they could be inherited by the collection society of which the author has chosen to be a member.[12]

Proposal 2: Levying Fees on Copies of Classical Art

The adequate time span for transferable rights is still unclear. The price setting during the life span of the artist should be left to direct negotation. After a while, some works of art establish themselves as classical points of reference – they become standards. A fee on the reproduction of such texts, scores or images (including performances and exhibitions) would meet with fairly inelastic demand. For reproductions of work older than 70 years and copied on an industrial scale, there could be an "art refinancing fee" of moderate dimension compared to original royalties, collected by the collection societies and distributed in scholarships and grants to artists and art circles of a comparable current genre.[13]

3.3. Some Objections

Obviously, such proposals raise more questions and counter-arguments than one can deal with or even foresee. Two objections will be addressed briefly:

a. The proposals would strengthen the position of collection societies.

This is true. Collection societies are hybrid by nature. They are privately incorporated, but they yield also public power. They facilitate search and they administer control, but they also take part in negotiations. Variations of such hybrid organizations will increasingly emerge throughout the economy. As long as such societies function as membership organizations and are not dominated by industry, there might be an adequate link between the aesthetic goals of an art circle and the goals of the decision makers in its collection society. For the rest, there might be stronger competition between collection societies, albeit with unforeseeable results.

b. The societies are unable to make quality judgments about the recipients of funds.

This is actually an argument for small collection societies: Judgments about aesthetic quality must be made by members of the the art circle. The society can institute them as juries or commissions with revolving membership. The horizon of artistic experience of the commission members will be limited, and just as limited should be the sphere of activity of the collection society. But within that scope, the commissions would have a mandate to promote anything they find conducive to the emergence of aesthetic ideas in the future.

4. Coda

This paper has been an attempt to think through the issue of intellectual property from a communication-oriented theoretical perspective. Given the goal that investment in ideas should be encouraged, the result was a suggestion for a change in the existing rights design. The proposals seem to emphasize the collection of tax-like fees rather than voluntary private investments. But the more favorable treatment of rights to works of art will, after a while, lead to an increase in human capital investments and, eventually, to markets stable enough for private financial investment.

As far as the implementation of such proposals is concerned, there are enough impediments to make them wellnigh impossible. First, there are those players who feel threatened by a change of the status quo. They foresee an increase in their own cost. Competitively, they are often in a situation where marginal increases are enough to wipe out a precarious profit margin. The goal of the institutional change – long term growth of the market – is far away and its attainment by no means convincing.

Secondly, there are at least five different social rationalities involved: A change of rules might be set into motion because it makes sense in logical, i.e. scientific terms. But the same change should also make sense in its artistic consequences and in its financial implications, it should make sense to political power-holders, and it should hold up in a court of law.

There is, then, a profound difficulty in transposing scientific results into social reality. If social processes are indeed self-organizing, as it was claimed in section II, then they follow their own laws of evolution. Scientific results and debates may be part of the interaction of such processes. But they certainly do not legitimize direct intervention.

Notes

1. "... the lure of a potential but uncertain reward must be sufficient to make the decision-maker willing to invest his time and money." (Scherer *et al.*, 1959: 44).
2. See also Hutter (1992).
3. The consistence of the work has implications for the design of adequate property rights.
4. For a full sociology of fine distinctions see Bourdieu 1979. The notion of a "leading distinction" (*Leitunterscheidung*) comes from the work of Luhmann (Luhmann, 1984). The Beauty/Ugliness difference has no definite content, it simply serves to distance it from other leading distinctions, like justice/injustice or scarcity/abundance. It is perfectly consistent when works of art reverse the conventional relation and focus on ugliness, moving beauty into the semantic environment of ugliness.
5. Such terms are, of course, outside interpretations. Often, they are first intended in a pejorative sense, like "impressionism." In some cases, they are clever inventions, like "arte povera" (see Santagata, 1994). For a fundamental study on the continuity of artistic forms see Kubler (1962).
6. It should be added that the focus on communication circle is a methodological choice. It is in no meaningful sense better or worse than the traditional focus on individuals. It simply leads to different observations.
7. For a brief history of patent rights see Hutter (1989: 76f).
8. It is worthwhile to note that the standard criteria of exclusivity and transferability are clearly contradictory. The task is to combine rights to private use with the right to access which characterizes transferability.
9. In a world of signs there can be no real individual. In fact, the reference is to the author's sign, his signature. Starting with Dürer's legal action to ensure protection for his sign, there has been legal emphasis on the act of signing and its consequences.
10. For some interesting empirical details see Towse 1994.
11. For that reason they have no market price. There are, of course, cases where a black market emerges.
12. Santagata (1994) argues for a "right to exhibit" in cases where the traditional *droit de suite* is not enforceable.
13. Dietz (1990) comes to strikingly similar recommendations. The conclusions are reached through practical experience, in an inductive manner, with rich institutional detail. He also reports that the notion of artist circles or communities already appears in the traditional concept of *domaine public payant.*

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