INTRODUCTION

At the core of this thesis is an irresolvable paradox: the paradox of 'intellectual property.' The basic idea of intellectual property is to find a balance between the protection of the economic and moral interests of creators and innovators and, at the same time, to enable cultural, scientific and economic innovation. Where creation and innovation rely on access to and the use of protected works, proprietary rights hamper new creation and innovation. This paradox of intellectual property has always existed, but due to the technological, economic, legal and cultural developments that have taken place since the mid-1990s, it has turned into a central problem of information society (Hilty, 2007).

The thesis focuses on the paradoxes produced by copyright in the light of art practices that are based on the use and reworking of protected material. As one specific form of intellectual property, copyright grants the creators of original works exclusive rights to their creations and thus prohibits unauthorised use and reworking. The basis of my research is my own art practice, the theory it is informed by, the issues it is concerned with, and the aesthetic and technical forms I develop and use in order to address them. Since 1997 I have been experimenting with online generative software and have developed different versions of an artwork titled *net.art generator*. When a key word is entered, the computer programme collects text and image material from the Internet and creates digital collages by processing the 'appropriated' material. The project involves questions of authorship, originality, and digital reproducibility, and is thus located in the tradition of conceptual and media-related avant-garde practices that have in common the challenging of romantic notions of authorship and originality, as well as the critique of artistic autonomy. More specifically, by critically exploring the basic operating principles and norms of the art world, the project pushes and

transgresses its boundaries particularly through the use of digital technologies. These deliberate attacks on the basic principles of aesthetic modernism also imply conflicts with the institutional and legal framework of art practice. Experimenting with digital authorship and originality automatically implies experimenting with copyright infringement. This became clear to me in 2004, when my exhibition *This is not by me* was cancelled. The exhibition concept included a presentation of the *net.art generator* (since 1998), the online tool for the automated creation of digital collages, and additionally, a selection of high-quality prints of digital collages.

The digital collages to be presented were all re-workings of the famous Warhol *Flowers*. I had chosen the *Flowers* as a reference image because the motif harbours the discourse concerning reproduction, authorship, and originality. Furthermore, the example perfectly demonstrates that artistic appropriation and transformation do not necessarily harm the 'original' work or its author, but can actually result in the enrichment of both. Still, the exhibition was cancelled due to alleged copyright infringement. This incident was my first negative experience with copyright in practice. It manifested the relationship of copyright and art, in particular the limiting aspects of copyright for specific artistic practices, and it drew my interest to the concept of intellectual property as the framework of all creative practice.

Although this experience had an initial damaging effect, the inflicted restriction motivated me to embark on a research journey. I expanded the original small exhibition project and used it as the starting point for my research. From operating as an interface to the legal sphere *This is not by me* became the basis

for my practice-led research, which actively explores the complex relationship between copyright and art. Within the research context, *This is not by me* provided an exemplary case from which all questions related to this study are derived. It enabled the exploration of the paradoxes of intellectual property from a practice perspective and offered the framework for the development of artworks that 'perform' the research, i.e. are 'about' copyright infringement, and which commit violation of copyright law in a staged situation at the same time.

1. RATIONALE

The hypothesis of my research is that copyright induces a paradoxical situation for artists whose practice is based on the use and re-working of pre-produced and copyrighted material. While one of copyright's main incentives is to stimulate and enable innovation, this purpose fails for such practices and produces the opposite effect. Starting from this assumption, I developed a number of questions that lead the way through this thesis. With reference to the central question underlying my research of how art practice can promote a subversion of the law, my investigation begins with the analysis and contextualisation of my own practice. The two questions addressed at the beginning are, to which particular creative practices the paradoxes of intellectual property pertain, and what the theoretical context is, in which they emerge. The next step is to acquire a better knowledge and understanding of copyright law and of the concept of intellectual property, in order to be able to comprehend how art and copyright are related and at which conceptual junctions the problems occur. The answers to these questions finally lead to the practice part. On the basis of performativity as the main methodology, the project *This is not by me* presents the paradoxes of intellectual property in a series of related projects. The thesis would not be complete without

contextualising appropriative art practices within the dynamics of remix as the new cultural paradigm of the networked society, as well as a discussion of the implied cultural, legal and political changes.

2. AIMS AND OBJECTIVES

A substantial research project on copyright-related issues conducted by an artist/creator is an exceptional undertaking. Normally it is legal experts, policy makers and lobbyists who deal with the legal framework of aesthetic practice. When it comes to looking after the interests of artists and creators, it is the collecting societies of the various sectors that champion for a stricter protection of creative works. As 'providers of auxiliary services in the creative process' (Hilty, 2007), their aim is usually the harsher enforcement of existing laws as well as the expansion of protection for rights holders.

The perspective represented by particular lobbyists, however, does not reflect the multitude of artistic approaches. The aim of this study, therefore, is to make the picture more complete by contributing an actual artistic perspective. It is the perspective of creators whose artistic practice is based on the use and re-working of existing copyrighted material. Copyright and the predominant cultural notions of originality and authorship it represents prohibit artistic practices based on the reworking of copyrighted material and thus stifle and hinder such activities. The principal aims of this thesis, therefore, are firstly to address the basic paradox underlying the concept of intellectual property from an involved artistic perspective, and secondly to make an interdisciplinary practice-led contribution that will be conducive to the solution of the problem in the long run.

Having said that, it is important to highlight that the aim of my research is not to make suggestions for the amendment of copyright law. Instead, I am using the specific capabilities of art practice to explore the paradoxes of intellectual property and make this abstract phenomenon tangible. Although it is clear that my research will not result in an immediate solution to the problem, it will nevertheless generate new knowledge relevant for an interdisciplinary approach to the problem addressed.

In order to achieve these aims, a number of research objectives have been defined consecutively: to describe and historically contextualise contemporary appropriative practices; to portray the media-related history of copyright; to highlight the connecting lines between copyright and aesthetic practice; to critically discuss philosophical theories of intellectual property and thus theoretically explicate the paradox of intellectual property; to conceive a methodology that brings together theory and practice and allows for the development of projects that perform the problem in practice; to stage the 'performances' and thus create awareness of the problem, and to locate the copyright-related problems of appropriative art practices within the dynamics of the networked society.

3. METHODOLOGY

As stated above, the incentive to start this research came from a problem I encountered in my own art practice. In that sense, the act of censorship provided an 'ideal situation' for the development of practice-led research as elaborated by Gray (1996). The problem I am addressing is the limiting function of copyright law for appropriative art practices. By integrating different disciplines such as

aesthetic theory and practice, and law, the nature of this study becomes interdisciplinary. However, since it was clear from the beginning that I would not be able to solve the problem through my research, the challenge was to come up with a methodology that would lead to results that still could contribute to a solution by producing new knowledge. For that reason I chose the concept of 'performativity' to be the methodological paradigm of my research, since it allows for the conceptualisation and dramatisation of a subversive artistic approach to law.

Haseman (2006) suggested that 'performative research' denotes a third research paradigm alongside the established paradigms of quantitative and qualitative research. For the development of his concept Haseman drew on Gray's (1996) understanding of practice-led and the notion of performativity as introduced in linguistics by Austin (1955). The main characteristic of practice-led research, according to Haseman is the 'primacy of practice,' which Gray elaborated as research being initiated in and carried out through practice. Haseman (2006) gives primacy to practice when it comes to the outcomes of research by arguing that the symbolic language and forms of practice hold a specific knowledge that cannot be expressed otherwise. He refers to Austin's speech-act-theory, in which Austin defines 'performative' sentences as sentences which bring into being what they name; through their utterance they execute 'conventional procedures.' Instead of describing facts they create them (Wirth, 2002). In this sense, practice in the context of art research means that artworks do not just function as conventional artworks; they function performatively by being expressive forms of research, and in that expression they become the research itself (Haseman, 2007).

I expanded Haseman's (2006) understanding of 'performative research' by relating it to Butler's (1990/1993) juridical model of 'performativity,' as well as Stone Peters' (2009) theory of law's performative nature. Butler's model includes positive law–and thus the social norms it expresses–as well as the broader notion of law as symbolic order. Her basic assumption is that 'the law' is constantly re-actualised through its performative repetitions. An important aspect of Butler's theory is the integration of linguistic and theatrical notions of performativity, where she situates a possible subversion of the law. The performing subject is not only able to re-actualise the factual law, by 'shifting, imitating, or mimicking' the normative concept underlying the law, it is also able to embody mutations of the law, and thus can contribute to its re-signification. Stone Peters (2009), interestingly, focuses on the role theatrical perfomances play in the production and reception of the law. According to her theory, the law is more than just a "bureaucratic system of rules and principles, doctrines and holdings, or even structuring institutions" (p.20). She brings to the fore the intrinsic performative dimension of law and its theatrical features.

The overall methodology of 'performative research,' which I developed for my research project, is a combination of the aforementioned theories. I use the 'trinity' of the subject, the law and its performative repetition as conceptualised by Butler as the model I transfer to the field of copyright by identifying the author and the law of originality as the basic components. The subversive repetition of the law, in my model, takes place through the deviating performance of appropriative practices as exemplified by the *net.art generator* and its contested outcomes: the re-worked Warhol *Flowers*. These works are artworks in the

conventional sense, thematising and exploring the paradoxes of intellectual property, but as such they also transgress the law and thus function in Austin's sense as performatives. Complemented by three subsequent artworks, they were exhibited within the project *This is not by me* in a variety of exhibition contexts; this means that in addition to their subversive character, the deviating performances are dramatised and performed 'on stage.' Since law always depends on its dramatisation to make its abstract nature accessible to the senses, according to Stone Peters, I use the project *This is not by me* to dramatise and perform the subversion of the law. Within the research process, the individual artworks take on different functionalities: they are self-contained outcomes of prior research, they perform the research, and they are also the basis for further critical reflection, which then leads to another level of research findings.

Practice-led in the context of my research does not mean that the study was conducted exclusively through practice. Rather, I applied a variety of methods depending on the particular questions, thus adopting a multi-method approach. The interdisciplinary nature of my research required conducting studies of legal literature and philosophy. For the contextualisation of my practice I referred to art history and aesthetic theory. For the practice part, I predominantly used methods common in art practice, complementing them with social science methods according to the needs of each particular project.

Finally, I would like to point out that the underlying methodology of performativity is not limited to conducting the actual research project, but finds its continuation in writing this thesis, in which I perform the role of a conventional author.

4. SCOPE OF THE STUDY

This study was initiated by my personal experience as a visual artist interfering with copyright problems, hence the decision to focus my research on the intersection of visual/conceptual art and copyright. Still, as the title of this thesis indicates, I found it necessary to position my specific research within the vast and ever-growing legal area of intellectual property rights and point out the relation between the hypothesis of my research and the overall discourse on intellectual property.

The terms 'copyright' and 'intellectual property' are not interchangeable. Rather, copyright can be defined as one specific form of intellectual property. Other types are primarily trademarks, patents, industrial design rights and trade secrets. The World Intellectual Property Organisation, WIPO, introduced a basic distinction between copyright and industrial property. The various forms of intellectual property are of different origin, they have different rules and objectives, and therefore raise different public policy issues (Stallman, 2005). What they have in common, according to the definition from WIPO, is that they all relate to:

> items of information or knowledge, which can be incorporated in tangible objects at the same time in an unlimited number of copies at different locations anywhere in the world. The property is not in those copies but in the information or knowledge reflected in them. Intellectual property rights are also characterized by certain limitations, such as limited duration in the case of copyright and patents (WIPO, online, n.pag.).

In this sense intellectual property could be regarded as a seemingly neutral umbrella term. However, since intellectual property rights play a central role in enabling the commercialisation of information, knowledge and culture within the industrial framework of the new informational capitalism (Castells, 1997), the term has come to play a central role within the justification of the ever-increasing

propertisation of intangible goods. Critics of the term (Rigamonti, 2001; Lessig, 2001; Moglen, 2003; Stallman, 2004; et al.) mainly fault its suggestive and misleading proximity to material property and understand its large-scale enforcement as a politically motivated strategy. Critics argue that as the term borrows legitimacy from material property, it represents the increasing attempt to control and expand intellectual property rights to the detriment of their actual function, i.e. balancing the antagonistic interests of copyright holders and the public. The connecting line between these dynamics and my specific research on the limiting aspects of copyright is that this growing control causes, according to Lemley (2005), 'dynamic inefficiencies', in other words it hampers innovation and creation. By referring to intellectual property in the title of my thesis, I intend to highlight this relationship between my specific field of research and the larger dynamics within which it is embedded. At the same time, I am aware that the copyright conflicts emerging in the visual arts are relatively incidental in the battle raging over intellectual property rights. Within the scope of copyright, visual art pertains to 'artistic creations' which are just one out of a variety of categories such as literary, dramatic, musical works, sound recordings, broadcasts, films, performances, typographical arrangements, etc., but also computer programmes, websites and databases. The relevance of copyright varies in the different fields, becoming more important when the economy of the field is based on selling large numbers of copies of the same work, i.e. when the work is of reproducible nature, as opposed to selling one unique original artwork. In other words, it is minor in the field of visual artistic creations compared to the economic and thus political relevance of copyright in the film and music industry. I decided to conduct my research in the field of visual art not only because I am a visual artist myself, but also because I contend that the notion of the individual

artist who creates 'original' works of art plays a central role in the legitimisation of intellectual property. As Stapleton (2002) emphasises, artistic challenges of the legitimacy of copyright have been taken very seriously in the discourse of intellectual property. Therefore, addressing the paradoxes of intellectual property with the means of artistic/visual research adds enormous symbolic value.

5. CONTENT STRUCTURE

Chapter one establishes the basis for my research by introducing and contextualising my art practice. The chapter is divided into a practice and a theory part, and provides an overview of the methodology underlying the practice-led research.

The practice part presents and discusses the two Internet art projects that constitute my research: the *net.art generator* (since 1998) and its precursor project *Female Extension* (1997). *Female Extension* was primarily an institution-critical intervention: the attempted hack of the first museum Internet art competition by 'flooding' it with a multitude of female artists. A computer programme was used in this context for the automated production of fake net art projects. This first version of a random-based generative software programme resulted in the development of the concept for the *net.art generator*, a discrete web-based software programme, which interactively creates digital collages on the basis of text and image material it collects from the Internet. By playing with the multiplication of identities, non-ascribable authorship and the appropriation of digital material, both projects critically explore and shift the basic operating principles and norms of the art world.

The discussion of the theoretical context of the projects situates them in the tradition of conceptual and media-related avant-garde practices that share the challenging of romantic notions of authorship and originality as well as the critique of artistic autonomy. The projects continue this tradition and expand it by particularly exploring the conditions of digital networked technology. However, as it will become clear, aesthetic practices that erode authorship, undermine the notion of the original artwork, in fact appropriate copyrighted material not only transgress the rule of aesthetic modernism, but, in doing so, also interfere with its legal framework: copyright.

In order to further my research on the conflicting relationship between copyright and art, I situate appropriative aesthetic practices within copyright law and the dynamics of intellectual property at large. Chapter two, therefore, explores the legal framework of aesthetic practice and its implications in detail. The chapter begins with an overview of contemporary copyright law explaining the utilitarian and non-utilitarian model and their diverse implications for copyright-critical approaches. Furthermore I consider the exceptions copyright provides for the use of copyrighted material, such as fair use, and discuss the ways in which digital technology challenges copyright. The section about 'moral rights' explains their origin in subject-oriented theories of copyright that view an intellectual product as the extension of the creator's mind and, therefore, ban all modifications, reworking, or sampling. While moral rights are regularly invoked as the cultural counterpart to the commodification of culture, their implications seem to be out-dated in a digital networked environment, where using and reworking pre-existing works has become a common cultural practice. A following section portrays the historical development of copyright and its philosophical and

political framing, emphasising its origin as a form of trade regulation. In this context the current developments in copyright that point to a declining importance of the individual author in favour of corporate ownership make the romantic notion of authorship appear to have been nothing but a transient model. The last section is dedicated to the critical discussion of the term intellectual property. It looks at the paradoxes which intrinsically underlie the concept of intellectual property from a philosophical perspective and demonstrates that they come into effect when the qualities of 'property' are imposed on intangible goods–as it is increasingly the case under the conditions of informational capitalism.

Chapter three constitutes the core of my practice-led research. It introduces the methodology applied in my research and discusses the four artworks the project *This is not by me* comprises: *anonymous-warhol_flowers* (since 2004), *copyright © 2004 cornelia sollfrank* (2004), *Legal Perspective* (2004), and *I DON'T KNOW* (2006). The overriding question of this thesis, of how artistic practice can promote a subversion of the law, here translates into performing the paradoxes of intellectual property in an art context. Due to the significance of the *Flowers* motif for my research, an art historical study into the multi-layered history of the appropriation of the motif provides the basis for the subsequent artworks. By focussing on the generated re-workings of Warhol's iconic *Flowers,* the individual works address different issues, such as the legal relevance of the difference between digital and analogue re-worked images, the unresolvable authorship question of generative art, the inescapability and uncertainty of legal grey areas and possible defence strategies, as well as the unpleasant scenario of a permission culture.

The conclusion addresses the relevance of appropriative art practices in the context of the emerging mass cultural phenomenon of remix. While the paradoxical principle of intellectual property has always existed, it is no longer confined to a specific cultural and legal niche, but rather becomes manifest as a central problem of the information society, hindering mass cultural activities as well as related business interests. It is within this changed context that art, by the deployment of its specific knowledge and methods, can contribute to a subversion of the law. Speaking out against the enclosure of cultural goods as private property now means not only claiming freedom of art, but also supporting the general demands for access to intangible goods and participation in the production of culture.