Art Juridified:

Legality in Contemporary Art Workings

by

Christoph Schreiber

A Thesis Presented in Partial Fulfillment
of the Requirements for the Degree
Master of Arts

Approved April 2018 by the
Graduate Supervisory Committee:

Meredith Hoy, Chair
Julie Codell
Angélica Afanador-Pujol

ARIZONA STATE UNIVERSITY

May 2018

ABSTRACT

Art and law have a troubled relationship that is defined by steep hierarchies placing art subject to law. But beyond the interplay of transgressions and regulations, manifest in a number of high-profile cases, there are more intricate connections between the two disciplines. By expanding the notion of law into the concept of a *hybrid collectif* of legality, the hierarchies flatten and unfamiliar forms of possible interactions emerge. Legality, the quality of something being legal, serves as a model to show the capricious workings of law outside of its own profession. New juridical actors—such as algorithms —already challenge traditional regulatory powers and art could assume a similar role. This thesis offers a point of departure for the involvement of art in shaping emergent legalities that transcend existent jurisdictions through computer code.

To Marco, who challenges me in all the right ways.

And to the most important non-human actor in my life:

Yōkō, my sassy Shiba Inu, who has been my bastion of calm for the past two years.

ACKNOWLEDGMENTS

I am most grateful to my wonderful advisor, Meredith Hoy. She was my ideal sparring partner to test my arguments, a walking encyclopedia of cutting edge theory, and my confidant throughout the rollercoaster of the writing process. This thesis would not have been awarded had you not taken me on as your advisee under adverse conditions. You serve true professorial extravaganza eleganza!

Julie Codell provided excellent editorial guidance from my first day of classes. She enabled me to develop a clear, academic writing style in English and saved me from many embarrassing errors. Angélica Afanador-Pujol greatly enriched my scope of art historical inquiry with her decidedly *social* history of art and her fascinating seminars on pre-Columbian cultures.

Last but not least, I am hugely indebted to both Fulbright and the DAAD—and I would quite literally be in debt without them. Both programs have the remarkable ability to send its applicants on a deep soul search to elicit those personalities that strive to have a positive impact on society. Once embarked on their transatlantic journeys, the strong sense of community among Fulbright and DAAD awardees provides both a safety web and an inexhaustible resource. Thank you for believing in my ideas and seeing in me the potential to make a difference! I would not have been able to achieve my Master's degree in the United States, explore the world, share my perspective, and grow with the challenges I encountered, if it wasn't for both of these invaluable programs.

TABLE OF CONTENTS

CHAPTER 1

MAKING A CASE FOR ART

Art and law have a troubled relationship that is defined by steep hierarchies placing art subject to law. But beyond the interplay of transgressions and regulations, manifest in a number of high-profile cases, there are more intricate connections between the two disciplines. By expanding the notion of law into the concept of a hybrid collectif of legality, the hierarchies flatten and unfamiliar forms of possible interactions emerge. Legality, the quality of something being legal, serves as a model to show the capricious workings of law outside of its own profession. New juridical actors—such as algorithms —already challenge traditional regulatory powers and art could assume a similar role. This thesis offers a point of departure for the involvement of art in shaping emergent legalities that transcend existent jurisdictions through computer code.

It is a prevalent notion that art is an act of resistance, a form of activism that pushes the boundaries of the law. Endowed with special rights protecting their freedom, artists have willingly taken the outlaw position or, in other cases, suffered the consequences of their clashes with the law. Research on the intersections of law and art has focused on issues pertaining to visual representations and artistic transgressions of law. Consequently, artists' efforts to question, violate, and gradually expand the legal framework have been tied to specific laws such as any moral, constitutional, or copyright laws.

Drawing from Scott J. Shapiro's book *Legality* (2011), the term legality stands for everything that instantiates the property of being legal.[1] I argue that the connection between legality and art is largely neglected. My inquiry expands the scope of legal art history to consider legality as a broader conceptual framework for reading contemporary art workings. Art which pushes and transgresses the boundaries of the law only unfolds its impact in relation to the prevalent social, political, and legal norms it challenges and not solely in an act of artistic bravery. My point is that legality constitutes a reference system for the amplitude of artistic agency. Placing the concept of legality in the context of contemporary art history and theory foregrounds the issue of agency, the ability and potential of art to act in society. Agency in art has been studied, most famously, by Alfred Gell[2] and also Niklas Luhmann has contributed to the understanding of art as a social system, but the legal perspective on art's agency has not received sufficient attention in contemporary art discourses.[3] Contemporary jurisprudence, on the other hand, focused on identifying "essential properties"[4] of law but is also characterized by an increased politicization, globalized thinking, and the openness toward other fields of inquiry into the values of law.[5] I will build upon these new inroads to interdisciplinary legal research.

Specific laws only take effect within the limits of their designated jurisdictions. Where appropriate, I will point out systemic differences such as the one that exists between common law and statutory law or will indicate when specific claims or references are only valid in their (jurisdictional) context. Otherwise, I will follow the theory of "stateless law," which asserts the possibility of understanding law beyond the

state level.[6] Legality, the concept I will present in this paper, is not confined to any specific site and does not denote conformity with any law, as the word *legal* might suggest, but describes a feature of art. Legality is a condition that comprises of all concrete legal things (courts, law books, judges, etc.) and all legal effects (e.g. feelings of guilt or empowerment, law's "invisible hand"); the latter, immaterial influences of legality do not take a physical form but they have an impact on and are present in art workings.[7]

Legality, in plain words, will serve this thesis as an umbrella term for anything law related, whether constituted by people, norms or any form of expression (writing, speech, art, architecture). I will loosely apply the term to law-like occurrences, such as conventions, customs or habits, to engage with legality in a way that goes beyond the judgments of officially issued, legislatively ratified laws. Law derives its power from organization; its power is systemic and implemented in society. Legality occupies the space in between, and exists side-by-side with both the formal and social system of law.

Contemporary art theory, to formulate a disclaimer at the outset, does not often dwell upon the distant past and there is much debate about the actual span of the "contemporary" period. To analyze the multifaceted contexts of legality in art, however, I venture to take a very condensed, generalized, and provisional look at the past to understand how the relation between art and law has evolved. By assembling various, seemingly unrelated associations and examples, I am alluding to Aby Warburg's *Mnemosyne Bilderatlas*, with which he "strove to make the ineffable process of historical

change and recurrence immanent and comprehensible"[8] on an iconographical level. I infer the connections between art and legality by employing a similar, associative method that draws from eclectic materials, times, situations, and places. This is to provoke new avenues of research into the field and to give a sense of the complexity of art's legality. Today, the internet—an associative power tool—takes the role of such a *Bilderatlas.* While Warburg used his assemblage of visual clues to prove how motives and images travelled and evolved across time, cultures and continents, I am presenting clues (not only visual ones) to show how legality unfolds. My approach is ultimately aimed at our present time, but seeks to be historically informed; it does so out of the conviction that laying bare the roots of how the status quo came to be, implies the possibility of an alternative status quo. Showing the genesis of things reveals the actors, decisions, and influences involved in their *making*, instead of accepting them as *given*.

First, I will look at the curious historical development in which violations of the law are not only tolerated but are a legitimating force within contemporary art practice. "Great art," as the U.S. Supreme Court Justice Oliver Wendell Holmes states, "… precisely because it breaks away from conventions and rules and expresses creative freedom and imagination, is the antithesis of law."[9] We frequently encounter the notion of "law as ordered, systemic, closed, coherent, and hermeneutically stable, while art and literature are seen as anarchic, open, and free"[10]—evoking the question whether law and art are altogether different, even antithetical as Holmes suggests. In what follows, I will show that the categories used to describe art in relation to law are porous and

oversimplifying. Instead, I advocate for a differentiated view on obedience versus transgression by introducing legality as a non-binary, non-judgmental third option.[11]

Using a Latin phrase for the title of my second chapter ("IUS ARTIS," the law of art, as an inversion of "ars iuris," the art of law) is a subtle attempt to both highlight and parody lawyers' affinity to the Latin language, evident in legal terms like *alibi*, *ipso facto*, *ex tunc*, *de jure*, and many more. The use of such terminology further manifests *Legalese* (the specialized language of the legal profession) as a secret language of the few—much like a code—and the knowledge of the law as a tool for the exercise of control. It is my ambition in this thesis to illustrate the close entwinement of art and law without resorting to the use of *Legalese*. Instead, I will use sociological terminology to weave together art theory and jurisprudence. Because both fields are either social phenomena or social tools, it seems appropriate to use sociology as the system of coordinates for my claims.

Based on Jürgen Habermas' theorization of the "juridifaction" of the lifeworld, I will show the interplay of increased codification and art production. Juridification is best explained through the analysis of concrete legal norms. For example, copyrights sustain creative activities in our economy driven world, but issues of copyright (and intellectual property) also call into question assumptions regarding the status of art (e.g. authenticity, authorship, ownership).

Taking juridification a step further, I will situate legality within the concept of the *hybrid collectif*, a term by the sociologist Michel Callon which describes the interaction of various human or nonhuman elements. Those elements, then, form relationships that

perform agency. This notion, applied in the context of legality, overturns the genius cult in art, which asserts that all agency is carried out by the artist. At the same time, my contextualization of legality will show that art's agency is facilitated by a legal *hybrid collectif*.

Recognizing both the discursive nature of law and its material manifestation, I set out to detect instantiations of legality in contemporary art. While my thesis will be theoretical in nature, I will illustrate some aspects of art's relationship to legality with concrete works and concepts. There is, however, no single artist whose oeuvre would warrant to be the sole focus of my thesis. As of now, legality remains too impalpable, too vague, and abstract to form a basis for continuous artistic involvement. But there are curatorial efforts amenable to my theoretical framework, like the current exhibition *Open Codes – Living in Digital Worlds* at the ZKM – Zentrum für Kunst und Medien (Center for Art and Media) in Karlsruhe, Germany.[12] The comprehensive exhibition exemplifies the occurrence of legality in art through code, not to propose that legality usurps art but to show the spectrum of its possible influence.

To compare law and code in the context of art opens the experimental field of coded art to the possibility of an active participation in the design of future legal systems and processes. In my concluding chapter, I provide a glimpse at the global and visionary perspective that current law and media theorists have on new forms of software governing. My thesis yields more questions than it offers answers; it is conceived as a

point of departure for a broader research project that is required to strengthen the notion of legality to contemporary art workings.

Playing by the Rules

What is art's relationship to law? And why should art historians engage in legal theory at all? These questions challenge us to make explicit the principles that underpin our commonsense conception of art and law; a conception that is pervaded by binaries: legal/illegal, (law and) order/ (creative) chaos, right/wrong, complex/complicated, and so on. Legal or illegal is the obvious dualism of law; you are either in or out(law). Put in less absolute terms which focus on action rather than status, a common notion is to divide art vis-à-vis law into *obedience* and *transgression*. To be able to embrace the complexity of art's legality, we need to perforate some of its binaries to highlight the phenomena in between.

Obedience to laws and law-like systems such as conventions has been a job requirement for artists for most part of art history. Diligence and servility were necessary to enter the profession of an artist in the ancient *collegia*, the medieval guilds as much as in the later academies. Success was measured by accuracy in imitating a master's regime of aesthetic conventions or by following a certain school of how art is to be made (e.g. perspective, composition, priority on drawing or color). In that sense, being an obedient artist had a customary context, not a statutory one, and submitting to the customs was regarded as something desirable or beneficial at least.[13]

At one point, artists' law-abidance began to be clouded by negative connotations: art came to be seen as (unintentionally or not) complicit with the law or instrumental to it, either when it represents a certain view of the law or, in a more political context, when it serves propagandistic purposes. While the provenance of this sentiment is yet to be determined, the institutionalization of art and culture during the Third Reich, involving extreme repressions and exploitations, had a profound effect on the relation between art and government authority, as Jonathan Petropoulos demonstrated in his book *Art as Politics in the Third Reich* (1996).[14] Some have even questioned the possibility of "true art" in (as in fostered and promoted by) an evil system, which has been a taboo until very recently.[15] It is a question, though, equally pertinent to legal scholars, in particular those who subscribe to the Natural Law theory, which posits that "it is a necessary property of the law that its existence and content are ultimately determined by social and moral facts."[16] If we assume that any law ultimately derives from moral norms, then how do we account for the laws of evil systems? Are they laws at all? Is art created in service of evil regimes still art? How does art relate to morality? Juxtaposing these trains of legal and art historical thought exemplifies the impact that a closer reading of these two very distinct, yet entwined, fields can have.

Leaving historical extremes aside, it is fair to say that the majority of art operates in blissful ignorance of the juridical law,[17] unaware of its regulations but working within or in accordance with the boundaries it sets. It would be imprecise to refer to this attitude towards the law as obedient, because ignorance does not require agreement or acceptance

of the law, but neither does it articulate any clear opposition to or even interest in the law.[18] Although, as the proverb goes, ignorance of the law is no excuse, it is axiologically neutral to say that art has nothing to do with the law. Not being involved with the law is not a bad thing after all; on the contrary, it usually augurs ill to say otherwise.

Ignoring the law, however, does not mean escaping its reach. Any artwork in a museum, for example, is embedded in numerous layers of law: economic regulations decide under which conditions an artist can buy materials and what materials are available in the first place, a commissioned artwork will likely be based on a written agreement (common at least since the thirteenth century),[19] the museum will house the work after signing a loan contract (which often entails other legal agreements about transportation, storage, insurance, etc.), visitors to the museum will have to obey its house rules to view the work, and so forth. In fact, the legal aspects of many everyday situations are too complicated to even attempt to provide a complete list of all laws involved in creating and showing art. What is important to note is that law concomitantly exists, is driven by and conflicts with other "semi-autonomous social fields" (such as art, businesses, institutions, families, religion, etc.).[20] This increased legal complexity is a symptom of the modern organization of the social world, significantly formulated by the German sociologist and philosopher Jürgen Habermas, which I will address in chapter 2.

Above the Law — Thoughts on Law and Art

The slow but steady rise of the artist's status since the Middle Ages played an important role in artists' ability to depart from conventions. Retrospectively, art history

has rewarded those artists who broke with conventions, because their deliberate transgressions are associated with progress and innovation—or the student surpassing the master.[21] The necessary self-confidence of art and the ability to sever ties with traditions and expectations is linked to the development of the notion of "autonomous art," advanced by the aesthetic philosophy of Immanuel Kant, who conceptualized the idea of "intentionless appreciation" (*interesseloses Wohlgefallen*) in his *Critique of Judgement*, first published in 1790.[22] In his opinion, a judgment about beauty is only valid to the extent that no intention is involved. Art, in Kant's view, while a product of the artist's intentions, possesses qualities that are independent from those intentions.[23] This theory liberates the artist from any affiliations and external interests, instead, it allows to create art for its own sake. Kant's Enlightenment ideas, liberating aesthetic judgements from authorities and ideologies, paired with the violent upheaval against authorities during the French Revolution, provided the theoretical framework for and the practical example of a justified disobedience. *L'art pour l'art* then became the French catchphrase for art with no strings attached, and has persisted since the 19th century.[24] Art, so the bohemian creed, is accountable to none—neither the law, nor any underlying morale. Laws, applying the creed's logic, were no longer the measure of all things. The non-accountability of art further elevated the status of artists and deferred art to a sphere outside of law.

But art's privileged standing, according to Anthony Julius, has evolved into a "conceptual lawlessness" of contemporary art.[25] Julius observed what I would call an *anything goes mentality* of artists in his book *Transgressions : The Offences of Art*

(2002). To him, this is as a result of a "plurality of aesthetics, a multiplicity of art practices" and the lack of overarching criteria.[26] Julius sees transgressions and crimes everywhere, from Piero Manzoni's *Artist's Shit No. 014* (1961) to Damien Hirst's bisected animals in formaldehyde. Do artists not only position themselves against the law, but perhaps operate outside its bounds? In his strictly moralizing view of supposedly unrestrained counter-culture, Julius did not acknowledge that the artists' conflicts with the law also amount to a strong engagement with it.

When the Tate Modern headlined an online section of a recent exhibition on Robert Rauschenberg "The American modern master, who ~~broke~~ ~~changed~~ [sic] rewrote all the rules…,"[27] they referred to the exceptional status of the artist before the law.[28] But, more importantly, they saw the artist as a law*maker* ("rewrote all the rules") instead of solely as a law-*breaker*. The engines of a dynamic legal system are fueled by breaking and rewriting rules. Thus, both scholarship and public interest concerned with the relationship between art and law has focused on the adjudication of artists as either culprits or plaintiffs. For example, the widely cited case *C. Brancusi v. United States* (1928), engaged in a deliberation over the bureaucratic classification of an imported sculpture by the Romanian artist Constantin Brancusi. The case ultimately shook the conceptual and aesthetic foundations of Modernism by trying to legally define what art is.[29]

Tedious technicalities of import tariffs may seem insignificant to our current, globalized art world, but they made possible the breadth and speed at which major American collections—such as the Metropolitan Museum of Art in New York City—were

able to form in the early 20th century. US lawmakers, who decided to eradicate the import tariff on art in 1909, profoundly changed the market and possibilities for artists, dealers, and collectors.[30] Customs officers no longer contest the status of certain goods as works of art. By raising public attention, prominent cases help to foster policy changes and expand the aesthetic and economic parameters of art .[31]

In other cases, artists might suffer immediate repercussions from the controversies sparked by their works, but they do not themselves aim to instigate lawsuits. *Piss Christ* (1986), a work by the American artist and photographer Andres Serrano depicting a crucifix drowned in a container filled with the artist's urine, caused an outcry from conservative groups, who deemed it blasphemous. Despite the harassment of and death threats to the artist, the legal consequences were borne by the National Endowment for the Arts, which had partially funded the work and was later subject to a drastic cut in its own funding as a result of the religious outrage.[32] The legislative setback was followed by an unsuccessful legal attack from the Catholic archbishop of Melbourne, Dr. George Pell, who sought an injunction against the National Gallery of Victoria, which was showing Serrano's work.[33] Beyond their anecdotal qualities, cases like these show the power that law can exert on the life and work of artists.[34]

As the most comprehensive collection of case documents of litigations against artists and artworks to date, *Law, Ethics, and the Visual Arts* (2007) provides a useful research tool for any aspiring art lawyer. It offers a plethora of angles on cases (including the aforementioned litigation against the NEA) as well as sections on the legal

implications of whole art movements (e.g. appropriation art), and essays on crimes and cultural policy (e.g. Nazi looted art). With a clear focus on American case law,—a distinct legal tradition stemming from the British common law tradition that derives legal maxims from previous rulings—this seminal compendium also contains documentation of specific laws of other countries (unilateral or multilateral ones) collected from various periods (e.g. copyright law in 19th Century Britain), and areas of the law (e.g. criminal law or cultural heritage law). John Henry Merryman, who was a professor of law and affiliated professor in the Department of Art at Stanford University, authored the first edition of his book in 1975. At that time, the field which we now call "art law" did not exist.

Generally, art law is a non-protected umbrella term that can encompass any kind of special law that lawyers apply to art; examples include but are not limited to: antitrust law, copyrights, cultural patrimony law, tax law, inheritance law, contract law, insurance law, constitutional law, international law, et cetera.[35] Due to Merryman's pioneering work, a number of academic programs emerged. These new fields of specialization are designed primarily for lawyers or law students interested in tracing the multiplicity of legal issues that arise from the production, existence, and circulation of art.[36] Targeting students attracted by the art world but not by law schools, the international auction house Christie's offers a master's degree in "Art, Law and Business" that focuses on the commercial art world and the "Language of Contemporary Art" with the goal "to provide students with the necessary art historical background."[37] "Necessary" is the keyword

here; the mixed bag business degree from Christie's does not provide a comprehensive art historical or theoretical education to be the springboard of comparative, critical thinking about art and law—which, admittedly, is also not the purpose of the program.[38]

More traditional approaches to law and the arts are altogether different. Costas Douzinas and Lynda Nead see the role of images as central to issues of art pertaining to law in their book *Law and the Image : The Authority of Art and the Aesthetics of Law* (1999). With their collection of essays by various authors (predominantly art historians, e.g. Georges Didi-Huberman and Hal Foster), they try to blur the lines of a supposed "radical separation … between law and art" by applying aesthetic theories to the law and legal categories to aesthetic judgement. One example is Martin Jay's essay "Must justice be blind? The challenges of images to the law," in which he discusses the possibility of impartiality through an analysis of allegorical images of Justice from Antiquity to the Renaissance. In his captivating iconography of Justice he finds that the most emblematic attribute of Justice, the blindfold (among sword and scale), was not originally part of the figure's regalia but developed into a symbol of impartiality: "Justitia's vision is veiled to maintain the fiction that each judgment brought before her is a 'case' of something more general, equivalent to other like cases and subsumable under a general principle."[39] Here, the sensory disruption of blindness is more than a guarantor of objectivity, it allows a judgement independent from visible particularities of a case but in relation to a greater context. Nota bene, Jay calls Justitia's objectivity a "fiction" that is being maintained. Every case remains inevitably unique and depends on more than retinal perception.

The book *Law and Image* was meant as "the first attempt to develop a specifically legal iconology, to draw on the critical procedures of law, art history, and cultural studies in order to consolidate a new interdisciplinary field of visual culture and law,"[40] but it turned out to confine law, justice, and legality in art solely to the visual realm. Legal scholar Anne Barron points out in her scathing review, that the notion of visual culture underlying the book's claims is at least "problematic," because it conflates the visual, something sensory evident, with culture, a product of human activity.[41] While I agree with her critique of this particular editorial endeavor, I see it as an example for the predominant approach to law taken by "legal art history" or "legal aesthetics" and contrast it with my own in the following chapter. To be clear, I do not dispute the power and importance of images, but it is my contention that legal aesthetics can be no more (and no less) than one factor worthy of consideration in the legal paradigm. Jay's example of Justitia stands for a number of art historical projects on topics of legal philosophy and points to the primacy of the visual that characterizes them. What seems to be missing from an art theoretical perspective is both a wider spectrum of legal inquiry in art and a narrower definition of the goals and benefits of such an approach.

---

[1] Scott J. Shapiro, *Legality* (Cambridge, MA, USA: Harvard University Press, 2011), 7.

[2] Gell argues that "visual art objects are not a part of language ... nor do they constitute an alternative language," instead, they constitute indices of social interaction that act as social agents. See Alfred Gell, *Art and agency: a anthropological theory* (Oxford: Oxford University Press, 1998), 6.

[3] See Alfred Gell, *Art and Agency : An Anthropological Theory* (Oxford : New York: Clarendon Press ; Oxford University Press, 1998) and Niklas Luhmann, *Art as a Social System* (Stanford, Calif.: Stanford University Press, 2000).

[4] Which has been criticized as a limiting endeavor. See Frederick Schauer, "Legality," *Yale Law Journal* 120, no. 3 (2010): 621.

[5] Douzinas, Costas, Goodrich, Peter, and Hachamovitch, Yifat, eds. *Politics, Postmodernity and Critical Legal Studies : The Legality of the Contingent* (Florence: Taylor & Francis Group, 1994), 11-12.

[6] See Helge Dedek and Shauna Van Praagh, ed., *Stateless Law: Evolving Boundaries of a Discipline* (Farnham: Ashgate, 2015).

[7] "Art practices" would be the more commonly used term, but by using "art workings" instead, I want to emphasize both the fixed "work" and the procedural "practice" aspect of contemporary art. Even if an artist does not produce any physically tangible objects, when she is engaging in purely performative or conceptual genres, her doings constitute a "work" in the sense that even after she stopped actively pursuing the art project, it still lives on through various other channels (in data, social media or even in academic papers like these).

[8] Christopher D. Johnson, Memory, *Metaphor, and Aby Warburg's Atlas of Images* (Ithaca, N.Y.: Cornell University Press, 2012), 10.

[9] Costas Douzinas and Lynda Nead, *Law and the Image : The Authority of Art and the Aesthetics of Law* (Chicago: University of Chicago Press, 1999), 1.

[10] Ibid., 4.

[11] The concept of legality is, of course, not new to jurisprudence, but to art theory.

[12] On show since October 20th, 2017 until January 6th, 2019.

[13] Of course, artists stepped out of the shadows of their masters (particularly in the Renaissance) and developed their own styles based on what they had learned. The point here is not to blame artists for servility toward their superiors, but to highlight the different status of artists in history.

[14] See Jonathan Petropoulos, *Art as Politics in the Third Reich* (Chapel Hill: University of North Carolina Press, 1996).

[15] For a differentiated account of Nazis' total control of the arts, see Pamela Maxine Potter, *Art of Suppression : Confronting the Nazi past in Histories of the Visual and Performing Arts* (Oakland, California: University of California Press. 2016).

[16] Shapiro, *Legality*, 28.

[17] Whenever I speak of "the law," I mean to describe actual and concrete (written down) statutory or common laws in the juridical sense of the word. In other instances, I will speak of conventions or customs (such as aesthetic, cultural or social ones).

[18] Some might even say that ignorance shows more neglect than outright contention, because it silently expresses absolute lack of concern and interest. The deliberate lacks and gaps that artists leave in their works may in some instances attest to that attitude, but it seems far fetched to suggest the same in regards to art and legality. There is either any kind of involvement with legal issues or instantiations of legality that can be traced or not.

[19] John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics, and the Visual Arts*. 5th ed. (Alphen Aan Den Rijn, The Netherlands: Kluwer Law, 2007), 419.

[20] The term was coined by Sally Falk Moore to describe how social subgroups evolve their own legal dynamics, see Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 722.

[21] Romanticism has foregrounded artists as equipped with an exceptional endowment (and not merely an exceptional skill or technique), which manifests itself in breaking rules, departing from traditions, effecting breakthroughs: that is, in originality," as Anne Barron wrote. Then, it was the artists' ingenuity alone that determined their success. See Anne Barron, "Copyright Law and the Claims of Art." *Intellectual Property Quarterly* No. 4 (2002): 377-78.

[22] The more common translation of Kant's "interesseloses Wohlgefallen" is "disinterested satisfaction" (see J. H. Bernard, *Kant's Critique of Judgement*, MacMillan and Co., Ltd: London, 1914, 47.), but I want to minimize the idea of carelessness deriving from "disinterested" and the climatic nature of the term "satisfaction." "Intentionless", meaning without a specific aim, and "appreciation" as a more neutral form of finding pleasure in something, seem more appropriate terms to me. For the concept of *interesseloses Wohlgefallen*, see Immanuel Kant, *Kritik der Urteilskraft*, in *Immanuel Kant: Werke in zwölf Bänden*, vol. 10, ed. Wilhelm Weischedel (Frankfurt am Main: Suhrkamp, 1977), 116-117.

[23] Casey Haskins, "Kant and the Autonomy of Art. (Immanuel Kant)." *The Journal of Aesthetics and Art Criticism* 47, no. 1 (1989): 45.

[24] Although the first rudiments of the concept of "art for art's sake" have been expressed by the 15th century Florentine philosopher Marsilio Ficino, the 19th century French writer Théophile Gautier can be accredited for leveraging the phrase to worldwide recognition, see Karl Heisig, "L'Art Pour L'art," *Zeitschrift Für Religions- Und Geistesgeschichte* 25, no. 3 (1973): 273-76.

[25] Anthony Julius, *Transgressions : The Offences of Art* (London: Thames & Hudson, 2002), 11.

[26] Ibid., 11.

[27] "The rules of art according to Rauschenberg," Tate Modern, http://www.tate.org.uk/rules-of-rauschenberg/.

[28] Most democracies have come to agree that art shall be able to unfold unbothered by the sword of law, that it should be able to work in freedom—a relatively young privilege warranted, for example, by the U.S. Constitution's First Amendment. The First Amendment names and ensures the freedoms of speech and press but its legal interpretation expanded to include other forms of expression, such as visual arts. The fixation on written and spoken words stems partly from the history of printing/publishing rights and reflects law's own fixation on these forms of expression.

[29] See: Thomas L. Hartshorne, "Modernism on Trial: C. Brancusi v. United States (1928)," *Journal of American Studies*, Vol. 20, No. 1 (April, 1986), 93–103.

[30] Flaminia Gennari-Santori, "An art collector and his friends : John Pierpont Morgan and the globalization of medieval art," *Journal of the History of Collections*, vol. 27, no. 3 (2015): 406.

[31] However, the international trade in art still remains a cultural battleground, where the interplay of nationalism and internationalism clashes with historical, spiritual, and personal ownership. See the case of *Beyeler v. Italy* (2000), in which the "European Court of Human Rights held that the Italian State violated Mr. Beyeler's right to peaceful enjoyment of his possessions while using its pre-emption right over the Van Gogh painting 'Portrait of a Young Peasant.'" Ece Velioglu, Alessandro Chechi, Marc-André Renold, "Case Portrait of a Young Peasant – Beyeler v. Italy," Platform ArThemis, Art-Law Centre, University of Geneva, https://plone.unige.ch/art-adr/cases-affaires/portrait-of-a-young-peasant-2013-beyeler-v-italy.

[32] Cynthia Koch, "The Contest for American Culture: A Leadership Case Study on The NEA and NEH Funding Crisis," UPenn.edu, 1998, http://www.upenn.edu/pnc/ptkoch.html.

[33] Damien Casey, "Law & The Sacred: Sacrifice, Piss Christ, and Liberal Excess," *Law/text/culture* 5 (2000): 20.

[34] That power can, of course, be constructive as well. To stick with Serrano, art controversies usually generate a fair amount of publicity and boost prices, resulting at least in some form of monetary compensation for personal suffering. Historically, when artists were first able to obtain work contracts (some claim as early as the thirteenth century, e.g. Nicola Pisano for constructing the Cathedral of Pisa, although it is difficult to account for any oral contracts that certainly existed prior to that) their social and financial security certainly improved. See, Merryman, *Law and the Visual Arts*, 419.

[35] Meaning, it is not a formalized and clearly outlined field such as, for example, tort law.

[36] Stanford, as the central place of Merryman's workings, offers a number of classes relating to art law. Many other law programs subsume art law under the broader category of intellectual property law (IP law), although IP law only covers a portion of all legal issues concerning the arts.

[37] Christie's, "M.A. Art, Law and Business," https://www.christies.edu/new-york/courses/masters-art-law-business.aspx.

[38] Hanoch Dagan, "Law as an Academic Discipline," in *Stateless Law: Evolving Boundaries of a Discipline*, eds. by Helge Dedek and Shauna Van Praagh (Farnham: Ashgate, 2015), 43-60.

[39] Martin Jay, "Must Justice Be Blind? The Challenge of Images to the Law," in *Law and the Image : The Authority of Art and the Aesthetics of Law*, ed. Costas Douzinas and Lynda Nead (Chicago: University of Chicago Press, 1999), 26.

[40] Douzinas, *Law and the Image*, 11.

[41] As she explains, there "is, to begin with, a basic incongruity in the juxtaposition of vision as a 'natural' physiological experience with cultural theory's understanding of culture as a structure of meanings that mediate and organize experience: at the very least, the placing of these terms side by side ought to prompt a further investigation of how the physical apparatus of human vision limits or constrains cultural regimes of visuality, and how the latter in turn act back upon the former." See Anne Barron, "Law and Image: The Authority of Art and the Aesthetics of Law. (Review)," review of *Law and the* Image, by Douzinas and Nead, *Oxford Journal of Legal Studies* 20, no. 2 (2000): 307.

CHAPTER 2

FROM IUS ARTIS TO LEGALITY

The cultural instantiations of law have recently witnessed a steady rise in scholarly attention, predominantly within the fields of law and the humanities. Stanford University Press, for example, launched a book series in 2005 called *The Cultural Lives of Law.* The series aims to explore "the ways law's power in cultural production is renewed and resisted," and proposes a more fluid circulation of legal meanings.[42] This mission statement notes that scholarly research on the intersection of art and law is comprised of two primary modes of inquiry. One is practice oriented and examines specific instances that counter, challenge, or influence of statutory laws. The other is theoretical and deals with the meanings and interpretations of legal thoughts, such as the interactions and relations between law and language, race, or politics.

Both sides of the spectrum—as well as the various shades between them—are relevant for my argument about what constitutes legality in art; I will attend most closely to the immaterial exchange of meanings, features, and values characteristic of the latter avenue of research. I find it, however, inevitable to briefly address the issues of art and the "law understood as an indeterminate number of legal norms,"[43] specifically copyright law, to demonstrate the intricate connections of art's legalities beyond the binary of obedience and transgression on a more conceptual level.[44] The situations, issues, and cases mentioned in this chapter do not represent the complete inventory of legality—the things and forces that make up the legal world—but are, to my understanding, a few of

the most relevant ones in this context and, more importantly, the most relevant ones for practicing artists.

Juridification of the Art World

Law, as we have seen, has proliferated into every niche of artistic activity—and beyond.[45] What once started as an effort to rationalize a limited number of social interactions (such as buy/sell, work/pay) by breaking it down into formulaic abstractions of reoccurring situations has reached its extreme in regulating even the shape of bananas.[46] Jürgen Habermas explained the "juridification" of the lifeworld in *Theory of Communicative Action* (1987)—one of the first comprehensive, sociological analyses of the spread of law—as follows:

> The expression 'juridification' [*Verrechtlichung*] refers quite generally to the tendency toward an increase in formal (or positive, written) law that can be observed in modern society. We can distinguish here between the expansion of law, that is the legal regulation of new, hitherto informally regulated social matters, from the increasing density of law, that is, the specialized breakdown of global statements of the legally relevant facts [*Rechtstatbestände*] into more detailed statements.[47]

Framing everyday situations in semantic, legal formulas is juridification as black letter law, the accumulation of legal paragraphs. Ronald Niezen further differentiates between "*legal intensification* … a widened jurisdiction of legal institutions and increased recourse to formal processes within societies in which law already preponderates in bureaucratic procedure, dispute resolution and governance" and "*legal substitution* …, the processes by which formal law is introduced to or becomes dominant in societies or communities that have previously relied more exclusively on informal,

customary institutions and procedures."[48] The increasing volume of newly conceived and enacted laws are, in part, necessary to ensure the calculability of actions (by setting the rules of how things are to be done or not) and prevent conflicts in societies that involve a high degree of social cooperation and interdependence.[49] In plain terms, they organize our world more efficiently.

Juridification also entails a formalized logic. Legal statutes categorize and outline social behavior in branches, articles, sections, and paragraphs, which condense actions to causal phrases (if this, then that). They serve as the referent and "norm" of the situation that they are designed to frame, subsequently influencing the very perception of human interaction through those norms. In other words, laws create a feedback loop in which a social input calls for juridification and the resulting law, in turn, shapes the social output.

The most significant form of juridification for artists—and an example of the legal feedback loop—is the development of copyrights. Legal scholar Anne Barron juxtaposed the tenets of (UK) copyright law with art theory and found that copyright laws effectively channel artistic production into legally defined categories (or genres) by vesting only those categories with special rights of property protection which are marketable.[50]

Barron argues that copyrights take a "taxonomic approach to the characterisation of its protected objects" by defining a list of genres (e.g. graphic work, photograph, sculpture or collage) in which art manifests itself.[51] As a result, copyright law is based on set conceptualizations of works that lawyers have gradually expanded by way of analogy, hence, any newly protected genre derived from the predefined set.[52] Art is only art in the

sense of the law, meaning to the extent a particular work can be subsumed under legal norms and definitions, not in any other conceptual way. “Copyright law,” Barron says, “…has no category of ‘art.’”[53]

Copyrights are essentially property rights issued to incentivize what we would call *creative entrepreneurship* today. In all reality, the legal benchmark for creative products to achieve copyrights is very low, so every smartphone user will enjoy the exclusive rights to her or his pet videos.[54] With a low threshold and the promise of long-lasting benefits, the law privileges media that are both moveable and marketable. Commodification and codification go hand in hand, rewarding the artists working in legally acknowledged media.

Many works of art are not strictly confined to any traditional medium, which—as the Modernist media theory à la Greenberg suggests— “demarcates an autonomous jurisdiction for each art.”[55] The very notion of copyrights must, therefore, lastingly alienate many modern and contemporary artists working across and beyond media. This is especially true, if their work “resists its own reification,” as Barron finds to be evident in “conceptual art, some of which liquidates the object entirely; and performance art, which yields an event unfolding in time rather than a spatially delimited artefact.”[56]

Marina Abramović, the world’s best known performance artist, has repeatedly lamented the issue of insufficient marketability of her performances. Despite her fame, she can only earn a fraction of the profits garnered by her similarly well known artist colleagues like Jeff Koons, whose 2013 auction record was at $58.4 million for *Balloon*

Dog (Orange).[57] Abramovic's record at the same vendor reached "merely" $365,000 for a whole set of framed photos documenting the artist's complete performance oeuvre—marking yet another gaping inequality in pay.[58] Her case is exemplary of the many performance artists, who have to resorted to other (secondary, documentary) media, like photo and film, to be able to sell their works. By demanding that artists produce permanent, physically tangible objects in order to enjoy rights to their works is the "discriminatory and exclusionary" side of the law that has immediate ramifications on art production.[59]

What Habermas described in the 1980s was more than just the bureaucratic act(s) of issuing new laws or codifying areas of the "lifeworld"[60] that have hitherto been organized informally. We must understand the juridified regime as a way of perceiving the world, as an epistemology of law that formalizes and influences our thinking and action. In other words, laws can program us perceptually in a way that we must adapt to its logic in an effort to add legal meaning (rights or benefits) to our actions.

Hybrid Collectif of Legality

Another claim made by *Law and the Image* is that the

> relationship between law and art can be analytically distinguished into two components: law's art, the ways in which political and legal systems have shaped, used, and regulated images and art, and art's law, the representation of law, justice, and other legal themes in art.[61]

Although the study of law's coercive forces has a long tradition, and while legal aesthetics yield valuable insights into iconographic lineages, I propose to lay a wider foundation to the research into art and law to make apparent their conceptual and process

relationships. This requires us to first recognize law as a human-made, cultural product[62] and, second, to accept that institutionalized law does not operate outside or above everyday life, and is an integral component of any social fabric.[63]

Thus far, I have offered a brief social history of the artist's status in parallel to the ability to challenge the law. I have shown how the favoring of the visual by legal aesthetics is too limiting, and presented a sociological explanation of the intensification of legality (Habermas) with a concrete and practical example from legal scholarship (copyrights). To gradually expand the scope of inquiry into the concept of legality, I will make use of explanatory models drawn from sociology while showing the parallel development of thoughts within art history.[64]

To grasp the complexity of legality, imagine a border crossing situation. You are about to enter a zone, where some of your fundamental rights are suspended to access your identity, travel history, and search your belongings (including your data). The spatial experience of many border architectures indicates that law is closing in on you as armed officers herd you through the narrow hallways or roped-off snake lines. Border zones, following Giorgio Agamben, are a permanent state of exception, where your legal status is in constant limbo.[65] Here, we step in front of a border patrol agent much like Josef K meets the doorkeeper in Kafka's *Before the Law*, asking for entry to the safe haven of law behind. It is an immediate bodily experience of law, walking the fine (border) line, where architecture, personnel, procedures, paragraphs, odors, uniforms, and guns form a hybrid collectif that performs law and exerts sovereignty with instant consequences. Legality,

one can witness in this situation, is more than bureaucracy or the actual immigration laws that are written down somewhere. Instead, it acts in ways that can have more immediate, sensible effects. Legality, in my use of the term, is a collection of a range of influences and phenomena regardless of their sensory qualities, a point of condensation of activities, materials, structures, and circumstances.

This reading and the concept of the hybrid collectif has its roots in the actor-network theory, which characteristically goes by the acronym ANT, bringing to mind an anthill and its organized chaos—an image that is quite appropriate. Similarly, the theory put forward by Bruno Latour, Michel Callon, and John Law (among others), argues that what might appear as a single, autonomous entity (here, the anthill) is actually made up of "patterned networks of heterogeneous materials."[66] Each ant, the soil, the gathered plant materials as well as the weather play a role in forming the anthill. Applied to our social world (the human anthills), ANT rejects a qualitative distinction between human and non-human actors, including inanimate materials, in its radical materialism.[67] "ANT," as Trevor Barnes described, "provides a means of coping with the messiness. It says that we need to attend to the networks of relations that crosscut, interleave and fold across culture…"[68]

When we attribute creative success to an artist for bending rules and conventions, for being innovative or simply technically skilled, we tend to conceal or entirely delete the networks that underlie the artist's prowess.[69] ANT, instead, is interested in highlighting the interplay of all materials (and "immaterials") involved in any situation,

without looking exclusively at people and their intentions to overcome the "speciesist bias in favor of humans."[70]

Around the same time, in the early to mid 1990s, art historians have also felt the need to challenge historically linear narratives and the oftentimes biographical focus of their discipline. An idea comparable to the hybrid collectif was formulated in Wolfgang Kemp's concept of the "wildly grown contexts" (*wild gewachsene Kontexte*). Art history, too, came to embrace complexity and had to accept that "much of art has resulted from the accidental, the chanced occurrence, the chaotic, from divergent wills, multifarious and conflicting impulses," as Corine Schleif suggests in her reading of Kemp's theory.[71] She continues with a vivid explanation of the term *wild grown contexts* as "referring to 'wild' as in 'wildflowers,' planted by the separate urgencies of wind and rains as well as by various insects, birds, and other animals—not by a (solitary) gardener."[72] With this botanical picture in mind, the hybrid collectif comes to life as a diverse (wild) set of actors (human and non-human) that share a history (grown), and provide the substrate (context) for other actors.

Artists—not only the ones painting water lilies—have been seen as the "(solitary) gardener," the genius unfolding imaginative power; their work is, accordingly, a manifestation of and a testament to their creativity. If, however, all this power is attributed to the artist, why do artworks still affect us when their creators have long vanished? Artworks, too, are seen as the culminating point of artistic efforts and there is a "strong tendency…to attribute agency to…points that last, that keep on going for a

time."[73] Once removed from the artist's immediate material control, artworks have an active afterlife due to the various actors that bestow agency. I argue that the paradigm of the hybrid collectif, which is essentially a theory of agency, helps explain the agency to art.

A caveat to the term agency is that it presupposes independent, willful activity to a certain end, which is a capacity ascribed primarily to human actors. As the anthropologist Jason de León, who employed the hybrid collectif theory for his book on the illegal immigrant trail in the Sonoran desert, explains:

> …people or objects don't act in isolation, but instead have complex relationships at different moments across time and space that sometimes create things or make things happen. It is these relationships that 'perform agency,' not isolated humans or solitary objects.[74]

To understand the notion of agency in this context, it is important to note that Michel Callon expanded ANT by the term hybrid *collectif* specifically to de-emphasize the volitional form of intentionality associated with agency. Rather than conscious acts with a shared will, a "collectif is an emergent effect created by the interaction of the heterogeneous parts that make it up."[75]

Agency, in the sense of the hybrid collectif, is not concentrated in one point but dispersed and spread out through the relationships between all actors involved. Even to speak of agency in singular conceals the fact that there are multiple forms of possible agencies, some intentional, others nonstrategic.[76] In her book on *Vibrant Matter : A Political Ecology of Things* (2010), Jane Bennett points out that an "actant never really

acts alone. Its efficacy or agency always depends on the collaboration, cooperation, or interactive interference of many bodies and forces."[77]

ANT and the hybrid collectif theory draw attention to the in-betweens of fixed points and potent actors to consider the "[r]elations which perform"[78] and see its actors as generated effects.[79] Legality, as I argue, forms a hybrid collectif, an amalgam of "[t]hings, processes, entities, relations, that are spread across time and space…brought together."[80] I have tried to address some of the pertinent components of the legal collectif already: its outreach, its complexity, its inclusion of all materials and "immaterials" (animate or inanimate), and its very immediate effects on artists.

We may now realize that art which pushes and transgresses the boundaries of the law only unfolds its impact in relation to the prevalent social, political, and legal norms it challenges and not solely in an act of artistic bravery.[81] My point is that legality constitutes a reference system for the amplitude of artistic agency. We cannot judge art without a reference system or how, to go back to an earlier example, would the Tate Modern see Rauschenberg's work if the rules he is said to have rewritten did not exist in the first place? This question is, of course, speculative. It may be admissible, though, to assert that the relation of art to any legal reference system has become a category for the judgement of art. But in what position does it place the artist? Whether obedient or transgressive, whether legally punished or not, does the artist remain subjugated to legality?

The horizontal hierarchies of network theories and the hybrid collectif allow for a less asymmetrical relationship. Legality does not overarch art or impose its formulaic language on art, legality exists next to and in-between art, which is a hybrid collectif in its own right. To expose the relations of the two, we must identify the strings attached between them, not the ones pulling the strings, because—as ANT teaches us—the strings are what is pulling. It is not without a reason that both ANT and the hybrid collectif emerged from the field of *science, technology and society studies*, or *science and technology studies* (both abbreviated STS), a relatively young, interdisciplinary field to address critical problems of the role of science and technology in knowledge making processes. While I have argued to pay attention to the juridified world, no contemporary art theory can ignore the simultaneous technologization. This is even more pertinent today than it was in the 1990s, when STS was founded.

My consultation of disciplines external to art history must seem boundless at this point and it might feel disorienting. Narrowing the focus on legality and simplifying my claim to say that legality offers new perspectives on contemporary art might be a more homeopathic dosage of theory, but it would not do justice to the complexity of contemporary art. Nevertheless, it is not my intention to juxtapose the increase of law with an increase of technology. My argument is not to proclaim more of the same, but that the expansion of both law and technology have a qualitative dimension in that they inform social behavior in ways that are often subtle but powerful. More importantly, juridification and technologization are concomitant developments, overlapping, creating

synergy effects, and mimicking one another. Computer code, the topic of my next chapter, is a case in point because of its already intricate relation to law.

---

[42] See Stanford University Press, "The Cultural Lives of Law," http://www.sup.org/books/series/?series=The%20Cultural%20Lives%20of%20Law.

[43] Shapiro, *Legality*, 225.

[44] Furthermore, I want to acknowledge the importance of all components involved with legality, even the ones which I decided to relegate to the sidelines of this paper.

[45] Human laws, of course, also regulate and affect plants, animals, and insects.

[46] See European Union, Commission Regulation (EC) No. 2257/94 of 16 September 1994 defining standards for bananas, commonly referred to as the "bendy banana law." It specifies the aesthetic and physical features required of bananas to be allowed on the European market.

[47] Jürgen Habermas, *The Theory of Communicative Action,* vol. 2, *Lifeworld and System*, trans. Thomas McCarthy (Boston: Beacon Press, 1987), 357. The first volume was published 1981 in German, titled *Theorie des kommunikativen Handelns: Handlungsrationalität und gesellschaftliche Rationalisierung*.

[48] Ronald Niezen, *Public Justice and the Anthropology of Law*. New Departures in Anthropology. (Cambridge;New York: Cambridge University Press, 2010), 218-19.

[49] Shapiro, *Legality*, 36.

[50] Barron, "Copyright," 374.

[51] Ibid., 372.

[52] Ibid., 373.

[53] Ibid., 372.

[54] The scope of the exclusive rights to such a snapshot will admittedly be very limited. Somebody else taking a similar pet video, for example, can hardly be sued for copyright infringement.

[55] Barron, "Copyright," 390.

[56] Ibid., 381.

[57] See "Balloon Dog (Orange)," Christie's, https://www.christies.com/lotfinder/Lot/jeff-koons-b-1955-balloon-dog-5739099-details.aspx.

[58] See "The Complete Performances 1973-1975," Christie's, https://www.christies.com/LotFinder/lot_details.aspx?intObjectID=5895444.

[59] Barron, "Copyright," 375.

[60] Habermas uses this term to describe what people perceive as the given world based on pre-scientific experiences and understandings. Before him, German philosophers Edmund Husserl introduced the term *Lebenswelt* (Leben = life; Welt = world) in 1936 in his book *Die Krisis der europäischen Wissenschaften und die transzendentale Ph¨anomenologie, Eine Einleitung in die phänomenologische Philosophie*: "In whatever way we may be conscious of the world as universal horizon, as coherent universe of existing objects, we, each "I-the-man" and all of us together, belong to the world as living with one another in the world; and the world is our world, valid for our consciousness as existing precisely through this 'living together.' We, as living in wakeful world-consciousness, are constantly active on the basis of our passive having of the world... Obviously this is true not only for me, the individual ego; rather we, in living together, have the world pre-given in this together, belong, the world as world for all, pre-given with this ontic meaning... The we-subjectivity... [is] constantly functioning." See Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology; an Introduction to Phenomenological Philosophy* (Evanston: Northwestern University Press, 1970), 108-109.

[61] Douzinas, *Law and Image*, 11.

[62] Shapiro, *Legality*, 389.

[63] John M. Conley and William M. O'Barr, "Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law," *Loyola of Los Angeles Law Review* 27, no. 1 (1993): 60.

[64] Anthropology and sociology have long recognized that fact in their search for a broader understanding of law in its context. As John M. Conley and William M. O'Barr made clear in their brief history of legal anthropology: "legal anthropology … must examine law as … a constituent of a much broader cultural milieu." Hence, we must account for more than visual representations, black letter law, and the activities of legal officials. See Conley, "Legal Anthropology," 64.

[65] See Giorgio Agamben, *State of Exception,* Chicago: University of Chicago Press, 2005.

[66] John Law, "Notes on the Theory of the Actor-Network: Ordering, Strategy and Heterogeneity," *Systems Practice* 5 (1992): 381.

[67] Ibid.

[68] Trevor Barnes, "Culture: Economy," in *Spaces of Geographical Thought: Deconstructing Human Geography's Binaries.* ed. Paul Cloke and Ron Johnston (London: Sage Publications, 2005), 72.

[69] Law, *Notes*, 384.

[70] Michel Callon and John Law, "Agency and the Hybrid Collectif," *South Atlantic Quarterly*, 94, No. 2 (1995), 502.

[71] For Kemp's pamphlet for an "art history of complexity," see Wolfgang Kemp, "Kontexte: Für eine Kunstgeschichte der Komplexität," *Texte zur Kunst* 2,II (1991): 89-101.

[72] Corine Schleif, "The Roles of Women in Challenging the Canon of 'Great Master' Art History," in *Attending to Early Modern Women*, ed. Susan Dwyer Amussen and Adele F. Seeff (Newark: University of Delaware Press, 1998), 88.

[73] Callon, *Hybrid Collectif*, 497.

[74] Jason De León, *The Land of Open Graves : Living and Dying on the Migrant Trail* (Berkeley : University of California Press, 2015), 39-40.

[75]Callon, *Hybrid Collectif*, 485.

[76] Ibid., 503.

[77] Jane Bennett, *Vibrant Matter : A Political Ecology of Things* (Durham, N.C.: Duke University Press, 2010), 21.

[78] Callon, *Hybrid Collectif*, 485.

[79] Ibid., 502.

[80] Ibid., 493.

[81] This is particularly true for art that claims to be socially engaged or forms of activism.

CHAPTER 3

THE CODE OF ART

Programming languages like *Processing*, specifically developed for artistic purposes, demonstrate the rising status of code, not only as a primary trope embedded in the discourse of information and data-saturated culture, but more specifically as an increasingly dominant "language" of art.[82] The question is not *whether* code has an impact on art but *how*. Is code a medium? A carrier of meaning or does it amount to nothing more but simple instructions? Or, to liken it to traditional art equipment, is it merely a tool like a brush or material like clay? Media theorists like Wendy Hui Kyong Chun and Alexander R. Galloway have overturned such simplifying —yet persistent— comparisons, making way for a better understanding of the multilayered workings of code on both the scriptural, executable, and material level.[83] This chapter aims to facilitate a dialog between legality and technology by examining the primary driving forces of technology—code—as a new form of law. The previous chapters have described the cultural dimensions of law and established an understanding of legality as a hybrid collectif, it is now time to shift our attention to the legal dimensions of (coded) art. Initiating from the question of whether (computer) code can be law, this chapter will identify manifestations of legality in contemporary art practice.

Espen Aarseth argues that "the internal, coded level can only be fully experienced by way of the external, expressive level."[84] We must, therefore, consider the "external," analog world to at least have an influence on code, instead of holding on to the binary

distinction between code (digital) and object/subject (analog). While programming and the interconnectivity of devices have facilitated the dematerialization of art, allowing for entirely web-based works (like Rafaël Rozendaal's *Almost There* at whitney.org) or video installations controlled by algorithms (like Jennifer Steinkamp's *Murmuration* at a courthouse in Long Beach, CA), code has not lost touch with the analog, which, as Galloway described it, is "a mode of mediation that always remains within the real."[85] It is important to note that the supposedly immaterial "digital" versus the analog "reality" is another dualism that we need to overcome. As Benjamin H. Bratton argues:

> The Cloud [technology] is not virtual; it is physical even if it is not always 'on the ground,' even when it is deep underground. There is nothing immaterial about massless information that demands such energy from the Earth…counting the transoceanic fiber-optics also digging through the countryside, data centers buried deep in mountains near dams, the exotic minerals pulled from African rivers to make cell phones.[86]

Therefore, writing about object, performance or experience based art—all things that happen in reality—is one way of writing about immaterial code and legality.[87]

I chose coded art to exemplify my arguments because code and law have frequently been likened to one another. Obvious parallels exist between (computer) code and the code of law. Both are formulaic and perceived as linear strings of logic within closed systems guaranteeing the calculability of actions. But even beyond the synonymous use of the word "code" in both legal and computational contexts, the notion of code as law has gained some traction.

From simple command structures over causal chains to artificial intelligence, the question of how coding is implemented into artworks deserves attention. What is the

modus operandi of code based artworks? The focus here is not the mathematical or linguistic underpinnings of code, but how it sets new parameters within which an artwork is recognized. To begin, I will foreground the ways in which code might resemble law, drawing from attorney Cindy A. Cohn's and legal scholar James Grimmelmann's contribution to the catalog of Ars Electronica's *Code - The Language of our Time* (2003). Relating their findings to contemporary art workings, I will draw from the current exhibition *Open Codes – Living in Digital Worlds* (2017-2019) which significantly takes place at the city of Karlsruhe—the seat of the German Supreme Court. The self-declared purpose of the exhibition is to show works that "visualize and explain the complex dynamics of codes, and the manner in which they are increasingly shaping the way we live and perceive the world. The exhibition analyzes the ingress of codes into our lives, and the structures of knowledge they generate."[88] My goal with this chapter is to establish coding as a form of artistic legal activity, not to imply that art constitutes a legal system in its own right, but to show how art—inter alia through code— engages in a form of social planning analogous to Scott Shapiro's notion of legality.

Legal Codes

Cohn and Grimmelmann propose the "Seven Ways in Which Code Equals Law (And One in Which It Does Not)," some of which provide a segue to present and future modalities of art's legality. They open with the semantic tautology between code and law, an aspect I address earlier in this text.[89] Moreover, they suggest that legal and computer coders engage in a similar activity of writing "in subtle, rule-oriented, specialized, and

remarkably complicated dialects."[90] Both code and law are based on executable language(s)—likewise specialized and not readily accessible. This poses a challenge in very practical terms. Legislators, courts, lawyers, authorities, and officials produce an insurmountable number of legal codes (laws, bills, decrees, orders, sentences, etc.) everyday, requiring a whole workforce of legal professionals to keep pace with it.[91] Computer code, too, has evolved to new complexities, since it is no longer dependent on punched cards or paper tape. As the American computer scientist Alan Kay demonstrates, an operating system like Microsoft Windows comprises of more than 220 million lines of code. In fact, even the software developer Microsoft cannot handle this sheer amount of code: one of the many software bugs in the program Microsoft Word could not be fixed since the 1980s for the simple reason that Microsoft is unable to find the specific line of code.[92] This is not simply the result of careless software organization. Hiding information is a structural necessity to computer code, as I will explain using the concept of *obfuscation*, and it is similar to the nested structure of law—the hierarchy from constitutional, federal, state laws, and so on—, yet in greater, numerical dimensions.

Several layers of code separate us from the common visualization of code as cryptic lines of letters, numbers, and symbols that we are used to seeing in movies when hackers type their way into secret facilities. For example, the Graphic User Interface (GUI) we navigate while using a word processor is a representation of the underlying software, an output of whole libraries of source code translated into machine code to control the LEDs of our screen. Programmers write in source code because it is the only form of code

readable by humans—self-evidently, only those familiar with the specific programming language. An algorithm, to further clarify the terminology, is a string of logic written in source code, a flowchart to solve a defined set of tasks. Because programming has evolved from the physical rewiring of space-consuming machines to basically a writing task on small keyboards, it has become much more specialized and academic in that it relies on previous knowledge to be processed, quoted or paraphrased, and fit into ones own argument—or code. Similarly, programmers draw from extensive archives and libraries of source code to which they add their own lines. Otherwise coding complex software from scratch would be a daunting task.

Citing from Michael Scott's *Programming Language Pragmatics*, Galloway explains the concept of *obfuscation* as central to programming efforts, programming

> depends critically on the notion of information hiding, which makes objects and algorithms invisible, whenever possible, to portions of the system that do not need them. Properly modularized code reduces the 'cognitive load' on the programmer by minimizing the amount of information required to understand any given portion of the system.[93]

For a computer's central processing unit (CPU) to convert source code into electrical signals that control the hardware carrying out the source code, it needs to be translated into binary machine code.[94] Compilers, assemblers, linkers or interpreters do the translation work; they are themselves written in source code, often in the same language as the source language that is meant to be translated.[95] Computer code, thus, exceeds law in quantity and complications.

The linguistic similarities between code and law constitute the third analogy of Cohn and Grimmelmann: "codes are written systems of communication."[96] Although this is not a lexicography of code, the definition of code as "an unvarying rule for replacing a piece of information such as a letter, word, or phrase with an arbitrarily selected equivalent,"[97] is important in the context of artistic involvement.[98] Art does not operate on an alphanumeric level as computer code, nor does it generally work like the formulaic written statements of legal code. How does art expresses itself through code then? One answer is that art uses code overwhelmingly for visualizations, which is somewhat disappointing given that I have tried to resist the primacy of the visual.[99]

Artists predominantly resort to readymade software to edit images, videos, paint or create 3D graphics—art as an iconic language. In code-based art practice, code is effectively the "morphogenetic force;"[100] the affordances and constraints of the "tool" to a certain extent define the aesthetic output—just as the aesthetic qualities of a poem written in English will change if it is translated into a different language. But the level of abstraction through graphic visualizations of underlying algorithms separates creators of computer generated imagery (CGI) from the actual source code. A brush tool in Adobe Photoshop is alterable in many ways (thickness, intensity, texture, color, etc.) but only to the degree provided for by the software developers. For securing their monetary interests, software companies usually deliver their products in executable files (.exe or .dmg) which only contain machine code that is unreadable, inaccessible to the end-user and by requiring contractual agreement about the terms of use (end-user license agreement).

Artists give up complete material control over untouchable and indestructible code and move within set parameters. It would fall short, however, to paint the user-artist as predetermined, blindly pulling the strings of code via graphical visualizations.

As Christiane Paul argues,

> there is the language of the written code in the sense of an artistic expression that formulates instructions in an individual way (similar to the use of natural language that, despite a given vocabulary, grammar and rules, functions as a form of personal expression); and there is the aesthetic 'language' of the code's actions, comparable to the language of painting or cinema.[101]

This passage shows how properties normatively assumed to be constitutive of and necessary for the recognition of art qua art—authorship, expression, and creativity—are also embedded in the process of writing code and law.

In his article *Transcoding Sexuality: Computational Performativity and Queer Code Practices* (2017), Gerald Stephen Jackson argued "for a critical move away from representation as the seat of meaning in code, and towards a performative understanding of [gendered] code through 'contexts of complexity.'"[102] In other words, reading code requires more than the interpretation of code as text or the understanding of its formal processes but a focus on its complexity, which Jackson describes as an "ecology of development practices that structure how certain norms circulate through software."[103] Seeing code solely as a chain of commands, as some kind of mathematical formula, ignores the underlying complexity of code, its functioning, and interaction with its context. Code is more than applied commands, just as a computer is more than a powerful calculator. People write code, implement it, apply it, use it or are influenced by

it everyday whether they are aware of it or not. Code is as human-made as any other cultural product.

Accordingly, code/law might be seen "as much a medium of expression for programmers as clay is for sculptors…"[104] With authorship, however, comes responsibility. If coders are authors, then their intentional relationship to their work must result in responsibility for it. In fact, "code is [already] the subject of law,"[105] as for example, by regulation through internet or intellectual property laws, and more recently through the investigation of software executed interference with national elections. The British artist Helen Knowles contemplated this issue in her installation *The Trial of Superdebthunterbot* (2016), a video projection of a staged murder trial at the "International Ether Court." Five students, so the fiction goes, had died in the course of actions taken by a debt collecting company that bought up student loans and tried to avoid loan defaulters by using big data to post job announcements for medical trials to those students' social media pages, who were statistically prone to miss out payments. The culprit in this case? An algorithm called *Superdebthunterbot*, which was used to execute this questionable business model autonomously.[106]

While the trial itself is enacted in part by real lawyers and in part by actors, the audience is strategically positioned outside of the camera's eye. A bench made of birch laminate ply and leatherette placed in front of the projected film frames the viewers as the jury of the trial. People who view the 45-minute trial can then form their verdict, showing the ultimately decisive role of the human actors. But the verdict leads nowhere, it remains

without consequence for the *Superdebthunterbot* and for the prerecorded trial. It seems as though the human jury is relegated to the sidelines as a silent spectator, while code facilitates the entire production and screening of the trial.

Code, in Knowles work, emerges as its own legal entity, accountable to the actions and effects it produces. "More laws and legal decisions," so Cohn and Grimmelmann, "will become decisions about code."[107] The framework of the hybrid collectif may, in fact, be instrumental to the argument that a (ro)bot—itself a hybrid—can be held accountable for its actions, as the German legal scholar Gunther Teubner predicted: "The result is that law is opening itself for the entry of new juridical actors [such as] electronic agents…Their legal personification, especially in economic and technological context, creates aggressive new action centers as basic productive institutions."[108]

The outreach and effects of code on the justice system are the focus of legal scholars proclaiming "a system of 'automatic justice' that is mediated by technology in ways that minimise human agency and undercuts the due process safeguards built into the traditional criminal justice model."[109] Algorithms are already taking more subtle effects on legal work through the ways information is searched for and found in legal databases like Westlaw, Lexis Advance or Casetext: "Simply drop a brief into [the] secure system, and [the] machine learning and AI technology will immediately go to work, researching Casetext's entire database of U.S. law and surfacing relevant case law in milliseconds."[110] Can code evolve from a "juridicial actor" to assume the role of legality?

At this point, we need to take a step back and ask for the purpose of legality to understand how art can affect it. Driven by the question "What is law?," Shapiro provides a detailed account of the major developments in legal philosophy in his book *Legality* to show how his theory is both anchored in tradition and how it departs from it. It is not necessary for the purpose of this thesis to recapitulate the generations of thinkers who tried to find a proximate definition of law. But it is well worth to take a brief look at the branch of analytical jurisprudence that is relevant here.

Legal positivism posits that "[a]ll legal facts are ultimately determined by social facts alone."[111] A law based on social realities sounds reasonable to our contemporary ears but, historically, most theories of law put great emphasis on its coercive powers. One of the proponents of legal positivism, the 19th-century British philosopher John Austin (1790–1859), for example, defined law as "general commands issued by someone who is habitually obeyed by the bulk of the population and habitually obeys no one else."[112] Each command, in his view, poses an obligation with the threat of sanctions (e.g. "do not steal or you will go to prison" or "if you do not pay your taxes you will be fined"). For a while, this important but limited understanding of law prevailed.[113] Until H.L.A. Hart (1907–1992) interjected that not all rules impose duties. On the contrary, some rules confer powers instead. Rather than limiting negative freedom (do not do this), such rules increase positive freedom (e.g. the law gives you the ability to form a contract at the benefit of greater security that it will be fulfilled).[114] Effectively, law influences human behavior by either limiting or incentivizing it.

Take, for example, Hans Haacke's *Photo-Electric Viewer-Controlled Coordinate System* (1968), an installation simply programmed to turn on light bulbs as soon as a person is detected by infrared sensors. Unsuspectingly, people walk into the empty room until—literally—a light dawns on them that their movement is causally linked to the illumination of the place. Luke Skrebowski described this "a moment of empowerment" that confers agency to people interacting with Haacke's work.[115] If we assume the functions of Haacke's installation as a very rudimentary form of law, it shows how nonchalantly visitor behavior can be created by offering a basic incentive (light turned on) under a very limited regime. *Photo-Electric* only makes up an early example of interactive art that accommodates for no more than a few visitors. Law, instead, applies to whole societies.

After all, law is a social framework to regulate human interaction through a defined set of reoccurring situations and conflicts. In Shapiro's view, the answer to the question of what is law, must be that "law is simply a sophisticated apparatus for planning in very complex, contentious, and arbitrary communal settings [and]… that legal activity is the shared activity of social planning and that laws are just plans, or planlike norms."[116]

Despite code's growing importance and its law-like behavior, Cohn and Grimmelmann would agree that law is still a people-driven endeavor—"if you can't convince a judge … your argument will go nowhere."[117] Understanding code as a hybrid collectif, though, we might also acknowledge: code—just as legality—emerges from diverse activities and conditions, including human effects. Legality is "a tool of social

order; it is a reflection of a society's values and also the most important way a society puts those values into practice."[118] But the institutional checks and balances that tie law to a common goal and the human potential to interpret the law that makes it adaptable and amendable do not apply to code.[119]

The *Superdebthunterbot* demonstrated how code can act without a conscience, making complicated but merely statistical decisions based on big data. But something is lost in the quantification and mediation between society and code, a void of values creating the "aggressive new action centers" of which Teubner was speaking. Art may be able to fill that void by serving as a forceful reminder of the unresolved relations between legality, technology, and society—as in Knowles installation—or by becoming a new "juridical actor" itself through code.

---

[82] Ira Greenberg, *Processing Creative Coding and Computational Art* (New York: Apress 2007), 20.

[83] Chun, for example, observed that "software is a functional analog to ideology," a form of perceiving and ordering the world, not in a way that software is a vehicle of ideology, but that itself represents an ideology. The term "software," here, denotes a cumulation of code, but we will abstain from the discussion around the origin and validity of the distinction between soft- and hardware. See Wendy Hui Kyong Chun, "On Software, or the Persistence of Visual Knowledge," *Grey Room* 18 (2004): 43.

[84] Espen Aarseth, *Cybertext: Perspectives on Ergodic Literature* (Baltimore, MD: Johns Hopkins University Press, 1997), 40.

[85] Alexander R. Galloway, "What Is the Analog?," *cultureandcommunication.org*. December 29, 2017, http://cultureandcommunication.org/galloway/what-is-the-analog#more-1373.

[86] Benjamin H. Bratton, *The Stack: On Software and Sovereignty* (Cambridge, Mass.: MIT Press, 2016), 28-29.

[87] Legal theory, in fact, heavily depends on external disciplines, as Matthias Kumm said. "The most obvious way to learn to engage law seriously as part of a sustained intellectual inquiry, it seems, is to learn the methodology of a discipline other than law." See Mattias Kumm, "On the past and Future of European Constitutional Scholarship," *International Journal of Constitutional Law* 7, no. 3 (2009): 411.

[88] "Open Codes," Zentrum für Kunst und Medien, https://open-codes.zkm.de/en.

[89] Cindy A. Cohn and James Grimmelmann, “Seven Ways in Which Code Equals Law (And One in Which It Does Not),” in *Code: The Language of Our Time,* ed. Gerfried Stocker and Christine Schöpf (New York, NY: Hatje Cantz, 2003), 20.

[90] Ibid.

[91] In 2013, then Senate Minority Leader Mitch McConnell presented a seven feet tall stack of paper representing the 33,000 pages of regulation for the so called “Obamacare” legislation. He was apparently trying to criticize the complexity of the health care reform, he was opposed to. The negative connotations of complexity are frequently evoked by those who tend to oversimplify complex matter. See Glenn Kessler, “How many pages of regulations for ‘Obamacare’?,” *The Washington Post*, May 15, 2013, https://www.washingtonpost.com/blogs/fact-checker/post/how-many-pages-of-regulations-for-obamacare/2013/05/14/61eec914-bcf9-11e2-9b09-1638acc3942e_blog.html?utm_term=.3201f5720124.

[92] Alan Kay, “Is it really ‘Complex’? Or did we just make it ‘Complicated’?” (presentation, Qualcomm, San Diego, CA, October 30th, 2013).

[93] Alexander R. Galloway, "Language Wants To Be Overlooked: On Software and Ideology,” *Journal of Visual Culture* 5, no. 3 (2006): 324.

[94] Casey Reas, Chandler McWilliams and Jeroen Barendse, *Form+Code in Design, Art, and Architecture* (New York: Princeton Architectural Press, 2010), 15.

[95] Wendy Hui Kyong Chun, “On Software, or the Persistence of Visual Knowledge,” *Grey Room* 18 (2004): 29.

[96] Grimmelmann, *Seven Ways*, 21.

[97] Britannica Academic, "Code," http://academic.eb.com.ezproxy1.lib.asu.edu/levels/collegiate/article/code/24616.

[98] Needless to point out the use of language as an artistic tool, for example, in conceptual art of the 1960s (like the pioneering English art group Art & Language, founded 1968).

[99] In 1990, Alan Kay said “it would not be surprising if the visual system were less able in this area [of programmation] than the mechanisms that solve noun phrases for natural language. Although it is not fair to say that ‘iconic languages can’t work’ just because no one has been able to design a good one, it is likely that the above explanation is close to truth.” Our perspective almost 30 years later must include the exponential increase in use of emojis, an iconic language that might not work on a similarly complex level as the aforementioned languages, but one that might unfold its potential. Therefore, I do not want to dismiss the visual languages as easily as Alan Kay. See Alan Kay, *User Interface: A Personal View* (Reading, Massachusetts: Addison Wesley, 1990), 203.

[100] Ioannis Zannos, "Algorithms and Language Concepts in Coded Art,” *Technoetic Arts: A Journal of Speculative Research* 9, no. 2-3 (2012): 255.

[101] Christiane Paul, “CODeDOC II,” in *Code: The Language of Our Time,* ed. Gerfried Stocker and Christine Schöpf (New York, NY: Hatje Cantz, 2003), 233.

[102] Gerald Stephen Jackson’s aim was to demonstrate how sociocultural norms of gender are deeply embedded into code. The gender aspects of his findings escape the scope of this thesis. See Gerald Stephen Jackson, "Transcoding Sexuality: Computational Performativity and Queer Code Practices,” *QED: A Journal in GLBTQ Worldmaking* (Project Muse) 4, no. 2 (2017): 1.

[103] Ibid. 2.

[104] Grimmelmann, *Seven Ways*, 22. Habermas, too, pondered the idea of law as a medium in his first publication on juridification. See Habermas, *Communicative Action*, 369. We might, however, interject that law effectively functions not *as* a medium but *through* media, some literary (law books, court decisions, etc.), others are performative (speech, gestures). Galloway, who discussed this question of media theory in more detail, said that "[t]his is the fundamental contradiction of software: what you see is not what you get. Code is the medium that is not a medium. … code is the only language that is executable." See Galloway, *Language*, 325.

[105] Grimmelmann, *Seven Ways*, 22.

[106] "Helen Knowles," Zabludowicz Collection, https://www.zabludowiczcollection.com/exhibitions/view/zabludowicz-collection-invites-helen-knowles.

[107] Grimmelmann, *Seven Ways*, 22.

[108] Gunther Teubner, "Rights of Non−humans? Electronic Agents and Animals as New Actors in Politics and Law," *Journal of Law and Society* 33, no. 4 (2006): 497-521.

[109] Amber Marks, Ben Bowling, and Colman Keenan, "Automatic Justice?: Technology, Crime, and Social Control," *The Oxford Handbook of Law, Regulation and Technology* (July 2017): 2.

[110] "Meet CARA, your automated research assistant," Casetext, https://casetext.com.

[111] Shapiro, *Legality*, 27.

[112] Shapiro, *Legality*, 54.

[113] The underlying conception of the human being that supported this thinking derived from Thomas Hobbes' *Leviathan* (1651), in which he justified the sovereign's use of force with his observation that people are quintessentially egoistic beings. According to Hobbes, a *state of nature* without any laws would result in *bellum omnium contra omnes* ("the war of all against all").

[114] Shapiro, *Legality*, 60–65.

[115] Luke Skrebowski, "All systems go: Recovering Hans Haacke's systems art," *Grey Room*, No. 30, (2008): 55.

[116] Shapiro, *Legality*, 194.

[117] Grimmelmann, *Seven Ways*, 23.

[118] Ibid.

[119] "Code and law are different ways of regulating; they have different textures. All of those people who are required to make the legal system work leave their mark on its outcomes: they make a certain amount of drift and discretion almost inevitable. Code doesn't have such a limit: it can make perfectly hard-nosed bright-line rules and hold everyone in the world to them. Code is capable of a kind of regulatory clarity and intensity that law can only state, never really achieve." See Ibid., 24.

CHAPTER 4

OPERATING SYSTEM

Technology, social engagement, and globalization are the buzzwords of contemporary art. Each, in fact, stands for a major trajectory of activity in contemporary art: an increased use of technologically diverse media, a greater social engagement, and the boundless flows of knowledge and production. These, however, raise the question about the place of art in a society ruled by legality and code. In times of insurmountable excess of information—big data—which is accessible at all times, information itself seems to lose significance across the board in the glut of data. Instead, the *Zeitgeist* shifts toward corporeal experiences and object-based artworks, evident in the rise of so called "experiential art." Joachim Sauter observes in Robert Klanten's book *A Touch of Code: Interactive Installations and Experiences* (2011) that "[p]hysical computing and computational design are the new design disciplines of the beginning of the twenty-first century, with code and mechatronics as their material, substance, and inspiration."[120] Linking this observation with the notion of code as law, the abstract idea of legality might take a physical form, and exhibitions like *Open Codes* channel the flows of meanings between both worlds. Art interacts with legality and produces unfamiliar sorts of legalities and new juridical agents.[121]

Open Codes in Karlsruhe was conceptualized as a dynamic exhibition in which its elements were continuously changed during its almost two years time span. Its curators, among them the director of ZKM Peter Weibel, decided to facilitate an extended stay of

their visitors by catering to Millennial needs, offering fruits, beverages, and ping-pong tables, but their *open* exhibition project also extends the invitation to artists and researchers to investigate and experiment with code, the "*materia prima* of our modern, global Information Society."[122] As all industries struggle to satisfy their exponentially increasing demand for a workforce fluent in code, they propagate the idea that virtually everybody—even elementary school kids—can and should learn how to code.[123] Nobody has ever made that claim for legal code or launched an educational offensive to increase literacy in legal matters. Through code, however, a new port might be open to merge both fields and to elicit a greater involvement with these crucial frameworks.

In this thesis, I have advocated for a deeper understanding of the interrelations and the possible synergy effects of legality, technology, society, and art. First, I examined the conventional understanding and quotidian usage of the the terms "art" and "law," in order to show that the application of the normative conception of law to art results merely in nominal categorizations like "obedient" or "transgressive." I showed that there is a far more latent complexity when you submit art and law to further investigation. Widening the scope of research and activity on the art/law intersection, suggesting the term and idea of legality, I elaborated on law's outreach (juridification) and impact on art practice and theory. To shift away the focus from human protagonists to network relations, I applied the sociological concept of the hybrid collectif, describing "emergent effect[s] created by the interaction of the heterogeneous parts that make it up."[124]

Code has not only challenged legal systems worldwide, it is also set to replace traditional regulatory powers. As the law professor Lawrence Lessig states, the "invisible hand [of code], pushed by government and by commerce, is constructing an architecture that will perfect control and make highly efficient regulation possible."[125] He posits that "code is law," advocating for a regulation of cyberspace—before it regulates us.[126] Dystopian visions on unleashed code are a common theme among cyberspace theorists, and the superior forces they ascribe to code might soon be enshrined in the recently founded Way of the Future, the first church for the worship of a Godhead based on artificial intelligence.

Besides the sensations imagined by Google executives, authors like Wendy Hui Kyong Chun make clear that new (computational) media matter most when they have moved from the new to the habitual, when we no longer find them noteworthy because they have become ubiquitous.[127] Similarly, code proliferates into a state of legality by moving from novelty to pattern of social behavior; it is becoming a new framework of social planning rather than simply replacing static, written down laws. Not the newsworthy clashes of art and law are important but the unnoticed performance of code as legality. In his book *The Stack: On Software and Sovereignty* (2016), Benjamin Bratton tries to maintain a balance between utopian and dystopian visions of the coded future, classifying seven layers of the computationally governed world: Earth, Cloud, City, Address, Interface, and User. As Ian Bogost summarized:

> Earth entails the material and energy-harnessing geological demands of computing; Cloud names the weird sovereignty of corporatized, global technology services like

> Google; City addresses the lived experience of cloud-computerized daily life; Address deals with identification as a form of management and control; Interface with coupling users to computers; and User with the human and nonhuman agents that interact with computational machines.[128]

Bratton proposes the *Stack* as a successor to the Westphalian, horizontal geography of the planet, as an infrastructure of data highways and digital jurisdictions, as "network 'stacks' that arrange different technologies vertically within a modular, interdependent order."[129] The *Stack*, too, is a product of a hybrid collectif, not the result of any intentional masterplan, but "an accidental megastructure, one that we are building both deliberately and unwittingly and is in turn building us in its own image."[130]

The law professor James Boyd White, who spent much of his career elucidating the art of law and educating his law students to become literary and culture critics, said:

> …law is not at heart an abstract system or scheme of rules, as we often think of it; nor is it a set of institutional arrangements that can be adequately described in a language of social science; rather, it is an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. It is not a set of rules at all, but a form of life. It is a process by which the old is made new, over and over again.[131]

Some of the arguments in my thesis might suggest that art is, after all, subject to legality, that the tense relationship between the two is based on unequal conditions, and that legality is the seismograph to artistic agency or the deciding instrument to evaluate art.[132] While these inferences are not altogether wrong, my intention was to show how legality and art—through code—can step into a new dialog.

---

[120] Joachim Sauter, "Preface," in *A Touch of Code : Interactive Installations and Experiences*, eds. Robert Klanten, et al. (Berlin: Die Gestalten Verlag, 2011), 5.

[121] Bratton sees the same effect resulting from the interplay of software and sovereignty. See Bratton, *Stack*, 20.

[122] Gerfried Stocker and Christine Schöpf, *Code : The Language of Our Time : Code=law Code=art Code=life* (New York, NY: Hatje Cantz, 2003), 10.

[123] "Elementary School," Code.org, https://code.org/educate/curriculum/elementary-school.

[124] Callon, *Hybrid Collectif*, 485.

[125] Lawrence Lessig, *Code : Version 2.0* (New York: Basic Books, 2006), 3.

[126] Ibid., 5.

[127] See Wendy Hui Kyong Chun, *Updating to Remain the Same* (Cambridge, Mass.: The MIT Press, 2016).

[128] Ian Bogost, "The Stack: On Software and Sovereignty (Book Review)," *Critical Inquiry* 44, no. 2 (2018): 389.

[129] Bratton, *Stack*, 3-4.

[130] Ibid., 5.

[131] James Boyd White, "An Old-Fashioned View of the Nature of Law," *Theoretical Inquiries in Law* 12 (2011): 382.

[132] I am drawing this motif from Uwe Fleckner, *Der Künstler als Seismograph : Zur Gegenwart der Kunst und zur Kunst der Gegenwart* (Hamburg: Philo Fine Arts, 2012).

BIBLIOGRAPHY

Aarseth, Espen. *Cybertext: Perspectives on Ergodic Literature*. Baltimore, MD: Johns Hopkins University Press, 1997.

Agamben, Giorgio. *State of Exception*. Chicago: University of Chicago Press, 2005.

Barnes, Trevor. "Culture: Economy." In *Spaces of Geographical Thought: Deconstructing Human Geography's Binaries*, edited by Paul Cloke and Ron Johnston, 61-80, London: Sage Publications, 2005.

Barron, Anne. “Copyright Law and the Claims of Art.” *Intellectual Property Quarterly* No. 4 (2002): 368-401.

Barron, Anne. "Law and Image: The Authority of Art and the Aesthetics of Law. (Review)." *Oxford Journal of Legal Studies* 20, no. 2 (2000): 301-315.

Bennett, Jane. *Vibrant Matter : A Political Ecology of Things*. Durham: Duke University Press, 2010.

Bogost, Ian. "The Stack: On Software and Sovereignty (Book Review)." *Critical Inquiry* 44, no. 2 (2018): 389-90.

Bratton, Benjamin H. *The Stack: On Software and Sovereignty*. Software Studies. Cambridge, Mass.: MIT Press, 2016.

Callon, Michel, and John Law. “Agency and the Hybrid Collectif.” *South Atlantic Quarterly*, 94, No. 2 (1995), 481–507.

Casetext. “Meet CARA, your automated research assistant.” https://casetext.com.

Casey, Damien. "Law & The Sacred: Sacrifice, Piss Christ, and Liberal Excess." *Law/ text/culture* 5 (2000): 19-34.

Christie’s. “M.A. Art, Law and Business.” https://www.christies.edu/new-york/courses/masters-art-law-business.aspx.

Chun, Wendy Hui Kyong. *Updating to Remain the Same*. Cambridge, Mass.: The MIT Press, 2016.

Chun, Wendy Hui Kyong. “On Software, or the Persistence of Visual Knowledge.” *Grey Room* 18 (2004): 26–51.

Code.org. “Elementary School.” https://code.org/educate/curriculum/elementary-school.

Cohn, Cindy A. and James Grimmelmann. “Seven Ways in Which Code Equals Law (And One in Which It Does Not).” In: *Code: The Language of Our Time*. Gerfried Stocker & Christine Schöpf eds., 2003.

Conley, John M., and O'Barr, William M. "Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law.” *Loyola of Los Angeles Law Review* 27, no. 1 (1993): 41-64.

Dagan, Hanoch. “Law as an Academic Discipline.” In *Stateless Law: Evolving Boundaries of a Discipline*, edited by Helge Dedek and Shauna Van Praagh, 43-60. Farnham: Ashgate, 2015.

Dahlberg, Leif. *Visualizing Law and Authority. Essays on Legal Aesthetics. Law & Literature*. Berlin: De Gruyter, 2012.

De León, Jason. *The Land of Open Graves : Living and Dying on the Migrant Trail.* Berkeley : University of California Press, 2015.

Douzinas, Costas, and Lynda Nead. *Law and the Image : The Authority of Art and the Aesthetics of Law*. Chicago: University of Chicago Press, 1999.

Douzinas, Costas, Goodrich, Peter, and Hachamovitch, Yifat, eds. *Politics, Postmodernity and Critical Legal Studies : The Legality of the Contingent*. Florence: Taylor & Francis Group, 1994.

Fleckner Uwe. *Der Künstler als Seismograph : Zur Gegenwart der Kunst und zur Kunst der Gegenwart.* Hamburg: Philo Fine Arts, 2012.

Galloway, Alexander R. *The Interface Effect*. Cambridge, UK ; Malden, MA: Polity Press, 2012.

Galloway, Alexander R. "Language Wants To Be Overlooked: On Software and Ideology." *Journal of Visual Culture* 5, no. 3 (2006): 315-31.

Galloway, Alexander R. “What Is the Analog?” *cultureandcommunication.org*. December 29, 2017. http://cultureandcommunication.org/galloway/what-is-the-analog#more-1373.

Geertz, Clifford. *Local Knowledge Further Essays In Interpretive Anthropology*. New York: Basic Books, 2008.

Gell, Alfred. *Art and Agency : An Anthropological Theory*. Oxford : New York: Clarendon Press ; Oxford University Press, 1998.

Gennari-Santori, Flaminia. “An art collector and his friends : John Pierpont Morgan and the globalization of medieval art.” *Journal of the History of Collections,* vol. 27, no. 3 (2015): 401–411.

Greenberg, Ira. *Processing Creative Coding and Computational Art*. New York: Apress 2007.

Habermas, Jürgen. *The Theory of Communicative Action*. Boston: Beacon Press, 1984.

Haskins, Casey. "Kant and the Autonomy of Art. (Immanuel Kant)." *The Journal of Aesthetics and Art Criticism* 47, no. 1 (1989): 43-54.

Hartshorne, Thomas L. “Modernism on Trial: C. Brancusi v. United States (1928).” *Journal of American Studies*, Vol. 20, No. 1 (April, 1986), 93–103.

Heisig, Karl. "L'Art Pour L'art." *Zeitschrift Für Religions- Und Geistesgeschichte* 25, no. 3 (1973): 273-76.

Husserl, Edmund. *The Crisis of European Sciences and Transcendental Phenomenology; an Introduction to Phenomenological Philosophy*. Northwestern University Studies in Phenomenology & Existential Philosophy. Evanston: Northwestern University Press, 1970.

Jackson, Gerald Stephen. "Transcoding Sexuality: Computational Performativity and Queer Code Practices." *QED: A Journal in GLBTQ Worldmaking* (Project Muse) 4, no. 2 (2017): 1-26.

Jay, Martin. “Must Justice Be Blind? The Challenge of Images to the Law.” In *Law and the Image : The Authority of Art and the Aesthetics of Law*, edited by Costas Douzinas and Lynda Nead, 19-35, Chicago: University of Chicago Press, 1999.

Johnson, Christopher D. *Memory, Metaphor, and Aby Warburg's Atlas of Images*. Ithaca, N.Y.: Cornell University Press, 2012.

Julius, Anthony. *Transgressions : The Offences of Art*. London: Thames & Hudson, 2002.

Karavokyris, Georgios. "The Art of Law." *Law and Critique* 25, no. 1 (2014): 67-85.

Kay, Alan. *User Interface: A Personal View*. Reading, Massachusetts: Addison Wesley, 1990.

Kay, Alan. “Is it really ‘Complex’? Or did we just make it ‘Complicated’?” Presentation at Qualcomm, San Diego, CA, October 30th, 2013.

Kessler, Glenn. “How many pages of regulations for ‘Obamacare’?” *The Washington Post*, May 15, 2013, https://www.washingtonpost.com/blogs/fact-checker/post/how-many-pages-of-regulations-for-obamacare/2013/05/14/61eec914-bcf9-11e2-9b09-1638acc3942e_blog.html?utm_term=.3201f5720124.

Kemp, Wolfgang. *Der explizite Betrachter. Zur Rezeption zeitgenössischer Kunst*. Konstanz: Konstanz University Press, 2015.

Klanten, Robert, Sven Ehmann, Verena Hanschke, and Lukas Feireiss. *A Touch of Code : Interactive Installations and Experiences*. Berlin: Die Gestalten Verlag, 2011.

Koch, Cynthia. “The Contest for American Culture: A Leadership Case Study on The NEA and NEH Funding Crisis.” UPenn.edu, 1998. http://www.upenn.edu/pnc/ptkoch.html.

Kumm, Mattias. "On the past and Future of European Constitutional Scholarship." *International Journal of Constitutional Law* 7, no. 3 (2009): 401-15.

Layton, Robert. “Art and Agency: A Reassessment.” *The Journal of the Royal Anthropological Institute*, Vol. 9, No. 3 (September, 2003), 447–464.

Law, John. “Notes on the Theory of the Actor-Network: Ordering, Strategy and Heterogeneity.” *Systems Practice* 5 (1992): 379-93.

Lessig, Lawrence. *Code : Version 2.0*. New York: Basic Books, 2006.

Loick, Daniel, and Mendieta, Eduardo. "Juridification and Politics." *Philosophy & Social Criticism* 40, no. 8 (2014): 757-78.

Luhmann, Niklas. *Art as a Social System*. Stanford, Calif.: Stanford University Press, 2000.

Marks, Amber, Bowling, Ben, Keenan, Colman. "Automatic Justice?: Technology, Crime, and Social Control.” *The Oxford Handbook of Law, Regulation and Technology* (July 2017): 1-34.

McCormack, Jon. “Codeform : A Balancing Act between Variation and Utility in Evolutionary Art.” *Leonardo,* Vol. 49, No. 3 (2016): 257–261.

Merryman, John Henry, Elsen, Albert E., Urice, Stephen K. *Law, Ethics, and the Visual Arts*. 5th ed. Alphen Aan Den Rijn, The Netherlands, 2007.

Modéer, Kjell Å., and Martin Sunnqvist. *Legal Stagings : The Visualization, Medialization and Ritualization of Law in Language, Literature, Media, Art and Architecture*. Copenhagen: Museum Tusculanum, 2012.

Moore, Sally Falk. "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study." *Law & Society Review* 7, no. 4 (1973): 719-46. doi:10.2307/3052967.

Niezen, Ronald. *Public Justice and the Anthropology of Law*. New Departures in Anthropology. Cambridge ; New York: Cambridge University Press, 2010.

Paul, Christiane. "CODeDOC II." In *Code: The Language of Our Time*, ed. Gerfried Stocker and Christine Schöpf, 231-34. New York, NY: Hatje Cantz, 2003.

Petropoulos, Jonathan. *Art as Politics in the Third Reich*. Chapel Hill: University of North Carolina Press, 1996.

Potter, Pamela Maxine. *Art of Suppression : Confronting the Nazi past in Histories of the Visual and Performing Arts.* Oakland, California: University of California Press. 2016.

Reas, Casey, Chandler McWilliams and Jeroen Barendse. *Form+Code in Design, Art, and Architecture*. New York: Princeton Architectural Press, 2010.

Reidenberg, Joel R. "Lex Informatica: The Formulation of Information Policy Rules through Technology." *Texas Law Review* 76, no. 3 (1998): 553-93.

Schauer, Frederick. "Legality." *Yale Law Journal* 120, no. 3 (2010): 586-621.

Schleif, Corine. "The Roles of Women in Challenging the Canon of 'Great Master' Art History." In Attending to Early Modern Women, edited by Susan Dwyer Amussen and Adele F. Seeff, 74-92. Newark: University of Delaware Press, 1998.

Shanken, Edward A. *Systems*. Documents of Contemporary Art Series. 2015.

Shanken, Edward A. *Art and Electronic Media. Themes and Movements*. London ; New York: Phaidon Press, 2009.

Shapiro, Scott J. *Legality*. Cambridge, MA, USA: Harvard University Press, 2011.

Skrebowski, Luke. "All systems go: Recovering Hans Haacke's systems art." *Grey Room*, No. 30, (2008): 55–83.

Stanford University Press. “The Cultural Lives of Law.” http://www.sup.org/books/series/?series=The%20Cultural%20Lives%20of%20Law.

Stocker, Gerfried, and Christine Schöpf. *Code : The Language of Our Time : Code=law Code=art Code=life*. New York, NY: Hatje Cantz, 2003.

Tate Modern. “The rules of art according to Rauschenberg.” http://www.tate.org.uk/rules-of-rauschenberg/.

Teubner, Gunther. "Rights of Non−humans? Electronic Agents and Animals as New Actors in Politics and Law." *Journal of Law and Society* 33, no. 4 (2006): 497-521.

Velioglu, Ece, Chechi, Alessandro, Renold, Marc-André. “Case Portrait of a Young Peasant – Beyeler v. Italy.” Platform ArThemis, Art-Law Centre, University of Geneva. https://plone.unige.ch/art-adr/cases-affaires/portrait-of-a-young-peasant-2013-beyeler-v-italy.

Weischedel, Wilhelm, ed. *Immanuel Kant: Werke in zwölf Bänden.* Frankfurt am Main: Suhrkamp, 1977.

White, James Boyd. "An Old-Fashioned View of the Nature of Law." *Theoretical Inquiries in Law* 12 (2011): 381-402.

Wolfe, Alan. "Algorithmic Justice." *Cardozo Law Review* 11, no. 5 6 (1990): 1409-434.

Zabludowicz Collection. “Helen Knowles.” https://www.zabludowiczcollection.com/exhibitions/view/zabludowicz-collection-invites-helen-knowles.

Zannos, Iannis. "Algorithms and Language Concepts in Coded Art." *Technoetic Arts: A Journal of Speculative Research* 9, no. 2-3 (2012): 255-69.

Zentrum für Kunst und Medien. “Open Codes.” https://open-codes.zkm.de/en.