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### Clashing things

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## Clashing things

### Abstract

Law has an ambivalent relationship with artistic and cultural material, for the artistic is malleable and unstable. Law assumes and prefers the stable and reliable, and the closed, and distrusts the vagaries that typify the artistic. Law likes to keep its distance from the artistic, though it is happy to be its judge, and to have its own views on art. It then firmly intrudes into the artistic, especially where rogue aspects of art and culture operate. While law is unable to trust its judgment about the artistic and cultural, it will still make art experts and institution subject to the overriding truth of the law.

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## CLASHING THINGS

*Marett Leiboff\**

Law has an ambivalent relationship with artistic and cultural material, for the artistic is malleable and unstable. Law assumes and prefers the stable and reliable, and the closed, and distrusts the vagaries that typify the artistic. Law likes to keep its distance from the artistic, though it is happy to be its judge, and to have its own views on art. It then firmly intrudes into the artistic, especially where rogue aspects of art and culture operate. While law is unable to trust its judgment about the artistic and cultural, it will still make art experts and institution subject to the overriding truth of the law.

### **Distrust<sup>1</sup>**

Law's response to the artistic is one of extreme distrust. A thing that has the status of artistic in the eyes of the beholder is instead subjected to the disinterest of the law, which will subjugate that which is artistic into the standard categories of legal analysis that reconstructs the artistic into that which law can recognise. Part of the difficulty that law faces in dealing with the artistic is an unexplicated trust in the nature of a *thing* as stable and reliable, and not subject to the vagaries of reinterpretations, reconstructions and reappraisals. Yet these are the hallmarks of that which is artistic, for this domain is characterised by the intangible that cannot be fixed in time and space, and against which the stability and certainty of material forms are treated as paramount. The consequence is a tension on the one hand between that which is apparently stable, and that which is unable to be tamed, and this leads to methods of legal analysis which are both contradictory and which lead to a clash of cultures at the point at which different categories of law approach a single piece of art.

### **Artistic**

The artistic, as I use the term in the context of this article, comprehends creative works that may have been created as a work of the mind by an originary hand. As well, the artistic may encompass those things that have been ascribed the status of artistic through their connection with those who have given the thing this status. In this sense, it is a term I use loosely, and I do not seek to narrow the concept through a restricted interpretation that may be used in a strictly legal context, such as those that apply in copyright or moral

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<sup>1</sup> My thanks to Mark Thomas for his extreme insight.

rights.<sup>2</sup> Rather, my use of the term operates to recognise the framing that can occur when the status of a thing can shift in and out of the artistic domain, and I will adopt this wide-ranging notion to recognise the constitutive and constructive processes in the creation of that which is or could be classified as artistic.<sup>3</sup> I do not mean, though, aesthetics in the sense of the desire for the absolute, the mimetic or the beautiful in its more particular sense,<sup>4</sup> and the extent to which taste formation is part of judging in law.<sup>5</sup> Rather, I am looking at the way that the notion of the closed, unchangeable desire of the art object is desired by law, and the ways that its eventual accretions are treated through the eyes and hands of the law.

### Commodity

While the notion of the artistic raises the disinterest of the eye of the connoisseur and the disinterested aesthetic spectator,<sup>6</sup> the use and exchange value of the artistic is always potentially present, as a commodity. It is business and pleasure, and reascribes its value through the market: 'The object status of the work of art ... always operates against its original or potential state of being a commodity.'<sup>7</sup> At this point of intersection, the law takes hold, and the artistic is altered as it falls into a frame of reference distinct from its starting point. An expectation of validity and value holds true when art enters this realm, though the artistic does not sit well in such foreign circumstances, where it is subjected to a sceptical eye that demands a truth that the commodity aspects of art cannot always live up to. Martin Chanock has argued that law has not effectively dealt with these differences:

As objects move in and out of sacral heritage status, or as their claim is disputed, not only is definition more difficult, but the claim that, in the balance with other interests, they should be specially protected against ordinary commodification, are harder to sustain. It is hardly surprising that it is easier to assert market value, and the clearly defined rights of property.<sup>8</sup>

### Sceptical

The malleability and shifting notions of the artistic are therefore unable to be tamed, leading to law adopting a style of analysis of the artistic that places the paradigmatic aspects of the artistic into the stuff that encases the intangible and

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<sup>2</sup> Cf Kearns (1998), pp xiii–xv: assuming creative and artistic are skill oriented; pp 63–67: assuming a categorisation approach towards the topic.

<sup>3</sup> Duro (1996), pp 1–3.

<sup>4</sup> Douzinas et al (1991), pp 162–164.

<sup>5</sup> Nahmod (1987), pp 226–235 generally.

<sup>6</sup> Kant (1994), pp 98–99.

<sup>7</sup> Erickson (1995), p 29.

<sup>8</sup> Chanock (1996), p ix.

attempts to discipline it within acceptable legal norms, even if these are clothed in a sanctified notion of the artistic.<sup>9</sup> Art is liked in that it may be seen as an expression of cultivation, and culture, for which law is grateful. On the other hand, while it may be partaken of, it cannot be treated seriously and must be tamed in order to enter law's domain.<sup>10</sup>

The consequence is that administrative and judicial decision-makers find themselves caught when faced with issues of art and that which is artistic, and are thus enmeshed in the binds of where boundaries are to be drawn. However, the issues are more problematic, in that the construction of standard categories and the decision-making that must be adopted force decision-makers into an undesired role of artistic value-maker. They must enter the realm of the artistic, for they are forced into fact-finding and construction of the law in the area that intertwines the law and the facts that are meant to be so clearly delineated from one another. They do not want to — and indicate that they do not, though the protestations do not reflect the actuality; the artistic is drawn into law's web, thus binding it into a new construction and a new reality.

### Real Law

This is specially so when law treats artistic things as standard commercial transactions, thereby treating the artistic as if it were the same as other items of commerce, the paradigmatic notion in law of the valued and the accepted.<sup>11</sup> Yet the 'special' nature of the artistic is recognised and denied the same time; at one end of the spectrum, there is a tendency to 'stay out' of the artistic, by using various devices to remain apparently at arm's length, thus denying the innate aspects of the artistic as seen in copyright, contracts and sale of goods. But this arm's length approach implicitly recognises the artistic. In part, it seems that this has emerged to keep the judicial (or other) decision-maker's eye or taste out of the picture.<sup>12</sup> In other instances, the law firmly intrudes into the artistic, especially where rogue aspects of art and culture operate. But in the context of the more generalised aspects of cultural heritage law, in which an aspect of the artistic operates, the artistic is allowed to speak for itself — at least in the context of national notions of art and culture.

### Polarities

Law has not found an effective way to connect a cultural thing itself in its material form as it connects with its intangible value, identity or status — that

<sup>9</sup> Cf Kearns (1998), p xv: 'One presupposition may be that art has the tendency to engender grey areas of law resultant upon the complexities involved for law in operating on art's elastic discourses and definitions, sometimes irreducible to the neatness of finite conceptual clarity that law requires for a practical result. Law, on the other hand, may be seen as the oppressor of art's distinctive character in the interests of its own and society's sense of social order based on priorities insensitive or antipathetic to art.'

<sup>10</sup> Douzinas and Nead (eds) (1999), pp 11–12.

<sup>11</sup> Prott and O'Keefe (1989), p 239.

<sup>12</sup> Douzinas and Neal (1999) generally; L Bently (1996), pp 9–12.

is, the link between the material and immaterial. At its crudest level, a simple duality between the tangible and intangible is made plain. A painting will fall, at one end of the spectrum, in law's gaze at its inception, in its creation. Law will recognise certain rights that exist in its intangible form, through copyright — albeit with certain qualifying requirements. Yet certain other rights exist in relation to the material manifestation of the painting itself as a physical object. Between these two polarities, though, are the methods by which law deals with disputes concerning rights and interests associated with the painting, such as contracts; however, this then tends to act as a form of brutality toward the painting, what it is and the way this is viewed. In one, the material manifestations are overlooked except for evidential reasons, while in the other, the intangible aspects are denied.

### Taming

The scepticism of law's response to the artistic resonates with the scepticism of early approaches towards intellectual property, and the unacceptability of non-physical and incorporeal property concepts that could not be connected with a physical object.<sup>13</sup> The 'idea of a property which could be stolen through a pane of glass and carried off by the eye without being found on a person offended the empiricist sensibilities of the law'<sup>14</sup> that related to emerging literary properties is still regnant in the sensibilities that apply to the results of the mental labour that connects with the resulting creative and artistic work in its material and remnant form. This is the point at which it enters the discourse of standard property considerations, the law of contract and sale of goods, and more specific law dealing with such things as items of national importance. Yet, in the discourses of these areas of law, empiricism rules and the vagaries of the artistic are tamed by the rules that insist on the tangible and the stable, with a distinct wariness imposed upon the malleable and changeable. The intangible cannot be trusted to speak the truth, and its bare bones — its physical form — is the only reliable thing on which the law will be guided; in this sense, the object is required to speak for itself. Matters of quality, description, mistake or misrepresentation are the terms used to assist in law's task and, while it can be aided by the intervening assistance of experts, ultimately the decision rests in the hands of the courts or administrative decision-makers who will decide on the basis of how they see the facts as they rest on the law.

Two case studies typify the responses of the law when faced with the stymied artistic thing, and these will be considered later. In these cases, the physical form is untruthful; its intangible is truthful in one or other respect, but is false in another; and to tame it, the decision-making has had to tread warily into the realm of the artistic. Taming occurs when the artistic is denied and commerce takes over, for these artistic things are restructured into law's gaze, as evidenced in contractual disputes. The law regains its comfort when its interventions treat the artistic thing as if it had no special status.

<sup>13</sup> Sherman and Bently (1999), p 20.

<sup>14</sup> Sherman and Bently (1999), p 20.

## **Taste**

A problem occurs at the point where the tamed thing is taken under the wing of law. The law cannot trust itself to judge the artistic, and requires the intervention of those who can be trusted to make judgements concerning taste and artistic or cultural value. However, the experts who can be trusted to assess the validity of an artistic thing can only guide the courts. But the role of the expert is qualified since their only role is that of emissary for the thing, which is otherwise expected to speak for itself. The expert, though, is not treated by the court as in any way contributing to creating the value and status of the thing. The thing is closed, and will do its speaking to those who can be trusted to tell its story, but that story is not constitutive of its value or status.

However, the court will also not trust the intermediary, the expert, to bestow the status of validity and value on the artistic thing. It will instead be captured by and subjected to standard categorisations that make it legally valid, though the foundation for the categorisations are fantastic.<sup>15</sup>

## **By-product**

All of these processes reframe an artistic object, and give it an altered status.<sup>16</sup> The object that originated as a by-product of mental and creative processes has been subjected to new creations and recreations through the mediations and interventions of institutions that endow the thing with its ongoing reconstruction as a thing that has a new intangible value and status that has changed from its earlier manifestation. But the law still wants the thing to speak for itself, at its point of closure, as this is a time of stability where the thing is considered to speak the truth through the hands of the originary genius who gave it its essential legitimacy, without the accretions of time which would contribute to the object no longer speaking its truth.

## **Stabilisation**

This distant point at which the artistic thing was stable and certain is what law desires in the art object so that there can be no distrust of it. This is the point where it can be clearly identified and described, identified and analysed without the taint of the uncertain, the malleable, flexible and changeable. The desire for an absolute untainted and closed thing that does not depart from its originary being resonates with the absolute forms of meaning of Derrida's 'book'. The book is closed off, with no further input into meanings and understandings, which treats the artistic as a form of analytical separation.<sup>17</sup> A version of art analysis that sees a thing in a scientific, disinterested way has also been used to distance the observer in the artistic domain, that suits law's desire for the closed, stable, unsullied artistic thing, as Taborsky points out:

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<sup>15</sup> Chanock (1996), p x.

<sup>16</sup> Duro (1996), pp 1–10.

<sup>17</sup> Taborsky (1990), p 60.

The only way to obtain any knowledge of this object is, as observer, to explore its material and social nature by non-discursive methods of abstract (and presumably socially unaffected) techniques of analysis, such as measurement, data collection, statistical tables. Here, the understanding is that there are such things as impartial observation, impartial means of measurement and that the meaning of the object is uninfluenced by the perception of the observer or the social nature of the object.<sup>18</sup>

This method is law's desire as well. Thus law treats the results of creative activity by snapping shut the time and space at which creative work is given its closure and end point at the time that it is left by its originary creator at the point of the final brushstroke or final burnishing. It is closed at that point and the now static object that was formerly the result of dynamic activity is now subject to the closed structure of standard legal analysis. However, as Chanock has pointed out, this closure by law is a fantasy,<sup>19</sup> as the thing itself continues a creative life after it has left the hands of its original creator. In other words, dynamic and creative interventions are the hallmark of a created thing, and the closure that law imposes on it is false.

### Dynamic

Derrida's oppositional construct of the text, in contradistinction to the book, is not closed. Instead, the text operates at the level of continuously dynamic interventions that concede the reconstructive nature of a thing.<sup>20</sup> The text is perhaps related to law's recognition of the intangible, but the law is not comfortable with the intangible either, concretising it as a way towards affording a constructed certainty that affects our understanding of the association between the intangible and object; Sherman and Bently's point resonates this argument as to the status of pre-modern intellectual property:

while the modern law has tended to think about intangible property as a concrete and stable object, in the eighteenth and much of the nineteenth century the intangible was defined in more abstract and dynamic terms ... To our modern eyes, which are used to seeing the intangible as an object, the idea of the intangible as a form of action may be difficult for us to comprehend<sup>21</sup> ... the law spoke of the intangible in dynamic terms, as something that was done; yet when it came to deal with and process the intangible, *the law was unable to represent the intangible in a way which reflected its active or dynamic nature.* (my emphasis)<sup>22</sup>

This discomfort is, I suggest, reflected in the accepted doctrines which make up the general law. If it has been problematic for intellectual property

<sup>18</sup> Taborsky (1990), p 60.

<sup>19</sup> Chanock (1996), p x.

<sup>20</sup> Douzinas and Nead (1999), pp 44–51.

<sup>21</sup> Sherman and Bently (1999), p 48.

<sup>22</sup> Sherman and Bently (1999), p 49.



law to acknowledge the shifting nature of the intangible, which is part and parcel of understanding issues within the domain of intellectual property, then this is magnified when the artistic thing confronts areas of law that are unsympathetic to the intangible. In other words, the active and dynamic nature of the artistic cannot be accommodated by law, which prefers closure. And the point of closure is unbearably artificial, for the law will treat the intangible aspects of the artistic thing as frozen in time, *snapped shut* and unable to be recreated through the passage of time. The freezing occurs at the point of originary completion, and the unbearable artifice of the point of closure proceeds to confound the thing through its next steps. Material aspects of the thing become all-important, and the textuality that forms the thing is shunned.

### Categories

Treating the artistic thing as the book, satisfying a desire for the authentic displaying the mark of the originary hand, *sees* law as wanting to satisfy the ultimate desire for the truthful artistic thing. But the book that law closes is then thrown into disarray as the range of categories of law that the thing finds itself engaged in draws the thing into differently constructed discourses which take the thing apart in different ways. Part of the problem that arises are the numerous categories in which the artistic thing will find itself in law, none of which necessarily fit each other well, if at all.<sup>23</sup> However, these different categories can deny what can be loosely termed the intrinsic aspects of those areas that make up the artistic, which see law acting inconsistently between one of its categories and another.

In this sense, law has maintained a bewildering distinction between the methods by which it assesses and views intangible aspects of the artistic, on the one hand, and tangible aspects, on the other.<sup>24</sup> In the former, it accepts — indeed requires — that there is some element of an existence apart from any material manifestation which is the bodily remnant of the thing, or in which — in instances where issues of significance apply, in the law applying to the heritage aspects of the artistic in law — some facet of a thing or object is bestowed or imposed upon by the views of those who are given the power to decide such things. However, in relation to the general law that is found in this area, the coyness of the courts has been overwhelming in the tendency to *avoid* entering into a recognition of the nature of that which is artistic, to the extent that the special or unusual aspects are either ignored, or relegated to a position of *obiter* in the decision.

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<sup>23</sup> For example, Anderson (1994), p 70; Duboff (1990), generally.

<sup>24</sup> Within standard legal discourses, this can be broken down into various proprietary interests in the canvas and paint and the other relevant materials, the final chattel as personal property, the copyright in the work, a good for sale, evidence of intellectual property, item in a museum collection, a piece of national heritage, part of universal heritage of humanity. These correspond to a range of domestic and international laws and treaties, and the general law.

## Material

But because there has been a tendency to construct the law within set boundaries, and in which the notion of intersecting issues are denied, between the material and the intangible which is creative of the value of the artistic, the law applying to the material aspects of the artistic tends to ignore and deny the value created through the intangible. At this point, the language of market and commerce take hold, despite the references back to the artistic value of the thing. Tony Bennett shows how, through the relationships set up through language, it may be pointless to attempt to deny the creating and recreating relationship between art and law. He reminds us that there can be no end point in this area. Ultimately, it is necessary to recognise that the thing should be dealt with in a wider frame than its mere materiality. Within the discourse of the book, in which the authentic designated hand of the originary genius is required, he points out that:

The authenticity of the artefact ... does not vouchsafe its meaning. Rather, this derives from its nature and functioning ... as a sign ... individual signifiers have no intrinsic or inherent meaning. Rather, they derive their meaning from their relations to the other signifiers with which they are combined, in particular circumstances, to form an utterance.<sup>25</sup>

This is made even more apparent in the heritage aspects of the artistic, for the law has to have either material remnants to which significance is applied,<sup>26</sup> or material which is assumed to be the embodiment of intangible intention.<sup>27</sup> However, the law itself is tentative about the nature of the material and its association with the signifiers that identify the material remnant or embodiment. It sometimes only needs materiality to be evidence of the *existence* of an intangible, such as the need for an 'original' in copyright law — the intangible exists as it is, though without the existence of some memorial, it is not validated. There is a generic desire for the closed in all senses, for even the most uncapturable areas of the artistic are not validated without capture that law requires, and in this way the law is deeply committed to the need for some kind of truthful, untainted, unchallengeable material. In this way, law is happy for a thing to embody and express the artistic as a form of capture of the spirit, though not of the recreations and reconstructions that are tantamount to the living existence of the artistic thing. On the other hand, in relation to the law applying to goods, the thing is never believed, and law is clearly sceptical of the story that purportedly gives value to the thing. The apparent desire of the

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<sup>25</sup> Bennett (1995), p 147.

<sup>26</sup> Particularly in the case of material to which significance is later applied — for instance, an ordinary item of commerce made extraordinary because of its connections, or alternatively, a degraded object with reduced significance, as a consequence of damage, reconstruction or destruction.

<sup>27</sup> For example, the material form requirement for copyright law, the requirement for an object of property in sale of goods as a chattel, or an object of cultural heritage.

law is to demand certainty through the existence of material — yet, when tested, the existence of the material fails.

### Border

The point at which this failure occurs is where questions of distinction occur — say, between subject matter and the hand of the genius, or the reappraisal of the ordinary in exceptional terms: the ordinary touched by that which bestows a new value through association, age or national meaning. It is in this last category that the problem of the language law uses to deal with the artistic is at its most unexplicated. I will suggest that it is necessary to understand the parameters of the field, to recognise the notions of materiality and textuality, and the concept of the senses applicable in law, rather than merely staying within conventional boundaries<sup>28</sup> for all purposes of dealing with the law as it applies to the artistic. I will not attempt to retrace or reassess the standard legal discourses or the boundaries themselves, nor to reconsider notions of tangible and intangible forms of property, but instead to place a border or a frame around the intersection between law and artistic discourses, especially at the point of capture, and the taming of the artistic thing into the boundaries of law. Douzinas, Warrington and McVeigh point out that legal doctrine is troubled by the intersection between law and art, where law is faced with art and aesthetics:

its *alter* of aesthetics cannot sustain the line it tries to draw ... The economy of alta(e)rity shows how the specificity of legal doctrine (its formality and normativity) rather than closing and insulating legal discourse, keeps relating to the extra-legal, those other discourses that become other because they are kept 'outside', at the critical distance defined by the frame of law.<sup>29</sup>

Law's processes demand a form of closure beyond which the boundaries of the legal meet non-law, and the way that law draws in and out of it tenuous connections with other disciplines is clearly shown in relation to the artistic. Points of legal comfort exist, especially at the point of the intangible. Law will recognise certain rights that exist in its intangible form through copyright — albeit with certain qualifying requirements. Yet certain other rights exist in relation to the material manifestation as a physical object. Between these two polarities, though, are the methods by which law deals with disputes concerning rights and interests associated with the painting, such as contracts, as well as public interests in the management of heritage and artistic interests — taxation, charitable trusts and, particularly, artistic heritage law. These all dissect the thing or the expression, and do not find a common language to explicate that which is the subject of the law applying to the artistic. In a sense, then, when law engages in this domain, it engages in a metaphorical act of

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<sup>28</sup> Douzinas et al (1991), p 178.

<sup>29</sup> Douzinas et al (1991), p 179.

brutality towards the artistic thing, which is problematised where the cleaving between thing and meaning of the thing are most apparent.

### Wounding

The consequence is that a facet of the law's response of distrust toward an artistic thing is highlighted where the thing itself has a tenuous connection to its point of closure, where it has been in some way damaged either physically or metaphorically. I mean damage in a broad sense here, as a form of alteration of the closed-off thing at the time of its last connection with the hand of the originary genius. An actual physical alteration, through restoration, conservation or repair, will intervene in the closed object, resulting in a wounded thing. It still bears the mark of the desired original, but the thing is now not pristine. However, this form of alteration is legitimate, unless the thing is so different from its starting point that it cannot be what it was. It is illegitimate if the new hand that has physically intervened has altered what is meant to be the thing, through repainting or doing something to affect the truth of the thing. This may verge on metaphorical damage, though the wounding is greatest at the point of the actual untruth of the counterfeit or the simulacrum, when the truth of the thing is confounded, and the thing is not what it was, and has never been what it was. The realm of the fake, and associated notions of misrepresentation, mistake and quality in the general law of contracts and sale of goods, raise the ire of the law towards the wounded thing, and it is denied protection and status through law.

### *Passe-partout*

Derrida says this in *The Truth in Painting*. It highlights the key towards law's engagement in clashing things. The fragments reflect the aspects of the things that clash in law. The *passe-partout* is its guide in and out and around the artistic, and it may assist with law's responses to the artistic. So these are the things he says, and we can see the clashes embedded in his observations. I would like him to speak, not me:

Four times, then, *around* painting, to turn merely around it, in the neighbouring regions which one authorises oneself to enter, that's the whole story, to recognise and contain, like the surrounds of the work of art, or at most its outskirts: frame, title, signature, museum, archive, reproduction, discourse, market, in short: everywhere where one legislates on *the right to painting* by marking the limit, with a slash marking an opposition [*d'un trait d'opposition*] which one would like to be indivisible ...

The common feature [*trait*] of these four times is perhaps the trait. Insofar as it is never common, nor even one, with and without itself. Its divisibility founds text, traces and remains.

Discourses on painting are perhaps destined to reproduce the limit which constitutes them, whatever they do and whatever they say: there is for them an inside and outside of the work as soon as there is work ...

One space remains to be broached in order to give place to the truth in painting. Neither inside nor outside, it spaces itself without letting

itself be framed but it does not stand outside the frame. The emblem for this *topos* seems undiscoverable; I shall borrow it from the nomenclature of framing: the *passe-partout*.<sup>30</sup>

This empty untraversed space is my concern, and the way in which the law creates the thing that is both in and around the artistic thing. The *passe-partout* is a key and a place in which to frame the way that law denies its role in the artistic and the way it does not take responsibility for its intrusion into the discourses that are creative of the artistic.

## Frames

The artistic is not closed, and the artistic thing thus moves in and out of the discourses that are creative of it. The moving and the shifting in, about and around cause discomfort in legal discourses requiring closure and certainty, and for this reason law has not found an effective way to connect the artistic thing itself in its material form as it connects with its intangible value, identity or status. In other words, unlike the *passe-partout*, the law attempts to sever the link between material and the intrinsic or the special aspect of the artistic thing that makes it what it is and, in so framing it, denies it its validity through forcing the boundaries that it imposes on the artistic.

So, as well as dealing with wounded things which cannot live up to law's expectations, the law also wounds in its processes of categorisation. This is because the law has demarcated a boundary between the intangible through the intellectual property side of the domain, as constructed by copyright law, and associated notions such as moral rights. The other side of the law — applying to tangible property — that has tended to fall within the boundaries of personal property, and the kinds of interests to both tangible and intangible that are found in the law associated with obligations such as contract law and equity, tend towards an acquiescence to some kind of tangibility.

It is apparent that there is an unexplicated ground effectively untraversed by standard legal categories, at the point of the *passe-partout*, though found within and through the various strands of law applicable in this area at a point of interface — where an intangible meets the tangible. In its conventional manifestation, the tendency is to deny the intangible aspects of the thing, especially in the approaches adopted in contracts and sale of goods, by divorcing the thing from its meaning and significance. This method instead focuses on the tangible and, instead of recognising the inherent or particular nature of the thing, relies on a method which treats inherence as a dubious, questionable, unstable thing which is denied relevance to the thing in itself. It instead becomes a secondary matter, in which the language of 'opinion' is used to describe rather than identify it.<sup>31</sup> This, of course, differs from the method used when the thing is mere evidence of its intangible qualities, as in intellectual property law, but where the connection has to be made:

<sup>30</sup> Derrida (1987), p 12.

<sup>31</sup> Palmer (1996), p 49.

one of the primary tasks confronting the law in its dealing with the intangible is the need to be able to identify the property ... [which is] best understood as an evidential question ... by juxtaposing reproduction and identification in this manner, we are better able to appreciate the conflicting demands embodied within the legal notion of the intangible.<sup>32</sup>

What this demonstrates is the problems that can be faced when attempting to pin down the artistic. It needs to be captured by some means in order to be allowed to operate within the ambit of the law. Sherman and Bently also raise the problem of the singularity of the original, but here the issue does not deal with the question of reproduction, but that of the indelibility of the mark of an originary creator, which law assumes resides in that thing,<sup>33</sup> which is the hallmark of the assumed value of the artistic.

What this throws up is the way in which differing methods are used in different legal domains, for in most areas of the general law, the completion of the thing is assumed; however, it also demonstrates the extent to which inconsistencies operate in relation to the artistic domain. Yet it seems to be inconsistent and problematic to set differing standards in this area because they must by their very nature, connect at a point of intersection, and the tension that exists is most clearly seen in the difficulty of delineation occurring at the boundaries at the point of materiality and textuality. However, the language which has dominated the discourse of law and art and culture has had an uncanny tendency to slip between the existence of that physical form and what it is said to be. Law can freeze a thing in a particular time and space, while still being happy to accept reconfiguration and reappraisal, depending on the version of law applying. But it cannot find a language to deal with a thing that has been changed either materially or in terms of an intangible reconstruction, and this is where the constitutive and creative processes of the institutions involved in the realm of the artistic — those 'four times, then, *around* painting'<sup>34</sup> — are integral to the thing in all its manifestations.

## Value

Artistic and cultural institutions — museums, galleries, art salesrooms and auction houses — and those who comprise the body of experts involved in sustaining these institutions, were historically an unexplicated but integral part of the creative process of the artistic. However, as Derrida has pointed out and as Bourdieu's studies have shown,<sup>35</sup> the creation of value through the cultured habitus and the role of institutions is constitutive of the artistic and its value. In other words, the artistic thing is recognised as constantly moving, and being ascribed and accorded a range of values as new creations once it has been released from the originary hand.

<sup>32</sup> Sherman and Bently (1999), p 51.

<sup>33</sup> Sherman and Bently (1999), p 52.

<sup>34</sup> Derrida (1987), p 12.

<sup>35</sup> Bourdieu (1984); Bourdieu et al (1991); Bourdieu (1996).

This means an *active* role for these institutions in value creation, ranging from the conservation and restoration to the keeping of these things. In this way, the quintessential artistic and cultural institution, the museum, has been described as being 'the strongroom for symbolic capital'.<sup>36</sup> Museums are not neutral keepers of these things, but through their own status of ascription are invested with a power to consecrate objects and convert aesthetic value into financial profit.<sup>37</sup> This provides for an expansion of an increasing *symbolic value* to the work which relates to its ultimate financial value, debunking the notion of the disinterested connoisseur who does not engage in concerns akin to anything other than that of the Kantian aesthete. This point of intersection collides with the salesroom or the auction house, or other market actors such as agents and publishers, who 'consecrate a product which he has "discovered" and which would otherwise remain a mere natural resource'.<sup>38</sup> Artistic things are thus reconstructed and recreated through the market. Law, however, does not recognise this process, instead preferring the closed object that is finalised at the point of the last contact with its creator.

One of the concerns of the legal desire for closure is its desire for absolute closure on the truthful thing, through the ascription of truth value. This is the desire for the truthful artistic thing that the institutions and those involved in the process of art market are meant to be engaged in, as being knowledgeable connoisseurs. But this is confronted where there is an untruthful thing — the fake, the counterfeit, the unauthentic and the undesired — which is axiomatically law's obsession. Baudrillard's approach towards cultural value has subverted the accepted notions of value creation that have been set out above. He has suggested, instead, that:

value is an arbitrary category, having no innate residence within the object, but having its origin within a social classification that hides behind the object. The value ascribed to them, even when it is denied to be monetary, is autonomous of the object itself and is a signifier which is constrained only by its indexical relation to other signifiers composing a discrete field which works to establish ratios of comparative worth.<sup>39</sup>

Thus, in the language of commodities, exchange value determines use value, rather than the other way around. Baudrillard arrived at this position through developing the notion of the simulacrum, around which the value of artistic things could be ascribed. He identified three stages: the first order simulacrum value is an indice of the relationship between sign and natural object; the second order is post-industrial, the relation between sign and artificial object, which 'desires to masquerade as natural'.<sup>40</sup> However, the third

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<sup>36</sup> Shelton (1990), pp 79–96.

<sup>37</sup> Shelton (1990), pp 79–80.

<sup>38</sup> Shelton (1990).

<sup>39</sup> Shelton (1990), p 79.

<sup>40</sup> Shelton (1990), p 95.

order simulacrum subverts both, where the sign achieves autonomy from the object which it represents.

What Baudrillard has observed is perhaps law's *passe-partout*, the place where the false relation between exchange and use value is laid bare, and a version of third order simulacrum holds sway. Law's desire in relation to the thing, the truthful chattel, remains in the first order, while the second order adopts a version of the law approaching the intangible. The unexplicated space between the thing and its creation through the market, the institutions and the cultured habitus therefore can be seen in the detached sign that has no connection with the thing. The way that law treats the connections between the thing and the extreme disinterest and distrust of the thing are perhaps only sensible at this point, neither inside nor outside, where the connection is made, but its value through law ascribed only at the place where no truth can be discovered, only asserted. It is really only through a recognition of the creative role of those in the field of cultural production,<sup>41</sup> that the law can recognise the way in which transactions intersect to create value. Yet law has been blinded by art, and has contributed to a fictive version of transactions and constructions of the artistic.

### Institutions

The institutions creative of the artistic acknowledge this process of ascription of value, though to varying degrees. While *public* museums and galleries have tended to acknowledge this process of cultural creation, and are conceivably liable in respect of false attributions and other matters in which the connection between the artistic thing and the law interact, they are outside the market and so less exposed to the consequences that follow. On the other hand, the art market, through private galleries, salesrooms, auction houses and dealers, is *less likely* to acknowledge their role in the process of value creation. Instead, while they choose to be acknowledged where their aesthetic and connoisseurship *create* value, they conversely choose to *disengage* at the point at which liability will follow. Indeed, the law apparently acknowledges the practice of the 'trade' by choosing to treat what are termed statements of authorship of works of art as expressions of 'opinion', not 'fact';<sup>42</sup> the law thus tends to adopt through the law of contracts and sale of goods those matters which are advantageous to the art market.

While the practicalities are that this use of language is protective of both institutions and individuals from liability in contract and tort, the focus becomes the way in which the emphasis in the law has related to the 'chattels' and the relationship between those who stake their name on the thing, create the thing and give value to it. But, as well, it points to a fiction, to a disengaging of the reality of the institutional and expert interaction and an engagement in this process. In this way, the seemingly disinterested connoisseur dealing with cultural value and the creation of the means by which art is valued cannot be ignored as part of the ongoing text that is the artistic

<sup>41</sup> Bourdieu (1996), p 169.

<sup>42</sup> Palmer (1996), p 49.



thing. The intangible is negated through this process, and the artistic thing is now treated within a boundary that treats its components as merely comprising nothing other than a truthful chattel that is capable of being 'described'.<sup>43</sup>

The consequence is that law has developed a strange relationship with the artistic thing, which has bound it into a false language. The law is also now operating beyond the *passe-partout*, for it is not speaking the same language as the institutions that it relies upon to express value creation. Law is choosing not to recognise this level of engagement, or even to comprehend its own involvement in the creative process of ascription of recognition of the thing, and the truthful completed thing is still desired. Sherman and Bently's observations about the limitations of the language of tangible and intangible thus arise, and the standard restrictions of the method of law are exposed. But it is at this nowhere land of the law, the neither inside nor outside, that the law fails to acknowledge that the intangible and tangible intersect, and the remnants, remains and traces of the material are identified with the thing to give it its value. But, as the law ignores its own role in ascribing value, through treating the thing as book, it also creates the value, and in this sense is involved around the thing, and contributes to the thing as text.

## Experts

Law relies on experts to assist with and provide the thing with its status as a valued artistic thing, or not. But, having accepted the views of the expert of connoisseur, it insists on having the final say as to the validity and value of the thing itself. *See what I mean?*<sup>44</sup>

This reliance on the art expert is found in cases dealing with disputes relating to art authenticity, value and law dealing with contracts and sale of goods, at the stage of the creation of the law applying to art in the latter part of the eighteenth century. The artistic thing thus also found itself being dealt with in its *material sense* — as the book — rather than at the level of the intangible — the text. The intangible aspects of the artistic were left at this stage of this creation to develop along a different path from the closed, finalised thing, which was assumed to be completely truthful, and did not need the intervening hand of anyone else to speak for it. Disputes involving the material thing were therefore devoid of recognition of processes of value creation, and the law treated disputes in this area as mere disputes about 'opinion',<sup>45</sup> thereby disengaging the artistic thing completely from its context of value creation. Statements in this respect could not be accorded the status of 'fact',<sup>46</sup> to use the language of the law, and, as a mere opinion, would not bind the expert in time and space, thus leaving the thing in conceptual and legal limbo, and caught in its clear treatment as a closed book.

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<sup>43</sup> Palmer (1996), generally

<sup>44</sup> Bently and Flynn (1996), generally.

<sup>45</sup> Palmer (1996), p 49.

<sup>46</sup> Palmer (1996).

It is perhaps not surprising that some of the early contracts cases dealing with misattribution and the like, such as *Jendwine v Slade*,<sup>47</sup> dealt with the problems associated with the emerging artistic marketplace. This case dealt with the selling of supposed Teniers and Lorrain, which were in fact copies. As an example of mere opinion, Lord Kenyon said, in rejecting the inclusion of this material in a catalogue as a warranty, that 'the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be a matter of opinion whether the picture in question was the work of the artist whose name bore it, or not'. It was for the buyer to effectively ensure the attribution was correct.

However, to demonstrate that the processes of law treat the artistic thing fairly, and there is no way for the untutored legal eye to expose its taste (or lack thereof), the expert is called in. But as well, the dispassion of the connoisseur would be esteemed as it would reveal the thing truthfully speaking its value; if law were to treat the artistic thing with indifference, then it would mean that the courts would not have deal with matters of taste and artistic or aesthetic judgment. Nevertheless, lawyers are also amateur connoisseurs, who see what they mean and mean what they say as good common sense in relation to a domain in which they acknowledge no knowledge. But the process is not simply one of connoisseurship or taste creation, or art for art's sake — it is market driven as well. Bennett shows how the commodification of culture developed in the post-Enlightenment emergence of the liberal spirit, which:

allow(ed) cultural products to be made generally available ... only by simultaneously detaching those products from their anchorage in a tradition that had previously vouchsafed their meaning. As works of culture no longer derived their meaning from their place within an authoritative tradition emanating from the monarch (or church), the process of arriving at a meaning and a value for cultural products was a task which bourgeois consumers now had to undertake for themselves ... They were assisted in this, however, by the newly flourishing genres of cultural criticism and commentary (dealing with) questions of aesthetic meaning and judgment.<sup>48</sup>

It is therefore perhaps no accident that the art contracts cases emerged at the time when the art market was faced with the new middle-class buyer in the eighteenth century. But it was only the completed and finalised, non-dynamic aspects of the artistic that the law felt comfortable with in relation to dealing with things in the marketplace. So, through this process of art interacting with law, the individuals who were granted the status of connoisseur and tastemakers were also used to assist the courts when dealing with cases of attribution and authenticity. However, their primary role was confined to the newly emerging art market to assist enlightened amateurs of value and taste as part of the process of transactions involved in the area; they were guides and not scientists who could say with finality what the status of an artistic thing

<sup>47</sup> (1797) 170 ER 459.

<sup>48</sup> Bennett (1995), pp 25–26.

was, unless it was an untruthful thing, and then they were believed wholeheartedly.

But there is no room in this sphere for the aesthete or expert tainted by commerce, such as that which affected the art historian Professor Frederick Hartt.<sup>49</sup> He failed in a defamation action against art journalist Geraldine Norman and *The Independent* newspaper; Mrs Norman had exposed a false attribution by Professor Hartt of a Michelangelo statuette, where a percentage of the sale was provided to Professor Hartt. The art market needs experts who remain outside the commercial environment. Yet, through this defamation action, the law has demonstrated that there is a clear relationship at all levels of value creation in relation to the artistic thing, and its creation is not final, reflecting what Derrida and Bourdieu have shown — four times around the painting.

### Clashing Things

We can see this, around the painting, that a mythic notion appears in law: that an artistic thing is a truth providing record that tells us, through its physical form, of its status as an authentic work that expresses the genius of an artist. But, as has been seen through the construction of the artistic, this notion of the truth-telling chattel is fantastic, and is not the reality of the artistic and cultural domains. But law's clash arises, and a contradictory assertion appears for, despite this belief in the truthful object, the law is untrustworthy of its status, apparently preferring to rely on the eye of the aesthete or expert than on its own amateur response to the Kantian notion of beauty and the sublime.

The trajectory of the lack of reliance on anything other than an 'opinion' or information has followed through over time, working on the principle that there is no such thing as a fact in this area. Contracts have been constructed in an attempt to remove the liability from sellers in this area, and are played out in a range of sale of goods cases and *Trade Practices Act* cases. The liberal marketplace requires the world of the aesthete to be kept outside the realm of the market, keeping it in them in the Kantian space for the artistic and beautiful. The courts reinforce this, and the new art consumer can only hope they have bought what they thought.

And again, another clash, as the law does not trust what it has designated to be 'opinions' or 'information', and will only afford validity to such things if they have contractual force. However, on the basis of a line of decisions, contracts in the area ensure that relevant conditions do not rely on such opinions or information. When the issue is put to the test, another clash arises, as the law falls back into its own domain, and trusts what it can see *without* the eyes of the aesthete or expert, and what it can see with its own eye. When left to its own devices, it operates in the realm of the immediately recognisable and quantifiable, and denies a place for the Kantian expert, instead preferring its

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<sup>49</sup> *Hartt v Newspaper Publishing plc* (1989) *The Independent* 27 October. A detailed discussion of the case can be found in R Redmond-Cooper (1992) 'Defamation and the Art World' *International Journal of Cultural Property* 175.

own amateur role as neutral observer.<sup>50</sup> However, it follows through with a requirement that this expert has such a status in the eyes of the law, though it is denied when subjected to the processes of law.

It is found, particularly, at the point at which the intangible meets the tangible, and this desire is tempered with the pragmatic requirement where law's interest is found in maintaining the art market.

What founds these clashes is the inability of a material object, a chattel, to hold within its bounds a final and determinable status. These things come to the attention of the law through their failure to meet up to the expectations that they apparently have, where the desire is denied through lies told on its behalf or, where the thing is in itself a lie, that it is an untruthful or a wounded thing. At this level, the concern of the law operates in its need to deal with in this field is to subject a thing to its truth-claim through standard legal methods that aim to test its validity. This tends to be expressed through disputes about the thing's status and its authenticity, expressed through contractual disputes dealing largely with issues of misrepresentation, mistake, its contemporary manifestation in trade practices and fair trading law, and sale of goods law.

### It's Still a Picture

However, underlying this area is the difficulty founded in the law's attempts to deal with the problem of the truthful artistic thing. This appears to be founded in law's attempt to treat the thing with disinterest, that 'Western type legal systems have tended to see a dispute involving items of cultural heritage as no different to one where the subject of the contract was a bag of potatoes'.<sup>51</sup> In adopting a method that treats the law as taking 'no sides' in cases of this sort, there appears to judicial desire to treat, in a semi-Kantian sense, the things in question as being outside the realm of law, to be dealt with only by those with requisite taste and sensibility, and only drawing the law in at a level that is purely non-aesthetic, or so it seems.<sup>52</sup>

### Salisbury Cathedral, a Schiele, or Not

The classic expression of this extreme disinterest can be viewed through the 'Constable' case — *Leaf v International Galleries*<sup>53</sup> — where Denning LJ's classic denial of the 'qualitative' aspects of the case — who painted it — have given the case an infamy for its focus on the material aspects of the painting, and matters of pictorial conservatism that dealt with a mimetic focus of the artistic,<sup>54</sup> the least 'valuable' aspects of the case.<sup>55</sup> While the case was decided on grounds other than this dictum, it is the process of analysis in which the decision in the case operated at the level of quantitative, ascertainable,

<sup>50</sup> Douzinas et al (1991), p 167.

<sup>51</sup> Prott and O'Keefe (1989), p 239.

<sup>52</sup> Douzinas et al (1991), p 169.

<sup>53</sup> *Leaf v International Galleries* [1950] 2 KB 86.

<sup>54</sup> Douzinas and Neal (1999), p 63.

<sup>55</sup> Prott and O'Keefe (1989), pp 254–255.

identifiable *subject matter* that makes it ripe for consideration within the language of the *passe-partout*. The case involved the sale of a painting of Salisbury Cathedral and, in conventional terms, it was incorrectly believed at the time that the parties entered into the agreement that the painting was by the 'well known artist' Constable. Denning LJ held that:

This was a contract for the sale of goods. There was a mistake about the quality of the subject-matter, because both parties believed the picture to be a Constable; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract: there was no mistake at all about the subject-matter of the sale. It was a specific picture, 'Salisbury Cathedral'. The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract.<sup>56</sup>

The contract and the subject matter were distinct, certain and represented. You saw and you got. The book was complete, and inside the painting was the place of judgment; the truth was spoken in respect of the inside, albeit in respect of a tangible that formed a *completed image*, that of the cathedral. The truth in respect of the intangible was not there to be seen, and could not be identified, and was irrelevant to the bargain. The outside was ignored, and the *passe-partout* was beside the point. Law's truth was complete.

This extreme disinterest represents the manner in which the aspects of this decision deny the artistic for what it is. The material manifests the thing, and the space between the material — the subject matter — and those things creative of the value of the thing are given no place. This is echoed in Evershed LJ's comments in relation to the distinction between the thing and what makes it desired, as it demonstrates clearly the clash between the truth of the thing in question, and the way law must respond to the removal of truth claims:

The plaintiff's case rested fundamentally upon this statement which he made: 'I contracted to buy a Constable. I have not had, and never had, a Constable.' Though that is, as a matter of language, perfectly intelligible, it nevertheless needs a little expansion if it is to be quite accurate. What he contract to buy and what he bought was a specific chattel, namely an oil painting of Salisbury Cathedral; but he bought it on the faith of a representation, innocently made, that it had been painted by John Constable. It turns out, as the evidence now stands ... that it was not so painted. Nevertheless it remains true to say that the plaintiff still has the article which he contracted to buy. The difference is no doubt considerable, but it is, as Denning L.J. has observed, a difference in quality and value rather than in the substance of the thing itself.<sup>57</sup>

<sup>56</sup> *Leaf v International Galleries* [1950] 2 KB 86 at 89.

<sup>57</sup> *Leaf v International Galleries* [1950] 2 KB 86 at 93.

This is the truthful substance, the thing, the material, the tangible. The distrustful intangible was caught out, for it did not speak the truth. But his Lordship identifies the space between the inside and the outside of the thing, and this space is actually the problem:

This leads me to suggest this matter for consideration: the attribution of works of art to particular artists is often a matter of great controversy and increasing difficulty as time goes on. (In relation to laches.) ... There may turn out to be divergent views on the part of artists and critics of great eminence, and the prevailing view at one date may be quite different from that which prevails at a later date.<sup>58</sup>

Thus 'the errant intention prevents the stabilisation of the artwork's meaning around the sovereignty of the origin'.<sup>59</sup> There is no truth, for there cannot be a truth where so much is unstable and where the story will change. But it is the lack of a recognition of the space of the *passe-partout* that is problematic and, as it turns out, Evershed LJ has to a certain extent hit the nail on the head, but for the wrong reason: that the chattel is perhaps more successfully dealt with on the basis of its utter meaninglessness. He has picked up the flaw in the belief in the truthful object. Those who are responsible for attribution — those on whom the determinations and attributions of the beautiful and artistic rest — are acknowledged in their role, but they cannot be trusted. It is only the law that can speak the truth, and the experts and aesthetes, the art historians, the conservators, the restorers and curators are treated by the law as a mere side-effect to the creation of value and significance in the field. But the thing does not, as has been seen, speak for itself in a Kantian tradition of the separate field, but rather is given voice through these players, though the law does not recognise that the thing needs this help.<sup>60</sup>

In *de Balkany v Christie Manson & Woods Ltd*,<sup>61</sup> another contracts case dealing with art, a different account of law's role as a creator of value can be seen. Morison J had to deal with the side-effects to the creation of value, that of the clash between experts and institutions, and the clash of the artistic with the legal:

it will be seen that one of the issues I must rule upon is whether the painting may properly be attributed to Schiele. That is a matter that has given rise to considerable dispute in the art world. I do not pretend that what I have to say will impress the scholars who take a different view. I remind myself, and them, that this is a judicial decision based upon the

<sup>58</sup> *Leaf v International Galleries* [1950] 2 KB 86 at 94.

<sup>59</sup> Douzinas et al (1991), p 178.

<sup>60</sup> Douzinas et al (1991), p 174; questioning the method by which this process occurs in the use of experts in this area relating to aesthetic judgment, which 'leads to an indecent *melange* of styles, signifiers and concepts'.

<sup>61</sup> *de Balkany v Christie Manson & Woods Ltd* [1997] Tr L 163.

evidence and it is not, and it does not purport to be, a contribution to the academic debate, in which I am not qualified to participate.

Here, the court was attempting to disengage itself from its creative role where the world was being told that a particular picture was 'forged'. In doing so, the law was working around the painting, going around it a few times, to say what it was and what it was not, giving the painting its future status, which was its truth. The aesthete, the expert and the institution were only there to act as law's helpmeets. The disingenuous informed connoisseur in the guise of judge sat as finder of fact, treating the stories around the painting as being true or untrue, and then going to the heart of the thing as a truthful thing within law's discourse. The decision around law created the thing for the future, and was not secondary, but was the thing, enjoining the *passe-partout*.

The law was not secondary — that is, in terms of the decision made in respect of the contractual condition — and the nature of the legal conception of forgery took form as precedent. The thing went off into the world after this decision, now tainted as forged and reduced in value by law. The law treated this thing as wounded and untruthful, because it was not true at its point of closure (in law's sense), when last touched by the hand of its originary genius, Egon Schiele; *Vor Gottvater Knieender Jungling* had been 94 per cent overpainted, including an overpainted signature, and was now an untruthful thing, caught by the construction of the contractual conditions that applied to its sale. Its lack of material truth tainted its entire being; it was not to be trusted, and law's walk around the painting changed it utterly.

That it was the mark constituting the signature, the false name, that made Christie's liable under its conditions to the buyer is intriguing, as this signature, so inside and tangible, yet outside and untruthful, was around the painting. The remnants, remains and fragments that underlay it were no longer part of the chattel, and the thing did not speak the truth. Its intangible was denied, though many stories were told on its behalf through experts who spoke for and against it, but it was the science of the book, the object discussed by Taborsky,<sup>62</sup> that showed it for what it was (or not), and it was only this truth, the material and the tangible, that could speak. The solid form was believed, though the spaces between the outside and the inside had so much to say.

But the thing did not tell the truth. Truth-telling had to be done by law. Law made the decisions, making the expert and institution subject to the overriding truth of the law. The thing was now complete.

### Law's Clash

Law fails at the point of where the language of the law cannot comprehend the material, and where text is denied. The language that has dominated the discourse of law and art has had this uncanny tendency to slip between the existences of the tangible and intangible, and reliance on material. It has chosen to freeze a thing in a particular time and space, relying on material, devaluing the immaterial. Meanings constantly shift and change and material

<sup>62</sup> E Taborsky (1990), p 60.

constantly alters and shifts, not telling the truth and not being untrue, but relying on the spaces between.

See what I mean?

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