

CHAPTER 4

Cultural Commons and the Law from the Renaissance to Postmodernity: A Case Study

4.1. Introduction

Throughout history, humanity's cultural endeavours have been characterised by collective practices of sharing and collaboration. From the advent of civilisation to the age of information and communication networks, the greatest achievements of art have resulted from collaborative creativity among many minds working together in community. Our cultural heritage, upon which any new cultural advancements are based, operates as an immense common pool resource, accumulated through the ages by the collective intellectual efforts of past generations. In general, cultural commons constitute the bedrock of human civilisation and lie at the core of socio-cultural reproduction.

Nonetheless, the greater the role that sharing and collaboration play in creativity, the more the prevalent perceptions and social institutions disregard their existence. Dominant historiographies of art primarily focus on the role of the individual, the commodity market and copyright law in modern and postmodern processes of intellectual production. Such perceptions of our past and present reinforce structural tendencies towards the enclosure and commodification of cultural resources. An alternative historical narrative from the perspective of the cultural commons aims to raise awareness of the fundamental role of the cultural community and the practices of sharing and collaboration in human creativity/inventiveness. Such a narrative brings the cultural commons and their importance for the contemporary networked information economy to the forefront of our attention.

The previous two chapters have revealed the ontological and epistemological perspectives of the intellectual commons. The present chapter unveils a

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historical narrative of the communal, cooperative and sharing characteristics of artistic and cultural production, distribution and consumption. Viewed as a productive process, culture is in any historical era based on units of collaboration and structures of sharing. Furthermore, artistic expression is framed and conditioned by the structures that dominate its wider socio-historical context. These primarily refer to: (i) structures controlling access to resources and infrastructure necessary for the reproduction of the creative process, (ii) structures controlling the social diffusion and circulation of works of art, and (iii) legal institutions. Finally, the creative process is heavily influenced by dominant social perceptions regarding the role of the author within artistic production. Such a narrative does not approach its object of analysis, i.e. the forces and structures of the cultural commons, as clear-cut historical manifestations of a certain ideal-typical abstraction. Instead, it seeks for the historical manifestations of information, knowledge and cultural sharing and collaboration, which persistently pervade the reproduction of the cultural bases of society, and their penetration by countervailing forces and structures of enclosure, antagonism and control. The chapter is structured in three main parts, which, in the context of the cultural commons, consecutively examine the history of creativity and the evolution of its regulation as the outcome of the clash between forces of commonification and commodification. The current historical analysis commences from the Renaissance, which signifies the rise of the master artist and the emergence of commodity markets in art and culture, and stretches up to postmodern times. The chapter concludes with general observations and findings elicited from the historical tendencies revealed in its main body.

4.2. Cultural Commons and the Law in the Renaissance

During the Renaissance, folk art produced within cultural communities was central in the creative process. Furthermore, workshops embedded in cultural communities were the main units of artistic production (Hauser 1999, 18). Nevertheless, the fifteenth century was marked by a shift of demand for the employment of skill and the participation of renowned individual artists in art works (Baxandall 1972, 23). Traditional hierarchies within the workshop were thus gradually reconstructed on the basis of skill, with the talented artist elevated at the centre as master of the productive process and the cooperating craftsmen acting as ‘assistants’. In reality, however, art works were produced through the collective work of multiple craftsmen. Even though art works produced in workshops were normally signed by their masters, many of them were a product of collaboration between the master and his assistants and pupils (Tummers 2008, 38). All in all, artistic production remained a chiefly cooperative process until the nineteenth century (Heinich 2001, 112). In the context of authorship, the copying, collating and reworking of preceding forms, methods, styles and techniques dominated the creative process. Authors built their creative

contributions in close relation to prior works of authorship in their genre (Woodmansee 1994, 17). Likewise, in relation to music, the great composers of classical music systematically borrowed from each other and appropriated the folk music of their era (Meconi 2004).¹⁶ From such a perspective, the archetype of the Renaissance artist is William Shakespeare. Rather than being the epitome of original genius, Shakespeare was not the actual originator of the plots of most of his plays. Instead, he could best be described as a ‘reteller of tales’, undoubtedly a brilliant one, whose tales were evidently derived from history, mythology, folk culture and prior art (Rose 1993, 122).¹⁷

In the Renaissance, artisanship was organised in guilds, as in the Middle Ages. Nevertheless, the diffusion and expansion of commerce across borders and the subsequent emergence of mercantile capital led to transformations in intellectual production and distribution (Zuckerfeld and Yansen 2016, 211). Medieval guildship was formalised, consolidated and solidified, while the guild form of organisation was also expanded to trade groups emerging within artistic distribution, such as those of printers and publishers. The guild system became interrelated with political institutions through the ratification of its internal rules by public authorities, their enforcement by state sanctions and the granting of privileges by the ruling aristocracy to its members (Merges 2004b, 12). Hence, throughout the Renaissance the source of regulatory power over the creative practice gradually shifted from the guild and the Church to the political authority and from social/associative norms to state laws. In addition, the sixteenth century marks the dawn of the modern institution of the academy. The rise of the academy and the university in arts and science signifies a break with the tradition of keeping knowledge secret, which thrived under the control of religious institutions and guilds, and promotes the transformation of knowledge into a universal commons (David 2005), produced on the basis of a communistic ethos (Merton 1979). The academy was founded as an educational institution for the tutelage of new entrants in the artisanship (Pevsner 2014, 44–47). Thereafter, the institution of the academy gradually became a central mechanism in the framing of sharing artistic knowledge and in the control over the orientation and evolution of creative practice.

In the Renaissance, patronage emerged as a novel structure of power within the reproduction of the creative practice, setting the outer limits of its expression (Wackernagel 1938). Members of the aristocracy and the upcoming wealthy bourgeoisie channelled their accumulated social surplus to the reproduction of artistic activity in the form of financial aid, material resources and social privileges to their protégés. In exchange, they received symbolic power bestowed by the aesthetic value of the works of art, which were produced through their aid. Even the feudal state was engaged in acts of patronage, which took the form of honoraria, i.e. financial grants or stipends as rewards to esteemed artists within its jurisdiction for their service to the state (Rose 1993, 17). As a corollary, the emerging figure of the patron gave rise to the master, a thin upper class of artists, which distinguished itself from guilded artisanship in terms of both

creative innovation and financial rewards. Works of art produced through the patronage system greatly reflected in their form and content the interests and world views of the social classes, to which patrons belonged (Antal 1986). Patrons intervened heavily in the productive process to the extent of ordering the colours to be used and the form of the figures depicted (Baxandall 1972, 11).

The sixteenth century signified groundbreaking technological and social transformations in the reproduction of artistic activity. By 1500, the emerging forces of capital had adapted the printing press to the needs of mass production and, thus, transformed the fixation of works of authorship into a great industry (Febvre and Jean-Martin 2010, 186–187). Whereas social perceptions of books as divine gifts insusceptible to absolute private appropriation persevered from the prior age of book barter (Davis 1983, 87), the social diffusion of books was being rapidly metamorphosed into a large-scale commodity market. From the sixteenth century onwards, the capitalist printer/publisher became the dominating mediator in the field of artistic production, distribution and consumption. In the late Renaissance, the tendencies of commodification were also reinforced by the gradual demise of the feudal system and the rise of a wealthy class of merchants and small industry owners, who increased demand and correspondingly expanded the nascent commodity market of art (Bourdieu 1993, 112–113). As a result, a parallel commodified system of distribution appeared alongside the social reproduction of culture as an inclusive part of community life through folk culture, folk art and the exchange of artefacts in local markets, which covered everyday cultural needs. Such a market of commodities rendered possible the exchange of fixated art between buyers and sellers of creative activity and stabilised the private appropriation of cultural artefacts.

The impact of mercantile capital and the subsequent commodification was not only confined to the transformation of social relations and the shift of social power in the production, distribution and consumption of art. Forces of commodification in combination with ideological forces also changed social perceptions over the relation of the artist with her work. The Protestant reformation and its demands for individual responsibility, self-discipline on earth and the non-dogmatic studying of the holy books accentuated the ethical value of personal autonomy. The authority of established communal entities, such as the Church, the municipality and the commons, were brought into question, whereas emergent political and economic institutions, such as the nation state and the commodity market, gained in importance. As the concept that social reproduction could be more efficiently governed by the autonomous economic activity of citizens under the rule of centralised nation states acquired political representation, law and politics gradually shifted their point of reference to the individual (De Moor 2013, 85). Hence, an amalgam of political centralisation and economic liberalization set in motion by social transformations in late Renaissance societies began to weaken communities and strengthen individualism. These changes had a radical impact on the social perceptions regarding

artistic activity. The rise of the master marked the beginning of a process of differentiation between the social status of artisanship, which was considered to belong to the domain of manual work, and art, which was perceived as intellectual and spiritual work of a higher social value (Becker 2008, 353–354). In the late Renaissance, the rising social value of originality in art works increased the importance of creative innovation in the productive process. As a result, in the seventeenth century the individual artist started to be viewed as the main source of artistic production and her creative contribution as crucial for any kind of artistic activity (Hauser 1999, 23).

In terms of regulation through social norms, the relation between publishers and authors was determined by the custom of the honorarium, according to which publishers offered financial rewards to authors, whose works they printed and traded. Honoraria often took the form of contracts between publishers and authors. Yet, even though authors were considered to own private property rights over their unpublished manuscripts as physical objects, such rights did not extend to the texts engraved on them (Rose 1993, 9). Hence, instead of being founded on common law or statute, honoraria were gradually developed as trade norms grounded on the necessity to sustain the material reproduction of authors and, accordingly, literary production and the publishing industry. Overall, the honorarium was a normative and economic institution not backed by state sanctions, which, like patronage, served the aim of the physical reproduction of authors' works.

In terms of regulation through law, the feudal state intervened at the mediatory level of distribution, in order to achieve censorship and control of the creative expression and, secondarily, in order to correspond to powerful private interests and regulate art trade (De Sola Pool 1983, 16–17). State regulation of the creative practice thus took the form of state-granted privileges to individuals or collectivities. Such privileges were chiefly issued by the sovereign as horizontal concessions to printer/publisher guilds for the regulation of book trade and the competition with neighbouring feudal states (Goldstein 2003, 33–34). Only in exceptional and rare cases were privileges assigned as vertical benefits to individual artists for their services to the well-being of the community (Bugbee 1967, 45; Rose 1993, 10). Privileges were exclusive monopoly rights to print works of authorship for limited periods of time within the geographical jurisdiction of the sovereign entity granting the privilege. They were granted on an ad hoc and case-by-case basis and as a discretionary policy choice of the sovereign, as opposed to general standardised legal rights under the rule of law 'conferring a uniform set of entitlements whenever predefined criteria were fulfilled' (Bracha 2004, 180–181).

The flourishing of commerce in the region of Venice boosted the economic role of private property and, gradually, gave birth to the institutional imaginary of private enclosures over intangible goods. The first privilege, which was issued in 1469 by the Venetian Senate, was actually a predecessor of the institution

of patents, since it conferred the monopoly over the art of printing itself for a term of five years to the German printer John of Speyer, the person who introduced the printing technology to the city (Mandich 1960, 381). Only five years later, on 19 March 1474, the institutional practice of granting privileges in the Republic of Venice was consolidated in the enactment of the Venetian Patent Statute. Being a triumph of mercantile capital, the latter constituted not only the first patent institution in the world but also the first statute that in general granted monopoly rights over products of the intellect. In the sixteenth century, variations of the Venetian printing privileges spread to most European states with significant printing industries, such as the Netherlands and Germany. Yet, it was chiefly in England that privileges were gradually transformed into an integrated system of industrial regulation and censorship implemented by the guild and sanctioned by the sovereign. Even though the Crown continued to assign printing patents on a separate basis, in 1557 the royal charter of incorporation granted to the Stationers' Company, i.e. the publishers' guild of London, the monopoly on book production (Rose 1993, 12). According to the by-laws of the guild, once one of its members asserted ownership of a text, no other member was entitled to publish it within the territory of England (Paterson 1968 46–64). Through state enforcement the guild was thus able to administer the distribution of works of authorship, indirectly determine power relations between authors and publishers, and orient the creative practice towards the logic of the commodity market. The monopoly over book printing was combined with censorship of the creative practice. From the Injunctions of 1559 to the Licensing Act of 1662, with the exception of the Interregnum, all books had to be licensed by the state before entering into circulation, and the Stationers were legally empowered to seize unauthorised books and bring offenders before authorities. As Paul Goldstein has written, '[t]he Stationers got the economic rewards of monopoly; in return, the Crown got from the Stationers a ruthlessly efficient enforcer of the censorship' (Goldstein 2003, 33–34).

In conclusion, the Renaissance artist was an artist in collaboration with preceding and contemporary creators and a collator of prior and contemporary cultural artefacts. Both the form and the content of works of art was greatly determined by dominant social perceptions and the influence of powerful actors in artistic production, distribution and consumption. The artist was still considered an artisan, yet the demand for aesthetic value created a new class of master artists with upgraded social status. In parallel, the rise of the book trade begun to shift perceptions over the commodification of knowledge, as art was for the first time seen as a source of valorisation by the nascent forces of capital. The combination of printing technology and industrialisation raised the need of sovereigns to control and censor printed works of authorship. These two fundamental factors led to the introduction of state licences for printing and to the granting of private monopolies over the printing of works of authorship. In accordance with the foregoing

Unit of collaboration	Structures of sharing	Forces controlling access to resources	Structures controlling distribution	Perception of the author	Normative framework
Workshop, individual artist as contributor to the creative process	Guilds, academies	Patron, publisher (after the sixteenth century)	Exchange markets/ commodity markets	Artisan, master	Honorarium, privilege

Table 4.1: The framework of creativity in the Renaissance.

Source: *Author*

analysis, the above table summarises the main elements framing creativity during the Renaissance.

4.3. Cultural Commons and the Law in Modernity

The era of modernity is characterised by the prevalence of the perception of the Promethean artist,¹⁸ i.e. the perception of artists as exceptionally creative individuals, who ‘craft out of thin air, and intense, devouring labor, an Appalachian Spring, a Sun Also Rises, a Citizen Kane’ (Goldstein 1991, 110). In modernity, individualistic perceptions over the creative process became naturalised and their dominance was projected as the natural state of art and culture throughout history (Foucault 1979, 141, 159). Nevertheless, the notion of the Promethean artist ran counter to the inherently collective and collaborative character of the creative process, which persevered in all artistic forms throughout modernity. Contrary to the Promethean ideal-type, art continued to be the outcome of knowledge sharing and collaboration between multiple creators, past and present. Folk art produced within communities continued to be the cultural base and the source of inspiration whence artists and creative industries derived the raw materials for their creative practice. Popular musical traditions, such as folk, jazz and rock, emerged and grew as artistic commons of sharing and adaptation within communities of musicians in constant dialogue to wider cultural communities (Seeger 1993; Hobsbawm 1961). In addition, both the artistic personality of individual authors and their works of art were strongly influenced by the socio-historical context of modernity. Thus, artistic production in modernity not only reflected the social conditions of its era (Lukács 1974; Weber 1958) but also contributed to the reproduction of the modernistic project towards conventional or alternative trajectories (Klingender 1947; Adorno 1991, 1992, 2002). Pablo Picasso can be considered more than anyone else to be the archetype of the modern artist owing to his multifarious talent and immense influence on the evolution of the visual arts. Yet,

far from adhering to the ideal-type of the Promethean artist creating out of thin air, Picasso systematically appropriated shapes, styles and techniques from prior artistic traditions, such as tribal art,¹⁹ and was clearly influenced from great artists of the past, such as Velazquez, Goya and Rembrandt, and from his contemporary fellow artists, such as Henri Toulouse-Lautrec, Paul Cézanne and Edvard Munch. Furthermore, Picasso collaborated with Georges Braque in the co-evolution of the art movement of cubism (Lucie-Smith 1986, 34). In addition, Picasso is considered the inventor of constructed sculpture and co-inventor of collage, both of them artistic techniques that are mainly based on the appropriation of existing material objects and their composition and transformation into works of art. In his words, '[w]hen there's anything to steal, I steal' (Picasso 1993, 53). Finally, in contrast to the social perception of the Promethean artist creating in introspective isolation, Picasso was allegedly a social and political being and, therefore, social events and political beliefs left an indelible mark upon his art and personal life.

The rise of the social perception of the Promethean artist coincided with a contrasting cooperative tendency in the actual relations of artistic production. Modern art was characterised by the reinvention of collective productive practices, centred on the art movement and the creative factory. As the development of individual artistic consciousness and the social emphasis on originality gradually destabilised prior nuclei of production, such as the artisanal workshop, individual artists began to establish novel modes of sharing, pooling together and reworking the achievements of their creativity. In modernity, creative innovation was thus reinvented as a collective endeavour and the art movement became its main vehicle. As a result, the metamorphoses of art during the nineteenth century and the first half of the twentieth century were strongly determined by individual artists participating in wider art collectivities and movements with common genres, styles and techniques (Lucie-Smith 1986). The artistic and literary movements of neoclassicism, romanticism, realism, impressionism and post-impressionism revolutionised nineteenth-century art. The surge of collective artistic activity during the first half of the twentieth century ignited more than 70 major art movements, such as Fauvism, German expressionism, cubism, futurism, the Vienna and Paris schools, realism, Dada, surrealism and Bauhaus. Circulation of knowledge among artists was taking place both by the formal means of exhibitions and by informal means, i.e. in artists' workshops and in artistic and literary public meeting places (Rittner, Scott-Haine and Jackson 2016). To exchange views and ideas, share knowledge and collaborate towards current artistic problems and common causes, the nineteenth-century Parisian bohèmes met at Café Guerbois (Tinterow and Loyrette 1994, 314), Italian futurists at Le Giubbe Rosse, Gilli and Caffè Paszkowski in Florence (Livorni 2009) and Dadaists at the Cabaret Voltaire in Zurich (Sandqvist 2006). Geographical proximity played a major role in the establishment of art groups that collaborated in the production of

common projects and exhibitions, such as the Dutch neoplasticist 'De Stijl', the German expressionist 'Die Brücke' and 'Der Blaue Reiter' and the Moscow avant-garde 'Jack of Diamonds.' Often, these shared world views were expressed and shaped by acts of self-determination in the form of art manifestos, such as Gustave Courbet's 1855 realist manifesto, Jean Moréas's 1886 symbolist manifesto, Filippo Tommaso Marinetti's 1909 futurist manifesto, Albert Gleizes's and Jean Metzinger's 1912 'Du Cubisme', Kazimir Malevich's 1915 suprematist manifesto, Ugo Ball's 1916 Dada manifesto and André Breton's 1924 surrealist manifesto. Apart from the commonality of forms and styles, the collective and socialised character of modern artistic production was also evident in the common identity that art movements constructed and represented, which either overtly or tacitly functioned in the form of an avant-garde of radical critique and renewal in relation to the artistic and social status quo of their era (Poggioli 1968, 16–41; Jencks 1990).

Modernity was characterised by the Industrial Revolution and the subsequent transition from the domination of mercantile to industrial capital. As a result, by the end of the nineteenth century and, especially, during the twentieth century various fields and practices of artistic production were transformed into full-fledged industries. In these industries, creativity was practised collectively and begun to approximate the factory-form of organisation (Adorno and Horkheimer 2002, 94–96). Owing to the unique characteristics of the resource of creative labour, which was the most important input in its productive process, the creative factory was since its inception an idiosyncratic factory-form based on the innovativeness of labourers rather than the formulaic manual repetition of artistic expression encountered in the earlier unit of the ancient and medieval workshop. A combination of technological, social, economic and cultural factors, such as the invention of film and television, the establishment of a middle class in the global North, the rise of consumerism, increased leisure time and levels of literacy and the mediation of entertainment by the commodity market expanded the commodification of art and established the basis for the mass production of symbolic goods and services (Hesmondhalgh 2002). In this context, individual artistic practice was first professionalised (Bourdieu 1995, 54–55) and then set within a wider organisational framework of industrialised cultural production based on the cooperation between multiple artists, the rationalised division of creative labour and the pooling together of talent and creativity under the rule of capital (Becker 2008, 2). Within the creative factory artists were transformed into wage labourers subject to the extraction of surplus value, the intellectual property of art works produced was as a rule automatically transferred to employers by virtue of statutory provisions and their extensive reproduction and distribution led to the mass consumption of commodity art and the rise of popular culture (Miege 1979, 1989; Garnham 1990). As a corollary, the consolidation of the creative factory resulted in an increased socialisation of the productive process of art, albeit one in which artistic expression was framed and conditioned by novel social powers and hierarchies.

Throughout modernity, already-established structures of cultural sharing, such as the academy and the guild, faced significant challenges, whereas novel structures emerged, such as the exhibition, the library and the museum. The consolidation of art commodity markets and the industrialisation of cultural production under the rule of capital undermined the workshop form of production and displaced the erstwhile dominant artisan guilds. The eighteenth century signified the domination of art by academic dogma (Pevsner 2014, 173). The royal academies in France and England became the incumbent institutions for the regulation and control of artistic activity by the state. Nevertheless, the academisation of art and the inherent hostility of the academic system against innovation and change constructed a rigid framework for the freedom of artistic expression. Such rigidity was disputed and surpassed, on the one hand, by artists themselves through the development of art movements, such as romanticism, which countered dominant academic perceptions about art, and, on the other hand, by the dynamism of art commodity markets. After the end of the seventeenth century academies in various countries began to organise public art exhibitions. In France, the members of the Académie des Beaux-Arts organised such non-commercial exhibitions, called ‘salons’, so as to circumvent the self-imposed prohibition of exhibiting their works for sale. Even though prizes were insignificant,²⁰ awards for artists competing in salons opened access to the art commodity market (White and White 1965, 27–43). In the nineteenth century, salons acquired an international aspect through their interaction with the novel institution of international industrial expositions. As an institution freely open to the public and widely popular, salons became the main structures for the social diffusion of visual arts and the popularisation of dominant and alternative aesthetics. Artistic and literary perceptions and modes of sharing were also determined by public museums and libraries. Museums emerged in the fifteenth century from the desire of wealthy patrons and art collectors, such as the Medici family in Florence, to emphasise their superior social status by opening their private collections to the public (Hooper-Greenhill 1992, 24, 47–49). Yet, the museum acquired its modern public form only in the late eighteenth and early nineteenth centuries with the opening of the Louvre museum to the public by the 1789 revolution. The museums became institutions central for the sharing of historical knowledge and, subsequently, for popular cultural education (Bennett 1995, 19–20). Open access to cultural heritage and knowledge was also facilitated during the nineteenth century by the transformation of libraries into public institutions, i.e. institutions freely open to the public and funded by public or non-profit sources.²¹ The humanitarian and democratic ethos of the time strongly pushed towards the universal free access of the citizenry to information, knowledge and literature (Ditzion 1947). As access to education increased and levels of literacy were gradually raised, public libraries played a great role in the access of lower classes to knowledge resources.

Throughout modernity, the central role of cultural sharing in modes of artistic production, distribution and consumption was evident in the spatial concentration of artistic activity and the formation of cultural centres. Nineteenth-century urbanisation led to the reproduction of a public space open to aesthetic and intellectual sharing, association and cooperation on common cultural projects and artistic expression. In this urban public space, informal and formal structures of sharing and collaboration accumulated, converged and produced cultural centres and capitals (O'Connor 2011, 42). Through this social process, London and, of course, Paris gradually became the major poles of attraction for the social forces of cultural production and their mediating structures, thus rising as the incontestable cultural capitals of modernity (Newman 2009), whereas New York emerged as the definite cultural metropolis after the first half of the twentieth century (Kaufmann 2004, 161). Hence, the modernistic mode of artistic production, distribution and consumption was geographically expressed in a division between cultural centres and peripheries and the interrelation between them strongly determined the cartography and the orientation of artistic activity, at least until the emergence of post-industrial information and communication networks (Castelnuovo 1989).

Artistic activity in the modern era was determined by the gradual abatement of artists' dependence on patronage and by the loosening of the overt control from political/religious powers over the creative practice (Bourdieu 1993, 112). Artists were freed from the various constraints existing under feudalism, communal bonds and guild artisanship, yet they became also free to sell nothing other than their creative work as labour in commodity markets at prices imposed by capital. By being engulfed in the structural power of commodity markets, artists were increasingly influenced in the practice of their creativity by capital's inherent tendency for profit maximisation (Bourdieu 1995, 49). Whether as wage labourers in the creative industries or as independent professionals within art commodity markets, creators were forced to adhere to the limitations posed by capital on their creativity, so as to be able to sell their power of creativity and access the resources necessary for their physical and artistic reproduction (Vazquez 1973, 84). Nation states with developed art commodity markets enacted copyright laws in order to regulate the relevant industrial sectors and outcompete other states in the regional and, later, global division of labour. In this way, states became motors for the facilitation of processes of commodification in the field of art. Conversely, during the twentieth century, states acquired a more active role as collective patrons of the arts within their boundaries. Hence, ministries of culture were established and public funding was used as an instrument to encourage artistic production. After the eighteenth century, technological developments along with social and political transformations resulted in the domination of commodity markets over all other social institutions for the social diffusion of art. The capitalist industries of art distribution pushed forward for the development of iron-frame printing presses, which

further accelerated the mass production of fixated works of literature (James 1976, 17). In the twilight of the twentieth century, novel inventions, such as photograph and film, facilitated mass fixation and reproduction of visual and performing art, thus making the latter susceptible to extensive commodification (Nesbit 1987, 235–237). In parallel, the nineteenth century signified the emergence of the new wealthy middle classes, which boosted the consumption of art via commodity markets (White and White 1965, 78–82). Finally, legal institutions in the form of copyright laws reflected and reinforced the forces of commodification in art. At the same time, law had a counter-influencing constitutive effect on societies, by forging the art commodity as the dominant form of the modern work of art and by projecting the Promethean individual artist as the prevalent subject in artistic production (Coombe 2011, 81). All these developments jointly transformed both the creative practice and the power relations in artistic production and distribution in a non-linear manner.

On the one hand, the industrialisation of artistic production and, on the other hand, the increasing commodification of the distribution of art were also reflected on legal institutions. Processes of industrialisation and commodification brought the privilege regime of the Renaissance to an end and pushed for its replacement by copyright law. The rupture with the old trade regulation of privileges and the birth of copyright was first marked by the 1710 Statute of Anne in England.²² At that time, the Stationers' monopoly over book printing and its adverse effects on the freedom of expression came increasingly under fire both by artists and statesmen (Goldstein 2003, 33). Simultaneously, authors started openly defending their interests by asserting natural rights of ownership over their works.²³ Under such pressure, the 1662 Licensing Act,²⁴ which expired in 1694, was never renewed by the House of Commons. When their petition for the extension of the privilege system of censorship failed, the powerful Stationers' Company called for a legal recognition of their incumbent interests on the grounds of a natural right of authors' ownership over their works (Deazley 2004, 31–50). Similar arguments related to Lockean justifications of ownership over intellectual works based on authors' labour were invoked by the Paris Publishers' Guild during the eighteenth century, so as to bring their trade monopolies under state protection (Hesse 1990, 112, 122–123). Hence, forces of commodification significantly contributed to the birth of the modern individualistic conceptualisation of the creative process. In England, this conflictual and contradictive process led to the enactment of the Statute of Anne. The new legislation signified a tectonic shift in the regulation of artistic creativity. Before 1710, authors' interests were invoked in order to legitimise publishers' monopolies (Peifer 2010, 351). After 1710, the author was established as a legally empowered figure and the modern conception of authorship was engraved in the law (Rose 1993, 4). The statute also freed artistic expression and the flow of art commodities from the restraints of state censorship, which was exerted through the prior system of privileges (Lessig 2004, 85–94). Yet, the fundamental transformation in the new system of regulation was the

subjection of private monopolies over intellectual works to the rule of law and its explicit orientation towards serving the public interest (Lunney 2001, 813–818). Whereas prior Licensing Acts grounded the justification of privileges on the private welfare of national publishers' guilds, the nascent copyright legislation granted private monopolies for 'the encouragement of learning'.²⁵ Furthermore, whereas the prior regime was exploited for the assignment of printing privileges of unlimited scope, in its vote to enact the Statute of Anne Parliament refused to recognise a natural right of ownership upon ideas.²⁶ Instead, the statute established private monopolies over intellectual works, which were subject to limitations imprinted in statutory provisions.

The advent and evolution of copyright laws has been a process of rationalisation in the regulation of cultural production, distribution and consumption through formality, codification and the acquisition of an abstract, impartial and impersonal form (Weber 1978). Through this process of rationalisation, case-specific and discretionary privileges were transformed into general standardised legal rights according to predefined statutory criteria and subject to purposes of public interest. The clearly delineated scope of protection and the powerful ideological justification of copyright law set robust preconditions for the diffusion of functional commodity markets in the commons of the intellect. Hence, the transition from the privilege regime to copyright law signifies a process of rationalisation and consolidation of the private enclosures of the social intellect. Before the end of the eighteenth century, pieces of copyright legislation were passed in key industrialised countries. In the 1790s, the United States Constitution was amended, so as to incorporate the recognition of a fundamental right of private monopoly over intellectual works, and the first US copyright act was enacted.²⁷ The French equivalent of *droits d'auteur* was enacted in 1793 by the revolution (Nesbit 1987, 230–233; Hesse 1990, 127–130). Simultaneously, a series of copyright laws were passed in various German states (Woodmansee 1984, 445). Overall, the emerging modern copyright law employed an individualistic notion of authorship, which constituted the figure of the ingenious Promethean artist as the archetype of creativity and ideologically reconstructed artistic production as a solitary non-collaborative engagement disconnected from its dependence on the intellectual commons (Jaszi 1991). The juridical notion of the Promethean artist as a legal subject having the right to own her work and being free to transfer her property through contract in the market reflected the social relations in the art commodity market and facilitated the circulation of art commodities (Fisher 1999, 12–13). The legal form was, however, not only reflective of the relations in the commodity art market. The recognition of the Promethean artist in law also defined the nature of the creative practice, by classifying artists as individual property owners of their creative skills and as sellers of their works of art in the form of commodities within the unequal power relations of the art commodity market (Pashukanis 1978). Still, the statutory recognition of private monopolies over cultural works was counter-balanced by explicit limitations grounded on public

interest objectives, an outcome that reflected in itself the correlations of power between forces of commodification/commonification at the time. Such correlations were, though, ultimately framed by copyright law, which disabled practices of commoning and empowered the capitalist mode of cultural production, distribution and consumption through sanctioning and legitimisation.

The history of copyright law is an expression of the dialectics between the enclosing power of industrial capital over the products of the social intellect and the opposite need for the ideological justification of such enclosures in the name of the public interest. Yet, in the course of the nineteenth and, especially, twentieth centuries, and as the commercialisation of culture shifted correlations of power in favour of the forces of commodification and against the social practices of commoning (Bollier 2008, 44–50), the balance, which guaranteed the prevalence of the public interest in policy choices related to copyright, gradually ceased to be sustainable. The theoretical dichotomy between ideas and their expressive fixations tended to liquify, as copyright protection was evoked to protect the market value of increasingly abstract and elusive intellectual assets (Bracha 2008, 238). By being influenced from moral justifications related to the labour theory of copyright and ‘sweat of the brow’ arguments, the threshold of originality was interpreted, more often than not, to reflect evaluations related to the significance of the private investment for the production of intellectual works as eligibility criterion for enclosure (Bracha 2008, 201). The scope of copyright protection followed a trend of consistent expansion, approximating a status of Blackstonian property-ness (Fisher 1999, 1–4; Lesig 2002a, 108–110, 250). And, in the twentieth century, the increase in the extension of the term of copyright protection accelerated at an unprecedented pace (Patry 2009, 67–68). Finally, the ‘work-for-hire’ doctrine, which spread in countries with powerful creative industries during the first half of the twentieth century, ensured the alienability and, thus, the unencumbered flow of art commodities within markets. In this case, the ideological function of law, as expressed in the copyright theory of authorship, was bypassed and absorbed by the prevalent social function of commodification, as exhibited in the recognition of the transfer of copyright ownership from creative workers to their employers (Bracha 2008, 189–190). In conclusion, notwithstanding significant instances of resistance, the general tendency of modern copyright law was to expand its subject matter and scope to any usage of information, knowledge and culture worth appropriating for its exchange value in commodity markets and to facilitate the commodification of art and culture. Hence, despite its various forms and internal contradictions, with the rise and consolidation of market-based societies modern copyright evolved to finally become a unified family of monopoly theories of the social intellect. Since then, monopoly theories set the political and institutional landscape in these issues, having internalised both the orthodoxy of enclosure and its inherent contradictions in a unified theory of property over intellectual works.

In conclusion, the forces, structures and ideologies conditioning creativity in modernity took the forms set out in the following table:

Unit of collaboration	Structures of sharing	Forces controlling access to resources	Structures controlling distribution	Perception of the author	Normative framework
Art movement/ creative factory	Academies, libraries, exhibitions, museums, cultural capitals	State, capital	Commodity markets	Promethean artist	Copyright

Table 4.2: The framework of creativity in modernity.

Source: Author

Overall, modernity was marked by a fundamental contradiction between the actual practices of artistic production and the regulation of creativity. The more art and culture became dependent on collective practices of sharing and collaboration, the more social institutions intervened to regulate the creative process according to the individualistic perception of the Promethean artist and, thus, reinforce cycles of private appropriation and commodification.²⁸ Yet, no matter how contradictory the modern epoch proved to be, this tendency did not reach its apogee before the coming of the postmodern historical condition.

4.4. Cultural Commons and the Law in Postmodernity

The postmodern era signifies the centrality of informational capital in production and the generalised penetration of the cultural commons by processes of commodification in distribution and consumption of intangible resources, i.e. the expansion of commodities, market exchange and monetary values to most facets of cultural reproduction. Hence, postmodernity marks the ‘extension of the power of the market over the whole range of cultural production’ (Harvey 1989, 62). Furthermore, the generalisation of commodification and the rise of consumer culture have resulted in the ‘prodigious expansion of culture throughout the social realm, to the point at which everything in our social life [...] can be said to have become “cultural”’ (Jameson 1991, 48). In postmodern times, intangible goods have acquired principal importance in capitalist production, the cultural industries have global reach and everyday life is permeated by cultural commodities. In this social context, culture has acquired materiality to such an extent that it has rendered the dichotomy between the base and the superstructure redundant (Lash and Lury 2007). In this sense,

postmodernity deepens and multiplies the tendencies and contradictions of modernity. It thus constitutes the master narrative of modernity, rather than marking a socio-historical discontinuity with the latter (De Angelis 2007, 214). Yet, postmodernity also marks extensive transformations in co-relations of power between capital and the commons. The decentralisation of the creative practice and the construction of multiple cultural identities across society is claimed to open possibilities for cultural declassification, democratisation and de-Westernisation (Featherstone 2007, 16–20, 139–140). In the latter sense, there arises the potential for alternative commons-based practices of social reproduction, including the potential for the expansion of the cultural commons.

The turn of the twenty-first century finds the dominant mode of cultural production consolidated in the form of concentrated and internationalised cultural industries, as a sector of the increasingly dominant informational capital. Human creativity in the postmodern cultural industry is hierarchically organised in the form of creative labour and aggregated in the creative factory. The latter is the main unit of informationalised cultural production and the locus where creative labour is pooled together, organised through sophisticated techniques for the division of labour, conjoined with digital communications machinofacture and valorised by informational capital to produce cultural artefacts on a massive scale. The organisation of work under informational capital is based on ‘the polyvalent complementarity of different lots of knowledge collectively mobilised by workers in order to achieve a productive goal’ (Fumagalli et al. 2019, 46). Hence, creative labour is a social relation reproduced within the assemblage of the creative factory, the frame, organisation and everyday actuality of which are preceded, established and determined by the social power of capital. Far from pertaining to the ideological abstraction of the solitary Promethean artist, the figure of the postmodern creative labourer constitutes the subjective element immersed in the wider social relations that synthesise the capitalist mode of cultural production (Lazzarato 2014, 25–29). The relations of production in the creative factory are inherently machinic, i.e. composed of humans and machines, and socialised, i.e. based on sharing and collaboration among multiple artists. In the cultural industries, work acquires forms of horizontal coordination and creative expression becomes a collective and collaborative process taking place within the organisational framework of capital. It could thus be claimed that artistic production has never before been a process of collective endeavour to such an extent. And, yet, the socialisation of artistic production in the cultural industries is distorted by the inherent contradictions of the capitalist mode of production. Access to, sharing and use of prior art are severely limited by contemporary intellectual property laws. Collaboration among artists both within and between industrial units of cultural production is mired in competition. Corporate hierarchies fail to provide the social climate of unrestrained inspiration, in which human creativity may thrive and achieve its full potential.

In this contradictory context arises the postmodern figure of the celebrity artist. It is in itself a social relation, which constitutes at the same time a factory and a commodity. Its archetype, Andy Warhol, vividly depicts its characteristics. Andy Warhol's studio from 1962 to 1968 was purportedly named the 'Factory', in order to associate its artistic production with industrial manufacture. The Factory brought together multiple artists, who worked on Warhol's projects under his supervision and mass-produced handmade copies of cultural artefacts. Even though artistic production in the Factory was a collective and communal process (Watson 2003), its output was solely attributed to the celebrity artist himself. In addition, Andy Warhol became a pop icon, marketing and valorising on his eccentric personality, artistic style, social life and image. In line with its archetype, the postmodern figure of the artist is a hyper-commodified simulation of the modern Promethean artist. It is a commercial enterprise, which has the 'person' celebrity artist as its point of reference in order to valorise on both the latter's artistic innovations and popular image in industrial mode. The simulacrum of the celebrity artist exploits and, at the same time, reinforces the social and legal infrastructures which still reproduce the ideology of the Promethean artist, so as to capture value and extract profit.

Contradictions in the dominant mode of postmodern cultural production produce centrifugal tendencies in cultural expression. The digitisation of prior art and the social diffusion of the means for artistic production and mass self-communication have created the material and social conditions for the rise of commons-based peer production in art and culture (Benkler 2006, 285–296). In this alternative mode of production, networks of peers physically or electronically join their creative forces in order to share information, knowledge and culture, collaborate and practise their collective cultural expression. Hence, commons-based peer-produced art and culture is the outcome of a communal process, in which peers collectively construct common meanings, aesthetics, techniques and practices through repetitive patterns of sharing and collaboration. The unit of commons-based peer production is the productive community, which takes its particular form in the horizontal and decentralised peer-to-peer collectivity. Peer-to-peer collectivities connect together, share information, knowledge and culture and collaborate through techno-social peer-to-peer networks. Peer-to-peer collectivities are claimed to generate an alternative participatory culture, which has relatively lower barriers to artistic expression and higher degrees of civic engagement than those encountered in the dominant forms of commodified culture (Jenkins et al. 2009, 5–6). The appropriation of real objects and pre-existing works of art and their mix through techniques of reworking, collation and derivation are core characteristics of the creative practices of peer-to-peer collectivities (Lessig 2008, 51–83). Commoners within these collective entities also use techniques of bricolage by utilising common materials available in their environment and by combining them in original aesthetic uses and meanings in order to create new cultural

identities (Hebdige 2003, 102–106). Often, peer-to-peer collectivities employ techniques of *détournement* in order to convey their cultural and political messages to wider audiences.²⁹ These techniques involve the reuse of mainstream cultural artefacts, such as corporate logos, in variations laden with meanings that are antagonistic to their original cultural and social use (Dery 2010).

The canvas of the emerging peer-to-peer collectivities is the public space. Either in cyberspace or on the urban terrain, or even with the use of both these domains, peer-to-peer collectivities engage in the production of a participatory folk art and culture, which circulates and is pooled as a commons. Do-it-yourself culture, mix culture, mashup art, culture jamming, graffiti art, ephemeral art, openly accessible user-generated cultural content, works of art licensed under copyleft licences, internet and urban cultures and memes and, generally, all contemporary non-commodified and openly accessible forms of cultural expression constitute a kaleidoscope of sharing, collective creativity and collaborative artistic innovation, which reshapes our common conceptions of art and aesthetics (Jenkins 2006; Lessig 2004, 2008). Such practices of commoning produce malleable, unfixed and fluid forms of culture (Poster 2006, 138). In this sense, they reconstruct our urban and digitised environments not as private enclosures but as shared public space, a social sphere divergent from the one (re)produced by the market and the state: the sphere of a renewed postmodern cultural commons. The centrifugal cultural tendencies of postmodernity generate an alternative insurgent artistic figure, which is best personified by the work and activity of Banksy. The street art of Banksy is ripe with techniques of appropriation, bricolage and *détournement*. Its mode of distribution and consumption is also commons-based, since it freely circulates as an open access commons. While its canvas is the public urban space, Banksy purportedly breaks the barriers between the ephemeral physical embodiment of his art and its digitisation. His pieces of art comfortably penetrate the digital public space and become viral in contemporary social media so as to reach wider audiences and become eternally reproduced and conserved. Both the content and form of his art directly challenge dominant social perceptions about the role and use of art in society, i.e. art as commodity and as a means for capital accumulation. At the same time, it becomes an effective means of circulating alternative aesthetic and political messages which also challenge dominant social, economic and political institutions and their adjacent ways of life. Banksy's art is always pseudonymously published and the artist himself has diligently protected his pseudonymity during all the years of his practice. The value of Banksy's street art lies in the characteristics that constitute it as a commons. In other words, it is valued for its free circulation and for the use values, i.e. alternative aesthetic, social and political values and meanings, that it freely circulates.

The deep transformations in the forces and relations of power in postmodern cultural production have stamped their mark on postmodern art and aesthetics. In the 1960s, the generalisation of rationalised, semi-automated industrial

production gave birth to the pop art, minimalist and post-minimalist movements, which conjugated art with industrial production and emphasised repetition and iteration (Kealy 1979). Accordingly, the increasing similarity of art works with industrially mass-produced goods has undermined dominant social perceptions over the importance of individual style in artistic expression (Daskalothanasis 2004, 200–201). Furthermore, the appropriation of everyday objects or prior works of art and their reworking and mixing into new genres of art has become the prevalent mode of postmodern creative expression, as expressed by pop artists, Fluxus, minimalist, neo-geo movements and contemporary art (Evans 2009). In this context, technologies and tools of digitisation and mass self-communication have intensified appropriation by unleashing the creative potential of artistic techniques, such as intertextuality, digital sampling, mixing, collage and pastiche. The exploitation of these technologies along with concurrent processes of cultural globalisation have boosted patterns of sharing both between different genres of art and among civilisations.³⁰ The increased dependence of postmodern cultural production on sharing and collaboration is evident in the leveraged role of cultural capitals, such as New York and Berlin, within the globalised cultural context and in the divide between these cultural centres and their periphery. As a result, the fusion of prior artistic and cultural styles, techniques and contents into new aesthetic contexts has come to be the fundamental characteristic of postmodern art since the 1980s (Buskirk 2003, 10–12).

The shifts taking place in the field of artistic production and the postmodern restructuring of channels and modes of distribution have disenchanting the aesthetic experience. In postmodernity, the work of art is iteratively experienced as copy and the artist as copier of symbols. Whereas the modernist artefact ‘is the commodity as fetish resisting the commodity as exchange’, its post-modernist counterpart collapses into such a conflict, ‘becoming aesthetically what it is economically’, i.e. ‘[t]he commodity as mechanically reproducible exchange ousts the commodity as magical aura’ (Eagleton 1986, 132–133). Inevitably, the ideology of the originality of the work of art is constantly being undermined by generalised appropriation, mass culture and the distribution of the commodity artwork as copy. Yet, at the same time, the commodification of culture has promoted and reinforced the same ideology it has undermined. Since exchange value is the primal metric in a commodified culture, certain generally accepted criteria are needed for the evaluation of the quality of art. In an ocean of art commodities, massively produced through patterns of sharing and appropriation, ‘authenticity’ and innovation have been promoted as the primal criterion for the evaluation of the quality of art. The postmodern capitalist mode of cultural production and consumption has thus become increasingly reliant on the construction of difference as a means to simulate the heterogeneity of the artwork within the homogeneity of the cultural commodity (Lash and Lury 2007, 187–188). ‘The search for and the praise of innovation for the sake of innovation’

(Greenfeld 1989, 101) in the world of art and culture have thus become the mirror image of accumulation for the sake of accumulation, of capital's valorisation process in the cultural industries and the art commodity markets (Marx 1990, 742).

In postmodernity, forces of commodification dominate the cultural domain by controlling access to the means, raw materials and value cycles of cultural reproduction. In recent decades the cultural industries have experienced an enormous growth and expansion in most terrains of cultural activity (Power and Scott 2004) and cultural economic activity has become an integral feature in capitalist production, the circulation of finance, the allocation of commodities, the exploitation of affect, mass consumption and, hence, capital accumulation (Amin and Thrift 2004). In the capitalist mode of cultural reproduction, capital controls the definite means of cultural production and distribution and also has the corresponding capacity to determine the form and content of cultural consumption. Such power upon consumption is evident in the increasingly important role of brands and commodity branding. Brands are cultural forms mediating commodity market relations, through which consumer demand for commodities is organised, controlled and governed (Lury 2004). In postmodern cultures dominated by capital, the art commodity is the cell-form of circulation and the market becomes the dominant value system, i.e. the system that determines which form of social value is valued the most and how such value is distributed and accumulated. As a corollary, the dominance of commodity markets has consolidated the social prevalence of the exchange over the use value of art. This means that art is primarily valued not for the social needs it addresses. Rather, what attributes value to works of art is their socio-economic function in market exchange. In this context, the resurging cultural commons spawning from digital networks become entangled with the commodity in multiple ways, giving birth to a hybrid gift-commodity internet economy of art and culture (Fuchs 2008, 171–189).

Instead of being the outcome of the supposedly invisible hand of the market, the processes of commodification described above are forcefully imposed by state enforcement. State intervention takes place through the systematic enactment of intellectual property laws at the (trans-)national and international levels, which protect, enforce, expand and prolong private monopolies over cultural works. By analogy to the historical enclosure movement that took place in the advent of capitalism, the expansion of intellectual property protections by state enforcement constitutes a second enclosure movement for the submission of the 'intangible commons of the intellect' to the capitalist mode of production (Boyle 2003). In this process of dispossession of the commons, the institution of the state crucially functions as the collective commodifying agent of our common culture.

From the Renaissance to postmodernity, the enclosure of art and culture through regulation has evolved towards its consolidation into intellectual

property, albeit with serious contradictions, setbacks and resistance. In postmodernity, regulatory enclosures of information, knowledge and culture have expanded and multiplied to the detriment of the intellectual commons (Lemley 1997, 886–887; Hunter 2003, 501; May and Sell 2006, 145–153, 181–185). The transition of dominance from industrial to informational capital has led to shifts in intellectual property law and jurisprudence towards an ever-expanding enclosure over increasingly valuable intangible goods, as marked by the adoption of the 1994 WTO TRIPS Agreement and the 1996 WIPO internet treaties;³¹ the enactment of the 1976 Copyright Act and the 1998 Digital Millennium Copyright Act in the US; the enactment of the copyright directives in the EU;³² and the US Supreme Court landmark case of *Diamond v. Chakrabarty*.³³ On the other hand, copyright laws have ceased to function solely at the level of industrial activity and their scope, application and enforcement have acquired a horizontal social effect, as the technological means for electronic access, copying and reworking diffused in societies (De Sola Pool 1983, 214; Doctorow 2014, 103, 131). Finally, intellectual property over cultural works has acquired a truly global reach by the enactment of the WTO TRIPS Agreement and the WIPO internet treaties³⁴ (Drahos and Braithwaite 2002, 108–149; May 2010, 71–97). These developments in the field of law are symmetrical to the augmentation of the cultural industries and the dissemination of the commodity to most facets of socio-cultural activity.

Postmodern intellectual property is a mutation of modern industrial copyright and, as with all mutations, an inherently contradictory and unstable one. Being simultaneously a legal institution for the regulation of sharing and collaboration in cultural production and an ideology of appropriation, postmodern intellectual property rises replete with systemic contradictions and negative externalities. The possessive individualist conception of authorship in postmodern intellectual property disregards the collaboration taking place in cultural production and is, therefore, effectively configured in conjunction with dominant relations of social power to favour the exploitative appropriation of cultural works by singular entities more than its outspoken incentivisation of actual creators (Lemley 1996, 882–884). Under postmodern intellectual property, private monopolies over cultural works tend to approximate the absolute exclusivity of Blackstonian property (Netanel 1996, 311–313; Lemley 1997, 895–904; Boyle 2008, 54–55; Patry 2009, 112–114).³⁵ Such approximation intensely dilutes the categories and undermines the ideology of industrial copyright. The expansion of its scope to subject matter, from weather forecasts and all other types of factual data to photos, objects of craftsmanship, databases, motion picture plots, trade secrets and computer programs, dilutes the idea/expression dichotomy. This radical relocation of the boundary between the private and the public in favour of commodification tends to have stifling effects on artistic and cultural innovation (Rose 1993, 141). The expansion of both the types and scope of private rights of exclusion, from the right to make creative

works available to the public to new generation neighbouring rights, multiplies the chances of anti-commons market failures (Heller 2008, 10–16) and increases the transaction costs of copyright clearance (Aufderheide and Jaszi 2004). The ever-expanding duration of intellectual property to quasi-indefinite levels encloses unprecedented quantities of cultural content, thus significantly weakening the public domain, which forms the raw material of creativity (Lessig 2002a, 110; 2004, 133–135). The foundation of private monopolies over cultural works on the doctrine of originality ignores patterns of sharing over prior culture and, hence, overvalues the creative contribution of existing authors, who in essence ‘recombin[e] the resources of the [intellectual] commons’ accumulated by their predecessors (Boyle 1996, 74). The expansion of the scope of intellectual property rights through contemporary law and practice, such as the three-step test of the Berne Convention,³⁶ and its narrow juridical interpretation,³⁷ concedes increased power to right-holders, has a corresponding diminishing effect on copyright limitations and, as a result, stifles public policies to adjust social access to prior art and culture to the potential of the digital era. The legal conception of limitations as exceptions and exclusivity as the rule in postmodern intellectual property law establishes a hierarchy between the two and construes any limitations to private monopolies over intellectual works as ‘islands of freedom within an ocean of exclusivity’ (Geiger 2004, 273). In conclusion, regarding the intellectual commons, the postmodern tendency of copyright law towards proprietisation has been considered to be ‘a wholesale attack on the public domain’ (Lemley 1996, 902).

In a nutshell, the main characteristics of the postmodern framework of creativity are manifested as follows:

Unit of collaboration	Creative factory/P2P collectivity
Structures of sharing	Internet, public space, cultural capitals
Forces controlling access to resources	Capital, state
Structures controlling distribution	P2P networks/commodity markets
Perception of the author	Celebrity artist
Normative framework	Intellectual property

Table 4.3: The framework of creativity in postmodernity.

Source: Author

To sum up, postmodernity deepens and intensifies the modern contradiction between the actual practices of cultural production and the regulation of creativity. On the one hand, resurging practices of cultural sharing and collaboration at the social base are increasingly impeded by reinforced cycles of enclosure and their regulatory entrenchment. On the other hand, the expansion of commodification undermines the vitality of the intellectual commons and in many ways acts as a fetter upon processes of cultural production, distribution

and consumption by obstructing the generation of cultural wealth. Postmodern intellectual property regulation of culture both internalises and exacerbates these contradictions.

4.5. Conclusion

Set out in historical sequence and from a comparative perspective, the findings of the current analysis help to elucidate the evolution of creative practice from the Renaissance to postmodernity (see below).

	Renaissance	Modernity	Postmodernity
Unit of collaboration	Workshop, individual artist as contributor to the creative process	Art movement/creative factory	Creative factory/P2P collectivity
Structures of sharing	Guilds, academies	Academies, libraries, exhibitions, museums, cultural capitals	Internet, public space, cultural capitals
Forces controlling access to resources	Patron, publisher (after the sixteenth century)	State, capital	Capital, state
Structures controlling distribution	Exchange markets/commodity markets	Commodity markets	P2P networks/commodity markets
Perception of the author	Artisan, master	Promethean artist	Celebrity artist
Normative framework	Honorarium, privilege	Copyright	Intellectual property

Table 4.4: The evolution of the creative practice from the Renaissance to postmodernity.

Source: Author

From the workshop of the Renaissance to the creative factory and the P2P network of postmodernity, creative collectivities have been the main factors of cultural production, their specific forms only varying over time. Furthermore, practices of sharing among creators have always constituted an integral element of cultural production, distribution and consumption, gradually shifting from more structured organisations in the Renaissance and modernity to the widely diffused networks of cultural sharing in postmodernity. Accordingly, forces controlling access to material and financial resources gradually consolidated from the castes of patrons and printer/publisher guilds into full-fledged industries controlling the distribution and consumption of cultural resources under the protection and promotion of the state. These forces have been shaped and

determined by the transformations in production, distribution and consumption taking place owing to the transition from the dominance of mercantile and industrial to the postmodern dominance of informational capital. In the same historical period, the social status of the author shifted from the periphery to the core of the creative practice, commencing from the perception of the medieval craftsman and reaching its climax with the simulacrum of the celebrity artist. Finally, the regulation of art and culture was characterised by a general tendency of formalisation and standardisation from the assignment of ad hoc and ad personam privileges towards alienable property rights over cultural works.

Such conclusions help us to ground more general assumptions in relation to the essence of the creative practice. Along these lines, it can be claimed that the evolution of art and culture is an inherently collective and communal process. Any culture in history is a common pool of cultural resources aggregated through the creative contribution of multiple creators, past and present, connected together by common meanings and world views. The resources of the cultural commons are thus the primal means of artistic production, the raw material upon which artists draw to collate their own creations. In the words of James Boyle, the 'public domain is the place we quarry the building blocks of our culture. It is, in fact, the majority of our culture' (Boyle 2008, 51). In addition, artistic production takes place on the basis of patterns of sharing and collaboration. Creativity and its supportive knowledge are cognitive resources widely dispersed in society. Their aggregation and transformation through sharing and collaboration are the cornerstone of the productive process. Creativity is a *sui generis* human trait. Even though its elements are allocated in single brains, it is unlocked and ignited through social exchange and constructed incrementally into art through a collective endeavour of multiple minds. This is the reason why it may only thrive in social contexts that facilitate the open exchange of ideas and individual/collective autonomy in collaboration and experimentation (Amabile 1996, 115–120).

An alternative history of art from the perspective of the cultural commons approaches artistic change on the basis of the transformation of the relations between the artistic collectivity and the world around it, considering the artistic collectivity as an active agent in the process. The work of art is the generative moment of creativity, in which all powers active in the social context are exerted and reflected. It should thus be viewed as the product of a particular time and place, deeply influenced by its social context, as much as the product of an artistic collectivity. As a corollary, the production of art and culture is neither a productive process in which individual agency plays no role at all nor a process that can be solely attributed to singular entities. Beyond these two opposing conceptions lies the notion of cultural production as a process, wherein the creative individual is dialectically related to the multitudinous productive collectivity, being constantly constructed by the forces/relations of cultural production and, at the same time, contributing to their dynamism. It

is only through a dialectical perspective that we are able to grasp that, in fact, cultural works 'are the product of the collective mind as much as of individual mind' (Mauss 1990, 85–86). Through this dialectic we are able to grasp the subjective productive force of our cultural commons, the social intellect.

Law regulates creativity, by framing the creative practice, formulating its processes and constructing social perceptions over its subjects and objects. In this sense, law has a material transformative effect upon art and culture. Copyright law and practice consolidates and entrenches the dominance of the capitalist mode of cultural production, distribution and consumption by means of both violence and ideology. Its negative definition, fragmentary regulation and exception-based recognition of the intellectual commons guarantee the subordination of commons-based peer production and the ceaseless capture of its wealth by capital. At the same time, the interrelation of copyright law with the intellectual commons reveals the dependence of capital accumulation in the cultural industries upon practices of commoning in art and culture. Nowadays, transformations in the relations of cultural production, distribution and consumption unveil new forms of commoning and bring about a resurgence of the intellectual commons.

Along these lines, this chapter has aimed to provide the historical arguments in favour of an intellectual commons law, which will, on the one hand, calibrate the aggravating contradictions of the dominant capitalist mode and, on the other hand, exploit in full the potential of the alternative mode of commons-based cultural production, distribution and consumption. The next chapters contain the social research of the book, which examines the circulation of value within and beyond the intellectual commons. The research renders visible the existence of alternative forms and flows of commons-based value in our societies, which circulate in parallel to the flow of commodities and money. The aim of the research is to unveil the inherent moral value and the social benefit of the intellectual commons, by providing solid evidence on the immense amounts of value generated, pooled together and redistributed to wider society by these institutions.