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Structures

By Sergio Muñoz Sarmiento*

"Had I not done philosophy I would have done law."
—Gilles Deleuze

I. Origins

Clandestine Construction Company International (“Clancco”) is an art project which explores, investigates, and examines juridical structures and their effects on art and visual culture.

Clancco was incorporated in 1968 and functions by employing theoretical and operating structures similar to those of corporations. Through the format of subsidiaries, Clancco implements three separate yet interconnected projects in real space and digital media. The three subsidiaries are: Projects, Art + Law (commentaries on international news related to art and law), and Writings and Interviews by and with arts professionals and legal scholars. Clancco and its subsidiaries are physically present in Williamsburg, Brooklyn and on Clancco’s website.¹

In terms of content, Clancco places a special emphasis on the investigation of real property law and intellectual property through the artistic practices known as sculpture,² drawing, writing, and performance. Simultaneously, Clancco uses laws and legal structures as mediums and *readymades* in order to expand the practice of art.

In one such sculptural project, *Structures*, Clancco explores alternative exhibition spaces in which to analyze real and intellectual property laws by using the following procedure: it finds private and public property locations across the U.S.—unaffiliated with any art institution—and installs structures on these sites, at times with consent of the landowner, at other times without. By employing such strategies, Clancco seeks other models for experiencing visual forms of communication and aesthetic

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¹ See Clancco, <http://www.clancco.com> (last visited Apr. 22, 2008).

² In this essay I will use the terms structure and sculpture synonymously. The differentiation (if any) will be examined and analyzed in a future paper.

experiences within a market-driven social and artistic framework. For the purposes of this essay, I will focus specifically on the *Structures* project in order to elaborate the concepts and strategies described above.

II. *Structures*

In *Structures*, Clanco analyzes two problems: one, the artistic practice of taking pre-existing gestures and structures *into* an art institution and claiming this gesture as art, thus diminishing its visibility and critical potential; and two, the institutional and ideological restrictions experienced by some contemporary artists in exhibiting their art projects (perhaps due to their scale, content, and unmarketability). To engage these two problems simultaneously, Clanco began to explore other spaces and sites in which it could concurrently engage questions of real property and intellectual property law as well as exhibit its sculptural projects without the need for curators, art directors, committees, or art critics. The latter factor is crucial because it sidesteps the venerated prerequisites and conditions generally believed to be necessary in order to create art projects, obtain an exhibition opportunity, or warrant critiques of one's work. As mentioned above, some of these obstacles may be warranted (scale of work), but others, such as the alleged "unmarketability" of the work or the failure of an artist to abide by, and thus fulfill, the art market's stereotypes are unwarranted.³ Additionally, many artists believe that their work can exist—and thus be viable—only in relation to certain art world institutions. This is unfortunate given that, unlike the practice of law, the discourse and practice of art is perhaps the space where an artist can generate a practice wholly inconsistent with social and market restrictions.⁴

Taking these two problems into consideration, Clanco created a strategy to circumvent the historical and canonical monuments of the art world so as to take into account five important concepts: the specific context of the site; the need for, or lack of, heroic and high-cost production and installation; the specific materials called for by the site; the nature and constitution of the likely viewing subject (audience); and whether the sculpture would be installed with or without the consent of the property owner.

These five factors were based on the probability of finding suitable exhibition locations for the structures as well as the feasibility of inserting these structures (covertly or with consent) in private or public property. Equally important was that the structures installed blend in as much as possible with their existing contexts.

³ For example: when the race, gender, or sexual orientation of the artist relegates (and thus limits) that artist's production to identity politics artwork. Note that it is also within one's "own" group that an artist can experience such exclusionary practices.

⁴ As this essay explains, this is one factor Clanco takes into account when engaging in corporate structures and strategies—the production by an artist of her/his own market, rather than the converse.



Home Depot Installation
Cambridge, MA

It is crucial to note that the aspect of physical assimilation was based on the aesthetic and intellectual experiences derived from similar structures which Clancco first saw and experienced in their original context (public and private spaces, both interior and outdoor). In other words, the mere witnessing and experiencing of certain structures in their “natural habitat” evoked experiential affects unlike those of other structures in other or surrounding locations. The question of why these particular structures evoked emotive responses while others did not is one that *Structures* analyzes. Analytically, Clancco was compelled to reference these structures in relation to the discourses of art history, critical theory, and philosophy. It may well be that the emotive and intellectual responses to certain pre-existing structures are similar to those obtained through previous exposure to modernist and contemporary sculpture.

These pre-existing structures were primarily found in construction sites, public parks, hardware and building material warehouses, and landscapes in the process of renovation or reconstruction. Based on the emotive and intellectual experiences derived from pre-existing structures, Clancco decided to analyze these experiences and reference them to the practice of art by installing (and at times producing) its own sculptures within similar sites and spaces provided they met two criteria: one, that the sculpture did not seem out of place (diverge radically from the context) and two, that the sculpture remained functional.



Tree Protectors Installation
Brooklyn, NY

For example, the visual experience of a wall and scaffolding structure on a New York City construction site engendered an emotive affect which in turn indexed the visual disavowal and historical erasure of the presence of similar structures within museum and gallery contexts, particularly during the installation and deinstallation of an exhibition. If a wall and scaffolding unit within a museum context could be sculpture, two logical questions follow: why the need for the museum at all, and how could the general public experience this without a museum context? Furthermore, the installation of a wall and scaffolding within a museum setting perpetuates the cooption of the *readymade*⁵ for the purpose of commodifying it via market forces, as well as making this gesture relevant solely *vis a vis* certain art discourses (art history, art criticism, art theory).

In order to deal directly with this problem, Clanco located a site that would be in need of construction and renovations, and thus a protective wall and scaffolding structure (as mandated by local ordinance laws). Clanco approached the construction company hired for the construction work at this location and offered to design and build, or to help in the designing and building, of the protective wall and scaffolding. For contractual and safety reasons, Clanco was only allowed to design the wall and scaffolding unit (its sculpture) and oversee its installation.

By installing its sculpture within a public context and not indexing it as art, Clanco thwarted the need for the four walls of an institution and for its curators, historians, and critics. The individual was presented with the possibility of an intimate and intellectual experience within a public space without the need to pay a museum fee or acquiesce to the dictates set out by museum directors and/or curators.



Wall and Scaffolding Installation
Corner of 5th Avenue and 53rd Street, New York, NY

⁵ The concept of the *readymade* and its problems are addressed below.

The functional aspect of this project dictates that the structure (object) have direct material and use relevance to the immediate physical context (put more simply, the “intervention” had to be in non-disruptive dialogue with its context). Placing a wall and scaffolding unit in front of a building *not* under construction would only mimic an operative wall and scaffolding unit. In its mimicry, the wall and scaffolding unit would become an art object referencing what occurs on actual construction sites or within the walls of an art institution (museum or gallery) during installation or deinstallation. If Clanco followed this artistic strategy, the sculptures would collapse back into the realm of representation. In this sense, representation is not a function.

Of major import was that a viewer of this structure not be notified of this installation and that the sculpture installed not be thought of and experienced as art. From this perspective, it is crucial that a viewer have equal opportunity to stumble upon this sculpture and to simply miss, or even dismiss, this same sculpture as just another banal object. In this sense, Clanco’s structures were synchronic to the intellectual-experiential affects of the pre-existing structures in which they were located.

Examples of some sculptural-architectural structures installed on and within their “natural habitat” are concrete cylinders used by urban planning and construction crews; wooden and steel safety structures built on New York City construction sites; wooden armatures used to protect trees; showroom displays in hardware stores; theological advertisement installed in front of a religious institution; and a portable wall.⁶



Religious advertising installed on private property
Northridge, CA

⁶ The sculptures shown here were installed between 2000 and 2007 in cities and towns across the United States, ranging from Northridge, CA, Ithaca, NY, and El Paso, TX to Cambridge, MA, New York City and Brooklyn, NY.



Dumpster cart installed on private property
El Paso, TX

The last point to note is that none of these structures were sold, stored, or destroyed by Clancco. After photographic documentation was taken, these structures were left in place in order to allow for a more organic and natural placement or displacement. The whereabouts and fate of these structures remain unknown.

III. Artistic Process

In order to further expand the field of art and sculpture, it is crucial to understand the *Structures* project in relation to and within the history and practice of sculpture. In dialogue with the artistic practices of Blinky Palermo and Michael Asher, as well as the hit-and-run tactics of Gordon Matta-Clark,⁷ Clancco locates similar “non-traditional” art sites for its own sculptures. Just as importantly, Clancco is indebted to the social practices of Rosa Parks, urban squatters, Native American contestations of

⁷ In 1975, for a project entitled *Day's End*, Matta-Clark cut openings into an abandoned and decrepit shed on Pier 52 in New York City. These cuts were done illegally, and once the city was notified of this act, the police set out to arrest Matta-Clark. Matta-Clark ended up leaving the country in order to avoid arrest. Although it could be argued that there are similarities between Matta-Clark and Clancco's acts, there are key and crucial factual differences: Matta-Clark preferred abandoned buildings and demolition sites whereas Clancco opts to intervene in and around new buildings and construction sites. Furthermore, Matta-Clark's acts were in reference to, and therefore dependent on, the “art world” structure.

land, and the sit-in movements of the early '60s, all of which have reshaped law and its impact on politics, property, and culture.

One key artistic example of a project that has influenced the genealogy of the *Structures* project is Michael Asher's *Project: Installation Münster (Caravan)*. In this piece, Asher has installed a [travel-trailer](#) in Münster, Germany in the exact same locations every ten years for the last forty years.⁸ Asher was determined that the trailer should remain in dialogue with its surroundings: "The method of placement was intended to create the impression that the trailer was an integral part of its surroundings, rather than an entity in or of itself."⁹

Both Asher and Clanco projects make the viewer aware of the immediate context surrounding the installed sculpture. They highlight the effects of gentrification and renovation projects underwritten by governmental and private actors, without being heavy-handed. These projects also draw attention to the transformation and dispersion of the urban center into suburban and ex-urban spaces.

Clanco's *Structures* project, however, differs from Asher's *Caravan* project in two crucial ways. First, in Asher's project, the viewer is given a map of caravan locations during the length of the Münster exhibition, whereas Clanco does not make the location of its structures available to unsuspecting and uninformed viewers. Second, Asher's *Caravan* is inserted into a context where it is either slightly out of place or completely out of place. Asher explains: "[I]t was important to find locations where the trailer would be seen in context. The trailer was placed in what appeared to be perfectly obvious locations, in places where it might have appeared to be slightly out of context, and in locations where it would have been unlikely to appear altogether."¹⁰ For Clanco, it is paramount that its sculptures "blend in" naturally to their immediate location and context. Furthermore, whereas Asher's project is established in the course of an art exhibition—and therefore dependent on the discourse of art—Clanco's installed sculptures eschew these machinations and dependencies. For Clanco, there is no need to wait for the financial and infrastructural support of an art exhibition.

German artist Blinky Palermo implemented a similar artistic strategy of making the "invisible" visible in his 1972 piece for the international exhibition *Documenta 5*. Art critic Ann Rorimer explains his project, *Zu Wandmalerei Treppenhaus Documenta 5, Kassel, 1972* as follows:

Palermo appropriated the space of the first floor landing in the staircase of the Museum Fridericianum at Kassel, which he painted with *Bleimennige*, an orange rust preventative undercoating . . . [t]he emphatic orange set off the enclosed wall area as an over-life-size rectangle that, *viewed* from different points, could also be seen as an irregular

⁸ *Project: Installation Münster (Caravan)* is an international sculpture exhibition which originated in 1977 and has taken place every ten years—in 1977, 1987, 1997, and 2007. The locations of Asher's installation varied, depending on the availability of each site, numbering from 10 to 19 sites in each exhibition.

⁹ Michael Asher, *Writings, 1973-1983 on works, 1969-1979* 166 (Benjamin Buchloh ed., 1983).

¹⁰ *Id.*

polygon. Palermo *neither originated the form nor imposed it on a secondary surface*; by covering the rectangular area with paint, he “uncovered” the work of art, revealing a preexisting form in the given architectural context.¹¹

By painting an existing wall space a different color, Palermo activated the existing architectural wall and its relation to the other walls as well as its ceiling and floor and expanded the nature of the artwork by allowing it to be experienced and understood by an unsuspecting viewer. The role played by a wall for Palermo is similar to the role played by real property (context/landscape) for Clanco. For Palermo, the wall replaces the canvas and its stretcher as the site for painting, indexing the museum’s architecture itself as a *readymade*. For Clanco, objects and structures are installed in a pre-existing landscape or construction site where they are or will be used. Just like Palermo’s paint erases the need for a stretched canvas, Clanco’s structures eviscerate the museum and gallery floor and walls. Therefore, structures, objects, construction sites, and landscapes are all *readymades*.

The indebtedness of the Clanco, Asher, and Palermo projects to Marcel Duchamp’s *readymade* and its embrace of a diverse range of materials and objects is obvious. However, all implement their projects for different reasons and with differing results. Although both Asher and Palermo had an investment in isolating forms in order to highlight their surroundings, both of their projects raise the question of the practical and social functionality of the *readymade*; in effect, they question the viability of the *readymade* as a tool to critique institutional discourses without simultaneously depending on them. In Asher’s case, the caravan “[p]erceived within the exhibition context . . . became an *indexical* sign in the tradition of the *readymade*, while simultaneously referring *symbolically* to both the discourse of sculpture and architecture.”¹²

¹¹ Anne Rorimer, *Blinky Palermo: Objects, ‘Stoffbilder,’ ‘Wall Paintings,’* in *BLINKY PALERMO* 69 (Museu d’Art Contemporani de Barcelona ed., 2003) (emphasis added).

¹² Asher, *supra* note 9, at 171 (emphasis added). In turn, this indexical system also *symbolically* referenced the social, economic, and political discourses involved in gentrification and urban planning.



Three dumpsters installed on private property
El Paso, TX

It is now clear that the inherent problem with Duchamp's 1917 urinal *readymade*, *Fountain*, was precisely that it was not functional. In this respect, it relinquished its independence by accepting its existence solely in a symbolic dialectical relationship with the museum. Similarly, both Asher's and Palermo's projects index the object's (caravan and wall painting, respectively) relationship to and dependency on artistic institutions, discourses, and structures. By contrast, Clanco's structures and objects retain their functional relationship to real property and, by not denying their propriety (their *raison d'être*), intervene in the ideological constructs of property law, land use, and the fiction of title and entitlement. Through this sculptural gesture, Clanco's *Structures* project obliterates the indexing of art historical institutions, yet engages the external discourses and real-practical consequences historically denied to the *readymade* and its political agency.

In a recent article, artist and writer Walead Beshty details the failure of the political agency of the *readymade* as well as its dependency on the institution of art—what he calls the “complex of understandings and framing devices by which art and its implications can be identified”¹³ Citing Rosalind Krauss' essay, *Sculpture in the Expanded Field*, Beshty writes:

Just as Krauss realized that a contemporary understanding of the art object required that it be situated within a relational field . . . the condition of contemporary art practice requires a *re-examination of the foundation upon which art production and its implications are displayed and assessed*.¹⁴

¹³ Walead Beshty, *On American Ingenuity (And the Failure of the Readymade)*, 17 AFTERALL 22 (Spring 2008).

¹⁴ *Id.* (emphasis added).

For Clanco, reexamining the foundation of contemporary artistic production involves not only its *relationship* to the legal structures which allow it to exist, but, just as importantly, the (im)possibilities of obtaining a site for *exhibition* and materialization of ideas. For Beshty, the failure of the political agency of art had its origins in the concept of the exhibition. Beshty makes his critique of the exhibition by comparing it to [The Great Exhibition of 1851](#), which he argues was simultaneously the “architectural template for what would become the museum, the corporate complex and the department store.”¹⁵ By the 21st century, the museum and the department store had become sites for provisional exhibitions of branded goods and services, all within a glamorized architectural structure and spectacular stage set.¹⁶ It can certainly be argued that contemporary art fairs operate as department stores on a transnational scale, branding the name of the art fair and gaining certain trademark protections based on the galleries and artists represented and artworks sold. In this regard, the art fair functions like a corporation, even if it is not legally structured as one. Yet it is Clanco’s contention that the structure and *theory* of a corporation is also a *readymade* which, unlike an art fair, is ripe for producing “exhibition” possibilities and interventions yet unseen.



The Gap Store, 5th Avenue and 54th Street, New York, NY

¹⁵ *Id.*

¹⁶ Note Takashi Murakami’s recent exhibitions at the Los Angeles Museum of Contemporary Art and the Brooklyn Museum of Art, where he installed a Louis Vuitton boutique selling designer goods bearing Murakami’s artwork. It is also worth noting that Murakami titled both of these exhibitions “© MURAKAMI.” Simultaneously, during the month of April 2008, the fashion retailer The Gap used Andy Warhol’s image and artwork to advertise their clothing and accessories.

IV. Corporation as Readymade as Exhibition



Helen of Troy Corporation, El Paso, TX

Under U.S. law, a corporation is a fictitious “person” which generally has the same rights as a “real” person. Citing Stewart Kyd’s *A Treatise on the Law of Corporations*, Joel Bakan explains:

[A corporation is a] collection of *many individuals* united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of law, with the capacity of acting, in several respects, as an individual, particularly of *taking and granting property*, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common.¹⁷

Viewed as free individuals, corporations eventually obtained the same “equal protection of law” and “due process of law” protections granted under the United States Constitution to freed slaves. In stark contrast to real human beings, however, corporations are required to follow only legally enforceable ethical or moral dictates. Their only mandate, by law, is to seek and turn a profit through any legal means. Clanco differs in this respect primarily because Clanco’s projects are not driven by a profit motive and because Clanco is not governed by a group of investors. Also, although no inherent or cultural ethico-moral perspective is taken as natural or as a given, Clanco is consistently aware that its own existence—its own production—is in

¹⁷ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 15 (2004) (emphasis added) (citing Stewart Kyd, *A Treatise on the Law of Corporations* 1 (1793)).

relation to shifting and linguistically-based ethical and moral edicts (in other words, Clancco acknowledges ethical and moral imperatives as linguistic constructs, and thus perhaps similar to law, their status as fictions).¹⁸ By adopting the corporation's ability to merge a multitude of individuals and ideologies under one rubric, however, Clancco conceptually and pragmatically employs a corporate constitution. Doing so allows Clancco to implement and carry out its diverse and at times divergent ideas and projects.

The "contradiction" of using a for-profit corporate structure as a model for artistic practices is less contradictory when placed in the context of the historical purposes of the corporate form. It is crucial to note that the original intent of the corporate entity was not for it to serve a business purpose; rather, a corporation's main objective and purpose was to serve the public good:

Before the nineteenth century, creating a corporation was seen as a significant *public act* to be undertaken only to achieve a special *public advantage*. Indeed, in the England of the seventeenth and eighteenth centuries, corporations were formed chiefly for political or charitable purposes rather than business ones.¹⁹

It is this "public purpose" which drives Clancco's interest in the corporate entity, primarily because it allows Clancco, through its alleged "outlaw" practices and projects, to question existing property and intellectual property laws for the sake of a public purpose and with a wider audience in mind.²⁰ Simultaneously, Clancco negates the problematic of private galleries and museums, which reserve the right to deny exhibition opportunities based on "unmarketability" or "unsaleability" factors, by erasing the need for these private institutions.

For Clancco, a corporation's structure as a single hub which (provisionally) holds a multitude of voices and expressions is similar to Duchamp's Société Anonyme.²¹ Beshty adds: "Rather than obeying the humanist conception of the unified self, corporations are instead a *multitude of voices* congealed into a singular entity, a

¹⁸ Deleuze's reflections on being a 'sell-out' are apropos: "I am not concerned about contradictions, and I'm not a righteous soul living out the tragedy of its condition: I have spoke because that was what I really wanted." See Gilles Deleuze, *I have nothing to admit*, available at <http://www.cross-x.com/vb/showpost.php?p=1128548&postcount=36> (last visited Apr. 23, 2008).

¹⁹ William T. Allen, Reinier Kraakman & Guhan Subramanian, Commentaries and Cases on the Law of Business Organization 86 (2007) (emphasis added).

²⁰ Note that Clancco's use of the corporation as its main theoretical-operative structure is similar to Clancco's reading of the seminal and fundamental property legal decision of 1823, *Johnson v. M'Intosh*, which granted Indian land to U.S. settlers under the court's ruling that the settlers be granted property rights due to their act of "discovery." See *infra* note 27. This concept will be expounded upon in a future analysis.

²¹ Société Anonyme was an art organization founded in 1920 by [Katherine Dreier](#), [Man Ray](#) and [Marcel Duchamp](#), and legally formed as a corporation, thus making it "Incorporated, Inc." The corporation existed for thirty years and was formally dissolved during a dinner held on the grounds of the New Haven Lawn Club. It produced art exhibits, musical performances, and lectures.

transcription of an ephemeral set of compromises and *competing agendas* given a unified self.”²² Take, for example, the now defunct corporation Beatrice Foods, which before its demise in the 1980s came to be the owner of diverse and unrelated brands such as Avis Rent-A-Car, Tropicana, Good & Plenty, Shedd’s, Playtex, and the Altria Corporation, which simultaneously owned Philip Morris and Kraft Foods. By operating a multiplicity of subsidiaries (practices), these corporations were able to manifest, and therefore invest, in multiple markets with differing needs and purposes. The key to accepting this strategy as an artistic practice is to not dwell on the specifics of Beatrice Foods or lament its profit-driven motive, operating structure, or shareholder ideologies. The idea is to objectify a corporation’s practice and study how it is able to survive, shift, and modulate according to the mandates, restrictions and liberties granted to it by law, and to observe how its practices are in turn incisively used to create and operate within a multitude of markets. True to life, the market should not be seen as a force that shapes a corporation (or in our case, artistic production) but rather the converse: artistic production can (and should) create its own market(s). In true Deleuzian manner, the artistic corp(u)s must constantly shift.²³

Through its hydra-headed subsidiary practices, Clanco is able to operate as an artistic corporation which, by its shifting nature, simultaneously engages a diverse range of audiences and connects a seemingly disparate group of discourses and practices.

V. Law and Location

Structures takes place in both private and public spaces, invoking and questioning property laws such as those governing personal property attached to land or a building (fixtures), entrance onto private property (trespass), the use of materials belonging to private parties (direct conversion), and the acquisition of real property titled to another party (adverse possession).

Informed by historical legal precedents such as the seminal U.S. property case, *Johnson v. M’Intosh*,²⁴ and contemporary theories by legal scholars Eduardo Moisés Peñalver and Sonia K. Katyal, Clanco takes on the role of the outlaw to highlight the repercussions of the privatization of artistic expressions (separation from a public audience) as well as the privatization of intellectual and aesthetic effects (ownership and commodification of ideas and experiences). Clanco’s projects search for alternative models of producing and experiencing visual forms of communication and culture in an increasingly market-driven schema.

²² Beshty, *supra* note 13, at 23 (emphasis added).

²³ In 2005 and 2006, Clanco held two Biennales within swap meets at the Bronco Swap Meet in El Paso, Texas and The Rose Bowl Flea Market in Pasadena, CA. As part of an ongoing series of [Biennales](#), Clanco views these as “exhibitions” which are not divorced from actual sites of exchange (the actual flea markets and swap meets), including but not limited to the economic, cultural, social, and political discourses.

²⁴ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that the United States obtained title to Indian lands by virtue of “discovery.”).

Just as important is Clanco's challenge of historical real property and intellectual property law discourses through the initiation of a dialogue surrounding the current commodification of—and thus the granting of property rights to—emotive, psychological, intellectual and psycho-sensual *experiences*. In a social network in which practically all “things” produced and owned come with a bundle of rights, Clanco is engaged in the analysis of the current status of intellectual property rights, which are founded and premised on the objectification, valuation, and exploitation of *aesthetic experiences* (at times also called “culture”).

An example of this type of intellectual property right would be rights emerging from tourist expeditions of “exotic” spaces, where the property right is based not on the thing itself (painting, company logo, phrase, architectural structure, sound, notation or lyrics), but rather on a singular or variable *experience produced by* that “thing” (painting, company logo, phrase, architectural structure, sound, notation or lyrics). What is “owned” is the right to disseminate an aesthetic experience (most likely to a paying customer), and feelings, emotions and sensations are categorized according to their degree or level of uniqueness (similar to the generic, descriptive, suggestive, and arbitrary/fanciful schematic found in trademark law). In other words, what is being commodified under the rubric of intellectual property is the experience of a given context. If this sounds either too abstract or absurd, perhaps the inability to conceptualize this possibility is based on the all too frequent misunderstanding of the nature of property.

A. Property

It is quite frequently assumed that property is a physical “thing”—land, house, computer, vehicle. However, property can also be understood as a concept, “the legal relationship among people in regard to a *res* (thing), or even an intangible subject such as an idea, e.g., a patent or a copyright.”²⁵ In this respect, it is clear that property raises the question of the relationship between an individual and a community as that relationship pertains to the use (or misuse) and exploitation of resources (and, when it comes to real property, limited resources). Similar to the constitution of a corporation, the idea and law of property is nothing but fiction. Jeremy Bentham noted that “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”²⁶

Recently, two legal scholars formulated a theory that deviates from the “legal relationship among people in regard to a *res*” perspective on property. In *Property Outlaws*,²⁷ Eduardo Moisés Peñalver and Sonia K. Katyal argue that the violation of property laws by “outlaws” can enhance the social order. In their view, “the apparent stability and order that property law provides owe much to the *destabilizing* role of the

²⁵ John E. Cribbet et al., *Property: Cases and Materials* 2 (8th ed. 2002).

²⁶ *Id.* at 5 (quoting Jeremy Bentham, *Theory of Legislation, Principles of the Civil Code*, Part I 113 (Dumont ed., 1864)).

²⁷ Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

lawbreaker, who occasionally forces shifts of entitlements and laws.”²⁸ Peñalver and Katyal argue for a property system that focuses more on resolving and *igniting* conflicts between owners and non-owners rather than on a legal system that places priority on establishing order and stability. For Peñalver and Katyal, it is those individuals who flout property laws, which they categorize under a triumvirate typology—expressive outlaw, acquisitive outlaw, and intersectional outlaw—who are to be credited with enabling the evolution and reinterpretation of existing and ossified property laws.

Time and again, groups of people have intentionally violated property laws, and in a number of important instances, property law has responded by shifting to accommodate their demands, bringing them back within the fold of the law-abiding community. From the squatters and adverse possessors of the nineteenth-century American frontier, to the Native American and civil rights protesters of the 1960s, to the urban squatters of the 1970s and 1980s, those disenfranchised by the existing property system have frequently flouted the law in hopes of achieving their goals. Whatever one thinks about the merits of their positions, there can be no doubt that the activities of these property outlaws have been important engines for legal change.²⁹

Peñalver and Katyal’s triumvirate is defined as follows: the “expressive outlaw,” itself an imperfect form of civil disobedience, is concerned more with the symbolic nature of its gesturality, i.e., the function of sending “a strong *message* about the perceived injustice of existing property arrangements.”³⁰ The “acquisitive outlaw,” on the other hand, does not maintain the symbolic aspect as its main *telos*, but rather engages in acts and gestures which are meant to acquire *immediate* and direct access to or appropriation of certain goods or property.³¹ Anticipating actions which encompass both expressive and acquisitive characteristics, the authors combine these two definitions to derive a third option, the “intersectional outlaw.”

The property outlaw’s *raison d’être* is analogous to that of the contemporary artist without access to an exhibition space: both practices seek to elucidate, symbolically and pragmatically, the inconsistencies of social, cultural, and legal networks and their exclusionary practices. “Intentional lawbreaking as a mechanism for legal change is . . . a strategy employed by those who cannot afford to file civil suits or whose voice in the legislative process is too weak to attract the attention of lawmakers . . . [i]n other words, intentional lawbreaking is a tool of the little people--of the ‘have-nots.’”³²

Clancco’s project, *Structures*, encompasses both the expressive and acquisitive aspects of Peñalver and Katyal’s theory, placing its projects well within the “intersectional” sphere of property outlaws. By seeking an “exhibition” space on private and public land, Clancco acquires a space in which to exhibit its sculptural structures; by doing so through the “flouting” of existing property laws, Clancco also

²⁸ *Id.* at 1098 (emphasis added).

²⁹ *Id.* at 1099.

³⁰ *Id.* at 1102 (emphasis added).

³¹ *Id.*

³² *Id.* at 1100-01.

unveils (expresses) the privatization practices and exclusionary tactics of the current art market and its operating structure.

B. Aesthetic Property

The issues raised by Clancco in its *Structures* project simultaneously address a current trend in intellectual property law. Due to the nature of its origin, materialization, documentation, and perhaps more so, its method of *exhibition*,³³ Clancco's *Structures* project elicits a panoply of aesthetic affects, precisely because it is not directly indexing the given sculptural structure as an art object. The emotions, thoughts, and sensations—characterized here as affects and intellectual engagement—could arguably be an extension of property rights (in this case based on the “art object”). Take, for instance, the experience most individuals have in viewing a construction site. The construction site, the armature being built, the machinery and equipment, the materials, and the labor force are all assets which belong to an individual, a group of people, or a corporation (the owners of the real property, machinery/equipment, construction materials, and labor force). If this construction site elicits in a passing viewer a certain emotive affect and intellectual engagement, then it is logical that the affect produced is conceivably within the “bundle of rights” of the property owner. But why seek to commodify these affects and critical thought? This occurs perhaps because world economies are increasingly based on the expansion of markets and the manipulation of experiences they produce (the commodification and branding of affects), rather than on owning the means of production and the goods themselves.

³³ The inherent risk in this undertaking is that Clancco is elucidating the possibility of allowing one more stick into the owner's bundle of rights, and thus potentially expanding the exploitation of this “right” to powerful corporations and individuals. This extra “stick” would be the right to own any and all affective experiences received by a viewer. This aesthetic property right could also be an asset that is figured into the structure eliciting the affective response regardless of whether or not a viewer/passersby actually experiences anything.



Construction site with Clanco additions, San Bruno, CA

To help us understand this seemingly incongruous argument, it is helpful to note that intellectual property rights in the U.S. evolved from other forms of property rights, primarily those based on agricultural and industrial production.

In his article, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, William W. Fisher III argues that, during the 20th century, information processing came to supplant agricultural and industrial production, thus increasing the need for intellectual property rights.³⁴ The transformation of the role of the U.S. from that of a net consumer of intellectual property to that of a net producer was a related shift; this was propelled by the importance of advertising in the early 20th century.³⁵ Fisher argues that manufacturers *produced* a thirst for their products and simultaneously stabilized consumer demands for them, all through the advertising of corporate brands.

Fisher elaborates on the cultural and ideological aspects which were crucial for the development of intellectual property in the U.S.. In a nutshell, he argues that within

³⁴ See William W. Fisher III, *The Growth of Intellectual Property: A History of Ownership of Ideas in the United States*, in *EIGENTUMSKULTUREN IM VERGLEICH* (1999), available at http://209.85.173.104/search?q=cache:b0Q0cKMB_DkJ:chnm.gmu.edu/digitalhistory/links/pdf/chapter7/7.4.pdf+the+growth+of+intellectual+property+fisher&hl=en&ct=clnk&cd=5&gl=us (last visited Mar. 24, 2008).

³⁵ The importance of the image in the 20th century is crucial but outside the scope for our intensive purposes here.

the U.S., three crucial discourses played an important role: one, the labor-desert theory of property, in which “a person deserves to own something that he or she has created through productive labor,”³⁶ and two, that a government could and should advance the public interest by identifying and rewarding “good works of art and socially valuable inventions.”³⁷ However, it is the third ideological discourse which bears the most relevance for the investigation of the relationship between art and law: the modernist and romantic conception of “authorship” and of the artistic genius. Fisher’s citation of William Wordsworth suits our purpose:

Genius is the introduction of a new element into the intellectual universe: or, if that be not allowed, it is *the application of powers to objects* on which they had not before been exercised, or *the employment of them* in such a manner as to *produce effects hitherto unknown*.³⁸

It is precisely this third factor—granting a “genius” the freedom to apply powers to objects which had not before been exercised and the ability to employ these objects in such a manner as to produce effects—which formulates the current state of intellectual property rights.

Gilles Deleuze predicted this state in his short yet seminal 1990 essay, *Postscript on the Societies of Control*.³⁹ In this essay, Deleuze expands on a society of control where “the corporation has replaced the factory [and where] the corporation is a spirit, a gas.”⁴⁰

But in the present situation, capitalism is no longer involved in production, which it often relegates to the Third World . . . [i]t no-longer buys raw materials and no longer sells the finished products: it buys the finished products or assembles parts. What it wants to sell is services but what it wants to buy is stocks. This is no longer a capitalism for production but for the product, which is to say, for being sold or marketed.⁴¹

Where we once had “controlling the means of production” (agricultural and industrial), we now have controlling the means of marketing and branding. Those that control the image control its reception. Those that own the product own the experience.

³⁶ Fisher, *supra* note 34, at 8.

³⁷ *Id.*

³⁸ William Wordsworth, *Essay, Supplementary to the Preface*, in POEMS (1815), available at <http://bartleby.net/39/39.html> (last visited Mar. 24, 2008) (emphasis added).

³⁹ Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3-7 (1992), available at <http://www.n5m.org/n5m2/media/texts/deleuze.htm> (last visited Mar. 24, 2008).

⁴⁰ *Id.* at 3-7.

⁴¹ *Id.* at 5-7.