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Symposium: Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law

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RECONSTRUCTING THE AUTHOR- SELF: SOME FEMINIST LESSONS FOR COPYRIGHT LAW

CARYS J. CRAIG*

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I. CONSTRUCTING AUTHORSHIP: THE UNDERLYING PHILOSOPHY OF THE COPYRIGHT MODEL

A. Introduction

The theoretical framework of intellectual property law, and copyright law in particular, is premised upon liberal and neo-liberal assumptions. At the core of copyright's functionality are the concepts of private rights, property, ownership, exclusion, and individualism. At the core of copyright's justifications are the concepts of individual entitlement or desert, on one hand, and economic rationality and self-interest on the other. Within this model, authors are individuated, proprietary personalities with a claim to ownership of their intellectual works; these works are the original, stable, and propertizable results of the authors' independent efforts.¹ Far from a situated, communicative act, the authorial activity presupposed by intellectual property is an individual act that produces a commodifiable thing and, of course, a right against all others in relation to that thing.

My aim in this paper is to explore the weaknesses inherent in the law's construction of authorship. Legal doctrine has a self-perpetuating power: the power to naturalize its constructions and cement its abstractions.² I will argue that copyright's reduction and individualization of authorial activity threatens to obscure the "communicative function of authorship"³ and to undermine its role in dialogic community. Copyright's construction of authorship and its focus upon the abstract, individual rights-bearer, therefore, threatens to obscure the social purposes of the copyright system and to undermine its attempts to encourage cultural creativity.

This paper consists of two parts. In Part I, I examine the romantic

1. See GRANTLAND S. RICE, *THE TRANSFORMATION OF AUTHORSHIP IN AMERICA* 76 (1997).

2. *Id.* at 73 (noting the criticism launched by Dierdrich Knickerbocker against "the 'naturalizing' tendency of the explanatory power of legal doctrines"). According to Knickerbocker, we are told, legal theories "only distort and create illusions while 'gravely accounting for unaccountable things.'" *Id.* (quoting ROBERTSON A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 158 (1984)).

3. *Id.* at 70.

conception of authorship that pervades the doctrinal constructs and application of copyright law, a conception that dichotomizes origination and imitation, while individualizing the author and propertizing his product. I also explore the post-romantic critiques to which scholars have subjected this vision of authorship. I will then identify some of the practical and political consequences of the romantic author in the copyright realm, focusing upon its tendency to support broad protection for “original” authors, while chilling downstream uses and silencing cultural exchange. In Part II, I will attempt to establish a route towards re-imagining copyright’s author, employing feminist literary and political theory to reveal the author as a relational self and the nature of authorship as a communicative and dialogic process. This theory of the author-self paves the way towards the re-imagination of a copyright system justified in terms of the social good that resides in communication and cultural exchange of meaning.

B. Authorship, Origination, and Objectification

Authorship is the foundation of copyright. It is authorship that brings into existence the copyrightable work, authorship that establishes the copyright interest, and authorship that determines the first owner of the copyright.⁴ Authorship is therefore a “bedrock principle” of copyright,⁵ and yet, contrary to the immutability and solidity that this might suggest, it is “[o]ne of the more elusive concepts in copyright law”⁶ (which is already full of elusive concepts). Recognizing the centrality of the concept of authorship to the operation and application of copyright law reveals the extent to which our copyright model is guided and shaped by our interpretation of this elusive concept. This in turn reveals that an inquiry into the nature, processes, and products of authorship affords the opportunity to rethink the shape of copyright protection.

In his seminal essay “What Is an Author?” Michel Foucault insisted “it would be worth examining how the author became individualized in a culture like ours . . . and how this fundamental category of ‘the-man-and-

4. See, e.g., Copyright Act, R.S.C., ch. C-42, § 13.1 (1985) (Can.) (“Subject to this Act, the author of a work shall be the first owner of the copyright therein.”). The Act provides no definition of “the author.” References in this article will be to the Canadian copyright legislation. However, these references are only intended to be illustrative, and equivalent provisions and examples can be found in other common law jurisdictions. See, e.g., 17 U.S.C. §§ 101-109 (2006) (granting U.S. copyright protection to “works of authorship”).

5. Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569, 571 (2002) (discussing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)).

6. *Id.*

his-work criticism' began."⁷ Recently, this challenge has been taken up by intellectual property scholars, perhaps most notably Martha Woodmansee and Mark Rose, who have produced important texts on the development of the modern concept of authorship in eighteenth century Germany and Britain respectively.⁸

These examinations reveal the extent to which the modern concept of the author as the sole independent creator of an original work is profoundly ideological and historical.⁹ Through a process of contextualization—locating modern concepts of assumed meaning within the “worlds of significance” in which these meanings developed—such scholarship has brought attention to “just how culturally specific and historically contingent such seemingly transparent terms actually are, and how complex the contexts in which they emerged, were contested, and gained legitimacy.”¹⁰ This recent body of academic literature has provided an important route towards the doctrinal reconfiguration of copyright law by anatomizing the author and demythologizing copyright doctrine. I will explore this route—its justifications and implications—in the discussion that follows. In particular, I hope to show that copyright's current author-figure is both

7. MICHEL FOUCAULT, *What Is an Author?*, in THE FOUCAULT READER 101, 101 (Paul Rabinov ed., 1984).

8. See THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Peter Jaszi & Martha Woodmansee eds., Duke Univ. Press 1994) (1992); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993) [hereinafter ROSE, *AUTHORS AND OWNERS*]; Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 76 (1988) [hereinafter Rose, *The Author as Proprietor*]; MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* (1994); see also Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, 30 REPRESENTATIONS (SPECIAL ISSUE) 109, 130 (1990) (defining “[t]he author as a legal instrument for the regulation of knowledge . . . created by the absolutist monarchy . . . that exercised power through privilege rather than by a constitutional regime”); Molly Nesbitt, *What Was an Author?*, 73 YALE FRENCH STUD. 229, 230 (1987) (stating that all authors are “equated in the law . . . [as a person] given rights to a cultural space over which he or she may range and work”); Mark Rose, *The Author in Court: Pope v Curll (1741)*, 21 CULTURAL CRITIQUE 197, 198 (1992) (noting that in England, the legal empowerment of the author as an owner of property preceded the social creation of professional authorship); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUD. 425, 434 (1984) [hereinafter Woodmansee, *The Genius and the Copyright*] (describing the process before the enactment of copyright laws in Germany through which authors received honoraria of recognition from publishers for works they agreed to print).

9. See, e.g., Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURISPRUDENCE 249, 285 (1993) (“The range of Western beliefs that define intellectual and cultural property laws—that ideas can easily be separated from expressions, that expressions are the singular products of the individual minds of Romantic authors, and that these expressive works can be abstracted from the meaningful worlds in which they figure to circulate as the signs of unique personality . . . are not universal values that express the full range of human possibility, but particular, interested fictions.”).

10. Rosemary Coombe, *Challenging Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397, 398 (1994) (book review).

facilitative and symptomatic of its larger ideological framework and to suggest that this figure/framework limits our ability to comprehend the cultural creativity central to copyright's claims. In Part I, I will turn my attention to the task of reconfiguring copyright's author, retrieving the author from the myths that have defined him. Having set about understanding the past behind the modern conception of authorship, it should become possible to re-imagine its future.¹¹

1. *The "Author"*

Present-day copyright law emerged out of commercial struggles amongst interested parties, occurring at a time and context specific moment in the process of cultural and economic development.¹² It is against this picture of historical contingency that the connection between the romantic author and property theory becomes most evident. I do not pretend to offer here a comprehensive account of the formation of the modern representation of the author,¹³ but it is crucial to recognize that, in spite of its apparent naturalness in the modern age, the modern author "is a relatively recent invention."¹⁴ According to Woodmansee, the modern author is the product of the professionalization of writing that accompanied the growth of public literacy in the eighteenth century.¹⁵ German theorists, elaborating upon the positions taken by English writers such as Edward Young and William Wordsworth, attempted to dislocate the notion of the writer as a master of rules or a receptacle of sublime inspiration in favor of the concept of internalized inspiration or "original genius."¹⁶ The writer was thereby

11. See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 293 (1991).

12. See RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775)* 37-38 (2004). See generally L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968) (providing an excellent account of the historical development of copyright).

13. See MARILYN RANDALL, *PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT AND POWER* 58 (2001) (examining the historical and ideological development of the idea of authorship and defining it "as the attribution of a particular set of authorial functions to the agent of discourse").

14. Woodmansee, *The Genius and the Copyright*, *supra* note 8, at 426.

15. See *id.* (describing how German writers who were unable to survive on writing alone sought to redefine the nature of writing to ameliorate their financial position in society).

16. See *id.* at 446; see also ROSE, *AUTHORS AND OWNERS*, *supra* note 8, at 118 (noting that the commercial value of writing often influences discussions of the work's literary value); Edward Young, *Conjectures on Original Composition: In a Letter to the Author of Sir Charles Grandison*, in *ENGLISH CRITICAL ESSAYS: SIXTEENTH, SEVENTIETH AND EIGHTEENTH CENTURIES* 270, 289 (Edmund D. Jones ed., 1975) (emphasizing concepts of ownership, advising writers to "thysself so reverence, as to prefer the native growth of thy own mind The man who thus reverences himself, will soon find the world's reverence to follow his own. His works will stand distinguished; his the sole property of them; which property alone can confer the noble title of an *author*" (emphasis added)); *Essay, Supplementary to the Preface*, in *LITERARY CRITICISM OF WILLIAM WORDSWORTH* 182, 184

transformed “into a individual uniquely responsible for a unique product. That is, from a (mere) vehicle of preordained truths . . . the *writer* becomes an *author* (Lat. *auctor*, originator, founder, creator).”¹⁷

The exaltation of “original” texts is also a relatively recent phenomenon: the idea of an “author” as a “maker” of an “original” text would have been alien to literary thought in the classical period.¹⁸ Indeed, at this time, copying or imitating the great poets and writers that had gone before was considered a worthy objective and, if done successfully, an admirable achievement.¹⁹ Marilyn Randall explains that, while prior to the eighteenth century “imitation was the aesthetic norm,”²⁰ the eighteenth century saw a “shift from a poetics of imitation to a valorization of originality.”²¹ Aspirations of imagination, novelty, creativity, and originality were of growing importance in the aesthetics of the Romantic period, which emphasized the individual author and the authority that flows from personal genius and sincere expression.²² At the heart of the Romantic ideal is the sanctity of individual creativity. The distinction between imitation and originality is therefore intricately tied to the perceived nature of man, such that true authorship represents the essence of human individuality.²³ The human agent, as author, does not copy without sacrificing his authenticity and obscuring his intrinsic worth. “Authorship

(Paul M. Zall ed., 1966) (quoting Wordsworth’s observation that “[o]f genius the only proof is, the act of doing well what is worthy to be done, and what was never done before Genius is the introduction of a new element into the intellectual universe”).

17. Woodmansee, *The Genius and the Copyright*, *supra* note 8, at 429.

18. *See id.* at 442.

19. *See id.* at 443; *see also* Longinus, *On the Sublime*, in CRITICAL THEORY SINCE PLATO 76, 83-84 (Hazard Adams ed., 1992) (“This writer shows us, if only we were willing to pay him heed, that another way . . . leads to the sublime It is the imitation and emulation of previous great poets and writers This proceeding is not plagiarism; it is like taking an impression from beautiful forms or figures or other works of art.”).

20. RANDALL, *supra* note 13, at 72. When imitation was the norm, the authority or originality of the work depended upon the quality of the imitation, its authenticity, and the legitimacy of the influence. *Id.* at 32. This is in contrast to the aesthetics of the eighteenth century, which saw “the connotations of authority recast in the form of personal genius and inspiration, and the connotations of authenticity, born of the sincerity of expression of the individual and of the intimate connection between product and producer.” *Id.* at 51.

21. *See id.* at 47.

22. *See id.* at 47-48 (quoting ROLAND MORTIER, L’ORIGINALITÉ: UNE NOUVELLE CATÉGORIE ESTHÉTIQUE AU SIÈCLE DES LUMIÈRES 134-35 (1982)) (“The novelty brought about by the eighteenth century was the preference accorded to direct and immediate expression that was faithful and sincere to feelings and ideas. The fact of borrowing images, formal schemas, and existing structures will be considered as an infraction of that sincerity.”).

23. *See id.* at 49-50 (noting that qualities that are learned and acquired over our lifetime are thereby regarded as stifling an innate quality that is original and authentic); Young, *supra* note 16, at 283 (portraying originality as unlearned and innate to the nature of man). Young famously wrote, “Born originals, how comes it to pass that we die copies?” *Id.* at 285.

retains, in the eighteenth century, both the connotations of authority recast in the form of personal genius and inspiration, and the connotations of authenticity, born of the sincerity of expression of the individual and of the intimate connection between product and producer.²⁴

In the nineteenth century, the addition of what Randall terms the “great author” phenomenon compounded the concept of individual authorship.²⁵ Originality came to be regarded as the mark of an individual’s genius and greatness particular to him.²⁶ Consequently, imitation signified inferior or “failed authorship,”²⁷ presumably by a lesser person. A great author was a “great soul emitting inspired and universal truths,”²⁸ while lesser humans could merely follow suit by learning, imitating, and borrowing.²⁹ Viewed as such, the originator has a personal and moral claim to right that is not shared by the imitator, and indeed, the imitator threatens to undermine the originator’s claim: imitation is thus the “scourge” of great literature.³⁰

The valorization of the individual author and his originality, and the resulting denigration of imitation that is captured in this description of nineteenth century authorship, is axiomatic in modern copyright law. Copyright’s subject is the author-as-originator. The “author” is defined by and rewarded because of the “originality” of his creation,³¹ with the essence of copyright’s standard of originality being independent production.³² And, of course, the unworthy imitator is copyright’s infringer.³³

24. RANDALL, *supra* note 13, at 51.

25. *Id.* at 54.

26. *Id.* at 51.

27. *Id.* at 52.

28. *Id.* at 54.

29. *Id.* at 50 (differentiating between learned knowledge, ability, and innate genius, stating “genius is from Heaven, learning from man Learning is borrowed knowledge; genius is knowledge innate, and quite our own”).

30. *See id.* at 51 (translating PIERRE LAROUSSE, GRAND DICTIONNAIRE UNIVERSEL DU 19ÈME SIÈCLE (1866)) (noting that imitation is “‘the most fertile source of literature,’ which ‘is also its scourge’”).

31. *See* Copyright Act, R.S.C., ch. C-42 § 5.1 (1985) (“Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every *original* literary, dramatic, musical and artistic work.” (emphasis added)); Carys J. Craig, *The Evolution of Originality in Canadian Copyright Law: Authorship, Reward, and the Public Interest*, 2 U. OTTAWA L. & TECH. J. 425, 444 (2005) (discussing the meaning of “originality” in Canada and its connection to theories of authorial right elsewhere).

32. *See* Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd., (1916) 2 Ch. 601, 608-09 (U.K.) (holding that, at its most minimal, originality “does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author”).

33. *See* R.S.C., ch. C-42 §§ 2, 3.1 (determining that the copyright owner has “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever,” and that “any copy, including any colourable imitation” of a work in which copyright subsists is “infringing”); R.S.C., ch. C-42 § 27.1 (announcing that it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that only the owner of the copyright has the right to do).

It is true that copyright does not concern itself with questions of genius, quality, or even creativity: it attaches to the most mundane of works,³⁴ resists inquiry into the objective value of the author's contribution,³⁵ and offers protection to works that demonstrate either the merest spark of creative effort, or sometimes, none at all. Thus, for example, a person in Canada exerting only a minimal (if more than trivial) amount of skill or judgment in additions or alterations to pre-existing works can nevertheless claim the title of "author" and ownership of her copyrightable contribution.³⁶ The fact that she copies a substantial portion of another's work does not negate her own authorial contribution. Furthermore, the law makes some allowances for such downstream uses of protected works by limiting infringement to cases of "substantial" copying³⁷ and even by permitting substantial copying for certain specific purposes.³⁸

While these features of the modern copyright system would seem to imply that copyright's author is in fact very far from the individual genius postulated in Romantic rhetoric, this apparent disparity simply reflects a divergence between copyright's reality and its guiding rationale. In reality, the copyright system does not demand that the "author" be the equivalent

34. See, e.g., *Desktop Mktg. Sys. Pty. Ltd. v. Telestra Corp.*, (2002) 119 F.C.R. 491 (Austl.) (finding that copyright protection attached to telephone directories); *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1963] 1 W.L.R. 273 (H.L.) (appeal taken from C.A.) (U.K.) (attaching copyright to betting coupons). Copyright is not reserved for "works of art" or "literature" within the ordinary meaning of such terms: it will vest equally in a child's scribble and a great painting, a grocery list and a great novel.

35. See *Univ. of London Press*, 2 Ch. at 608 (suggesting that courts have resisted inquiring into the artistic or literary quality or merit of a work when establishing whether the subject matter is one to which copyright attaches and that "the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' . . . refers to written or printed matter"); see also *DRG Inc. v. Datafile Ltd.*, [1991] 35 C.P.R. (3d) 243 (Can.) (observing that "artistic work" is used merely as a generic description of the type of works which find expression in a visual medium).

36. See e.g., *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, [2004] S.C.R. 339 (Can.) ("[A]n 'original' work under the Copyright Act is one that originates from an author and is not copied from another work. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise."). Applying this standard, plaintiffs were held to have copyright in reported judicial decisions by virtue of having arranged the case summary, catchlines, case title, and case information in a specific manner, although they did not have copyright in the judicial reasons themselves. *Id.*

37. See R.S.C., ch. C-42 § 3.1 (granting to authors rights over their work "or a substantial part thereof"); see, e.g., *Preston v. 20th Century Fox Can. Ltd.*, [1990] 33 C.P.R. (3d) 242 (Can.) (clarifying that if the portion used by the defendant is not either qualitatively or quantitatively a substantial part of the protected work, there is no infringement).

38. See R.S.C., ch. C-42 § 29 (expressing some limitations and exceptions to the rights of copyright owners for research or private study, such as defenses for fair dealing with copyrighted works, criticism or review, and news reporting, subject to certain conditions). Other available exceptions address specific uses that may be made of protected works by educational institutions, libraries, archives, and museums. R.S.C., ch. C-42 § 30.

of the “great man” eruditely writing in his garret, nor does it ask that the “original” work represent his novel or brilliant musings. Equally, the system does not deny the possibility of some copying and derivative use by authors and others. Indeed, as Jessica Litman has argued, the copyright fiction of “original” authorship is sustainable because copyright law concedes the concept of a public domain upon which authors are free to draw.³⁹ The argument, however, is that these ideals of individual origination inform our sense of the author’s right, and so have become engrained in the underlying rationale of the copyright system. This, in turn, defines the way in which that system works.

Let us return to the proposition that copyright’s subject is the author-as-originator: the “author” is defined by, and rewarded because of, the “originality” of his creation,⁴⁰ with the essence of copyright’s standard of originality being that of independent production. Irrespective of whether copyright doctrine requires creativity, skill, or merely labor, the copyrightable work must “originate” from the author and must not be copied from any other source.⁴¹ Only those elements of the downstream author’s work that are said to be original to that author, in this sense, shall fall within the monopoly that copyright provides.⁴² It is true that none of these requirements in fact demands a demonstration of genuinely *de novo* origination, but once declared “original,” the difference between reality and rhetoric is easily forgotten.⁴³

And what of the second proposition, that the unworthy imitator is copyright’s infringer? It is true that the downstream author who copies substantially from another may also be an original “author,” but that her relevant role in the copyright scheme is now that of an “infringer”: a permanent injunction can be issued to restrain her from continued use of

39. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1023 (1990) (“The public domain . . . permits us to continue to exalt originality without acknowledging that our claims to take originality seriously are mostly pretense. It furnishes a crucial device to an otherwise unworkable system by reserving the raw material of authorship to the commons, thus leaving that raw material available for other authors to use. The public domain thus permits the law of copyright to avoid a confrontation with the poverty of some of the assumptions on which it is based.”).

40. See Copyright Act, R.S.C., ch. C-42 § 5.1 (1985); Carys J. Craig, *The Evolution of Originality in Canadian Copyright Law: Authorship, Reward, and the Public Interest*, 2 U. OTTAWA L. & TECH. J. 425, 444 (2005).

41. CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] S.C.R. 339 (Can.).

42. See, e.g., *id.* (determining that, with respect to compilations of judicial opinions, the judicial reasons without the headnotes are not original works in which the publishers could claim copyright, and that it would not be copyright infringement for someone to reproduce only the judicial reasons).

43. Of course, it can be said that nothing is truly “original” in this sense, and that “independent creation” is no more than a legal fiction employed to permit the existence of a copyright system, amongst other things. But the more that we are told the same story, the more real it becomes.

the infringing work as a whole, and an order can be made for surrender of any infringing copies.⁴⁴ While copyright law permits insubstantial copying, the substantiality of the taking is determined not with reference to the totality of the downstream work, but instead with reference to the original protected work: no infringer can avoid liability by pointing to what she has created in addition to what she has copied.⁴⁵ And while even substantial copying may be permitted in some circumstances, such circumstances are unduly limited, and defenses for *prima facie* infringements are rarely successful.⁴⁶

With these considerations in mind, it seems that the copyright system is built around the moral divide between original (independent) authorship and downstream (derivative) expression.⁴⁷ However, the moral divide between author and copier, between origination and imitation, is as untenable in today's "post-modernity" as it was in the literary aesthetics of pre-Romantic eras. It captures and hypostasizes a moment in the evolution of authorship; and that moment has passed.

In 1968, Roland Barthes famously declared the "death of the author."⁴⁸ This pronouncement did not signal the death of the author concept *per se*, but rather the demise of its Romantic and post-Romantic conceptualization.⁴⁹ In repudiating this instantiation of the author-figure, post-structuralist literary theory undermined the significance of the "biographical author-person" and "the confidence placed in individual

44. Copyright Act, R.S.C., ch. C-42 § 39.1 (1985); see *Horn Abbott Ltd. v. W.B. Coulter Sales Ltd.*, [1984] 77 C.P.R. (2d) 145 (Can.) (determining that in the case of copyright, actual damage need not be proved because the right of the owner of a copyright is not measured by the amount of the actual damage suffered). Copyright is a type of property and the owner is entitled to protection of that property. *Id.* If infringement is proven, an injunction will issue without evidence of actual damage. *Id.*

45. *C. P. Koch Ltd. v. Cont'l Steel Ltd.*, [1984] 82 C.P.R. (2d) 156, 164 (Can.) ("Whether copying of some substantial part has or has not occurred is a fact which must be determined in the light of all circumstances. However, it is no defence that a defendant may have added original material of his own to an original work copied.").

46. Carys J. Craig, *The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform*, in *IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 437, 445 (Michael Geist ed., 2005).

47. See RANDALL, *supra* note 13, at 77.

48. ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142, 148 (Stephen Heath trans., 1977).

49. See RANDALL, *supra* note 13, at 57 ("The notion of the individual 'author' that emerged, and that Barthes and others take to be the one which died—or was put to death—at the end of the 1960s, is only a moment in [the historical evolution that 'our society' underwent from the Middle Ages through to the Enlightenment], hypostasized as its final—or essential—form."). Notwithstanding the death of the author identified by Barthes then, Randall insists, "[t]he Author is alive and well in contemporary aesthetics, as well as in contemporary literary theory and criticism, surviving as a network of functions that, if one abstracts the historically brief—and illusory—moment of the Romantic fetishization of 'original genius,' are not remarkably different from those traditionally attributed to authorship." *Id.* at 59.

agency and control over discourse that involves, inevitably, a belief in the possibility of creative originality.”⁵⁰ The contemporary demystification of authorship insists upon the “practical impossibility” of independent creation and declares that all texts are *necessarily* reproductions of other texts:⁵¹ it is in the nature of expression and cultural development that the new builds upon the old.⁵² Regarded in this light, the act of writing involves not origination, but rather translation and recombination of “raw material” taken from previously existing texts. In Jessica Litman’s words, authorship is essentially a “process of adapting, transforming, and recombining what is already ‘out there’ in some other form.”⁵³ What we hail as “creativity” is really the result of “a combination of absorption, astigmatism, and amnesia.”⁵⁴ In Barthes’ vision,

[t]he text is a tissue of quotations drawn from the innumerable centres of culture . . . the writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.⁵⁵

To the extent that we accept this description of the creative process, the label of “originality” can do little more than legitimize (and valorize) texts “that draw[] on a broad range of anonymous textual material over [texts that draw] only on identifiable sources.”⁵⁶ This may appear to be an arbitrary basis upon which to determine a text’s worth, but it is the gold standard for copyrightability in a copyright system that clings to the vision of the author as *creator ex nihilo*.⁵⁷

In light of such reasoning, it has become a fairly common feature of

50. *Id.* at 28.

51. Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHL-KENT L. REV. 725, 756-57 (1993) (asserting that texts are necessarily “reproductions” of other texts, not in the legal sense of having reproduced a substantial part of any particular pre-existing work, but in the sense that they derive from, draw upon, and incorporate within them, an unspecifiable array of pre-existing texts that have influenced and shaped the author and the cultural standpoint from which she speaks). “It is hardly possible to accept a critical view which confuses the original with the aboriginal, and imagines that a ‘creative’ poet sits with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo*. Human beings do not create in that way. Just as a new scientific discovery manifests something that was already latent in the order of nature, and at the same time is logically related to the total structure of the existing science, so the new poem manifests something that was already latent in the order of words Poetry can only be made out of other poems; novels out of other novels.” *Id.* at 756 (quoting NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* 97 (1957)).

52. Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of “Authorship,”* 2004 BYU L. REV. 69, 94.

53. Litman, *supra* note 39, at 967.

54. *Id.* at 1011.

55. BARTHES, *supra* note 48, at 146.

56. See Rotstein, *supra* note 51, at 757-58.

57. See *id.* at 756.

critical copyright scholarship to assert that the Romantic aesthetic is responsible for the shape of copyright law and its conception of authorship.⁵⁸ The extent to which the law commits modern copyright to a Romantic ideology remains a subject for discussion,⁵⁹ but there is little doubt that copyright law reinforces an exclusionary ideal of the individual author that reflects a particular ideology and a particular locus in history. While copyright readily extends protection to the banal and commonplace—works that are undoubtedly far from the level of romantic aspiration—the label of “author” and its concomitant romanticization ensure that these uninspired works are nevertheless over-protected, and that such “original authorship” is disproportionately valued against excluded forms of cultural expression. Indeed, the less copyright’s subject-matter looks like the creation of a Romantic author, the more powerful is the role of Romantic ideology in maintaining the moral divide between author and

58. This line of argument—insisting that the Romantic authorship concept continues to function and define our law—has been most famously pursued by James D. A. Boyle. See, e.g., JAMES D. A. BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996) [hereinafter BOYLE, SHAMANS, SOFTWARE AND SPLEENS]; James D. A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 631 (1988) [hereinafter Boyle, *The Search for an Author*] (proffering that the Romantic “conception of the status of authorship, of the relationship of art to commerce, of the illegitimacy of ‘borrowing’ from other works—is actually a comparatively modern one”); see also Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 S. ATLANTIC Q. 947, 948 (1996) (discussing how intellectual property law evolved alongside of and, to a surprising degree, in dialogue with Romantic literary theory, especially dealing with Continental authors’ rights); Peter Jaszi, *Towards a Theory of Copyright: The Metamorphosis of Authorship*, 1991 DUKE L.J. 445, 456 [hereinafter Jaszi, *Towards a Theory of Copyright*] (“Law’s reception of ‘authorship’ began well before the heyday of Romanticism in the late eighteenth and early nineteenth centuries. But . . . it is not coincidental that precisely this period saw the articulation of many doctrinal structures that dominate copyright today. In fact, British and American copyright presents myriad reflections of the Romantic conception of ‘authorship’—even if they sometimes remind one of images in fun-house mirrors.”).

59. See Anne Barron, *Copyright Law and the Claims of Art*, 2002 INTEL. PROP. Q. 368, 369 (arguing that “copyright law’s debt to Romanticism has been vastly overstated”). Barron contends that this overstatement is the result of an excessive focus upon the subject of copyright (the author) at the expense of the object of copyright (the protected work). *Id.* The connection between copyright discourse and aesthetic theory is best seen in copyright’s definition of the “work,” which reflects “if anything a Modernist—not a Romantic—aesthetic.” *Id.* at 370. This is an interesting critique of the anti-Romanticist position, but I would tend to support the centrality of the author to copyright’s doctrinal form and regard the construction of the “work” as a consequence thereof. The mistaken notion of the work as “stable, fixed, closed, self-contained, and autonomous of its context and audience” seems to me to flow from the propertization of the intellectual work, which relies in part upon the individuation and origination reflected in copyright’s version of authorship. See *id.*; see also Boyle, *The Search for an Author*, *supra* note 58, at 629 (“This transcendental insight or genius [presumed by the Romantic model] plays a very important role in establishing the author as the ruler of the text. It ‘goes without saying’ that the author’s interpretation governs because it is the author’s genius, the author’s special knowledge, which created this piece of art *ex nihilo*.”); Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 472 (“The ‘authorship’ concept, with its roots in notions of individual self-proprietorship, provided the rationale for thinking of literary productions as personal property with various associated attributes including alienability.”).

copier.

It should be evident that there is nothing natural or necessary about the particular conception of authorship embraced by the current copyright model. With this acknowledgement comes the space to ask about the appropriate conception of authorship for the purposes of copyright and to inquire into the kinds of cultural creativity and communicative activity that the current concept excludes (or even precludes). Randall defines authorship as “the attribution of a particular set of authorial functions to [an] agent of discourse.”⁶⁰ If this is the transhistorical significance of authorship, then the label of “author” performs a function; it does not state a fact. It must be asked, then, what function does copyright’s version of authorship perform?

2. *Propertization and the Concept of the “Work”*

With the transformation from inspired imitator to original creator complete, it seems clear that “the writer’s claim to a property interest, particularly one based on natural rights, becomes more credible.”⁶¹ As Randall notes, “[t]he theme of intellectual production as property is never very far from the concerns of those involved with defending literary ethics and aesthetics.”⁶² If the triumvirate of authority, authenticity, and originality make up the essential elements of authorship,⁶³ a crucial fourth element is that of ownership. The enduring relationship between authorship and ownership suggests a link between the emergence of the modern author-figure and the acceptance of proprietorship in the literary realm.⁶⁴

60. RANDALL, *supra* note 13, at 58.

61. Durham, *supra* note 5, at 615.

62. RANDALL, *supra* note 13, at 71.

63. *Id.* at 28.

64. This is not to say that the link is a causal one: proprietorial attitudes towards intellectual production existed long before the Romantic period. *See id.* at 65 (“It is commonly and not unreasonably believed that modern plagiarism is a product of the development of copyright laws that depend, in turn, on the rise of individualism and capitalism in Enlightenment Europe. But this socio-economic model is not entirely satisfactory, as it does not explain . . . the almost continuous existence of plagiarism as at least a breach of ethics since ancient times.”). The concept of plagiarism generally reflects a belief that “appropriating another’s discourse is theft,” and thus presumes that there is something akin to property to be thieved. *Id.* at 67. The link between Romantic concepts of original authorship and Enlightenment concepts of the possessive individual is therefore best characterized as one of mutual facilitation: one does not entail or necessitate the other, but each supports and complements the other. *See RICE, supra* note 1, at 93 (noting that advocates for literary property in antebellum America were keen to enjoy the benefits afforded by such rights, but many were wary of the transformation of authorship that would come with a proprietary model and “actively resisted this categorization”); ROSE, *AUTHORS AND OWNERS, supra* note 8, at 82 (exploring the relationship between authorship and proprietorship); Rose, *The Author as Proprietor, supra* note 8, at 78 (implying that the traditional concern with authors’ property rights is strained by the current literary thought,

The valorization of original genius lent weight to claims by “authors” to property in their writings, and so ought not to be completely set apart from the proliferation of more general commercial motivations during this period of socio-economic change.⁶⁵ Indeed, in the realm of law, the emergent concept of author-genius was developed strategically to further commercial goals, lending its ideological power to economic self-interest:

Although the concept of “authorship” was introduced into English law for the functional purpose of protecting the interests of booksellers (and continued to do so throughout the eighteenth century and beyond), the term took on a life of its own as individualistic notions of creativity, originality, and inspiration were poured into it. “Authorship” became an ideology As the “authorship” construct accumulated force and circumstantiality, the strategic manner in which the construct initially had been deployed was effaced.⁶⁶

By the time the vocabulary of copyright law began embracing the term “authorship,” the word “author” already had acquired connotations of power, or “author-ity.”⁶⁷ As the institution of copyright emerged in the eighteenth century, it thrived on the general philosophical discourse of the time, wherein concepts of “‘authorship’ and ‘control’ already were intimately associated” with the “individual” and “property,” and aspects of what Ian Watt has termed the “vast complex of interdependent factors denoted by the term ‘individualism.’”⁶⁸ As Grantland Rice argued, the issue believed to be at stake in the literary-property debates of the time was “no less than one of philosophical underpinnings” of liberal thought,⁶⁹ or what C.B. Macpherson identified as “possessive individualism.”⁷⁰ In other

which emphasizes the idea that texts permeate and enable each other, and therefore distinct boundaries between separate texts are now hard to sustain).

65. Cf. Hesse, *supra* note 8, at 130-31 (arguing that in revolutionary France, political as well as socio-economic factors were at play in the reconception of authorship). According to this argument, the idea of the individualistic author was introduced by the monarchist State as a means of regulating knowledge. *Id.* at 130. Revolutionary legislation propertized the “author’s” claim to his writing, but did so in order to ensure maximum exchange, recasting the notion of the “author” as a public servant as opposed to a private individual. *Id.* Revolutionary politics and a concern for public life, led the legislators to produce “a legal conception of authorial identity that not only consecrated but also limited the author’s power of self-determination for the sake of the public good.” *Id.* at 131.

66. Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 471.

67. See generally Boyle, *The Search for an Author*, *supra* note 58 (analyzing the “author-ity” argument dealing with Shakespeare’s works and how it relates to the theory of original intent by claiming that the author with “author-ity” has an opinion and facts that receive credibility standing alone).

68. Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 469 (citing IAN WATT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON AND FIELDING* 60 (1957)).

69. RICE, *supra* note 1, at 89.

70. C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 3 (1962) (defining “possessive individualism” as the “conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them”).

words, “the enlightenment project of freeing the individual from dependence predicated the possession of property.”⁷¹ Thus, the theme of Lockean and Hobbesian possessive individualism that dominated social thought ensured that the word “author” was invested with particular weight.⁷²

Foucault described the emergence of this notion of “author” as “the privileged moment of *individualization* in the history of ideas, knowledge, literature, philosophy, and the sciences.”⁷³ Through this process of individualization, the “author” acquired “a role quite characteristic of our era of industrial and bourgeois society, of individualism and private property.”⁷⁴ The individuality and “originality” of “authorship” in its modern form therefore established a simple route towards individual ownership and the propertization of creative achievement. The elevation of the “author” achieved through the notion of original genius legitimated writers’ claims to property in their writings, allowing a shift in the author’s role towards “that of a professional trading in a new form of commodity.”⁷⁵ This modern and highly individuated concept of “authorship” possesses an almost “alchemical power to transfer anything it can be made to adhere to into *property*, absolutely defined.”⁷⁶

The individualization of the author is both complimented and compounded by the propertization of the author’s product, and so the modern author, as an originator, became a proprietor, and his product became a “special kind of commodity.”⁷⁷ Ownership claims flowed from the trope of origination as appropriation. This connection between the Romantic persona of the author-as-originator and the proprietary interest accorded to him in his “work” is a major component of the “the solid and fundamental unit of the author and the work.”⁷⁸ It is the conceptual unit

71. RICE, *supra* note 1, at 89.

72. See MACPHERSON, *supra* note 70, at 269 (construing both Hobbes’s and Locke’s theories of possessive individualization as beginning with the individual “created in the image of market man” and then “mov[ing] out to society and the state”).

73. FOUCAULT, *supra* note 7, at 101.

74. *Id.* at 119; see also Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 467 (quoting A. KERNAN, *THE DEATH OF LITERATURE* 123 (1990)) (“[T]he appearance in the eighteenth century of copyright laws and the linked artistic ideas like creativity and originality as a conversion of . . . ‘things of the mind into transferable articles of property . . . [that] has matured simultaneously with the capitalist system.’”).

75. Coombe, *supra* note 10, at 405.

76. Rosemary J. Coombe, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 *STAN. L. REV.* 1357, 1358, 1361 (1996) (emphasis added) (arguing that the authorial “work” operates to silence the Other, struggling against “forces of alterity that operate as dangerous supplements to the integrity of the author/work relationship,” and positing that “authorial tropes” legitimize appropriation and expropriation at the expense of dialogic public spheres and communicational ethics).

77. ROSE, *AUTHORS AND OWNERS*, *supra* note 8, at 1.

78. FOUCAULT, *supra* note 7, at 101.

around which copyright is built.

Having complicated the operative assumptions of copyright's authorship concept, it is appropriate to reconsider the concept of the author's *product*: the original "work" that is the result of authorship, so defined. The notion of a "work" currently enshrined in copyright law is no more inevitable than that of the "author" and has similarly been the subject of doctrinal reification or the "naturalizing" tendency of law.⁷⁹ "Work," as a term of art in modern copyright law, represents the commodified version of a text produced by the Romantic figure of the professional "author."⁸⁰ Put another way, the term "work" solidifies the literary property notion, embracing the idea of creative production as an independent, identifiable, and alienable object of personal property; the author's work is an object of appropriation.⁸¹

Copyright dogma thus depicts the "work" as an autonomous object with immutable characteristics and a fixed textual meaning: an abstraction that clearly facilitates its propertization as an essential adjunct to the individualization of the "work's" "author." The idea of the "work" as a discrete or free-standing entity differs greatly from the understanding of "text" that existed from the classical period through the Renaissance, when, as Rose explains: "the dominant conception of literature was rhetorical. A text was conceived less as an object than as an intentional act, a way of doing something, of accomplishing some end such as 'teaching and delighting.'"⁸²

From the late seventeenth century to the nineteenth century and the Romantic period, literary creations evolved into property and commodity; the "text" became a "work," an object of knowledge and meaning rather than a behavioral process of action and reaction.⁸³ The propertization of literary creativity demanded this vision of the text as a stable object capable of commodification; a vision that paired easily with the Romantic understanding of originality and author-genius.⁸⁴ Indeed, our continued attachment to the notion of the sole author and the solitary genius, in spite of the disaggregationist impulse of our postmodern age, might be regarded as a testament to the power of modern capitalism in which texts function as

79. See Durham, *supra* note 5, at 614 (emphasizing that one must first identify "what is truly essential to authorship and the rights that flow from [a work]. A typical work of authorship embodies labor and personality, and society's interest in possessing the work justifies the grant of exclusive rights.").

80. See *id.* at 615; ROSE, *AUTHORS AND OWNERS*, *supra* note 8, at 132.

81. See RICE, *supra* note 1, at 79.

82. Rose, *The Author as Proprietor*, *supra* note 8, at 63.

83. Rotstein, *supra* note 51, at 733-35.

84. See Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 479.

another form of private property.⁸⁵

Rice describes the debates in nineteenth century America over the corporeality of the literary product as reflective of “the shift in legal thinking from political accounts of the *activity* of authorship to economic formulations of the *materiality* of authorship.”⁸⁶ According to Rice, the efforts of lobbyists to recast authorial activity as the creation of material capable of ownership and appropriation caused the debate over copyright to be “preoccupied with the object—rather than on the act of—public writing,” with the result that it “collapsed the intentional and communicative aspects of publication into an understanding of authorship that was no different than any other productive activity.”⁸⁷ When the results of authorship are cast as a stable, almost corporeal entity, the communicative and textual nature of the work is obscured. In the construction of the copyrightable work, then, the element of communication is sacrificed to commodification, and speech is mischaracterized as property (in the material and not just the relational sense).

In the latter half of the twentieth century, accompanying the demise of the modern author-figure, the concept of the static literary work was increasingly questioned through the lens of structuralist and post-structuralist thought.⁸⁸ Structuralists thought the “work” to be located within a broader context than that of a free-standing object with internalized significance, as a system of signs and conventions that acquire meaning only through the process of assimilation by the reader.⁸⁹ Post-structuralist critique went further still, questioning the possibility of a fixed identity or meaning for any text, and understanding the reader and reading as determinative of a text whose identity must therefore be in a constant state of flux.⁹⁰ In 1979, Barthes announced the end of the literary “work” as a fixed object of stable meaning to be passively consumed.⁹¹ In its place he proclaimed the literary “text,” an entity situated in language and suspended in a continual state of production in which readers are authorial

85. See HOLLY A. LAIRD, *WOMEN COAUTHORS 2* (2000) (noting that our impulse to embrace text in the realm of private property may explain our persistent commitment to the individualized author-figure who legitimizes the propertization of text (and not merely vice versa)).

86. RICE, *supra* note 1, at 91.

87. *Id.* at 91-92.

88. See Rotstein, *supra* note 51, at 735-36.

89. See *id.* at 735-36.

90. See *id.* at 736. See generally STEPHEN CONNOR, *POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* (2d ed. 1997) (1989) (providing a postmodernist critique of modernism).

91. Roland Barthes, *From Work to Text*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 73, 74 (Josué V. Harari ed., 1979).

collaborators, interpretation is “intertextual,” and meanings are fluid and infinite.⁹² The boundaries between the “author” and the reader are thereby disintegrated as the “reader becomes an overt collaborator in an unending process of reading and writing . . . returning us to something very like the expressly collaborative writing milieu of the Middle Ages and the Renaissance with which we began.”⁹³

The post-structuralist challenge to the consensus generally surrounding copyright’s characterization of the “work” highlights some critical fault lines in the assumptions of our copyright model.⁹⁴ As the concept of the free-standing “work” is undermined by claims of “inter-textuality” and “audience recoding,” copyright’s “thingification” of the text becomes increasingly apparent and problematic. Again, by problematizing the object of copyright we can create an interpretative space within which to rethink the nature of the “copyrightable work.” Learning from the post-structuralist critique, we might begin this process by relinquishing the notion of the “work” as a noun (a static object) and reconceptualizing “work” as a verb (a communicative activity).

C. The Practical and Political Consequences for Copyright

Post-structuralism directly challenges many of the ideas central to the current system of copyright by throwing into confusion the copyright trinity of “originality,” the “author,” and the “work.” As a result of interlocking dependencies, a challenge to any one of these concepts disrupts the delicate balance. To doubt any one, then, is to doubt all three; to dissolve the significance of one is to destabilize the foundations of modern copyright law. It is possible, however, to disaggregate the current meaning of these concepts without effecting the disintegration of the

92. See *id.* at 73-80.

93. Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 290 (1992) (discussing the reversal in the “trajectory of print” in the context of electronic communication and interactive hypertext, and, in particular, in relation to JAY DAVID BOLTER, *WRITING SPACE: THE COMPUTER, HYPERTEXT, AND THE HISTORY OF WRITING* (1991)).

94. See Rotstein, *supra* note 51, at 739-40 (positing that the radical deconstruction of the concept of the “work” could be incorporated into a dramatic reconfiguration of copyright law). Because literary theory understands text as having an identity as a “speech event involving interaction among a producer (the ‘author’), the textual artifact (book, movie, song, computer program), and a recipient (reader, viewer, listener),” it fosters a copyright system that seeks to determine what is consistent about a text in a particular context. *Id.* at 739. An infringement action would therefore involve “a universe of discourse in which it is possible as a practical matter to reach agreement on the identity of the text such that copyright law can meaningfully adjudicate.” *Id.* at 740; cf. Keith Aoki, *Adrift in the Intertext: Authorship and Audience ‘Recoding’ Rights—Comment on Robert H. Rotstein*, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,” 68 CHI.-KENT L. REV. 805, 809, 811-12 (1993) (arguing that literary theory cannot be assimilated into copyright law due to its exaggerated claims about the “death of the author”).

copyright system. To achieve this requires that we re-evaluate the foundations and justifications of copyright as a whole, and re-imagine the concepts around which modern copyright law is built. In Part II of this paper, I will attempt to provide a route towards this re-imagination. In the remainder of Part I, my purpose is simply to underscore the political and practical implications of the current theoretical model. While the issues addressed thus far may appear unduly abstract, it is important to stress that they have very real consequences for the interpretation, application, and operation of copyright law.

1. *The Author Function at Work*

According to Mark Rose, “[m]uch of the notorious difficulty of applying copyright doctrine to concrete cases can be related to the persistence of the discourse of original genius and to the problems inherent in the reifications of author and work.”⁹⁵ While the aesthetic theory surrounding the emergence of the Romantic author-figure may sound distinctly antiquated, it is submitted that the fetishization of the individual and original author is still very much alive in our current construction of copyright and the policies that inform its development.

As evolving technologies have presented new challenges for intellectual property policy, the authorship concept has been used to justify the extension of copyright’s subject matter and the scope of the protection it affords. From early cases concerning the copyrightability of photographs⁹⁶ to controversies over the protection of computer software,⁹⁷ the spectre of

95. ROSE, *AUTHORS AND OWNERS*, *supra* note 8, at 141.

96. *See, e.g.*, *Nottage v. Jackson*, (1883) 11 Q.B.D. 627, 635 (U.K.) (Cotton, L.J., concurring) (explaining that “‘author’ involves originating, making, producing, as the inventive or master mind, the thing which is to be protected”). “[T]he true definition of ‘author’ . . . was the man who really represents or creates, or gives effect to the idea or fancy, or imagination.” *Id.* at 637 (Bowen, L.J., concurring); *see also* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (using this concept of “authorship” to grant a photographer copyright protection). In *Burrow-Giles*, the Court found that the plaintiff made the picture “entirely from *his own original mental conception* [F]rom [the] disposition, arrangement, or representation, made entirely by the plaintiff, he produced the picture in suit.” *Id.* at 54-55 (emphasis added). Therefore, the copyright was justified on the basis of “views of the nature of authorship and of originality, intellectual creation, and right to protection.” *Id.* at 61.

97. *See* *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1248 (3d Cir. 1986) (holding that copyright protection could extend to a computer program’s “structure, sequence and organization”). Protection for computer programs is often justified by means of a comparison between the programmer and the literary “author” who imagines, inspires, and creates. *Id.* at 1248; *see also* Anthony L. Clapes, Patrick Lynch & Mark R. Steinberg, *Silicon Epics and Binary Bards: Determining the Proper Scope of Protection for Computer Programs*, 34 UCLA L. REV. 1493, 1510-45 (1987) (outlining how a tendency toward limiting copyright protections does not adequately protect computer programs because, unlike other copyrightable forms, marketing computer programs signifies publishing); Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 463 n.23 (noting that the creative process of creating computer programs is similar to the creative process a literary author

Romantic authorship has been invoked and manipulated to support the claims of those who stood to benefit from the monopoly rights that copyright could confer.⁹⁸ In recent debates over peer-to-peer technologies, the venerated author-figure has been reinvigorated by the appeals of recording industry stakeholders whose “public education” and lobbying strategies point to the noble and deserving artist as a reason to stamp out online file sharing.⁹⁹ In the case of the computer software debate, appeals to authorship tended to obscure the actual practical and policy concerns posed by the protection of software for this burgeoning industry and ultimately supported the interests of the large corporate bodies whose products (and profits) depended upon this putative authorship.¹⁰⁰ Similarly, in the file-sharing debates, it is the corporate actors who stand to benefit most from the regulation and commercialization of music downloading.¹⁰¹

undertakes).

98. See Michael J. Madison, Comment, *Where does Creativity Come From? And Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747, 757-58 (2003).

99. See Recording Industry Association of America, Issues – Copyright, <http://www.riaa.com/issues/copyright/default.asp> (last visited October 29, 2006) (describing “copyright” in terms favorable to the artist: “You don’t need to be a lawyer to be a musician, but you do need to know one legal term—copyright. To all creative artists—poets, painters, novelists, dancers, directors, actors, musicians, singers, and songwriters—the term matters dearly. Copyright is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To artists, ‘copyright’ means the chance to hone their craft, experiment, create, and thrive. It is a vital right, and over the centuries artists, such as John Milton, William Hogarth, Mark Twain, and Charles Dickens, have fought to preserve that right”). *But cf.* Madison, *supra* note 98, at 757-58 (“Significant numbers of music consumers . . . may now be recognizing that the romance of the deserving Author . . . has faded, and not just because that romantic ideal never existed in the first place. . . . Consumers are told by copyright owners that culture has its price, and copyright law is the mechanism by which that price is enforced. But consumers also know, more than they ever did before, that the ‘art’ that they read, watch, listen to, and otherwise use derives from corporate hierarchies. The copyright industries have successfully commoditized culture, making what was a relatively elite industry at the time of copyright’s inception three centuries ago into a mass and popular phenomenon. In important senses, copyrighted books, records, movies, and computer programs are no different than mass-produced, fungible widgets. Copyright industries should not be surprised to see their story [of the noble and deserving Author] take this turn, with consumers treating the resulting products with consumerist indifference.”).

100. See Pamela Samuelson, *Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs*, 70 MINN. L. REV. 471, 519 (1985); see also Jaszi, *supra* note 11, at 298 (describing British legal antecedents that traditionally award ownership to the mastermind owner of a business rather than to the workers who may have labored and created the product).

101. See David Nelson, *Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution*, 79 S. CAL. L. REV. 559, 562-63 (2005) (“The music industry recently began a public relations campaign designed to discourage the downloading of copyrighted music. An examination of the Web site established to support this effort, however, reveals another clear goal: convincing the public that the rights of artists and the rights of the record industry are one. While this may have been true in the past, the Internet has drastically changed this relationship. This connection, however, remains essential to the record industry.” (footnotes omitted)). Nelson warns that “[w]hen considering the normative arguments for copyrights it is important to remember that in the music industry it is almost always the record label and not the artist that controls the copyright.” *Id.* at 576.

The irony, of course, lies in the extent to which the Romantic notion of “authorship” has served the commercial interests of publishers, employers, and distributors, often at the expense of the people whose role in the “creative” process most resembled that of the Romantic author figure.¹⁰² Indeed, the manipulation of the author concept has achieved its most paradoxical result in the United States in the context of works made for hire, where the claims of employers to direct ownership over the products of their employees have been rationalized in terms of a bizarre inversion of the “authorship” concept.¹⁰³

The persuasive force of Romantic authorship makes this an extremely powerful strategy for obtaining and strengthening copyright protection. As such, its function in copyright discourse has altered very little since the occasion of its first deployment in the eighteenth century literary-property debates, where it was an effective ideological instrument used to cloak the economic interests of the booksellers.¹⁰⁴ Indeed, as processes of creative production have come to resemble less and less the vision of creativity embodied in the Romantic author concept, the ideological function of “authorship” has only grown correspondingly.¹⁰⁵

102. See Jaszi, *supra* note 11, at 298-300 (discussing the recent upsurge of concern surrounding the “moral rights” of the author in Anglo-American legal doctrine, despite the unenthusiastic response from captains of industry); see also Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 496-98 (describing how granting the “moral right” of authorship to the person who puts in the labor of creation would detriment publishers, employers, and distributors by inhibiting the flow of commerce of authored works). Jaszi interpreted this development as evidence of the continuing force of the Romantic authorship vision for its own sake, and its persistent presence in legal consciousness as a purely ideological concept in spite of its commercial inconvenience. *Id.* at 498-99. This may be even more compelling in Britain and Canada, where there has been much less reluctance to endorse the “moral rights” concept required by Article 6 of the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works. *Id.*

103. See Jaszi, *Towards a Theory of Copyright*, *supra* note 58, at 485-90 (outlining the developments leading to the conception of the employer as the ideological author and originator, possessing the inspiration and the motivating factor in the “creation” of the “work,” while the employee is a mere mechanic following orders).

104. See *id.* at 500-01 (“[A]uthorship’ has remained what it was in eighteenth-century England—a stalking horse for economic interests that were (as a tactical matter) better concealed than revealed, and a convenient generative metaphor for legal structures that facilitated the emergence of new modes of production for literary and artistic works.”).

105. See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, VA. J.L. & TECH., Spring 2004, at 1, 24 (suggesting that “the economic reality of today’s intellectual property laws, perhaps best exemplified by the rise of corporate copyright ownership and the transfer of employee inventions to employers, conflicts with ‘author- or inventor-centrism’ and romantic notions of authorship,” and diminishes the relevance of Romantic authorship in modern copyright law). To the contrary, I would suggest that the role of the Romantic author fiction grows in light of this economic reality. In order to minimize the significance of Romantic authorship critiques, it is not enough to say that modern creativity and copyright does not in fact resemble romantic authorship. At the heart of the critiques is the assertion that Romantic authorship is a fiction that performs a function in shaping copyright policy. However, the function becomes more important as the fiction becomes more tenuous.

If it is true that “authorship shapes the character of copyright law,”¹⁰⁶ our persistent attachment to the vision of authorship as an independent process of original creation must have significant implications for copyright policy. The presence of this vision in the legal subconscious can explain, at least in part, the sheer scope given to the rights of copyright owners, and the importance (moral, legal, and cultural) accorded to them.¹⁰⁷ The authorship myth that animates copyright discourse supports calls for wide protection and generates complacency around the expanding domain of intellectual property and the corporate ownership that dominates the intellectual realm.

2. Authors and Imitators

Boyle argues that the myth of the Romantic author causes us to value some forms of “creation” over others and to underestimate the importance of external sources in the “creative” process, while overemphasizing the claims of the identified “author.”¹⁰⁸ Specifically, this conception of individuated authorship privileges the person identified as the “original author” to the detriment of “second generation” authors making “downstream uses” of the original work.¹⁰⁹

By way of example, a clear case of this primary-author bias can be found in the area of “appropriation art,”¹¹⁰ which has its foundation in the post-

106. Madison, *supra* note 98, at 760.

107. See Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882-88 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (arguing that the Romantic Author cannot explain much about intellectual property law). For example, intellectual property is “heavily skewed to protect the interests of corporations, not individual authors.” *Id.* at 882. However, romantic authorship may paradoxically support corporate ownership. *Id.* In the United States, it does this by simply recasting the corporation as “author.” While in Canada, it achieves a similar result by providing a powerful ideological framework that overlooks the reality of corporate ownership and its implications for real (as opposed to mythic) authors.

108. See BOYLE, SHAMANS, SOFTWARE AND SPLEENS, *supra* note 58, at 51-60.

109. See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1547 (S.D.N.Y. 1991) (holding that the “anthologizing” of pre-existing materials by professors into course books for use by students was an infringement of copyright); Aoki, *supra* note 94, at 815-16 (“[T]he *Kinko’s* court failed to focus on the substantial added social value (to students, professors, universities, etc.) by the serial nature of the author-like editorial decisions involved in tailoring, re-assembling, and distributing particular groupings of materials to students in a new form. The court’s concentration on the individualized author model made it virtually impossible to see, let alone acknowledge the value of the contributions made through such modes of deviant authorship.”). Regarding post-Modern appropriative art, Aoki considered the case of *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). *Id.* at 813-15.

110. See John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 3 COLUM.-VLA J.L. & ARTS 103, 105-06 (1988) (arguing for an expansion of fair use to permit the artistic appropriation of commercial images). See generally Johnson Okpaluba, *Appropriation Art: Fair Use or Foul?*, in DEAR IMAGES: ART, COPYRIGHT AND CULTURE 197, 197-224 (Daniel McClean & Karsten Schubert eds., 2002) (noting that this term is used to refer to the practice of incorporating, without the consent of intellectual property owner, part or all of a protected image in the creation of a visual art work by a person other than the

modern aesthetic and anti-proprietary ethics. By definition, “appropriation art” challenges “the viewer’s ability to see beyond the link between notions of originality and art’s commodity status.”¹¹¹ Predictably, because appropriation in the production of new artistic works is *prima facie* infringement in the eyes of copyright law, artistic appropriation practices have clashed with a copyright regime largely incapable of accommodating the expressive use of reproduced images:

[T]he incorporation of recognizable visual images into new works of art . . . gives contemporary art its unique and irreverent flair. To the law, appropriation is simple copyright infringement, for which only minor exceptions are allowed through the doctrine of fair use. Appropriationists have tried to avoid liability by invoking the defense of fair use, to little avail. The philosophical underpinnings of post-Modernism and intellectual property are fundamentally at odds.¹¹²

This would explain the (in)famous Second Circuit ruling in *Rogers v. Koons*.¹¹³ In this frequently cited example, the artist Jeff Koons mounted his *Banalities* show, which included the sculpture known as *String of Puppies*, depicting a couple holding a string of bright blue German Shepherd dogs.¹¹⁴ Koons based this large, three-dimensional sculpture upon a postcard reproduction of a black and white photograph taken by Art Rogers, but “undermin[ed] the sentimental cuddliness of [the original and] replac[ed] it with a tacky, slightly disturbing and subtly hilarious image.”¹¹⁵ Koons argued that the sculpture was a satire of society at large and belonged to an artistic tradition that critiqued modern consumer culture through the incorporation of objects and media images drawn from contemporary, mass-produced culture.¹¹⁶ Nonetheless, Rogers succeeded in his copyright infringement suit against Koons, whose work was regarded by the court to be intentionally exploitative, lacking in parodic value, and beyond the scope of fair use.¹¹⁷ The decision has been criticized as “rife with ominous implications for the practice of artistic appropriation,”¹¹⁸ and the court has been criticized for basing its decision upon “its distaste for

owner). Relevant artistic practices include collage, montage, and simulation. *Id.*

111. See Okpaluba, *supra* note 110, at 201.

112. Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 195 (1993).

113. 960 F.2d 301 (2d Cir. 1992).

114. *Id.* at 304-05.

115. KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 141 (2005).

116. *Rogers*, 960 F.2d at 309.

117. *Id.* at 309-10.

118. Martha Buskirk, *Appropriation Under the Gun*, ART IN AMERICA, June 1992, at 37.

Koons and his art [rather] than . . . any sound legal principle.”¹¹⁹

Rogers v. Koons offers a concrete example of the troublesome nature of author-based reasoning and, for this reason, it has received plenty of attention in copyright scholarship.¹²⁰ According to Keith Aoki, for example, the court’s conclusion resulted from the polarization of the parties in light of a particular vision of worthy authorship: the “‘pure’ artist” was contrasted with the “conniving and cynical art world rook;” the plaintiff’s “solo production” was contrasted with the defendant’s team of “skilled laborers;” and “photo from life” was contrasted with “parodistic treatment of pre-existing cultural material.”¹²¹ These polarizations converged to undermine the cultural and artistic contribution made by Koons’s product.¹²² The court could not regard Rogers’s work as a legitimate source of others’ creativity because Rogers “was so clearly an author,” and his photograph so clearly an original copyrightable work.¹²³ Similarly, the court could not regard Koons as an author or creator of meaning because he failed to fit the template of an original author who creates independently.¹²⁴ Viewed from this perspective, the case reveals “copyright’s bias toward rewarding clearly demarcated individual authorship with property rights enforceable [sic] against later deviant authors who attempt to trespass without ‘author-ization’ on those rights.”¹²⁵

The problem highlighted here is the power of the individual authorship trope to occlude discussion of the social, educational, or cultural value of downstream or derivative uses of protected works.¹²⁶ Because copyright’s concept of the work resides in independent, original production, the work of a second-generation producer cannot compete equally as a “work” of social value that merits protection; the social importance or the cultural value of the second text barely comes within the cognizance of the law.¹²⁷

119. Okpaluba, *supra* note 110, at 207.

120. See Aoki, *supra* note 94, at 813-15; see also Jaszi, *supra* note 11, at 305-12 (pointing out how Judge Cardamone adopted value-laden descriptions that disparage Koons’s use of the “Puppies” image by characterizing Rogers’s enterprise as creative and Koons’s as opportunistic).

121. Aoki, *supra* note 94, at 813-14.

122. *Id.* at 814 (“By thus casting the dichotomies between the works or texts produced by Art Rogers, earnest artist/photographer, and Jeff Koons, cynical postmodernist sculptor, the judicial calculus was freighted to come out in Rogers’ [sic] favor on the question of substantial similarity and to reject Koons’ [sic] puntative fair use defense to infringement liability on the grounds of parody.”).

123. *Id.* at 814-15.

124. *Id.* at 815.

125. *Id.* at 814.

126. See Rotstein, *supra* note 51, at 794 (concluding that “the construct of the ‘work’—the reification of the text—provides a built-in bias toward the plaintiff’s work” that does not permit useful appropriation).

127. But see Aoki, *supra* note 94, at 824-25 (“Radically expanding the concept of

Add to this the subconscious and rhetorical impact of copyright's author construct: the idealization of the author-originator entails the corresponding denigration of the author-user. Rather than regarding downstream users as authors who use prior texts to make new and important contributions to social dialogue, these authors are reduced to copiers from whom genuine authors must be protected.¹²⁸ As a result of its commitment to fictional notions of "creation" and "creator," copyright fails to adequately appreciate alternative methods or actors. When they fall on the wrong side of the creator-imitator dichotomy, they are infringers, not worthy authors.

In contemporary culture there are many forms of art, music, and intellectual endeavor that draw directly, consciously, and explicitly from pre-existing and protected works¹²⁹ (a practice that differs from other traditional forms of cultural "creativity" only in the sense that such derivation is typically indirect, unconscious, or implicit). It is crucial to understand that even as creators consume and re-present existing images and text, they are engaged in their own act of meaning making.¹³⁰ In a

authorship by accounting and arguing for legal acknowledgement of a wider range of alternate authorship possibilities works to break up the image of the individuated Romantic author, opening up the possibility that a chastened copyright regime may then be able to reconceive of texts as fluid events, with dynamic inputs coming in, feeding back and intersecting at multiple loci.").

128. See Rotstein, *supra* note 51, at 795 (reasoning that it is therefore perfectly palatable to impose liability upon them).

129. See MCLEOD, *supra* note 115, at 30, 68 (using digital sampling in rap and hip-hop music as an obvious example, although musical borrowing has a long history in the jazz and blues tradition). "The things that DJ Derrida, Funkmaster Foucault and Roland 808 Barthes wrote about in the late 1960s and 1970s foreshadowed, in part, the way today's young adults have been brought up reading and playing with fragmented, hyperlinked texts and images. The manner in which [they] use the Internet and editing software has severely damaged the myth of the individual genius author, for it gives them the tools to freely collage image, music, and text." *Id.* at 73. The recent controversy surrounding the *Grey Album*, by underground hip-hop artist Danger Mouse, an album that combined instrumental fragments from the Beatles' *White Album* with a capella rap vocals by Jay-Z, reflects this new reality. *Id.* at 153-54. As Danger Mouse explained in an MTV interview, "I thought it would be more challenging and more fun and more of a statement on what you could do with sampling alone. . . . It is an art form. It is music. You can do different things, it doesn't have to be just what some people call stealing." *Id.* at 153. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) (discussing how new technologies such as the digital sampler and online file sharing have expanded the creative possibilities of re-mixing pre-existing works and cultural artefacts); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 580 (2006) (illustrating the prevalence of courts' negative characterization of hip-hop borrowing and sampling as theft).

130. See Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991) (arguing "that the consumption of commodified representational forms is productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas," not just an appropriative activity). But see also Rebecca Tushnet, *Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (warning that the rhetoric of transformative appropriation should not be used to evoke yet another creative genius and thereby devalue pure copying, which is also

process of cultural dialogue, this re-presentation is a response to what has already been said: appropriation is therefore a “technique in critical discourse.”¹³¹ Indeed, the very act of appropriation can be politically symbolic to the extent that it openly resists proprietary structures and “manifests a rejection of private property in favor of a more communitarian conception of society.”¹³² If the communicative function of authorship were not lost beneath the commodified object of copyright, the significance of appropriation as communication would be evident, and the value of its contribution to cultural dialogue could be appreciated.

However, this is a message that copyright in its current form seems unable to absorb without thereby signalling its own demise. With respect to the legal commentators who critique *Koons*, Marilyn Randall insists: “There is an unwitting irony in the suggestion that the institution specifically charged with the regulation of private-property rights according to financial incentives, should embrace a critique of those very rights and incentives to the point of ‘legalizing’ those infractions that it is constituted to control.”¹³³ The apparent irony dissipates if we replace the idea of copyright as the regulation of private-property rights with the idea of copyright as a vehicle to encourage the creation of meaning and widespread engagement in social discourse. From this perspective the real unwitting irony would be that an institution entrusted with this public purpose should foreclose the very meaning-making it is supposed to encourage. If copyright cannot reflect the realities of cultural creation, then cultural creation may be forced to reflect the realities of copyright, to the detriment of us all.¹³⁴

D. Conclusions on Copyright’s Authorship Construct

Our copyright regime is presently “in the thrall of an idea [of authorship] that is taken as truth where it should be questioned as dogma.”¹³⁵ The

expression). See generally Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005) (developing the idea of the “situated user” as opposed to the “romantic user”).

131. Patricia A. Kreig, Note, *Copyright, Free Speech, and the Visual Arts*, 93 *YALE L.J.* 1565, 1578 (1984).

132. *Id.* at 1578-79 (“[T]he act of appropriation itself imparts a political message; it reveals that society (and its legal system) is laden with assumptions that financial incentives promote individual creativity, and that property interests supersede society’s right of access to ideas and information.” (footnote omitted)).

133. RANDALL, *supra* note 13, at 258.

134. Arewa, *supra* note 129, at 645 (“Such notions of music creation are often not conducive to the development of vibrant and living music traditions. As we apply such legal standards, we should be careful and be alert to the . . . fact that musical production may in the end come to mirror the conceptions contained in the copyright standards applied to it.”).

135. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail*,

discussion in Part I has suggested the need for a radical demystification of the “work” concept and the notions of “originality” and the “author” that dominate copyright rhetoric but prove inhospitable to the public purposes of the copyright system. The societal function of copyright is to encourage participation in cultural dialogue. Where the author is a worthy producer of something from nothing and the work is an owned object of fixed meaning, the dialogic and communicative nature of cultural creativity is hidden from view. The result is a copyright regime which propertizes and over-protects the works of some authors while dismissing others as copiers and trespassers; which encourages some kinds of creativity while condemning others as unlawful appropriation; which values so-called original contributions but silences responses in the cultural conversation. Rather than creating an environment for communication and facilitating an exchange of meaning, the system creates a marketplace for intellectual products and rules for the exchange of commodities. By recognizing these central tenets of copyright doctrine—authorship, originality, and the work—as politically, socially, and legally constructed metaphors lacking any essential meaning, it may be possible to reconsider their role and substance in a way that allows them to better serve their function in the furtherance of copyright’s public purposes.

II. AUTHORSHIP AND CONCEPTIONS OF THE SELF: A FEMINIST INQUIRY INTO THE PROCESSES OF CREATIVITY

A. Introducing Feminist Theory

In Part I, I suggested that copyright law and its construction of authorship are premised upon the assumptions (both ontological and normative) of the Enlightenment and post-Enlightenment era, and in particular, the tenets of possessive individualism. The result is a copyright model that forces all intellectual production into doctrinal categories shaped by individualistic assumptions about the authorial ideal, producing the simplifying dichotomies of creation/reproduction, author/user, laborer/free-rider. Unless we problematize these binary oppositions, we risk hindering and preventing precisely the kinds of communicative activities that copyright is meant to encourage. I have suggested that, in order for copyright to embrace marginalized forms of creativity (especially those that explicitly rely upon prior works for their expression), we need to achieve a theoretical shift away from the liberal model upon which it is currently built.

In Part II, I will argue that the legitimacy and success of copyright law

and Insider Trading, 80 CAL. L. REV. 1413, 1534 (1992).

depends upon a theoretical framework informed by feminist theory and capable of embracing the notion of the relational self/author and the principles of dialogism. Identifying the liberalist foundations of the intellectual property system therefore opens a door for the re-imagining of copyright. Based as it is upon the legal structures and theoretical assumptions of liberal thought, the copyright model embraces liberal notions of the “self”: copyright’s “author” is liberalism’s human subject. It follows that the impoverished subject of liberal thought entails an impoverished vision of the author. I hope to show that an ontological self that is complicated by liberalism’s feminist critics can provide a route by which to see authorship in all its complexity.

My purpose in exploring the weaknesses of copyright’s author-figure is not to proclaim the death of the original author. Copyright needs the author (just as feminism needs the equal and autonomous bearer of rights). Rather, the question is “how can we [re]conceptualize authorship as a largely transformative act . . . *without* losing our sense of . . . how to distinguish . . . between the original and unoriginal, or ‘authored’ and ‘un-authored?’”¹³⁶ It is in the face of this dilemma that I turn to feminist theory. Employing the notions of dialogism and the relational self that have emerged from feminist scholarship, I hope to show how we can re-imagine the author not as source, origin, or authority, but rather as participant and citizen. We can re-imagine authorship as the formation of individual identity and the development of self and community through discourse. These ideas illuminate the nature of authorship as a social and formative process, but they also offer the foundation for a coherent justification of copyright. If speech/dialogue makes us social beings, copyright law, which aims to encourage creativity and exchange, thereby encourages meaningful relations of communication and participation with others. We have to comprehend the substance of copyright’s ends before we can expect it to achieve them.

In the discussion that follows, I will explore the challenges faced by feminists in defining the nature of the “subject” in literary and political theory, and some of the ways in which feminist scholarship has met these challenges. In doing so, my ultimate aim is to import some of the concepts and reasoning that has proved central to feminist theorizing into debates about the reconstruction of authorship. In Section B, I will briefly highlight the convergences I see between feminist theory, constructions of

136. Durham, *supra* note 52, at 72 (emphasis added); see also Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW* 121, 153 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (“[T]alking about creativity and inspiration need not entail philosophical commitment to discredited romantic ideals of individual authorship and related notions of the natural rights of authors.”).

authorship, and conceptions of selfhood. In Section C, I will outline the dilemmas presented by competing constructions of authorship and suggest a possible route towards meeting these challenges with an appeal to “dialogic feminism.” I will then consider, in Section D, the similar challenges faced by feminists in light of competing conceptualizations of selfhood. I will appeal to relational feminism, and the attendant concept of dialogue, as appropriate vehicles by which to resolve the debates and collapse the dichotomies that have characterized much of contemporary political theorizing about the nature of the self. In Section E, I will inquire into the potential for these feminist discourses to reshape our understanding of the processes and products of cultural creativity, and the nature of the rights granted by the copyright system.

B. Feminism, Authorship, and Constructions of the Self

The paragon of independent original creation, discussed in Part I, represents a naïve conception of the processes of authorship, and so provides the copyright system with an untenable—and undesirable—premise. To the extent that the truly original author-owner is conceptualized as an individual (and not merely a function or fiction), she depends upon Enlightenment ideals of individuation, detachment, segmentation, and abstraction.¹³⁷ The competing view sees the author as necessarily engaged in a process of adaptation, derivation, translation and recombination.¹³⁸ This latter version of authorship coheres with a view of the individual as socially situated, as constituted by community, culture, and society, thus constantly shifting and evolving: “a ‘subject in process’—never unitary, never complete.”¹³⁹ Rather than meaning created out of nothing, the author’s expression is the result of the complex variety of influences that have shaped her, and its meaning is essentially fluid, derived only from its interaction with other texts and discourses.

The tension between competing constructions of authorship has played out in feminist literary theory as a debate between recovering a strong and stable identity for women writers and their experiences and deconstructing traditional notions of author and experience.¹⁴⁰ This tension in literary theory to some extent mirrors a tension that has been a critical subject of feminist scholarship in political and social theory: the tension between the individual, pre-social self of liberal theory and the socially constituted,

137. See Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*, 47 EMORY L.J. 163, 168-90 (1998).

138. BARBARA L. MARSHALL, ENGENDERING MODERNITY: FEMINISM, SOCIAL THEORY AND SOCIAL CHANGE 108 (1994).

139. *Id.*

140. LAURIE A. FINKE, FEMINIST THEORY, WOMEN’S WRITING 1 (1992).

always-already encumbered self instated in communitarian critiques of liberalism. While these debates have generally been insulated from one another as a result of disciplinary divides, they are not unrelated and present similar challenges for feminism. Namely, how can we escape a concept of the self that ignores relations, discourses, and communities, without descending into a position where subjectivity and agency is overwhelmed by social situation?

The egalitarian rhetoric of feminist politics and its foundation in rights discourse weds feminism to the central premises of modernist theory.¹⁴¹ However, the historic exclusion of women from the benefits of rights and egalitarianism reveals as fictive the neutrality of modernism's philosophical paradigm and casts doubt upon the universalism of its putative meta-narratives.¹⁴² Arguments about the nature of social theory's "subject," and challenges to the liberal conception of the self in particular, have thus played a central role in the feminist struggle for genuine and substantive equality. Western liberal philosophy conceives of the self as an autonomous (independent) rational agent with the capacity for self-determination. This conception entails claims about the rights the agent must have if he is to be free to exercise this capacity: in particular, the right to own private property and to enter into voluntary, private contractual relations with other autonomous agents.¹⁴³ As it is currently conceived, copyright, which takes the form of a private property right and is premised upon transferability through contract in a free market, relies squarely upon this liberal notion of the self as independent creator, individual owner, and rational (economic) agent.¹⁴⁴ It has been widely argued that liberalism's version of the self cannot accommodate—and so excludes or silences—those people whose experienced realities do not resonate with the individualized account of autonomy. Similarly, copyright's version of the author cannot accommodate—and so excludes or silences—those people whose communicative activities do not fit within the individualized and originative account of authorship.

However, the simple refusal of a "subject" is highly problematic for the

141. Jennifer Nedelsky, *Citizenship and Relational Feminism*, in *CANADIAN POLITICAL PHILOSOPHY: CONTEMPORARY REFLECTIONS* 131, 134-35 (Ronald Beiner & Wayne Norman eds., 2001) (asserting that both liberalism and feminism presuppose the equality of all people).

142. *Id.* at 132 ("In the realm of both political theory and legal history . . . women and other subordinated groups were excluded from the underlying [liberal] conception of selfhood and from the corresponding legal rights. The important point here is not just the fact of historical exclusion, but the arguments that such exclusion was built into these paired conceptions of self and rights. If these arguments are persuasive, then it is not possible simply to use these exclusionary concepts to include everyone.").

143. *Id.*

144. Nedelsky, *supra* note 141, at 132.

feminist political project,¹⁴⁵ just as the simple refusal of the “author” would be highly problematic for copyright policy. It is not sufficient for feminist theory to radically deconstruct the modernist self because with the evaporation of the self comes the evaporation of the concept of woman.¹⁴⁶ Feminists in literary, political, and legal theory alike have therefore struggled to find a conception of the self that acknowledges connectivity without precluding individual autonomy, identity, or voice. This struggle stems from awareness of the feminist ontological dilemma. “[I]t can fully embrace neither an unreconstructed modernism’s ‘subject’ nor postmodernism’s rejection of the subject.”¹⁴⁷

It has thus been observed that feminism “constitutes both a critique of *and* a defen[s]e of modernity, so has a great stake in the modernity-postmodernity debates, which are at heart about the possibility of a ‘subject’ for social theory.”¹⁴⁸ In other words, “the issue of agency and of subjectivity more generally . . . lies at the heart of feminism’s ambiguous ‘positioning’ between modernity and post-modernity.”¹⁴⁹ Issues of agency and subjectivity are also critical to the construction of the author in copyright law: if we are to tackle the unreconstructed notion of the author as independent creator, but also refuse to deconstruct the author out of existence, then copyright theory has a similar stake in the modernity-postmodernity debates, which pertain to the possibility of an author-subject for the copyright system.

The re-imagination of copyright requires a challenge to the concept of autonomous selfhood that informs liberal political theory. It also requires a concept of self that affirms the centrality of relationships and community while acknowledging creative capacity and the agency to engage in social discourses. It seems to follow that feminist theory can inform copyright’s search for an author-subject because it offers not only a critique of the atomized liberal individual, but its reconstitution as a rights-bearing, autonomous, and relational self. It therefore holds the promise of a new theoretical model that can be brought to bear on the copyright system.

145. See MARSHALL, *supra* note 138, at 111.

146. See Teresa de Lauretis, *Upping the Anti [sic] in Feminist Theory*, in THE CULTURAL STUDIES READER 74, 83 (Simon During ed., photo. reprint, Routledge 1997) (1993).

147. MARSHALL, *supra* note 138, at 148 (“[W]omen as subjects have never been accorded the coherence, autonomy, rationality or agency of the subject which undergirds an unreconstructed modernism, and which postmodernism has deconstructed out of existence.”).

148. *Id.* at 148; see also ANNE BROOKS, POSTFEMINISMS: FEMINISM, CULTURAL THEORY AND CULTURAL FORMS 13 (1997).

149. BROOKS, *supra* note 148, at 15.

C. Feminist Literary Criticism and the Author-Self

1. The Dilemma for Feminist Literary Theory

Foucault began his examination of the relationship between the text and the author by posing the question, “What does it matter who is speaking?”¹⁵⁰ Since the “fundamental unit of the author and the work” gives rise to the “fundamental category of ‘the-man-and-his-work criticism,’”¹⁵¹ a feminist might answer that it matters precisely because the authoritative speaker is presumed to be a man. It certainly is arguable that, where authors belong to traditionally marginalized or unauthorized groups, the poststructuralist effacement of the author only compounds the historic invisibility of these stifled voices and denies them the authority to speak that traditionally attaches to authorship¹⁵² before it has even been acknowledged. Nancy K. Miller responds to Foucault’s question:

What matter who’s speaking? I would answer that it matters, for example, to women who have lost and still routinely lose their proper name in marriage, and whose signature—not merely their voice—has not been worth the paper it was written on; women for whom the signature—by virtue of its power in the world of circulation—is *not* immaterial. Only those who have it can play with not having it.¹⁵³

Miller’s statement captures the feminist concern that the fragmentation of the author and her work forecloses the inquiry into the agency of the female subject, reduces her self-expression to a textual construction, and thereby reasserts hegemonic masculine meaning-making in the guise of intertextuality.¹⁵⁴ According to Miller, where the author dissipates into textual free-play, there can be no acknowledgement of the author *qua* woman; disaggregating the author is therefore a luxury that belongs to those whose identities are not already experienced as decentered and fragmented.¹⁵⁵

Marilyn Randall defined authorship as “the attribution of a particular set

150. FOUCAULT, *supra* note 7, at 101.

151. *Id.*

152. RANDALL, *supra* note 13, at 58-59.

153. Nancy K. Miller, *The Text’s Heroine: A Feminist Critic and Her Fictions*, 12 *DIACRITICS* 48, 53 (1982).

154. *Cf.* FINKE, *supra* note 140, at 194 n.1 (“[A]s it proliferated in American universities in the 1980s, deconstruction seemed to lose the force of this ideological agenda and political mission. The death of the author served more to aggrandize the (male) critic than to expose the pernicious effect of patriarchal order as an ideological formation.”).

155. *See id.* at 109-10 (explaining that theories of the decentered subject allow theorists at the center of Western philosophy to co-opt the position of those already at the margins, preventing the truly marginalized any subject position from which to articulate their exclusion).

of authorial functions to the agent of discourse.”¹⁵⁶ This definition reveals, first, the agency implicit in the concept of authorship (a comparatively transhistorical constant), and, second, the need to inquire into the nature and operation of these authorial functions (as fluid and historical contingencies).¹⁵⁷ Randall identifies one relatively stable feature or function of authorship as the notion of the appropriation of the authority-to-speak.¹⁵⁸ Feminist and post-colonial theorists have exposed the presupposition of such authority in their examinations of marginalized discourses, which reveal “authorship” to be “a privilege that must be acquired (constructed, earned, or appropriated), even in the postmodern, ‘post-authorial’ context.”¹⁵⁹ Furthermore, the notion of the “appropriation” or “misappropriation” of “voice” across “communities of identity,” which is premised upon a concern with the “authenticity” of the speaker’s voice, has been a common component of contemporary gender, racial, and post-colonial literary studies.¹⁶⁰

This presents a dilemma for critical theorists, pitting the “authorizing authenticity of personal experience against the dangers of the essentialism that authority based on gender, race, or culture and sexuality seem to imply.”¹⁶¹ It also suggests the root of a divide that emerged in the feminist literary criticism of the 1980s “between those pragmatically committed to the recovery of the woman writer and, with her, something usually called women’s experience, and those concerned to explore the implications for feminism of postmodern theories that question the legitimacy of such constructs as the author and experience.”¹⁶²

The poststructuralist critiques of copyright’s “author” and “work,” outlined in Part I, clearly encapsulate this feminist dilemma. I have argued that copyright theory has to complicate the author construct if it is to recognize the realities of cultural creativity. However, in the context of women’s writing, and from the perspective of literary theory’s “gynocritics,”¹⁶³ such a challenge to the author is a challenge to the

156. RANDALL, *supra* note 13, at 58.

157. *See id.*

158. *Id.* at 58-59 (identifying other stable features of authorship as self-consciousness (authorship as an “intentional act of transmission, imitation, transformation, or innovation”) and the construction of identity (through discourse)).

159. *Id.* at 59.

160. *See id.* at 56.

161. *Id.* *See generally* WHO CAN SPEAK?: AUTHORITY AND CRITICAL IDENTITY (Judith Roof & Robyn Wiegman eds., 1995) (compiling essays on contemporary issues in visibility, marginality, and authorized speech in the context of the authorization of academic speech).

162. FINKE, *supra* note 140, at 1.

163. *See* Elaine Showalter, *Feminist Criticism in the Wilderness* 8 CRITICAL INQUIRY 179, 185 (1981) (coining the term “gynocritics” to refer to criticism that constructs a female framework for the analysis of women’s writing).

assertion of women's experience and the project of recovering women's voices. More fundamentally, it is a challenge to the male voice and the paternal nature of authorship that characterized Romantic and post-Romantic aesthetics, for "[t]he image of the 'artist' underlying the words of the *Copyright Act* is that of the solitary *male* genius, isolated both spatially and temporally from his community and the background of the art in which he works."¹⁶⁴ In other words, society should not be fooled into assuming that the original author-figure of copyright (and the target of poststructuralist critique) is gender-neutral.

Also, the gendered nature of the authorial ideal is evident in the aesthetic and cultural theories of value that determine the worth or import of intellectual contributions.¹⁶⁵ In this regard, feminists have pointed to the exclusionary category of the literary canon that attributes greatness to predominantly (white, first-world) male authors.¹⁶⁶ The equalizing solution initially proposed was simply the discovery, re-evaluation, and inclusion of worthy women writers who met accepted standards of excellence.¹⁶⁷ The better solution, I think, is to challenge the traditional theories of value represented by the canon and to "interrogate the processes through which such values are produced, given authority, and disseminated within a particular historical and social formation," and the manner in which they "reproduce the social formation that created them."¹⁶⁸ One might ask, for example, why traditional aesthetic values favor originality over creative imitation, or sole authorship over collaborative creativity, and how these preferences emulate and perpetuate the solitary male authorial ideal. How is it that such contingent and contestable value judgments have come to seem "natural, timeless, and self-evident,"¹⁶⁹ and whose experienced realities or aspirations do they reflect? Examined in this light, it is not surprising that the relationship between the author and the work as concretized in copyright law should reflect "a paternalistic or patriarchal relationship in that it emphasizes the importance of identifying the particular author responsible for creating a work and gives to him the

164. Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 62 (1994) (second emphasis added).

165. Cf. FINKE, *supra* note 140, at 152-54 (noting that the canon of Western culture's great literature consists almost entirely of predominantly white, first-world, European, ruling-class males and any feminist critique must also examine the underlying aesthetic and cultural values that create that canon).

166. *Id.* at 152.

167. *Id.* at 153.

168. *Id.* at 154. See generally LILLIAN ROBINSON, *SEX, CLASS AND CULTURE* (1983); JANE TOMPKINS, *SENSATIONAL DESIGNS: THE CULTURAL WORK OF AMERICAN FICTION, 1790-1860* (1985); Christine Froula, *When Eve Reads Milton: Undoing the Canonical Economy*, 10 CRITICAL INQUIRY 321 (1983).

169. FINKE, *supra* note 140, at 154.

absolute right to control and exploit the work for economic gain.”¹⁷⁰

As feminists have learned, it is often a misguided strategy to attempt to fit women into patriarchal structures by showing the ways in which we are the same and so deserve to be included.¹⁷¹ The better approach is to challenge the structure itself and the putative universalizability of the attributes and values it represents.¹⁷² If we chose simply to assert the women writer as equally authentic, authoritative, and original, we should be aware that this project presupposes “a concept of stable identity and an authenticity and originality rooted in an ontological ‘self.’”¹⁷³ In this respect, I share Finke’s concern:

[I]t has been the project of feminism to enable women to construct the same powerful sense of identity as men. But the search for ‘authentic’ women’s experience, for the woman writer who expresses herself authentically, grounds the female ‘self’ in a Western mind/body dualism that ironically reinforces the very ideology of bourgeois individualism feminists wish to resist.¹⁷⁴

Similarly, there is a danger that, by insisting upon the inclusion of certain women writers in the canon, we only subsume new works within the traditional definitions¹⁷⁵ while continuing to portray value as inherent and objective rather than contingent and perspectival.¹⁷⁶ Instead, we must cast doubt upon the ideological assumptions that have shaped conceptions of authorship and question the attributes by which the value of literary achievement has been measured.¹⁷⁷ Mary O’Connor explains this need to re-evaluate rather than integrate:

Women’s literature has been motivated by the imperative to know who we are and how to act on that knowledge, but our liberation comes

170. Wright, *supra* note 164, at 77-78.

171. See FINKE, *supra* note 140, at 153 (noting criticism of attempts at fitting women into patriarchal structures as ineffective and arguing that even successful attempts can be co-opted, leaving traditional ideas of literary excellence unchanged).

172. See *id.* at 154 (asking, for example, why irony and complexity are valued over sentimentality and simplicity).

173. *Id.* at 110.

174. *Id.*

175. See *id.* at 153; see also Laurie Finke, *The Rhetoric of Marginality: Why I do Feminist Theory*, 5 TULSA STUD. IN WOMEN’S LITERATURE 251, 262 (1982) (“While feminist new critical readings of literary texts can provide a ‘turn of the screw’ to male readings, they remain indebted to the aesthetic values and ideological fictions of New Critical doctrine—the autonomous, unified, experiencing self . . . and the holistic coherence of the literary text as a reflection of experience—a doctrine articulated by a male intellectual elite.”).

176. See FINKE, *supra* note 140, at 153 (noting that efforts to include certain female writers in the canon, as well as efforts to expand the canon, do not challenge the aesthetic or ideological judgments underlying and legitimizing that canon).

177. See *id.* at 155 (describing a few critiques of the value system, including critiques based on aesthetics and critiques dismissing evaluation as subjective, emotive, and essentially personal).

belatedly as we discover that the ‘wholeness’ of men is indeed a fabrication . . . Freedom in this poststructuralist world must come from analyzing and subverting all constructed identities . . . Women must still deconstruct the patriarchal image of ourselves as silent, . . . but problems arise when we start to construct our own identity.

These issues have been debated in feminist literary theory—whether it is our job to establish a new identity, unified and strong, based on personal experience that is not dependent on male dominance, or to forego this Romantic illusion and look for an identity that is based on the fluid process of history.¹⁷⁸

Undoubtedly, this presents a challenging dilemma for feminist theorizing. How can we resist the dominant (male) Romantic author-figure, while refusing to let go of the empowerment that the author-function affords? How can we reject the entirely fragmented, “deceased” author of radical poststructuralism, which forecloses discussion about subjectivity and the agency/identity of the author-subject, while insisting upon the deconstruction of the author-label? How can we claim to value particular works of authorship, while repudiating the traditional criteria by which works have been evaluated and disavowing the concept of inherent or internal value?

2. *Introducing Dialogism*

These challenges present themselves as binary oppositions, asking us to choose between biographical author-person and historical author-function; between a stable pre-existing self and a “radically decentered and fragmented subject;”¹⁷⁹ between universal value systems and an aesthetic relativism that precludes value judgments.¹⁸⁰ A feminist literary theory needs to dissolve these dichotomies if it is to arrive at a concept of authorship capable of acknowledging the identity of the author, her subjectivity, and the value of her contribution. According to Finke and O’Connor, the notion of dialogism, drawn from the work of Mikhail Bakhtin¹⁸¹ (and ostensibly reworked to overcome the male-centeredness of

178. Mary O’Connor, *Subject, Voice, and Women in Some Contemporary Black American Women’s Writing*, in *FEMINISM, BAKHTIN AND THE DIALOGIC* 199, 200-01 (David M. Bauer & Susan J. McKinstry eds., 1991).

179. FINKE, *supra* note 140, at 111.

180. *See id.* at 155.

181. *See, e.g.*, MIKAHIL BAKHTIN, *RABELAIS AND HIS WORLD* 60-62 (Helene Iswolsky trans., Ind. Univ. Press 1984) (1965) (describing how the contemporary aesthetic and ideological world of Rabelais’ readers informed their interpretation of his text). *See generally* MIKAHIL BAKHTIN, *THE DIALOGIC IMAGINATION* (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) [hereinafter *BAKHTIN, IMAGINATION*] (exploring the concept of dialogism, which describes literary works as carrying on a continual dialogue with other works of literature, answering, correcting, silencing, extending, informing, and being informed by previous works).

Bakhtin's critique),¹⁸² is capable of bridging these poles and offering a space within which to contest them.¹⁸³

While a comprehensive or critical account of Bakhtin's dialogic theory is beyond the scope of this work, it is important to highlight the central characteristics of Bakhtinian dialogism that have been harnessed by feminist critics in the face of these challenges. The appeal to dialogism has provided a critical rhetoric with which feminists have sought to empower suppressed voices and discourses, while revealing the otherness hidden within dominant, ostensibly monologic discourse.¹⁸⁴ In particular, Finke draws upon Bakhtin's portrayal of discourse as inherently dialogic and multivocal: every utterance exists in relation to other utterances, with the result that all utterances must be understood as interactive and interanimating.¹⁸⁵ Every utterance contains within it myriad voices (*heteroglossia*)¹⁸⁶ that stand in dialogic relationship with one another: a notion that emancipates subordinated voices while discrediting formalistic, ahistorical analyses of language and literature.¹⁸⁷ For Bakhtin, language is always a struggle between "competing codes, interpretations, and reconstructions of meaning,"¹⁸⁸ and literature is only the magnification of

182. See Patricia Yaeger, *Afterword*, in *FEMINISM, BAKHTIN, AND THE DIALOGIC* 239, 240 (Dale M. Bauer & Susan Jaret McKinstry eds., 1991) ("These essays give us stunning examples of a feminist dialogics; they overcome the male-centeredness of Bakhtin criticism and replace its fallacies with new forms of textual and cultural critique—providing the resistance from the margins that Bakhtin applauded but refused to gender."). See generally Wayne C. Booth, *Freedom of Interpretation: Bakhtin and the Challenge of Feminist Criticism*, 9 *CRITICAL INQUIRY* 45 (1982) (applying a feminist critique to Bakhtin's writings on Rabelais); Patricia S. Yaeger, "Because a Fire Was in My Head": Eudora Welty and the *Dialogic Imagination*, 99 *PMLA* 955 (1984) (applying Bakhtin's theories of dialogism to create a new perspective from which to examine the tensions between men and women's writings).

183. O'Connor, *supra* note 178, at 214-15 ("The Bakhtinian dialogism is not a strict binary opposition between, for instance, the marginal woman's voice and the central dominant male voice. It is rather . . . the exploration and activating of the unvoiced exiled world of women—that other place in all its variety.").

184. See Gale M. Schwab, *Irigarayan Dialogism: Play and Powerplay*, in *FEMINISM, BAKHTIN, AND THE DIALOGIC* 57, 67 (Dale M. Bauer & Susan J. McKinstry eds., 1991) ("Dialogic textuality, by articulating otherness, inevitably articulates the powers attempting to marginalize or eliminate otherness. As the power struggle is dragged out into the open in dialogics, all monologic positions are undermined, and revealed as ultimately untenable, self-contradictory."). See generally DALE BAUER, *FEMINIST DIALOGICS: A THEORY OF FAILED COMMUNITY* (1988) (adding gender considerations to refashion Bakhtin's sociological stylistics into feminist dialogics, deemphasizing the authority of the text and bringing forth intentions other than normative or disciplinary ones).

185. See BAKHTIN, *IMAGINATION*, *supra* note 181, at 354; FINKE, *supra* note 140, at 12.

186. BAKHTIN, *IMAGINATION*, *supra* note 181, at 263 (using the term "heteroglossia" (untranslated: *raznojazychie*) to capture the dynamic complexity and clamorousness of this contested field of multivocal utterances).

187. MIKHAIL BAKHTIN, *BAKHTIN SCHOOL PAPERS* 4 (Ann Shukman ed., 1983).

188. FINKE, *supra* note 140, at 13.

that struggle.¹⁸⁹ Language (and so literature) therefore exists in the “realm of cultural activity, where it participates in the historical, social, and political life of its speakers... as both a production and a producer of social relations.”¹⁹⁰

The concept of dialogism captures the clash and struggle of different languages and allows us to see the social significance of discourse and the relational nature of every utterance.¹⁹¹ Bakhtin’s theory offers a critique of the transcendental self by attributing to the speaker a sociolinguistic point of view and arming him only with a language already saturated with the voices of others.¹⁹² However, it also promises the power and agency to actively respond to the dominant discourses, and “the opportunity to engage in a productive, complex exchange with the other’s words.”¹⁹³ Hence, the attraction of Bakhtin’s theory for feminist critics:

[Bakhtin’s] dialogism . . . takes into account the various determining and producing historical factors in our lives and at the same time allows for the idea of an active response on the part of the subject to these various discourses and other subject positions. Thus, his theories allow for a model of intersecting ideologies, in other words, a connection with history in society, as well as a model of connecting with others. Finally, they allow for process and change.¹⁹⁴

3. *Dialogism, Authorship, and Copyright*

Furnished with the concept of the dialogic, we can return to some of the dilemmas that have challenged feminist literary criticism. The desire to hold onto a concept of authorship—and the accompanying notions of authority, authenticity, and identity—had caused some feminists to resist the “death of the author,” or the Foucauldian insinuation that it may not matter who speaks.¹⁹⁵ Finke notes, however, that Foucault did not go so far

189. See Yaeger, *supra* note 182, at 241; see also BAKHTIN, IMAGINATION, *supra* note 181, at 276 (“[A]ny concrete discourse (utterance) finds the object at which it was directed already as it were overlain with qualifications, open to dispute, charged with value, already enveloped in an obscuring mist—or, on the contrary, by the light’ of alien words that have already been spoken about it.”).

190. FINKE, *supra* note 140, at 13.

191. See V. N. VOLOŠINOV, MARXISM AND THE PHILOSOPHY OF LANGUAGE 85 (Ladislav Matejka & I. R. Titunik trans., 1986) (“Utterance, as we know, is constructed between two socially organized persons The word is oriented toward an addressee, toward who that addressee might be There can be no such thing as an abstract addressee, a man unto himself, so to speak.” (emphasis in original)).

192. See BAKHTIN, IMAGINATION, *supra* note 181, at 293 (“[E]ach word tastes of the context and contexts in which it has lived its socially charged life Contextual overtones . . . are inevitable in the word.”).

193. FINKE, *supra* note 140, at 14.

194. O’Connor, *supra* note 178, at 201.

195. Miller, *supra* note 153, at 53 (1982).

as to state that the speaker's identity does not matter; rather, he invited us to consider whether it matters, and if so, why.¹⁹⁶ Finke finds an answer in Foucault's work and expresses it in terms that seem to draw together Foucault's skepticism of the author-figure and Bakhtin's optimistic dialogism:

It matters [who is speaking], but for different reasons from those we have in the past supposed: not because a fixed, preexisting self expresses itself through discourse but because discourses—historically situated discourses—are part of the evolving, open-ended, and shifting process of becoming a subject.¹⁹⁷

It follows, for Finke, that “[t]he contemporary theoretical concern with destabilizing subjectivity must be theorized relationally and historically rather than categorically.”¹⁹⁸ The binary opposition between the wholly unified and the irretrievably fragmented author can be dissolved when we recognize the author-subject as existing at the “nexus of material, social, and historical practices through which [her] subjectivity . . . has been constructed.”¹⁹⁹ Historically situated discourses shape the author's subjectivity, while the author shapes those discourses by contributing her voice to the dialogue. That the contribution is “hers” matters, not because she is the authoritative source of meaning, but because “language cannot be cut loose from person, time, and place to float freely in some ideal, impersonal, non-time, non-space.”²⁰⁰ By adding her voice to the dialogue, the speaker *qua* author engages in the complex arena of struggle and exchange with other dynamic voices and discourses in the cultural realm: a discursive interplay which operates at the levels of the text, society, and the self.

If subjectivity does not transcend history, neither does the author. The author necessarily writes from within a “complex network of . . . social relations that fracture the author's apparent solidity as the locus of meaning in her texts.”²⁰¹ A dialogic account of the author therefore repudiates the

196. FINKE, *supra* note 140, at 111.

197. *Id.*; see also FOUCAULT, *supra* note 7, at 119-20 (explaining how discourses would be received in the absence of the “author-function”). “We would no longer hear the questions that have been rehashed for so long: Who really spoke? Is it really he and not someone else? With what authenticity or originality? And what part of his deepest self did he express in his discourse? Instead, there would be other questions, like these: What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? What are the places in it where there is room for possible subjects? Who can assume these various subject functions? And behind all these questions, we would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking?” *Id.*

198. FINKE, *supra* note 140, at 111.

199. *Id.*

200. Schwab, *supra* note 184, at 58.

201. FINKE, *supra* note 140, at 194.

notion of the highly individualized or atomized self, but it also acknowledges the discursive agency of the author (albeit within the constrictions of inherited social discourses). While the subjectivity is constituted through discourses, it is also contested within discourses.²⁰² From this perspective, the historical and situational contingency of the author-as-subject category does not detract from the agency of the author-as-speaker, nor does it undermine the significance of the author's discourse. The author is socially situated and necessarily dependent upon the texts, languages, and discourses already at play in the cultural domain. However, because the utterance is always imbued with the particular situation of the speaker and the addressee, its significance is always critical, interactive, and novel. The embedded nature of the author-self does not preclude originality, but rather affirms it. "It is the context, a particular social and cultural situation, that creates the sign's provisional, local meaning."²⁰³ This is not originality in its conventional sense, but a complex notion of originality whose significance is not rooted in the independence of the author and text.

This understanding of the author implies a concomitant revision of the concept of authorship: authorship is about interacting with the meanings and texts and discourses that are already out there—already shaping our ideologies, communities, and ourselves—and adding to them something of ourselves and our (socially-constituted) subjectivity. Others' speech is always present in our own, but this reality does not stultify our attempts to create meaning. "[W]e can take it into new contexts, attach it to new material, put it in a new situation in order to wrest new answers from it, new insights into its meaning, and even wrest from it new words of our *own* (since another's discourse, if productive, gives birth to a new word from us in response)."²⁰⁴ The dialogic approach thus casts authorship as something very different than the Romantic ideal that flows from a socially dislocated account of the author-self: authorship is not originitive but participative; it is not internal but interactive; it is not independent but interdependent. In short, a dialogic account of authorship is equipped to appreciate the derivative, collaborative, and communicative nature of authorial activity in a way that the Romantic account never can.

At another level, this dialogic theory of authorship can also assist with

202. Cf. Janet Ransom, *Feminism, Difference and Discourse: The Limits of Discursive Analysis for Feminism*, in UP AGAINST FOUCAULT: EXPLORATIONS OF SOME TENSIONS BETWEEN FOUCAULT AND FEMINISM 123, 134-35 (Caroline Ramazanoglu ed., 1993) (arguing that the social and historical constitution of the subject is not a limit on women's agency, but the precondition for women taking action, being a subject that thinks, feels, interacts, resists, and innovates).

203. FINKE, *supra* note 140, at 13-14.

204. BAKHTIN, IMAGINATION, *supra* note 181, at 346-47 (emphasis added).

the feminist interrogation into the theories of value that have defined the worthy attributes of intellectual works.²⁰⁵ Value judgments themselves are revealed to be utterances existing in dialogic relationship with other judgments, meaning that value is not intrinsic to the text or self-evident, but is contingent and so dependent upon external ideals and agendas.²⁰⁶ This acknowledgement should lead us to inquire into alternative discourses cloaked behind the monologic claims of the dominant discourse. We could ask, for example, whether originality merits its centrality in the valuation of literary works, and what dialogical response this statement of value anticipates. Who might argue that value resides in originality, in what conditions, and to what end? Who might disagree, and what circumstances or purposes would cause them to do so?²⁰⁷ While a dialogic approach reveals the importance of agency, function, and condition in theories of value,²⁰⁸ these dynamic concepts are hidden behind the abstract universalism of copyright's author-figure, and the intrinsic value of copyright's original intellectual work. Dialogism forces copyright theory to address the contingent nature of its assumptions about the copyrightable work and the discourses it privileges.

Where a property-rights oriented account of copyright fails to capture the nature of copyright as speech regulation, a focus on the dialogic illuminates the institutional role that copyright plays in shaping discourses. As Finke explains:

[E]very utterance about value forms part of a discourse on value, forming a class of judgments, a speech genre governed by rules that determine the authority (or lack thereof) of the speaker or the receiver and the particular historical, social, or institutional context in which an utterance is given force.²⁰⁹

The copyright system is an institution that attributes value to particular utterances, and thereby determines the authority of the speaker (author), as well as the lack of authority of the receiver (user). The dialogic approach provides a lens through which to view the influence of copyright in structuring (and suppressing) dialogic processes by virtue of its

205. FINKE, *supra* note 140, at 154.

206. *See id.* at 155.

207. *See id.* at 159 (“[V]alue is always ‘value-for’ because it is through selection, classification, and ordering (hierarchies) that we confer value upon objects. ‘Value-for’ enables us to reevaluate objectivist theories of intrinsic value by requiring us to pose questions that in traditional terms are unposable ‘nonquestions.’ If value is value-for, then we must ask of any valued object, value for whom? under [sic] what circumstances and conditions? and [sic] for what purpose?”).

208. *See, e.g., id.* at 161 (using dialogism to examine suppressed diachronic operations in twentieth century discussions of value and the transformation of a text from non-art to art, as applied to T. S. Eliot's account of value and canon formation).

209. *Id.* at 156.

reinforcement of dominant discourses about value and authority. Central to this analysis is the unearthing of the power relationships that establish where that authority should lie.

[T]he notion of the dialogic requires precisely an investigation of the power relations that inform and shape any discourse. It calls for an investigation of the social institutions that control who speaks, in what situation, and with what force.²¹⁰

Copyright is one such institution. The notion of the dialogic therefore calls for an investigation into copyright, the power relations that it sustains and perpetuates, and the discourses of value and authority that it informs and replicates. In a culture such as ours, characterized by corporate ownership of cultural texts and images, it is not hard to imagine where such an investigation would lead.

As it relates to the core concepts of copyright theory—constructions of the author, the processes authorship, the value of works, and the institution of copyright as a whole—this discussion demonstrates the role that feminist theory can play in the re-imagining of copyright. Feminist literary theorists have met the challenges presented by the author-subject and its de/re-construction with an appeal to dialogism and the constant interplay of voices, texts, and discourses that create the cultural noise in which we exist and upon which our subjectivity depends.²¹¹ Copyright theory, which also needs to survive the de/re-construction of the Romantic author, can learn from this approach; it should acknowledge the historical contingency of the author-figure, the social situation of the author-speaker, and the dialogic nature of the authored text. It should also examine the role that the institution of copyright plays in silencing counter discourses, attributing authority to speakers, and allocating power over speech.

D. Feminist Theory and the Atomistic Self

1. Political Theory, Copyright, and the Self

As suggested above, the tension in literary theory between competing versions of authorship parallels a similar tension between competing conceptualizations of selfhood in social and political theory. The liberal theory of the self as an autonomous self-determining subject has been widely accused of denying the social and interdependent nature of the

210. *Id.* at 16-17.

211. See Yaeger, *supra* note 182, at 240 (noting that the dialogic celebrates the multivocal nature of utterance and the interactive character of discourse, as the word's roots would suggest: "'dia-' with its connotation of togetherness, and 'legesthai,' meaning to tell, to talk. To talk with one another, to argue, to exchange information—these activities assume the importance of voice, of presence, of deliberate intersubjectivity").

human self;²¹² the competing communitarian vision of the socially constituted and encumbered self has also been criticized, in this case for foreclosing possibilities of genuine agency, autonomy, and change.²¹³ Feminist legal theorists have sought to resolve the dilemma by dissolving the binary opposition between social construction and individual agency.²¹⁴ In this section, I will outline the core concepts of relational feminism that have provided a route towards this end and explore their possible implications in the field of copyright law.

It is important, at this juncture, to underscore the connection between conceptions of authorship and conceptions of selfhood *per se*. The following passage by Shelley Wright captures this relationship and is worth reproducing in full.

The existing definition of copyright as both economic and personal within a political or civil context presupposes that individuals live in isolation from one another, that the individual is an autonomous unit who creates artistic works and sells them, or permits their sale by others, while ignoring the individual's relationship with others within her community, family, ethnic group, religion—the very social relations out of which and for the benefit of whom the individual's limited monopoly rights are supposed to exist. The community has only the most tenuous identity. Society itself is seen as an aggregate of anomic individuals, each separate, segregated, fragmented, and existing only as subjects of circumscribed civil rights, including the right to consume what others produce or create within limited 'fair dealing' or 'fair use' provisions. This vision undercuts to a large extent the social justification for monopoly rights as they exist in copyright and places the emphasis on the individual rights of the artist as a 'creator' and the artist, or her publisher, as a producer of saleable commodities.²¹⁵

Highlighted here is, first, that the construction of the author reflects a particular vision of the self, and, second, that this individualized vision of the self inevitably undermines the social reasons for which the copyright

212. See, e.g., Wright, *supra* note 164, at 73-74.

213. See, e.g., ELIZABETH FRAZER & NICOLA LACEY, *THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE* 174 (1993).

214. See, e.g., *id.* (“[T]he resolution, or at least weakening, of the agency/structure dichotomy is of first importance from a feminist perspective. For if this cannot be achieved, we are stuck with an unenviable choice. We can have a disembodied conception of selfhood which implicitly excludes or problematizes women and marginalizes women's experiences, and to which we can only have access at the cost of abandoning aspects of embodied existence which feminist thought has struggled to celebrate and to reveal as central to our selves. Or we can have a determined if embodied conception of the socially situated self which seems to take away with one hand the possibility of critical thinking, social struggle and radical politics just as it gives us the possibility of contextualized political theory with the other.”).

215. Wright, *supra* note 164, at 73-74.

system exists.²¹⁶ Wright continues, “[I]ndividuals . . . are the products of their community, culture, and society. The production of artistic works assists in creating this culture, this sense of community, and the psychological content of individuals themselves both as creators and as communicants of creation.”²¹⁷ Reframing the self within the community complicates the individualized self that plays the role of copyright’s original author. The subject matter of copyright is not the independently produced and individually owned work-as-object, but rather a contribution to the continually evolving culture in which the author exists and by which she is constituted.

Built upon the ontological assumptions that inform liberal thought, and the normative ideals that inform possessive individualism, the current copyright model is not well equipped to recognize either the communal and communicative nature of cultural expression or the significance of that expression to the society and the communicator.²¹⁸ If copyright is to encourage such cultural expression while also respecting the interests of the public to access and engage with the expression, it must first be capable of recognizing the nature and significance of its subject matter. The re-imagination of copyright therefore necessitates a challenge to the robust individualism of the pre-social, liberal self.²¹⁹

2. Political Theory and the Feminist Dilemma

Perhaps the greatest challenge to liberalism’s conception of selfhood in recent decades has come from the school of thought categorized as communitarianism.²²⁰ While communitarianism resists any attempt at sweeping definition, it has more or less crystallized around a critique of liberal individualism premised upon social constructionism and the public good.²²¹ Unifying communitarian thought is the rejection of a liberal

216. *Id.* at 74.

217. *Id.*

218. See RANDALL, *supra* note 13, at 58-59 (noting that the identity of the individual author is not natural or essential, but formed in part by the cultural discourse in which she participates (through her artistic expression): “an insight that is thoroughly pre-modern and only appears modern or postmodern in the light of Romantic presuppositions about the individuality of identity”).

219. See FRAZER & LACEY, *supra* note 213, at 45 (noting that in the liberal tradition, the moral status of an individual is derived from a conception of the individual as pre-social, possessing essential, individual characteristics before entering society as an embodied person). With respect to the Rawlsian theory, “the ontological conception of the person as pre-social and transcendent feeds into an ethical conception of the paramount importance of individual rights and negative liberties, and the value of individuality.” *Id.* at 46.

220. See, e.g., Shlomo Avineri & Avner de-Shalit, *Introduction to COMMUNITARIANISM AND INDIVIDUALISM* 1, 1 (Shlomo Avineri & Avner de-Shalit eds., 1992).

221. See FRAZER & LACEY, *supra* note 213, at 102. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984) (1981) (arguing that moral discourse and practice in the contemporary world is hollow and reinvigorating

theory of the self as essentially pre-social, and the community as merely contingent and instrumental.²²² According to communitarians, the self can be understood only in the context of his or her community, culture, and values, and in light of the social processes and institutions that have shaped them; the self is not “unencumbered” but always-already situated, identity is not innate but intersubjective, and the community is not external but constitutive.²²³ As Sandel explains: “For [its members], community describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.”²²⁴

Communitarian concern with the metaphysics of social construction is not limited to a methodological claim—it translates into a normative discourse. It makes sense that the socially situated individual is concerned for the kind of society in which she exists, that she might hold obligations to other members of the community (as opposed to merely rights wielded against them), and that the values, norms, and goals of the community might be shared and regarded as her own.²²⁵ Thus, the social construction theory of the self flows into a social constructionist approach to political

traditionalist and communitarian thought); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998) (1982) (critiquing Rawls's conception of the person for privileging the standpoint of self-interested individuals at the expense of communal interests); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975) (presenting an analysis and a criticism of political and moral assumptions underlying liberal thought); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) (analyzing how society distributes not just wealth and power but other social goods such as work, free time, education, kinship and love, and recognition, and how a society can justly distribute these goods); Charles Taylor, *Atomism*, in *COMMUNITARIANISM AND INDIVIDUALISM* 29 (Shlomo Avineri and Avner de-Shalit eds., 1992) (objecting to the liberal idea that men are self-sufficient outside of society and defending the view that man is a social animal). *But see generally*, Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE* 159 (Nancy L. Rosenblum, ed., 1989) (clarifying the differences between liberalism and communitarianism and arguing that the two views do not necessarily oppose each other); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 *POL. THEORY* 6 (1990) (investigating the power of the communitarian critique in its American versions and offering a new perspective incorporating the two strands aimed at liberal practice and theory).

222. See Seyla Benhabib, *Autonomy, Modernity and Community: Communitarianism and Critical Social Theory in Dialogue*, in *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 68, 70 (1992) (“As a political theory, ‘communitarianism’ must primarily be identified *via negative*, that is less in terms of the positive social and political philosophy it offers than in light of the powerful critique of liberalism it has developed.”).

223. See SANDEL, *supra* note 221, at 150.

224. *Id.*

225. See Avineri & de-Shalit, *supra* note 220, at 6-7; see also FRAZER & LACEY, *supra* note 213, at 56 (“Ontological and methodological commitments can and do predispose a [political] theory toward particular substantive commitments and absences. This means that epistemologies and ontologies themselves are open to both deconstruction and political critique.”).

and moral value and a concern with “public goods” often lacking in the liberal landscape.²²⁶

Of course, feminists have expressed a similar disenchantment with the liberal conception of personhood.²²⁷ Because it overlooks the socially situated nature of the self, liberalism’s individual is essentially disembodied, and social relations such as sex, class, and race are rendered invisible.²²⁸ This precludes sufficient acknowledgement of social injustice experienced as a result of group identity, legitimizes the problematic public-private distinction behind which myriad oppressions lurk,²²⁹ and simply denies the connected sense of self that many women experience in their lives.²³⁰ Thus, it is a common thread amongst much feminist theory that “[a] person’s critical, political consciousness can only be explained in terms of this socially situated conception of the self in which individual agency is not fully analysable in pre-social terms.”²³¹

There may appear to be a neat convergence between the feminist critique of degendered, universalizable conceptions of the self and communitarian objections to the ahistorical and atomistic individual of liberal political

226. See FRAZER & LACEY, *supra* note 213, at 109-10.

227. Compare Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 645 (1990) (proposing ethical feminism as an alternative to liberal and radical feminism because ethical feminism focuses on what women will become, rather than what women are), and Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 7 (1989) (mentioning that the liberal theory of feminist autonomy is unable to achieve the aspirations of feminist theory, and is incompatible with its methodology), with Benhabib, *supra* note 222, at 69-70 (describing some of the themes of communitarian critique of liberalism including the darker side of economic growth and scientific progress, along with the domination of nature), and LORRAINE CODE, WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE 275 (1991) (exploring the ecologically oriented feminist position, which avoids merging individualism with individuality, thus promoting mutual responsibility and interconnections between people, environments, and events), and SARAH HOAGLAND, LESBIAN ETHICS: TOWARD NEW VALUE 144-45 (1988) (creating the word “autokoenoyn,” which means the self in the community, to discourage the notions of autonomy, which means self rule and implies that others can rule over an individual).

228. See FRAZER & LACEY, *supra* note 213, at 54.

229. See *id.* at 125; see also Penny A. Weiss, *Feminism and Communitarianism: Comparing Critiques of Liberalism*, in FEMINISM AND COMMUNITY 161, 171-73 (Penny A. Weiss & Marilyn Friedman eds., 1995) (discussing the difference between communitarian and feminist critiques of the liberal account of human relations).

230. See, e.g., Virginia Held, *Non-Contractual Society: A Feminist View*, in FEMINISM AND COMMUNITY 209 (Penny A. Weiss & Marilyn Friedman eds., 1995); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls’ Theory of Justice*, 16 N.M. L. REV. 613, 627 (1986); see also Nedelsky, *supra* note 141, at 134-41 (examining the claims of maternal feminism).

231. FRAZER & LACEY, *supra* note 213, at 57; cf. SUSAN MOLLER ORKIN, JUSTICE, GENDER AND THE FAMILY 60-61 (1989) (acknowledging that feminist thinkers disagree about the causes and nature of women’s oppression and the solutions to it, yet they all agree that any tradition that does not address these issues should no longer be regarded as just or logical).

theory.²³² The communitarian conception of the constitutive community is attractive to feminists and other critical social theorists who take issue with the isolated rights-bearing individual.²³³ However, while it may be “commonplace amongst communitarians, socialists and feminists alike that liberalism is to be rejected for its excessive ‘individualism’ or ‘atomism,’”²³⁴ feminists cannot simply appeal to communitarianism as an adequate solution to the shortcomings of modern political thought.

The crux of the problem is the apparent absence of political potential within communitarian scholarship:

[A]lthough communitarians take on board a critique of liberal individualism and purport to recognise the constitutive role of the social in our identity, they have so far stopped short of any genuinely political analysis or critique of the very community institutions whose importance they acknowledge.²³⁵

At best, the failure of communitarianism to generate any substantive political critique of the community institutions that constitute our identities leaves it disappointingly impotent.²³⁶ At worst, this failure is merely symptomatic of a distinctly conservative undertone in communitarian thought, manifested in propensity to idealize even oppressive communities, and so to rationalize the status quo.²³⁷

Feminism needs a critique of individualistic social ontology, but it also demands a critical capacity to evaluate and denounce the communities, traditions, and institutions that it recognizes as constitutive. Perhaps most importantly, it must be fully capable of perceiving the power relations that exist within and between these various communities;²³⁸ questions of comparative disadvantage and power-disparity are notably absent from the

232. See Seyla Benhabib & Drucilla Cornell, *Introduction to FEMINISM AS CRITIQUE* 1, 11-12 (Seyla Benhabib & Drucilla Cornell eds., 1987).

233. See Benhabib, *supra* note 222, at 70 (“[T]he communitarian insistence that contemporary moral and political theory enrich its understanding of the self and base its vision of justice upon a more vibrant view of political community offers a corrective to the excessive formalism of justice-centred and deontological theories.”); FRAZER & LACEY, *supra* note 213, at 117-29 (elaborating on the feminist attraction to communitarianism); *cf.* Weiss, *supra* note 229, at 164-65 (discussing the commonality in contemporary feminist and communitarian understandings of liberalism’s view of the self).

234. Will Kymlicka, *Liberalism and Communitarianism*, 18 CAN. J. PHIL. 181, 181 (1988).

235. FRAZER & LACEY, *supra* note 213, at 136-37.

236. See Weiss, *supra* note 229, at 175 (explaining that women’s roles often force the elimination and surrender of the self or the redefinition of one’s self and self-interest mainly in terms of and in relation to others). The communitarian’s answer to liberalism’s poor social life fails to solve or seriously address this enforced self-abnegation. *Id.*

237. See *id.* at 173-74.

238. *Cf.* Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in FEMINISM AND COMMUNITY, 233, 237-40 (Penny A. Weiss & Marilyn Friedman eds., 1995) (discussing the differences between the concepts of Individualism and Community).

works of prominent communitarians such as MacIntyre or Sandel.²³⁹ Communitarianism therefore fails to provide a foundation for feminist critique at a political level; indeed, it largely fails to provide an account of how women, in the context of their communities, can develop a critical consciousness at all.

On this communitarian view of personhood, the woman who lives in a sexist and patriarchal culture is peculiarly powerless. For she cannot find any jumping-off point for a critique of the dominant conception of value: her position as a socially constructed being seems to render her a helpless victim of her situation How is she to attain any measure of critical consciousness, so as to move towards the formation of alternative communities, alternative definitions[?]²⁴⁰

Once again, feminism encounters its dilemma. The challenge for feminists who believe in the socially situated self is to provide a coherent account of selfhood that permits sufficient subjectivity for a person to “comprehend her situation in critical terms”²⁴¹ and sufficient agency for her to engage with and shape the community that shapes her.²⁴² Feminism has therefore tackled head-on the “difficulties inherent in building a theory (and practice) that adequately reflects both the social and the individual nature of human beings.”²⁴³

3. Relational Feminism: Rethinking the Self

I cannot hope to canvas all of the ways in which feminist political and legal theorists have attempted to address this dilemma. Rather, I have chosen to appeal to the notion of “relational feminism” as one potential route towards resolving the tension between individualism and communitarianism.²⁴⁴ While feminist scholarship generally insists upon

239. See Weiss, *supra* note 229, at 165. (“From a feminist perspective, most centrally affecting the formation of the self are factors such as sex, age, race, sexuality, and class. Yet about such things most nonfeminist communitarians are peculiarly hushed [The communitarian notion of social context] omits such traditions and practices as sexism and racism, practices that may have a larger role in forming the self and determining one’s social place than do cities or neighbourhoods Such forces . . . not only often create distinct communities (the ‘lesbian community,’ Boy Scouts, etc.) but also establish relations that pervade and structure all communities.”).

240. FRAZER & LACEY, *supra* note 213, at 151.

241. *Id.*

242. See *id.* at 175 (explaining that because communitarians see the social dilemma as disintegration, their response is connection, yet the problem for women has not been isolation and lack of dedication, and the feminist substitute is neither connection nor separation, it also entails a re-examination of engendered institutions such as the family and the sexual division of labor).

243. Nedelsky, *supra* note 227, at 8.

244. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 194 (1990) (stating that one aspect of relational feminist scholarship is the search for wholes and relationships instead of simply separate parts, along with the emphasis of experience and intuition); Jennifer Nedelsky, *Reconceiving Rights as*

the inter-subjective nature of being, it is concerned with freeing women to shape their own lives, to write their own narratives, to create themselves. Rather than emphasizing only situatedness, feminists therefore stress the need to renegotiate our gendered identities and the terms of our subjectivity. For relational feminists, the key to this renegotiation lies in the very network of relations and cultural narratives that are commonly perceived as a threat to our subjectivity; according to relational feminism, they are also the route towards autonomy and self-identity.²⁴⁵

a. The Relational Self

The starting point for a relational account of the self is “an attention both to the individuality of human beings and to their essentially social nature.”²⁴⁶ The aspirational society is one that structures relations in such a way that communities and relationships foster, rather than undermine, self-worth and individual autonomy.²⁴⁷ Thus, the concepts of autonomy and individuality survive the rejection of atomistic individualism and the appeal to social constructionism.

The re-imagination of autonomy provides the centrepiece to relational feminism.²⁴⁸ The need for a genuine conception of autonomy is essential to the feminist political project,²⁴⁹ but the traditional liberal portrayal of autonomy as freedom, independence, and self-determination misses the mark. If we take as a starting point the intrinsic sociality of human beings, then interdependence is not the antithesis of autonomy, but its precondition.²⁵⁰ If interdependence is a “constant component of

Relationship, 1 REV. CONST. STUD. 1, 11 (1993) (refusing to summarize the communitarian versus liberal individualism debate); Nedelsky, *supra* note 227, at 8 (stating that feminist views and demands guide the inquiry into resolving the tension between individualism and communitarianism by pointing to dangers, defining aspirations and indicating the contours of an approach to solve the issue); see also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 152-55 (1982) (discussing the process of individuation in terms of the changes in a person’s relationships with him or herself and to the rest of the world); Mary Becker, *Patriarchy and Inequality: Toward a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22; cf. CATHERINE KELLER, FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF 233 (1986) (analyzing the tensions between religion and claiming that religion is what an individual does privately, yet it is also a social event). See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (reviewing the difference between cultural feminism and radical feminism and finding that both say something true about the female experience).

245. See, e.g., Nedelsky, *supra* note 227, at 21 (“The collective is not simply a potential threat to individuals, but is constitutive of them, and thus is a source of their autonomy as well as a danger to it.”).

246. *Id.* at 22.

247. See *id.*

248. See Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417, 426-27 (1997).

249. See *id.* at 427.

250. See Nedelsky, *supra* note 227, at 12; Williams, *supra* note 248, at 435 (“[O]ne

autonomy,” genuine autonomy is only realizable through the human interactions that allow it to develop and flourish.²⁵¹ If autonomy is understood to mean the capacity to find and live by one’s own law, that law and the capacity to find it can only develop in the context of relations with others.²⁵² An adequate theory of autonomy must therefore understand autonomy in relational and not individualistic terms: “It is relationships, from child-parent, to student-teacher, to client-state, as well as patterns of relationship among citizens, that make actualization of the human potential for autonomy possible.”²⁵³

In the context of constructive relationships, Jennifer Nedelsky casts the agency and autonomy of the relational self in terms of a human capacity for self-creation: “a capacity that means we are never fully determined by our relationships or our given material circumstances. . . . We are always in a creative process of interaction, of mutual shaping, with all the dimensions of our existence.”²⁵⁴ Susan Williams understands this creative process as narrative agency—the capacity to engage in an ongoing process of evaluation, interpretation, and reinterpretation of one’s experiences and life-story.²⁵⁵ In other words, “the self is a creature in and of the world, but one capable of at least partially transforming herself through thought, criticism, and self-interpretation.”²⁵⁶ With its commitment to interdependence, community, agency, and individuality, relational theory provides the solution to feminism’s political and ontological dilemma:

The notion of the relational self, . . . nicely captures our empirical and logical interdependence and the centrality to our identity of our relations with others and with practices and institutions, whilst retaining an idea of human uniqueness and discreteness as central to our sense of ourselves. It entails the collapse of any self/other or individual/community *dichotomy* without abandoning the idea of genuine agency and

cannot be an autonomous person in isolation; one can only be autonomous in relationships with other persons.”); *see also* DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE 40 (1989) (criticizing the reduction of personal autonomy to a special case of free will because it does not address the issue of how an individual can live in harmony with his or her authentic self).

251. *See* Nedelsky, *supra* note 227, at 21; *see also* FRAZER & LACEY, *supra* note 213, at 180 (“On the relational conception of subjectivity, autonomy can still claim its place as an important value, but our conception of autonomy is no longer of separateness in the sense of isolation. Rather we can see that autonomy . . . typically depends not only on background facilities and welfare levels but also on our relations with others. My autonomy depends not just on others’ or the state’s leaving me alone, but in others’ acknowledgement of, respect for and support towards me.”).

252. *See* Nedelsky, *supra* note 227, at 11.

253. Nedelsky, *supra* note 141, at 133.

254. *Id.*

255. *See* Williams, *supra* note 248, at 427-28.

256. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 888 (1994).

subjectivity.²⁵⁷

b. Rights as Relationship

The notion of the relational self challenges the liberal conception of the autonomous individual as an independent bearer of rights to be wielded against others and the state.²⁵⁸ The role of rights in feminist discourse is therefore another facet of the dilemma that feminists face in the liberal-communitarian debate. This rights-bearing individual is the protagonist of liberalism, and the epitome of individualism. However, in the context of a struggle for substantive equality, feminists generally refuse to abandon the notion of rights as a political tool, even while rejecting the rights-fetishism of the liberal political order. As with autonomy, the concept of rights must be retained but re-imagined.

In liberal thought, rights take the form of limits to democratic outcomes, constraints upon collective choices, and boundaries between citizens. Rights are portrayed as innate to the individual, and human relations are cast in terms of clashing rights and interests. In contrast, from a relational perspective, human interaction is seen primarily “in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy.”²⁵⁹ Rights, in this picture, do not simply mediate the boundaries of individual self-interest: they encapsulate collective choices about the values that we, as members of this society, hold most dear. These values are neither innate nor trans-temporal but evolve with society over time. As such, they are best understood in terms of relationships because “the shifting quality of those basic values makes more sense when our focus is on the structure of relations that fosters those values.”²⁶⁰

In liberal thought, property rights epitomize the role attributed to rights in general.²⁶¹ Property represents the boundaries of the individual’s private sphere and a limit upon the powers of the state and fellow citizens.²⁶² It has been suggested that the symbolic power of traditional property flows in part

257. FRAZER & LACEY, *supra* note 213, at 178.

258. See Nedelsky, *supra* note 227, at 20-21.

259. *Id.* at 8 (recognizing that society, community, and relationships are still relevant to liberal individualists); see also Ronald Dworkin, *Liberal Community*, in COMMUNITARIANISM AND INDIVIDUALISM 205, 217 (Shlomo Avineri & Avner de-Shalit eds., 1992) (accepting that people need the community in order to identify with it and recognize that the value of their own lives is only a reflection of and is derivative from the value of the life of the community as a whole).

260. Nedelsky, *supra* note 244, at 9.

261. See Nedelsky, *supra* note 141, at 132 (advancing that when rights are regarded as the vehicle by which an autonomous individual exercises his or her right of self-determination, the legal right to own property seems central to that vision).

262. See Nedelsky, *supra* note 227, at 15-18.

from its apparent concreteness, which lends materiality to the personal space claimed by the rights bearer and makes it easy to identify violations and resultant harm.²⁶³ As lawyers know, however, this conceptual tendency to physicalize property belies its nature. Property rights are primarily about relations between persons and not the material things that are owned.²⁶⁴ Moreover, there is nothing about property rights that make them intrinsic or pre-social: their significance is entirely dependent upon the rules and guarantees of the state.²⁶⁵ Like any other right, then, property rights represent a collective, democratic choice about structuring relations of power and responsibility in society. Property rights may give the owner protection against the collective, but they have their source in the collective.

Relational feminism thus recasts individual rights as relational: rights are not things to be wielded by individuals in defence of their personal sphere but are instead vehicles that “construct relationships—of power, of responsibility, of trust, of obligation.”²⁶⁶ Debates about the substance or scope of rights should not begin and end with the claim or denial of right (which only obfuscates the underlying issues) but should instead focus upon the kinds of human relationships the right would structure, and the values that would be furthered by its guarantee.²⁶⁷

c. Dialogic Communitarianism

In light of the role played by “dialogism” in feminist literary criticism and the collapse of structure/agency dichotomies, it is interesting to note the significance accorded to dialogue in relational feminism’s theory of selfhood. This is perhaps captured best in the work of Nicola Lacey and Elizabeth Frazer, who appeal to the concept of “dialogic communitarian”²⁶⁸

263. *See id.* at 23.

264. *See* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 621-23 (1988) (discussing whether relationships can create property rights); *see also* David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO L. J. 325 (2003) (arguing that redefining private property as a relationship through a resource forces us to understand the particularities that any given resource brings to the property relation).

265. *See* Nedelsky, *supra* note 227, at 22-23.

266. Nedelsky, *supra* note 244, at 13; *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 25 (1990) (defining rights as relationships, not possessable things, as institutionally defined rules specifying what people can do in relation to each other, as referring to doing more than having, and as to social relationships that facilitate or restrict actions).

267. Nedelsky, *supra* note 244, at 14-15.

268. *See* FRAZER & LACEY, *supra* note 213, at 203-12; *see also* DRUCILLA CORNELL, THE PHILOSOPHY OF LIMIT (1992); Seyla Benhabib, *Autonomy, Modernity and Community*, in SITUATING THE SELF 68 (1992); Seyla Benhabib, *Liberal Dialogue Versus a Critical Theory of Discursive Legitimation*, in LIBERALISM AND THE MORAL LIFE 143 (Nancy L. Rosenblum ed., 1989); Drucilla Cornell, *Roberto Unger’s Politics: A Work in Constructive Social*

as a means by which to move beyond the binary oppositions of the liberal-communitarian debate:

This ideal is dialogic in the sense that it assumes democratic institutions providing real access to political processes for all citizens. It is both dialogic and communitarian in the sense of proceeding from the relational theory of the self, recognising the importance of both dialogue and identification with various ‘communities’ in the constitution of subjectivity and human identity, and it is communitarian in the sense of placing questions of both public goods and the institutions needed to support them, and the ideal of collective life based on mutual acceptance and recognition, at the heart of politics.²⁶⁹

Taking as their starting point a theory of the “relational self,” Frazer and Lacey argue that a commitment to dialogue is essential for the ongoing scrutiny and negotiation of power relations within communities and social structures.²⁷⁰ This necessitates both an awareness of the power that inheres in practices and discourses and attention to the value and audibility of members’ voices.²⁷¹ Substantive access to informed political debate and the capacity to be heard are central to the dialogic communitarian ideal.²⁷²

According to dialogic communitarianism, subjectivity requires discursive engagement: the capacity to listen to the claims of others and to articulate one’s own.²⁷³ Feminism’s appeal to the practice of interactive consciousness-raising is an example of transformative politics through dialogic process.²⁷⁴ The collective practice of exchanging personal accounts and experiences generates a critically reflective capacity, creating opportunities for women to better understand themselves and their social condition. Related to this practice is the similar but more self-conscious art form of “narrative” creation.²⁷⁵ The creation of narrative is essentially

Theory: Beyond Tragedy and Complacency, 81 NW. U. L. REV. 693, 696-98 (1987); Drucilla Cornell, *Two Lectures on the Normative Dimensions of the Community in the Law*, 54 TENN. L. REV. 327, 341-42 (1986); Nedelsky, *supra* note 141, at 143 (stressing the importance of public participation in ongoing debates and collective decision-making, both as an essential aspect of autonomy and expression, and to ensure that the structures of relationship encourage the autonomy of everyone).

269. FRAZER & LACEY, *supra* note 213, at 203.

270. *Id.* at 192-93.

271. *Id.* at 192.

272. *Id.* at 197 (finding that dialogic communitarianism provides “a richer set of possibilities for the reconstruction of a realistic ideal of participative, active citizenship”). As participating citizens, we speak from within the social group to which we belong. *Id.*

273. *See id.* at 208.

274. *See* FRAZER & LACEY, *supra* note 213, at 208; Katharine T. Bartlett, *Feminist Legal Methods*, in FEMINIST LEGAL THEORY: READING IN LAW AND GENDER 370, 381 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (defining consciousness-raising as an “interactive and collaborative process of articulating one’s experiences and making meaning of them with other individuals who also articulate their experiences”).

275. *See* Anne C. Dailey, *Feminism’s Return to Liberalism*, 102 YALE L.J. 1265, 1274

“story-telling,” which aims to give voice to women’s experiences, but also, through the processes of communication and sharing, to facilitate human connection across difference.²⁷⁶ Narrative is self-evidently situated and perspectival, but it is also creative (in its construction and interpretation) and potentially reconstructive (in its political power).²⁷⁷ As such, it is another tool with which feminists have tempered the implications of social constructionism:

[T]here is enough of a story-teller in all of us to create a coherent, if unstable self. Yet the narrative speaker is not simply an outspoken incarnation of the pre-existing, bounded individual of modernist thought; she must contend with the social forces that continually threaten to destroy her carefully crafted sense of self.²⁷⁸

The use of narrative is also said to temper the postmodern deconstruction of the Woman by recreating a meaningful connection amongst women through their gendered realities. “Narrative thus straddles the postmodern divide between a unified, essentialist meaning of womanhood and no meaning at all; the narrating self is a woman-in-process.”²⁷⁹

At the foundation of consciousness-raising, narrative creation, and dialogic communitarianism more broadly, dynamic interaction with others in a process of dialogic exchange, both interpersonal and intrapersonal, constitutes identity and subjectivity.²⁸⁰ It is through this dialogic process of

(1993) (reviewing KATHARINE T. BARTLETT & ROSANNE KENNEDY, *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (1991)) (“Narrative . . . is speech with a different objective. In contrast to the spontaneous, open-ended dialogue of consciousness-raising, narrative as practiced by feminist legal scholars is a supremely self-conscious art form. The stories feminists tell are sometimes autobiographical and sometimes true, but they are as often fictions and even fantasies. Feminist narrative in law is literature with a political point.” (footnotes omitted)).

276. *See id.* at 1278 (“Narrative can transcend human difference only when the listener responds to the story of another by seeking out traces of her own experience. The empathetic listener uses her imagination to comprehend the speaker’s difference, and this creative effort is what builds the human bridge between them.”); *see, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

277. Dailey, *supra* note 275, at 1284 (“At its strongest, narrative acts as a profoundly destabilizing, subversive force in public deliberation. The voice of narrative is often loud, angry, disruptive. It aims as often to shatter the illusion of similarity as to build upon differences. . . . [N]arrative can serve to destabilize prevailing legal discourse by promoting the stories of those whom law fails to recognize and protect.”).

278. *Id.* at 1275.

279. *Id.* at 1276.

280. Having deconstructed the unity of subjectivity and acknowledged the shifting and multiple nature of the communities within which the fragmented subject is constituted, our capacity to conceive of ourselves as possessing some degree of stable identity seems dependent not just upon dialogic relations with others, but also upon a continuous internal dialogue. *Cf.* Benhabib, *supra* note 222, at 5 (“The identity of the self is constituted by a narrative unity, which integrates what ‘I’ can do, have done and will accomplish with what you expect of ‘me,’ interpret my acts and intentions to mean, wish for me in the future, etc.”).

interpreting and ordering experiences, discourses, and social forces that the socially-situated subject of feminist ontology is able to exercise the agency demanded of her by feminist politics.

4. Relational Theory, Authorship, and Copyright

My aim in exploring these elements of relational feminism has been to reveal the potential for a notion of subjectivity that acknowledges the connectedness of the human subject without engulfing it within its social situation and so denying individuality, difference, and creative capacity. My purpose, of course, is to draw from this some lessons for the law of copyright. Authorship is an essentially human project, and constructions of authorship are thus essentially bound to conceptions of the human self. I argue that the author in copyright law is postulated in unequivocally liberal terms. It is my suggestion that copyright theory can draw upon the lessons of relational feminism to re-imagine the nature of the author-self (which will in turn necessitate the re-imagination of copyright itself).

a. The Relational Author

As Nedelsky has noted, there is “inherent tension between the idea of autonomy as both originating with oneself *and* being conditioned and shaped by one’s social context. Those tensions are the tensions of feminism, and they come from feminism’s recognition of the nature of human beings.”²⁸¹ Similarly, I would suggest there is an inherent tension between the idea of authorship as both originating within oneself and being derived from the social and cultural context within which the author creates. These are the tensions of copyright. Copyright’s failure to adequately recognize the essentially social nature of human creativity obscures these tensions, and so misrepresents the processes of authorship. Copyright needs a relational theory of the author-self.

Far from the individualized, self-determining author of modern copyright law, the “relational author” is always-already situated within, and constituted by, the communities in which she exists, and the texts and discourses by which she is surrounded. Far from creating independently and choosing relationships through the vehicle of copyright *qua* private property, the author necessarily creates from within a network of social relations: she is not individualizable, and her works of authorship cannot be regarded in isolation. It follows that the author’s works are not “independent” creations and they do not originate from the author alone.

However, this does not mean that author and authorship are illusory or obsolete. A relational theory of authorship recognizes the social dimension

281. Nedelsky, *supra* note 244, at 11 (emphasis in original).

of the author, but also her duality: she encapsulates both our connectedness and our capacity for critical reflection.²⁸² As we have seen, relational feminism regards the self as continuously engaged in a “creative process of interaction, of mutual shaping, with all the dimensions of our existence.”²⁸³ When we conceive of autonomy as the freedom and ability to construct one’s own narrative and to project this narrative of the self into the world,²⁸⁴ the self takes on the role as both actor and author. The scene is set, and the role is given, but the relational self has the creative capacity to improvise, to refuse direction, to re-write the ending. It is easy to find, in the creative process of authorship, an instantiation of this capacity for creative agency upon which relational feminism insists.

In an effort to explain the duality of the relational self as both socially constituted (determined) and possessing narrative autonomy (creative), Susan Williams’ words also provide insight into the duality of the *author-self*:

[T]he difference between creativity and determinism may simply be a difference in the degree of complexity in the causal sequence. It is not that anything is uncaused, but that the influences on a given human being are so many, varied, and interacting that at some point it becomes meaningless to ascribe causality to any useful subset of those influences.²⁸⁵

Similarly, in the processes of authorship, the texts, discourses, experiences, and relationships that constitute the author are combined, interpreted, reinterpreted, and retold. What emerges from the authorial process is not original in the sense of having emerged *ex nihilo*, but it is nonetheless the author’s creation in the only sense that matters. When Williams describes narrative autonomy, she might easily be describing authorship:

[T]he activity of narrative construction—of interpretation and reinterpretation—begins, of course, from the materials at hand. That is, a person works with her own experiences and the stories, values, and concepts that are available to her in whatever culture(s) she inhabits. These materials are always, and from the beginning, both given and created. They are given in that they are shaped by forces beyond any individual’s control; they are created in that each new repetition of such [] cultural and personal artifacts is always a reinterpretation rather than

282. Cohen, *supra* note 136, at 151 (mentioning although “there is much that is individual about creativity, creativity . . . cannot be understood as an individual phenomenon”).

283. Nedelsky, *supra* note 141, at 133.

284. See Benhabib, *supra* note 222, at 5; Williams, *supra* note 248, at 430.

285. Susan H. Williams, *Utopianism, Epistemology, and Feminist Theory*, 5 YALE J.L. & FEMINISM 289, 312 (1993) (reviewing DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1991)).

merely a replication.²⁸⁶

In the same way, the materials of authorship are both given and created. The relational author must always create from the materials around her, but the authorial process is one of reinterpretation, recombination, and so transformation. The influences upon the author are so many, and the sources so various, that we can call this process authorial creativity.

b. Relational Copyright

A relational theory of the author has implications for the nature of copyright. In the relational model, copyright cannot play the role attributed to traditional property rights in liberal political theory. Due to the ubiquitous property analogy, copyright lends itself to similar reification (in spite of its intangible nature) and so threatens to occupy a similar role in an individual rights-based analysis. Additionally, because copyright is so often rationalized in Lockean terms (whereby the author's intellectual labor is rewarded), it lends itself to categorization as a "natural right."²⁸⁷ Applying the lessons of relational feminism, the individual liberty and natural rights-based accounts of copyright are untenable.

The author's right is not reducible to an individual entitlement that limits the actions of others. Although few would dispute this broad claim, its implications have yet to be grasped in principle or realized in practice. Copyright must be understood in relational terms: it structures relationships between authors and users, allocating powers and responsibilities amongst members of cultural communities, and establishing the rules of communication and exchange. To assess the nature of copyright with reference only to the copyright owner's private sphere of entitlement is to undermine its normative significance. The importance of copyright lies in its capacity to structure relations of communication, and also to establish the power dynamics that will shape these relations. Its purpose is to maximize communication and exchange by putting in place incentives for the creation and dissemination of intellectual works. Relational feminism can teach us that an individualized account of the copyright holder's right will disregard the significance of the relationships affected by copyright and will be blind to the power dimensions and social implications of the copyright system. It is therefore imperative that society not regard copyright as just another brick in "erecting a wall (of rights) between the individual and those around him."²⁸⁸

Relational feminists do not ascribe to the notion of the individual as

286. Williams, *supra* note 248, at 430-31.

287. See Carys J. Craig, *Locke, Labour, and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1, 3 (2002).

288. Nedelsky, *supra* note 227, at 12.

possessor of rights and interests that precede her entrance into civil society as an embodied person. Such rights or interests as she has under the law and against the collective are only the culmination of collective choices that have been made about the kind of society in which she should live, and the kind of relationships and values that should be fostered. From this perspective, it makes no sense to talk of the author's natural right to own the fruits of her intellectual labor, nor to compare the authorial act to the picking of acorns in the state of nature. There is no prior, transcendent entitlement for the political powers that be to respect in the name of legitimate government; there is only a choice about the kind of intellectual creativity and exchange that we want to see in our society, and the relations of communication that are likely to foster it. Copyright only exists because the state creates and defines it, and the state only creates and defines it to the extent that it is enforceable through state mechanisms. A relational theory of copyright thus repudiates any notion of copyright as a natural right of the author—it is simply the result of democratic, political decision-making, and subject to revision as a result of shifting values, changing circumstances, or the need to redress imbalances of power.

It follows that the claim to authorial right only obfuscates the real issues underlying policy debates about the strength and scope of copyright. The language of *copyright* and intellectual *property* is unfortunate because it contains a rhetorical power to foreclose debate,²⁸⁹ and like any invocation of right or entitlement, has the tendency to “obscure rather than clarify what is at issue, what people are really after.”²⁹⁰ The lessons of relational feminism reveal that the copyright system, as the result of a collective choice, always requires evaluation and re-evaluation.²⁹¹ In particular, we must be attentive to the relationships of power and responsibility that it generates and ask ourselves whether they foster the kind of creativity that we value.²⁹² By regarding copyright as relational and resisting its reification in the form of property, we open the door to debate about its subject matter, its scope, its goals, and its consequences.²⁹³ At this moment in history, where traditional copyright concepts are critically challenged by new technologies and the activities they facilitate, the future direction of copyright depends upon our readiness to debate these issues.

289. Nedelsky, *supra* note 244, at 16 (speaking of the conclusory quality of claims such as “it’s my property,” and warning that proprietary language can do harm by “treating as settled what should be debated”).

290. *Id.* at 15.

291. *Cf. id.* at 16 (discussing how property rights can be used to evaluate and structure relations of power in society).

292. *See id.*

293. *See id.* at 17.

c. Authorship as Dialogic Process

The final lesson to be drawn from a relational-feminist inquiry into copyright relates to the dialogic nature of the authorial creation. As we have seen, relational feminism stresses the central role of dialogue and narrative in the process of shaping social practices, institutions, discourses, and, of course, the self.²⁹⁴ A relational theory of copyright should regard authorship as participatory and dialogic. When the author creates original expression in the form of literature, art, drama, or music, she engages in an *intrapersonal* dialogue (developing a form of personal narrative by drawing upon experience, situation, and critical reflection) and an *interpersonal* dialogue (drawing upon the texts and discourses around her to communicate meaning to an anticipated audience). Authorship, like the feminist conception of narrative, is a way to develop one's voice, to communicate, and so to interact with others in and across communities. It is a way to generate meaning and establish one's individuality, but also to connect with others in relations of communication. This is the dual nature of authorship.

By understanding authorship as a dialogic process rather than a single unitary act, we can recognize facets of authorship that copyright law has, traditionally, either neglected or undermined. We must understand the author's works in their social context and examine her acquired rights in relation to her audience and other members of her communicative communities. There is no vacuum around the creative process, and no wall surrounding the author and her expression. With her original expression the creative author is entering a cultural conversation that has been going on long before she appeared, and one that will continue long after she leaves. Whatever she adds will therefore incorporate and respond to that which has already been said; and she must trust that her contribution will inform what others say after her. In other words, the dialogic nature of authorship reveals the cumulative nature of cultural creativity.

The author can only generate meaning using the texts, discourses, and experiences that she has encountered, and all original expression is, in this sense, derivative. The creation of meaning through imitation, incorporation, or transformation of pre-existing texts should, therefore, be recognizable as a central component of original authorship. This does not "diminish the merit" of authorship, but accurately describes the creative process that copyright is meant to encourage.²⁹⁵ A copyright system

294. See Dailey, *supra* note 275, at 1283.

295. See Litman, *supra* note 39, at 1011 ("My characterization of authorship as a combination of absorption, astigmatism, and amnesia is not intended to diminish its merit. Indeed, my position is that this mixture is precisely the process that yields the works of authorship we wish to encourage through the copyright law If this description is accurate, it implies that the romantic model of authorship, taken seriously, would do grave

shaped by a dialogic theory of authorship would, therefore, embrace creative forms that are currently marginalized, chilled, or declared unlawful because of the use that they make of pre-existing, protected works. It follows that the rights we establish over intellectual expression must leave room for others to engage in a similar communicative process; when others enter the cultural conversation they must be free to acknowledge, respond to, and build upon the contribution the author has made. A dialogic theory of authorship thus reveals the necessary limitations of copyright's protective sphere if it is to facilitate authorial contributions to the cultural conversation.

III. CONCLUSION: A FEMINIST THEORY OF AUTHORSHIP AND COPYRIGHT

Copyright's conception of the author is dependent upon a particular conception of the self. In calling for a re-imagination of the author-figure that occupies the protagonist's role in modern copyright, I am appealing to the de-/reconstruction of selfhood that has been a central component of (post)modern political philosophy and theorizing but from which the structures of intellectual property have remained stubbornly immune. As a member of groups, communities, and society, and a participant in cultural and political dialogue, the author cannot be individualized without being stripped of the very characteristics that make her an author. Authors exist within, and create out of a community, culture, and society; in turn, through their creative capacity, their works shape that culture and community. We must therefore understand authorship within the context of cultural dialogue and participative processes, and in recognition of its audience and the public as a whole.

Attempts to recast the author as something other than that the originating individual tend to have taken the form of criticisms of romantic authorship, usually drawing upon poststructuralist accounts of the "death of the author."²⁹⁶ These important contributions to copyright scholarship have not had the desired impact, most likely because the notion of the author is clearly alive and well.²⁹⁷ From a policy perspective, insisting upon the death of the author is a non-starter; from a theoretical perspective, any attempt to assimilate the author's death into copyright law can only spell the death of copyright itself.²⁹⁸ Copyright needs the author, but it is not

disservice to the authors it seeks to describe.").

296. Aoki, *supra* note 94, at 811.

297. *See id.* at 811-25 (arguing that the resilience and continued potency of the Romantic author notion in modern copyright law is evidence of the fact that claims about the "death of the author" have been exaggerated).

298. *See id.* Aoki argues that because literary theory takes the disappearance of the author as a given, any attempt to assimilate this theory directly into copyright would be a mistake. *Id.*

sheer pragmatism that allows copyright's author-figure to survive her brush with death: there is something intuitive about the idea of the author as, in some sense at least, the source of the words, notes, actions, and images that she creates. There is something about the idea of creativity, individuality, ability, that we are unwilling to discard. Even in the face of social constructionism and the fragmentation of the stable, unified self, something that looks like author/authorship persists. The task for copyright theory is to begin to define that something in the absence of the masks and metaphors traditionally employed.

Feminist theory, both literary and political, has taught us that the simplifying dichotomies of liberal thought (self/other, public/private, individual/community, autonomy/dependence) creates false dilemmas that impede our ability to engage in genuine debate and that obstruct our path towards nuanced solutions. By regarding the self as both an individual and a member of multiple, shifting communities—an autonomous agent *and* socially constituted—feminism provides the route by which we can break down the simplifying dichotomies that pervade copyright theory (author/user, creator/copier, labourer/free-rider). As an autonomous but socially constituted individual, the author is the product of her community and culture but capable of developing her own voice, constructing her own narrative, and making her own meaning out of the discourses that constitute her. Her works are therefore the product of her communities, her culture, and her self.²⁹⁹

This route leads us to a new understanding of authorship and so to a new appreciation of copyright's task. Employing a feminist theory of dialogism, we can rediscover the significance of authorship that adopts and adapts prior texts to create new meaning. We can appreciate the nature of copyright as an institution that attributes value and authority to certain texts and speakers while silencing others and inquire into the power dynamics that inform it. We can also perceive the importance of authorship as a dialogic process with the power to shape speakers, listeners, and communities, even as it reproduces established languages and discourses. Employing relational feminism, we can question the individualized account of the author by locating her (and her expression) within the communities and relationships in which she creates. We can appreciate the nature of copyright as an institution that constructs relationships of communication between authors, users, and the public by allocating powers and responsibilities. We can also perceive the nature of authorship as a form of dialogue through which individuals actively participate in a cultural

299. See Wright, *supra* note 164, at 74 (observing that the author is both (and at once) a creator and a communicant of creation). The author's expression (as utterance) is, in Bakhtinian terms, both interactive and inter-animating. *Id.*

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conversation. All of these lessons culminate to underscore one essential proposition: a copyright system designed to encourage authorship must be capable of recognizing *and valuing* the derivative, collaborative, and communicative nature of creativity. Only then will the rights that it grants be means—and not obstacles—to that end.