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Feminist Interpretations of Intellectual Property

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FEMINIST INTERPRETATIONS OF INTELLECTUAL PROPERTY

DEBORA HALBERT *

| | |
|--|-----|
| I. Feminist Epistemology and the Construction of Knowledge..... | 434 |
| A. Early Feminist Theory and the Social Construction of Knowledge | 435 |
| B. Feminist Epistemologies and Seeking Alternatives | 438 |
| II. Women as Authors, Women as Texts | 447 |
| Conclusion—Where Does Feminism Fit In?..... | 459 |

“Representation of the world, like the world itself, is the work of men; they describe it from their own point of view, which they confuse with absolute truth.” —Simone de Beauvoir¹

For the past forty years, feminism has provided an important paradigm through which to critique modernity. A feminist analytical lens allows us to view social action and policy making differently and to uncover underlying assumptions about social action. However, in part because of the backlash Susan Faludi wrote so eloquently about in the early 1990s, the “F” word is not used much outside academic circles.² For many, feminism evokes the image of a bra-burning, man-

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1. SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 176 (1970) (quoting the famous French feminist’s assertion that society itself is male).

2. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN*, at xix-xxiii (1991) (concluding that the latest backlash against feminism is part of a pattern of backlashes throughout American history triggered by a perception of great advancement of women’s rights). The use of the term the “F” word” is widely disseminated in feminist literature and is used to describe the way the backlash against feminism has made it into a dirty word. *Id.*; see *The Infamous F-Word*, <http://www.rci.rutgers.edu/~elk/feminismquotes.html> (last visited July 26, 2006) (linking “the F-word” to common quotes about feminism); see also Amy Richards & Julie Parker, *The F-Word*, *NEW INTERNATIONALIST* (1995), <http://www>

hating radical. For many more, to the degree a feminist movement was ever necessary, there is no need for it anymore. Anyone who has studied feminist thought understands that not only is the stereotypical image of a feminist inaccurate, but there are continued benefits from a feminist analysis of issues. Furthermore, there is no single feminism that can claim to speak for all women who call themselves feminists. Feminist thought aligns loosely around themes regarding women's equality,³ but the multiplicity of feminism(s) at times overshadows the similarities.⁴

In part because significant differences exist between the many varieties of feminism, feminist thought has blossomed into a complex tapestry of perspectives.⁵ Offering a feminist interpretation can disrupt conventional understandings with questions about male domination and the uncertainty of truth. Creating a feminist epistemology, a feminist critique, a feminist standpoint, or simply legitimating "women's ways of knowing"⁶ provides insight into power, social structures, and theory that would otherwise be missing. In other words, while there are many feminist avenues for critique, applying a feminist framework gives us a different way of looking at the world.⁷

.newint.org/issue270/fword.htm (discussing the issues surrounding young people and the term feminism).

3. See JUDITH GRANT, *FUNDAMENTAL FEMINISM: CONTESTING THE CORE CONCEPTS OF FEMINIST THEORY* 42-43 (1993) (arguing that while it may be possible and necessary to identify core feminist concepts, contemporary feminism is diverse and contradictory).

4. See Sandra Harding, *Conclusion: Epistemological Questions*, in *MODERN FEMINISMS: POLITICAL, LITERARY, CULTURAL* 319, 319-21 (Maggie Humm ed., Columbia Univ. Press 1992) (1987) [hereinafter *MODERN FEMINISMS*] (suggesting that a unitary feminist theory is unlikely given the importance of women's unique experiences based on race, class, and culture in the development of their perspectives).

5. Just to name a few different types of feminist thought, there are Marxist feminists, radical feminists, postmodern feminists, standpoint feminists, eco-feminists and first, second, and third wave feminists. At times, animosity exists between these branches. See, e.g., JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 219-21 (2000) (arguing that tensions arise because second wave feminists do not have enough respect for younger women in the movement). See generally *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR*, at xxiii-xxv (Cherríe Moraga & Gloria Anzaldúa eds., 2d ed. 1983) (explaining the different kinds of exploitation women of color experience in an anthology of essays and poetry).

6. GRANT, *supra* note 3, at 94 (describing the concept of a women's way of knowing as derived from feminist standpoint theory). This theory suggests that there is a distinctly "female" type of knowledge—a feminist epistemology. *Id.* Grant points out that a distinction must be made between a women's way of knowing and the development of a feminist lens. *Id.*

7. See SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 136 (1986) (suggesting that feminist science or epistemology could exist as an "alternative mode of knowledge-seeking" that would defy the dichotomy that currently exists in society between males and females).

My interest in intellectual property and feminist theory led me to investigate what might become visible if a feminist lens was applied to copyright and patent law.⁸ The goal of this paper is merely to probe several dimensions of feminist interpretation(s), not to be comprehensive, due to the complexity of both feminist literature and of intellectual property. Given that there are multiple feminisms, I seek to map some of the *possible* contributions feminists can make to an understanding of intellectual property.⁹ This paper is divided into areas where the connections between feminist theorizing and intellectual property seem most salient. Part I investigates feminist epistemology and the construction of knowledge. Part II highlights the links between feminism, texts, and publication by looking at the gendered construction of authorship, as well as the way feminists, especially postmodern feminists, theorize about texts, and the possible alternatives offered by independent feminist presses.

My early hypothesis was that feminist theory could be used to create a critique of expanding intellectual property rights. However, I am not convinced all feminist theory, and by extension all feminists, would be equally critical of intellectual property. That being said, my argument is that while some feminists may perceive benefits from copyright and/or patent law, feminist theory can make visible the underlying masculine assumptions existing in our construction of intellectual property as well as highlight a political economy of intellectual property that has historically benefited men more than women. Furthermore, the value of a feminist analysis is that it can be

8. The term intellectual property is much more recent than the underlying regimes of copyright and patent law. See CHRISTOPHER MAY & SUSAN K. SELL, *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* 18-19 (2005) (explaining that intellectual property as a concept was in use in the mid-nineteenth century, but not in common use until the twentieth century). While the term is used to refer to copyright, patents, trademarks, and other generic regimes, it rests upon the assumption that intangible products are similar to tangible products and can thus be called 'property.' *Id.* at 18-19. The term is not without its critics. See, e.g., Richard M. Stallman, *Confusing Words and Phrases that are Worth Avoiding*, in *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* (Joshua Gray, ed. 2002), available at http://www.gnu.org/philosophy/words-to-avoid.html#Intellectual_Property (arguing that one should avoid thinking in terms of intellectual property because it conceals as much as it reveals about the underlying agreements).

9. A feminist analysis of intellectual property is currently underway. In April of 2004, Professors Anne Shalleck and Peter Jaszi of American University's Washington College of Law brought an interdisciplinary group of scholars together to discuss the issues of gender and intellectual property. The conference, "Mapping Gender and IP," approached the subject from numerous angles—the role of women in fields of intellectual property law, the way judges interpret the law in a gendered manner, literary criticism, and many others. See, e.g., Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures*, in *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 111, 111-20 (Lise Buranen & Alice M. Roy eds., 1999) (stressing the importance of a feminist framework to the future of authorship and the development of intellectual property law).

used politically—to think actively about what the future may hold by avoiding choices that privilege men more than women.

I. FEMINIST EPISTEMOLOGY AND THE CONSTRUCTION OF KNOWLEDGE

In this section, I seek to map the ways feminist theorists have approached cultural production and developed a feminist epistemology. Intellectual property scholarship and feminist epistemologies have proceeded upon parallel but unconnected tracks. Feminist scholars rarely, if ever, mention the words copyright, patent, or intellectual property; intellectual property scholars rarely, if ever, appeal to feminist interpretations to better understand the law.¹⁰ However, while the words copyright and patent do not appear in the feminist literature, the ideas underlying these legal regimes are evident when feminists talk about the production of culture as male dominated, about how women have been excluded from creative work or have had their work appropriated by men, and about a feminist epistemology.¹¹ Thus, by investigating the ways feminists theorize about the construction of knowledge, new insights into how intellectual property law has been developed upon gendered assumptions may become apparent. These feminist theorists are typically not read with the idea of intellectual property in mind, but the connections between the two are clear. While feminist theorists will be familiar with these thinkers, intellectual property scholars may not be, and I have chosen to outline the feminist arguments at length to make the links between both types of scholarship clear.

Many feminist theorists discussed in this section, especially those seeking a unique women's way of knowing, have been accused by later feminists of essentializing women by conferring on them a "unique" set of characteristics. While I am sensitive to this critique, in this section I try to navigate between essentialism and what can be politically valuable about theories focused on a women's way of knowing. While I do not wish to reduce any individual to essentialized claims about his or her "nature," it is possible to use this stream of feminist theory to develop an argument about another world where both men and women can participate in a different type of cultural production and ownership—a world generated from a

10. See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 776 (2004) (encouraging legal scholars to take an interest in the way feminism may help interpret the law and demonstrating the ways a feminist analysis can be applied to an understanding of trademark decisions).

11. See *id.*; see also Simone Murray, *Deeds and Words: The Woman's Press and the Politics of Print*, in 11 WOMEN: A CULTURAL REV. 197, 197-98 (2000) (discussing the male-dominated field of publishing and the need for increased female literary participation).

feminist standpoint. By using these feminist theorists to make an argument about the future, instead of focusing on traits that are uniquely feminine, it becomes possible to move beyond essentialism and shed light onto the social construction of knowledge protected by intellectual property laws.

A. Early Feminist Theory and the Social Construction of Knowledge

An important early contribution to understanding how feminists might interpret intellectual property can be found in the work of Shulamith Firestone. Firestone published *The Dialectic of Sex* in 1970, and her work is among the most important second wave contributions to feminist theory.¹² While the terms copyright, patent, and intellectual property do not appear within the context of Firestone's argument, she spends considerable time investigating the relationship between women, culture, and the construction of knowledge.¹³ Firestone's argument is premised upon a dialectical relationship between men and women that influences all aspects of our lives from personal relationships to culture and science.¹⁴ Within this dialectic, she argues that contemporary society considers the feminine inferior to the masculine.¹⁵ Sex dualism precludes women from participating in "culture," which is masculine space.¹⁶

Culture is a masculine construction for second wave feminists.¹⁷ According to Firestone, the role women play, from a masculine perspective, is at best indirect.¹⁸ Women "contribute" to culture by acting as the "raw fuel for the culture machine" by providing emotional support or inspiration for the cultural creation of men.¹⁹

12. FIRESTONE, *supra* note 1; *see also* MODERN FEMINISMS, *supra* note 4, at 53-54 (describing second wave feminism as concerned with reproductive rights of women, but aligning with first wave feminists to also unpack the concept of "woman").

13. *See id.* at 176-91 (theorizing that a woman's relation to culture is through men and, therefore, indirect and removed).

14. *Id.* at 172-73 (depicting graphically the scope of human history as seen through a gendered lens).

15. *See id.* at 178 (arguing that "[b]ecause cultural dicta are set by men, presenting only the male view . . . women are kept from achieving an authentic picture of their reality").

16. *Id.*

17. The argument regarding the masculine construction of knowledge and history is reflected in the scholarship of contemporary feminists interested in understanding the underlying power structures associated with the evolution of Western thought more generally. *See, e.g.,* CAROLYN MERCHANT, *THE DEATH OF NATURE: WOMEN, ECOLOGY AND THE SCIENTIFIC REVOLUTION* 152 (1980) (developing the argument that western history is premised upon the narrative of male supremacy over women and nature).

18. FIRESTONE, *supra* note 1, at 176 (arguing that women's participation in culture has primarily been indirect and only direct if women act as men).

19. *See id.* (highlighting the importance of women as sources of inspiration for

Theoretically speaking, women stand outside, or on the periphery of, masculine creation. If creative work, either scientific or artistic, is to be protected legally, it will on balance be the work of men.²⁰

If women seek to engage in cultural production, the dualism inherent in relations between the sexes requires them to do so on masculine terms.²¹ Women, for the most part, cannot see themselves outside a culture already “saturated with male bias.”²² This political economy of cultural creation and innovation disparages and marginalizes women’s contributions to culture.²³ The process of scientific discovery is also constructed through the male gaze.²⁴ Given that there is no neutral starting place for an examination of cultural creation, intellectual property law itself is premised upon assumptions of creative work favoring the male creator.

Firestone’s argument opens up an interesting insight into the production of knowledge as a gendered practice. Women can choose to participate on terms constructed by men, but these terms are considered neutral. The production of knowledge is territorialized, and entrance is based upon gender. Without a gendered analysis of how knowledge is constructed, women who choose to participate in knowledge construction are often branded inferior simply because of their gender.²⁵ Feminist historical analysis suggests that women were systematically excluded from sites of production, and, as assorted crafts became masculine territory, women were not given the opportunity to develop knowledge in those fields.²⁶ Culture and

men, especially in the field of art).

20. See *id.* at 176-77 (arguing that men set cultural standards).

21. See *id.* at 178 (asserting that women view the world in masculine terms because of the prevailing male culture).

22. *Id.*

23. See *id.* at 177 (commenting that few women have contributed directly to culture).

And in those cases where individual women have participated in male culture, they have had to do so on male terms. And it shows. Because they have had to compete *as men*, in a male game—while still being pressured to prove themselves in their old female roles, a role at odds with their self-appointed ambitions—it is not surprising that they are seldom as skilled as men at the game of culture.

Id.

24. See HARDING, *supra* note 7, at 30-31 (discussing feminist critiques of science that stem from the systematic exclusion of women from participation in serious science).

25. See FIRESTONE, *supra* note 1, at 193 (stating that the absence of women from scientific discipline is often illogically attributed to some deficiency on the part of women).

26. See MERCHANT, *supra* note 17, at 152 (describing how throughout the sixteenth century women lost access to a variety of trades and crafts and the knowledge associated with their production). Specifically, statutes that limited the numbers of persons engaged in baking, butchering, and fish-mongering denied

innovation as male territory is asserted and maintained using the circular argument that women by definition cannot participate meaningfully in knowledge or cultural production.

Liberal feminists who argue for the equal participation of women often do so without questioning the underlying assumptions associated with how we construct knowledge.²⁷ They argue that women can participate *as men* on male defined territory.²⁸ However, it is necessary to dig deeper and understand the way in which knowledge itself is structured as masculine. Women need to develop a way of seeing themselves not already defined by men.²⁹ Investigations into feminist epistemology help to uncover the power involved in the construction of knowledge by asserting that there is no “neutral” field of knowledge production and the status quo is by no means a universally applicable framework, but one of many possible avenues for knowledge construction.³⁰

When radical second wave feminists were constructing their epistemological arguments, they were in part attempting to create grounds for the construction of knowledge for and by women.³¹ For many early feminists, the construction of culture as masculine was a central claim.³² Clearly, this epistemological framework has implications for how we view the idea of intellectual property. If the

women’s access to these professions. *Id.* By the seventeenth century, women had also lost control over brewing and were increasingly marginalized in midwifery as well. *Id.* at 152-53. This severely circumscribed women’s productive opportunities. *Id.*; see also FIRESTONE, *supra* note 1, at 192-93 (noting the lack of women at all levels of the scientific disciplines).

27. JANICE McLAUGHLIN, *FEMINIST SOCIAL AND POLITICAL THEORY: CONTEMPORARY DEBATES AND DIALOGUES* 25 (2003) (arguing that during the second wave of feminism feminists began criticizing liberal feminists as privileging “masculine ways of being”; see also GRANT, *supra* note 4, at 18 (quoting Jean Bethke Elshtain, who characterizes second wave liberal feminists as asking the question, “Why can’t women be more like men?”).

28. KATHY E. FERGUSON, *THE MAN QUESTION: VISIONS OF SUBJECTIVITY IN FEMINIST THEORY* 26 (1993) (describing the conflict between liberal and radical feminists as one between trying to integrate women into already existing institutions versus trying to change those institutions).

29. See HARDING, *supra* note 7, at 144 (stressing that self-knowledge for women is important if a feminist science is to replace the current culture of knowledge that exists).

30. See *id.* at 141-42 (identifying the various feminist epistemologies as possible avenues for providing alternate views of nature).

31. Second wave feminist Kate Millet demonstrates that understanding knowledge and culture as masculine constructions is not unique to Firestone. See generally KATE MILLET, *SEXUAL POLITICS* (Univ. of Illinois Press 2000) (1969) (arguing that one can only understand politics by examining gender relationships constructed within a system of patriarchy, an ideology that dominates our understanding of psychology, economics, family structures, and biology).

32. See VALERIE BRYSON, *FEMINIST POLITICAL THEORY: AN INTRODUCTION* 198-201 (2d ed. 2003) (observing that many of the early feminists, like Firestone and Millet, differed on many points, but agreed that knowledge has been constructed as male).

very construction of knowledge that is the basis for claims to copyright and patent protection is gendered, then what is protected is the outgrowth of a gendered system rendered invisible until a feminist lens sheds light on the politics of this otherwise “neutral” construction.

The construction of culture, knowledge, science, politics, and public life as masculine is premised upon the public/private distinction significant in understanding the traditional place of women in the world.³³ Feminists have done considerable work clarifying the dualisms of male/female and public/private.³⁴ If, as feminists have argued, knowledge is constructed from a male point of view, then it follows that it must be possible to articulate a feminist epistemology—an alternative to a masculine epistemology that masquerades as a universal mode of being.³⁵ These feminist epistemologies, according to Sandra Harding, “can be used to undercut the legitimacy of the modernist epistemologies, which explicitly ignore gender while implicitly exploiting distinctively masculine meanings of knowledge-seeking.”³⁶ A women’s way of knowing is an alternative to a status quo premised upon an exclusively masculine tradition.³⁷ Articulating a women’s standpoint is a political activity that provides us with a different understanding of creative work and how it should be protected by law.

B. Feminist Epistemologies and Seeking Alternatives

There are several epistemological arguments that allow us to examine the construction of knowledge from a feminist standpoint. These are especially important for understanding what feminists might protect with intellectual property law and what remains outside the boundaries of protection. Each epistemological starting point has some relevance to the issue of intellectual property and the construction of knowledge.³⁸

33. See JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 46 (2d ed. 1993) (asserting that women have long been relegated to the private sphere while the public sphere has been seen as the natural space for men).

34. See *id.* at 201-04 (summarizing different feminists’ attempts to re-define the public and private spheres).

35. See *generally* HARDING, *supra* note 7 (concentrating on articulating a feminist epistemology and surveying feminist thought as it relates to feminist epistemology).

36. *Id.* at 141.

37. See GRANT, *supra* note 4, at 41-45 (describing the evolution of an understanding of knowledge as gendered).

38. See HARDING, *supra* note 7, at 142 (suggesting that the various feminist epistemologies provide understandings of nature that are lacking from a men’s perspective).

First, a feminist epistemology can be grounded in an examination of craft labor done by women. Craft labor focuses on labor performed by women involving “caring”—the labor of the hand, brain, and heart.³⁹ Women’s labor networks people together in social structures by moving beyond labor as a commodity to labor as an act of care.⁴⁰ This predominantly female type of knowledge construction can be contrasted to “industrialized labor,” which is claimed to be primarily masculine in construction.⁴¹ Industrialized labor exists within a system of production that generates knowledge in the abstract sense, instead of placing knowledge within social relationships.⁴² Women historically have been shut out of the industrial system of knowledge production, a system that takes place in factories, laboratories, and research institutes.⁴³ Masculine knowledge exists within a capitalist mode of production, dividing subject from object and knower from the known. What men do for recognition, women do for love.⁴⁴

A second epistemological feminist standpoint argues that when knowledge is constructed as abstract and rational, a gendered dynamic is at work.⁴⁵ This argument claims that the abstract and rational knowledge is associated with the masculine, while a relational

39. See *id.* at 142-43. (developing the argument that the thoughts and practices of women scientists are examples of a distinct feminist theory of knowledge because they incorporate caring labor).

40. See *id.* (quoting Hilary Rose who describes women’s labor as “caring” labor).

41. See *id.* at 142 (describing craft labor as a unification of “manual, mental, and emotional” activity and, therefore, reflective of a feminist theory of knowledge).

42. See *id.* at 145.

43. See *id.* at 143.

[F]eminist epistemology cannot originate in meditations upon what women do in laboratories, since the women there are forced to deny that they are women in order to survive, yet are still ‘by and large shut out of the production system of scientific knowledge, with its ideological power to define what is and what is not objective knowledge’.

Id.

44. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 23-24 (1988).

[F]eminist artists, historians, anthropologists have been the first to show concern and respect for the crafts of the midwives and grandmothers, the anonymous work of women’s hands, the oral culture of women sitting in the kitchens, the traditional arts and remedies passed on from mother to daughter, the female culture never granted the reverence accorded to ‘high art.’ . . . And so we can both take pride in all that women have done for ‘love’—including the resourceful, heroic coping of ordinary women everywhere—and also ask ‘Why should women, and women only, work for love only?’

Id. (quoting ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE*, 260-63 (1979) (citation omitted)).

45. See HARDING, *supra* note 7, at 148 (quoting Nancy Hartstock’s assertion that adult labor is divided between masculinity and femininity).

epistemology is associated with the feminine.⁴⁶ It is important to recognize that feminists see this binary perception of knowledge not as an essential characteristic of women and men, but as a political construct that privileges one way of thinking and doing over another.⁴⁷ A masculine social construction of knowledge means that women and men primarily participate in an already determined system framed by masculinity.

The ability to define one way of knowing as the only way of knowing, or the best way of knowing, is a question of domination and power. Many feminists want to deconstruct the power/domination relationship and suggest alternative methods for understanding relationships based upon reciprocal empowerment.⁴⁸ A feminist way of knowing emphasizes the relationships built, rather than dominion over others. It seeks to value multiple ways of knowing instead of privileging one over the other. Thus, instead of replacing a masculine epistemology with a feminine epistemology, feminist scholarship seeks to transcend the binary altogether and create a new attitude towards knowledge that will value the abstract as well as the relational. The construction of a women's epistemological standpoint has political power because it makes it possible to see that another way of thinking about the world is possible.

The abstract and rational construction of knowledge can be interpreted psychoanalytically as well.⁴⁹ This psychoanalytic approach suggests that masculine individuality is defined by what it is not—it is defined against women as the other. Ironically, seeking to distinguish yourself from your mother is not motivated by “rational” behavior at all. The feminist argument is that to move towards a successor to a masculine knowledge, is to move away from a knowledge constructed as “always defined exclusively against women.”⁵⁰ Both men and women need to move away from the construction of knowledge as

46. *See id.*

47. Joan Scott, *Deconstruction Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, in *CONFLICTS IN FEMINISM* 134, 134 (Marianne Hirsch & Evelyn Fox Keller, eds. 1990) (arguing that we need to construct a feminist theory that allows us to “break the conceptual hold, at least, of those long traditions of [Western] philosophy that have systematically and repeatedly constructed the world hierarchically in terms of masculine universals and feminine specificities”).

48. *See id.* at 149 (summarizing Hartstock, writing, “[a]gainst power as domination over others, feminist thinking and organizational practices express the possibility of power as the provision of energy to others as well as self, and of reciprocal empowerment”).

49. *See id.* at 152 (arguing that “[w]ere women not exclusively the humans against whom infant males develop their senses of a separate and individuated self, ‘human knowledge’ would not be so preoccupied with infantile separation and individuation dilemmas”).

50. *Id.*

“other” towards a reciprocal understanding of knowledge. It is worth reiterating that such a move is not linked to women or men categorically, but is a standpoint that either women or men can appropriate in order to view knowledge in a different and, as feminists would argue, better and more constructive light. The goal of investigating feminist epistemologies is not to argue that there is a superior female way of knowing, but rather is to contribute to the process of creating a “successor epistemology” that will lead to a gender-neutral construction of knowledge, where both women and men can function and where both women and men create their futures within a “degendered social order.”⁵¹

How might these epistemological frameworks be related to intellectual property? Two examples help highlight the values associated with women’s creative work and can lead to an alternative view of the way intellectual property may look from a gendered perspective. The first example highlights the difference between craft and industrialized knowledge and illustrates the differences in knowledge construction.⁵² Knitting has long been considered a craft enterprise associated with women’s work.⁵³ Virtually all knitters are women. There is a long history of sharing patterns among knitters, knitting is often communicated from parent or grandparent to child, and knitting circles were a popular method of doing productive labor while enjoying the company of other women.⁵⁴ Within the past few years, knitters have noticed changes in the world of knitting. Where once patterns were published in easy-to-share formats with little concern for copyright, today’s knitting patterns come with strict prohibitions regarding sharing, copying, and producing knitted material for commercial purposes.⁵⁵

In other words, copyright has entered the world of knitting patterns, a world assumed by many involved as a communal source of knowledge to share. Patterns have been appropriated into the larger

51. HARDING, *supra* note 7, at 146.

52. Thanks to Hillary Warren in the Department of Communications at Otterbein College for suggesting this example.

53. See HARDING, *supra* note 7, at 142 (discussing the basis of Hilary Rose’s feminist epistemology, where an activity that engages the hand, brain, and heart is characteristic of craft labor and women’s work in general).

54. See generally Jean Rutter, *Fellowship for the Fiber-Fixated*, N.Y. TIMES, May 27, 2004, at G4 (commenting on the newfound resurgence of knitting despite its long tradition).

55. See The Girl from Auntie, *Copyright for Crafters: About the Knitter’s Guide to Copyright*, [hereinafter *Knitter’s Guide*], <http://girlfromauntie.com/copyright> (last updated Dec. 28, 2004) (discussing the growing awareness of intellectual property rights among knitters and crafters and the increasingly complex legal issues that may arise from borrowing others’ patterns).

industrialized process of publishing for profit.⁵⁶ It is now common to find regulations on what a pattern might be used for.⁵⁷ For example, the pattern may claim that it can be used to knit a sweater for personal use but cannot be used to knit a sweater to sell. These patterns also claim that one cannot share the pattern with friends, as so many patterns in the past were shared. If some commercial pattern manufacturers have their way, used patterns will not be available for sale⁵⁸ despite the first sale doctrine.⁵⁹

While the knitting circles and community remain primarily female (public and shared), the ownership of knowledge about patterns has been appropriated into the dominant mode of production—it has been privatized. Patterns are sold, not to further the culture of knitting, but to maximize profit. As a result, much of the old community of knitting is being replaced with a marketplace of knitting, where knitters “steal” patterns if they do not each buy a pattern individually or if they use it in a way not deemed appropriate by the copyright owner.⁶⁰ A feminine way of producing knowledge within the realm of craft has been replaced with a way of producing knowledge that emphasizes abstract originality and authorship in the production of knowledge, instead of the relations built into culture and custom.

It is important to note that women (who need not be feminists) may operate in either paradigm and that many of those constructing these copyrighted patterns are women. Feminists, however, would argue that the women’s way of knowing, illustrated by the tradition of

56. See Halbert, *supra* note 9, at 113, 117 (noting that the American system of copyright, with its masculinized process and focus on profit and production, is in direct conflict with the communal ideas of property).

57. See Rutter, *supra* note 54, at G4 (noting the success by many knitting pattern creators, such as Bonne Marie Burns and Jenna Wilson, in selling downloadable patterns).

58. See Metafilter, *Selling a Used Item as a Copyright Infringement?*, <http://www.metafilter.com/comments.mefi/21960> (last visited July 26, 2006) (noting that some in knitting circles are troubled by knitting pattern and yarn design, and production company Alice Starmore, Inc.’s requests to Ebay that the web clearinghouse take down pages by knitters selling her used patterns and yarn); see also Virtual Yarns, *Alice Starmore Classics*, <http://www.virtualyarns.com/designs/classics.asp> (last visited July 26, 2006) (detailing the inspiration behind her designs). Ironically, Starmore’s designs are all premised upon the rich cultural heritage of her Scottish lineage and traditional Celtic designs; however, using the language of individual authorship and originality, she quickly ignores the traditions upon which she draws in favor of a language of private property based on the exclusion of others. See Virtual Yarns, *Design Showroom*, <http://www.virtualyarns.com/designs/default.asp> (describing her approach to original design).

59. See 17 U.S.C. § 109 (a) (providing control by the copyright owner over the first sale of a copyrighted item but limiting control over this item after the first sale). The first sale doctrine allows businesses such as used book and record shops to exist. *Id.*

60. See *Knitter’s Guide*, *supra* note 55.

knitting, should be used as the source for articulating and understanding a different method of constructing knowledge—one not contingent upon the abstract individual and original author, but one centered in relationships of care.⁶¹ After all, the pattern is only part of the creative process. The individual who does the knitting makes changes to the design, picks the colors of the yarn, and invests her unique motivation into the knitting process.⁶² The creative act of knitting transcends the pattern; yet, as copyright invades and colonizes this space, its users attempt to appropriate for themselves the claim to original creativity and seek to control the activity well beyond the construction of a pattern.⁶³ A feminist epistemology premised upon the craft mentality provides a standpoint from which to critique the method of producing (and consuming) knowledge exemplified by an industrialized and commodified process.

Quilting provides a second example of “intellectual property” that developed outside the productive world of abstract authorship and within the framework of a network of sharing and care, thus illustrating the theoretical claims made by those endorsing a feminist epistemology. Given that women’s stories are often excluded from “traditional” history, contemporary scholars have turned to unique places to understand the lives of women. For example, one important source for understanding history, artistic, and cultural production and the development of what can be called a women’s way of creating can be found in the growing literature on the history of quilting. Quilts are increasingly read as women’s history because the knowledge sewed into their patterns not only tells stories of the women who made them, but transformations in quilting also mark changes in the status of women over time.

Sewing was an essential skill learned at an early age by the majority of girls and some boys.⁶⁴ In the nineteenth century, quilt-making was just one example of women’s work considered essential to the household, serving very functional purposes. Quilts were not assigned the status of “original” given that the primary purpose of quilting was

61. See HARDING, *supra* note 7, at 148 (observing that it is women’s relational activity and approach to life that allows women to attain knowledge and information not accessible through “men’s characteristic activities”).

62. See Jenna Wilson, *Copyright [A Primer for Knitters]*, <http://knitty.com/ISSUEfall03/FEATcopyright.html> (last visited July 6, 2005) (noting that stitch patterns in a sweater, even in a traditional design, can be a copyrightable work of artistic craftsmanship).

63. See *id.* (explaining that knitting techniques are not protected by copyright, but that an author’s expression of those techniques can be copyright protected).

64. See PAT FERRERO ET AL., HEARTS AND HANDS: THE INFLUENCE OF WOMEN AND QUILTS ON AMERICAN SOCIETY 16, 26 (1987) (noting that sewing was an essential skill taught to children as young as two or three).

functional, therefore they could not earn copyright protection. As the position of women within the household changed during the nineteenth century, so did the focus on sewing and quilting. Even as most productive jobs were moving outside the household, the “cult of domesticity” prescribed sewing as an essential aspect of women’s work.⁶⁵ Integral to the place of women in the home was the understanding that sewing was the essence of the “feminine.” Women like Mary Wollstonecraft were considered “immodest” because of their work for women’s rights.⁶⁶ By contrast, women who sewed were developing appropriate feminine skills and retained their sense of place.⁶⁷

Instead of simply providing functional blankets, women now also quilted more intricate patterns and designs. These designs were taken from popular magazines and defined as works of “leisure” for women.⁶⁸ Women who quilted became status symbols for their husbands because they had the time to spend on quilting instead of working.⁶⁹ As the quilts became less functional, they certainly did not take any less labor. Instead, the act of quilting was transformed from a vital function for the household into an activity to do in one’s spare time. While remaining essential to “civilizing” the home, these more decorative quilts were not seen as works of original authorship.⁷⁰ Unlike early utilitarian quilt production, these more artistic quilts could be bought as kits, but there is no evidence they were treated as works of authorship in the same sense as literary works of the same period. While these artistic quilts may have been displayed in the common living areas of a house in order to highlight women’s “leisure” time, they remained domestic objects, not serious works of art.

Unlike the notion of the romantic author that had emerged to assert ownership of the written text, the culture of quilting remained collective and integrated into the everyday lives of women. Women came together and developed friendships over quilts. Multiple

65. *See id.*

66. *See id.* (commenting that in the eyes of rural societies, “‘immodest’ women were those crusading feminists like Mary Wollstonecraft or Frances Wright who spoke in public and wrote books agitating for female equality”).

67. *See id.* at 26-27 (remarking on how the meaning of sewing changed from being that of a practical skill to a specific characteristic of femininity).

68. *See id.* at 27 (observing that the advice literature of the period promulgated sewing as a means to develop proper decorum in young girls, which included modesty and quiet manners).

69. *See id.* at 25 (explaining that decorative quilts emphasized the fact that women quilted for pleasure, not necessity).

70. It would be interesting to find copies of these original quilt patterns that could be purchased to see what the copyrights on the quilts might be.

women would work on a single quilt, thus confounding our modern understanding of authorship and possibly even joint authorship. Quilts were made as gifts for families and to commemorate special occasions.⁷¹ While it is possible to associate many quilts with their makers, the narrative of authorship of quilts is much less associated with the individual author than it is for literary texts. Certainly, the creative work of a quilt is similar to that of any other form of authorship. The designs reflect originality, and the sophisticated use of color to create the intended effect is an artistic talent. However, their creation as collective projects, as gifts, and always with the intent of care, suggests another model for authorship.

Quilts often include stories sewn into their squares, they utilize important knowledge of textiles and appliqué techniques, and they have served important political and cultural functions.⁷² However, their place as utilitarian objects, and as products of the work of women, has often meant that most are lost to contemporary history.⁷³ Additionally, because quilts were historically created within the culture of feminine sharing, issues of authorship were not associated with the abstract notion of author protected by copyright. Certainly, women took great pride in the creation of these quilts, but these quilts existed within a different paradigm of ownership—one that attempted to solidify connections between people, not divide people by property boundaries.

Both quilting and knitting, primarily women's ways of creating, have existed outside copyright law and developed as collective enterprises, perhaps because the romantic author and the desire for profit were not central to the process of creation. Examining these activities provides insight into how a world of creativity outside the realm of copyright law might exist, at least until the process of quilting and/or knitting becomes commodified and appropriated into a system of commercial production. These noncommercial and sharing cultures need not be exclusively female. However, because women's work has historically been discounted as less creative or innovative,⁷⁴ examples of sharing cultures are more likely to be found

71. See PATRICIA COOPER & NORMA BRADLEY ALLEN, *THE QUILTERS: WOMEN AND DOMESTIC ART, AN ORAL HISTORY* 15, 17 (Texas Tech Univ. Press 1999) (1989) (documenting the quilting practices of a group of rural Texan women). Many of the quilts produced by these women were specifically designed as gifts. *Id.*

72. See FERRERO, *supra* note 64, at 47 (noting that “[i]n their narrative concept, format and technique, [the quilts illustrated on the adjacent page] clearly hark back to the traditional appliquéd tapestries of Dahomey in western Africa”).

73. See *id.* (praising Jennie Smith's foresight in recording the description of a quilt maker's firsthand account of her vision of the quilt).

74. See *generally* MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 38 (1993) (noting that the historical perception of authorship, as

in female-dominated subcultures that have escaped commodification.⁷⁵

Arguments about feminist epistemologies are not meant to suggest that women *as women* will always see creative work as collective or an act of care. Women can be as motivated by profit-making as men.⁷⁶ However, the feminist standpoint does suggest there are *alternatives* to intellectual property that can be used by both women and men who seek to escape what is often considered the only possible path to protect creative work—intellectual property law.

The relational attitude becomes quite revolutionary when applied to the “products” of knowledge called “intellectual property.” Once one stops privileging the abstract and rational and seeks out the relational in cultural creation and innovation, it is clear that a paradigm of intellectual property that creates rigid boundaries to sharing stands in the way of a relational approach to knowledge creation, one in which care and the work of the heart can play a role. A feminist critique from this perspective is a quite radical critique of the boundaries established by intellectual property law, which typically are boundaries that seek only to divide and control instead of facilitate exchange.

The applicability of these epistemological standpoints highlights possible feminist interpretations of intellectual property. If the very construction of knowledge is masculine, then it follows that the rules protecting the ownership of knowledge, such as patents and copyrights, emerge from a system of knowledge production that does not recognize reciprocity, but rather emphasizes the abstract and individuated male.⁷⁷ Both women and men are alienated within such a system because the framework itself remains invisible. However, the structure privileges masculine forms and disregards the type of labor and knowledge practiced by women until the time, as is the case with

exemplified in the paternity metaphor of the author as begetter and the book as child, was seen as belonging in the realm of masculine work and activity).

75. See generally Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 *THE S. ATLANTIC Q.* 947, 967-68 (1996) (discussing the foundations of the romantic author as premised upon individual creativity at the expense of the collaborative methods in which authorship is more likely to occur).

76. See DEBORAH LINDSAY WILLIAMS, *NOT IN SISTERHOOD: EDITH WHARTON, WILLA CATHER, ZONA GALE, AND THE POLITICS OF FEMALE AUTHORSHIP* 3-4 (2001) (noting that women writers did create huge profits for their editors and publishers as well as themselves); see also Natalie Danford, *Feminist Publishing for Fun and Profit*, *PUBLISHERS WEEKLY* Oct. 6, 2003, at 18 (indicating that women are responding to new competitive publishing environments, as exemplified by the Feminist Press).

77. See generally West, *supra* note 44, at 32 (noting that many radical feminists see the loss of boundaries, most often experienced by women, to be the source of oppression instead of something to value).

knitting, that a commercial value might be found.⁷⁸ Both men and women can profit from the system of knowledge that feminists argue is a masculine construction, but the feminist standpoint allows us to build a bridge to an alternative understanding of knowledge and the types of knowledge that become valuable.

Feminists argue that women's labor "relieves men of the need to take care of their bodies or of the local places where they exist, freeing them to immerse themselves in the world of abstract concepts."⁷⁹ Thus, when a feminist lens is applied to the construction of knowledge, it becomes clear that isolated, original, and individual works of authorship are impossible—they come at the price of a gender dualism. The move away from this particular social construction of knowledge requires us to understand these underlying principles.

The social construction of knowledge is one possible feminist interpretation that helps us look at intellectual property differently. There are other avenues that may also be explored. One such avenue is the substantial literature on women and authorship that has developed, which provides interesting feminist insights into authorship and ownership. Additionally, postmodern feminism and the critique of texts available through a postmodern lens open up new avenues for a feminist interpretation of intellectual property.

II. WOMEN AS AUTHORS, WOMEN AS TEXTS

During the eighteenth and nineteenth centuries, the idea of the author underwent a transformation.⁸⁰ The focus shifted from the text to the author as original genius and authority of the work. It was not uncommon for early texts to be published anonymously, either to avoid attribution of controversial political ideas,⁸¹ or because authorship was not seen as essential to the text.⁸² It was not

78. See *id.* at 33 (commenting on the radical feminist perspective that no respect for boundaries, in terms of bodily integrity, is part of the problem women face).

79. HARDING, *supra* note 7, at 156.

80. See John Feather, *The Commerce of Letters: The Study of the Eighteenth-Century Book Trade*, 17 *EIGHTEENTH CENTURY STUDIES* 405, 418 (1984) (commenting that there is still much to be learned about the status of authors during the eighteenth century).

81. See Rose, *supra* note 74, at 34 (providing the example of Defoe, who advocated for a law against anonymous authorship so those writing "offending books might be known and punished"); see also Feather, *supra* note 80, at 418-19 (arguing that the increased circulation of texts during the eighteenth century made it much more difficult for the state to act as a censor, especially as the book trade became more international).

82. See Lisa Maruca, *Political Propriety and Feminine Property: Women in the Eighteenth-Century Text Trades*, 34 *STUD. IN THE LITERARY IMAGINATION* 79, 82-83 (2001) (arguing that another reason for anonymous authorship during the

uncommon for printers and booksellers to hire writers—either through discrete third parties or through their network of alliances within the trade—whose identities remained unknown to them. Although this did increase the bookseller’s liability because the chain of responsibility ended with him, it also increased his control over his investment, especially in an economic and legal climate in which views on intellectual property were changing.⁸³ The professionalization of writing and the desire on the part of authors to monopolize revenues from the book trade helped change the ways in which authorship was constructed.⁸⁴ As the late eighteenth century debates over perpetual copyright suggest, capturing the profits generated by works of authorship motivated many authors to make arguments about the nature of writing.⁸⁵ Arguments regarding the author as the creator of original works manifesting a unique personality were made to justify copyright ownership.⁸⁶ The primary sense in which authorship functions is by endorsing a system resting on the “conviction of ourselves as individuals.”⁸⁷

Interestingly, the language used to construct the romantic author took on a gendered quality, as did debates over who might be considered “authentic” authors versus “prostitutes of the pen.”⁸⁸ Poet

eighteenth century deals with the better ability of publishers to control the work if the author remained unknown and thus not linked to what could otherwise be seen as their property).

83. See *id.* (observing that significant factors driving anonymous authorship were the economic and political implications surrounding the publishing process).

84. See ROSE, *supra* note 74, at 118 (suggesting that lying underneath the surface of eighteenth-century literary discussions of a writing’s worth was its commodity value).

85. See *generally id.* (describing the different approaches taken by authors to justify their perpetual ownership).

86. See SONIA HOFKOSH, *SEXUAL POLITICS AND THE ROMANTIC AUTHOR* 15 (1998) (proposing that the poet Samuel Coleridge was active in asserting a romantic form of authorship, which claimed writing as the expression of the creative and unique self); see also ROSE, *supra* note 74, at 137 (quoting Justice Oliver Wendell Holmes’ opinion in *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903), where the Court affirmed copyright protection for an advertisement containing a depiction). In *Bleistein*, Justice Holmes reasoned that even if the depiction was a direct copy of a real performance, “[t]he copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible.” *Id.*

87. See ROSE, *supra* note 74, at 138-39 (surmising that while legal fictions are still sometimes useful, it is the notion of authors as individuals which drives the whole system of copyright); see also Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 314-15 (1992); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 285, 288-89 (1992)

88. See HOFKOSH, *supra* note 86, at 16 (indicating that Coleridge’s question of literary property, while on the surface not a question of gender, is nonetheless a question that cannot be asked without also contemplating the question of what women want).

Samuel Coleridge was vocal about his interpretation of authorship and those not worthy of the title “author.”⁸⁹ The construction of authorship and readers within the growing marketplace in books was explicitly gendered. Coleridge found it important to create distinctions between authentic authors, like himself, and those who were tainted by the company of women.⁹⁰ In making these distinctions, Coleridge sought to criticize those aspects of literary culture he did not consider of appropriate artistic content, primarily texts whose predominant audience (and often authors) were women.⁹¹ The distinctions created between authentic and inauthentic authorship premised upon the romantic notion of birthing original ideas was possible at that time, because a masculine sense of authorship was privileged and placed in opposition to “promiscuous company.”⁹²

Inherent in the discourse on literature and authorship throughout the eighteenth century was a concern about the feminization of literature.⁹³ As literacy among women grew, and increased numbers of women took up the pen to write, women were met with resistance on the part of the male authors who resented and were threatened by the growing numbers of female authors.⁹⁴ Literary societies, organized by women, and circulating libraries, used by both men and women, but almost exclusively associated with women, were thought to encourage promiscuity.⁹⁵ It was thought that there was something inherently wrong with a woman who engaged in the circulation of texts or the criticism of these texts.⁹⁶ If authorship as ownership has been constructed in the masculine terms of territory and original

89. *See id.*

90. *See id.*

91. *See id.* at 18 (examining Coleridge’s objection to those features he deemed as differentiators in a writing career, “anonymous critics, newspapers, advertisements, and the ‘novels and tales of chivalry’ produced for and often by women,” that is, those features that are “reproducible and replaceable features of literary culture”).

92. *See ROSE, supra* note 75, at 38 (commenting on how even the metaphors used to understand authorship framed writing in masculine terms). An author was “shepherd, tiller of the soil, vessel of divine inspiration, magician, and monarch.” *Id.*

93. *See TERRY CASTLE, BOSS LADIES, WATCH OUT! ESSAYS ON WOMEN, SEX, AND WRITING* 4-5 (2002) (explaining that throughout the eighteenth-century the notion that literary judgment was largely “a privilege reserved for men” prevailed and that women writers “represented a new and destabilizing force” in the marketplace).

94. *See id.* at 5 (suggesting that eighteenth century traditionalists saw the female critic as the “most blatant example of woman’s new and overweening literary ambition”).

95. *See HOFKOSH, supra* note 86, at 20 (discussing how libraries provided a forum for women to engage in “social gossip”).

96. WENDY WALL, *THE IMPRINT OF GENDER: AUTHORSHIP AND PUBLICATION IN THE ENGLISH RENAISSANCE*, 279-340 (outlining the problems faced by women who sought to write, including links between female writers and harlotry).

male genius, then the role women played as authors should be examined more closely.

“Literature” was established as a male domain; great works of literature were not written by women—an idea only deconstructed by feminist literary critics in the past forty years or so.⁹⁷ The gendered nature of traditional literature points to the role of women as “other,” the all-encompassing entity against which men act.⁹⁸ I would argue, this sense of the other applies to any discussion of authorship where creative and literary work is assumed to be authored by men while women traditionally remained excluded from the canon. In other words, there is a political economy of authorship that has a gendered component. The following focus on gender, literature, and authorship helps highlight the importance of these issues for a feminist interpretation of intellectual property. William Hazlitt, for example, published his first book, *An Essay on the Principle of Human Action*, claiming, “no woman ever read, or would ever comprehend the meaning of [it].”⁹⁹ Joseph Hergesheimer wrote in 1921, “literature in the United States was ‘being strangled with a petticoat.’”¹⁰⁰ What is astonishing about quotes such as these is not the suggestion that women might be unable to understand the work, but that male authors feel the need to stake out territory in such a way that they hope to exclude women. While such a statement reveals much about the male author and the need to establish legitimacy through superiority over women, it says little about women as scholars or readers.

In order to succeed in a male dominated field, many women throughout the early twentieth century tried to assimilate into the already existing masculine culture.¹⁰¹ Historically, to be a female

97. See TORIL MOI, *SEXUAL/TEXTUAL POLITICS: FEMINIST LITERARY THEORY* 54-55 (1985) (arguing that it is important to evaluate how the concept of greatness in literature has often been used to exclude women from the canon). Early feminist criticism focused on the literary works of men to highlight the pervasive inequality of gender relations. *Id.*; see also SIMONE DE BEAUVOIR, *THE SECOND SEX* 199-253 (1989) (offering a feminist critique of the work of Montherlant, D.H. Lawrence, Claudel, Breton and Stendhal). See generally MILLET, *supra* note 31 (offering literary critiques of D.H. Lawrence, Henry Miller, Norman Mailer, and Jean Genet).

98. See DE BEAUVOIR, *supra* note 97, at 197-98.

He projects upon her what he desires and what he fears, what he loves and what he hates. And if it is so difficult to say anything specific about her, that is because man seeks the whole of himself in her and because she is All. She is All, that is, on the plane of the inessential; she is all the Other. And, as the other, she is other than herself, other than what is expected of her.

Id.

99. HOFKOSH, *supra* note 86, at 104.

100. WILLIAMS, *supra* note 76, at 3-4.

101. See *id.* at 5 (arguing that Wharton and Cather attempted to transcend their gender in part by situating their own work within the masculine tradition).

author was to produce “mass cultural” objects, not to be an “authentic” writer, and female authors struggled to overcome these arbitrary barriers.¹⁰² An important conclusion that can be drawn from the gendered nature of the discussion over texts is that literary work and literary genius were initially only possible for men—a circular argument at best—therefore, the work of women was typically seen as second rate.¹⁰³ In fact, earlier female literary critics were lost to obscurity.¹⁰⁴

Despite the articulation of original authorship, works of literature, and literary criticism as male territory, women today have entered the public sphere as authors and critics and have staked a claim to the title “author.”¹⁰⁵ In doing so, women authors have both appropriated the already constructed masculine notion of the author as an individual creator and attempted to assert new modes of authorship and publication. While often their works are denigrated as not “serious” literature, it is also the case that many female authors earn their living from a system of copyright established to protect the rights of authors. While early debates over copyright protection were often framed in terms of male authors needing copyright in order to provide for their otherwise helpless wives and children,¹⁰⁶ female authors can also benefit from the system.

Female artists, operating under the authorial paradigm established in the seventeenth century, will seek to protect their “property” from improper use, will see these works as the extension of their personality, and will wish to be seen as the authors of their works. Thus, while some feminists may critique a system of property ownership in what has come to be known as “intellectual property,” other feminists who conceptualize themselves as *authors* may assign value to a system of property rights that protects their work.¹⁰⁷ While

102. See *id.* (postulating that for Nietzsche and other turn-of-the-century male intellectuals, women were associated with the “inauthenticities of mass culture”).

103. See CASTLE, *supra* note 93, at 16 (noting that female critics, especially those who criticized male works, were also held in high disdain and seen as trespassers into masculine territory).

104. See *id.* at 20 (remarking that after 1800, literary criticism became increasingly professionalized and the territory of men).

105. See Shawn St. Jean, *Hanging “The Yellow Wallpaper”: Feminism and Textual Studies*, 28 FEMINIST STUDIES 397, 398 (2002) (suggesting that because some feminist writers have been provided with legitimacy as authors, it is time to focus upon defining “authoritative” texts more closely).

106. ROSE, *supra* note 75, at 40 (discussing the argument by London booksellers and authors that piracy was destroying their livelihoods and helping to develop a concept of authorial property).

107. Feminists may also wish to lay claim to the language of authorial genius and originality as St. Jean does when discussing the ways in which one ought to interpret Gilman’s *The Yellow Wallpaper*. See St. Jean, *supra* note 105, at 398.

some feminists problematize the construction of authorship, others may suggest that owning property is itself an important feminist right. Because of women's past (and sometimes present) position as property, it is likely that many feminists will advocate, at the very least, a theory of female economic and personal autonomy.¹⁰⁸ Furthermore, women's autonomy may manifest itself in arguments about ownership of property and the creation of a sphere of bodily integrity.¹⁰⁹ In other words, the ownership of private property, and by extension intellectual property, is likely to be equally appealing to contemporary feminists as it would be to men.

However, one might also imagine feminist critics using the starting point of women as property to critique the notion of private property in favor of a less rigid understanding of ownership of tangible things. From this perspective, much as with copyright, it is possible for feminists to offer an underlying critique of the idea of private property that one day may transform a system of property that continues to work more in favor of men than of women.¹¹⁰

In an effort to examine private property through a feminist lens, one could argue that the seemingly "rational" world of property discourse is in effect a story where not all actors can be predicted to behave in the name of rational self-interest.¹¹¹ Specifically, women as mothers will most likely not order moral choices about property in a manner that will only benefit themselves to the exclusion of others (the otherwise "rational" choice).¹¹²

108. See Bina Agarwal, *Gender, Property, and Land Rights: Bridging a Critical Gap in Economic Analysis and Policy*, in *OUT OF THE MARGIN: FEMINIST PERSPECTIVES ON ECONOMICS* 264, 264 (Edith Kuiper & Jolande Sap eds., 1995) (arguing that land rights are a crucial part of women's autonomy in South Asia); see also Renée Hirschon, *Introduction: Property, Power and Gender Relations*, in *WOMEN AND PROPERTY- WOMEN AS PROPERTY* 1, 17-19 (Renee Hirschon ed., 1984) (concluding that property rights are socially constructed and typically less available to women).

109. In many ways, arguments over reproductive rights are over bodily integrity and ownership of one's own body.

110. See generally Hirschon, *supra* note 108 (pointing out that women generally have more trouble than men in obtaining property rights).

111. See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, in *PERSPECTIVES ON PROPERTY LAW* 20, 28-36 (Robert C. Ellickson et al. eds., 2d ed. 1995) (discussing property discourse from a variety of perspectives, not all of which are motivated entirely by self-interest).

112. See *id.* at 31 (following Carol Gilligan's groundbreaking work on moral development and introducing a character called "Mom," who views scarce resources from a "cooperative" perspective according to which each person may take some, or "pretty much," but not all of a resource); see also CAROL GILLIGAN, *IN A DIFFERENT VOICE* 95 (Harvard Univ. Press 1993) (1982) (contending that women's "morality" often includes concern or "care" for "both self and other"). See generally SARA RUDDICK, *MATERNAL THINK: TOWARD A POLITICS OF PEACE* 23 (Beacon Press 1995) (1989) (arguing that women's relationship to nurturing and care-giving provides a kind of "maternal thinking" that cannot be calculated using what has been assumed to be a neutral and universal rational calculation of self interest).

Women's interests in property can be viewed as seeking to avoid becoming the object of property and instead retaining the subjectivity to own property.¹¹³ This deontological position translates into the world of intellectual property. Subjectivity as a *potential* property owner must be acknowledged.¹¹⁴ It is the dehumanizing forces of turning people into objects that must be resisted. This is where a feminist critique can be made the most powerful. At a secondary level, a feminist lens allows us to rethink traditional property in less absolutist terms and again seek a middle path and/or a balance between rigid ownership and total lack of control.¹¹⁵ Feminist analysis of private property may not reject the notion of ownership, but it does seek to render that idea more complex, multiple and linked to the larger public domain.¹¹⁶ Feminist presses offer an example of the problems associated with feminist concepts of authorship and property.

The publishing industry has traditionally been male dominated and has led many feminists to seek alternatives to the mainstream publishing system.¹¹⁷ British feminists fighting for suffrage during the early twentieth century created feminist presses in order to attack the "patriarchal cultural hegemony by interrupting men's discourse with each other."¹¹⁸ During the pre-World War I period there were at least eleven feminist presses operating in London that focused on the cause of women's suffrage.¹¹⁹ The most popular of these early feminist presses, *The Woman's Press*, was forced to create new distribution channels after being vilified by the mainstream male-dominated publishing industry.¹²⁰ Despite their position, feminists understood the necessity of asserting their own narrative of women's

113. See Hirschon, *supra* note 108, at 3 (pointing out that in some cultures, women are considered "things" and "objects" and are "equated with wealth").

114. See Agarwal, *supra* note 108, at 17-19 (noting that, at least for women in certain geographical locations, owning property is an essential part of women's autonomy).

115. See Rose, *supra* note 111, at 28-36 (proposing such a compromise by introducing a "cooperative" perspective on property, which she illustrates through use of a female character called "Mom").

116. See *id.* (discussing the "cooperative" perspective on property, which is more complex than others in that it incorporates a concern for others and a sharing of resources).

117. See Murray, *supra* note 11, at 198 (arguing that the American publishing industry and the process of creating literature as a legitimate pursuit was male dominated).

118. *Id.*

119. See *id.* at 199 (noting that evidence exists that "at least eleven pro-suffrage presses in addition to the Woman's Press operat[ed] in London between 1905 and August 1914").

120. See *id.* at 206 (remarking that political forces compelled the Woman's Press to publish "non-fiction propaganda pieces").

rights and successfully used commercial shops to sell suffrage related materials.¹²¹ Unlike later feminist presses that operated as not-for-profit volunteer organizations, *The Woman's Press* successfully raised money and generated profits.¹²² However, as later feminist presses would illustrate, the necessity of creating a voice outside the mainstream publishing world was integral to articulating a feminist worldview.¹²³

Feminists wishing to publish in the late 1960s and early 1970s met similar resistance to those writing in the early twentieth century.¹²⁴ If feminist ideas were to be disseminated, alternatives to the mainstream press, still dominated by men, would have to be found.¹²⁵ As the second wave feminist movement took hold in the 1970s, feminists constructed independent publishing houses in order to bypass the male dominated publishing industry and, what they saw as, the commercialization of the book market.¹²⁶ These publishers relied heavily upon volunteer hours and collective organizational structures to distribute feminist texts and explicitly attempted to create an alternative paradigm for publishing materials.¹²⁷

Sybylla, an Australian cooperative feminist publishing house, describes its approach to publishing as, “a wilful disrespect for the values of commercial publishing.”¹²⁸ The Feminist Press, begun by Florence Howe in 1970, saw its mission as publishing the “lost” texts of female authors—giving them voices that they otherwise would be denied.¹²⁹ Authors publishing through these presses seemed to be

121. See *id.* at 207 (asserting that the sale of pro-suffrage materials at commercial shops played a crucial role in the “suffragette campaign”).

122. See *id.*

123. See Laura Furman, “A House Is Not a Home”: Women in Publishing, in *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* 72, 72-75 (Robin Morgan ed., 1970) (arguing that publishing houses at the time were sexist and that women could not advance within the system).

124. See *id.*

125. See Leigh Felesky, *Feminist Ink: Politics and Publishing in a Big Box World*, *HERIZONS*, Summer 2004, at 46 (noting that the “niche” of “small presses” is to publish “voices” and views that may otherwise not reach a large audience).

126. See *id.* at 21 (recognizing some of the Canadian independent publishing houses—Press Gang, Women's Press, and Gynergy Press). Felesky also notes that large presses have recently bought some of these smaller publishing houses, while others have gone out of business. *Id.*

127. See *id.* at 22 (describing volunteer hours as “the backbone of many feminist presses”).

128. Diane Brown & Maryanne Lynch, *Creating a Space: Sybylla Feminist Press, 1988-2003*, 29 *HECATE* 285, 288 (2003).

129. See Florence Howe, *From Race and Class to The Feminist Press*, 44 *MASS. REV.* 117 (2003) (remarking that the “prime purpose of The Feminist Press” was to “recover and republish” the work of women authors); see also St. Jean, *supra* note 105, at 397 (arguing that The Feminist Press was responsible for bringing Gilman's *The Yellow Wallpaper* from relative obscurity into prominence as a feminist text). St.

motivated by the necessity of expressing the ideas of feminism as much as, if not more than, benefiting from the commercial rewards of owning copyrights. For example, when Press Gang Publishers, a small independent feminist publisher, closed its doors, it held a benefit to help pay the royalties due to its authors who had not been paid in three years.¹³⁰ While I am sure these authors would have liked to see royalty payments, it is also the case that small feminist independent presses work for reasons other than profits.

Feminist authors often desire their texts to circulate as widely as possible and to create a critical level of consciousness about feminist ideas.¹³¹ It is possible to argue that early feminists were more interested in seeing their ideas spread than they were in protecting their copyrights, an attitude that is not unique to feminists but may apply to any ideologically motivated group. The explicitly political origins of Sybylla, organized as a Marxist feminist publishing collective run primarily by volunteer labor, suggest that providing an alternative to mainstream publishing that allowed women to publish their ideas was a crucial aspect of the inception of independent feminist presses in the 1970s.¹³² However, equally important to recognize is that while the demand for royalties may be tempered by the desire to have ideas published and circulated, the goal of making a living as an author is not without adherents in feminist circles.¹³³ As feminist ideas become increasingly main stream and publishers see the market potential in feminist writing, issues of ownership may begin to transcend sharing ideas.

Besides providing important avenues for publication by women, these feminist presses created new conceptual spaces organized upon different sets of values than those articulated in the mainstream press and codified as copyright law.¹³⁴ While royalties and economic

Jean also suggests that the lack of copyright for *The Yellow Wallpaper* has led to numerous versions that are not the same, thus creating some room for argument over how to interpret the text. *Id.*

130. See Felesky, *supra* note 125, at 23 (commenting on the necessity of “support from feminist media” and a “strong feminist readership” in preventing the closing and, thus, the silencing of feminist presses).

131. See *id.* at 46 (remarking on the fact that specific smaller, feminist presses have published works, and thus disseminated ideas, to which the public would not have had access to otherwise).

132. See Brown & Lynch, *supra* note 128, at 290 (observing that Sybylla maintained “a subversive presence in the broad marketplace” by advocating novel “ways of reading” and noting that this activity was “linked to the socialist-feminist politics of Sybylla’s past”).

133. See Felesky, *supra* note 125, at 46 (noting the need for everyone to buy books so that feminist authors may earn and living and continue to write).

134. See *id.* (providing an example of one set of values, those held by lesbians, that mainstream publishers and bookstores do not often recognize).

survival are not absent from these presses, the focus is much more on the exchange of ideas, creating an opportunity for political engagement, and the link to the larger community.¹³⁵ In other words, they provide a balance to the simplistic view of property rights by recognizing the links that exist between author, publisher and reader. However, not all feminist authors work within this system of independent presses, and thus their approach to copyright issues remains to be seen. Whether feminist authors, by the nature of their feminism, hold a different approach to copyright and their texts is a question that can only be tested empirically.¹³⁶

Today, feminist independent presses struggle to survive.¹³⁷ Because feminist ideas have, to some degree, become more mainstream, the market for small feminist presses is shrinking.¹³⁸ As feminism entrenched itself in academia, it might also be argued that publishing within the traditional framework of the original author became increasingly important for reasons of tenure. Thus, feminist literature today is produced through the same processes as any other literature and increasingly subjected to the same calculation—not of quality, but of sales. Feminist writers want to see their works published through the “best” presses and reach large audiences. Feminist presses have had to evolve to remain competitive. Brown and Lynch document that Sybylla had to change its publishing strategies as feminist theory moved towards identity politics.¹³⁹ Despite the many challenges, feminists dedicated to the ideas expressed through these presses continue to work to provide an alternative space to the mainstream publishers.¹⁴⁰

135. See *id.* (noting that one smaller, independent publishing house “is also dedicated to publishing books on timely feminist issues”).

136. See, e.g., Andrea Abernethy Lunsford, *Rhetoric, Feminism, and the Politics of Ownership*, 61 C. ENG. 529, 529-30 (1999) (discussing her own lack of proprietary feeling towards her writing and noting that many authors have a difficult time with the concept of “singular authorship”). I, along with the feminist authors Lunsford mentions in her article, feel less proprietary towards my writing. Other writers Lunsford has interviewed also attribute their lack of proprietary feelings over their writing to a feminist system that values collaboration and an acknowledgement of intellectual debts. *Id.*

137. See Felesky, *supra* note 125, at 21 (observing that, at least in Canada, larger presses have bought several independent feminist presses, and at least one has closed).

138. See *id.* at 22 (quoting one employee of the Women’s Press/CSPI as saying, “[c]learly, the ‘F’ word is not such a bad word as it was when feminist presses opened their doors thirty years ago”).

139. See Brown & Lynch, *supra* note 128, at 290 (discussing how politics provoked changes in Sybylla’s publishing strategies).

140. See Danford, *supra* note 76, at 18 (observing that feminists are also changing to meet the new competitive publishing environments, as exemplified by the Feminist Press, which has reinvented itself through a new feminist pulp fiction series).

The advantage of a feminist perspective is that it provides a new lens through which to view copyright. This feminist perspective can help raise the consciousness of women and men. The issue of copyright has not been considered a feminist issue, and it is likely that some process of consciousness-raising is necessary to bring this approach to a wider audience.¹⁴¹ This paper suggests that a feminist critique of copyright is possible, even if many contemporary feminists benefit from the current system.

If one were to create a feminist response to copyright, and by extension the idea of the romantic author, one might begin by arguing that the idea of author should be secondary to the circulation of texts. Lunsford suggests that feminists are beginning to create a new theory of authorship focused on the connections between people, not the boundaries separating them.¹⁴² A feminist critique may begin with a critique of how texts are currently assessed—based upon marketability instead of the quality of the ideas. In fact, while not specifically a feminist critique, highlighting the centralization of ownership and authorship into the hands of corporate owners is an important part of developing an alternative.¹⁴³ If it were possible for the works of women to be valued to the same degree as the works of men, then feminism may debunk the very notion of an individually creative author and instead locate the text within the reciprocal world of ideas. Such a position undermines the very concept of copyright that only conceives of the author as an individual and the work as an article of private property with clearly defined borders.

A second possible feminist critique might join the postmodern critique of authorship illustrated by Foucault in his seminal essay, “What is an Author?”¹⁴⁴ Foucault deconstructs what he calls “the author-function,” the illusion of the author as “authority,” the author as in control of the text in favor of the circulation of texts without authors.¹⁴⁵ Some feminists recognize the importance of a de-

141. See Lunsford, *supra* note 136, at 532 (noting the sheer number of copyrights, particularly copyrights owned by corporate entities, in recent years).

142. See *id.* at 538-39 (noting that legal scholar Lani Guinier “situate[s] authority in the *connections* a person makes among the discourses available to her and out of which can come . . . a medley of component voices that is singular and plural at the same time”).

143. See *id.* at 532 (pointing out a “gold-rush’ mentality” that drives corporate entities “to copyright and patent everything under the sun”).

144. Michel Foucault, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 113 (Donald F. Bouchard ed. & Donald Bouchard & Sherry Simon trans., 1977); see also JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” (1993) (discussing Foucault’s link to “constructivism” and “human agency” and rebutting his critics).

145. See Foucault, *supra* note 144, at 124-26 (discussing how, with the advent of stringent property law, the “author-function” became one of “authority” and

centered author in part because there is no monolithic “self” from which the “author” works—this line of feminist analysis aligns with the postmodern move to call for the elimination of the author-function.¹⁴⁶

Other feminists are less willing to eliminate the concept of the author because female standpoints and subjectivity (as well as women authors focusing on class and race) express important aspects of women’s experience that could not otherwise be articulated.¹⁴⁷ These feminist literary critics point to the seeming coincidence between the increasing importance of women as literary figures and the claim by male postmodernists that the author is dead.¹⁴⁸ Some feminists find it suspicious that the idea of the author is lost just as women and people of color are arriving at legitimacy as authors.¹⁴⁹ Furthermore, given how easily corporate interests appropriated the author to cover the centralization of ownership under copyright law, it is very likely that theories regarding the “death of the author” will be appropriated into a world where the absence of an author allows for even greater profits for corporate entities that own copyrights.¹⁵⁰

To deal with the clash between the death of the author position and the need for autonomous feminist agency, a middle ground must be found.¹⁵¹ Two standards of authorship can help create the balance between the author-function and authorial agency. First, literary texts *have* (rather than *are*) authors. This idea suggests that the text is not the sole possession of the author and that texts, once written, are independent of the author. Second, the fluid nature of subjectivity

propriety).

146. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBDIVISION OF IDENTITY* (1990) (outlining a critique of gendered identity that destabilizes the notion of the individual as “naturally” gendered by developing the concept of the heterosexual matrix). Butler does not take up the issue of the author-function. *Id.*

147. See MOI, *supra* note 98, at 57-69 (outlining Gilbert and Gubar’s feminist argument that women’s writing is an expression of women’s experience and placing their argument in the context of Barthes’ and Foucault’s position that the author is dead).

148. See Cheryl Walker, *Feminist Literary Criticism and the Author*, 16 *CRITICAL INQUIRY* 551, 560 (1990) (expressing concern that in declaring that the author is dead, “post-structuralism” is not “meeting the needs of current feminism”).

149. See ELSPETH PROBYN, *SEXING THE SELF: GENDERED POSITIONS IN CULTURAL STUDIES* 34 (1993) (developing the argument that many women, especially women of color, found it problematic that the “death of the author” occurred just as they were gaining legitimacy in literature).

150. See Lunsford, *supra* note 136, at 532 (writing that “[m]ore interesting and alarming to me as a feminist and a rhetorician today, however, is the appropriation of the sovereign ‘author’ construct by the corporate world”).

151. See Walker, *supra* note 148, at 560 (contending that “what we need, instead of a theory of the death of the author, is a new concept of authorship that does not naively assert that the writer is an originating genius”).

means that authors can never be fully present in their work.¹⁵² Additionally, a postmodern analysis that speaks to the death of the author is not seeking to eliminate subjectivity but to insert questions of power into textual analysis.¹⁵³ The middle path allows for subjectivity and authorship but gives author limited authority over the text and its interpretation. Authors should remember that the text belongs to the reader as well. This critical analysis concludes that texts may not be the private property of their authors, but at the same time some authorial autonomy should be retained.¹⁵⁴ A path between private property, where boundaries are established to prevent the circulation of texts, and pure textual circulation where the subjectivity of the author is ignored must be considered. Certainly, copyright law is structured to identify an individual author and provide certain rights to that author. The law, which at least until recent additions skewed it towards ownership, provides some “rights” for readers, but perhaps not as many as it should.

The feminist response recognizes the necessary relationship between authorship and the public. In fact, by constructing authorship within the language of private property (or intellectual property), as is currently the case, we warp the relationship between public and private spheres in favor of the private and to the detriment of the public good.¹⁵⁵ Writing, reading, and authorship are all public acts and as such should only be interpreted within the framework of the larger public good. A feminist critique of copyright begins by seeking a true balance between circulation of texts and ownership of texts.

CONCLUSION—WHERE DOES FEMINISM FIT IN?

I have attempted to investigate the multiple ways feminist perspectives might be applied to intellectual property. Women who identify with feminist thought may take any number of positions on the issue of intellectual property, from endorsing a system that protects the authorial autonomy of women, or, by contrast, offering a critique of the underlying assumptions of a property discourse

152. See *id.* at 566 (interpreting the work of Cora Kaplan as arguing that “[a]uthors are never full subjective presences because of the fluid nature of subjectivity”).

153. See *id.* at 567 (noting that the discussion of the role of the author involves “politics and power relations”).

154. See *id.* at 571 (asserting that “[t]hough I may not wish to treat texts as the private property of their authors, I am unwilling to lose the sense of vital links between women that only a practice which preserves authors in some form can provide”).

155. See *id.* (discussing the link between authoring a piece and owning that piece as private property).

founded on a masculine construction of knowledge. While work has been done on the history of authorship and the ways women were either ignored and/or used to define the boundaries of literary texts, much less has been done on the contemporary state of authorship from a feminist perspective. Additionally, there is a need for a more direct feminist interpretation of the growing case law on copyright, patents and trademarks.¹⁵⁶

Feminism can provide a study of intellectual property with both a different viewpoint on the law and a method for articulating a different process. The alternatives grow from the case examples of women's creativity—quilting, knitting and feminist publishing to name a few. These examples suggest that whether “natural” to women or not, a different relationship to creative work can be articulated from a feminist perspective. This is an approach that recognizes collaboration as much as individual contributions, recognizes that the author (of a quilt, dress or book) and the reader/user form an important relationship often based upon mutual respect, recognition, and care, and that there is no need to construct a definition of literature or “high art” premised upon reactive boundaries that declare what good work is not—the work of women. A feminist perspective works at the foundation of the legal system by changing the assumptions upon which much of the law is based. Thus, there would ultimately have to be changes in the law that would reflect changes in the underlying social structure.

The ultimate threat posed by the system of intellectual property, as currently conceptualized, is that it may further erode the values that can still be found in the types of creative endeavors that women produce. We can hope that by understanding the alternatives a feminist interpretation makes available, at least some creative people will be provided with a cultural space where creation is about more than property rights. Of course, a structural critique must be tempered by the fact that numerous women have turned the traditional system of intellectual property to their benefit. In the end, much as in the beginning, it is difficult to see a single feminist interpretation applying here. However, the many different interpretations create a more complex and richer dialogue on intellectual property, one that seems important to continue.

156. See generally Bartow, *supra* note 10 (presenting some interesting work on trademark case law and suggesting that many trademark cases have been decided using a gendered lens).