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Feminist Anthropology and Copyright: Gauging the Application and Limitations of Oppositions Models[1]

B COURTNEY DOAGOO

ABSTRACT (EN): The purpose of this brief chapter is to explore the application of interdisciplinarity to intellectual property law, specifically copyright law, through the lens of feminist critiques. The paper attempts to demonstrate how the application and limitation of the two oppositions models offered by feminist anthropology intersect with copyright law. Specifically, drawing on examples from what is considered to be traditionally feminine areas of creativity, the paper broadly examines the values we associate with women, what they create, and how it is perceived and valued before the law.

RÉSUMÉ (FR): Le but de ce court chapitre est d'explorer l'application de l'interdisciplinarité au droit de la propriété intellectuelle, plus particulièrement au droit d'auteur, d'un angle critique féministe. Cet article essaie de démontrer comment les applications et les limites de deux modèles opposés offerts par l'anthropologie féministe s'entrecroisent avec le droit d'auteur. Plus spécialement, en se basant sur des exemples de ce que l'on considère comme des domaines traditionnels de créativité féminine, cet article exa-

1 I would like to express my sincere gratitude to the Intellectual Property Workshop Committee (Professor Mistrale Goudreau, Professor Teresa Scassa, and Executive Director of the Centre for Law, Technology and Society, Madelaine Saginur) for encouraging me to participate in this tremendous project, and also for all of their help, patience, and guidance. I would also like to thank the participants at the conference for their feedback, the two peer reviewers, the student editors, and committee editor for all of their hard work, dedication, and assistance.

mine globalement les valeurs associées à la femme, la façon dont elle crée et comment cette création est perçue et évaluée par le droit.

A. INTRODUCTION

In recent years, scholars have revealed an interest in unravelling the inherently patriarchal underpinnings of copyright law.[2] Why certain kinds of art, culture, and knowledge receive mainstream economic and legal protection while others do not is an important question that has far ranging implications beyond law.[3] Copyright protection — or the lack thereof — for creativity traditionally considered "feminine" such as decorative crafts, needlework, and clothing[4] is illustrative.[5]

While examining intellectual property, specifically copyright, from a traditional legal approach might yield a justification based on Lockean, Hegelian, or utilitarian theories,[6] an inquiry through the lens of interdisciplinarity allows for an alternate approach to understanding the origins of the

2 See, generally, Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law" (2006) 14:3 Am U J Gender Soc Pol'y & L 551; Shelley Wright, "A Feminist Exploration of the Legal Protection of Art" (1994) 7 CJWL 59; Debora Halbert, "Feminist Interpretations of Intellectual Property" (2006) 14:3 Am U J Gender Soc Pol'y & L 431; Carys J Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law" (2007) 15 Am U J Gender Soc Pol'y & L 207; Dan L Burk, "Feminism and Dualism in Intellectual Property" (2006) 15 Am U J Gender Soc Pol'y & L 183; Rebecca Tushnet, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright" (2007) 15:2 Am U J Gender Soc Pol'y & L 273.

3 Wright, above note 2, states that "[t]he apparent gender neutrality of copyright is therefore questionable because of its association with the public world of the marketplace which has, in European history, consistently marginalized or excluded women" at 70; Tushnet, above note 2, asserts that "[c]opyright's economic focus and the expense of litigation will systematically lead to case law undervaluing non-market production, including historically female creative practices" at 304; Tushnet also contends that although seemingly neutral, the law is "entangled in ideas about gender and sexuality" at 304.

4 While clothing was produced by men and women, both prior to and after the eighteenth century, these roles were not recorded with accuracy: see, generally, Madeleine Ginsburg, "The Tailoring and Dressmaking Trades, 1700–1850" (1972) 6:1 Costume 64. "In 1859, there are 23,517 London tailors. There is no eighteenth century estimate of professional needlewomen or dressmakers but a high proportion of the women mentioned in the Old Bailey Sessions Papers, a good cross section of London artisan life, so describe their occupation" at 64.

5 Tushnet, above note 2, suggests that there is a tendency to compensate masculine activities whereas traditionally feminine activities such as "fashion, cooking, and sewing," do not garner the same level of economic security at 303–4.

6 See, generally, Daniel J Gervais & Elizabeth F Judge, *Intellectual Property: The Law in Canada*, 2d ed (Toronto: Carswell, 2011) at 34.

law. This is particularly true of feminist critiques, which have contributed relevant insights about gender and the socio-cultural inequalities present within the intellectual property law system.[7]

This chapter considers the contributions and limitations of feminist anthropology to an understanding of how traditional "feminine" creativity fits into the Canadian copyright framework.[8] The goal of this piece is to provoke dialogue about the values that we associate with creativity by examining the economic security we grant to certain kinds of cultural production and deny to others.[9] This chapter will attempt to expand further on the idea that the marginalization of feminine activities from the scope of intellectual property protection is intimately tied to the gender values associated with the producer of the work.[10] In the first part, I will briefly introduce the "oppositions" models associated with feminist anthropology in order to offer context for the social treatment of feminine cultural production. Section C will relate the concepts to historical examples of cultural production, and Section D will attempt to highlight these implications from within the Canadian legislative context.

B. EXAMINING THE "OPPOSITIONS" APPROACH

The feminist critique of copyright law has gained impressive ground in the past few decades.[11] Scholars have mostly written about the "other side" of the economic security granted by intellectual property law, namely those areas of cultural production that have been excluded (either entirely or partially) from the framework of legal protection.[12] Although there are num-

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7 See, generally, above note 2; Halbert, above note 2, contends that "applying a feminist framework gives us a different way of looking at the world" at 432.

8 This topic has been well documented in Wright, above note 2, a paper that articulates the gendered history of copyright and design laws; see also Rozsika Parker & Griselda Pollock, *Old Mistresses: Woman, Art and Ideology* (New York: Pantheon Books, 1981), who make the connection between the feminist anthropology oppositions models and feminine cultural production that I will discuss in this paper; the examination of oppositions models in intellectual property is not new, as it has previously been explored in Burk, above note 2.

9 This paper does not take the view that copyright law should be expanded to include additional protection for various industries; rather, it seeks to help identify the possible biases inherent in the system stemming from gender inequalities.

10 See, generally, above note 2.

11 *Ibid*.

12 *Ibid*.

erous feminist theories relevant to this discussion, the section below will examine the application and limitations of two specific oppositions models[13] in order to explore the treatment of feminine cultural production and its relationship with copyright.

Broadly described, feminist anthropology is a discipline that "formulates its theoretical questions in terms of how economics, kinship and ritual are experienced and structured through gender . . ."[14] and further asks "how gender is structured and experienced through colonialism, through neo-imperialism and through the rise of capitalism."[15]

In an instrumental piece explaining the construction of gender and its corresponding inequalities, Sherry Ortner proposed an analytical framework that explored what she felt was the universally accepted view that women hold a secondary status to men.[16] Ortner rejected the suggestion that "biological determinism"[17] dictated the subordination of women and instead pointed to the "universals of the human condition" (i.e., the physical, social, and psychological realms) for an answer.[18] She identified *nature*, in its most generalized sense, as something that was devalued, manipulated into, and controlled by *culture* (what she largely defined as the products of human consciousness and thought processes), and compared this relationship between women and men.[19]

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13 While there are many theories within feminism and feminist anthropology, this article will focus on the two opposition models as proposed by Sherry Ortner and Michelle Zimbalist Rosaldo.

14 Henrietta L Moore, *Feminism and Anthropology* (Cambridge: Polity Press, 1988) at 9 [Moore, *Feminism*].

15 *Ibid* at 10.

16 Sherry B Ortner, "Is Female to Male as Nature Is to Culture?" [Ortner, "Is Female to Male"] in Michelle Zimbalist Rosaldo & Louise Lamphere, eds, *Woman, Culture, and Society* (Stanford: Stanford University Press, 1974) at 67 [Rosaldo & Lamphere, *Woman, Culture, and Society*].

17 *Ibid*. Biological determinism only gains significance in the "framework of culturally defined value systems" at 71; Moore, *Feminism*, above note 14. Moore summarizes Ortner and distills what she calls *asymmetries* at the "level of cultural ideologies and symbols" at 14.

18 Ortner, "Is Female to Male," above note 16 at 71. For example, Ortner looks for answers in the universals that exists in every culture: everyone is born to a mother, engages in society, strives for survival, dies, etc.

19 *Ibid* at 72. Although *nature* and *culture* are social constructs, Ortner "maintain[s] that the universality of ritual betokens an assertion in all human cultures of the specifically human ability to act upon and regulate, rather than passively move with and be moved by, the givens of natural existence" at 72; Moore, *Feminism*, above note 14 at 14; Burk, above note 2. Dualisms, i.e., mind/body have been used to "naturalize domination" and to support dominance over women, at 192.

As a result of these cultural beliefs, Ortner proposed that women have merely been considered *closer* to nature than men, while men have been considered *closer* to culture.[20] She outlined three general levels that contribute to the association of women with nature, concerning the "female body and its function" (i.e., procreative function), which were all at tension with her simultaneous participation with culture, thereby suspending her status between the two oppositions.[21] Finally, Ortner concluded that the ensuing position of women — being considered closer to nature — was also perpetuated in the "institutional forms that reproduce her situation."[22]

Connected to Ortner's framework — and important to the analysis of the devaluation of cultural production — was the idea that the socially systematic division of gender (nature/culture) is mirrored in societal institutions (i.e., private versus public spheres).[23] The private/public model had been considered important because "it provides a way of linking the cultural valuations given to the category 'woman' to the organization of women's activities in society."[24] This model, as observed by Michelle Zimbalist Rosaldo, outlined a "structural framework necessary to identify and explore the place of male and female in psychological, cultural, social, and economic aspects of human life."[25] For example, she observed that women, in their role as mother and nurturer of children were relegated to the domestic sphere, while men attended to "extra-domestic" activities.[26]

Further, Rosaldo claimed that this dualism "underlies" the "cultural stereotypes . . . in the evaluation of the sexes" rather than "determine[s]" it.[27] One of the consequences of women's "ascribed status" to womanhood (as opposed to men's "achieved status" to manhood), she observed, was that their activities were "relatively uninvolved with the articulation and expression of social differences."[28] Rosaldo concluded in suggesting that women

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20 Ortner, "Is Female to Male," above note 16 at 73.

21 *Ibid* at 73–74.

22 *Ibid* at 87.

23 *Ibid*; Moore, *Feminism*, above note 14 at 21; Michelle Zimbalist Rosaldo, "Woman, Culture, and Society: A Theoretical Overview" in Rosaldo & Lamphere, *Women, Culture, and Society*, above note 16 at 23 [Rosaldo, "Woman, Culture, and Society"].

24 Moore, *Feminism*, above note 14 at 21.

25 Rosaldo, "Woman, Culture, and Society," above note 23 at 23.

26 *Ibid* at 24; but see Michelle Zimbalist Rosaldo, "The Use and Abuse of Anthropology: Reflections on Feminism and Cross-Cultural Understanding" (Spring 1980) 5:3 Signs 389 at 400 [Rosaldo, "The Use and Abuse"].

27 Rosaldo, "Woman, Culture, and Society," above note 23 at 23.

28 *Ibid* at 29.

relegated to the domestic sphere experienced oppression due largely to their alienation from society, and that the opportunity to interact within the public sphere instead provided them with "power and a sense of value."[29]

Even though these models provide a useful framework for understanding the subordination of women, they have important limitations. Both Ortner and Rosaldo cautioned against relying on universalisms to frame the questions and to explain the complexities of gender dynamics in society, because doing so oversimplified and overlooked the nuances and contradictions that actually existed across and within different cultures.[30] In her later work, Rosaldo suggested that applying universalisms (i.e., the public/private model) to account for concrete cases "assume[s] — where it should rather help illuminate and explain — too much about how gender really works."[31] Similarly, Ortner acknowledged concerns about these cultural particulars at the very beginning of her piece, asserting that although certain universals existed (such as the secondary status of women), they were at tension with cultural variances, stating that "the specific cultural conceptions and symbolizations of woman are extraordinarily diverse and even mutually contradictory."[32]

These opposition models were also criticized by scholars,[33] however, as Henrietta Moore observed, they served an important purpose at the time

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29 *Ibid* at 41.

30 Ortner "Is Female to Male," above note 16 at 67; Rosaldo, "The Use and Abuse," above note 26 at 395 and 415.

31 *Ibid* at 399. "[B]y linking gender, and in particular female lives, to the existence of domestic spheres, we have inclined, I fear, to think we know the 'core' of what quite different gender systems share, to think of sexual hierarchies primarily in functional and psychological terms . . . to minimize such sociological considerations as inequality and power" at 400.

32 Ortner, "Is Female to Male," above note 16 at 67; Sherry B Ortner, *Making Gender: The Politics and Erotics of Culture* (Massachusetts: Beacon Press, 1996). In a response to her earlier work, Ortner addresses the issues concerning universalisms, stating that "[t]he biggest substantive 'error' in the paper may be the main point, that is, the point that a linkage between female and nature, male and culture 'explains' male dominance, whether universal or not" at 177; rather, she finds that male dominance can be due to the "result of some complex interaction of functional arrangements, power dynamics, and bodily effects" at 177.

33 Henrietta Moore, "'Divided We Stand': Sex, Gender, and Sexual Difference" (1994) 47 Fem Rev 78 [Moore, "Divided"]. "The categories of nature, culture, public and private were themselves found to be historically and culturally variable . . . and the categories of gender difference were revealed to be far from universal" at 80; Moore, *Feminism*, above note 14 at 16 and 21; see, for example, Carol P MacCormack "Nature, Culture, and Gender: A Critique" in *Nature, Culture, and Gender* (Cambridge: Cambridge University Press, 1980).

they were introduced because they endeavoured to explain the devaluation of women based on social and not biological terms.[34] Moore also suggested that the use of universalisms had since opened the door to their "critical reinterpretation" by feminist scholars, resulting in unique and diverse accounts of what being a "woman" meant, and further challenging what these accounts entailed.[35]

Notwithstanding these limitations, the models do offer interesting insights about the dynamics of contemporary society, specifically in the context of cultural production, which is arguably tied to the social status of its producer. The relevance of these models is grounded in the fact that much of the language used to describe the subordination of feminine cultural production makes references to the nature of the work as tied to its producer and the place in which it is created.[36] For example, Parker and Pollock suggest that the language used in the Victorian era to describe women's work perpetuated themes of nature and the separation of spheres to denote the division of labour between the sexes.[37]

Importantly, the subordination of women affects the social, economic, and legal valuation of their cultural production.[38] For example, women have been excluded from certain activities, their work has been devalued, and, finally, their exclusion from equal participation in cultural production tends to perpetuate masculine ideologies.[39] Having identified the param-

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34 Moore, "Divided," above note 33 at 80.

35 *Ibid* (i.e., through the lens of sexual orientation, race, culture, etc.).

36 Parker & Pollock, above note 8 at 9–10, 12, and 70; Rozsika Parker, *The Subversive Stitch: Embroidery and the Making of the Feminine*, 3d ed (New York: I B Tauris, 2010) at 5.

37 Parker & Pollock, above note 8 at 10 and 12–13.

38 See, generally, Bartow, above note 2. Most creative sectors are "dominated and controlled" by men at 578; also labelling cultural production female "commands less attention and less money than the creative works of men" at 552; see, generally, Tushnet, above note 2 at 303–4; Burk, above note 2, suggests that patterns of subordinating "feminine labour" — which goes unrecognized — are arguably present in "our system for rewarding innovation and creativity" at 192–93.

39 See Sally Hagaman, "Feminist Inquiry in Art History, Art Criticism, and Aesthetics: An Overview for Art Education" (1990) 32:1 Studies in Art Education 27. Hagaman identifies these three levels of inequality in knowledge for women in academic disciplines at 28; Gill Perry, "The Parisian Avant-Garde and 'Feminine' Art in the Early Twentieth Century" in Gill Perry, ed, *Gender and Art* (London: Yale University Press, 1999) at 199 [Perry, *Gender and Art*]. Perry discusses the exclusion of women from public Parisian art academies until the late nineteenth century. They were permitted to attend private schools, but were often segregated and charged higher fees than male students; Ortner, "Is Female to Male," above note 16 at 80. Cooking is considered a woman's natural domestic role; in contrast, at a professional level, such as haute cuisine, it is mostly the domain of men;

eters of the oppositions models — the association of women to nature and the private sphere — the following will attempt to explain the devaluation of feminine cultural production socially and legally.

C. GENDERING CULTURAL PRODUCTION

This section will briefly examine two examples of cultural production prevalent between the end of the Renaissance and Victorian eras in Britain. This temporal and geographical period is of particular interest since Canadian copyright law is based on the 1911 British *Imperial Copyright Act*, and was therefore influenced by the corresponding social and cultural context leading up to that period.[40] Taking into consideration the application and limitations of the two oppositions models discussed above, the following will attempt to link the binary themes of nature/culture and private/public to the general socio-cultural context of this period.

1) Arts and Crafts

The devaluation of female cultural production is perhaps best seen comparatively, in relation to masculine cultural production. An interesting example is the distinction between the arts and the crafts: craft is valued differently than art.[41] However, this was not always so. Art and craft were

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Carol M Rose, "Woman and Property: Gaining and Losing Ground" (1992) 78 Va L Rev 421. Rose addresses traditional feminine crafts, noting that "[m]odern feminism has interested the art world in the aesthetic merit of such crafts, suggesting that such cooperative forms of creativity may attain very high levels, despite the often strained circumstances of their creation and the disdain with which our legal institutions have treated them," at 455; Burk, above note 2 at 192: feminine labour is largely devalued and unrecognized; see, generally, Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: William Morrow & Company, 1970) at 178: masculine domination of culture has caused all creations of culture to be seen via the lens of masculine ideas of aesthetic and beauty — women artists even painted the female body based on its masculine interpretation; Parker & Pollock, above note 8 at 135–36.

40 1911 (UK), 1 & 2 Geo V, c 46; see, generally, Sara Bannerman, "Copyright: Characteristics of Canadian Reform" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at 17, for a general discussion on the evolution of Canadian copyright law and reform.

41 Mark Banks, "Craft Labour and Creative Industries" (2010) 16:3 International Journal of Cultural Policy 305 at 312; see, generally, Sally J Markowitz, "The Distinction between Art and Craft" (1994) 28:1 Journal of Aesthetic Education 55.

equally valued until the Renaissance period, during which time a cultural shift occurred, creating an "intellectual separation" between the two.[42]

This shift resulted in art (and consequently artists) assuming a status superior to craft (and consequently craftspeople), which in turn also affected the way the arts were perceived, appreciated, and taught.[43] It has been suggested that the division between arts and crafts could roughly be equated with the division between the sexes during this period: men began to associate themselves with *superior* activities, such as the politics, business, or arts, while women were encouraged to participate in *menial* activities such as the domestic crafts.[44] It should be noted that men also participated in craftwork; however, their involvement was predominantly with industrial, and not domestic crafts.[45]

The division of masculine art and feminine craft mirrored the status of women during that time; craft, like embroidery, was considered inferior to art and therefore "accorded lesser artistic value."[46] Further, women's association with embroidery became symbolic of, and eventually synonymous with, their natural femininity.[47] Parker and Pollock suggest that "the act of embroidering, the hours a woman spent sitting stitching for love of home and family, symbolized the domestic virtues of tireless industry, selfless ser-

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42 Edward Lucie-Smith, *The Story of Craft: The Craftsman's Role in Society* (Ithaca: Cornell University Press, 1981). It was the stage after the Renaissance where an "intellectual separation between the idea of craft and that of fine art" occurred, at 11; Anthea Callen, "Sexual Division of Labor in the Arts and Crafts Movement" (1984) 5:2 Woman's Art Journal 1. The split between the (fine) arts and (lesser) crafts occurred during the Renaissance period, "when artists began to shun the practical and manual aspects of their craft in order to gain the social status accorded to intellectuals" at 3.

43 Parker & Pollock, above note 8 at 17; Lucie-Smith, above note 42 at 11; Markowitz, above note 41 .Markowitz suggests that one of the key justifications for the distinction between art and craft can be attributed to the mind-body dualism, which proposes that society places a higher value on the products of the mind (art) in contrast with products of physical labour (craft). "This dualism has shaped the way we regard morality, politics, [and] gender; now we must ask as well how it has shaped our view of art" at 68); Burk, above note 2. The valuations attributed to labour are reflected in the way creativity is rewarded, for example Burk observes that "mental effort" is awarded a higher value than the "corporeal [or] material development" at 192–93.

44 See, generally, Wright, above note 2 at 87–88; Lucie-Smith, above note 42 at 182–83; Parker & Pollock, above note 8 at 50–51: women did participate in the arts, albeit on a restricted level; Parker, above note 36 at 5 (art/craft).

45 Callen, above note 42 at 4; Lucie-Smith, above note 42. Lucie-Smith holds that few men also engaged in domestic craft activities although it was uncommon and was considered "eccentric" at 182.

46 Parker, above note 36 at 5.

47 *Ibid* at 11; Wright, above note 2 at 88.

vice and praiseworthy thrift"[48] and that it "played a crucial part in maintaining the class position of the household."[49]

Further, much of feminine cultural production took place within the private sphere.[50] Women were largely hindered from enrolling in public art institutions. [51] However, when women did successfully participate in the arts, it was mostly because they were able to circumvent the barriers to access and not because it was socially or institutionally facilitated.[52] The following passage is telling:

> Women artists were, it became clear, usually either trained as part of household workshops of artists by their fathers, and belonged to the skilled craft worker class, or they might be noblewomen, whose fathers paid for them to be tutored by professional artists.[53]

Finally, the artistic subject matter that women practised perpetuated their association with nature, compared to the wide range of subject matter available to men.[54] It seems that in addition to the hierarchy between art and craft, women were also subordinated within the domains of art and craft.

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48 Parker & Pollock, above note 8 at 61: needlework became an accepted female stereotype.

49 *Ibid* at 60–61: embroidery gradually went from being a leisurely activity associated with aristocracy to a marginalized feminine activity; Lucie-Smith, above note 42. "[F]ancy work" akin to ornamentation provided an outlet for women who were prevented from joining other industries at 182–83; spinning was considered to be traditional female employment at 183–84.

50 Parker & Pollock, above note 8 at 70, considering Ortner's oppositions model.

51 *Ibid* at 33 and 35. Parker, above note 36 at 120.

52 Parker & Pollock, above note 8 at 17–18. While men from all backgrounds were able to access the arts, mostly noblewomen were able to do the same; Gill Perry, "Women Artists, 'Masculine' Art and the Royal Academy of Art" in Perry, *Gender and Art*, above note 39 at 88–89 [Perry, "Women Artists"]. Art historians have signalled the necessity of looking beyond traditional institutions "to uncover some other enabling strategies adopted by women artists, who more often worked on the fringes of official or professional art practices" at 100.

53 Catherine King, "Made in Her Image: Women, Portraiture, and Gender in the Sixteenth and Seventeenth Centuries," in Perry, *Gender and Art*, above note 39 at 33 [King, "Made in Her Image"]: female artists in the sixteenth and seventeenth centuries.

54 Parker & Pollock, above note 8 at 51 and 58; Parker, above note 36 at 120; Catherine King, "What Women Can Make" in Perry, *Gender and Art*, above note 39. "[G]endering of genres" is used to describe the hierarchical and gendered division of seventeenth century Western art. Men were permitted to engage in the creation of all genres of art, whereas women participated in areas that "symbolize[d] . . . her relative weakness" at 61; Perry, "Women Artists," above note 52, refers to alternate types of art that women participated in such as "flower painting, miniature painting or embroidery" which were deemed lesser arts, at 100.

2) Weaving and Spinning

A further example of the devaluation of feminine cultural production is apparent in the case of needlework.[55] Parallel to the segregation between art and craft, women were discouraged from participating in economically important sectors of production such as the silk and wool weaving industries.[56] Weaving and masculine activities were deemed to require a higher level of skill and thus granted a higher status than women's work.[57]

The marginalization of women's work was justified based on what was deemed their natural abilities.[58] For example, Joanne Entwistle observes that women were deliberately labelled with "natural" characteristics such as "nimble fingers," which were considered well adapted to spinning.[59] These justifications (i.e., natural thus effortless) coupled with the fact that the work was often performed in the home also operated to strip the act of spinning from association with "real art or technique."[60]

Shelley Wright suggests that the devaluation of feminine cultural production could be associated with women's role as "homemaker and caregiver."[61] She suggests that women were confined to the home (or sweatshops), silently contributing to the economy, without recognition, "turning this cloth into wearing apparel for themselves and their children and creating artistic work with needle and thread."[62] In contrast, men concerned themselves with important public sphere activities such as creating "real art."[63]

Drawing attention to the fact that the description of women's cultural production was imbued with references to nature, natural ability, the feminine, and the domestic sphere establishes a noteworthy connection with the models theorized by Ortner and Rosaldo.[64] Simply acknowledging the

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55 Wright, above note 2 at 87. Wright observes that with the decline in women's status in the monastic communities, women were relegated to activities such as spinning while men dominated the weaving industry. By the seventeenth century needlework became a highly feminized and devalued activity.

56 *Ibid*; Joanne Entwistle, *The Fashioned Body: Fashion, Dress, and Modern Social Theory* (Cambridge: Polity Press, 2000) at 212. Male weavers established a guild in the eighteenth century which would work to exclude women and children from the weaving industry.

57 *Ibid* at 212–13.

58 *Ibid*.

59 *Ibid* at 213 [endnote omitted].

60 *Ibid* [endnote omitted].

61 Wright, above note 2 at 89.

62 *Ibid* at 91.

63 *Ibid* at 88.

64 See Parker & Pollock, above note 8 at 69–70, making reference to Ortner's theory.

parallels between the oppositions theories and the historical accounts of feminine cultural production could provide a general framework to help explain why certain areas of cultural production may have been overlooked by legislation. However, as mentioned above, important limitations exist in applying the models as they might not take into account the variances and exceptions that exist within the domains of art, craft, needlework, and weaving. Variances may include factors such as geography, class, ethnicity, or the fact that female artists did exist,[65] as did male tailors, designers, and dressmakers.[66]

D. GENDERING THE LAW

The inception of copyright law, beginning with the *Statute of Anne*,[67] was based on the protection of public sphere, economically important male-dominated industries and has since expanded in scope to encompass numerous new ones.[68] Although the Canadian *Copyright Act*[69] is derived from and has evolved since the 1911 British *Copyright Act*,[70] the legislative framework remains largely the same.[71]

The oppositions models offer a useful perspective for examining the gendered origins of copyright law. Quite logically, economically important activities carried out by men in the public sphere would have an influence on the marketplace, which would in turn influence Parliament to legally secure them.[72] By contrast, women, whose vocational activities were often performed in the home, were largely excluded from the public sphere, and consequently from the scope of the legislative decision-making process.[73]

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65 Perry, "Women Artists," above note 52 at 100; Parker & Pollock, above note 8 at 17.

66 Ginsburg, above note 4; Callen, above note 42. Callen observes that designing embroidery was considered masculine because it required "both intellect and creative powers" at 4.

67 1710 (UK), 8 Anne, c 19; Bartow, above note 2: copyright originated from male-centric ideals of "creativity and commerce" at 557; Wright, above note 2, notes that "it is clear that this legislation was for the benefit of 'learned men,' their publishers, and 'their families,' e.g. women and children" at 70.

68 For example, software and architecture.

69 RSC 1985, c C-42.

70 See above note 40.

71 David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed (Toronto: Irwin Law, 2011) at 55–56; Gervais & Judge, above note 6 at 36.

72 See, generally, Wright, above note 2 at 70; Tushnet, above note 2 at 304.

73 Bartow, above note 2, states that "[c]ertain kinds of works, those best suited for industrialized commoditization, have been heavily propertized through a symbiotic blend of copyright and contract law precepts, while other forms of arts and crafts, those that have

The section below will examine several provisions in the Canadian *Copyright Act* that correspond to the protection of craft and needlework (clothing), and attempt to trace the marginalization of these industries within the law. The two relevant provisions that will be discussed in the following segment are the "works of artistic craftsmanship" under the definition of *artistic works*, and the *useful article* provision in section 64 of the *Copyright Act*.

1) Works of Artistic Craftsmanship

Copyright law protects artistic, dramatic, and musical subject matter.[74] Artistic works encompass a broad range of visual arts (such as paintings, sculpture, and drawings), but also include the more obscure category "works of artistic craftsmanship."[75] While copyright protection for any artistic work does not require an artistic or aesthetic qualification, craftwork seems to require a qualitative artistic element. The term also reproduces the unfortunately masculine reference to its origins with a "craftsman."

First, as Wright points out, the subject matter of copyright law does not neatly incorporate feminine craft.[76] "Works of artistic craftsmanship," a subcategory of *artistic works* defined in the *Copyright Act*[77] may be used to protect certain types of craft, although the scope of protection has never clearly been defined by legislation or the courts.[78] Further, she argues that the enactment of this subcategory was explicitly intended to protect craftsmen, and not craftswomen.[79] Examples of *feminine* crafts included fanciful or decorative activities such as embroidering, decorative or applied arts, performed predominantly in the home, as opposed to *masculine* crafts such as architecture, stonework, and ironwork, which were performed in trade.[80]

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been relegated to the domestic realm, are less often the subject of rigorous copyright protections or restrictions" at 559; Wright, above note 2 at 70.

74 *Copyright Act*, above note 69, s 2.

75 *Ibid* [artistic works].

76 Wright, above note 2 at 91.

77 *Copyright Act*, above note 69, s 2.

78 Wright, above note 2 at 91.

79 *Ibid* at 91, n 102. Works of artistic craftsmanship were meant to protect craftsmen, not women, because women would not have been designated as craftsmen during the time that the provision was enacted in the British *Copyright Act* of 1911.

80 Callen, above note 42 at 4; King, "Made in Her Image," above note 53; Cheryl Buckley, "Made in Patriarchy: Toward a Feminist Analysis of Women and Design" (1986) 3:2 Design Issues 3. Women are considered to have sex-specific skills that relegate them to areas of design that are "naturally suited" to them such as "decorative arts" at 5.

An interesting example of the treatment of feminine cultural production (in this case, clothing), illustrated by Wright, is in the language used by the court in *Burke & Margot Burke Ltd v Spicers Dress Designs*:[81]

> I can conceive it possible that Mrs. Burke might design a frock and make it all herself, and if she did that I can well understand she might be the author of an original work of artistic craftsmanship, but that is not what has happened in this case. *I do not want it to be assumed that, even so, I should feel able to hold that a lady who designed a frock and made it all herself was necessarily entitled to copyright* . . . . Does a designer who herself designs and makes a frock cultivate one of the fine arts in which the object is mainly to gratify the aesthetic emotions by perfection of execution whether in creation or representation? A possible view is that what she does is merely to bring into being a garment as a mere article of commerce. If that is the right view there may be a difficulty in holding *that even a lady who designs and executes a beautiful frock is necessarily the author of an original work of artistic craftsmanship* . . . .[82]

The language used by the court permeates the social and cultural attitudes directed towards women, and subsequently feminine cultural production.

Second, as Wright also observes, the originality requirement for "works of artistic craftsmanship" involves showing an elevated aesthetic merit that is not required for other artistic works protected by copyright.[83] These heightened requirements are present in the language used by the courts when evaluating "works of artistic craftsmanship" in British, and more subtly in Canadian, caselaw.[84] This requirement has been taken to mean that the author must prove an artistic intent in creating the work.[85]

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81 *Burke & Margot Burke Ltd v Spicers Dress Designs*, [1936] Ch 400 [*Burke*] as quoted in Wright, above note 2 at 92.

82 *Ibid* at 408 [emphasis added].

83 *DRG Inc v Datafile Ltd*, [1988] 2 FC 243 at 13–15 [*DRG*]; Wright, above note 2 at 92.

84 See, generally, *George Hensher Ltd v Restawhile Upholstery (Lancs) Limited*, [1976] AC 64 [*Hensher*]. The courts required that a level of intellectual or emotional satisfaction had to be invoked by the work; *Burke*, above note 81; *Merlet and Another v Mothercare*, [1986] RPC 115 at 126. The test to determine whether a work of art was artistic lies in the intent of the artist and will also take into consideration whether the craftsman — breaking into the arts — was already an artist. In this case, the aesthetic value of the work was not aesthetic enough on its own merits and was not copyrightable; *DRG*, above note 83.

85 *Ibid*. Note that not all of the lords in *Hensher*, above note 84, took this view; Vaver, above note 71. Vaver suggests that "[w]hat the producer intended (appropriately discounted for self-interest), how she proceeded, and what resulted are key issues" at 84.

In Canada, clothing design may not yet qualify for copyright protection under the subcategory of "works of artistic craftsmanship,"[86] and the question remains unresolved by the courts.[87] In *DRG v Datafile*, the Federal Court pronounced that although artistic works do not require an elevated threshold of aesthetic merit, the sentiment remained unclear for works of artistic craftsmanship.[88]

> To turn then to the definition of "artistic work" as set out in s. 2 of the *Copyright Act*, I forbear from stating whether "artistic"-ness must be determined by the courts for works of craftsmanship and architecture. It is not necessary to discuss this issue, although it must be noted that the text of Canadian statute mirrors that of the 1911 Act of the United Kingdom [*Copyright Act*, 1911 (U.K., 1 & 2 Geo. 5), c. 46] where jurisprudence has seemed to indicate that such is required. Also the *Hay* case, noted above, has accepted this view and struggled to find an appropriate test.
>
> Even if works of craftsmanship and architecture must be measured against some test of "artistic"-ness (as set out in the *Hensher, Merlet* or *Hay* cases) I do not accept that the category of artistic works in general must meet such a test. *I do not accept that the word "artistic" in reference to "artistic work" is being used in the same sense as the word "artistic" in reference to "works of artistic craftsmanship," that is, if in the latter case "artistic"-ness requires a determination along the lines of that attempted in Hensher, Merlet or Hay* . . . . It [artistic work] is used as a general description of works which find expression in a visual medium as opposed to works of literary, musical or dramatic expression.[89]

Traditional arts such as painting and sculpture, which were once predominantly masculine activities (public sphere) enjoy straightforward protection under the *artistic works* section of the *Copyright Act* while predominantly feminine activities such as "domestic" crafts (private sphere) float somewhere between copyright and industrial design protection, thereby reinforcing the gendered distinction between art and craft.

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86 *Ibid*.

87 See, generally, *Magasins Greenberg Ltée c Import-Export René Derhy (Canada) Inc* (2004), 37 CPR (4th) 305; *Pyrrha Design Inc v 623735 Saskatchewan Ltd*, 2004 FCA 423.

88 *DRG*, above note 83 at 13–15.

89 *Ibid* at 14–15 [emphasis added].

2) "Useful Articles" and Industrial Design Protection

At the height of the textile boom in the United Kingdom, Parliament responded to lobbying from within the (male dominated) weaving industries by enacting the first copyright protection for printed designs called the *Designing & Printing of Linen Act* in 1787.[90] Design laws eventually expanded to include articles beyond its original scope of textile design to subject matter such as articles of manufacture.[91]

The foundation of industrial design protection in Canada, now the *Industrial Design Act*,[92] is based largely on British legislation, and has since evolved from protection for specific classes of goods, to a single definition of design.[93] Clothing design is categorized under the *Industrial Design Act* as a class of good, and if a clothing or craft designer wishes, they may receive protection once the design has been registered.[94] However, there are rigorous registration requirements,[95] the term is ten years,[96] and the scope of protection has been criticized as quite narrow.[97]

Clothing design and crafts that do qualify for copyright protection may be protected as an artistic work until more than fifty copies are made based on the "useful article" provision (section 64) of the *Copyright Act*.[98] Once this threshold is surpassed, then it is no longer considered infringement

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90 Lara Kriegel, "Culture and the Copy: Calico, Capitalism, and Design Copyright in Early Victorian Britain" (2004) 43:2 Journal of British Studies 233 at 240; "History of Design" *UK Intellectual Property Office*, online: www.ipo.gov.uk/types/design/d-about/d-whatis/d-history.htm. The 1787 Act provided protection for "arts of designing and printing linens, cottons, calicos and muslin."

91 *Ibid*. The 1839 *Copyright and Design Act* extended protection to various types of materials such as "wool, silk or hair and to mixed fabrics" and also evolved to expand protection to articles of design in the spirit of modern design laws; Amy Muhlstein & Margaret Ann Wilkinson, "Whither Industrial Design" (2000) 14 IPJ 1 at 8–9; Wright, above note 2, suggests that the shift from domestic to factory production (owned and controlled by men) is the point at which the legal protection for "some forms of needlework" became significant at 91.

92 RSC 1985, c I-9.

93 Muhlstein & Wilkinson, above note 91 at 9, 12, and 16.

94 Clothing is categorized under Class Code 006 [APPAREL] "Canadian Industrial Design Database" *Canadian Intellectual Property Office* (last update 13 December 2012), online: CIPO www.ic.gc.ca/app/opic-cipo/id/dsgnSrch.do;jsessionid=0001vdheRb4wgaoA40Y-2Gap53v8:24RD3DMHMH; *Industrial Design Act*, above note 92, s 4(1).

95 *Ibid*, s 6(1); Muhlstein & Wilkinson, above note 91 at 19.

96 *Industrial Design Act*, above note 92, s 10(1).

97 Muhlstein & Wilkinson, above note 91 at 23.

98 *Copyright Act*, above note 69, ss 64 and s 64(2); Gervais & Judge, above note 6 at 1152; Vaver, above note 71 at 86.

to reproduce the designs either substantially or entirely.[99] The end result is that if the creator intends on protecting their design once the fifty-copy threshold is surpassed, then the design should be registered under the *Industrial Design Act*.[100]

The rationale behind the enactment of section 64 based on the 1988 amendment was to prevent commercially mass-produced works that were also useful items from receiving the extended protection of copyright in the interest of promoting competition in the marketplace.[101] As a result, the *Copyright Act* was amended in order to dovetail with the *Industrial Design Act* based on section 64, creating the threshold for commercially produced useful articles. However, exceptions were also enacted in subsection 64(3) that would allow for certain traditional copyrightable (artistic) elements to retain protection for the entire copyright term.[102]

David Vaver suggests that the "attempt to draw a bright line between fine art and industrial design is unfortunately undermined by the list of bric-à-brac that is specifically allowed to retain full copyright: trade-mark designs, labels, architectural works, textile designs, character merchandising items . . . and anything else the government feels like adding by regulation."[103] For example, based on paragraph 64(3)(c) of the *Copyright Act*, full copyright protection extends to "material that has a woven or knitted pattern or that is suitable for piece goods or surface coverings or for making wearing apparel,"[104] but does not extend protection to clothing design.[105] Further, textiles receive both copyright and industrial design protection concurrently, irrespective of the fifty-copy threshold,[106] which perhaps emanates from the gendered history of the weaving industry.

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99 *Copyright Act*, above note 69, s 64(2)(c); Muhlstein & Wilkinson, above note 91 at 19–20.

100 *Industrial Design Act*, above note 92, s 5(1); Gervais & Judge, above note 6 at 1152.

101 *Copyright Amendment Act*, SC 1988, c 15; *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 6 (26 June 1987) at 7689 and 7692 (Sheila Finestone and Lynn McDonald, respectively); Myra J Tawfik, "When Intellectual Property Rights Converge — Tracing the Contours and Mapping the Fault Lines 'Case by Case' and 'Law by Law,'" in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (London: Edward Elgar, 2008) 267 at 270.

102 *Industrial Design Act,* above note 92, s 10(1); *Copyright Act,* above note 69, s 64.

103 Vaver, above note 71. Since the nineteenth century there has been differential treatment between fine arts and "design" artwork at 89 [footnotes omitted].

104 *Copyright Act,* above note 69, s 64(3)(c).

105 Vaver, above note 71 at 89.

106 See also "Canadian Industrial Design Database," above note 94 at Class Code 026.

Arguably, one might suggest that the distinction lies in the utilitarian (hence "useful articles") nature of the craft and clothing articles;[107] yet this argument is undermined since protection for architecture — both useful and previously a male dominated enterprise — is also exempt from the commercial quantity threshold.[108]

Copyright protection is therefore limited for craft and clothing in some circumstances based on the number of copies produced, while at the same time craftspeople bear the burden of demonstrating a higher threshold of originality under the *Copyright Act*, compared to other works of art. Commentators attribute the lack of clear, definitive protection for feminine industries to the fact that these works were created by and associated with women working in the private sphere.[109] At the same time, rationalizing the legal treatment of cultural production based on the oppositions models does not fully account for variances such as class and race, and their application should therefore be limited in scope and in light of relevant historical and empirical evidence.

E. CONCLUSION

Interdisciplinarity provides an interesting means of exploring the various facets of intellectual property law. The feminist anthropology critique is particularly useful as it allows us to critically deconstruct the inequalities based on gender, race, and class, and enables us to appreciate a deeper and dynamic understanding of the underlying social values we place on cultural producers. The association of certain forms of creativity with *nature* and the *domestic* sphere, as described in the literature concerning the devaluation of feminine cultural production, provides a relevant contribution to understanding the socio-cultural framework and context surrounding the inception and enactment of copyright law.

Although reliance on the universalisms present in the oppositions models risks oversimplifying and excluding the diverse experiences of women from various backgrounds and are therefore limited in application,

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107 Thalia Gourma-Peterson & Patricia Mathews, "The Feminist Critique of Art History" (1987) 69:3 The Art Bulletin 326 at 333. The authors suggest that the distinction of craft as low art and art as high art is partially because crafts "could not transcend utilitarianism" hence art is valuated solely for aesthetic purposes while craft is for practical use.

108 *Copyright Act*, above note 69, s 64(3)(d).

109 Wright, above note 2 at 91 and 94; Bartow, above note 2 at 559.

they do offer an interesting perspective on the apparent gender neutrality of intellectual property law. Finally, while it is true that intellectual property laws — copyright law in this case — were not initially created with gender neutrality in mind,[110] questioning and acknowledging the social and institutional inequalities that women face is an important step in acclimatizing and democratizing the way we value and attribute economic security to feminine creativity today.

110 Wright, above note 2 at 70.