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## WHAT'S FEMINIST ABOUT OPEN ACCESS? A RELATIONAL APPROACH TO COPYRIGHT IN THE ACADEMY

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### *Abstract*

In a context of great technological and social change, existing intellectual property regimes such as copyright must contend with parallel forms of ownership and distribution. Proponents of open access, for example, question and undermine the paradigm of exclusivity central to traditional copyright law, thereby fundamentally challenging its ownership structures and the publishing practices these support. In this essay, we attempt to show what it is about the open access endeavour that resonates with a feminist theory of law and society—in other words, we consider what is “feminist” about open access. First, we provide an overview of a relational feminist critique of traditional copyright law and the assumptions of possessive individualism that pervade it. We then offer a brief description of the open access movement and the way in which it reflects or responds to this criticism. In doing so, we discover vital synergies between this branch of feminist legal theory and the open access movement. Ultimately, we hope to underscore the importance of an open access policy for legal journals such as this one, whose mission is to support, advance and disseminate a feminist perspective that challenges the prevailing hegemony within traditional legal scholarship. We conclude by offering ways in which this journal can help draw out the synergies between feminist criticism and the open access movement.

### 1. Introduction

The ownership and control of information resources is one of the most important forms of power in contemporary society.<sup>1</sup> The ability to access, appropriate and disseminate a host of cultural, technological and social goods is enhanced in the digital realm, calling into question the traditional modes of practice and content controls

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<sup>1</sup> James Boyle, “A Politics of Intellectual Property: Environmentalism for the Net?” (1997) 47 Duke L.J. 87 at 87: “Everyone says that we are moving to an information age. Everyone says that the ownership and control of information is one of the most important forms of power in contemporary society. These ideas are so well-accepted, such clichés, that I can get away with saying them in a *law review article* without footnote support.” The irony of this footnote is not lost on us.

addressed by intellectual property laws. Digital technologies provide us with the potential to alter and subvert power structures by changing the ways in which we access, engage with, and participate in the creation of these resources. By the same token, intellectual property laws have the capacity to shore up existing power structures and limit creative practices by entrenching conventional proprietary norms in digital environments. In particular, copyright law, which attaches to original literary, dramatic, musical and artistic expression, grants authors and subsequent owners the power to control the reproduction, publication and performance of their works. Through these powers of control, copyright limits flows of information, regulates the production and exchange of meaning, and shapes social relations of communication.

In a technological environment where works can be created, shared, accessed and transformed more easily and efficiently than ever before, the copyright system is unfortunately employed to reinforce the norms of the analog world rather than to maximize the potential of the digital revolution. Private ownership, exclusion and pay-per-use practices obstruct the capacity of network technologies to create an accessible, democratic and vital space in which citizens can freely participate.<sup>2</sup> As such, the way that we traditionally think about copyright and the role that it serves in our cultural landscape<sup>3</sup> is in desperate need of re-imagination. Changing technological and social situations necessitate intellectual property reforms. Government and corporate reluctance to contemplate and implement legislative changes that address the growing digital shift has

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<sup>2</sup> See Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham, NC: Duke University Press, 1998).

<sup>3</sup> Cp. Julie E. Cohen, "Copyright, Commodification, and Culture: Locating the Public Domain" in L. Buibault and P.B. Hugenholtz, eds, *The Future of the Public Domain* (Netherlands: Kluwer Law International, 2006) at 121-166.

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thus resulted in the emergence of various movements that challenge the dominant intellectual property paradigm.

The open access movement is one example of how copyright's traditional ownership structures, and the publishing practices they support, are being challenged from the ground up. Proponents of open access—the origins of which lie in the open source and free software movements—challenge the paradigm of exclusivity central to traditional copyright law. While this “openness” is typically achieved through the use of copyright constructs, the terms on which access and use of protected content are permitted essentially create something like a quasi-public domain; open access uses the tools of copyright to carve out a legal space free for public entry. The rapid spread of open access practices promises a radical change to the way in which knowledge and information is shared and disseminated in the digital world.

In this essay, we will attempt to show what it is about this open access endeavour that resonates with a feminist theory of law and society—in other words, we consider what is “feminist” about open access. To do so we address a broadly conceived notion of feminist legal theory to draw out parallels between this form of legal criticism and the open access paradigm. Feminist legal theory and open access movements are approached generally in order to highlight their points of intersection, which is not to deny the more nuanced dimensions of these critical movements. Specifically, we focus on *relational* conceptions of feminism and *counter theories* of ownership in open access theory and practice. In section 2, we begin by laying out a feminist critique of traditional copyright law and the assumptions of possessive individualism that pervade it. In section 3, we proceed to examine the open access movement and the way in which it reflects or

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responds to the feminist critique of copyright. We conclude, in section 4, with some thoughts about the synergies between the feminist legal theory movement and the open access movement. Ultimately, we hope to underscore the importance of an open access policy for legal journals such as this one, whose mission is to support, advance and disseminate a feminist perspective that challenges the prevailing hegemony within traditional legal scholarship.

## **2. A Feminist Critique of Copyright Law**

Notwithstanding the intangible, dialogic and communicative nature of human expression, its categorization as intellectual property through the vehicle of copyright—legitimated by a particular understanding of authorship—encourages us to conceptualize it as merely another form of private property. Viewed through a proprietary lens, an author's intellectual expression is an object that is owned like any other. In the context of a market economy, it is simply a commodity to be exchanged and exploited in the marketplace. Nonetheless, the language of "ownership," "property," and "commodity" obfuscates the nature of copyright's subject matter, and cloaks the social and cultural conditions of its production and the implications of its protection.

Copyright law fundamentally enables controls to be exercised over expression and thus manipulates fields of communication—the law protects the author's voice by silencing the infringer's. Copyright is built around certain conceptions of the self, society and worth, which translate, through law, into norms about who can speak, who can listen, what can be said, and with what force of authority. Regarded in this way, it is difficult to believe that the copyright system has remained as stubbornly immune to feminist critique

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as it has.<sup>4</sup> In this section, we will briefly explore the philosophical and political underpinnings of copyright law and present a feminist counter-theory of authorship that challenges these underpinnings and their normative implications.

### *2.1 The Possessive Individualism of Copyright Norms*

The defining concepts of intellectual property generally—and those of copyright in particular—are premised upon liberal and neo-liberal assumptions. At the core of copyright's functionality are concepts of private rights, ownership, exclusion and individualism. Central to copyright's justifications are concepts of individual entitlement or desert, on the one hand, and economic rationality and self-interest on the other. Within this model, authors as owners are individuated personalities with exclusive claims to fully control their intellectual works; these works are understood to be the original, stable and proprietary results of authors' independent efforts from which the public may be justly excluded.<sup>5</sup>

It is important to emphasize that in spite of its apparent naturalness in the modern age, the modern author is a relatively recent invention:<sup>6</sup> the idea of an author as a maker

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<sup>4</sup> There are a few notable exceptions. See, for example, Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law" (2006) 14(3) *J. Gender, Soc. Pol'y & L.* 551; Malla Pollack, "Toward a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter" (2005-2006) 12 *Wm & Mary J. of Women & L.* 603; Andrea Lunsford, "Rhetoric, Feminism, and the Politics of Ownership": <http://weather.ou.edu/~femrhets/speech.html>; Dan L. Burk, "Copyright and Feminism in Digital Media" (2006) 14 *J. Gender, Soc. Pol'y & L.* 519; and, Dan L. Burk, "Feminism and Dualism in Intellectual Property Law" (2007) 15 *J. Gender, Soc. Pol'y & L.* 183. For a more expansive discussion of a feminist-relational theory of copyright law, see Carys J. Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law" (2007) 15 *Am. U. J. Gender, Soc. Pol'y & L.* 207; and *Copyright, Communication and Culture: Towards a Relational Theory of Copyright* (Cheltenham, UK ; Northampton, MA: Edward Elgar Press, forthcoming, 2011).

<sup>5</sup> Grantland S. Rice, *The Transformation of Authorship in America* (Chicago: University of Chicago Press, 1997) at 76 [Rice, *The Transformation of Authorship*].

<sup>6</sup> Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17 *Eighteenth-Century Studies* 425 at 426.

of an original text would have been alien to literary thought in the classical period.<sup>7</sup>

Marilyn Randall has examined the “shift from a poetics of imitation to a valorization of originality”<sup>8</sup> that occurred in the eighteenth century, such that aspirations of imagination, novelty, creativity, and originality came to dominate the aesthetics of the Romantic period. She observes that the distinction between imitation and originality was intricately tied to the perceived nature of man in the sense that true authorship was believed to represent the essence of human individuality.<sup>9</sup> The human agent, as author, could not copy without sacrificing his authenticity and obscuring his intrinsic worth. Imitation was disparaged as evidence of a lesser state of human civilization and development.

As the institution of copyright emerged in the eighteenth century, it was augmented and given vitality by the general philosophical discourse of the time, wherein concepts of authorship were intimately associated with the “individual” and “property,” and enmeshed with the “vast complex of interdependent factors denoted by the term ‘individualism.’”<sup>10</sup> The issues at stake in the literary-property debates of the time (which disputed the existence, nature, and duration of authorial entitlement) went to the core of the philosophical underpinnings of liberal thought,<sup>11</sup> or what C.B. Macpherson identifies

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<sup>7</sup> *Ibid.* at 432.

<sup>8</sup> Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit and Power* (Toronto: University of Toronto Press, 2001) at 47 [Randall, *Pragmatic Plagiarism*].

<sup>9</sup> See *ibid.* at 47-50.

<sup>10</sup> Peter Jaszi, “Towards a Theory of Copyright: The Metamorphoses of ‘Authorship’” (1991) 2 *Duke L.J.* 455 at 469 [Jaszi, “Towards a Theory of Copyright”] (citing Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson and Fielding* (Berkeley, CA; University of California Press, 1957) at 60). See also, Rosemary J. Coombe, “Challenging Paternity: Histories of Copyright” (1994) 6 *Yale J. L. & Human.* 397 [Coombe, “Challenging Paternity”].

<sup>11</sup> Rice, *The Transformation of Authorship*, *supra* note 5, at 89.

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as “possessive individualism.”<sup>12</sup> During this period, the modern author-as-originator became a proprietor, and his product became a “special kind of commodity.”<sup>13</sup> Foucault famously described the emergence of this notion of “author” as “the privileged moment of *individualization* in the history of ideas, knowledge, literature, philosophy and the sciences.”<sup>14</sup> Through this process of individualization, the “author” acquired “a role quite characteristic of our era of industrial and bourgeois society, of individualism and private property.”<sup>15</sup> The individuality and originality of authorship in its modern form therefore established a simple route towards individual ownership (through labour and appropriation) and the propertization of creative achievement.

The valorization of the individual author and his originality, and the resulting denigration of imitation that developed throughout the nineteenth century, is axiomatic in modern copyright law. The author is defined by—and rewarded for—the originality of his creation, with the essence of copyright’s standard of originality being independent production. The original work is the author’s property by virtue of his labour and/or creativity. And, of course, the unworthy imitator is copyright’s infringer, cast in the role of trespasser or thief. As Shelley Wright argues:

“The existing definition of copyright...presupposes that individuals live in isolation from one another, that the individual is an autonomous unit who creates artistic works and sells them, or permits their sale by others, while ignoring the individual’s relationship with others within her community, family, ethnic group, religion—the very social relations out of which and

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<sup>12</sup> C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962) at 3 (defining “possessive individualism” as the “conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them”).

<sup>13</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993) at 1.

<sup>14</sup> Michel Foucault, “What Is an Author?” in Paul Rabinov, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) at 101[emphasis in original].

<sup>15</sup> *Ibid.* at 119; see also Jaszi, “Towards a Theory of Copyright”, *supra* note 10, at 467.

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for the benefit of whom the individual's limited monopoly rights are supposed to exist.”<sup>16</sup>

Because “authorship shapes the character of copyright law,”<sup>17</sup> our persistent attachment to the vision of authorship as an independent process of original creation has significant implications for copyright policy. Although copyright readily extends protection to the banal and commonplace—works that are undoubtedly far from the level of romantic inspiration—these uninspired works are nevertheless over-protected, and “original authorship” is disproportionately valued against other forms of cultural expression and creative play.<sup>18</sup> Indeed, the less copyright's subject-matter looks like the creation of a Romantic author, the more powerful the role of Romantic ideology becomes in seeking to maintain the moral divide between the author and the copier-appropriator (or “pirate”)” and in shoring up the privileges and authority accorded to the former.<sup>19</sup> The authorship myth that animates copyright discourse supports calls for wide protection and generates a staggering complacency around the expanding domain of intellectual property and the corporate ownership that dominates the intellectual realm. The result is a copyright model that forces all intellectual production into doctrinal categories shaped by individualistic assumptions about the authorial ideal, producing simplifying dichotomies such as creation/reproduction, author/user, labourer/free-rider. This moral divide favours originality over dialogue, individuality over relationship, and monologue over communication.

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<sup>16</sup> Shelley Wright, “A Feminist Exploration of the Legal Protection of Art” (1994) 7 C.J.W.L. 59. Wright perfectly captures the nature of this relationship, at 73-74.

<sup>17</sup> Michael J. Madison, “Where does Creativity Come From? And Other Stories of Copyright” (2003) 53 Case W. Res. L. Rev. 747 at 760.

<sup>18</sup> See Coombe, “Challenging Paternity”, *supra* note 10, at 473.

<sup>19</sup> See Johanna Gibson, *Creating Selves: Intellectual Property and the Narration of Culture* (Dartmouth: Ashgate, 2006). See also, William Patry, *Moral Panics and the Copyright Wars* (Oxford: Oxford University Press, 2009).

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## 2.2 A Feminist Counter-Theory of Authorship

In 1968, Roland Barthes famously declared the death of the author.<sup>20</sup> He is regarded as one of the progenitors of post-structuralist literary theory which fundamentally shook “the confidence placed in individual agency and control over discourse that involves, inevitably, a belief in the possibility of creative originality.”<sup>21</sup> Indeed, the contemporary demystification of authorship insists upon the “practical impossibility” of independent creation and declares that all texts are *necessarily* reproductions of other texts;<sup>22</sup> it is in the nature of expression and cultural development that the new builds upon the old.<sup>23</sup>

Regarded in this light, the act of writing involves not origination, but rather the adaptation, derivation, translation and recombination of “raw material” taken from previously existing texts. In Jessica Litman’s words, authorship is essentially “a process of adapting, transforming, and recombining what is already ‘out there’ in some other form.”<sup>24</sup> What we hail as “creativity” is really the result of “a combination of absorption, astigmatism, and amnesia.”<sup>25</sup> In Barthes’ vision, “[t]he text is a tissue of quotations drawn from the innumerable centres of culture... [T]he writer can only imitate a gesture

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<sup>20</sup> Roland Barthes, “The Death of the Author” (1968) in *Image, Music, Text* (New York: Hill & Wang, 1997) [Barthes, “The Death of the Author”].

<sup>21</sup> Randall, *Pragmatic Plagiarism*, *supra* note 8, at 24.

<sup>22</sup> See Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work” (1992/93) 68 *Chicago-Kent L. Rev.* 725 at 756. Texts are necessarily “reproductions” of other texts, not in the legal sense of having reproduced a substantial part of any particular pre-existing work, but in the sense that they derive from, draw upon, and incorporate within them, an unspecifiable array of pre-existing texts that have influenced and shaped the author and the cultural standpoint from which she speaks.

<sup>23</sup> Alan L. Durham, “Copyright and Information Theory: Toward an Alternative Model of ‘Authorship’” (2004) *B.Y.U.L. Rev.* 69 at 94.

<sup>24</sup> Jessica Litman, “The Public Domain” (1990) 39 *Emory L.J.* 965 at 967.

<sup>25</sup> *Ibid.* at 1011.

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that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them.”<sup>26</sup>

It is important, at this juncture, to underscore the relationship between conceptions of authorship and conceptions of selfhood *per se*. Whereas copyright's original author-owner reflects Enlightenment ideals of individuation, detachment, and unity, the competing post-structuralist version of authorship coheres with a vision of the individual as socially situated, as constituted by community, culture, and society. Rather than meaning created out of nothing, the author's expression is the result of the complex variety of influences that have shaped her, and its message is essentially fluid, derived only from its interaction with other texts and discourses. Described in these terms, the tension between competing constructions of authorship mirrors a tension that has been a critical subject of feminist scholarship in political and social theory: the tension between the individual, pre-social self of liberal theory, and the socially constituted, always-already encumbered self posited by (most notably communitarian) critiques of liberalism.

Feminist political and legal theory has struggled to find a conception of the self that acknowledges connectivity without precluding individual autonomy, identity or voice. In our view, “relational feminism” offers the clearest route towards resolving the tension between liberalism's individualism and communitarianism's social constructionism.<sup>27</sup> For relational feminists, the key to renegotiating our gendered

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<sup>26</sup> Barthes, “The Death of the Author”, *supra* note 20, at 137.

<sup>27</sup> See e.g. Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca, NY: Cornell University Press, 1990); Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale J. L. & Fem.* 7 [Nedelsky, “Reconceiving Autonomy”]; Jennifer Nedelsky, “Reconceiving Rights as Relationship” (1993) *Rev. Const. Stud.* 1 [Nedelsky, “Reconceiving Rights”]. See also, Catherine Keller, *From a Broken Web: Separation, Sexism, and Self* (Boston, MA: Beacon Press, 1986); Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Robin West, “Jurisprudence and Gender” (1988) 55 *U. Chicago L.*

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identities and the terms of our subjectivity lies in the very network of relations and cultural narratives that are commonly perceived as a threat to our subjectivity. The starting point for a relational account of the self is therefore “an attention both to the individuality of human beings and to their essentially social nature.”<sup>28</sup> The aspirational society is one that structures relations in such a way that communities and relationships foster, rather than undermine, self-worth and genuine autonomy. Autonomy itself is understood in relational terms; if we take as a starting point the intrinsic sociality of human beings, then “[i]t is relationships, from child-parent, to student-teacher, to client-state, as well as patterns of relationship among citizens, that make actualization of the human potential for autonomy possible.”<sup>29</sup>

The notion of the relational self also challenges the liberal conception of the autonomous individual as an independent bearer of rights wielded against others and the state. In liberal thought, human relations are cast in terms of clashing rights and interests. In contrast, from a relational perspective, rights do not simply mediate the boundaries of individual self-interest; they encapsulate collective choices about the values that members of a society hold dear. Debates about the substance or scope of rights should not begin and end with the claim or denial of right (which only obfuscates the underlying issues) but should instead focus upon the kinds of human relationships the right would structure, and the values that would be furthered by its guarantee.<sup>30</sup>

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Rev. 1; Mary Becker, “Patriarchy and Feminism: Toward a Substantive Feminism” (1999) U. Chicago Legal. F. 21.

<sup>28</sup> Nedelsky, “Reconceiving Autonomy”, *ibid.* at 27.

<sup>29</sup> Jennifer Nedelsky, “Citizenship and Relational Feminism” in Ronald Beiner and Wayne Norman, eds, *Canadian Political Philosophy* (Oxford: Oxford University Press, 2001) [Nedelsky, “Citizenship and Relational Feminism”].

<sup>30</sup> Nedelsky, “Reconceiving Rights”, *supra* note 27, at 14-15.

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Finally, it is interesting to note the significance accorded to dialogue in relational feminism's conception of selfhood. This is perhaps captured best in the work of Elizabeth Frazer and Nicola Lacey, who appeal to the concept of the "dialogic communitarian."<sup>31</sup> Taking as their starting point a theory of the "relational self," Frazer and Lacey argue that a commitment to dialogue is essential for the ongoing scrutiny and negotiation of power relations within communities and social structures.<sup>32</sup> This necessitates both an awareness of the power inherent in discourse, and attention to the perceived value and audibility of members' voices.<sup>33</sup> Substantive access to debate and the capacity to be heard are central to the dialogic communitarian ideal. According to Frazer and Lacey, subjectivity requires discursive engagement: a capacity to hear the claims of others, and to articulate one's own; hence feminists' appeal to the practice of "consciousness-raising"<sup>34</sup> and the creation of "narrative."<sup>35</sup> At the foundation of consciousness-raising, narrative creation, and dialogic communitarianism more broadly,

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<sup>31</sup> Elizabeth Frazer & Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Toronto: University of Toronto Press, 1993) [Frazer & Lacey, *Community*]. See also Seyla Benhabib, "Liberal Dialogue Versus a Critical Theory of Discursive Legitimation" in Nancy Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989); Seyla Benhabib, "Autonomy, Modernity and Community" in Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992) at 70 [Benhabib, *Situating the Self*]; Drucilla Cornell, "Beyond Tragedy and Complacency" (1987) 81 Nw. U.L. Rev. 693; Drucilla Cornell, "Two Lectures on the Normative Dimensions of the Community in the Law" (1987) 54 Tenn. L. Rev. 327; Drucilla Cornell, *The Philosophy of The Limit* (New York: Routledge, 1992). Nedelsky, in "Citizenship and Relational Feminism", *supra* note 29, at 143, also stresses the importance of public participation in ongoing debates and collective decision-making "both as an intrinsic part of human autonomy and expression, and in order to ensure that the structures of relationship are such that they foster the autonomy of all."

<sup>32</sup> Frazer & Lacey, *Community*, *ibid.* at 193.

<sup>33</sup> *Ibid.* at 192.

<sup>34</sup> *Ibid.* at 208. Consciousness-raising is an "interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences:" Katharine T. Bartlett, "Feminist Legal Methods" in Katharine T. Bartlett & Rosanne Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Oxford: Westview Press, 1991) at 381.

<sup>35</sup> See Anne C. Dailey, "Feminism's Return to Liberalism" (1993) 102 Yale L.J. 1265 at 1274: "Narrative ... is speech with a different objective. In contrast to the spontaneous, open-ended dialogue of consciousness-raising, narrative as practiced by feminist legal scholars is a supremely self-conscious art form.... Feminist narrative in law is literature with a political point."

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is the understanding that identity and subjectivity are constituted by dynamic interaction with others in a process of dialogic exchange, both interpersonal and intrapersonal.<sup>36</sup>

So what can feminism's "relational self" tell us about the author-self at the centre of copyright law? Far from the individualized, self-determining author of modern copyright law, the "relational author" is always already situated within, and constituted by, the communities in which she exists, and the texts and discourses with which she is surrounded, which also shape her consciousness and expressive activities. Far from creating independently and choosing relationships through the vehicle of copyright *qua* private property, the author necessarily creates from within a network of social relations: she is not individualisable, and her works of authorship cannot be understood in isolation. However, this does not mean that author and authorship are illusory; a relational theory of authorship recognizes the social dimension of the author, but also her duality. The author-self encapsulates both our connectedness *and* our capacity for critical reflection. In the processes of authorship, the texts, discourses, experiences, and relationships that constitute the author are combined, interpreted, reinterpreted and retold. The resulting expression is not original in the sense of having been created *ex nihilo*; but it is nonetheless the author's creation in the only sense that matters:

"[T]he activity of narrative construction—of interpretation and reinterpretation—begins, of course, from the materials at hand. That is, a person works with her own experiences and the stories, values, and concepts that are available to her in whatever culture(s) she inhabits.

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<sup>36</sup> Having deconstructed the unity of subjectivity and acknowledged the shifting and multiple nature of the communities within which the fragmented subject is constituted, our capacity to conceive of ourselves as possessing some degree of stable identity seems dependent not just upon dialogic relations with others, but also upon a continuous internal dialogue. *Cp.* Benhabib, *Situating the Self*, *supra* note 31, at 5: "The identity of the self is constituted by a narrative unity, which integrates what 'I' can do, have done and will accomplish with what you expect of 'me,' interpret my acts and intentions to mean, wish for me in the future, etc."

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These materials are always, and from the beginning, both given and created. They are given in that they are shaped by forces beyond any individual's control; they are created in that each new repetition of such cultural and personal artefacts is always a reinterpretation rather than merely a replication."<sup>37</sup>

A relational theory of the author has implications for the nature of copyright. In the relational model, copyright cannot play the role attributed to traditional property rights in a liberal model. The author's right is not reducible to an individual entitlement that limits the actions of others. Rather, copyright must be understood in relation terms: it structures relationships between authors and users, allocating powers and responsibilities amongst members of cultural communities, and establishing the rules of communication and exchange. The importance of copyright lies in its capacity to structure relations of communication, and to establish the power dynamics that will shape these relations. Its purpose is to maximize communication and exchange by putting in place incentives for creativity and the dissemination of intellectual works.<sup>38</sup> It is therefore imperative that copyright is not regarded as just another brick in "the wall (of rights) erected between the individual and those around him."<sup>39</sup> There is no prior, transcendent entitlement here; there is only a choice to be made about the kind of intellectual creativity and exchange that we want to see in our society, and the relations of communication that are likely to foster it.

The lessons of relational feminism reveal that the copyright system, as the result of a collective choice, always requires evaluation and re-evaluation. In particular, we must be attentive to the relationships of power and responsibility that it generates, and

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<sup>37</sup> Susan H. Williams, "A Feminist Reassessment of Civil Society" (1997) 72 *Ind. L.J.* 417 at 430-31.

<sup>38</sup> See Carys J. Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" (2006) 56 *U. of Toronto L.J.* 75.

<sup>39</sup> Nedelsky, "Reconceiving Autonomy", *supra* note 27, at 12.

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ask ourselves whether those relationships will foster creative activities that we mean to encourage. By regarding copyright as relational, we open the door to debate about its subject matter, its scope, its goals, and its consequences. At this moment in history, where traditional copyright concepts are critically challenged by new technologies and the activities they facilitate, the future direction of copyright depends upon our readiness to debate these issues.

Finally, a relational feminist counter-theory of authorship illuminates the dialogic nature of creative expression. When the author creates original expression in the form of literature, art, drama or music, she is engaged in an *intrapersonal* dialogue (developing a form of personal narrative by drawing upon experience, situation, and critical reflection) and an *interpersonal* dialogue (drawing upon the texts and discourses around her to communicate meaning to an anticipated audience). By understanding authorship as a dialogic process rather than a single unitary act, we can recognize facets of authorship that copyright law has conventionally neglected or undermined. Expressive works must be appreciated in their social context, and the author's acquired rights must be examined in relation to her audience and other members of her communicative communities. It follows that the rights we establish over intellectual expression must leave room for others to engage in a similar communicative process; when others enter the cultural conversation they must be free to acknowledge, respond to, and build upon the contribution previous authors author have made. In this way, a dialogic theory of

authorship provides insight into the necessary limitations of copyright's protective sphere if it is to facilitate contributions to the cultural conversation.<sup>40</sup>

In sum, a relational feminist critique of traditional copyright challenges the traditional, individualized account of the author and her work; it therefore recognizes the relationships that copyright constructs, and appreciates the contribution to cultural dialogue that authorship represents. These lessons culminate to underscore one essential proposition: when the law intervenes to manipulate the creation and dissemination of expression for the benefit of society, it must recognize and value the derivative, collaborative and communicative nature of creativity. To the extent that copyright's traditional proprietary structures preclude or obstruct the capacity of citizens to access, engage with and respond to cultural resources—or, more broadly, to experience their cultural landscape—these structures should be challenged, reconfigured or rejected.

### **3. Open Access and the Feminist Perspective**

We have seen, in Part 2, the way in which a relational feminist perspective can problematize and reconceptualize the central components of our copyright system, with the potential to challenge and change the existing intellectual property paradigm. Turning our attention to the open access movement, we can now begin to explore the synergies between this feminist perspective and the vision and aspirations that underlie the open access movement. This will require, first, an introduction to the concept of open access and its developing role in the Internet era, and second, an insight into the philosophy and guiding principles that inform it.

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<sup>40</sup> See Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue", 69 *Tex. L. Rev.* 1853.

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### 3.1 *The Internet, Open Access and Recursive Publics*

It need hardly be said that the birth of the Internet has radically resculpted our cultural landscape. Accompanying the development of the Internet is a long history of rhetoric and support for open access. Following the end of the Cold War, the precursor to the Internet, ARPANET, moved away from its primarily military orientation and was opened up to universities and researchers.<sup>41</sup> The open and collaborative role of the Internet in providing access and information to groups separated by distance and disparate resources thus emerged as a central component of the ethos that dominated online interaction. This rhetoric crested in the 1990s with the belief that this technology would create, as James W. Carey describes it, “[a]n enduring peace, an unprecedented rise in prosperity, an era of comfort, convenience and ease and a political world without politics or politicians—these were the hopes that cultivated a wave of belief in the magically transforming power of technology.”<sup>42</sup> In this sense, recent attempts to enrich and expand the open access of the Internet can be viewed in the context of an ongoing effort to contribute to intellectual activity and the development of broad communities of knowledge, ultimately in pursuit of this techno-utopian ideal

Despite this aspirational ethos, the commercialization of the Internet under the auspices of neo-liberal capitalism has challenged the freedoms that the Internet’s supporters envisioned, pointing to the pragmatic evolution that Carey describes. Alongside its transformative function, the Internet also entrenched, exacerbated and established other limitations: “[A]s one set of borders, one set of social structures is taken

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<sup>41</sup> ARPANET was designed to safeguard US communications from a nuclear attack. Tania Regina Tronco, “A Brief History of the Internet” in Tania Regina Tronco, ed., *New Network Architectures: The Path to the Future Internet* (Berlin: Springer-Verlag, 2010) at 1-11.

<sup>42</sup> James W. Carey, “Historical Pragmatism and the Internet” (2005) 7(4) *New Media & Society* 443 at 445.

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down, another set of borders is erected".<sup>43</sup> The political, social and economic forces that contributed to the development of the Internet have, inevitably, gone a long way towards defining its contemporary (and some may say counter-utopian) reality.

Intellectual property rights, and copyright in particular, have limited the revolutionary ethos that the Internet was imagined to usher into communicative relations. Users of the Internet who attempt to interact with cultural forms and information find that their access and use are controlled by the exercise of intellectual property rights held largely by corporations, who increasingly restrict what can be done with their intellectual property and/or charge for its use. Open access movements can be regarded as critical responses to the economic imperative that drives the commercialized Internet. Projects that oppose the ownership and control paradigms that provide power to those who hold proprietary interests over online information help to subvert the capitalist logic of neo-liberalism and offer points of departure for developing alternative conceptions and understandings of digitized communications. Collaboration and the sharing of information are central tenets of the open access movement and relate directly to the relational nature of the author posited by feminist criticisms. The possibility of realizing these social values is often obscured by the technical nature of the Internet as well as pervasive legal and normative discourses that privilege individuated authors, albeit usually in the form of faceless corporations. The relational nature of the Internet has to be continually reasserted in the face of these norms.

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<sup>43</sup> *Ibid.* at 453.

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In a study of early “open source” software designers, Christopher Kelty<sup>44</sup> describes their shared commitment to the development of freely available digital code that would enable the Internet to continue to function as a public place for deliberation—one that could not be controlled by virtue of private ownership of intellectual property in software. These designers believed that the Internet had to be kept open to new forms of evolution, and that this could only happen if those who contributed works—such as software and its underlying code—to its development also ensured that their contributions would remain free for further developments by others similarly committed to maintaining the Internet as a public space. Not only does this view of the Internet capture the potential of network technologies to further dialogic development and innovation; it also illuminates the ways in which various actors work in varying relationships to produce new creations more generally. Indeed, it exemplifies the way in which we use language, maintain communities, and socially reproduce ourselves as a species.

The history of the Internet and the World Wide Web demonstrates a tension between open, collaborative forms of development and closed, proprietary systems.<sup>45</sup> These competing notions of the Internet—open versus controlled—have contributed to a vibrant debate about the future of online interaction. In December 2001 the Open Society Institute formulated the basic tenets of online open access culture with respect to published literature:

“By ‘open access’ . . . we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them

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<sup>44</sup> Christopher Kelty, “Geeks, Social Imaginaries and Recursive Publics” (2008) 2(2) *Cultural Anthropology* 185 at 185 [Kelty, “Geeks”]. See also Christopher Kelty, *Two Bits: The Cultural Significance of Free Software* (Durham, NC: Duke University Press, 2008) [Kelty, *Two Bits*].

<sup>45</sup> James Gilles & Robert Cailliau, *How the Web Was Born* (Oxford: Oxford University Press, 2000) at 640.

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as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.”<sup>46</sup>

The open access formulations developed by the Open Society Institute serve as a counterpoint to the proprietary Internet, which is based upon intellectual property norms that privilege individuated conceptions of authorship and ownership. These norms have operated to restrict the development of emerging online socialities. As Ann Bartow points out, they also hinder the development and application of knowledge:

“From a practical standpoint, patent law advances the state of ‘open source’ knowledge very slowly. By the time an invention reaches the public domain by way of patent expiration, the state of the art technology in the pertinent field has made two decades’ worth of advancements and the knowledge now freely available is likely to be obsolete and have little, if any, practical application value (possibly excepting pharmaceutical products, or adoption in geographic areas with less technological development).”<sup>47</sup>

Open access principles seek instead to maintain and contribute to a vibrant public sphere based upon public domain, accessible and/or re-useable materials, thereby leveraging the enormous possibilities for innovation and exchange that online, networked communication technologies afford.

The Internet is very much a public space—individuals and groups come together to develop the operating structures, social mechanisms, and legal and technical infrastructure that facilitate its existence and operation. Christopher Kelty describes the Internet that the early open source community sought to forge as a *recursive* public, “a

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<sup>46</sup> Budapest Declaration (2001), as quoted in Joseph Scott Miller, “Why Open Access to Scholarship Matters” (2006) 10 *Lewis & Clark L. Rev.* 733 at 734 [Miller, “Why Open Access”].

<sup>47</sup> Ann Bartow, “Open Access, Law, Knowledge, Copyrights, Dominance and Subordination” (2006) 10 *Lewis & Clark L. Rev.* 869 at 873-4 [Bartow, “Open Access”].

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particular form of social imaginary through which this group imagines in common the means of their own association, the material forms this imagination takes, and what place it has in the contemporary development of the Internet.”<sup>48</sup> By relying upon the modes and tactics of a recursive public, open access movements seek to assert the primacy of collaborative forms of communication and creativity. In doing so, they mirror the concerns of the relational feminist perspective of individuality discussed in Part 2 of this article—and present new opportunities for creative endeavour and development that are based upon collaborative (or open) techniques. Open source, for example, “is distinguished from other forms and practices of software production for many reasons, but most interestingly because its practitioners discuss it not simply in technical terms, but as a philosophy, a politics, a critique, a social movement, a revolution, or even a ‘way of life.’”<sup>49</sup>

This is not to say that movements committed to openness necessarily operate outside of the dominant social, legal and cultural structures that they are working to critique:

“None of them are anti-commercial, nor even anti-intellectual property—indeed, they all rely on the existence of intellectual property to create and maintain the ‘commons’ that are an inevitable part of their names, even as they occupy a position of challenge or resistance to the dominant forms of intellectual property in circulation today.”<sup>50</sup>

Such movements are better seen as creating forms of ‘counterpublics’ that work within and against those forces that are perceived as oppressive. Recognizing that the often

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<sup>48</sup> Kelty “Geeks”, *supra* note 44, at 186.

<sup>49</sup> Christopher M. Kelty, “Culture’s Open Sources: Software, Copyright and Cultural Critique” (2004) 77(3) *Anthropological Quarterly* 499 at 499.

<sup>50</sup> *Ibid* at 547.

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presumed openness of the Internet is not inevitable,<sup>51</sup> but rather is increasingly restrained by corporate, legal and or government interventions, movements such as FLOSS and the Creative Commons<sup>52</sup> (for further examples) seek to use the powers that individuals have, even over their own intellectual properties, to create spaces where the ideal open ethos of the Internet can be actualized.

### *3.2 Emerging Open Access Practices in Academic Publishing*

Due to their relationship with public institutions and broader communities of knowledge, scholarly journals offer a place where the ideals and goals of the open access movement may be fruitfully deployed. Such journals present and publish research with the objective of “making the work accessible, publicizing the work, and endorsing the work as trustworthy”<sup>53</sup> to the ultimate end of serving a greater good, namely the creation, dissemination and circulation of knowledge and the advancement of human understanding. Such lofty aspirations are impaired, however, by an economic system that seeks to maximize the value of information through the creation and promotion of its scarcity.

Instead of free circulation, traditional journal publishers distribute and manage their resources according to a pay-for-use model that restricts access for those unable to afford the proprietary license fees. Furthermore, these business practices essentially require authors as well as their institutions to fund both the research and publication costs associated with this information—universities, with the assistance of other funding

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<sup>51</sup> Lawrence Lessig, *Code: And Other Laws of Cyberspace* (New York: Basic Books, 1999).

<sup>52</sup> Free/Libre/Open Source Software (FLOSS) is an internationally distributed open source software initiative, for more see, <http://www.flossworld.org/>. For more information on the Creative Commons, see <http://www.creativecommons.org>.

<sup>53</sup> Michael J. Madison, “The Idea of the Law Review: Scholarship, Prestige, and Open Access” (2006) 10 *Lewis & Clark L. Rev.* 901 at 903.

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agencies, are required to pay for the research costs, associated salaries of researchers as well as subscriptions to the journals where this work is ultimately published, while also often signing away control of these publications. The result of this traditional publishing model “is an exploitative situation in which academic authors and the institutions for which they work are paying the costs of publication but losing control over their published works.”<sup>54</sup> Such a situation can restrict the circulation of information and knowledge by privileging the economic interests of the publishers who have become the owners of the intellectual property of the works they disseminate.

This traditional “walled garden”<sup>55</sup> approach to publishing and information dissemination relies upon forms of editorial and access controls that limit the freedoms available to large groups of the public while entrusting smaller groups with a great deal of privilege. On one hand, the journals’ editors exercise discretion over content, determining what will appear in the journal, in what format and where. On the other hand, the owners of the intellectual property of the content itself determine where and how the materials can be accessed, how they can be used, and by whom. These publication formats effectively prevent information from reaching larger segments of the public, thus limiting the social benefits that would be attained by affording wider access to expressive goods. Opening the gates to these walled gardens is therefore vital to the development of a robust and expansive public sphere.

The open access movement, as stated in the Berlin Declaration, contrasts this restrictive model with one that seeks to produce the “universal availability of a

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<sup>54</sup> Nicholas Bramble, “Preparing Academic Scholarship for an Open Access World” (2006) 20 *Harvard J. L. & Technology* 209 at 217 [Bramble, “Preparing Academic Scholarship”].

<sup>55</sup> *Ibid.*

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comprehensive source of human knowledge and cultural heritage.”<sup>56</sup> As Nicholas

Bramble’s survey of open access journals finds,

“most open access advocates would agree that the purpose of open access is to remove price barriers such as subscription and licensing fees, as well as permission barriers such as licensing restrictions, from what authors can do with the articles they write and from what viewers can do with the articles they read.”<sup>57</sup>

Within the open access movement, especially as it relates to scholarly publishing, there are distinct strains and modes of practice. The so-called “green road” is a system of self-archiving where authors place their writing in open electronic archives; the more ambitious “golden road,” meanwhile, is the use of open access online journals such as this one—publicly available resources that readers can use for free with relatively few limitations aside from attribution.<sup>58</sup> Travelling upon these pathways particular challenges must be overcome.<sup>59</sup> On the green road, these problems relate to the need to negotiate with traditional publishers favourable access and publication rights so that the author—or her institution—can publish or post the article online in a free-for-use format notwithstanding its likely for-profit publication elsewhere. The gold road, meanwhile, necessitates the creation of entire journals that are based upon the free-for-use model, thus requiring alternative modes of financing for the publisher. In many cases, this must be achieved through institutional or organizational support as well as by having authors—often through grant and research funds—pay for the publication of their articles. Open

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<sup>56</sup> “The Road to Open Access” (2005), available at [http://www.zim.mpg.de/openaccess-berlin/roadmap\\_print.pdf](http://www.zim.mpg.de/openaccess-berlin/roadmap_print.pdf).

<sup>57</sup> Bramble, “Preparing Academic Scholarship”, *supra* note 54, at 211.

<sup>58</sup> Stephanie L. Plotin, “Legal Scholarship, Electronic Publishing and Open Access: Transformation or Steadfast Stagnation?” (2009)101 *Law Library Journal* 1.

<sup>59</sup> For a more comprehensive look at these difficulties see, Bramble “Preparing Academic Scholarship”, *supra* note 54.

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access journals, then, require the creation of alternative rights and business models that stand in contrast to those used by the traditional publishing industry. These journals remain enmeshed within current intellectual property practices, as they are dependent upon content and content curation for their existence, yet they employ intellectual property laws in innovative ways that upset the power structures perpetuated by traditional publication practices.

While there is a great deal of momentum within the open access movement, competing societal and economic pressures threaten to subvert the expansion of open access regimes. The desire for prestige and recognition from authoritative bodies—including tenure committees and employers—may favour the maintenance of traditional, hierarchical publishing structures. Peer reviewed journals maintain a privileged position in terms of how published materials are socially understood and respected,<sup>60</sup> making the move to open access publication difficult for authors seeking professional recognition. At the same time, relaxing controls over intellectual property may prevent established journals from being able to recoup their costs and remain profitable, at least without fundamental changes in their business models and dissemination strategies. And, of course, there are already significant financial pressures constraining the socially valuable activities of the kinds of publicly funded institutions that could lead the charge towards an open-access publishing paradigm.

The social and economic structures that maintain the hierarchical nature of traditional publishing models thus have the power to relegate open access publishing models to a parallel track where they are undervalued or perceived to be less legitimate

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<sup>60</sup> *Ibid.*

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than their traditional counterparts:<sup>61</sup> “green road” open access strategies will continue to be subject to restrictions imposed by traditional publishers, while the “golden road” will remain the path-less-travelled—quite possibly regarded as a less legitimate and esteemed alternative or short-cut off the main route. Thus, despite the clear social gains promised by more open forms of academic publishing and distribution, open access models will likely continue to play only a complementary role in scholarship unless cultural and institutional norms change to legitimate and facilitate these practices and the values they embrace.

### *3.3 Open Access: Philosophy and Guiding Principles*

Within the open access movement, liberal ideas about property and creativity are undermined and challenged. Rather than adhering to the individuated form of authorship that intellectual property laws presuppose, open access initiatives take into account varying forms of collaboration, creativity and development. Such initiatives recognize that the production of information, knowledge and culture are based around mimetic processes that build from and upon one another<sup>62</sup> while development is enmeshed within larger social structures that support and stimulate innovation. The individual author is not viewed as a person working independently, but rather her creative process is understood in the context of (and as a contribution to) society and cultures of knowledge and development. Thus open access projects emphasize the individuated author as an historically constructed, unnecessary and undesirable fiction in many of the same ways that relational feminist criticism does.

From these perspectives, knowledge should be understood not as an asset or

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<sup>61</sup> *Ibid.*

<sup>62</sup> Marcus Boon, *In Praise of Copying* (Cambridge, MA: Harvard University Press, 2010).

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resource but as the foundation of a series of relationships of domination and subordination. The ability to grant or deny access to knowledge is the power to dominate those who seek to access it. Rather than equalizing power, “the goal of improving access to knowledge under this construction would require dismantling the structures that facilitate domination and subordination.”<sup>63</sup> In terms of scholarship and other communities of knowledge this would allow for expanded access to the tools and information necessary for further development. As Miller describes it:

“The central reason open access scholarship matters is because it extends the reach of every scholar who participates in it. Simply put, placing one’s article in an open access repository (such as SSRN or Berkeley Electronic Press’s Legal Repository (“bepress”)) dramatically reduces the cost at which people *outside* the U.S. law school community (i.e., people other than law professors and current law students) can find and read that article. So long as the means for distributing articles doesn’t undermine the incentive for producing them in the first place, reducing the access cost is a social gain.”<sup>64</sup>

This social gain stands at the forefront of the philosophy embedded within the open access movement.

Whereas intellectual property laws were historically envisioned—and continue to be rationalized—as a means for creating and sustaining the incentive to produce new and socially valuable ideas, the continuous expansion of intellectual property rights has produced legal regimes that restrict access and downstream use of information resources far beyond what is required to encourage their creation. This is particularly true in the academic realm where creativity has its own incentives both cultural (in the form of professional requirements and recognition) and economic (in the form of salaries and

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<sup>63</sup> Bartow, “Open Access”, *supra* note 47, at 871.

<sup>64</sup> Miller, “Why Open Access”, *supra* note 46, at 735.

grants). Indeed, where these academic salaries and grants draw on public funds, the exclusion of the public from the expressive works that they support looks particularly problematic. As Bartow writes, “copyright laws are preventing rather than incentivizing the creation and distribution of important ideas and expression. Moreover, when the government brings the force of law to bear to prevent the authorship, distribution, and reading of certain words, it begins to seem a lot like censorship.”<sup>65</sup> In this way, intellectual property structures often do more to obstruct than to further the ostensible goals of academic scholarship and publication; in contrast, open access paradigms, which disrupt these forms of censorship and exclusion, further such goals by contributing to an expansion of the effective public domain and the dissemination of available knowledge and information.

#### *3.4 What's Feminist about Open Access?*

Relational feminist critiques of authorship and ownership challenge the legal conceptions presupposed by intellectual property law, which assert a masculine form of creativity that subverts the influences of culture and society to conceptions of an authoritative and independent author. Mark Rose<sup>66</sup> has critically highlighted the patriarchal notions that are ingrained in these legal conceptions of authorship and property. These assumptions feminize, and make subordinate, the cultural realm to the will and inspiration of the masculine author. Inspiration is thus a masculine form in that it actively creates from an inert culture that merely nurtures this creativity. Authorship and ownership are thus afforded to the individual—conceived of as a male—without regard to

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<sup>65</sup> Bartow, “Open Access”, *supra* note 47, at 879.

<sup>66</sup> Mark Rose, “Mothers and Authors: *Johnson v. Calvert* and the New Children of our Imaginations” (1996) 22 *Critical Inquiry* 224.

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the cultural influences that, in fact, actively negotiate and contribute to the creation of the work. As we have seen, relational feminist critiques of intellectual property challenge this authorship paradigm and reaffirm the social as an active agent necessary for the creation of various works. Open access movements follow in this vein by providing the tools and spaces necessary for discursive formations of knowledge and innovation.

Through their identification of lines of critique that challenge dominant neo-liberal conceptions of online activity, open access initiatives, and feminist theories share a number of commonalities. Most explicitly, both of these critical movements embrace relational conceptions of intellectual creativity that problematize intellectual property paradigms. For its part, feminist critique “works across borders in ways that unsettle familiar philosophical and political frameworks.”<sup>67</sup> Such criticism draws attention to the ways that formalized power structures exert influence over peoples, especially those that belong to marginalized groups. In the digital realm, this marginalization characterizes those groups that either do not have access to online materials and/or work with online materials in ways that counter the hegemonic capitalist practices that dominate neo-liberal structures of governance over the Internet.

Open access initiatives intersect with and are sympathetic to feminist orientations geared toward problematizing and disrupting established individualistic and patriarchal orders and thereby allowing traditionally excluded groups greater room for manoeuvre. Both movements value information, communication, and dialogic participation as sources of empowerment. The revolutionary potential offered by digital communications

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<sup>67</sup> Uma Narayan & Sandra Harding, “Introduction” in Uma Narayan & Sandra Harding, eds., *Decentering the Center: Philosophy for a Multicultural, Postcolonial and Feminist World* (Bloomington, IN: Indiana University Press, 2000) at 1.

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motivates these attempts to destabilize dominant market structures and transcend their limitations. As Judy Wajcman writes, “industrial technology may have had a patriarchal character, but digital technologies, based on brain rather than brawn, on networks rather than hierarchy, herald a new relationship between women and machines.”<sup>68</sup> The interactive and social nature of digital technologies offers new forms of interaction and collaboration that may have socially transformative effects.

However, such transformative aspirations can be realized only by altering the social and economic conditions that support the dominant structure. As Dianne Currier writes, feminist critique:

“allows an assessment of the intersections between technologies and men and women in terms of prevailing relations and distributions of power. Adopting an alternative conceptual horizon will not, in itself, effect a wholesale transformation of the lives and activities of women and men. Clearly, there remains a pressing need for everyday intervention and political action. It will, however, open up the possibility of thinking new and radically transformed futures, which remains a crucial element of feminism as an aspirational enterprise.”<sup>69</sup>

Through processes of more overt dialogue in digital environments, open access movements and relational feminist critiques might better voice these possibilities. Open access law journals have a unique role to play in hosting such dialogues, highlighting the limits of intellectual property frameworks and their disempowering effects for the relational practices of creativity and authorship that characterize the way digital technologies might ideally function in human worlds of sociality.

Relational feminism and open access, then, share a concern for the social nature of

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<sup>68</sup> Judy Wajcman, “Feminist Theories of Technology” (2010) 34 *Cambridge Journal of Economics* 143 at 148.

<sup>69</sup> Diane Currier, “Feminist Technological Futures: Deleuze and Body/Technology Assemblages” (2003) 4 *Feminist Theory* 321 at 337.

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human existence. Rather than privilege an individuated form of subjectivity and authorship, both look to restore the ideals of sharing and dialogue that are apparent in conceptualizations of the relational self. Accessibility and communicative exchange are necessary elements of knowledge, creativity and existence in democratic environments. This conception dislodges the dominant, modern, neo-liberal conception of intellectual property rights in which relations of communication are effectively conceptualized as relations of marketplace exchange.<sup>70</sup> It indexes a commitment to a lively public sphere of common deliberation, open dialogue, and the egalitarian quest for greater mutual understanding and social progress dependent upon the combined energies of participants mutually committed to improving the commonweal.<sup>71</sup> Open access and relational feminism, then, serve to dislodge the individuated and economic rationale behind dominant intellectual property regimes and offer ways to reconceptualize how the author and creative works are situated within our social, economic and political economies.

#### **4. Concluding Remarks: On the Synergies of Open Access and Feminist Movements**

Over time, feminists have both hailed and doubted the power of technology to effectuate greater equality.<sup>72</sup> Current debates surrounding the open access movement revitalize this conversation and provide new opportunities for evaluating the potential of communications technologies to effect forms of social transformation by equalizing access to the means of communicative expression. In challenging the existing power

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<sup>70</sup> See Shalini Venturrelli, "Cultural Rights and World Trade Agreements in the Information Society" (1998) 60(1) *Gazette: International Journal for Communication Studies* 47.

<sup>71</sup> Lewis Hyde, *Common as Air: Revolution, Art and Ownership* (New York, NY: Farrar, Straus and Giroux, 2010). See also Kelty, *Two Bits*, *supra* note 43.

<sup>72</sup> See Sally Wyatt, "Feminism, Technology and the Information Society: Learning from the Past, Imagining the Future" (2008) 11(1) *Information, Communication & Society* 111.

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structures that support the intellectual property architecture in modern neo-liberal society, open access paradigms and practices offer a distinctly unique way of fostering creativity, interaction and collaboration by unlocking the wealth of human knowledge from proprietary controls and undermining concentrations of economic privilege.

Open access crusaders and feminist critics find new possibilities for social change in these technological conditions. As Sadie Plant has observed,

“[M]any feminists are now finding a wealth of new opportunities, spaces and lines of thought amidst the new complexities of the ‘telecoms revolution’. The Internet promises women a network of lines on which to chatter, natter, work and play; virtuality brings a fluidity to identities which once had to be fixed; and multi-media provides a new tactile environment in which women artists can find their space. . . Complex systems and virtual worlds are not only important because they open spaces for existing women within an already existing culture, but also because of the extent to which they undermine both the world-view and the material reality of two thousand years of patriarchal control.”<sup>73</sup>

In order for such technological possibilities to enable these new social realities, it is necessary to challenge both the ideological and economic logic that continues to prevent these technologies from realizing their full political potential. We have argued that intellectual property rights, as they are expressed in contemporary capitalist societies and as they have become globalized under neoliberal trade agendas, are at the core of this logic. Only by contrasting these laws and their premises with, and demonstrating the viability of, alternative models will we be able to fully seize the potentialities that digital technology affords for dialogic and relational forms of creativity. Both open access and feminist movements are committed to using a ground up, grass roots, and participatory approach to social change, providing alternative modes of thought, practice and collegial

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<sup>73</sup> Sadie Plant, “On the Matrix: Cyberfeminist Simulations” in R. Shields, ed., *Cultures of Internet: Virtual Spaces, Real Histories, Living Bodies*. (London: Sage Publications, 1996) 170 at 170.

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sociality, thereby offering new possibilities for unlocking the potential of digital media.

This journal, then, finds itself in a critical position both within movements of feminist critique and those of open access. As we have argued, by offering alternative ways of relating with and asserting the rights of authors, open access movements point to a postmodern conception of authorship that reflects feminist criticism's relational perspective. Challenging the predominately individuated notion of the author that is represented and reproduced by contemporary intellectual property laws offers the opportunity for shifting towards a paradigm that reflects the recursive and relational nature of creativity and knowledge production. Such a task is essential as digital and networked technologies transform the modes of practice that contribute to innovation and creativity. Harnessing the potential offered by digital technologies offers the possibility of creating a more just, robust, open, and collaborative public space that enriches discourse and knowledge. Entering into these parallel movements, this journal can contribute to the larger movement of copyright and intellectual property reform in various ways. And so we will conclude with a few thoughts about how an open access journal such as this might help to advance the shared aspirations of the feminist critical and open access movements.

### *1) Challenging Existing Norms*

Clearly both the feminist movement and open access alternatives critically address the norms implicated within the existing intellectual property paradigm. Specifically, both movements we discuss in this paper highlight the need to reform intellectual property laws in a way that reflects a relational and recursive conception of authorship and originality. Making works free-for-use and open to a larger public allows this journal

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to contribute to this discussion, challenging traditional normative frameworks and the individuated form of authorship that they presuppose. Creating a space, or spaces, where research, criticism, and scholarly activity can take place also serves to create oppositional and aspirational realms where these discussions can appropriate and spread into other areas. Utilizing innovative forms of rights management that are rooted in a desire to disseminate knowledge and discourse to wider publics and audiences creates the possibility of interconnections and relationships with other like-minded movements.

### *2) Highlighting the Possibility of Alternative Modes of Practice*

Practical considerations remain a sticking-point in the creation of alternative intellectual property and rights management paradigms. With legislators across the world seeking to address the ongoing “digital revolution” by creating “balanced” forms of copyright protections, the viability of open access journals such as this one helps to demonstrate the existence of alternative modes of practice. Rather than being locked into traditional publishing models that assert the primacy of the rights holder over the greater social goods that can be garnered through more open access to information, the proliferation of open access journals can highlight the importance and viability of alternative and open practices.

### *3) Disrupting Conventional Publishing Practices*

As established industries and publishers seek to further entrench their proprietary rights in an effort to maximize profits, the existence of parallel open access journals will help to subvert these attempts by creating alternative spaces where further research and dissemination can take place. In doing so, they disrupt the monopolistic practices and control of the established industries by offering competing information that is freely and

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easily accessible. This journal is now part of a critical mass of similar open access initiatives that, in combination, challenge the capitalistic considerations that guide traditional industries, forcing them to compete with open access journals and adjust their business models accordingly.

This journal is therefore evidence of how critical feminist scholarship and the open access movement can work in tandem to advance the shared aspirations that we have identified, redressing the ingrained norms that support the dominant intellectual property paradigm and the power imbalances that it produces in our cultural realm.