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Exposing Gender Bias in Intellectual Property Law: The UK Music Industries

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1. Introduction: Unconscious Gender Bias of IP Law

The music industries in the United Kingdom (UK) have seen a number of damning reports in the last few years. The 2019 “Counting the Music Industry: the Gender Gap” report paints a bleak picture,¹ where most signed artists by major (traditional) record labels in the UK are male. UK publishers (record labels) have in the reported period signed 12,040 writers, out of which only 14.18% are women. In similar vein, female musicians make up less than 20% of the rosters of the acts, signed to labels. This severe under-representation of women is also demonstrated in the statistics of music played on UK radio, where a 2020 report finds that women are often (if not always) left out, with some radio stations often not playing female artists at all.² Before the Covid-19 stopped most live music events, female artists also reported under-inclusion on the festival circuits.³ These reports sit in the broader context of gender inequalities including the gender pay gap⁴ or motherhood penalties⁵ in the creative industries; gender-based discrimination; and violence as exposed through movements like Me Too⁶ or Time’s Up.⁷

Intellectual property (IP) law is traditionally examined through a range of theories, none of which include feminist legal theory.⁸ This, as will be argued here, is to the detriment of IP law and all of its stakeholders. Although there is some significant scholarship in the United States,⁹ feminist engagement is not systemic and is left to discussions in isolation, or as sometimes

¹ Vick Bain, ‘Counting the Music Industry: the Gender Gap’ (2019) <https://vbain.co.uk/research>. All links in this chapter have been accessed on 15 January 2021.

² Linda Coogan Byrne & Women in CTRL, ‘Gender Disparity Data Report, An analysis of the Top 20 Most Played British Acts across British Radio Stations in the Period of June 2019-2020 and the Top 100 Radio Airplay chart in 2020’ (2020) <https://www.canva.com/design/DAEE37rIDuc/-7R8D7lzU7EMdcnv9Snw3w/view#1>.

³ For example, as noted by musician Emma Lee Moss, and reported by the BBC (22 June 2017) <https://www.bbc.co.uk/news/uk-england-40273193>.

⁴ For example, see Marilena Vecco *et al*, *Gender gaps in the Cultural and Creative Sectors* (with the exception of the audio-visual sector) (European Expert Network on Culture and Audiovisual (EENCA) Report, 2019) <http://www.eenca.com/eenca/assets/File/EENCA%20publications/Final%20Report%20-%20Gender%20in%20CCS%20EAC.pdf> 27 (equal pay issues in the EU markets).

⁵ Orian Brook, Dave O’Brien and Mark Taylor, *Culture is bad for you; Inequality in the cultural and creative industries* (Manchester University Press, 2020) 221-248.

⁶ For detail, <https://metoomvmt.org/about/>.

⁷ For detail, <https://timesupnow.org>; also on diversity and statistics in the US film industry, <https://womenandhollywood.com>; or in the UK publishing sector, <https://www.womeninpublishinghistory.org.uk>.

⁸ For example: (1) Lionel Bently *et al*, *Intellectual Property Law* (5th edn, OUP, 2018) 39-44 (copyright: (a) natural rights; (b) reward; (c) arguments based on speech; (d) incentive-based theories; (e) neoliberal economics; and (f) democratic and republican arguments), 397-399 (patents), 853-858 (trade marks); (2) Graham Dutfield *et al*, *Dutfield and Suthersanen on Global Intellectual Property Law* (2nd edn, Edward Elgar, 2020) 18-49 (listing (a) Rawls and societal justice; (b) stakeholder theory; (c) institutionalism and (d) traditional theories applied to IP (including Locke; economic rationales; Kant and Hegel)); (3) Annette Kur *et al*, *European Intellectual Property Law; Text, Cases and Materials* (2nd edn, Edward Elgar, 2019) 5-10 (referring to idealistic and utilitarian rationales for IP protection).

⁹ See section 2.2.

phrased by feminist scholars, secluded to the “pink ghetto.”¹⁰ With obvious advantages to feminist engagement with any area of the law in mind, many scholars call for an increased feminist analysis of all areas of the law, in particular where scholarship, has resisted, or merely ignored all (or most) feminist examination thus far.¹¹

IP law has been justified through (i) natural rights theories, such as Locke or Hegel; (ii) rewards and incentives theories; (iii) law and economics, such as Landes and Posner; and (iv) most broadly, through a neoliberal approach.¹² At the same time, criticism of IP law is prevalent and theories of cultural or creative commons have been devised in response to the continuous over-expansion of IP private rights (monopolies) at the expense of the commons, public good, and overall society at large.¹³ In other words, IP law is not without its challenges and challengers and the continuous over-expansion is resulting in a legitimacy crisis. An important way to address this legitimacy crisis in IP law, is a feminist re-alignment of its fundamental principles, following the integral tenets of IP Social Justice and its aims of inclusion and empowerment for the under-represented.

It is particularly the neo-liberal justifications that are proving damaging to the apparent lack of balance in IP law today. Neo-liberal principles in IP law will see ‘anything of value’ or an ‘asset capable of financial valuation,’ attracting IP protection, with a corresponding private monopoly.¹⁴ Such a direction comes at a price of other, non-commercial interests, such as human rights, *i.e.* free speech or the right to health.¹⁵ This increased favouring of IP owners (typically non-humans) is exacerbated by the challenging task of protecting IP works online (or digitally). The human creatives are consequently on the one hand left out of the protection of IP law, or at least, more at the mercy of the legal persons who are the owners of IP assets; and on

¹⁰ Pink ghetto concept referring to situations when feminist engagement is limited to specific topics, Kate Ogg, ‘The future of feminist engagement with refugee law: from the margins to the centre and out of the ‘pink ghetto?’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019) 176 (at note 6, referring to Karin Stallard, who first coined the term in Karin Stallard, Barbara Ehrenreich and Holly Sklar, *Poverty in the American Dream: Women and Children First* (South End Press, 1983) 18).

¹¹ Emma Larking, ‘Challenging gendered economic and social inequalities: an analysis of the role of trade and financial liberalisation in deepening inequalities and of the capacity of economic and social rights to redress them’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019) 306.

¹² For an overview, *Bently et al* (n8) 39-44, 397-399, 853-858; see further references at (n8).

¹³ On Creative Commons: Lawrence Lessig, ‘The Creative Commons’ (2003) 55 Fla L Rev 763. Professor has written extensively to this topic, and has also started the project of Creative Commons, <https://creativecommons.org>. Generally, on the negative effects of IP laws on the Commons, Guy Standing, *The Corruption of Capitalism; Why Rentiers Thrive and Work Does Not Pay* (Biteback Publishing, 2016) 165, 197 (“Plundering the Commons”, where “cultural commons” include “the arts; sports, the mass media, public libraries, art galleries, museums, concert halls, and public spaces for performances and other creative activities,” and “are being depleted”).

¹⁴ *Bently et al* (n8) 43 (offers a helpful, if unsympathetic overview, where, according to “an alternative economic theory, associated with neoliberal economics, [justifies the] protection of virtually “all value”[...] According to this school of thought, private ownership of resources is the juridical arrangement most conducive to optimal exploitation”).

¹⁵ Often seen in the international investment regime, which protects intellectual property rights, as investment assets. In cases such *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, (Decision on Jurisdiction, 2013 (PM v Uruguay); Award, 2016 (PM v Uruguay II)) ICSID Case No ARB/10/7 (Bernardini, Crawford, Born (concurring and dissenting)), the tension between trade marks as investment assets was weighed against the public interests in reducing health risks from tobacco use (tobacco plain packaging cases). For a general overview of IP assets as investment assets and associated risks of indiscriminate protection, see Metka Potočnik, *Arbitrating Brands; International Investment Treaties and Trade Marks* (Edward Elgar, 2019); also Simon Klopschinski, Christopher S Gibson and Henning Grosse Ruse-Khan, *The Protection of Intellectual Property Rights under International Investment Law* (Oxford University Press, 2021).

the other hand, even the most agreed upon forms of protection that extend to creatives cannot be enforced in the digital realm to their benefit. Recent governmental and organisational inquiries into the consumption of digital music (streaming services) confirm¹⁶ that the current economic systems are not working to the benefit of the creative talent (artists, musicians) and that the system needs fundamental rethinking. With this, there is an opportunity, to draft inclusive rules, which will not be informed exclusively from the evidence provided by the 'big players.' At present, the record labels and streaming services providers are the better organised stakeholders in legislative debates. The voices and interests of women and gender minority artists, who are also under-represented amongst the signed talent by the record labels, are not represented in an organised or concerted manner.

If a feminist approach is to be the solution, or at the very least a significant component of the solution, one needs to identify a theory, or a combination of theories, to be followed amongst the multiple options available. Feminist jurisprudence or feminist theory is not a single or unitary approach.¹⁷ In fact, some would argue that feminist approach is best described as a tapestry or a multitude of approaches, with some commonality in the broadest sense. As posited by Grant Bowman,

"Feminist legal theory is the study of the philosophical foundations of law and justice; informed by women's experiences, its goal is to transform the legal system and the understanding of it to improve the quality of jurisprudence and women's lives."¹⁸

The aim of this chapter is to expose the hidden gender bias of IP law (or at least start) by critically reflecting on its rules through a feminist lens and focusing on the UK music industries (section 2).¹⁹ This chapter, and the case study of the UK music industries, forms part of research, in which this author critically investigates IP law and its gender bias.²⁰ The

¹⁶ In the UK, the Digital, Culture, Media and Sports Committee to the Parliament, launched an inquiry into the 'Economics of Music Streaming' (launched in October 2020) <https://committees.parliament.uk/work/646/economics-of-music-streaming/>. More broadly in the UK, the Intellectual Property Office is collecting evidence on the effectiveness of IP rules in protecting individual authors and creatives (October 2020) <https://www.gov.uk/government/consultations/review-of-the-ip-enforcement-framework-call-for-evidence>. Internationally, the World Intellectual Property Organization responded to the current imbalance in remuneration for individual artists in the digital content market with the establishment of the consortium 'WIPO for Creators' (2020), which collaborates with the Music Rights Awareness Foundation, https://www.wipo.int/pressroom/en/articles/2020/article_0016.html.

¹⁷ Extensive overview of feminist theory offered in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016). More specifically on feminist jurisprudence: Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019); also, Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019); and Juliet A Williams, 'Feminist Jurisprudence' in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016); or earlier works, including Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing, 1998); and Zillah R Eisenstein, *The Radical Future of Liberal Feminism* (Northeastern University Press, 1993); or select chapters in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell, 2014) (mainly Chapter 14). This list is of course only illustrative.

¹⁸ Cynthia Grant Bowman, 'Socialist feminist legal theory: a plea' in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 91.

¹⁹ This carries an important limitation to the present research: the author is limited to the EU literature in the English and Slovenian languages.

²⁰ For detail: <https://researchers.wlv.ac.uk/m.potocnik>: (1) Society of Legal Scholars (UK) funded project: "Hear Her Speak: a Feminist Approach to Intellectual Property Law" (2020-21); (2) Lord Paul Fellowship, University of Wolverhampton funded project: "ALL HER VOICES Record Label: a Feminist Approach to Intellectual Property Assets" (2020-21). The author is also on the Board of

investigation relies on relational legal feminism in order to consider a theoretical realignment of IP law (section 3). Specifically, this chapter aims to answer the research question, what is (to be) the role of IP law in the music industries especially with respect to redressing the effects of their apparent bias against women and gender minority (non-binary) musicians? This question will be reflected on through a section of select concepts of IP law (section 5) related to music.

To answer its research question, the author relies on the feminist methodology toolbox (section 4)²¹ and the theory of positionality, which together form arguably the best approach to feminist construction of knowledge.²² With this chapter the author presents findings of a year-long project,²³ in which she conducted semi-structured interviews with fifteen creatives (women and gender minority), who helped to construct a partial picture of the lived experience of female and gender minority artists, authors, musicians and other creatives in the UK. Informed by the theoretical framework, doctrinal evidence and numerous testimonials, the author argues that IP law is not gender blind and more research is needed for a better understanding of the gender bias in all areas of IP law. Although the creatives are unaware of its role or effects, it is suggested here that IP law has proven to pose a substantial barrier to the success of women creatives and gender minority creatives in the creative industries.

The extent to which IP law promotes or at the very least, enables gender bias in the IP ecosystem presents a systemic problem of IP social injustice that is monumental in dimension. Gender bias in the formation and implementation of IP law can deprive a society of the IP contributions of at least half of its citizenry. Moreover, a male dominated IP economic system is qualitatively imbalanced, in that it lacks the diversity of perspective and input that is essential to a fully optimized IP regime. The IP Social Justice rationale recognizes the importance of widespread and diverse participation to the social of function of IP protection. This means that the IP regime must adhere to precepts of socially equitable access, inclusion, and empowerment.²⁴ A feminist analysis of IP law applies the tenets of IP Social Justice toward correcting the gender biases and related deficiencies of the IP regime. As theory of positionality

Directors of the new UK The F-List for Music CIC (representing Women in Music), <https://thef-listmusic.uk/about-us/directors-of-the-f-list/>.

²¹ Hila Keren, 'Feminism and contract law' in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 424 (offers the term, but does fill the toolbox with specific methods); Julie A Nice, 'The gendered jurisprudence of the Fourteenth Amendment' in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 343 ("The common context-based methods of feminist jurisprudence include: grounding one's perspective in women's lived experiences; incorporating multiple aspects of identity beyond sex (such as race, ethnicity, sexual orientation, gender identity, age, class, disability and immigration status); uncovering implicit bias often hiding behind purported objectivity; identifying double binds and dilemmas associated with either ignoring or highlighting differences; revealing the resilience and reproduction of male dominance; and understanding cultural coding of women's consciousness and choices.").

²² Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harv L Rev 829, 832.

²³ Metka Potočnik, 'Breaking Monopolies: a Feminist Approach to Intellectual Property in the Creative Industries,' Early Researcher Award Scheme (ERAS), University of Wolverhampton (October 2019 – September 2020), <https://www.wlv.ac.uk/research/the-doctoral-college/early-researcher-award-scheme-eras/eras-fellows-2019-20/dr-metka-potocnik/>.

²⁴ See Chapter (Mtima on Theory).

suggests, every additional perspective will enrich our understanding of the consequences IP law has on its stakeholders.²⁵ *Therefore, this is just the beginning.*

2. Gender Bias of IP: Identifying the Problem

2.1. Beyond Economic Utility of IP

Creative industries are defined by the UK Department of Digital, Culture, Media and Sport (DCMS)²⁶ as “industries that are based on individual creativity, skill and talent with the potential to create wealth and jobs through developing intellectual property.”²⁷ Creative industries include advertising; architecture; arts and culture; craft; ‘createch;’ design; fashion; games; music; publishing; and TV and film.²⁸ As suggested by the DCMS definition, intellectual property serves as the vehicle for transforming ‘individual creativity skill and talent’ into the creation of ‘wealth and jobs.’ The definition on its face does not appear to favour any particular type of individual and reads as an objective term, which focuses on the merit of individual’s endeavours.

Are all ‘individuals’ equal under the current regime? As clearly stated by the various industry reports in the introduction to this chapter, there are great inequalities in the music industries, and more broadly the cultural industries. These reports of course sit in the broader context of social inequalities, including the gender pay gap,²⁹ gender-based discrimination and violence as exposed through movements like Me Too³⁰ or Time’s Up.³¹ All this evidence notwithstanding, the main proposition that IP law is gender-neutral, persists. From the governmental perspective, as reflected in the DCMS definition, it is still posited, that individual creativity, skill and talent will lead into wealth and jobs. ‘Worthy’ artistry will pay the bills. Or so the story goes.

Placed against the broader context of the inequalities in the creative industries, it is argued here that not all ‘individuals’ are equal (at least not before the provisions of the IP law). With an express link between IP and individual creativity, skill and talent, a question that crystallises is whether IP is playing its role in transforming all individual creativity, skill and talent into societal utility. At the same time, the question of what amounts to ‘societal utility’ is to be asked. The economic function of IP law to ‘create wealth and jobs’ is currently embedded in

²⁵ The author continues her empirical study with women and gender non-binary artists (creatives), with the support of The Society of Legal Scholars Research Activities Fund (24 April 2020 – 31 July 2021) (n20).

²⁶ <https://www.gov.uk/government/organisations/department-for-digital-culture-media-sport>.

²⁷ DCMS Creative Industries Sector Deal (March 2018): <https://www.gov.uk/government/publications/creative-industries-sector-deal>.

²⁸ Listed on UK CIC portal: <https://www.thecreativeindustries.co.uk/industries>.

²⁹ For example, see Marilena Vecco *et al*, *Gender gaps in the Cultural and Creative Sectors* (with the exception of the audio-visual sector)’ (European Expert Network on Culture and Audiovisual (EENCA) Report, 2019) <http://www.eenca.com/eenca/assets/File/EENCA%20publications/Final%20Report%20-%20Gender%20in%20CCS%20EAC.pdf>, 27 (equal pay issues in the EU markets).

³⁰ For detail: <https://metoomvmt.org/about/>.

³¹ For detail: <https://timesupnow.org>; also on diversity and statistics in the US film industry: <https://womenandhollywood.com>; or in the UK publishing sector: <https://www.womeninpublishinghistory.org.uk>.

governmental policies and its resulting Creative Industries Sector Deal (2018).³² It suggests that IP's function is in creating economic utility. This is however a narrow view and alternative options should be explored.

The DCMS definition is turning a blind eye to the pre-existing inequalities in the sector. The DCMS suggests that an artist will earn money with her music through intellectual property, which transforms 'individual creativity, skill and talent' into 'wealth and jobs.'³³ And although it is agreed that intellectual property has an important economic function, more is needed. It is argued here that a social utility of IP laws is crucial in order to avoid the pre-existing inequalities, underrepresentation and discrimination. According to the theory of IP Social Justice "[t]o achieve its social utility purpose of human nourishing and flourishing, the intellectual property law must [] adhere to inherent precepts of socially-equitable access, inclusion, and empowerment."³⁴ In sum, the application of a feminist analysis in the pursuit of IP Social Justice can not only improve the internal efficacy of the IP regime but it can also enhance the social effects of IP in the total political economy.

2.2. Literature Review: Doctrinal Evidence of Gender Bias in IP Law

Scholars engaging in IP feminist review acknowledge, that gender and feminist theory are seldom used by mainstream scholars,³⁵ despite the doctrinal need for IP law to be examined through the lens of feminist theory. No different to other areas of the law, feminist theories will expose the fallacy in the presumed gender neutrality and bias of seemingly neutral legal rules and in-existent objectivity of legal standards. Scholars in this field will not always expressly differentiate between different theoretical approaches that exist in feminist scholarship, but it has been correctly argued that applying different feminist theories, can lead to substantively different results.³⁶ Although authors might disagree with the outcomes, it is recommended we see further development of the field, and diversity of theoretical approaches applied to critically examine IP law.³⁷ Refusal of academics to do so, perpetuates the IP law's seeming 'neutrality,' which is harming the diversity of intellectual creations protected and valued under the system.

³² See reference at (n27).

³³ Department of Digital, Culture, Media and Sport: <https://www.gov.uk/government/organisations/department-for-digital-culture-media-sport>.

³⁴ Lateef Mtima, 'IP Social Justice Theory: Access, Inclusion, and Empowerment' (2019) 55 *Gonz L Rev* 401, 419; and Steven D Jamar and Lateef Mtima, 'A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship' in Megan M Carpenter, *Entrepreneurship and Innovation in Evolving Economies* (Edward Elgar, 2012).

³⁵ Ann Bartow, 'Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law' (2006) 14 *Am U J Gender Soc Pol'y & L* 551, 552. An example of a text, where the author considers gender-based differences in a creative industry: Casey Fiesler, 'Pretending without a License: Intellectual Property and Gender Implications in Online Games' (2013) 9 *Buff Intell Prop LJ* 1.

³⁶ Deborah Halbert, 'Feminist Interpretations of Intellectual Property' (2006) 14 *Am U J Gender Soc Pol'y & L* 431, 433-434.

³⁷ Halbert (n36) 460; Bartow (n35) 554.

Bartow³⁸ applied feminist theory to US copyright law, with a normative goal. According to Bartow, all feminist scholars should pursue 'low protectionism' in copyright law,³⁹ although admittedly, not all feminist scholars might agree with this approach. In her more specific observations on the state of creative industries, Bartow shares an observation of the role of copyright as a barrier to inclusivity:

"Creative industry sectors such as publishing, film, television, theater, art dealing, and the music business are also dominated and controlled by men. Consequently, it is predominantly men who choose the content that will be commercialized and the quantity of resources that will be expended to promote individual works. Decisions about how aggressively to "protect" copyrights, such as when to bring infringement suits and how zealously to pursue them are largely made by men as well."⁴⁰

More damningly, Pollack⁴¹ observes that IP systems, which are built on notions of property and exclusion, are inherently male. Objects that will be protected are of commercial interests to men; and conversely, objects that are traditionally not protected from copyright or patent protection, such as clothing, food, folklore; or traditional knowledge are excluded on a "gendered, anti-feminist manner."⁴² The reason why IP law will necessarily have gendered implications rests in the fact, that it is part of a larger society, which has historically favoured men:

"Some intangibles can be owned. Some cannot. Decisions about the scope of protection are usually described as the outcomes of economics, special interest politics, or history. Economic relationships, special interest groups, and political power, however, have long been dominated by men. Furthermore, economic efficiency through individual ownership is an inherently male approach to the world, especially when the central prong of ownership is the right to exclude others."⁴³

In a similar vein, Tushnet through the study of fair use case law, observes that US copyright's "economic focus and the expense of litigation will systematically lead to case law undervaluing non market production, including historically female creative practices."⁴⁴ By looking at mainstream media and copyright law in the US through a feminist lens, Chaloner argues that

³⁸ Bartow (n35) 551.

³⁹ Bartow (n35) 570.

⁴⁰ Bartow (n35) 578.

⁴¹ Malla Pollack, 'Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter' (2006) 12 Wm & Mary J Women & L 603 (discussing also patents).

⁴² Pollack (n41) 603.

⁴³ Pollack (n41) 603.

⁴⁴ Rebecca Tushnet, 'My Fair Ladies: Sex, Gender, and Fair Use in Copyright' (2007) 15 Am U J Gender Soc Pol'y & L 273, 303-304.

copyright serves as a controlling mechanism for deciding which culture gets distributed.⁴⁵ Although not solely responsible for this exclusion, Chaloner finds that copyright plays a role in excluding women from mainstream, commercial culture.⁴⁶ Holistically Chaloner also sees IP as a masculine field, "because it is about asserting dominance and control over information."⁴⁷ Chaloner does not propose the abolition of copyright, but points to important doctrinal value of feminist critique of IP law:

"A feminist critique of copyright recognizes that the law works to protect patriarchal systems of creation and does not provide space for alternative narratives or for critical dialogue with dominant narratives."⁴⁸

IP law is also not race neutral,⁴⁹ and feminist scholars have considered, through the principle of intersectionality, both race and gender issues together. Greene explored how women artists, in particular black women, have been (negatively) impacted by the IP system, and importantly posits that authorship, like gender and race, is socially constructed.⁵⁰ Greene relies on critical race theory, and combines it with feminist legal theory. The value of the latter, "is its focus on uncovering subordination hidden in "neutral" legal regulations."⁵¹ Applying critical race, feminist and cultural production theory on IP law, Lester argues that IP law is not objective.⁵²

Other authors have also found that feminist legal theory, when applied to IP law, will have fundamental effects on some of the key concepts, such as authorship or inventorship. Robbins relies on feminist material culture theory to redefine the notion of authorship, as "a flexible cultural formation shaped by material conditions and contested beliefs about writing, reading, and texts themselves."⁵³ Halbert relies on theories of social construction of knowledge, gendered construction of authorship and postmodern feminism,⁵⁴ and finds that IP law is inherently masculine, resulting in the particular appeal of feminist theories in the designing the future direction of IP law-making, wishing to avoid over-expansion:

⁴⁵ Emily Chaloner, 'A Story of Her Own: A Feminist Critique of Copyright Law' (2010) 6 ISJLP 221.

⁴⁶ Chaloner (n45) 221.

⁴⁷ Chaloner (n45) 238-239.

⁴⁸ Chaloner (n45) 254-255.

⁴⁹ An example of a recent monograph: Anjali Vats, *The Color of Creatorship; Intellectual Property, Race and the Making of Americans* (Stanford University Press, 2020).

⁵⁰ KJ Greene, 'Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues' (2008) 16 Am U J Gender Soc Pol'y & L 365, 379.

⁵¹ Greene (n50) 378.

⁵² Toni Lester, 'Oprah, Beyoncé, and the Girls Who Run the World - Are Black Female Cultural Producers Gaining Ground in Intellectual Property Law' (2015) 15 Wake Forest J Bus & Intell Prop L 537, 543 (in general discussing copyright cases of Oprah Winfrey, Beyoncé Knowles and Alice Randall (*Gone with the Wind* / *The Wind Done Gone*)).

⁵³ Sarah Robbins, 'Distributed Authorship: A Feminist Case-Study Framework for Studying Intellectual Property' (2003) 66(2) College English 155, 160.

⁵⁴ Halbert (n36) 431 (discussing also patents).

"My early hypothesis was that feminist theory could be used to create a critique of expanding intellectual property rights. However, I am not convinced all feminist theory, and by extension all feminists, would be equally critical of intellectual property. That being said, my argument is that while some feminists may perceive benefits from copyright and/or patent law, feminist theory can make visible the underlying masculine assumptions existing in our construction of intellectual property as well as highlight a political economy of intellectual property that has historically benefited men more than women. Furthermore, the value of a feminist analysis is that it can be used politically-to think actively about what the future may hold by avoiding choices that privilege men more than women."⁵⁵

The application of feminist legal theory to patent law also led to tangible results. Burk found that viewing traditional concepts of patent law, such as person skilled in the art, through a feminist lens (relying on the writings by MacKinnon), would lead to a different system of patent grants, compared to the patents granted today.⁵⁶ Foster reviews the role of patents in the field of biotechnology, and with the use of feminist theory and construction of 'labour' argues "that patent law functions within gendered and ethno-racialized forms of neoliberal, biopolitics involving the patenting of women's reproductive and intellectual labor within new bioeconomics."⁵⁷ Studying the historical case study of the corset, Swanson applying feminist theory to patent law finds that this area of the law is not a "gender-free zone of technology, but involves carefully negotiated knowledges about gender that are exposed when the masculine category of technology is claimed for a profoundly feminized item, such as a corset."⁵⁸

The doctrinal evidence is scarce outside the US.⁵⁹ Feminist IP US scholarship is on the rise and it seems to suggest, that IP law is not gender neutral. If anything, this is 'a question not asked,' and not, 'a non-issue.' As Swanson concluded, based on the growing US IP feminist scholarship,⁶⁰

⁵⁵ Halbert (n36) 433-434.

⁵⁶ Dan L Burk, 'Feminism and Dualism in Intellectual Property' (2007) 15 *The American University Journal of Gender, Social Policy and the Law* 183 (also discussing copyright); Dan L Burk, 'Do Patents Have Gender' (2011) 19 *Am U J Gender Soc Pol'y & L* 881, 891.

⁵⁷ Laura A Foster, 'Patents, biopolitics, and feminisms: locating patent law struggles over breast cancer genes and the Hoodia plant' (2012) 19(3) *IJCP* 371.

⁵⁸ Kara W Swanson, 'Getting a Grip on the Corset: Gender, Sexuality, and Patent Law' (2011) 23 *Yale JL & Feminism* 57, 115.

⁵⁹ There is some literature: Sharmista Barwa and Shirin M Rai, 'Knowledge and/as Power: A Feminist Critique of Trade Related Intellectual Property Rights' (2003) 7(1) *Gender, Technology and Development* 91; Pauline Greenhill, 'Natalia Husar and Diana Thorneycroft versus the Law: A Critical Feminist Consideration of Intellectual Property and Artistic Practice' (2006) 18 *Can J Women & L* 439; Raadhika Gupta, 'Copyright v. Copyleft: A Feminist Perspective on Marginalization under Copyright Law' (2011) 4 *NUJS L Rev* 67; Madhavi Sunder, 'Intellectual Property and Identity Politics: Playing with Fire' (2000) 4 *J Gender Race & Just* 69; and Madhavi Sunder, 'IP3' (2006) 59 *Stan L Rev* 257.

⁶⁰ Kara W Swanson, 'Intellectual Property and Gender: Reflections on Accomplishments and Methodology' (2015) 24 *Am U J Gender Soc Pol'y & L* 175.

"Facially neutral IP law is not neutral, but imbued with the assumptions of those who wrote it and interpret it, including assumptions about sexual orientation and gender identity. Identifying this problem is a first step toward addressing the problem."⁶¹

2.3. Research Gap: Identifying Appropriate Feminist Theories and Collecting Empirical Evidence

Learning from the literature, there are several future directions a researcher might wish to take. First, the feminist investigation of IP law is still unknown in most jurisdictions outside the US, in particular the UK. Second, IP law would benefit from an investigation through various feminist legal theories, as feminist theory is not a singular concept. And finally, any future direction in IP reform should be informed by the lived experience of women. In order to understand the way in which IP law and its rules affect women and gender minority artists, we must collect empirical evidence.

3. Theoretical Framework: a Tapestry of Feminist Approaches

Feminist theory is not a unitary concept. Instead, a feminist approach is best seen as an umbrella for a variety of approaches, which covers a range of theories, combined with numerous methodologies. Accordingly, it appears reasonable to expressly state the selection of a theoretical approach, which is arguably the more convincing choice for IP law.

3.1. Relational Feminism: The Inclusive Understanding of a Human

Increasingly the individual author is disappearing from the IP discourse, and the interests protected by IP laws seem to value the economic interests above all. The neoliberal justification of IP law appears to be prevalent, despite the continuous struggles and objections from the academia to resist these developments. Even when faced with the need to protect the most basic of human rights, the right to health, the rights of IP owners are not trumped, and instead, have now been recharacterized as investment assets, meriting yet another level of legal protection.⁶²

There are several variants of feminist theory. Relational feminism perhaps offers the best path forward for the reasons noted below. This chapter does not aim to offer an extensive overview of feminist theories and the multiplicity of approaches that have been developed in the past century and a half.⁶³ Much better texts have been written to that effect. It is

⁶¹ Swanson 2015 (n60) 185.

⁶² Discussed broadly in Potočnik, *Arbitrating Brands* (n15).

⁶³ For an overview of different schools, see for example Robin West, 'Introduction to the Research Handbook on Feminist Jurisprudence,' in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 1-22. For an overview of numerous theoretical approaches, see for example Disch and Hawkesworth (n17).

acknowledged here however that liberal feminism, as the most obvious theoretical choice still faithful to the liberal legal order, has received ample criticism, which cannot be ignored.⁶⁴ Instead, alternative theoretical options have been identified in the search of a more suitable lens to explore the previously assumed gender-neutrality of IP law. Out of the many options,⁶⁵ this author opts for relational feminism, as developed by West.⁶⁶

West developed relational feminism as a response to three types of criticism against liberal feminism. Liberal feminism is based on formal equality, the “sameness” argument and inherently individualistic approach. Relational feminism aims to address all three characteristics through a new concept of ‘humans’ and our inter-connectedness. From the start, one of West’s observations is particularly noteworthy from the perspective of the plaguing criticism of IP law, which appears to serve mostly the neoliberal visions of corporations (legal persons), and fails to adequately protect the individual authors and inventors,

“There is much that is wrong, that is inhuman and cruel, about our idealized liberal vision of unencumbered souls marching through chosen lives of productivity and earned incomes unencumbered by human connection. Feminism can be and has been a way to highlight what is wrong with such a vision and to seek a more humane and inclusive ideal for communal life.”⁶⁷

The appeal of relational feminism in law is, that it reasserts the importance of human beings in the liberal legal order and it stresses the need to diversify the understanding of a multitude of

⁶⁴ In basic terms, liberal feminism rests on the proposition of equality between the sexes; argued in Sylvia A Law, ‘In defense of liberal feminism’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 24 (Law argues that the “liberal feminist commitment [is] to an expansive conception of women’s liberty and women’s equality”). There has been ample criticism of the theory, resulting from the focus on the blind focus on the “white elite” or the refusal to appreciate the differences between men and women. To illustrate: (1) radical feminism as per Catharine MacKinnon, which offers an improvement of the “formal equality theory” which originated with Aristotle: discussed in Chao-ju Chen, ‘Catharine A. MacKinnon and equality theory’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019); (2) bell hooks, *Ain’t I a Woman; Black Women and Feminism* (Pluto Press, 1981) (explaining how black women have been systematically ignored by the women’s rights movements in the 1920s onwards, and the feminist movements all to 1980s); or (3) Lola Olufemi, *Feminism, Interrupted; Disrupting Power* (Pluto Press, 2020) (a recent contribution in radical feminism, which is a systemic critique of liberal feminism, which focuses on elite group); (4) similarly intersectionality, which highlights the need to consider the multiple characteristics, which combined can increase systemic oppression (notoriously black women have been ignored by liberal feminism and theories): Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour’ (1991) 43 *Stan L Rev* 1241 (the first scholar to coin the term of intersectionality, but proceeded by works such as bell hooks); (5) Eisenstein (n17) 9 (presenting an overarching criticism that liberal feminism is not to be seen as “the feminism” and without suitable theory, it is best viewed as ideology; according to Eisenstein, liberal feminism has an inherent limitation or contradiction, in that liberal feminists ask for “sexual egalitarianism from within a structure [i.e. a liberal state] that is patriarchal”).

⁶⁵ For a brief description of four schools of thought (liberal, radical, cultural and postmodern): M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence* (8th edition, Sweet & Maxwell, 2008) 1288-1289 (“For liberals, equality amounts to equal opportunity. Radical feminists, such as Littleton and MacKinnon, focus on differences between women and men and support affirmative measures to challenge inequalities. Cultural feminists also emphasize difference, but view it more positively. They (thinkers such as Carol Gilligan and Robin West) use the rhetoric of equality to advocate change that supports the values (caring, relational connectedness) of this difference. Postmodern feminism sees equality as a social construct and, since it is a product of patriarchy, one in need of feminist reconstruction, but it warns against searching for a new truth to replace an old one.”).

⁶⁶ In 2019: Robin West, ‘Relational feminism and law’ in Robin West and Cynthia Grant Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar, 2019) 65-72.

⁶⁷ West on Relational Feminism (n65) 70.

human perspectives. Here the liberal legal order includes and values the human and lived experience by women, and in that way, makes it more humane,

“At the heart of the movement sometimes called relational feminism is the claim that we might best address all the problems, or limits, within liberal feminism [] by reconceptualizing the human being and doing so in a way that centralizes precisely the experiences, emotions, ambitions, fears and dreams shared by many women that are marginalized by liberal conceptions of the human. Perhaps human beings are not, contrary to any number of political theorists writing within the liberal tradition, essentially separated from or disconnected from other human and animal life and uniquely knowledgeable of that separation. [] Perhaps human beings are not embodied in a physical self that acts as a ‘container’ of each individual being. If we centralize women’s experiences to the definitional and tentative accounts we give of humanity, a different and truer picture might emerge.”⁶⁸

In order to start the vision of an inclusive liberal legal order, and with it, IP law, feminist methodologies and the exploration of the lived experience of women will be necessary. Without the appreciation of the women’s experience, a new – and more inclusive liberal legal order – will not be possible,

“[w]e should build a liberal legal order on a foundation that rightly values choice and individualism, but that also recognizes human connection [] If we centralized women’s experiences of both *the harms* and *the aspirations* that are rooted in some way in this fundamental fact of human connectivity to the understanding of humanity that undergirds our liberal legal orders, we might thereby construct a more humane as well as more inclusive liberal legal order.”⁶⁹

3.2. In Case of Emergency: Break this Window!

At present, this research relies on relational feminism, and the collection of lived experience of women in the UK music industries. It is quite possible however, that upon the collection of a broader body of evidence, a more radical approach in theory will be required, when searching for a suitable foundation for new IP rules. Lola Olufemi, a radical feminist, has already made a

⁶⁸ West on Relational Feminism (n65) 71.

⁶⁹ Emphasis added. West on Relational Feminism (n65) 71-72. This is also a nexus point between relational feminism and IP Social Justice Theory, which advocates for access, inclusion and empowerment: see Chapter (Mtima on Theory).

convincing argument in "Arts for Arts Sake" that not everyone gets to make art, as they are intrinsically linked to politics,⁷⁰

"As feminists, if we wish to see a world of art and creativity, then we must remove the barriers to that creativity and the systems that kill artists. We must dismantle the systems of poverty, racism, incarceration, impoverishment that leave so many women unable to fulfil their creative potential. Art requires will. But it also requires, as writer Virginia Woolf recognises, a room of one's own. A set of social and financial circumstances that enable creativity to take place. The question of who gets to make art is inseparable from questions of liberation and freedom."⁷¹

3.3. Positionality as the Construction of Knowledge Theory

Feminist theories have many differences, while at the same time, they share significant commonalities. These have also been identified in the aims that feminist theorists pursue, or as three common characteristics of feminist theory,

"[w]e identify three common characteristics of feminist theory in the late twentieth and twenty-first centuries: (1) efforts to denaturalize that which passes for difference, (2) efforts to challenge the aspiration to produce universal and impartial knowledge, and (3) efforts to engage the complexity of power relations through intersectional analysis."⁷²

Feminist scholars therefore pursue three main principles: first, sex and race are seen as political or social constructs, not reductively as biological or physical traits;⁷³ second, feminist scholars are challenging the knowledge as experienced, collected, and written by "socially privileged men;"⁷⁴ and third, feminist scholars follow the principle of intersectionality, which instructs that a combined set of characteristics in a body (sex, race, age, ability, class, ...) can lead to further systemic oppression.⁷⁵ It is therefore characteristic of feminist theory to challenge the existing ways in which "universal and impartial knowledge"⁷⁶ is constructed. Here, the author finds Bartlett's approach to the theory of positionality convincing,

⁷⁰ Olufemi (n64) 87-88 (the divide between art and politics is not real; resulting in the fact that poor women do not get to make art). Similar confirmation in a 2020 empirical study confirming the lack of diversity in UK cultural industries in Brook *et al* (n5) (discussing not only gender, or race, but also class, age, disability, etc).

⁷¹ Olufemi (n64) 88.

⁷² Mary Hawkesworth and Lisa Disch, 'Introduction: Feminist Theory; Transforming the Known World' in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) 4.

⁷³ Hawkesworth and Disch (n72) 4.

⁷⁴ Hawkesworth and Disch (n72) 6.

⁷⁵ Hawkesworth and Disch (n72) 8 ("intersectional analysis draws attention to the complex means by which power is encoded within particular bodies, exploring how specific gender norms are racialized, reserving the category "men" or "women" to those in dominant classes, while denying gendered inclusion to those deemed "inferior," "subhuman," or "deviant.").

⁷⁶ Hawkesworth and Disch (n72) 4.

"I conclude that the theory of positionality offers the best explanatory grounding for feminist knowledge. Positionality rejects both the objectivism of whole, fixed, impartial truth and the relativism of different-but-equal truths. It posits instead that being "correct" in law is a function of being situated in particular, partial perspectives upon which the individual is obligated to attempt to improve. This stance, I argue, identifies experience as a foundation for knowledge and shapes an openness to points of view that otherwise would seem natural to exclude."⁷⁷

Positionality dictates that feminist engagement with the law and its assessment of its legitimacy is an on-going critical process.⁷⁸ One can never arrive at the final or absolute truth. This theory of knowledge construction therefore demands researcher's continuous commitment to the discovery of multitude of perspectives, which are not fixed in time or absolute. How to uncover those perspectives is posited in the following section.

4. Methodology: The Feminist Toolbox

The Feminist Toolbox is a concept that has been used in previous writings,⁷⁹ yet authors use a different combination of methodologies in their varied theoretical approaches. The Feminist Toolbox here is combined with the theory of positionality, as the most appropriate theory to resist the previously constructed "common truths" or "objective standards,"⁸⁰ the latter being particularly prevalent in IP law. The combination of methods aims to devise an analytical approach (*i.e.* the Feminist Toolbox), that will shed light on the potential gender bias in IP law.

4.1. Consciousness Raising as the Meta-Method

The starting of all methods, is the consciousness raising,⁸¹ also referred to as a "meta-method."⁸² This method prepares any research area for all the subsequent feminist methods, including asking the woman question⁸³ or feminist practical reasoning⁸⁴ by identifying and ascribing the research value of women's experiences in challenging the *status quo* or the "dominant versions of social reality."⁸⁵ In order to enrich or enhance the traditional views, justifications and evaluation of IP law, it is therefore crucial to seek insights through "collaborative or interactive engagements with others based upon the personal experience and

⁷⁷ Bartlett (n22) 832.

⁷⁸ Bartlett (n22) 868.

⁷⁹ Keren (n21) 424.

⁸⁰ Freeman (n17) 1297 ("Feminist theory challenges the positivist-empirical tradition, the assumption that through observation and measurement by an objective observer the truth about reality will emerge.")

⁸¹ Bartlett (n22) 831.

⁸² Bartlett (n22) 866.

⁸³ See section 4.2.

⁸⁴ See section 4.4.

⁸⁵ Bartlett (n22) 866.

narrative."⁸⁶ To identify the potential hidden bias of IP law, researchers must conduct empirical research to unearth the narrative and personal experience of women and gender non-binary artists, musicians and other creatives.

4.2. Lived Experience of Women

The obvious step in appreciating the personal experience and narrative of female and gender non-binary creatives is to 'speak and listen to them.' This can include 'asking the woman question' or 'asking the woman about her experience.' As Nice explained, one of the common context-based methods of feminist jurisprudence is when researchers ground their perspective in women's lived experience.⁸⁷

Would researchers not know (by now), if there is gender bias hidden in IP law? It is posited here that the existing research and literature have not yet conducted empirical studies needed in order to understand any power or general inequalities within IP law.⁸⁸ Rubenstein and Isaac have stressed the fundamental nature of the lived experience of women method, to understanding the power in society and the follow-on recommendation to remedying any potential inequalities.⁸⁹ It will only be possible to answer the question of whether women and gender minority creatives have been left out of IP law, if we ask them the relevant questions surrounding their experience.⁹⁰

Bartlett explains the multi-tier approach to asking the woman question in that: (1) are there any gender implications of a social practice or rule, that is to say, have women been left out of policy or society's consideration; (2) if they have been left out, in what way has that been done; (3) if there is an omission, how can it be corrected?⁹¹ And in particular relevant to IP law, are the apparently gender-neutral standards set in IP law written in a way that values the experience of men over those of experience of women? Bartlett aptly observed on legal neutrality,

"Asking the woman question confronts the assumption of legal neutrality, and has substantive consequences only if the law is not gender-neutral. The bias of the method is the bias toward uncovering a certain kind of bias. The bias disadvantages those who are otherwise benefited by law and legal methods whose gender implications are not

⁸⁶ Bartlett (n22) 831.

⁸⁷ Nice (n21) 343.

⁸⁸ See section 2.3. There are some empirical studies in the US on the characteristics of IP systems, which have started the conversation: see Chapter (Mtima on Theory) at fnXX.

⁸⁹ Kim Rubenstein and Anne Isaac, 'Oral history as empirical corrective: including women's experiences in international law' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019) 356.

⁹⁰ Bartlett (n22) 837.

⁹¹ Bartlett (n22) 837.

revealed. If this is “bias,” feminists must insist that it is “good” (or “proper”) bias, not “bad.”⁹²

If there are any default settings in legal standards set in IP law, are they disadvantaging women? As observed by Bartlett, it is important to evaluate whether “some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense.”⁹³ The doctrinal evidence explored previously would suggest that there are clear disadvantages, and that IP rules are ‘male’ in their current default settings.⁹⁴ Speaking to women creatives will allow for the exposure of any default male settings in IP law in practice, or ‘in the real world’ and the understanding of how they operate, and allow for a critical evaluation of IP law, which might lead to the suggestion of a gender correction going forward.

4.3. Intersectionality

The need to diversify the feminist approach beyond another default, *i.e.* the white woman, did not stop at the overwhelming criticism of the theoretical blindness of liberal feminism, but extended to the methodology in feminist jurisprudence. It is here, that the importance and fundamental nature of intersectionality is recognised in that it becomes not only one of the theoretical approaches,⁹⁵ but more fundamentally as the method to feminist engagement with the law. Intersectionality a key element to the Feminist Toolbox. Established scholars of different feminist theories adopted intersectionality as a method, including MacKinnon in her radical feminist theory.⁹⁶

In order to expose the bias of IP law and its overwhelming neoliberal stance, intersectionality as a method is crucial, as artists and creatives can face a multitude of barriers in achieving success. Focusing on gender, without paying attention to race, class, ethnicity, age, (dis)ability or other circumstance, could cloak inequalities unknown to the researcher. Whilst starting the conversations with a multitude of diverse creatives from all fields of the creative industries, “intersectionality can illuminate the diverse ways in which relations of domination and subordination are produced.”⁹⁷

Intersectionality will therefore allow the researcher to evaluate whether there are women and gender minority creatives, which have characteristics or relations, that render them invisible to IP law and consequently their interests under-represented and unprotected. In order

⁹² Bartlett (n22) 847.

⁹³ Bartlett (n22) 837.

⁹⁴ See literature review in Section 2.2.

⁹⁵ As coined in 1989 by Kimberle Crenshaw (n64), described further in Williams (n17) 251.

⁹⁶ As noted in Chen (n64) 63. Also, in Ekaterina Yahyaoui Krivenko, ‘Women and the International Court of Justice’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019) 209.

⁹⁷ Brittney Cooper, ‘Intersectionality’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press, 2016) 401.

to fully appreciate the women's experience with IP law, intersectionality is not only the method in the Feminist Toolbox, but together with the meta-method of consciousness-raising, as characterised by Williams, the dominant feminist research paradigm.⁹⁸

4.4. Practical Feminist Reasoning, Rationality and Contextuality

Feminist engagement with any area of the law calls for a deeper context.⁹⁹ In replacing the apparently gender-neutral objectivity, feminist reasoning demands the appreciation of other perspectives, importantly the women's experience, and a more case-by-case assessment.¹⁰⁰ According to Keren, the objectivity in law is to be replaced with more contextuality.¹⁰¹ Contextuality as a method is complemented by practicality of feminist engagement with the law, but the reasoning is not irrational.

Feminist practical reasoning is rational, although the concept of rationality itself is to be viewed sceptically, when not challenged for its apparent favouring of the male default position. First, it is observed that issues are better appreciated on continuums, and not in the form of dichotomies. Here, Bartlett explains,

"Practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. [] [n]ew facts present opportunities for improved understandings and "integrations." Situations are unique, not anticipated in their detail, not generalizable in advance. Themselves generative, new situations give rise to "practical" perceptions and inform decisionmakers about the desired ends of law."¹⁰²

Equally, feminist critical thought does not refuse abstraction, and in that sense, remains a process of rationality. Bartlett again helpfully clarifies that,

"[f]eminist practical reasoning gives rationality new meanings. Feminist rationality acknowledges greater diversity in human experiences and the value of taking into account competing or inconsistent claims. It openly reveals its positional partiality by stating explicitly which moral and political choices underlie that partiality, and recognizes its own implications for the distribution and exercise of power. [] [f]eminist

⁹⁸ Williams (n17) 252.

⁹⁹ Presenting her case for contextual methods, Nice (n21) 343; also Krivenko (n96) 205 (listing contextuality as one of the main 3 feminist methods: (1) context-specific analysis and attention to the individual and his/her suffering (derived from feminist standpoint epistemology); (2) intersectionality; and (3) deconstruction of binaries and avoidance of hierarchies).

¹⁰⁰ Keren (n21) 422.

¹⁰¹ Keren (n21) 421.

¹⁰² Bartlett (n22) 851.

method [] strives to make more sense of human experience, not less, and is to be judged upon its capacity to do so."¹⁰³

Overall, all law making is the result of its context and social reality. Unless we can confidently point to the collection of women's perspectives in drafting the laws, it is time to investigate just how monolithic the experience of the author, inventor and performer in IP law is.¹⁰⁴

5. Exposing Gender Bias in IP Law: A Feminist Checklist for the UK Music Industries

There are several reports at the start of this chapter, which offer empirical evidence of the gender (and other categories) under-inclusion in the bigger, better founded organisations (record labels; radio stations or festivals) in the UK music industries. It is suggested here that this under-inclusion is present also in other sectors of the creative industries, but this chapter at present focuses on the music industries. What is unfortunately still not clear, is the role of IP law in this debate. At its core, intellectual property is meant to promote creativity and protect authors' material and moral interests.¹⁰⁵ The question remains, if there are broader societal inequalities that IP law should correct, in order to foster inclusive creative and expressive spaces.

The main human rights instruments, as written, aim to promote all creativity, not solely of particular type of a creative. As seen from Olufemi or Brook *et al*;¹⁰⁶ art, culture and creativity are, in practice however, not meant for all. There are political, systemic and other barriers, which obviate the purported aim of intellectual property laws to incentivise and promote intellectual creativity in all authors. Rather than simply accepting that intellectual property does not have the power to overcome all these barriers, it is argued here, that IP rules must be revised in a way to protect and empower creativity in the currently under-represented groups. The social justice rationale of IP protection recognizes this fundamental characteristic of an efficacious IP regime and thus mandates the implementation of IP protection in accordance with the precepts of socially equitable access, inclusion, and empowerment.¹⁰⁷ To ensure the ultimate efficacy of this realignment of the IP infrastructure, this revision of IP rules must be done critically and informed by empirical evidence. That together necessitates a structured, well-funded and collaborative project between the law, creative and business communities in the music industries.

¹⁰³ Bartlett (n22) 857-858.

¹⁰⁴ Bartlett (n22) 854 (stating that "feminist insist that no one community is legitimately privileged to speak for all authors [and consequently] feminist methods reject the monolithic community often assumed in male accounts of practical reasoning [...]).

¹⁰⁵ Article 27(2) Universal Declaration of Human Rights (UDHR) GA res. 217A (III), UN Doc A/810 at 71 (1948); Article 1 Protocol 1 European Convention on Human Rights (4 November 1950) 213 UNTS 221 (ECHR); and Article 17(2) Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (CFREU).

¹⁰⁶ Olufemi (n64); Brook *et al* (n5).

¹⁰⁷ See Chapter (Mtima on Theory).

5.1. Lived Experience of the Creatives: a Start to Women's and Non-Binary Narratives

All IP lawyers will be familiar with the “objective standards” within this area of the law. Whether it is the “average consumer” in trade mark law, or the “person skilled in the art” in patent law, or the “author” in copyright law, whose works are protected, if they amount to “author's own intellectual creation.”¹⁰⁸ Cases where third party uses will not amount to copyright infringement, because they amount to fair dealing, will be tested against the impression of fairness by a “fair minded and honest person.”¹⁰⁹

There are two compound barriers to overcome here. First, as already noted by feminist scholars, objective standards in law, when not informed by practice, will often exclude the lived experience of women, and are from that perspective ill-designed.¹¹⁰ And second, many artists do not know, or engage with IP law.¹¹¹ Therefore, a concerted effort must be made, to involve all artists into a critical investigation of IP law. From the perspective of this chapter (and the ongoing empirical project), women and gender minority artists must be invited to share their views and experiences directly.

To illustrate, when speaking to emerging artists in the music industries or other creative industries,¹¹² the initial study confirms, that they still hold the belief that the system is merit based, and with hard work, success will be achieved. In contrast, women who have long standing experience in the industry, do not share this view.¹¹³ The author calls these ‘merit tinted glasses’ which seem to come off, once an artist has been in the industry for a longer period of time. In a similar vein, emerging artists are not well acquainted with IP law, and all would welcome more information in this area. More established artists will have more knowledge but are not likely to pursue their legal rights in court of public opinion or litigation, for fears of retribution and future loss of career opportunities.¹¹⁴

Most artists agreed whether familiar with IP law in detail or only in general terms, that the law is incredibly complex.¹¹⁵ At the same time, artists wished and hoped for IP law to offer them rewards and protection, in the sense of control over their creative works.¹¹⁶ Therefore,

¹⁰⁸ The standards introduced here are based on UK law; as harmonized (sometimes indirectly) through EU sources. The originality standard in copyright law ‘author's own intellectual creation’ see Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* (2009) ECLI:EU:C:2009:465.

¹⁰⁹ Aldous LJ in *Hyde Park Residence v Yelland* [2004] RPC 604 [38].

¹¹⁰ Keren (n21) 421; also challenge to ‘reasonable businessmen’ standard made in Mary Keyes, ‘Women in private international law’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar, 2019) 105-106.

¹¹¹ Potočnik in ERAS (n23) speaking to Creatives 35, 18, 7

¹¹² Potočnik in ERAS(n23) speaking to Creatives 4 and 5 (emerging).

¹¹³ Potočnik in ERAS (n23) speaking to Creatives 12 and 19 (long-term experience).

¹¹⁴ Potočnik in ERAS (n23) speaking to Creatives 6 and 7.

¹¹⁵ Potočnik in ERAS (n23) speaking to Creatives 1 (‘a mine field’), 6 (‘had to learn it through conflict’), 18 (‘and currently not working’), 7 (‘I was oblivious when faced with an IP problem’), 9 (‘a mine field’), 2 (‘a very messy area’), 12 (not working ‘for individual artists’), 19 (‘difficult to enforce in practice’), 5 (‘not easily accessible’), 36 (‘some awareness, but not fully understood’), 27 (never knew about it), 4 (no meaning at all), 35 (aware, but not familiar with the detail of it; ‘I was not important enough for IP to take notice’ (in the form of disputes)).

¹¹⁶ Potočnik in ERAS (n23) speaking to Creatives 2, 7 and 9.

from the current lived experience collected, it is not suggested IP law be abolished all together. It is suggested instead, we are looking at a project of de-construction, with the aim of rebuilding.

5.2. Item 1: From Outputs to People

At present, IP law can be criticised to be too oriented on the 'valuable IP assets' as opposed to the artists (people) behind their creation. From the name of the UK Copyright, Designs and Patent Act (CDPA),¹¹⁷ the role of the person, who creates music or other creative outputs is not mentioned. The overall emphasis on the outputs appears to be more in step with neoliberal justification of IP law in the first place, rather the incentivisation of individual creators of the works, their personhood or their creative processes.

Relying on relational feminism it is suggested here that IP law should explore legislative solutions, which focus on the creatives (persons), and less on the outputs, assets or their corporate owners. In line with this, the current under-nourished moral rights under the UK CDPA should be improved and strengthened.¹¹⁸ When focusing on the rewards and incentives for the creatives (musicians), the law is focusing on the creation of circumstances in which all types of creativity would be embraced. By changing the rules on the works protected under CDPA,¹¹⁹ more could be done to also protect the creative process (as part of 'author's own intellectual creation'; or in rules on idea/expression dichotomy). Equally, the law could encourage creativity from all sectors in the society by abolishing barriers to professional success in the music industry (and creative industries more broadly).¹²⁰

Lived experience of female creatives (and musicians)¹²¹ confirms that the aim of IP law should be to facilitate 'utilities' beyond the mere profit-generation. IP laws, when amended, could promote the artists' opportunity to share their creative works, but also make an impact, share their ideas, raise consciousness of their living experience¹²² and overall, build relationships across their communities.

¹¹⁷ 1988, as amended: <https://www.legislation.gov.uk/ukpga/1988/48/contents>. Of course, the notion of the 'author' (s.9 CDPA) is instrumental to the concept of 'owner' (s.11 CDPA), but it is the works or outputs from s.1 CDPA that will qualify for protection (s.16 CDPA).

¹¹⁸ Moral rights appear a particularly useful tool for the protection of female and gender non-binary musicians, against claims raised by the copyright owner (if the author transfer copyright in her works). These issues reported as a matter of concern in Potočnik in ERAS (n23) speaking to Creatives 9 and 12.

¹¹⁹ Section 1 CDPA.

¹²⁰ This would also allow art to take on multiple functions in the society, for example Olufemi (n63) 93 (Olufemi speaks to the use of art as a consciousness raising tool).

¹²¹ Potočnik in ERAS (n23) speaking to Creatives 1, 6, 9, 12.

¹²² Potočnik in ERAS (n23) speaking to Creative 4 (a particular concern when women create art, which is not considered as 'family friendly' for simply sharing female aspects of life).

5.3. Item 2: The Dominant Position of Gatekeepers in IP

Industry reports¹²³ and collected lived experience of female creatives¹²⁴ confirms that the music industries are controlled by organisations, which act as gatekeepers to the distribution of creative content and platform to commercialisation of certain creative works. This creates numerous issues of access and inclusion, which arguably originate in IP rules and their treatment of ownership and commercialisation of IP law.

Additionally, the selective signing of the creative talent by the UK record labels and the lack of inclusion of female musicians on radio rosters and festival circuits is exacerbating the issues in the system, as it exists right now. Musicians who are not signed by established record labels will struggle to arrange the business and legal side of their creative process, which puts them at a disadvantage when disseminating their works, and also earning a living from them. IP law does nothing to alleviate these systemic barriers, which on the whole, are prevalent for women and gender minority creatives. By rethinking the monopoly position of the gatekeepers in the music industry, the position of an individual artist could be strengthened.

Finally, the 'big players' often represent the music industries in legislative inquiries, which is problematic, when their signed talent is not representative of the society and/or the creative talent.¹²⁵ It is therefore imperative that the under-represented groups of musicians continue to come together in formal, or informal networks, and share their lived experience with the decision makers. In the UK for example, this is now done with the new establishment of The F-List for Music CIC, which represents all female musicians, of all genres, which have been enrolled on the F-List (currently 5,000 strong).¹²⁶

5.4. Item 3: The Negotiation Black Hole

At present, most of the IP rules on commercialisation, assignment or licensing are based on the principle of party autonomy and the premise of equality of parties. That is however a starting point, which is not supported by the literature,¹²⁷ evidence and the lived experience of female creatives. One of the artists clearly stated that when signing their first contract, "she signed her life away with her early releases"¹²⁸ and this is possible under IP rules, because there are no rules on protecting the weaker party, here the individual artist. Appropriate contract control mechanisms, which would protect the individual artists, and also protect her creative autonomy, should be at the core of newly imagined legislative solutions. IP law should attempt to serve as

¹²³ See references at (n1, n2).

¹²⁴ Potočnik in ERAS (n23) speaking to Creatives 9, 2, 1, 12, 19 (for music); and 5, 35 (for other creative industries).

¹²⁵ DCMS Legislative Review on Economic of Music Streaming (opened in October 2020), written and oral evidence available: <https://committees.parliament.uk/work/646/economics-of-music-streaming/>.

¹²⁶ More information: <https://thef-listmusic.uk>.

¹²⁷ Mary W Gani, 'Negotiating Like a Diva: Preserving Creative Autonomy in the Music Industry' (2019) 3 WLJ 37.

¹²⁸ Potočnik in ERAS (n23) speaking to Creative 9.

a corrective mechanism to outside inequalities and barriers, not further exacerbate existing inequalities in the creative circles.

6. Conclusion

This chapter offers an overview of a wealth of empirical studies, done in UK Creative Industries, which together confirm that there is gender (together with race, class, age, disability and other characteristics) bias in the sector. What is yet missing, is a large-scale empirical study on the role intellectual property law plays (whether complicit or not) in perpetuating this actual, or unconscious bias. The author, relying on research funding¹²⁹ and collaboration with the industry actors,¹³⁰ aims to collect further empirical evidence, informing future legislative agenda on IP law.¹³¹

On a more practical note, one of solidarity, this researcher is taking the feminist approach to intellectual property to the industry, both in her role on the board of directors of The F-List for Music CIC, and at the University of Wolverhampton, where plans for the establishment of a non-profit record label are on their way. Whilst educating the under-represented musicians of their IP rights under the current systems, this researcher continues to collect, register and record the lived experience of multiple under-represented musicians. The aim is to use this wealth of information and first, de-construct the existing power structures in IP law; and second, rebuild IP law in accordance with IP Social Justice principles, which will empower multitude of musicians to create music and share their lived experiences with the world.

¹²⁹ Detail at (n20).

¹³⁰ The F-List for Music CIC (UK).

¹³¹ See current parliamentary and IPO investigations at (n16).