

## **“Intellect Eclipsed”: An Analysis of the Unconscious Bias and its Impact on the Development of Intellectual Property Law.**

Hasini Rathnamalala# and Padmaja Wijesooriya

*Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka*

rathn016@umn.edu

**Abstract:** The main objective of the research is to analyze the historical development of intellectual property law and its contemporary challenges in light of the feminist jurisprudential interpretations. The secondary objective is to examine the probable links between the areas in intellectual property law such as copyrights law, patent law and application of the relevant theoretical paradigms of feminist legal theory. The research methodology is based on the exploratory research design, adhering into the legal research methodology, which is mainly on library-based secondary data review. The outcome of this interdisciplinary research is a policy paper to recognize the dynamics of historical discrimination in order to overcome the contemporary challenges in gendered areas of intellectual property law.

**Keywords:** Intellectual Property Law, Copyrights Law, Feminist Legal Theory

### **I. INTRODUCTION**

Intellectual property law (Herein after referred to as IPL) is recognized as creating exclusive rights in a wide and diverse range of things from novels, computer programmes, paintings, films, television broadcast, and performances, through to dress designs, pharmaceuticals, and genetically modified animal and plant organisms. Intellectual property law also creates rights in the various insignia that are applied to various goods and services, from ‘FUJITSU’ for computers and to ‘I CAN’T BELIEVE IT’S NOT BUTTER’ for margarine. We are surrounded by and we constantly interact with the subject matter of

intellectual property law. For example, you are reading a copyright work bearing the Oxford University Press trademark. You are sitting on a chair protected by design rights and marking the book with a pen the mechanism for which has, at some stage, been patented. Alternatively, you may be typing notes into a computer, which no doubt has parts (such as the mouse) that are protected by patents and design rights. (Bently and Sherman, 2014)

On the other hand, feminist legal theory (hereinafter referred to as FLT) could be recognized as one of the main jurisprudential schools of thoughts in legal philosophy. As Minow and Verchik points out it is not as easy task; precisely to point out the exact starting point of FLT from world history. (Minow and Verchik, 2016) Feminist legal theories emphasize the role of law in describing society and in prescribing change, while other types of feminist theory might de-emphasize or even question the role of law in these areas (Minow and Verchik, 2016). Feminism has been described as a house with many rooms; theorists have offered various ways to analyse these chambers or schools of feminist theory. As they describe the world has been shaped by men (who possesses larger shares of power and privileges) women and men should have political, social and economic equality.

This research focuses on the link between IPL and FLT. While IPL providing legal protection aesthetic and scientific works by authors, FLT focuses on guaranteeing equality between men and women in areas such as

employment, family relation, right to participation in public life and political participation. Historically women did not enjoy right to participation in the democratic process or economic and social life and it indicates in the concept of women in IPL, in areas such as copyrights law, Patents and Trademark laws.

Considering the above, the authors willing to discuss on the IPL and its relationship with FLT.

## **II. GENERAL INTERPRETATIONS BETWEEN INTELLECTUAL PROPERTY LAW AND FEMINIST LEGAL THEORY**

Intellectual property scholarship and feminist epistemologies have proceeded upon parallel but unconnected tracks. (Halbert, 2006) Feminist scholars rarely, if ever, mention the words copyright, patent, or intellectual property; intellectual property scholars rarely, if ever, appeal to feminist interpretations to better understand the law. (Halbert, 2006) As indicated above, it should be noted that IPL's basis is "new knowledge" and FLT is based on the concept of equality between genders. In this research, the authors focus on the analysis of the foundation of theories in IP law and its impact on each other. For example, there is a link between equality and social construction on genders as accepted in FLT. On the other hand, IPL's basis, "new knowledge" It should be analysed in the gendered assumptions of FLT's in light of new knowledge and ownership-based creations of literature, science and aesthetic areas.

The construction of culture, knowledge, science, politics, and public life as masculine is premised upon the public/ private distinction significant in understanding the traditional place of women in the world. (Halbert, 2006) It is one of the prominent underlined theories in FLT. Further, FLT within the discourse of jurisprudential theory argues that substantive equality could not

persist as long as the society applies women the male standards and concludes it is equality. Feminist historical analysis suggests that women were systematically excluded from sites of production, and, as assorted crafts became masculine territory, women were not given the opportunity to develop knowledge in those fields. (Halbert, 2006) This could be understood in light of certain FLT arguments and gendered assumptions on woman's role in the society. For example, in the peak of the industrial revolutionary years, women's role mostly limited as 'home-makers' or 'primary caregivers' while men were the 'bread winners'. (Cook and Cusack, 2011) In the above scenario, even the concept of Aristotelian Sameness theory could be prevailed to some extent, as Halbert correctly points out above, women were not in a position to contribute freely and openly in male constructed social and cultural arena. Women historically have been shut out of the industrial system of knowledge production, a system that takes place in factories, laboratories, and research institutes. (Halbert, 2006)

## **III. COPYRIGHTS LAW AND APPLICABLE PRINCIPLES OF FEMINIST LEGAL THEORY**

Copyrights law is one of the major areas in IPL. Copyright is the term that used to describe the area of intellectual property law that regulates the creation and use made of a range of cultural goods such as books, songs, films and computer programmes. (Bently and Sherman, 2014) Copyrights law could be defined as The rights specified under the statute include the exclusive right of reproduction, the "copy" right, as well as exclusive rights to distribute, publicly perform, publicly display, and adapt protected works. (17 U.S.C. § 106, 2005).

Over the past century it has been the focal point of anxieties over law's ability to adapt to new technologies. Copyright law determines the number of literary and artistic

copies that created by the author. Our post-industrial era is marked by rapid technological changes in which our ability to reproduce and receive information grows exponentially. (Joyce, 2013) Many of our grandparents witnessed the development of the television as a novel feature and communication through cables and satellite would belong to a hazy future. Despite the cable and satellite communication, today, we are linked to digital era where experiencing the physical distance to carry texts, images, and sounds with startling ease and rapidity. (Joyce, 2013)

As elaborated by feminist legal theorists, women were perceived as homemakers. Hence knitting and cookery were considered as essential elements in their stereotypical gendered roles until recent. Therefore, traditionally, cooking recipes and the knitting patterns, quilts designs were shared from generations to generation or from county to country without any copyrights protection. However, in the commercial world, knitting and cookery as a trade lead significantly by men as major income generating sources. Cookery books and knitting books are currently copyrights protected and considerably expensive. It is a noteworthy example on male construction in the area of copyrights. Especially it is a generalization of women's contribution as recognized by societal norms such as caring and nurturing nature goes without monetary value.

Halbert is one of the prominent authors in the area of gendered aspects in American copyrights law and she argues this issue in several important ways. Firstly she connects the social construction of gender to copyrights law. Theoretically speaking, women stand outside, or on the periphery of, masculine creation. If creative work, either scientific or artistic, is to be protected legally, it will on balance be the work of men. (Halbert, 2006) If the very construction of knowledge that is the basis for claims to

copyright and patent protection is gendered, then what is protected is the outgrowth of a gendered system rendered invisible until a feminist lens sheds light on the politics of this otherwise "neutral" construction. First, a feminist epistemology can be grounded in an examination of craft labor done by women. (Halbert, 2006) Craft labor focuses on labor performed by women involving "caring" -- the labor of the hand, brain, and heart. (Halbert, 2006) Masculine knowledge exists within a capitalist mode of production, dividing subject from object and knower from the known. What men do for recognition, women do for love. (Halbert, 2006) A masculine social construction of knowledge means that women and men primarily participate in an already determined system framed by masculinity. (Halbert, 2006).

Secondly, the author focuses on the historical developments in gendered aspects in printing phases of creations/authorships under copyrights protection. As the legal history and philosophy indicates, women's abilities in tradable areas were not recognized similarly to those of men. This was a famous realism in the male-dominated printing presses during the pre-world war II era that female authors were ousted. To remedy this, feminists started the printing presses on their own. The aforesaid phase in the world history is indicated by Halbert as the publishing industry has traditionally been male dominated and has led many feminists to seek alternatives to the mainstream publishing system. The most popular of these early feminist presses, The Woman's Press, was forced to create new distribution channels after being vilified by the mainstream male-dominated publishing industry. Feminists wishing to publish in the late 1960s and early 1970s met similar resistance to those writing in the early twentieth century. (Halbert, 2016)

Not only the area of printing but also the whole concept of authorship was gendered in

certain areas, for instance, the author of the famous “Mill on the Floss” Mary Ann Evans used the pen name George Eliot to write her novels in a time when female novelists were seen as only romantic authors. Mary Ann wanted to be taken seriously therefore appeared as a male-author to overcome the societal norms on then-female authors (Hughes, nd).

#### **IV. PATENTS LAW AND FEMINIST LEGAL THEORY**

Patents could be defined as a limited monopoly that is granted in return for the disclosure of technical information (Bently and Sherman, 2014). It is our primary policy tool to promote innovation, which encourage the development of new technologies, and increase the fund of human knowledge (Burk and Lamely, 2003). To accomplish this end, the patent modelled to creates a general set of legal rules that govern a wide variety of technologies.

The authors utilize this part of the research to denote the contemporary challenges in gendered aspects in patent law practice.

As indicated by Hagen, based on an empirical research published on the legal practice on the theme, “Essay on Women and Intellectual Property Law: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property”, based on the author, it was indicates that less female lawyers are involved in the litigation process in American intellectual property law, particularly patent law. As indicated by the above research, bachelor's degree and proof of scientific and technical training equivalent to that received for a bachelor's degree in one of the recognized technical fields is needed to qualify to patent litigation in American patent litigation. Though it is not required everywhere in patent litigation, women in technological and technical sectors are less recognized. The same issue applies

universally for women in many fields including attorneys engaged in litigation too.

#### **V. LITIGATION AND FEMINIST LEGAL THEORY**

Legal practice has been recognized in gendered parameters universally since its beginning. Internationally women were allowed to study law and enter the bar relatively after a long time to that of men. Pursuing legal education and a career, especially in the legal practice were influenced by perceptions and societal norms regarding women. (Mendis et. al., 2008) This affects inevitably on the IPL practice.

Further, the litigation process of IPL itself denotes the gendered dimensions. As indicated above in Hagen’s research “Essay on Women and Intellectual Property Law”: The Challenges Faced by Female Attorneys Pursuing Careers in Intellectual Property, a case study based on Sandra, a five year intellectual property litigator, Hagen indicates that there are still many obstacles for women as Sandra (the interviewee) puts it, "dare to trespass" into the former boys' club of intellectual property litigation. Further Hagen adds a model (Rosenthal, 1974) for a client and lawyer relationship in Intellectual Property Law as client is on equal status with the attorney and participates actively in the professional relationship for a more satisfied client.

As the outcome of the above research carried out by Hagen, This type of interaction is favoured by the trademark attorneys who were interviewed, and may be an additional factor explaining why there are more female trademark attorneys and why there are fewer female intellectual property litigators. This aspect of trademark law fosters an atmosphere in which the attorney and the client work together to achieve the same goal. In light of the Hagen’s empirical survey, this part of the research indicates that though it is a different jurisdiction, the outcome is

applicable beyond borders as it is very apparently applicable in intellectual property litigation universally.

## VI. CONCLUSION

Based on the above discussion, with three main findings on feminist interpretations on intellectual property law authors entail in their concluding observations.

Social construction of gender, unequal bargain power in political relations and its institutional application were also common in the area of intellectual property law. Specifically in the areas of copyrights law, the historical discrimination as indicated above undermined females as authors and traditional knowledge bearers.

Secondly, this reality has made an impact on women's litigation in current IPL related practice such as in trademarks and patent laws. The technological knowledge-based barriers as well as socially constructed gender roles in legal practice made a negative contribution in this regards. Further, this phenomenon could be described and termed as an "unconscious bias" Unconscious bias is a single term used by Justice Ruth Bader Ginsburg to describe generations-long societal attitudes on gender roles. However; its impact on female litigators is irreparable.

Thirdly, to overcome the above contemporary challenges in the area of intellectual property law, these historical discrimination and the contemporary challenges such as "unconscious bias" should be taken to the limelight in order to eliminated further discrimination and for the betterment of the future of intellectual property law as whole.

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Authors are lecturers in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. They are Attorneys-at-Law and currently reading for their M.Phil/Ph.D.s in Law. Authors hold LLM and LL.B. (Hon) from the Faculty of Law, University of Colombo. Hasini Rathnamalala holds LLM in Human Rights Law (University of Minnesota Law School-USA) and her research areas are Human Rights Law, Jurisprudence and International Humanitarian Law. Padmaja Wijesooriya holds LLM in Intellectual Property Law (Faculty of Law, University of Exeter, UK). Her research areas are Intellectual Property Law and Traditional Knowledge.

