
COMMENTS ON PANEL 1

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I am extremely grateful to both of these speakers for sharing these papers with us. The papers themselves are beautifully written. I had immense joy in reading them, and I am very happy they are part of this conference. I want to congratulate both of you for doing such big projects in a short amount of space and synthesizing so much work, and interdisciplinary work at that. I am going to attempt to say a few things that might put the papers “in dialogue.”

In a sense, both papers talk about dualisms. Most obviously, Dan’s paper examines the mind/body dualism. Carys’s paper also involved a dualism: the origination/imitation dualism, if you will. Each paper reminds us that these dualisms, or paradigms, do not map onto reality very well. Instead, these paradigms mask reality and produce some negative effects. One effect is an inaccurate distribution of rights. Perhaps we saw that most clearly in Dan’s paper. These dualisms cause us to devalue feminized traits. In the IP context that means that they cause us to incorrectly value the labor and the production of creating works, as well as the works, inventions, and discoveries themselves. In fact, these dualisms may not even have the desired effect of incentivizing behaviors that we would like to incentivize through the intellectual property system (i.e., the progress of the arts and sciences). These insights are important contributions to a feminist study of intellectual property.

Nevertheless, I wonder about the project of deconstructing these paradigms and where that leads us. If we deconstruct the mind/body dualism and the authorship construct, what would be the result? What would happen if the law recognized what Dan terms “invisible work”? What would be the practical effect of rendering this work legally visible? Wouldn’t we have more patents issued? Would this be a good thing for competition? Carys acknowledged this a little bit in her paper when she said, “this deconstruction might lead to the demise of the copyright system,” which she thought may not be a good thing. But both of these papers recognized that these paradigms offer us a convenient ruse. They offer the intellectual property system a ruse for the location and assignment of rights and for the requirements of the creation of rights. And they also

remind us that these paradigms have really taken hold. They seem to have intuitive appeal, and they seem to outlast any critique.

These papers caused me to recall a recent visit to the Museum of the American Indian where I saw a performance of tribal song and dance. Through the introductions to these performances, we were informed that the songs and dances were very traditional and that they were being performed according to the traditional rules. But at the end, each song was credited in a way that was surprising to me. Some young person would be pointed out as the “owner” of the song. I wondered how these songs could both be so traditional and authentic and also have their ownership assigned to an individual, and a young one at that. I wonder now, given what we have heard from these papers today, whether that “owner” may have discovered the songs. Or perhaps the owner was in dialogue with them. Or maybe the owner made the songs concrete if they had previously been in the mind only. In other words, this ownership system may represent an alternative imagined in these papers. Perhaps it offers the kind of practical assignment of rights without maintaining the traditional ownership paradigm.

The speakers demonstrate for us that feminist theory can make important contributions to the field of intellectual property and have thus earned their airfare here in doing that today. Feminist theory allows us to acknowledge this ruse for what it is, and thereby allows us to expose its detrimental effects and to offer alternative solutions. Dichotomies are attractive because of the simplistic truths they seem to offer. But in their simplicity they do not always work so well. These dualisms and constructs are therefore not constant in the development of IP law. We see, and there are examples of this in both of the papers, where these dualisms and constructs have ebbs and flows. They come on very strongly at some points and they conveniently recede at others. It is at these moments where these paradigms emerge and disappear that they are really doing their work. And it is at these points that we have an opportunity to offer alternatives that we can take from feminist theory.

I want to thank these speakers for the hope that they have given us for this project in intellectual property. It has been a great start for this conference because they have given us a real foundation for this feminist project. I want to again acknowledge the great contribution from these speakers. Thank you.