Cats, Crafts, and Creativity
By Kara W. Swanson

An ardent cat lover observes what she suspects is an immunodeficiency in stray cats, and records
detailed observations in support of her hypothesis, later proven by a virologist working in a
school of veterinary medicine. When the cat lover is left out of the resulting patents, she sues,
unsuccessfully.\(^1\) A quilter laments the loss of a “culture of quilting” based on sharing,
cooperation, and admiring imitation as the assertion of copyright claims warns against passing
patterns to a friend or raffling a quilt made from a copyrighted pattern.\(^2\) Each of these women is
objecting to the subject matter of intellectual property, as the law conflicts with her
understanding of creativity and innovation. Although both the Patent Act and the Copyright Act
are facially gender neutral, these examples demonstrate how the legal definitions of “author” and
“inventor” and the “works” and “inventions” they create reinforce persistent gender disparities in
patents and copyright registrations.

Anyone who has been paying attention is not surprised that women earn fewer patents
than men. Women are underrepresented in STEM education and in STEM employment, facts that
would support a prediction that women receive fewer patents.\(^3\) Despite recent increases in
women in STEM, women receive less than 15 percent of United States patents, a disparity that
far exceeds women’s STEM participation.\(^4\) Because historically there has been less overt
discouragement of girls and women from creating in non-STEM fields, we might predict less
gender disparity in copyright registration, and we would be correct. Registration reflects
commercialization potential, however, and the copyright-intensive industries—music, video, and
software—reflect the same lack of women in authority as do traditional STEM fields.\(^5\) While
gender disparity in copyright has been decreasing since the 1970s, women receive only slightly
over 30 percent of copyright registrations, ranging from barely over 10 percent in software to
almost 50 percent in art.\(^6\) These disparities in both patents and copyrights reflect long-enduring
and consequential institutional structures and implicit biases that are important to identify and
resist if we want to draw upon the full potential of our citizenry and allow all creators to harness
the potential of intellectual property.

They are not the entire story of intellectual property and gender, however. In our laws to
promote the progress of science and the useful arts, the United States has defined the subject
matter of copyright and patents in ways that have tended to exclude women.\(^7\) Intellectual
property law focuses on the protection of abstract knowledge generated by an individual seeking
to monetize a creation in the market, that is, “commodity creativity.” There is another broad
sector of creativity, however. Domestic crafts—those labors left in the household as “women’s
work” as production shifted to the factory during the industrial revolution—generate embedded
knowledge that is created and shared through informal social networks rather than learned
formally in credentialing institutions like schools and trade apprenticeships. Often (although not
always) domestic creations are motivated by an ethos of caring for one’s family or community
rather than by profit.\(^8\) This division between commodity and domestic creativity is reinforced by
our intellectual property laws, tending to leave more female creativity excluded from protection.

For example, copyright law has traditionally excluded recipes and clothing from
protection. Cooking and sewing are areas of creative endeavor historically dominated by women,
as are other domestic crafts, such as knitting, quilting, and embroidery. As applied to these crafts,
copyright can feel both underprotective and overinclusive. Categorically excluding types of
creation from the legal status of authored works—like recipes—is an indication that such
creation is lesser, lacking even that modicum of originality that copyright requires. Yet as the protest of the quilter reveals, applying copyright protection to the “pictorial” aspects of a useful article like a quilt, or treating a knitting pattern like a copyrighted architectural drawing, also disturbs the norms of crafting creation, failing to acknowledge or support the communal ways in which such creativity is generated. Quilting and knitting have long been social endeavors, done in bees and circles, in which women admired, copied, and adapted each other’s designs, and passed along patterns as part of folk traditions that lacked identifiable single authors. Some members of craft communities have sought to move their creations into the marketplace, and to use copyright to define and protect their productions as commodity creativity. Other members of such craft communities have found such claims bewildering or even harmful, threatening the constant cycle of copying and adaptation that has created the rich array of options that are the basis of any new pattern.

When the transformation of domestic creativity into commodity creativity is done not by the creators themselves, but by a third party from outside the community, it can become unclear how works can be situated in both categories, and how much the creative community is benefiting. For example, controversy has swirled about the sale of intellectual property rights by the famous African American quilters of Gee’s Bend, Alabama. Their innovative creations have been displayed in museums, showcasing quilts as individual art pieces (and greatly enhancing the value of the quilts purchased by the art collector who “discovered” them). The same collector brokered a sale of intellectual property rights in the quilt designs to a for-profit venture. That venture has licensed the use of patterns on bed linens, rugs, candles, and other mass-produced housewares, sold as “Gee’s Bend” products, both acknowledging and exploiting the communal nature of the quilts. While monies are returned to the community, the lack of control by the quilters of the commercial development of their creations demonstrates the distinction between commodity and domestic creativity and the uneasy fit of intellectual property in domestic craft communities.

Similarly, the type of knowledge that patent law considers part of an inventive contribution distinguishes between technical or scientific knowledge and lay knowledge. When Marlo Brown suspected that the cats in her care were suffering from a virus similar to HIV, she collected supporting evidence from observations of the cats. A virologist was able to use her hunch and observations to isolate the virus, which was then patented. Brown lost her suit to be named as a coinventor because the court found that as a “nonscientist” she had not contributed to the invention, following clear patent doctrine interpreting “conception.” Lacking the training to isolate the virus herself, or to collaborate with the researchers once the investigation moved from sick animals to the cellular level, Brown did not participate in the creation of knowledge “made by man” that occurred in the laboratory. Her careful observation of nature, and her hunch based on those observations, was not an “invention” as defined in patent law, even though but for her observations the laboratory invention might not have occurred.

These anecdotes do not illustrate misapplications of intellectual property law, but rather the gendered effects of existing doctrine, conventionally applied. Further, these omissions and mismatches are not necessarily undesirable results. Our laws, as intended, best protect commodity creation. But it is worth noting the gendered aspects of the distinctions the law borrowed when privileging abstract, individual creation, and remembering that this distinction was neither inevitable nor neutral. In defining the originality of the author and the mental conception of the inventor, intellectual property law has replicated pervasive assumptions about
cultural production, innovation, and individual action that have helped keep the author and inventor, as a matter of law, male-dominated.

**BIO:**

**Endnotes**
7. Although not the focus of this article, the same is true with respect to race. Id. at 14–17; Lisa D. Cook & Chaleampong Kongcharoen, The Idea Gap in Pink and Black (Nat’l Bureau of Econ. Research, Working Paper No. 16331, 2010), http://www.nber.org/papers/w16331.pdf.
9. See Robertson, supra note 2.