

# FAIR USE AND THE FAIRER SEX: GENDER, FEMINISM, AND COPYRIGHT LAW

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## INTRODUCTION

Copyright laws are written and enforced to help certain groups of people, largely male, assert and retain control over the resources generated by creative productivity. Consequently, the copyright

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infrastructure plays a role, largely unexamined by legal scholars, in helping to sustain the material and economic inequality between women and men.

Female creative output commands less attention and less money than the creative works of men, and women are less visible and receive less compensation than their male counterparts when they collaborate in the production of creative works with men. Male writers, male singers, male visual artists, male actors, male directors, male producers, male composers, male architects, and male authors of almost any form of copyrightable work dominate the cultural terrain and thereby acquire and control a substantial majority of the financial resources that creative works accrue.<sup>1</sup>

Copyright laws formulate and regulate the distribution channels through which copyrighted works are exploited. Whether authors, intermediaries, and consumers are treated fairly, or treat each other fairly, is partly a function of copyright laws. Copyright laws, therefore, have an impact upon whether women are treated superior to, inferior to, or equal to men in copyright-related contexts. Identification of some of the specific issues that exist at the intersection of gender, feminism, and copyright law is the focus of this article.

Many of the professionally prominent, active legal scholars in the intellectual property subject areas, those whose publications obtain high numbers of citations and receive the most numerous and prestigious speaking engagements (citations and conference invitations being important metrics for gauging reputation and prestige), do not explicitly address issues of gender, race, or economic class in their scholarship very frequently.<sup>2</sup> While concepts of liberty,

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1. To confirm this point, the author asks readers to look at the “best seller” lists for books, music, and listen to which artists are in heavy rotation on commercial radio. Look at what male actors earn versus female actors, look at who wrote the plays that are produced on Broadway. Look at who wins the Academy Awards in almost every category. Look at who wins architectural awards. Look at who works in Hollywood—directors, even camera operators. Look at the masthead of every major newspaper or magazine. See *generally* Who Makes the News?, Global Media Monitoring Project 2005, at <http://www.whomakesthenews.org> (promoting fair gender portrayal in news in an effort to make it the professional standard); <http://www.seejane.org> (noting that girls aged 12 to 15 are more likely than boys to have a mobile phone, use the internet, listen to the radio, and read newspapers or magazines).

2. This is a broad generalization to which there are important exceptions. Out of concern that I might omit or mischaracterize a person or her work, I respectfully decline to list specific names or scholarly works here beyond those listed in some of the footnotes immediately following this one, but I am certainly aware of, and very pleased about, their existence. I have previously written about gender and intellectual property issues in: Ann Bartow, *Our Data, Ourselves: Privacy, Propertization and Gender*, 34 U.S.F.L. REV. 633, 676 (2000) (arguing that individuals should have property rights to their own personal information); Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 799 (2004) (discussing how commodification of the stereotypical “very easily confused female consumer”

equality, and social justice are certainly discussed, it is often through lenses of economic analyses that rely on gender, sexual orientation, economic class, and race-neutral assumptions about human behavior.

Happily, some established legal scholars are writing about issues such as the intersections between intellectual property and issues of gender, sexual orientation, and race,<sup>3</sup> and other more junior legal academics are making important contributions to this discourse as well.<sup>4</sup> This is an exciting and important development that reflects both a maturation of scholarly trends within the intellectual property subject areas and the fresh diversities of thought that the intellectual property related subject areas inspire. The substantial bodies of foundational doctrinal work in copyright, patent, and trademark law now in existence make more adventurous scholarship both possible

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affects judicial perceptions in trademark disputes); Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449, 481-82 (2005) (calling for greater scrutiny of how copyright laws and the policing of cyberspace fail to take into account female needs and perspectives in the online world).

3. See, e.g., Dan L. Burk, *Copyright and Feminism in Digital Media* (Minn. Legal Stud. Research Paper No. 05-12), available at <http://ssrn.com/abstract=692029> (discussing conflicts between current copyright law and feminist conceptions of hypertext); see also Llewellyn Joseph Gibbons, *Digital Bowdlerizing: Removing the Naughty Bytes*, 2005 MICH. ST. L. REV. 167, 198-99 (concluding that copyright laws do not prohibit the alteration of digital works to remove offensive content); Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 223 (2005) (challenging the use of current trademark law to reject "queer marks"); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 101 (1993) (advocating the use of copyright and patent law to facilitate the production of and deployment of knowledge into an accessible commons of information); Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 461- (1998) (discussing the ways in which the globalization of U.S. intellectual property law expands the rights of domestic intellectual property owners); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1356 (2004) (stressing that the unregulated public domain perpetuates global inequities); Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 75 (2000) (arguing against treating cultural identity as intellectual property and showing how claims of a right to Indian culture were used in an attempt to censor a film on Indian lesbianism).

4. See Sonya K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 Am. U. J. Gender Soc. Pol'y & L. 463 (2006); see also Timothy R. Holbrook, *Curing Heterosexuality? Moral Signals and the Potential for Expressive Impacts in Patent Law 1* (Apr. 11, 2005) (unpublished article, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=702587](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=702587)) (asserting that the patenting of genes linked to homosexuality encourages the discrimination and marginalization of gays and lesbians); Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Olufunmilayo Arewa, *Copyright on Catfish Row: Control and Compensation in Porgy and Bess* (Case Legal Studies Research Paper No. 05-3, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=667385](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=667385); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 356-359 (1999) (examining how the structure of copyright laws has operated to deny legal protection to black artists and musicians).

and, to some of us, greatly appealing.

The purpose of this article is to identify some of the gendered aspects of copyright law and suggest some feminist perspectives about them. The aim of the identification portion of the project is to create a list of gendered issues in copyright law with a reasonable degree of balance and objectivity. The goal of the feminist analysis, however, is decidedly normative.<sup>5</sup> The view asserted here is that important feminist principles are most harmonious with a “low barriers”<sup>6</sup> construction of copyright law. As a result, this article argues that low protectionism is the vision of copyright law that feminists should actively pursue. Not all feminists and/or copyright law scholars contemplating feminist legal theory are going to agree with this conclusion, and the author very much looks forward to reading or hearing and learning from their contrary views sometime in the future.

### I. GENDER AND COPYRIGHT LAW

Many substantive bodies of law have fairly obvious gendered aspects. Criminal law as a subject area encompasses gendered categories of offenses such as rape and domestic abuse; employment law includes gender and pregnancy discrimination and sexual harassment; and family law, with its focus on issues such as alimony, child support, child custody, divorce, and property division, has few doctrinal components that are not deeply linked to gendered characteristics and differences. These are merely a few of the most palpable examples.

Other legal subject areas have gendered issues that are somewhat less manifest on the surface, but still unmistakably present. Legal scholars have aptly demonstrated that less intuitively gendered areas,

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5. Other scholarly works advancing feminist views of copyrights include: Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 63 (1994) (examining how the notion of “reproduction” in copyright illustrates inherent gender biases); Deborah Halbert, *Poaching and Plagiarizing: Property, Plagiarism and Feminist Futures*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 111, 113 (Lise Buranen & Alice M. Roy eds., 1999) (describing early forms of copyright law as based on a male conception of authorship as “paternity” that excluded women from authority and authorship); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW 28-29 (1998) (examining the role of intellectual property law in the creation of cultural politics, identity, and difference); KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 270-78 (2005) (arguing that privatization and the over-use of intellectual property and copyright laws threatens free-speech and suppresses creativity); Burk, *supra* note 3.

6. See Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 43 VILL. L. REV. 13 (2003) (defining low barriers as relatively weak copyright protection).

such as tax law<sup>7</sup> and bankruptcy law<sup>8</sup>, also have components or cause outcomes that affect women and men disparately. Similarly, copyright law is an area in which gendered issues seem somewhat buried beneath a very complicated statute and dense body of case law. Excavation of the intersections between gender and copyright law will foster a richer understanding of copyrights and may generate significant policy recommendations and reconsiderations as well.

Copyright laws began as implements of censorship and remain tools by which the cost, availability, and, to some extent, even the existence of creative works such as songs, novels, movies, and paintings are controlled.<sup>9</sup> Copyright laws in the United States allocate dominion over creative works in seemingly gender-neutral ways, facially appearing to uniformly affect the creators and consumers of copyrightable works without regard to the sexes of the interested parties.<sup>10</sup> Yet cultural understandings of the purposes and strictures of copyright may measurably diverge across gender and promulgation and enforcement of actual copyright laws may have differential effects upon women and men. Consideration of these possibilities will enhance understandings of the overall fairness (or lack thereof) of the current copyright infrastructure.

The necessity and propriety of the current copyright legal regime is passionately contested for reasons rhetorically unrelated to gender-based inequities. Advocates of the “high barriers”<sup>11</sup> copyright scope tout the tremendous profitability of the music, television, motion

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7. See generally Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 133-34 (1998) (applying queer theory to critical tax scholarship and examining the way tax laws affect same-sex couples); Collected Papers of Marjorie Kornhauser, available at [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=22192](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=22192) (last visited July 26, 2006).

8. See Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 56 (2002) (asserting that bankruptcy law is a woman's issue and examining how bankruptcy legislation profoundly effects women's lives); see also Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427, 439 (1994) (applying economic theory to create a model for allocating the costs of preventing sexual harassment between employer and employee); Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1553 (1990) (describing bankruptcy law as a phallogocentric creation that perpetuates poverty among women).

9. See Pamela Samuelson, *Should Economics Play A Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 3, 20 (2004) (concluding that even though copyright is an important form of economic regulation, economic analysis should have more influence on copyright law and policy).

10. See Copyright Act of 1976, 17 U.S.C. § 101 (2005) (providing definitions that are carefully gender neutral, such as referring to “a person's ‘children’” and defining an author's “widow” or “widower” as “the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried”).

11. *Contra* Bartow, *supra* note 6.

picture, and publishing industries as evidence of the positive economic impact of powerful copyright protections.<sup>12</sup> They assert that acts of creation and distribution generate powerful intellectual property rights that the law should recognize, respect, and defend, so that the appropriate, deserving actors are fully compensated, and future works are adequately incentivized.

Critics of strong protectionism question whether the copyright laws allocate profits and controls in ways that maximize incentives to create and distribute new works<sup>13</sup> and note that enforceable copyrights may

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12. See *NOW: Judicial Review 2* (PBS television broadcast, June 17, 2005) available at [http://www.pbs.org/now/transcript/NOW124\\_full.html](http://www.pbs.org/now/transcript/NOW124_full.html); *NOW with Bill Moyers: Tollbooths on the Digital Highway* (PBS television broadcast, Jan. 17, 2003), available at [http://www.pbs.org/now/printable/transcript\\_copyright\\_print.html](http://www.pbs.org/now/printable/transcript_copyright_print.html) (quoting Jack Valenti's statement on behalf of the Motion Picture Association of America that, "if what creative people produce cannot be protected . . . then the victim is going to be the American republic and the inevitability of a lessened supply of a high quality expensive high budget material"); see also Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1619 (2001) (arguing that tighter author control over copyrighted works will result in increased quantity and quality of work produced); Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 73 (2003) (predicting that enhanced copyright protection creates an environment which will encourage the digital release and dissemination of works); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 260 (discussing how stronger copyright protections through the institution of private property regimes would result in greater savings for society through a reduction in transaction costs); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1013 (2003) (asserting that profit motives may overwhelm normative limitations on intellectual property); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (2003).

13. See LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 14-15 (2001) (advocating that constraints on "real space" creativity are no longer justified for Internet); see also JESSICA LITMAN, *DIGITAL COPYRIGHT* 14 (2001) ("The fact that technology enables copyright owners to exercise more complete control is no reason to modify the copyright law to facilitate it"); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 182-84 (2001) (stating that a "leaky system" of copyright best enables users to benefit from cultural proliferation while a reckless construction of copyright laws can lead to censorship); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1314-18 (1996) (advocating "low barriers" for copyright protection in the domestic context); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1142-43 (1998) (noting that copyright law authorizes too much intrusion into the privacy of individuals and that proposed provisions would threaten constitutionally proscribed limits of copyright protection); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1819 (2000) (concluding that a greater understanding of the creative process is essential for the creation of effective copyright protections); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 64-65 (2001) (taking a skeptical view of the social value of price discrimination and arguing that the reward for producers should be limited to an amount adequate to stimulate the creation of future work); Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 SW. U. L. REV. 1, 1 (2000) (arguing that intellectual property clause should be able to control government's ability to bypass financial scrutiny); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003); Samuelson, *supra* note 9.

actually be unnecessary for the flourishing of whole categories of creative endeavor.<sup>14</sup> They observe that the computer software industry, and many of the technologies underlying the Internet, developed without receiving much in the way of legally enforced monopolistic controls.<sup>15</sup> Similarly, clothing designs and cooking recipes do not generally receive copyright protection, and yet we do not go naked and hungry, nor do we typically observe or experience vacuums of creativity with respect to fashion or food.<sup>16</sup>

Vigorous disagreements about the proper societal role and scope of copyright laws have made copyright law a high-profile matter of public debate but without much explicit acknowledgement or discussion of embedded gender-related aspects. That does not mean that gender-based dissonance is not present or that it is not significant. Copyright laws may be undesirable and counterproductive in gendered contexts because they are likely to impede creativity by women rather than incentivizing it and to obstruct rather than facilitate the broad distribution of creative works and useful knowledge to women.<sup>17</sup>

Copyright laws were written by men to embody a male vision of the ways in which creativity and commerce should intersect. Whether this model of copyright serves women as well as men has not been a primary consideration of policy makers, if it has even been contemplated at all. Men dominate Congress and the federal judiciary, as well as the large-scale, copyright-holding enterprises that interact with, and have the ability to influence, the federal

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14. See, e.g., Raymond Shih Ray Ku, *The Creative Destruction Of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 295-300 (2002) (examining the distribution of online music and suggesting that copyright impedes creativity and is unnecessary for digital works); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); see also VAIDHYANATHAN, *supra* note 13, at 180 (discussing the positive effect of MP3 distribution and peer-to-peer networks on creative musical discourse); see also COOMBE, *supra* note 5, at 290-91 (explaining what makes a political community common and how that community can enable the creation of literary discourse).

15. See *id.*

16. See LITMAN, *supra* note 13, at 105-106; see also Malla Pollack, *A Rose is a Rose is a Rose – But is a Costume a Dress? An Alternative Solution in Whimsicality, Inc. v. Rubie’s Costume Co.*, 41 J. COPYRIGHT SOC’Y U.S.A. 1, 16-17 (1993) (evaluating the use of copyright law to protect costume designs); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477, 1479 (1991) (proposing the extension of copyright protections to food in order to encourage consumers to share recipes).

17. See Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL’Y 547, 548-62 (1995) (applying bargaining games to explain the different allocation of assets across gender in terms of real or culturally perceived differences in preferences for cooperative strategic behavior); cf. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 424-38 (1992) (explaining how prisoners’ dilemma games and zero-sum games provide insights about relative wealth levels of women and men).

government. Feminist legal scholar Catharine MacKinnon has written.

Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.<sup>18</sup>

Men have defined key copyright concepts such as “authorship,” “protectability,” “infringement,” and all of the other precepts, terms, and conditions of copyright law. As will be explained below, it is highly probable that there are gendered differences in the ways that copyright laws benefit and burden everyone affected by copyright laws and practices, including authors, intermediaries (such as editors, publishers, and distributors), and consumers. The strictures of copyright law are undoubtedly experienced differently by discrete groups of women, as are the benefits and opportunities of copyright protections. Both women and men are extremely diverse within their respective genders and essentializing people strictly by gender can be deeply problematic.<sup>19</sup> Nevertheless, reflection upon whether gender biases may be embedded in copyright laws and policies is both useful and necessary, even if initial forays into this complicated terrain require a somewhat unrealistically essentializing, gender-dualist approach.

Considerations of gender issues in the structure and application of copyright law will not displace other sorts of policy analyses, but rather enhance them. Evaluation of the gendered implications of copyright issues can be integrated into a wide variety of ongoing scholarly inquiries. Because authorship, intermediation, and consumption are fluid and overlapping constructs, copyright laws affect many individuals in multiple ways. Gender is only one variable, but it is an important and largely immutable characteristic inherently present in any copyright circumstance that bears independent scrutiny.

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18. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 81, 84 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

19. See, e.g., *Culture Cat, Essentialism: Draft of 3W Encyclopedia Entry*, Aug. 7, 2004, <http://culturecat.net/node/essentialism> (describing how broad essentialist views of “natural” gender roles premised on biological difference reinforce harmful sex stereotypes and hierarchies).

## II. FAIR USE, FAIRNESS, AND GENDER

The current model of U.S. copyright law, within which the copyrights in creative works can be characterized as pieces of saleable “property,” is a masculine construct. Certain kinds of works, those best suited for industrialized commoditization, have been heavily propertized through a symbiotic blend of copyright and contract law precepts, while other forms of arts and crafts, those that have been relegated to the domestic realm, are less often the subject of rigorous copyright protections or restrictions. Categories of works specifically enumerated in the Copyright Act are described very generally, and they are open-ended by design.<sup>20</sup> Specific works that receive powerful copyright protections from the courts are typically those that have been broadly commercially exploited. This is because the copyrights in monetarily valuable works are most likely to be deemed by their owners worthy of “protection” through infringement litigation, which can be lengthy and expensive. The fact that the plaintiff works in copyright infringement suits tend to be culturally visible may lead to a perception that the more remunerative a work, the more extensively protected its copyrights are. People who create things for noncommercial purposes may feel that copyright law has nothing positive to offer them. Though their works may be inherently vested with robust incipient copyright protections, without the will or ability to fund the legal activity necessary to enforce these copyrights, it may seem as if copyright protections barely exist at all.

For some authors, copyright law impacts them chiefly by making them vulnerable to allegations of infringing copying. As a consequence, the copyrights of others affect their creative lives more than their own copyrights.<sup>21</sup> “Fair use,” the legal doctrine allowing unlicensed, non-permissive uses of copyrighted works,<sup>22</sup> is therefore critically important. It is the friction-reducing statutory construct by which, at least in theory, copyrighted materials can be used without engaging in sometimes onerous quests to obtain permissions, negotiate commercial transactions, or remit licensing fees. As a shelter from the buffeting copyright claims of others, fair use may be more important to noncommercial creators than it is to profit seeking entities.

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20. See Copyright Act of 1976, 17 U.S.C. § 102 (2005) (stating that copyright protection vests in tangible original authored works, including musical, pictorial, and literary works, but does not extend to original ideas embodied in the works).

21. See McLEOD, *supra* note 5, at 142 (discussing the growing trend of corporations suing artists for the use of culturally iconic trademarks in music or art).

22. See 17 U.S.C. § 107 (stating that the fair use of copyrighted works for purposes including teaching and news reporting will not constitute infringement).

Fair use liberates authors to fairly copy, adapt, or embed portions of pre-existing content into their own new creative endeavors. Fair use enables intermediaries to fairly develop new content delivery models and distributive technologies without incurring secondary liability. Consumers utilize fair use when they fairly make noncommercial backup or auxiliary copies of copyrighted works they have purchased or use them in a way that might otherwise infringe one or more of the exclusive rights held by copyright owners.<sup>23</sup>

One can only avail herself of fair use by using fairly, which limits and complicates the doctrine, but encompasses considerations far more expansive than commercialization and monetary exchange. To the extent that women and men may construe fairness differently, the definition of fair use is susceptible to gendered shadings. Fair use determinations invoke ethical and moral considerations, which many observers believe are influenced by gender.<sup>24</sup>

The cultural gendering of fair use is observable when, for example, a representative of the Recording Industry of America asserts about peer-to-peer music uploading and downloading: "I don't think your mother had in mind this kind of sharing."<sup>25</sup> Good mothers,

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23. See 17 U.S.C. § 106 (establishing the exclusive rights of a copyright owner, which include the exclusive rights to reproduce, distribute, and publicly perform or display the copyrighted work).

24. Rosemarie Tong, *Feminist Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (2003), <http://plato.stanford.edu/entries/feminism-ethics/> (citing Alison M. Jaggar, *Feminist Ethics*, in ENCYCLOPEDIA OF ETHICS 363-64 (Lawrence C. Becker & Charlotte B. Becker eds., 1992)).

Among others, feminist philosopher Alison Jaggar faults traditional western ethics for failing women in five related ways. First, it shows little concern for women's as opposed to men's interests and rights. Second, it dismisses as morally uninteresting the problems that arise in the so-called private world, the realm in which women cook, clean, and care for the young, the old, and the sick. Third, it suggests that, on the average, women are not as morally developed as men. Fourth, it overvalues culturally masculine traits like independence, autonomy, separation, mind, reason, culture, transcendence, war, and death, and undervalues culturally feminine traits like interdependence, community, connection, body, emotion, nature, immanence, peace, and life. Fifth, and finally, it favors culturally masculine ways of moral reasoning that emphasize rules, universality, and impartiality over culturally feminine ways of moral reasoning that emphasize relationships, particularity, and partiality.

*Id.*; see also CAROL GILLIGAN, IN A DIFFERENT VOICE 105 (1982) (suggesting that the concepts of goodness and care are central to women's construction of morality); Eva-Maria Schwickert, *Gender, Morality, and Ethics of Responsibility: Complementing Teleological and Deontological Ethics*, HYPATIA, Spring 2005, at 164, 165-70 (evaluating theories on gender differences in the construction of moralities).

25. Brock Read, *Industry Executives and Copyright Activists Debate File Sharing at a Cornell U. Colloquium*, CHRON. OF HIGHER EDUC., Apr. 29, 2005, at A30 ("Mr. Sherman acknowledged that recording studios have struggled to convince college students that piracy is unethical . . . 'We've clearly lost the vocabulary war, because it's called file sharing, which sounds wonderful,' he said. 'But I don't think your mother had in mind this kind of sharing.'").

according to the view implicit in this comment, establish a moral paradigm of intellectual property use by their children that does not encompass putatively infringing behaviors.<sup>26</sup> Why the comment references “mothers” rather than “parents” suggests that the speaker sees women as important arbiters of copyrights and “copywrongs.”<sup>27</sup>

Generalizations about divergences between the views and behaviors of women and men are of limited utility, and they risk assuming either too much difference or similarity between the sexes, as well as too much uniformity within them. Some aspects of discernible difference, however, are reasonably the subject of data-generating empirical research. Relevant “authorship” data, for example, would include information about gender differences in terms of the number of authors who create independently and are initially vested with ownership of their copyrights versus the number of authors who create under “work for hire” status and, therefore, never own or control copyrights in their works unless awarded these rights by contract.<sup>28</sup> The relationships of gender to rates of creative productivity, inclinations toward artistic collaboration, income levels, and professional status would also be of interest. Gendered statistics with respect to the numbers of commercial creative works that are produced in various media, and the levels of commercial success these works achieve, would be useful and informative as well. Little data on this subject is currently available.

There is, however, both anecdotal and empirical evidence about gendered differences in authorship that is available in many individual contexts. One only need open a typical newspaper to see that women, who comprise over half of the U.S. population,<sup>29</sup> are significantly underrepresented as content providers on the Op-Ed

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26. *But see* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, in *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 25, 30-37, 40-41 (1994) (describing “Mom,” who makes sacrifices for the common good by favoring greater joint utility over individual wealth maximization, as the “heroine” of various group thought experiments).

27. *See* VAIDHYANATHAN, *supra* note 13 (emphasizing the existence of “copyrights” and “copywrongs”).

28. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (noting that § 101 of the Copyright Act of 1976 provides that a work for hire is: (1) a work prepared by an employee within the scope of employment or (2) a work ordered or commissioned for use as a contribution to a collective work).

29. *See* U.S. Census Bureau, *Population Pyramid Summary for United States*, <http://www.census.gov/ipc/www/idbpyr.html> (last visited July 26, 2006) (recording that women made up fifty-one percent of the U.S. population in 2000 and showing population distribution of males and females among different age ranges); *see also* infoplease.com, *Ratio Of Males To Females, By Age Group, 1950-2004*, <http://www.infoplease.com/ipa/A0800439.html> (last visited July 26, 2006) (indicating that over the past fifty years there averaged ninety-six males per one hundred females in the United States).

pages,<sup>30</sup> on the comics pages,<sup>31</sup> and in most other authorship contexts throughout the publication.<sup>32</sup> While this might not mean that women write less than men do, it certainly suggests that their works are published and distributed less often and, therefore, “consumed” less as a result. Lack of publication opportunities certainly might dishearten and disincentivize female authors.<sup>33</sup>

The Guerilla Girls, a group of anonymous feminist artists, once publicized a poster that asked, “Do women have to be naked to get into the Met Museum?” and noted that less than five percent of the modern artists shown at New York City’s Metropolitan Museum of Art were female but more than eighty-five percent of the humans depicted nude in the displayed artwork were women.<sup>34</sup> Again, this statistic does not necessarily mean that women produce fewer quality paintings, but it does indicate that their works are less frequently displayed in prestigious venues and are therefore less successful by many traditional measures. This, in turn, might decrease incentives for women to take up painting, sculpture, and other visual arts as fields of study from which to launch careers.

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30. See *Women Still Infrequently Called Upon For Policy, Public Affairs TV Debates*, MEDIA REP. TO WOMEN, Winter 2002, <http://www.mediareporttowomen.com/issues/301.htm> (reporting on the absence of women’s voices and opinions in public policy discussions on influential Sunday morning public-affairs talk shows); see also Katha Pollitt, *Invisible Women*, THE NATION, Apr. 4, 2005, available at <http://www.thenation.com/doc/20050404/pollitt> (complaining that the many talented and outspoken female pundits are invisible to op-ed editors, who publish almost exclusively male columnists and bemoan the lack of female talent).

31. See Trina Robbins, *Gender Differences in Comics, Image & Narrative*, Sept. 2002, <http://www.imageandnarrative.be/gender/trinarobbins.htm> (noting that mainstream comic artists, almost all male, depict extremely over-sexualized female characters, and the small number of female comic artists, published by mainly by independent presses, depict women in a more realistic fashion); see also Jack Glascock & Catherine Preston-Schreck, *Gender and Racial Stereotypes in Daily Newspaper Comics: A Time-Honored Tradition?*, 51 SEX ROLES 423, 428-430 (2004) (asserting that a lack of female representation ‘behind the scenes’ has had a negative impact on depictions of women on television and in printed advertisements). *But see* Jackie Estrada & Elayne Riggs, *Women Doing Comics*, FRIENDS OF LULU, May 25, 2004, <http://www.friends-lulu.org/wdc.html> (compiling a list of women active in the designing and publishing of comics).

32. See Fairness and Accuracy in Reporting, Media Advisory “Women’s Opinions Also Missing on Television-Women of Color Virtually Invisible on Sunday Shows” (Mar. 24, 2005), <http://www.fair.org/index.php?page=2473>; Bob Papper, *Running in Place-Minorities and Women in Television See Little Change, While Minorities Fare Worse in Radio*, COMMUNICATOR, July-Aug. 2005, at 26-32, available at <http://www.rtnda.org/news/2005/071105.shtml>; see generally Laura Flanders, REAL MAJORITY, MEDIA MINORITY: THE COSTS OF SIDELINING WOMEN IN REPORTING (1997).

33. See Pollitt, *supra* note 30 (noting that few major news publications employ female columnists, who represent only one out of the nineteen pundits in the *Washington Post* and are completely absent from *Time*, where all eleven columnists are male).

34. See Jeffrey Toobin, *Girls Behaving Badly*, THE NEW YORKER, May 30, 2005, at 34 (discussing the formation of a feminist artist collective to promote women in the arts).

Information about intermediaries that would be relevant to a gendered analysis of copyright law would similarly track variables such as income levels, productivity, professional status, and commercial success. The ratio of female to male executives with decision-making power in all manner of media companies and arts organizations would be of interest, as would a gender-differentiated analysis of the creative and commercial decisions that are made. Such data would shed light on whether female executives are more, less, or equally as likely as men to favor, promote, and aggressively protect the works of other women.

Pertinent data about consumers would focus on gendered differences in purchases and usage of goods and services that derive their primary value from copyrighted works.<sup>35</sup> Ascertainable differences by gender in the quantity and form in which music purchases are made, for example, might suggest that women and men are not equally interested in commercially produced and distributed music.<sup>36</sup> On average, women may prefer to obtain or access music through different mechanisms than men. For example, one gender may download songs in greater numbers than the other.<sup>37</sup> There may be gender differences with respect to radio listening habits. Research might (or might not) demonstrate that women and men are not

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35. Contrasted with goods or services in which copyrighted works are used to create an artificial monopoly that burdens rather than helps consumers. See Press Release, Electronic Frontier Foundation, *Electronic Frontier Foundation Defends Printer Cartridge Co.: Opposes Printer Manufacturer's Broad Copyright Claims* (July 2, 2003) [http://www.eff.org/legal/cases/Lexmark\\_v\\_Static\\_Control/?f=20030702\\_eff\\_pr.html](http://www.eff.org/legal/cases/Lexmark_v_Static_Control/?f=20030702_eff_pr.html) (using copyright as way to prevent use of refillable and/or competing printer toner cartridges); see also LawGeek, [http://lawgeek.typepad.com/lawgeek/2004/08/skylink\\_wins\\_fe.html](http://lawgeek.typepad.com/lawgeek/2004/08/skylink_wins_fe.html) (Aug. 31, 2004) (commenting on a case wherein the plaintiff used copyright to attempt to prevent competitor's replacement remote control from working with garage door opener); Jacqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability*, 62 WASH. & LEE L. REV. 487, 490 (2005) (examining corporate attempts to use the Digital Millennium Copyright Act to prevent competitors from incorporating a product's copyrighted software into replacement parts for that product).

36. See generally *TV Tunes Top Mobile Ringtone Poll*, BBC NEWS, July 2, 2004, <http://news.bbc.co.uk/1/hi/entertainment/music/3859929.stm> ("Women made up more than half the 5.9 million people who downloaded a ringtone to their phone in the three months up to June"); Lucy Sheriff, *Are Women Safer Surfers Than Men?*, THE REGISTER, Aug. 26, 2005, available at [http://www.theregister.co.uk/2005/08/26/women\\_men\\_safe\\_surfing/print.html](http://www.theregister.co.uk/2005/08/26/women_men_safe_surfing/print.html) (revealing the results of a telephone poll which concluded that online scams and viruses effect men more than women); Posting of Keith Stuart to gamesblog, [http://blogs.guardian.co.uk/games/archives/2005/06/15/mobile\\_gaming\\_more\\_popular\\_with\\_women\\_than\\_men.html](http://blogs.guardian.co.uk/games/archives/2005/06/15/mobile_gaming_more_popular_with_women_than_men.html) (June 15, 2005, 15:35 EST) (noting the results of surveys across Europe and the United States which concluded that women play more games on their mobile phones than men).

37. See, e.g., Natalie Hanman, *Music To Her Ears*, GUARDIAN UNLIMITED, May 6, 2005, <http://www.guardian.co.uk/features/story/0,,1477648,00.html> (discussing the divide in online purchases of music between women, who purchase only four percent of downloaded music, and men, who purchase ninety-six percent).

equally law-abiding when it comes to copyright and instead there is a gendered divergence with respect to copyright infringement.

If there are measurable and significant differences in the ways in which copyright laws affect women and men, questions then arise about how the disparate impacts should be addressed. Few people are likely to expect or want Congress to amend the copyright laws in order to provide two different sets of rights and restraints, one for women and the other for men. If the copyright laws as currently written and applied result in gendered imparity, a recalibration of the laws so that they more closely approach gender neutrality is probably the optimal solution, and feminist legal theory provides an important framework upon which less gendered copyright laws could be constructed.

### III. FEMINISM AND COPYRIGHT LAW

There are many links between copyright laws and women's lives that bear examination. Consider the fact that until 1979, copyright protection was effectively unavailable for pornographic movies.<sup>38</sup> To the extent that copyright protections truly become incentives for the creation of new works, one consequence of judicial determinations that obscene works were entitled to copyright protection was to spark the production of more of them.<sup>39</sup> The possibilities that pornography, and especially violent and misogynistic pornography, might directly or indirectly hurt some women was not discussed, nor was the possibility that the plentiful supply of pornography geared towards the sexual desires of men might lead to a distorted view of women's sexual needs and the expected sexual behavior of women.<sup>40</sup>

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38. See *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 865 (5th Cir. 1979) (holding it was improper to permit the assertion of obscenity as an affirmative defense to a copyright infringement claim). First, the court concluded that nothing in the 1909 Copyright Act indicated that obscene materials could not be copyrighted. *Id.* at 854-58. Second, the Act was constitutional under the necessary and proper clause even though it accorded protection to works that arguably did not promote "science and useful arts" under the Copyright Clause. *Id.* at 858-60. Finally, the court held it was improper to apply the equitable unclean hands doctrine in contravention of the Act's pro-creativity purposes. *Id.* at 861-66.; see also *Jartech, Inc. v. Clancy*, 666 F.2d 403, 408 (9th Cir. 1982) (deciding that taking pictures of copyrighted adult movies for nuisance abatement proceedings was fair use and therefore not copyright infringement).

39. See Kurt L. Schmalz, *Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far?*, 36 VAND. L. REV. 403, 403-04 (1983) (tracing the history of copyright protection for obscene works and stating that the *Mitchell Brothers* and *Jartech* courts failed to recognize that giving copyright protection to obscenity violates federal obscenity laws).

40. See generally CATHARINE MACKINNON, *ONLY WORDS* (1993) (advocating that the United States must balance free speech concerns against pornography, which the author considers hate speech that degrades women and furthers the victimization of women).

This article takes no position on whether these cases were correctly decided but notes that if the increased incentives to produce pornography were considered at all by the legal decision makers involved, they were apparently deemed outside the scope of relevant or appropriate copyright law considerations. The relevant court opinions frame the issue of copyrightability of pornography in a gender-neutral manner, as a freedom of speech issue.

Assuming there are significant quantitative and qualitative differences in the impact that copyright laws have upon women and men, there are many possible perspectives one can take on gendered aspects of copyright law, if it is viewed through a multifaceted feminist lens. A few are listed below.

*A. Should the Explicit Substantive Coverage of  
Copyright Law be Expanded?*

If copyright laws do not adequately value women's creative work, it may mean that the laws themselves should be amended, expanding existing protections so that additional categories of creative works are clearly accorded copyrightability. This assumes that copyrightability will enhance creativity and the distribution of creative works in a way that is favorable to the greater good of women.

Women who fail to fully commercialize their creative works may lose income. The impact of commercialization upon the control they have over their works is a bit more complicated, as commercialization usually requires an author to relinquish all control over her copyrights or ownership of the actual copyrights themselves. Women who manage to retain ownership of their copyrights, but do not aggressively police unauthorized uses of their copyrighted works, may lose both income and a measure of control over their works. All of this is true for men as well, but there may be gendered differences with respect to the number of female versus male authors who are realistically able to commercialize, control, and protect their creative works. Portions of any detectable disparities may be attributable to the nature and form of the works themselves, rather than the sex of the authors, but there also may be gendered differences in the mediums through which women and men creatively express themselves. If women are disproportionately disadvantaged by too little copyright protection for particular types of creative works, application of feminist principles would suggest that copyright laws need to be amended to create copyright parity between the genders.

Expanding copyright coverage might then be envisioned as "leveling the playing field." However, this assumes that, substantively

as well as rhetorically, after the playing field is “re-graded,” women ought to be out competing equally with men in a game contrived by men that has objectives and governing rules devised by men and is refereed by men. In this respect at least, an expansionist or maximalist position on copyright scope can be characterized as contrary to some of the values of feminism.

*B. Should The Application of Existing Copyright Law Be Altered?*

Certain copyright use and access restrictions may not mesh well with culturally significant roles and activities of women. Copyright protections constructively impose complicated formalities, such as licensing and permission procedures, that generate uncertainty and transaction costs, which can complicate creative productivity and the distribution and end uses of copyrighted works. If female authors, intermediaries, or consumers are disproportionately inhibited by copyright law strictures or have less access to competent legal advice and assistance, feminism would propose that the ways in which copyrights are applied or enforced by the courts should be altered in ways that better facilitate actualization of the goals of the copyright system with respect to women.

One specific, complicated, and interesting question is whether female authors are disproportionately burdened, or benefited, by the relative absence of legal formalities that must be complied with in order to secure a valid and protectable copyright. At one time, the procedural requirements for securing and maintaining full copyright protection for a newly created work required an aspiring copyright holder to comply with somewhat complicated copyright notice, deposit, registration, and recordation of transfers and licenses provisions.<sup>41</sup> The Copyright Act of 1976 and subsequent Berne Convention Implementation Act of 1988 significantly reduced formalities,<sup>42</sup> vesting works created on or after January 1978 with copyright protections at the moment they are completed,<sup>43</sup> and eliminating the notice requirement as of March 1989.<sup>44</sup> Though U.S.

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41. See Copyright Act of 1909, 17 U.S.C. § 1 (1909) (delineating, for example, classifications for the types of work which must be specified on a copyright application, authors who are qualified to apply for copyrights, and the duration, renewal, and extension provisions); see also U.S. Copyright Office, *How to Investigate the Copyright Status of a Work*, COPYRIGHT INFORMATION CIRCULAR 22, Dec. 2004, available at <http://www.copyright.gov/circs/circ22.html> (instructing how to approach a copyright investigation and how to search copyright records).

42. See 17 U.S.C. §§ 401-412 (2006) (describing the primary formalities in the Copyright Act).

43. See *id.* § 302(a) (stating that the copyright begins at the creation of the work and extends for seventy years after the author's death).

44. See *id.* §§ 401-406 (codifying the form of notice, position of notice, and

residents must register copyrighted works in order to bring copyright infringement suits,<sup>45</sup> registration can be virtually coterminous with the filing of the pertinent complaint and supporting documents.<sup>46</sup>

This diminution of formalities, particularly the elimination of the notice requirement, has been vigorously criticized<sup>47</sup> because it has effectively created a presumption that everything that is potentially copyrightable is copyright protected. The absence of copyright notice on a work no longer communicates anything meaningful on the subject of the copyright status of the work or about who holds the rights. This makes it more difficult to ascertain whether a particular work actually is copyrighted, what the scope of the copyright might be, and who needs to be contacted if licenses or permissions are to be obtained.

Authors without ready access to lawyers and copyright-licensing legal machinery are arguably disadvantaged the most by this relatively new paradigm. Simply discerning whether a work that an author might like to copy, adapt, or borrow from is copyrighted now requires a fair amount of research, even before factors such as its availability and desirability are ascertained.<sup>48</sup> Freeing initial authors from the

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evidentiary weight of notice for visually perceptible copies, phonorecords of sound recordings, and publications incorporating works of the United States Government up to the effective date of the Berne Convention Implementation Act of 1988).

45. See *id.* § 411 (requiring that an action for copyright infringement cannot be made until pre-registration or registration of the copyright has been made and that where a deposit, application, and fee for registration have been delivered but registration refused, the applicant may still institute a copyright infringement action if notice and a copy of the complaint is served to the Register of Copyrights).

46. See *id.* § 412 (noting that a copyright owner cannot generally recover statutory damages or attorney's fees where the copyright has not been registered prior to the occurrence of the infringement).

47. See, e.g., LITMAN, *supra* note 13 (arguing that digital copyrighting requires Internet viewers to pay for their sights and sounds, and that this may eventually create a collision between what people regard as their freedom of expression and these copyright protections); see also Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 528-39 (2004) (tracing the history of copyright formalities from the U.S. Constitution through the modern Copyright Act which the author argues is becoming increasingly unconstitutional due to the relaxing of formalities).

48. See U.S. Copyright Office, *supra* note 41.

There are several ways to investigate whether a work is under copyright protection and, if so, the facts of the copyright. These are the main ones: (1) Examine a copy of the work for such elements as a copyright notice, place and date of publication, author and publisher. If the work is a sound recording, examine the disk, tape cartridge, or cassette in which the recorded sound is fixed, or the album cover, sleeve, or container in which the recording is sold. (2) Make a search of the Copyright Office catalogs and other records; or (3) Have the Copyright Office make a search for you . . . Copyright investigations often involve more than one of these methods. Even if you follow all three approaches, the results may not be conclusive. Moreover, as explained in this circular, the changes brought about under the Copyright Act of 1976, the Berne Convention Implementation Act of 1988, the Copyright Renewal Act of 1992, and the Sonny Bono Copyright Term

burdens of complying with formalities thus exacerbates copyright complexities for downstream transformative users.

On the other hand, the reduction in copyright formalities has made obtaining a defensible copyright an almost paperwork-free endeavor.<sup>49</sup> Though copyright protection remains unavailable for works that are not “fixed in any tangible medium of expression,”<sup>50</sup> at least the reduction in formalities has made holding copyrights more accessible to authors who resist, or are logistically excluded from, forms of property ownership that require written titles and deeds and attorneys to draft and process them.

Before the Copyright Act of 1976 took effect on January 1, 1978, “publication” of a work was required before it was eligible for copyright protection,<sup>51</sup> copyright formalities were complicated, and the penalties for failing to correctly comply with them were severe.<sup>52</sup> To the extent that women were culturally deemed less worthy of literacy and providing them with higher education was seen as wasteful, the process for obtaining and preserving copyrights must have seemed especially difficult and somewhat intimidating to a female author who may have had to struggle momentarily simply to convince an intermediary that the work was even worthy of

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Extension Act of 1998 must be considered when investigating the copyright status of a work. This circular offers some practical guidance on what to look for if you are making a copyright investigation. It is important to realize, however, that this circular contains only general information and that there are a number of exceptions to the principles outlined here. In many cases it is important to consult with a copyright attorney before reaching any conclusions regarding the copyright status of a work.

*Id.*

49. See 17 U.S.C. § 407 (2000) (requiring the “owner of copyright or of the exclusive right of publication in a work published in the United States” to deposit copies of the work in the U.S. Copyright Office within three months of the date of publication); see also *id.* § 106(3) (authorizing the owner of a copyrighted work “to distribute copies or phonorecords of a copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”).

50. *Id.* at § 102(a).

51. See Peter B. Hirtle, Copyright Term and the Public Domain in the U.S. (Jan. 1, 2006), [http://www.copyright.cornell.edu/training/Hirtle\\_Public\\_Domain.htm](http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm) (charting the copyright terms for various published and unpublished works).

52. See *id.*

[I]n investigating the copyright status of works first published before January 1, 1978, the most important thing to look for is the notice of copyright. As a general rule under the previous law, copyright protection was lost permanently if the notice was omitted from the first authorized published edition of a work or if it appeared in the wrong form or position. The form and position of the copyright notice for various types of works were specified in the copyright statute. Some courts were liberal in overlooking relatively minor departures from the statutory requirements, but a basic failure to comply with the notice provisions forfeited copyright protection and put the work into the public domain in this country.

*Id.*

publication, no less copyright protection.

*C. Should Women Increasingly “Commodify” Their Creative Output Through Current Copyright Law?*

Alternatively, if one starts with an assumption that the copyright laws cannot or should not be changed or differently applied, one must conclude that women should behave more like men and aspire to be treated more like men. Such “masculinization” might enable women to benefit more fully from copyright laws as creators and to obtain equality of access as consumers of creative works. It would also concomitantly expand the realm of copyright by increasing the commoditization of previously collaboratively taught and practiced skills and the commoditization of copyrights in creative works that had previously been functionally (if not technically) part of the public domain. The strand of feminism that views sameness, identical behavior, and identical treatment as the preferred embodiment of equality between the genders might favor this approach. Difference feminists, however, would question any normative reforms that did not value, preserve, and advance the unique creative endeavors of women, if the forms of expression and modes of distribution were freely chosen.

IV. INJECTING GENDER AND FEMINISM INTO  
THE CULTURAL COPYRIGHT DISCOURSE

Gender-linked reluctance to aggressively protect copyrights may be related to the double bind articulated by scholars such as Margaret Jane Radin and Marilyn Frye: there are few options for subordinated people and all of them suborn, censure, or exact penalties.<sup>53</sup> Men contrived copyright law to facilitate commerce in creative endeavors. If they had equal opportunities to participate in financially remunerative creation and distribution of copyrighted works, one can only speculate about whether women would be equally enamored of the current level of commoditization as the men in control of the government and the content industries. Women might expand or contract the reach of copyright protections and the scope of fair use, or they might leave one or both as they are.<sup>54</sup>

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53. See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699-1704 (1990) (describing the dual problem of the commodification of women as one where if women are prohibited from marketing their sexual services it threatens the personhood of these women but if they are allowed, the personhood of the woman becomes a commodity); see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 9 (2d ed. 2003).

54. See generally Stephen L. Carter, *Commentary: Custom, Adjudication, and Petrushevsky's Watch: Some Notes From the Intellectual Property Front*, 78 VA. L.

Real life experiences of women vary because of differences in race, income level, religion, ethnicity, physical ability, and sexual orientation. Therefore, articulation of one overarching feminist philosophy of copyright law that meets with universal or even substantial acceptance is probably unrealistic. While asserting anything definitive about feminism is potentially an act of great hubris, it is the claim of this author that low barriers protection is the correct feminist position on copyrights. Those who already hold such philosophical positions about copyright without having consciously considered the gendered aspects of copyright doctrine and practice may be surprised, hopefully pleasantly, to learn they hold fundamentally feminist views about copyright law and that the methods and teachings of feminist legal theory can be integrated into their ongoing scholarly pursuits.

The low barriers approach to copyright law assumes that both individual creators and society will largely benefit from a conservative construction of copyright protection that facilitates a significant amount of unauthorized excerpting, adapting, and sampling by declining to deem it infringing. Any lost royalties or licensing fees of copyright holders are presumed offset by the quantity and variety of new creative works that are made possible by the enhanced accessibility of existing works.

Below is an overview of some the ways in which women could reap advantages from lowered copyright barriers. The analysis separates women into three categories in which copyright laws and people intersect: as authors, intermediaries, and consumers.

#### A. *Women as Authors*

Copyright laws form the frame within which a commercial marketplace for creative works is stitched. Copyrights “protect” the creative works of authors regardless of the author’s gender at the initial level of analysis. Even during the historical interval in which women were prohibited from owning “real” property,<sup>55</sup> women

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REV. 129 (1992) (discussing the fair use doctrine and questioning whether it is appropriate that individual courts decide what constitutes fair use, thereby removing an individual’s right to exclude).

55. See Jim Garamone, *The Changing Nature of Equality*, UNITED STATES DEPARTMENT OF DEFENSE, June 27, 2002, [http://www.dod.mil/news/Jun2002/n06272002\\_200206277.html](http://www.dod.mil/news/Jun2002/n06272002_200206277.html) (discussing the changing nature of women’s rights from the signing of the Declaration of Independence through the civil rights struggles of the 1960s and 1970s); see also Donna Przecha, *Finding Female Ancestors*, GENEALOGY.COM, [http://www.genealogy.com/50\\_donna.html](http://www.genealogy.com/50_donna.html) (last visited July 26, 2006) (recommending ways of searching for female ancestors that take into account the difficulties that stem from women’s social and legal status through history); Reader’s Companion to American History: Married Women’s Property Acts, [http://college.hmco.com/history/readerscomp/rcah/html/ah\\_056700\\_marriedwo](http://college.hmco.com/history/readerscomp/rcah/html/ah_056700_marriedwo)

could legally hold copyrights in the works they authored. However, their ability to enter into contracts related to those copyrights for the purposes of assigning or exploiting the works was limited.<sup>56</sup> Since copyright laws have always been primarily designed to facilitate commerce, this rendered a woman's copyright power little more than a right of attribution to the extent that she was unable to make and enforce her own publication and distribution arrangements. In addition, any wealth that the copyrights generated would have become the property of her husband, if she had one, or possibly come under the control of a male relative if she was unmarried.<sup>57</sup>

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men.htm (last visited July 26, 2006) (examining the gradual reversal of laws that disallowed married women from holding, buying, or selling property, suing or being sued, entering into contracts, or retaining wages); Law Library of Congress, Married Women's Property Laws, [http://memory.loc.gov/ammem/awhhtml/awlaw3/property\\_law.html](http://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html) (last visited July 26, 2006) (exploring the history of women's rights in the United States and giving examples of language from various Acts in the United States concerning women's rights); Jone Johnson Lewis, Married Women's Property Act: 1848 New York State, [http://womenshistory.about.com/od/married-womens-property/a/property\\_1848ny.htm](http://womenshistory.about.com/od/married-womens-property/a/property_1848ny.htm) (last visited July 26, 2006) (providing the language of the New York Married Women's Property Act of 1848, which allowed the women of New York the right to own property separate from their husbands, and receive rents and gifts).

56. Cf. Pamela J. Smith, *Part I - Romantic Paternalism - The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER RACE & JUST. 107, 112-13 (1999) (arguing that while the law has recently been liberating for women, it has come with a price similar to the price that white women historically paid under romantic paternalism, creating limitations and restrictions through judicial affinity).

57. See CAROL M. ROSE, *Women and Property: Gaining and Losing Ground*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 233, 245-47 (1994); see also Richard H. Chused, *Family (Property)*, 1 Green Bag 2d 121, 123-24 (1998) (stating that the married women's property acts were not created as a recognition of wives' rights to control property and be independent economic actors, but rather as debtor protection against the creditors of the husband, therefore the statutes did little to change the rights of husbands to control family accounts and their wives' wages); Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 Geo. L.J. 2213, 2214-18 (1994) (discussing the historical relationship between family law and property law and noting that any wealth acquired by a woman in a marriage was generally attributable to the husband upon divorce proceedings); Richard H. Chused, *Married Women's Property Law: 1900-1850*, 71 Geo L.J. 1359, 1359-61 (1983) (using case law, archival records, and legislative materials to analyze the causes of the women's property acts and to determine that the early acts only made minor changes to laws relating to women, which conformed to, rather than confronted, the domestic roles of women at that time); Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 Geo. L.J. 2213, 2214-18 (1994) (discussing the historical relationship between family law and property law and noting that any wealth acquired by a woman in a marriage was attributable to the husband upon divorce proceedings); David H. Bromfield, *Book Review*, 85 Mich. L. Rev. 1109, 1110 (1987) (stating that while historians traditionally characterize the married women's property acts as an effect of the economic changes that accompanied industrialization, the reviewed book argues that it was the ideological and social forces that gave women increased autonomy through these reforms); James W. Ely, Jr., *Book Review*, 31 UCLA L. Rev. 294, 296 (1983) (maintaining that the common law rules before the married women's property acts made wives economically dependent and legally invisible).

The primary focus of modern copyright law remains on the regulation of commercial transactions involving creative works, and the interests of women are assumed to be coterminous with those of men.<sup>58</sup> Women working in creative fields suffer from gender discrimination (as they do in most disciplines), which likely results in depressed employment opportunities and lowered salaries. While it is clear that female authors who produce creative content in direct competition with men can make parallel use of the copyright industrial complex, despite potentially receiving a smaller amount of monetary compensation for their efforts, it is less clear that copyright protections are as readily available for more traditionally feminine creative arts. The copyright laws seem to assume that certain types of creative works within the domestic sphere are either not appropriately creative or that they should not be subject to monopolistic control.

Section 102 of the Copyright Act sets out the following categories of copyrightable works: literary works, musical works, including any accompanying words, dramatic works, including any accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.<sup>59</sup> It then explicitly lists uncopyrightable categories of works, stating, "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>60</sup>

Many of the creative works located within the domestic sphere have traditionally been excluded from copyright protections, such as cooking recipes, food preparation methods, sewing techniques, and knitting and crocheting procedures.<sup>61</sup> While doctrinally they might strike one as more appropriately being the subjects of patents, patents are expensive to apply for, take a long time to issue, and would be difficult to enforce if they were being infringed in the relative privacy of individual homes.

Even before the United States eliminated formalities altogether as a prerequisite for copyright protection,<sup>62</sup> copyrights were much faster and easier to obtain than patents, which is at least partly the reason

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58. See Wright, *supra* note 5, at 71 (discussing the limitations of copyright protection to what is considered high art through patriarchal legislation).

59. See Copyright Act, 17 U.S.C. § 102 (2006).

60. 17 U.S.C. § 102(b) (2006).

61. See, e.g., LITMAN, *supra* note 13; Pollack, *supra* notes 14 and 17.

62. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, 1161 U.N.T.S. 3 (requiring no formalities for copyright protection).

the software industry pursued and obtained copyright protection for computer programs and user interfaces.<sup>63</sup> Copyright laws were not originally designed or intended to protect works like the code that drives computer software, but they were instrumentally deemed to do so when continued incentivizing of this category of works appeared to require the development of some sort of monopoly-generating legal tools of control and exclusion.<sup>64</sup>

Like computer software, extant copyright law poorly accommodates some stereotypically feminine art forms. Quilting, for example, is not a good fit with intellectual property constructs.<sup>65</sup> Quilting is not typically recognized as an art form because a quilt is often the product not of a solitary individual, but rather of an indefinite group, such as a “Stitch and Bitch”<sup>66</sup> (or the more suitably genteel “Batting and Chatting”<sup>67</sup>) quilting club, where, at each monthly meeting, the entire membership works on one member’s quilting project and many finished quilts feature the repetitive use of traditional designs<sup>68</sup> or designs derived from natural objects.<sup>69</sup> And though they are

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63. See NAT’L COMM’N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 45 (1979), available at <http://www.digital-law-online.info/CONTU/PDF/index.html> (laying out the National Commission on New Technological Uses of Copyrighted Works’ findings on how to address computers and copy machines in the Copyright Act of 1976).

64. See, e.g., Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L. J. 663, 694 (discussing the revision process of the copyright statutes in the United States and noting that in 1980 Congress adopted the CONTU recommendations to make computer programs in machine-readable form copyrightable).

65. See Wright, *supra* note 5, at 90-94, 96 (describing the decisions, which denied protection to women’s sewing craft productions and noting the marginalization of women under the myth of an artist as a romantic hero); cf. Posting of Laurie Finke, director of the Women’s and Gender Studies Program, Kenyon College, to students of her Women’s Studies 111 Class (Fall 2004), *Paper #1: Gender Norm Violation*, <http://www2.kenyon.edu/Depts/WMNS/Courses/Syllabus/violation.htm> (last visited July 26, 2006) (assigning students to act in violation to their gender roles, for example: girls should open open doors for boys, and boys should carry purses).

66. See, e.g., Stitch And Bitch Café, [http://www.sewfastseweasy.com/stitch\\_and\\_bitch/index.php](http://www.sewfastseweasy.com/stitch_and_bitch/index.php) (last visited July 26, 2006) (providing a forum for bloggers to discuss current fashion, swap sewing patterns, and chat in groups online); In a Minute Ago, <http://inaminuteago.com/blog/> (last visited July 26, 2006) (allowing quilters to swap sewing patterns and project ideas with one another over the Internet).

67. See Bernard Herman, *Q.S.O.S. Interviews with Quiltmakers: Catherine Whalen*, CENTER FOR THE QUILT ONLINE, May 26, 2003, [http://www.centerforthequilt.org/qsos/show\\_interview.php?pbd=qsos-a0a2h5-a](http://www.centerforthequilt.org/qsos/show_interview.php?pbd=qsos-a0a2h5-a) (relaying information about Catherine Whalen’s quilts and her Batting and Chatting Quilting Group where people share their projects with each other, building upon, and interpreting, each others ideas in order to design new quilts).

68. See Catherine Whalen, *Q.S.O.S. Interviews with Quiltmakers: Ginny Smith*, CENTER FOR THE QUILT ONLINE, Apr. 4, 2003, [http://www.centerforthequilt.org/qsos/show\\_interview.php?pbd=qsos-a0a4d1-a](http://www.centerforthequilt.org/qsos/show_interview.php?pbd=qsos-a0a4d1-a) (describing a quilt Ginny Smith made which was based on a traditional log cabin design).

69. See Herman, *supra* note 67 (discussing a quilt Catherine Whalen made based on an abstract vision of her rose garden).

sometimes turned into decorative wall hangings, quilts are ordinarily used quite mundanely on beds in private homes. They are not something to drop quotes from in conversation or to display publicly as if they were paintings or work of sculptures. In fact, one is well advised not to display a quilt publicly if, for example, a depiction of Mickey Mouse has somehow been incorporated into the design without the permission of the aggressively litigious Disney Company.<sup>70</sup>

Studies of the demographics of Internet web logging have found that women are slightly more likely than males to create web logs ("blogs").<sup>71</sup> In some respects, group blogs offer a text-based cyberspace homology to quilting.<sup>72</sup> Though most are contrived to allow authorship indicia for each individual posting, it is together that the postings form the useful whole. Individual blogs may in turn form intersecting web circles, an image that is evocative of a common quilting pattern. They may retain indicia of individual authorship but these features are often credited to a pseudonym rather than the actual author's legal name. As a general matter copyright law does not easily accommodate collaborative, creative online endeavors.<sup>73</sup> Consequently, it is unlikely that the promise of protectable copyrights incentivizes such projects.

One might think that cooking recipes are certainly adequately creative to be copyrighted, given the very low thresholds of originality and creativity that are required in order for a work to be deemed

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70. See Charles S. Sara, *Protect Your Corporate Intellectual Property Position*, BIO TACTICS IN ACTION, Nov. 1998, <http://www.biotactics.com/Newsletter/v1i6/IP1.htm> (relaying that a daycare center in Wisconsin, which commissioned an artist to paint Disney characters on its walls, was forced by Disney to paint over the mural at its own expense because the daycare used the copyrighted Disney characters without permission); Daycare Center Murals (Dec. 29, 1996), <http://www.snopes.com/disney/wdco/daycare.htm> (discussing a situation where Disney forced daycares in Florida to remove images of Disney characters painted on the daycare walls).

71. See Perseus Blog Survey, <http://www.perseus.com/blogsurvey/theBloggingIceberg.html#demographics> (last visited July 26, 2006) (noting that "[f]emales are slightly more likely than males to create blogs, accounting for 56.0% of hosted blogs"); see also SUSAN C. HERRING, INNA KOUPER, LOIS ANN SCHEIDT & ELIJAH L. WRIGHT, *WOMEN AND CHILDREN LAST: THE DISCURSIVE CONSTRUCTION OF WEBLOGS* (2004), [http://blog.lib.umn.edu/blogosphere/women\\_and\\_children.html](http://blog.lib.umn.edu/blogosphere/women_and_children.html) (noting that quantitative studies show as many or more female blog authors than male, yet discourse about blogs in the media, scholarly communication, and in the blogs themselves tend to disproportionately feature male bloggers).

72. See, e.g., Alliance for American Quilts, *Quilters' S.O.S. - Save Our Stories*, CENTER FOR THE QUILT ONLINE, <http://www.centerforthequilt.org/qsos/qsos.html> (offering a place for quilters to tell their stories, view pictures of quilts, and share designs online).

73. See Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 257-58 (1996) (suggesting that "typical authorship practices" in digital network-based computer environments create doctrinal problems in current copyright law regarding joint works).

copyrightable.<sup>74</sup> However, recipes do not unambiguously ascend to lofty heights of copyrightability until they are collected into a cookbook, which handily enough is also a marketable as well as copyrightable commodity.<sup>75</sup> Commentary at the U.S. Copyright Office's web site notes:

A mere listing of ingredients is not protected under copyright law. However, where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a collection of recipes as in a cookbook, there may be a basis for copyright protection. Note that if you have secret ingredients to a recipe that you do not wish to be revealed, you should not submit your recipe for registration, because applications and deposit copies are public records.<sup>76</sup>

Though the distribution of sewing patterns tends to be somewhat commercial and monetized online, as it is in real space, the free sharing of recipes over the Internet is quite common and, as an anecdotal matter, many of those offering recipes are female.<sup>77</sup> Some recipe sites feature corporate sponsorship and large amounts of advertising, while others contain exhaustive lists of foods in noncommercial formats, thereby facilitating public interest oriented information exchanges.<sup>78</sup> Still other recipe web sites appear to be

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74. See Steven S. Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work*, 40 SANTA CLARA L. REV. 325, 335 (2000) (explaining that courts only require copyright holders to demonstrate a minimal level of creativity in order to maintain a copyright).

75. See U.S. Copyright Office, What Does Copyright Protect?, [http://www.copyright.gov/help/faq/faq-protect.html#what\\_protect](http://www.copyright.gov/help/faq/faq-protect.html#what_protect) (last visited July 26, 2006) (indicating that copyright law does not protect "mere" recipes).

76. See *id.* (highlighting the factors necessary to receive copyright protection for original work).

77. See Sewing Patterns, <http://www.sewingpatterns.com> (last visited July 26, 2006) (highlighting the various sewing and clothing patterns for sale on the Internet); see also McCall Pattern Company, <http://www.mccall.com> (last visited July 26, 2006) (providing a search index allowing for the sale of clothing patterns); Simplicity, <http://www.simplicity.com> (last visited July 26, 2006) (selling clothing patterns for items ranging from wedding dresses to pillows); Folkwear, <http://www.folkwear.com> (last visited July 26, 2006) (providing, for charge, clothing patterns for vintage and ethnic clothing); Stretch and Sew, Inc., <https://www.gmidesign.com/stretch/home.html> (last visited July 26, 2006) (listing clothing patterns and other accessories available for sale). *But see* Free Sewing Patterns and Sewing Machine Help at AllCrafts!, <http://www.allcrafts.net/sewing.htm#freeprojects> (last visited July 26, 2006) (offering free sewing patterns to anyone who wishes to obtain them); Sundancers, Wild Women and DreamWeavers, <http://wildwomen.typepad.com> (last visited July 26, 2006) (explaining various methods for creating fabric and other crafts).

78. See, e.g., Kraft Foods, <http://www.kraftfoods.com/kf/> (last visited July 26, 2006) (making recipes available through Kraft Foods sponsorship); All Recipes, <http://www.allrecipes.com/> (last visited July 26, 2006) (providing free recipes while raising revenue through the use of advertisements from sources such as Weight Watchers and *USA Today*); Food Network, <http://www.foodtv.com/> (last visited July

largely created for the amusement of the authors, such as “Knife-wielding Feminists,”<sup>79</sup> which is subtitled, “A recipe spot for feminist foodies.”<sup>80</sup>

There is a high degree of sharing of advice and instruction in knitting communities as well, both on and offline.<sup>81</sup> Freely available instructions and patterns for sweaters, scarves, socks, and other knittable goods are legion. Most, but not all, online yarn manipulators are women. One male web ring participant slyly calls his blog, “When Knitting Was a Manly Art.”<sup>82</sup>

Some female bloggers organize or support collaborative craft projects. One wonderful example is “A Month of Softies,” which is an open group craft project facilitated by Loobylu, the personal web site of Claire Robertson, an illustrator and mother from the suburbs of Melbourne, Australia.<sup>83</sup> Participants create works that embody the monthly theme, such as monsters or flowers, and then arrange to have pictures of their contributions posted at the Loobylu web site, along with instructions for replicating them.<sup>84</sup> Contributors effectively donate aspects of their creative output to everyone who accesses their Month of Softies material.<sup>85</sup>

If women are less likely to consider themselves copyright-holding

26, 2006) (providing recipes through Food TV sponsorship); RecipeSource, <http://www.recipesource.com/> (last visited July 26, 2006) (listing free recipes from countries all over the world as submitted by site visitors); CopyKat Creations, <http://www.copykat.com/> (last visited July 26, 2006) (highlighting free viewer-submitted recipes for popular restaurant dishes).

79. See *Knife-Wielding Feminists*, <http://feministfoodies.blogspot.com/> (last visited July 26, 2006) (providing a place where like-minded people can share recipes).

80. See *id.* (explaining uses for various foods and creating new recipes for the enjoyment of bloggers posting on this site).

81. See *Knitty*, <http://www.knitty.com/ISSUESpring05/index.html> (last visited July 26, 2006) (publishing a quarterly collection of knitting patterns); see also *Another Knitting Blog*, <http://mimoknits.typepad.com/> (last visited July 26, 2006) (blogging about knitting and ongoing knitting projects by anonymous posters); *Wendy Knits*, <http://wendyknits.net/> (last visited July 26, 2006) (describing her knitting projects on her weblog and making recommendations to readers with regard to completing their own projects); *The Rittenhouse Review*, <http://rittenhouse.blogspot.com/2003/12/knitting-memories-or-memories-of.html> (Dec. 30, 2003) (publishing a letter from the blogger’s mother, in which she described learning to knit in grammar school); Posting of Teresa Nielson Hayden to *Making Lights*, <http://nielsenhayden.com/makinglight/archives/004342.html#004342> (Dec. 28, 2003) (describing a newspaper article and emphasizing the benefits of knitting).

82. See *When Knitting was a Manly Art*, <http://www.gaiser.org/knitblog/> (last visited July 26, 2006) (posting about knitting issues and other daily events).

83. See *A Month of Softies*, <http://www.loobylu.com/softies/about.html> (last visited July 26, 2006) (explaining that the authors created the website to institute a monthly craft project through which any knitting enthusiast, from anywhere in the world, could become involved).

84. See, e.g., *id.* (describing the July 2005 theme of knitting sock monkeys).

85. See *id.* (explaining the sock monkey project and freely providing resources to other participants in order to help them create sock monkeys).

authors or to demand formalized “credit” for their creative works than men, this suggests gendered differences with respect to the degree to which copyright protections are sought and enforced. To the extent that people who are unlikely to assert copyrights can be characterized as more giving and generous people, this designation might apply to more women than men.<sup>86</sup> If it did, this would suggest that any quantitative evidence that women hold fewer copyrights than men could be a consequence of a gendered rejection of copyright formalism, rather than a result of lesser creative productivity by women.<sup>87</sup>

Celebrating the reluctance of some women to own and control their creative output may mean conterminously affirming the qualities and characteristics of female powerlessness. Copyright law was designed to facilitate the commoditization and exploitation of creative works, and gender-related reluctance to stake rigorous copyright claims hinders women authors professionally and economically.

Women’s subordinate status, and the disadvantages that flow from it, is often ascribed to choices women make themselves, purportedly freely. One feminist scholar noted about organized sports:

Sexism, which is what we are discussing here, often justifies itself by assuming that women don’t want the thing that is being denied them. Before Title IX, which opened up high school and college athletics to women, the common wisdom was that girls didn’t like sports—girls weren’t competitive, they were weak (remember girls’ basketball?), they didn’t like to get sweaty and dirty, they feared being hurt, they were always getting their periods. Once the opportunities were there—thanks to the women’s movement, not to gym teachers promising to keep an eye out for talented female players—girls turned out in droves. Now we see girls even in quintessentially masculine sports like soccer and rugby. Today

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86. Cf. Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 428-29 (1992) (explaining how prisoners’ dilemma and zero-sum games provide insights about relative wealth levels of women and men); see also Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL’Y 547, 548-62 (1995) (applying bargaining games to explain the different allocation of assets across gender in terms of real or culturally perceived differences in preferences for cooperative strategic behavior).

87. Cf. J.E. Bedi, *Innovative Lives: Exploring the History of Women Inventors*, SMITHSONIAN INST., Mar. 3, 2005, <http://invention.smithsonian.org/centerpieces/ilives/womeninventors.html> (recognizing that the role of women in the home contributed to the limitation of patents granted to women); Mary Bellis, *Mary Kies – Patenting Pioneer*, <http://inventors.about.com/library/inventors/blkeis.htm> (last visited July 26, 2006) (indicating that Mary Kies was the first woman to obtain her own patent in the United States, despite the difficulties of female property ownership in the early 1800s).

nobody says girls are shrinking violets on the playing field.<sup>88</sup>

In a similar vein, women may not be choosing to relinquish control over their creative endeavors because it may not be available to be relinquished. If the works they author are works for hire or judged unsuitable for commercialization, the unavailability of royalties is hardly something that has been chosen voluntarily.

A classic double bind emerges. Female authors risk accusations of selfishness and greed if they violate perceived gender-linked social norms of sharing, caring, and selfless collaboration because they seek to procure and enforce individual authorship rights and attributive credit.<sup>89</sup> However, women who adhere to collaborative norms and decline to rigorously anoint themselves “sole authors” or to hold and enforce the full panoply of copyright based exclusive rights forgo attribution, income, and control. Before the equality litigation activity of the 1970s and the legislative changes that followed, women were often restricted by laws that sought to “protect” them from the conflicts that copyright protections can engender, and the possibility that copyright laws have a similar destructively paternalistic aspect bears consideration.

### *B. Women as Intermediaries*

Women tend to have less powerful intermediation roles in creative fields than men. Men largely control of the large media companies, though there are certainly a few visible exceptions, such as Oprah Winfrey. 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.

Women may need to adopt male views and strategies to succeed in male-dominated intermediation roles. Many corporate intermediaries are perfectly happy to sell to and profit from women but generally do

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88. See Posting of Katha Pollitt to Political Animal, [http://www.washingtonmonthly.com/archives/individual/2005\\_03/005908.php](http://www.washingtonmonthly.com/archives/individual/2005_03/005908.php) (Mar. 22, 2005) (arguing that men keep women from entering into certain fields by claiming that women would not want to do the task in question, thus limiting the ability of women to gain a foothold in male-dominated areas).

89. See Roberta Kwall, *Authors – Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S.C. L. Rev. 1 (2001); see, e.g., *Childress v. Taylor*, 945 F.2d 500 (1991) (reviewing Taylor’s claim of joint authorship); *Thompson v. Larson*, 147 F.3d 195 (2d Cir 1998) (litigating the right to joint authorship credit for the Broadway musical *Rent*).

not want to closely identify with female interests, unless it is part of a successful marketing strategy. Artworks by women command less revenue and attention than those by men, so profit and reputation-minded art dealers might try to elude becoming known as a “woman’s gallery.” Colloquially, this phenomenon might be expressed as “avoiding girl germs.” Galleries that specialize in women’s works would probably be characterized as “niche” because successful female artists are rare, despite the majority status of women in the population at large.

Romance novels, however, seem to benefit from apparent female authorship, regardless of the author’s actual gender. Pseudonyms appearing on romance novel covers are usually female and, generally, very Anglo and aristocratic sounding, such as Victoria Aldridge, Ellyn Bache, Elizabeth Bailey, Daphne Clair, Jacqueline Diamond, Olivia Gates, Jillian Hart, Tara Taylor Quinn, Roxanne Rustand, Carol Stephenson, Meredith Webber, and Rebecca Winters.<sup>90</sup>

Some categories of romance novels have a marked tendency to offer the same basic plot lines over and over to an extent that one might expect copyright law to discourage or prevent. Yet it almost seems as though certain romance novel publishers have chosen to either risk or forgo copyright infringement suits premised upon the doctrine of substantial similarity.<sup>91</sup> If it is true that *West Side Story* would infringe the copyright of “Romeo and Juliet” if that Shakespearian play was currently protected by a U.S. copyright<sup>92</sup> and if the appropriation of a few notes from a copyrighted song without permission for sampling purposes is widely viewed as actionable,<sup>93</sup> one would think that some of the more repetitive romance novels

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90. See eHarlequin.com, <http://www.eharlequin.com/cms/index.jhtml> (last visited July 26, 2006) (providing access to romance novel authors through a site-based search engine); see also Lucy Monroe’s List of Author Web Pages, <http://www.lucymonroe.com/authorwebpages.htm> (last visited July 26, 2006) (providing links to new romance authors and touting their work); Wilma Slaight, *Carolyn Heilbrun*, WELLESLEY COLLEGE ARCHIVES, June 26, 2000, <http://www.wellesley.edu/Anniversary/heilbrun.html> (describing feminist literary theorist Carolyn Heilbrun, who penned mystery novels under the name Amanda Cross to hide her identity before she obtained tenure at Columbia University).

91. See ROBERT C. OSTERBERG & ERIC C. OSTERBERG, *SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW* (2003).

92. See MELVIN B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03(B) (Matthew Bender & Co. 1985) (arguing that *West Side Story* and Shakespeare’s “Romeo and Juliet” are very similar stories for the purposes of copyright law).

93. See Ivan Hoffman, *Fair Use: Music Sampling*, <http://www.ivanhoffman.com/fairusemusic.html> (recommending that people always seek licenses for fair use of musical material in order to ensure complete compliance with copyright laws); see also Posting of Kevin Heller to Tech Law Advisor, <http://techlawadvisor.com/2004/09/music-sampling-question.html> (Sept. 28, 2004) (advising that people obtain licenses before copying even a minimal amount of music from a song recording).

would be routinely enjoined by copyright-holding competitors. However, copyright suits do not appear to be a significant part of the ostentatiously satin and lace fabric of this sector of the romance novel publishing industry.

In the very different context of relatively noncommercial web logging, women authors affirmatively act as intermediaries to advance the cause of sisterhood. Female web loggers (“bloggers”) often link to each other to subvert the dominant link paradigm, which overwhelmingly favors male bloggers and to blogroll and highlight each other’s blogs to promote mutual visibility.<sup>94</sup> This is an example of authors taking on the work of intermediaries because traditional mechanisms have failed them.

### C. Women as Consumers

Copyright laws allow, but do not reward, the sharing of useful information and creative techniques by authors, assuming they either retain or do not claim “ownership” of copyrights in their own creations. The copyright laws largely oppose the sharing of the works of others without authorization by and monetary compensation to copyright holders. Large copyright-holding entities have had a great deal of success recasting any acts of copying, especially of digital works, as presumptive copyright infringement. Relatively recent high barriers copyright developments have adversely effected many cultural institutions, such as depleting the collections of public libraries.<sup>95</sup> This has a disproportionate impact on females, because women are the primary users of public libraries.<sup>96</sup>

While it may be fine and even laudable to share a loaf of bread, regardless of whether it is home-baked or purchased from a commercial bakery, it may not be acceptable as a matter of copyright law to generously share music, movies, or books if they are digital and have been licensed or encoded with a digital rights management

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94. See, e.g., Pen-Elayne on the Web, <http://elayneriggs.blogspot.com/2005/03/estrogen-month-day-20-its-sundayand.html> (Mar. 20, 2005) (linking to several female bloggers as a way to promote women on the web); The Countess, [http://trishwilson.typepad.com/blog/2005/03/subvert\\_the\\_dom\\_1.html](http://trishwilson.typepad.com/blog/2005/03/subvert_the_dom_1.html) (Mar. 28, 2005) (recommending approximately twenty weblogs written exclusively by women); Utopian Hell, <http://www.utopianhell.com/resources/> (last visited July 26, 2006) (providing links to other feminist blogs and other resources).

95. See Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 96 (2003) (indicating that digitalized books make public libraries nervous due to the fear that publishers will not work with libraries to make such content available to library consumers).

96. See, e.g., Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449, 462-63 (2005) (explaining that women constitute the majority of library patrons to highlight the lack of legal scholarship for gender issues available online).

(DRM) device. The norms of sharing works with one's friends and family are undermined or disabled by DRM technologies. The very concept of sharing copyrighted works is being socially recast as infringement, especially if copying is involved, even as a potential matter.<sup>97</sup> While it may be a longstanding norm for a woman to loan books to her friends or DVDs to a parent who is unexpectedly homebound with a sick child, technical changes enforced by new legal regimes such as the Digital Millennium Copyright Act make once generous, selfless seeming acts technologically impossible or legally risky.

Copyright ownership fosters and relies on dominance over consumers. Women consume many types of creative content at higher rates than men. For example, women purchase and read more works of fiction than men.<sup>98</sup> Consider again the romance novel. There are different types of romance novels, and many romance novels are rich, complicated works of fiction, as intricate, sophisticated, and valuable as any other category of literature. These tend to be single-titled romances, lengthier works which are released individually, and not as part of a numbered series.<sup>99</sup> Though often dismissed as inconsequential or frivolous, it is difficult to understand why they are more or less socially important than westerns, political thrillers, spy sagas, or books about sports figures.<sup>100</sup>

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97. See generally STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* 38-78 (Cambridge University Press 2004) (explaining how society creates a norm and the means by which people in that society must recognize the norm).

98. See Anastasia Niehof, Final Paper, *Judging Books and Readers by Their Covers: An Examination of the Intersections of Gender and Readers' Advisory* (May 7, 2003), <http://mingo.info-science.uiowa.edu/~niehof/genderra.htm> (recognizing that while women constitute the majority of romance novel readers, most women do not necessarily read romance novels).

99. See A Romance Review, *The Social Significance of the Romance Novel*, <http://www.aromancereview.com/columns/theromancenovelparttwo.phtml> (last visited July 26, 2006) (recognizing the difference between single-title romance novels and numbered series, both economically and with readers).

100. See, e.g., TANIA MODLESKI, *LOVING WITH A VENGEANCE: MASS-PRODUCED FANTASIES FOR WOMEN* 11-15 (1982) (indicating that society views popular female literature, such as romance novels, in a burdensome and unfair light, despite the fact that male-based literature can often read more poorly, even if viewed more highly); JANICE RADWAY, *READING THE ROMANCE: WOMEN, PATRIARCHY, AND POPULAR LITERATURE* 8-10 (P. Steiner et al. eds., UNC Press 1984) (criticizing romance novel critics for treating consumers in a condescending manner by indicating that romance novels have no value); PAMELA REGIS, *A NATURAL HISTORY OF THE ROMANCE NOVEL* 11-16 (2003); Cora Kaplan, *The Thorn Birds: Fiction, Fantasy, Femininity*, in *SEA CHANGES: ESSAYS ON CULTURE AND FEMINISM* 117, 145-46 (1986) (recommending that rather than criticize romance novels for feminist issues, critics should analyze the political impact of romance novel fantasies); LAURIE LANGBAUER, *WOMEN AND ROMANCE: THE CONSOLATIONS OF GENDER IN THE ENGLISH NOVEL* 17-20 (1990) (explaining that critics often determine the definition of a novel by distinguishing it from a romance); CAROL THURSTON, *THE ROMANCE REVOLUTION: EROTIC NOVELS FOR WOMEN AND THE QUEST FOR A NEW SOCIAL IDENTITY* 3 (1987) (recognizing that while American women of all ages and backgrounds read romance novels, the mass media rarely takes notice

There is, however, a subcategory of pulpy, formulaic romance novels, which illustrates an odd intersection between copyrights and gendered book consumption.<sup>101</sup> Their intended and actual audience is overwhelmingly female.<sup>102</sup> Sometimes referred to as “bodice rippers,” these books, often available through monthly subscriptions, feature stereotypical characters, repetitive plotting, and sexual contacts of borderline consensuality.<sup>103</sup> They are often written under somewhat pretentious-sounding pseudonyms and graced with cover art depicting an attractive, well-dressed, heterosexual couple in some sort of romantic embrace. One observer noted:

Typically, the heroine is removed from her familiar surroundings, usually associated with a fairly comfortable background in childhood or family. She meets an aristocratic man whose advances she initially rejects because she believes he has only a sexual interest in her. Thus she is typically antagonistic towards him. Then the intermediate intervention occurs. Typically, heroine and hero become separated in some way. This makes possible an eventual reversal of the initial rejection and antagonism. The hero typically displays an act of tenderness which is not fully explained at this juncture, but provides the opportunity for a gradual re-interpretation of the hero’s initial behaviour. Eventually, the hero declares his love for the heroine and they are happily reconciled.<sup>104</sup>

The successful monthly pulp romance repeatedly tells its readers the same essential story: regardless of contrary initial impressions,

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of the highly profitable industry); JANICE RADWAY, *The Readers and Their Romances*, in FEMINISMS 574, 576 (Robyn R. Warhol & Diane Price Herndl eds., 2d ed. 1997) (suggesting that analysts cannot simply review a selection of romance novels and then hypothesize as to the cultural impact on society created by the romance novel).

101. See *A Romance Review*, *supra* note 99.

Romance fiction critics claim that romance novels are all formulaic pornography for women. Elaine Wethington, a sociologist with an interest in popular cultural studies, believes that instead of finding fault with the formulaic qualities of category romances we should examine whether publishers pressure romance authors to conform to a formula because of what they write. To a certain extent, series romances are formulaic because of the guidelines developed by publishers. Is it sexism that makes the novels formulaic or the author’s plot devices?

*Id.*

102. See *Women and Media: On Soaps and Media Reception* (Feb. 10, 2000) <http://courseweb.edteched.uottawa.ca/cmn3104/soaps.htm> (citing Harlequin’s 1990 annual report which concluded that the average Harlequin readers are “overwhelmingly women of whom [forty-four percent] work at least part-time . . . range in age from [twenty-two to forty-nine], average family income of [fifteen to twenty thousand dollars], high school diploma but haven’t completed college”).

103. See *id.* (recognizing that “series or ‘category’ romances [are] short romances that are released in numerical order on a monthly basis, with a series number on each title”).

104. See *Reception Studies: Romantic Fiction*, Janice Radway: Reading the Romance (June 21, 2003), <http://www.cultsock.ndirect.co.uk/MUHome/cshtml/media/radway.html> (explaining the basic makeup of a serial romance novel).

beneath distant and foreboding exteriors, the men who pursue them romantically are decent, caring people who are worthy of being loved by female protagonists and by the readers themselves. Both reinforcement of idealized heterosexual relationships and perceived market imperatives may drive publishers' content decisions. Serial romance novel consumers can only buy, or refrain from buying, the books that contain the content that distributors choose to provide. Copyright law seems to do a poor job of incentivizing originality in this context, and one consequence may be that a patriarchal status quo is effectively reinforced.

#### CONCLUSION

Copyright laws allocate control over and distribution of resources generated by creative works. They help determine whether, and to what extent, those who produce creative works reap the rewards of this production, the role of intermediaries in the distribution of creative works, and the goods and options that will be available to consumers.

The ways in which male-constructed and male-enforced copyright laws disadvantage women have not been discussed very much in intellectual property legal scholarship. One obvious explanation for this is that gendered aspects of copyright laws are viewed as secondary to other economic and social considerations. Consequently, an important goal of this article is to convince the reader that gender issues should be part of the primary copyright discourse and that fundamental fairness in the copyright context is not strictly a matter of money.

There is a very visceral double bind posed to the author by writing this article: pointing out the dearth of gender analysis in existing copyright scholarship written by women may (incorrectly) make it appear as though the author is criticizing female intellectual property scholars for accidentally overlooking or intentionally avoiding something important, or, as applicable, of being "inadequately feminist." Many women have done extremely important work in the intellectual property field, and it is not at all the intention of this work to diminish their accomplishments in the least. Drawing attention to the lack of scholarship on gender issues in male-authored copyright scholarship may provoke defensive questions about why more women are not engaging in it or accusations that this article is giving short shrift to those who are. No censure of anyone is intended for any reason. This author has intentionally minimized the quantity and moderated the stridency of her gender-related scholarship for instrumental career reasons and is in no position to criticize any

similar choices made by others. The point of this exercise is simply to encourage increased consideration of gender issues in the legal copyright scholarship of the future.