# *ARE WE ON THE SAME PAGE?*

## Why a Feminist Reinterpretation of Copyright Law Would Afford Media Created by Women and Men a More Fulsome Legal Legitimacy


## By Kevin El Khoury

Kevin El Khoury is a third-year law student. He believes that each of us has a moral imperative to interrogate the assumptions that have shaped and continue to shape our institutions. In the spirit of Socrates, he derives great intellectual delight from being a gadfly but, thankfully, is far removed from the jurisdiction of ancient Athens. He makes his academic writing debut in this journal.


## INTRODUCTION

In 1989, a group of anonymous feminist artists called The Guerilla Girls publicized a poster in which they asked, "Do women have to be naked to get into the Met Museum?"[1] At the time, less than 5% of the displayed artwork in New York City's Metropolitan Museum of Art was created by female artists, but more than 85% of the collection's nude artwork depicted women.[2] The Guerilla Girls' critique of one of the world's most eminent art museums poses a broader inquiry of the laws that govern the creation and protection of artwork at large. A feminist critique of copyright law reveals that the laws make explicit and implicit assumptions about sex that disenfranchise female artists and other artists from traditionally marginalized groups. In this article, I will identify and question those assumptions, tracing their origins before and after the Copyright Act of 1976, then make a case for what I call the "detoxification of copyright law's toxic masculinity." I will argue how feminist theory can provide a framework for a reinterpretation of copyright law that, if implemented, would afford media created by women and men a more fulsome legal legitimacy. I will substantiate my argument by providing case studies that illustrate just how oppressive towards women the patriarchal copyright regime is, making the call for the emasculation of copyright law, a movement that is well underway, all the more persuasive.

## I

### *WHO GETS TO PICK UP THE PEN?*

Before a meaningful discussion of feminist theory and copyright law can commence, it is imperative that I conduct a review of the origin and evolution of authorship. To foreshadow the obvious (and, in some instances, not so obvious), the contemporary conceptualization of the author is a product of sexist philosophies, legislation, and jurisprudence.

#### Once Upon a Time, the Author Was a Hero

Before the Enlightenment, the owner of a writing was exclusively recognized to be its publisher.[3] In 1710, the British Parliament enacted the Statute of Anne, which is considered to be a "watershed event in Anglo-American copyright history."[4] Under the law, copyright vested in authors, not publishers.[5] A figure of major importance in lobbying for the rights of authors was John Locke, who argued in his *Two Treatises of Government* that authors are entitled to proprietary rights in their works as a consequence of the time and labor expended in producing them.[6] Locke, a champion of empiricism and logical thinking, ironically subscribed to a Romantic notion of the author as hero, which falsely assumes that, like a knight in shining armor seeking to rescue the damsel, the author is "[an] autonomous individual who creates without support from his cultural network" and proceeds to masculinize the author in his claim of dominion over his creations.[7]

The gendered language of authorship is illustrative. In the early 18th century, female writers were maligned, referred to as "prostitutes of the pen" by their male counterparts.[8] The so-called moral rights of authors were also known as the rights of paternity.[9] Today, there is censorship technology that can scan for and skip over scenes with graphic violence or sex, which has been said to have given birth to "bastard[s]" of the original film.[10] As will be further discussed in Section II, subscription to the fallacy of the author as hero is a result of an unquestioned acceptance of authorship as a manifestation of male ego.

For now, if we reject the premise that an author's creation is wholly his own and, instead, appreciate that it involved the labor of others, the notion of the author as hero is not merely idealistic but rather quixotic.[11]

#### The Author Cannot Rest in Peace

In sharp contrast with the Romantic notion of the author as hero is the post-structuralist movement that sought to undermine the integrity of the author at his core. In 1968, French post-structuralist Roland Barthes declared the "death of the author."[12] What Barthes meant was that the Romantic notion of the author as hero was dead. The demystification of authorship insists on

accepting the impossibility of originality. Every artwork is necessarily a reproduction.[13] Barthes also identified capitalism as a guardian of Romanticism.[14] Because capitalism commodifies all labor, artwork, as a product of labor, is reduced to just another form of private property.[15] When the results of authorship are cast "as a stable, almost corporeal entity," the communicative nature of artwork is obscured.[16] However, disillusionment with the Romantic notion of the author as hero forces one to come to terms with a host of ramifications no less problematic than before the author was 6-feet under. Given how easily corporate interests have appropriated the author to cover the centralization of ownership under copyright law, theories that espouse the "death of the author" might further enable corporations to commodify authorship.[17] Furthermore, it is suspicious that White, male post-structuralists are burying the author at the same time women and people of color are enjoying increasing legitimacy and importance as authors.

### It's Better to Be a Nephew Than a Niece

The founding fathers delegated to Congress the duty "to promote the progress of science and useful arts, by securing for limited times to authors and investors the exclusive right to their respective writings and discoveries."[18] In the United States, the division between the public and private spheres is sacred; Uncle Sam's presence in the latter is often regarded with intense suspicion. This division is usually characterized as the separation of the government from interference in one's individual and group liberties. An objective, at least theoretically, is to protect intellectual property from government regulation. However, all forms of intellectual property are at odds with this objective as they are "commercial products specifically protected and regulated through state action."[19]

Before 1976, the process for obtaining and maintaining protection was austere and cumbersome. Registration and deposit with the United States Copyright Office and notice were required for protection.[20] If artwork (usually a writing in this context) was published without a proper copyright notice affixed to all copies, it lost protection and fell into the public domain.[21] The Copyright Act of 1976 significantly reduced formalities to the extent that obtaining protection is now a nearly paperwork-free endeavor.[22] When the United States became a signatory to the Berne Convention in 1988, formal requirements were further eroded.[23]

At first blush, protection in a post-Berne world should be more accessible to all artists.[24] However, certain populations, specifically female artists and other artists from traditionally marginalized groups who often "do not enjoy ready access to lawyers and the copyright-licensing machinery," are arguably disadvantaged the most by the relatively new copyright paradigm because "discerning whether artwork that an [artist] might like to copy, adapt, or borrow from is copyrighted requires a fair amount of research, even before factors such as its availability and desirability are ascertained."[25]

Artwork that receives robust protection tends to be that which has been broadly commercially exploited or has the potential to be broadly commercially exploited.[26] When an artist institutes an infringement action, which is lengthy and expensive, it can be viewed as a tautological proxy for an artwork's value.[27] In other words, protecting artwork is appraising artwork. Altogether, changes to copyright law since the 18th century to have resulted in the increasing "commodification of art, its segregation from the community from which it comes and to which it is directed, and its severability in an economic sense from its creator."[28]

## II

## *FEMINISMS*

Can one can like men and still be a feminist? Yes, a feminist is not prohibited from appreciating men in sexual and non-sexual ways.[29] Neither does a woman-feminist have to disavow her femininity.[30] The image of a feminist as bra burner is, literally, an incendiary stereotype. As the term, "woman-feminist," implies, a man can be a feminist.[31] With respect to the many misconceptions of feminist theory, which betray deeply misogynistic and homophobic sentiments, one that is relevant to this discussion is that there is, in fact, more than one school of feminism. Feminisms are as abundant and diverse as the real life experiences of women, which vary because of differences in race, ethnicity, income level, religion, physical ability, and sexual orientation.[32] Therefore, an articulation of one overarching feminist perspective on copyright law that would garner "universal or even substantial acceptance is probably unrealistic."[33] That said, two prominent schools of feminism, liberal feminism and radical feminism, offer starkly contrasting analyses of copyright law, though both feminisms share the fundamental objective of advancing systemic gender parity. While the feminisms have been accused of engaging in gender essentialism, most feminists, however, appreciate that women and men are extremely diverse within their respective sex.[34] For the purposes of engaging in a productive discourse on gender issues, feminists argue that the gender binary should not determine the behaviors of women and men but, nonetheless, results in prophetic effects as the products of an ensconced "political construct that privileges [men's] way of thinking and doing over [women's]."[35] So, while it seems to belie their theses, feminists are forced to employ gender essentialist rhetoric to communicate or else they risk being perceived as unintelligible.

At this point, having conducted a brief historical review of authorship and copyright law and feminist theory primer, I will commence an informed evaluation through a feminist lens of how the patriarchal copyright regime, falsely empowered by Romantic and post-structuralist thinkers, has imbued rightsholders with the "power to control representations of female and non-White bodies and suppress narratives of resistance," with adverse consequences for egalitarian and dignity interests.[36] Because feminists propose that "gender subordination is the archetype of all subordination," a feminist perspective on copyright law is apt to identify and rectify the oppression suffered by any traditionally marginalized group.[37] Feminists seek to reform the general hierarchical order, which is the asserted reason for the oppression of any group.[38]

### I Don't See Gender:

### The Problem of Gender Blindness

While copyright law on its face does not discriminate on the basis of sex, it

is being enforced in ways that have a disparate impact on women and men.

Under the patriarchal copyright regime, women and men "achieve only formal equality, not substantive equality."[39] The Copyright Act of 1976 enumerates that "[i]n no case does 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."[40] Copyright law on its face seems to be neutral towards sex, but it descends from laws that were "written by men to embody a male vision of the ways in which creativity and commerce should intersect."[41] The so-called moral rights of authors, which prevent others from altering an author's artwork, are inalienable and exist in perpetuity in France and other civil law jurisdictions.[42]

Consequently, copyright law can be overprotective of artwork such that prospective artists, who are often women and social minorities, are dismissed as unlawful appropriators of extant artwork.[43] The fact that certain types of creative works within the domestic sphere, which has been generally occupied by women, are not protected impeaches the agnosticism of copyright law with respect to sex. The patriarchy's feigned justification is essentially that domestic creative works, such as cooking and sewing, are not adequately creative to warrant being subject to monopolistic control.[44] The patriarchy's gender biases, however, seem to color its proffered definition of creativity. Female artists have "disappeared as recognized creators of art in the European tradition as categories of art have either been masculinized to the position of high art as with the English novel or feminized into the category of craft as with needlework," with the latter falling below the threshold for protection.[45] It should be noted that up until the Renaissance, embroidery and tapestry-making were considered high art.[46]

Courts, which ostensibly refrain from rendering value judgments of artwork, generally have not recognized copyright in clothing, holding that clothes are primarily utilitarian in design and, to that end, are reconstructions of sewing instructions, which themselves are not copyrightable.[47] The problem, feminists argue, is that courts are indeed judging the artistic merits of clothing by putting a premium on functionality, which is a pretext for what the patriarchy perceives as the creative deficiency of women. It is possible that clothing and the like might be protected by patents, which are cumbersome to apply for and enforce, or industrial design law, but factories, for the most part, are run by men, so these alternatives are conveniently aligned with the self-serving interests of the patriarchal copyright regime.[48]

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### If You Can't Beat Him, Join Him: Liberal Feminism

With respect to affecting change in copyright law, the ideas for change espoused by liberal feminists, who were instrumental in gaining women's suffrage in the United States, are inadequate because they fail to redress the grievances that are intrinsic to the patriarchal copyright regime. Take, for example, the problem of the under-protection of clothing. Liberal feminists advocate for the expansion of copyright law to include clothing.[49] are disproportionately disadvantaged by the lack of protection for certain types of creative works, it is reasonable and well-intentioned to think that extending protection to include those works would bring about an egalitarian solution.[50] However, after the "playing field is regraded," women would be expected to compete equally with men in a game "contrived by men that has objectives and governing rules devised by men and is refereed by men."[51] In other words, liberal feminists argue that "women can participate as men on male-defined territory" without redressing the underlying assumptions associated with how we construct knowledge.[52] So, the Romantic notion of the author as hero is translated to reworded to read as "heroine," but the underlying narrative is no less paternalistic. Gains for female artists have been incremental and uneven, which begs the question: which women get drafted to play among men? The answer: the ones who can afford to, literally. For the sake of women and men from all socioeconomic backgrounds, it must be possible to "articulate a feminine epistemology [as an] alternative to a masculine epistemology that masquerades as a universal mode of being."[53]

### We're All in This Together: Radical Feminism

Radical feminism attempts to redress the problem of gender blindness in copyright law by taking an approach that eschews the incrementalism of liberal feminism for iconoclasm. Radical feminists draw from the post-structuralist thesis that the Romantic notion of the author as hero has been exposed to be problematic.[54] However, their work does not stop once the author has been pronounced dead. On the contrary, at that moment, radical feminists appeal for dialogism, which is a perspective on authorship that is sensitive to the conversations that are being had between female artists and other artists from traditionally marginalized groups, which are being drowned out by the dominant, masculine rhetoric.[55] Dialogism "discredit[s] formalistic, ahistorical analyses of [artwork]" by valuing the relational nature of authorship that transcends time and space.[56] Dialogism proposes that when an artist creates an original expression in any form, she engages in intrapersonal and interpersonal dialogues. She engages in an intrapersonal dialogue when examining herself to develop a personal narrative and interpersonal dialogue when examining others, including their artwork, to communicate meaning to an anticipated audience.[57] An artwork is not original "in the sense of having emerged *ex nihilo*," but it is the

artist's own from having engaged in intrapersonal and interpersonal dialogues.[58] A copyright regime that functions on radical feminist principles extols the specificity of an artist but not at the depersonalization or exclusion of others.

The public domain and doctrine of fair use offer a respite from the restrictiveness of the patriarchal copyright regime.[59] Artists can copy and adapt materials that are in the public domain without bearing the risk of being sued for infringement.[60] The doctrine of fair use, codified in the Copyright Act of 1976, functions as an affirmative defense against a claim of infringement.[61] The public domain and doctrine of fair use operate on a distinctively feminine modality, resisting male hegemony in copyright. They demonstrate that radical feminist principles are sound in theory and practice. Because the public domain, which is not commodified, recognizes and nurtures the communal nature of creation, it is feminine (one might even say maternal).[62] The doctrine of fair use, though more conditional than the public domain, can be identically characterized.[63] Collective works and joint authorship, despite what they are called, do not embody radical feminist principles because they perpetuate the conventions of separation and autonomy in copyright.[64] The copyright dispute over the musical, *Rent*, for example, demonstrates the inequities of joint authorship. In 1995, Jonathan Larson agreed to work with Lynn Thomson on the script for *Rent*.[65] Larson died hours after the final dress rehearsal and the show premiered on Broadway shortly thereafter.[66] Thomson's claim to co-author status was resoundingly rejected because, while her contributions to *Rent* were substantial, including verbatim drafting of "significant language," mutual intent, the determinative element of joint authorship, was absent.[67] Larson had billed himself as the sole author and referred to himself as such in third-party agreements.[68] The requirement of mutual intent for joint authorship unduly burdens women who risk being stigmatized for violating gender-linked social mandates to behave selflessly, even self-effacingly.[69] So, any quantitative evidence that women hold fewer copyrights than men could be a consequence of aversive social pressures to conform with gender norms.[70] "[An] authorial calculus" that elevates bargaining power above creativity disadvantages female artists and other artists from traditionally marginalized groups.[71]

# III

## *CASE STUDIES*

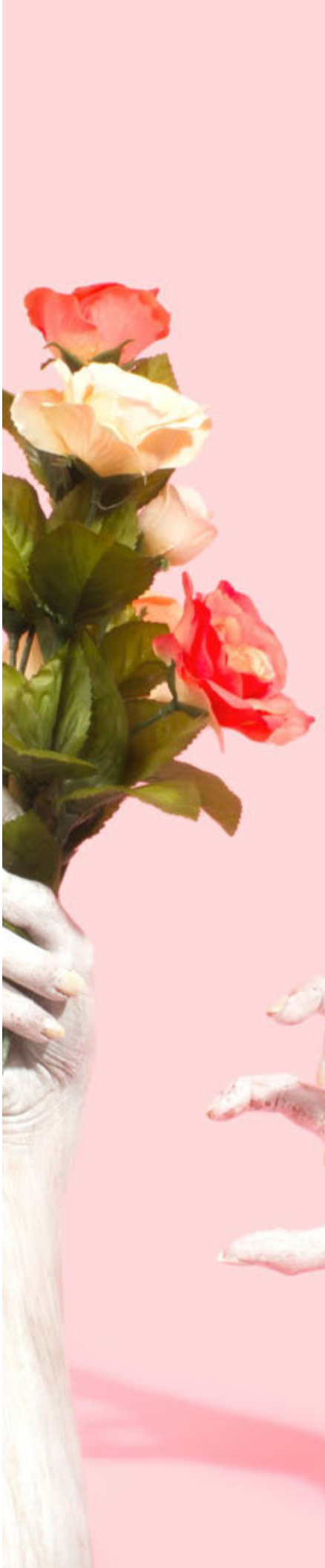
So far, this discussion of feminist theory as applied to copyright law has been primarily abstract as I have investigated the historical underpinnings of the patriarchal copyright regime and introduced some basic tenets of liberal and radical feminisms. In the third section of this article, I will investigate adjudicated and unadjudicated claims of infringement in various media, including film, sculpture, and literature. I will expose how pervasive and perverse the male gaze is in copyright law, in part by speculating what might have resulted under a vision informed by feminist values.

### A Fixation with Fixation

In 1884, the Supreme Court held that the copyright in a posed shot of Oscar Wilde belonged to its photographer, Napoleon Sarony.[72] The recognition of copyright in photographs was a seminal decision because it normalized a "fetishization of unitary authorship" for what was, at the time, new media.[73] The Supreme Court articulated a reductive definition of authorship, simply reciting the following from the dictionary: "[the author is] he to whom anything owes its origin; originator; maker; one who completes a work of science of literature."[74] Unwittingly or not, belief in the authorial singularity became zealous. Over a century later, controversy involving an actresses in the movie, *The Innocence of Muslims*, provided a high-profile opportunity to apply the Supreme Court's guidance.[75] Initially, the Ninth Circuit subverted precedent and expectations by holding that the actress owned a copyright in her performance and, as such, could enjoin the movie from being shown. Hollywood, unable to surrender its fixation with fixation, urged reconsideration of the decision, which was reversed by an en banc panel.[76] In reversing, the en banc panel held that a performer was not entitled to a copyright in her performance because she "played no role in [the] fixation [of it]."[77] The notion of the fixator as author and rightsholder, which had been a rebuttable presumption, became a bright-line rule.[78]

The consequences of entertaining a steadfast adherence to the fixator-as-author-and-rightsholder jurisprudence become increasingly problematic when privacy and First Amendment interests are involved. The outcomes of the following cases stand for the proposition that the patriarchal copyright regime privileges the interloper, penetrator, and the voyeur with protection.[79]

In 2012, photographer Arne Svenson captured shots of his neighbors as they went about their daily routines from the balcony of his apartment.[80] Notwithstanding Svenson's measures to limit exposure of his





subjects' identifying features, the fact remains that Svenson took the photographs without his subjects' permission.[81] By mounting a vigorous defense of his constitutional right to expression, Svenson was spared from being labeled a peeping Tom.[82] The subjects did not claim a copyright in Svenson's artwork, *The Neighbors*, but, if they had, they might have been successful. Like the actress in *The Innocence of Muslims*, if the subjects argued that the copyrights in their performances were theirs, the Second Circuit might have been persuaded.[83] Whatever the ruling might have been, the politics of copyright in today's surveillance society are contentious and warrant serious debate.

Copyright law "weaponizes the camera as phallus and allows full realization of photography's hunting metaphor, where we talk about loading and aiming a camera, about shooting a film, with the object as prey."[84] Sportscaster Erin Andrews was the victim of both the man who had uploaded an intimate video of her on the Internet and what I call the "peephole loophole" in copyright law. Andrews sued the hotel and the peeping Tom for invasion of privacy and won.[85] However, hers was a Pyrrhic victory because the court ruled that the copyright in the video belonged to the peeping Tom. Accordingly, her remedies were limited to tort. However, if copyright in the video had belonged to her, she could have had the video removed from the Internet under the Digital Millennium Copyright Act.[86] Because a performer seldom owns the copyright in her performance as captured on film, the only way that Andrews, at the time, could have acquired the copyright in the video would have been by written assignment by none other than the peeping Tom.[87] The patriarchal copyright regime empowered Andrews's tormentor, vesting in him the rights to control the reproduction, distribution, and display of the video. Moreover, Andrews is one of countless victims. In a phenomenon called "revenge porn," vindictive paramours upload recordings of their sexual encounters to pornographic websites without the permission or in spite of the disapproval of their partners.[88] The Cyber Civil Rights Initiative, the leading advocacy group for victims of revenge porn, estimates that approximately 90% of revenge porn victims are female.[89] So, women-victims are condemned to suffer the perpetuity of the Internet at the hands of men-perpetrators who are afforded copyright in sex tapes because the latter happen to set up the cameras.

**Reassembling the Glass Ceiling**

In 1989, Arturo Di Modica, hoping to encourage the citizens of New York in the wake of a recession, installed a 3.5-ton bronze statue of a bull at the intersection of Wall and Broad Streets.[90] In 2017, a visitor dared to face *Charging Bull*. Measuring just over four feet in height, the installation of *Fearless Girl* directly in front of *Charging Bull* profoundly changed the latter's meaning.[91] Di Modica was perturbed that *Charging Bull*, once a symbol of American tenacity, had been essentially recast as a bully.[92] Consequently, Di Modica threatened to sue the commissioner and creator of *Fearless Girl* for infringement. Di Modica has not yet followed up on his threat, but he might have two colorable claims, both of which rely on the paramount importance of fixation in copyright law. First, under the Visual Artists Rights Act, which affords the so-called moral rights of authors to artists that create certain media, such as statues, Di Modica could claim that the juxtaposition of *Charging Bull* and *Fearless Girl* constitutes an "intentional distortion, mutilation, or other modification of [*Charging Bull*] that would be prejudicial to [his] honor or reputation."[93] The second claim would proceed from the argument that the semiotic existence of *Fearless Girl* is inexorably related to, if not irrevocably dependent on, *Charging*

*Bull*. If, in fact, *Fearless Girl* is said to be based on *Charging Bull*, it would be stripped of protection for being an unauthorized, derivative artwork.[94] The hatred that Di Modica has for the ontological castration of his artwork stems from a sense of entitlement from having been raised in a patriarchal copyright regime that is seeking to extend authorship interminably. Whether Di Modica himself is a misogynist is neither here nor there; his desire to remove *Fearless Girl* from *Charging Bull*'s line of sight constitutes an effort to vest in himself the power to control his vision, figuratively, by controlling what *Charging Bull* literally can see.[95] The patriarchal copyright regime would have the zeitgeist that is embodied by the depiction of a young Latina standing with her arms akimbo in the middle of the Financial District of Lower Manhattan suppressed with little or no reservation.

Copyright law's male gaze is also White and majoritarian in general. Because the patriarchal copyright regime ignores the virtues of community-created artwork, folklore and traditional knowledge are at risk of being colonized.[96] For example, the recording of an indigenous people's oral traditions vests in the colonizer the copyright therein. He can do so without the community's permission, and no control or remuneration is afforded to the community.[97] The colonizer cares only about the commercial potential of indigenous artwork; dissociating artwork from its cultural origins does not sully his conscience.[98] At the same time, the commodification of indigenous artwork relies on the exoticization of its aesthetic.[99] Similarly, the patriarchal copyright regime has enabled the appropriation of Black culture. Jazz, a genre of music that is characterized by improvisation, has been whitewashed by an industry that is beholden to the patriarchal copyright regime.[100]

The patriarchy's covetous predisposition is apparent in patent law too. Between 1976 and 1983, John Moore went to a university hospital to undergo treatment for leukemia.[101] Moore's caretakers, however, were also researchers who, without his consent, harvested his cells to create a cell line for which they eventually obtained a patent.[102] In a decision that "inverts the natural order," the California Supreme Court held that, in addition to there having been no conversion of his cells, Moore did not have any property interest in the cell line that descended from his cells.[103] Moore was divested of a patent in what were his creations in the truest sense, demonstrating that the male gaze has no sense of propriety but an inflated sense as a proprietary.

**Adopting a "read-write culture," which heralds feminist values, would foster rather than chill the production of fan fiction, which is a ready platform for countermajoritarian ideas.**

### A New Chapter in New Media

The patriarchal copyright regime is humorless, meaning that it tends not to condone artists' attempts to subvert its broad definition of derivative artwork. Copyright law assumes that the process by which one interacts with media, forms of writing in particular, is "read-only."[104] In other words, reading is passive, and should one be inclined, out of appreciation, to emulate what she has read, she will have to overcome accusations of infringement. Alice Randall, the writer of *The Wind Done Gone*, a parody of *Gone with the Wind*, managed to pass muster, but she is the exception.[105] The livelihoods of fan fiction writers, many of which do not have the resources to defend against infringement lawsuits and whose stories would not likely qualify as parody, are in constant jeopardy.[106] For the most part, these "amateur culturists" write for the sake of writing.[107] They create culture in the margins by taking their favorite literature and unironically reinterpreting it by inserting their own experiences.[108] Large publishing houses are usually not inclined to instigate litigation against fan fiction writers because there is little financial gain to be had.[109] However, when they do, it is usually because an unauthorized writing reinterprets the source material in ways that the dominant culture considers to be morally deviant.

For example, "slash fan fiction" involves romantic pairings of same-sex characters in mainstream science fiction television programs and films.[110] Slash fan fiction showcases how "female [and queer] consumers can radically rework and recode existing texts."[111] Under the patriarchal copyright regime, which subscribes to a read-only assumption of interaction with media, it is the capricious prerogative of heteronormative publishers to send cease-and-desist letters to slash fan fiction writers. Adopting a "read-write culture," which heralds feminist values, would foster rather than chill the production of fan fiction, which is a ready platform for countermajoritarian ideas.[112]

Another ready platform for countermajoritarian ideas is blogging. Blogging is a professional and recreational activity that is immensely popular with women.[113] Group blogging in particular can be seen as a "text-based cyberspace homology to quilting."[114] Incidentally, online knitting communities, such as Knitty, Another Knitting Blog, and Wendy Knits, exist in abundance.[115] The Creative Commons and the Organization for Transformative Works seek to promote these kinds of communal creation by advocating for the relaxation of licensing schemes.[116] These organizations also advocate that fan fiction is sufficiently transformative and, therefore, should not be considered a violation of the doctrine of fair use.[117]

Hypertext is a tool that is used by authors who write on digital platforms to direct readers to related materials via links and whose transformative nature has been heralded by radical feminists.[118] Readers of hypertext are liberated from total authorial domination. Writings with hypertext

afford non-linear meaning-making experiences to readers. They facilitate "webs of interconnectedness" as opposed to "ladders of hierarchy" in imparting knowledge.[119] Hypertext integrates dialogism in form and substance, resulting in a medium that can amplify the voices of women and social minorities.

Video games comprise a medium that the patriarchal copyright regime has not decisively conquered. Courts have not squarely addressed player contribution to a video game, specifically the possibility that a player is contributing original expression by playing the video game.[120] Most likely, some license or authorization by the manufacturer might be inferred, but it depends on the nature of the game.[121] A coder who is able to access and reorganize the images of an underlying video game might be authoring an unauthorized derivative work because it "essentially tells a new story based on the original game."[122]

# IV

## *CONCLUSION*

As Virginia Woolf once wrote, "I would venture to guess that Anon, who wrote so many poems without signing them, is often a woman."[123] Many female artists (just how many, we will never know) have been excluded from the canon because of misattribution of artwork to male artists or through anonymity imposed on them due to societal prohibition on women's participation in autonomous creation.[124] More recently, female artists who manage to tear the veil of anonymity and create artwork in their own names are not afforded a fulsome legal legitimacy because the patriarchal copyright regime, which is infatuated with Romantic notions of authorial singularity and solitude, promulgates laws that are simultaneously under-protective and overprotective. A feminist reinterpretation of copyright law would halt and reverse the relentless encroachment of the patriarchal copyright regime. Liberal feminists call for the augmentation of protected categories, but their approach might be viewed as an implicit concession that the patriarchal copyright regime cannot be dismantled or fundamentally changed. On the other hand, radical feminists "question any normative reforms that do not value, preserve, and advance the unique creative endeavors of women."[125] They repudiate any notion of copyright as being a natural right of the author. Both liberal and radical feminists, however, are cognizant of the widespread injuries sustained by female artists and other artists from traditionally marginalized groups as a result of copyright law's majoritarian gaze. They resent that courts have disproportionately rewarded men (and male-run entities), who tend to possess greater bargaining power, at the expense of women and social minorities, who are pressured to exhibit their artistry from submissive postures.

Going forward, "from a policy perspective, insisting on the death of the author is a non-starter [and, from] a theoretical perspective, any attempt to assimilate the author's death into copyright law can only spell the death of copyright itself."[126] Expanding intellectual property rights is not a panacea but rather a sectarian solution that might exacerbate the problems of women and social minorities, which are rooted in lack of economic and political leverage.[127] The proposals of radical feminists are lofty. Ending the derivative work right, which would empower the expression of resistive narratives, is desirable but unlikely. Perhaps more likely is a revitalization of performer rights, which would restore agency that individuals in front of the camera possess over their bodies and representations of them, and elimination of the mutual intent requirement for joint authorship, which would serve artists who lack economic and political leverage or use discursive and recursive platforms of expression.[128] What is certain, however, is that even though a feminist reinterpretation of copyright law does not lack vision, it will remain largely unrealized until the patriarchal copyright regime stops treating female artists and other artists from traditionally marginalized groups as ingénues, fully allowing them to create their masterpieces.

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[1] Jeffrey Toobin, "Girls Behaving Badly," *The New Yorker* (2005).

[2] *Id.*

[3] *See* Shelley Wright, "A Feminist Exploration of the Legal Protection of Art," Can. J. Women & L. 7, 68 (1994).

[4] L. Ray Patterson, "Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U. S. Constitution," Emory L. J. 52, 916 (2003).

[5] 8 Ann. Cl. 21.

[6] Wright at 68.

[7] Malla Pollack, "Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter," Wm. & Mary J. Women & L. 12, 606 (2005).

[8] Debora Halbert, "Feminist Interpretations of Intellectual Property," Am. U. J. Gender Soc. Pol'y & L. 14, 448 (2006).

[9] Wright at 81.

[10] Dan L. Burk, "Copyright and Feminism in Digital Media," Am. U. J. Gender Soc. Pol'y & L. 14, 547 (2006).

[11] Raadhika Gupta, "Copyright v. Copyleft: A Feminist Perspective on Marginalization Under Copyright Law," NUJS L. Rev. 4, 73 (2011).

[12] Carys J. Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law," Am. U. J. Gender Soc. Pol'y & L. 15, 216 (2006) (quoting Roland Barthes, *The Death of the Author* (Stephen Heath trans. (1977)).

[13] *Id.* at 217.

[14] *Id.* at 222-3.

[15] *Id.*

[16] *Id.*

[17] Halbert at 458.

[18] U. S. Const. Art. 1, § 8, Cl. 8.

[19] Wright at 74.

[20] Patty Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials*, 89 (2012). A proper notice must have included the copyright symbol, the word, "copyright," or its abbreviation, as well as the year of the artwork's first publication and the name of the copyright owner. *Id.*

[21] *Id.*

[22] *See* Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law," Am. U. J. Gender Soc. Pol'y & L. 14, 568 (2006).

[23] *See* Gerstenblith at 89. For artwork created after March 1, 1989, notice became permissive rather than mandatory. *Id.*

[24] Bartow at 566.

[25] *Id.* at 567.

[26] *Id.* at 559.

[27] *Id.*

[28] Wright at 73.

[29] *See* Lois Tyson, "Feminist Criticism," *Critical Theory Today: A User-Friendly Guide* (2014).

[30] *Id.*

[31] *Id.*

[32] Bartow at 570.

[33] *Id.*

[34] *Id.* at 558.

[35] Halbert at 440.

[36] John Tehranian, "Copyright's Male Gaze: Authorship and Inequality in a Panoptic World," Harv. Women's L. J. 41, 343 (2018).

[37] Gupta at 77.

[38] *Id.*

[39] *Id.* at 70.

[40] 17 U. S. C. § 102(b).

[41] Bartow at 557.

[42] Wright at 80. The notion of an inviolable bond between a father and his children has been corrupted in some common law jurisdictions, the United States in particular, where the so-called moral rights of authors can be waived. *Id.*

[43] Craig at 233.

[44] *Id.* All that seems to be required is a modicum of creativity. *E.g.,* Desktop Mktg. Sys. Pty. Ltd. v. Telestra Corp., 119 F. C. R. 491 (2002) (holding that copyright attached to telephone directories).

[45] Wright at 89.

[46] *Id.* In India, textiles, specifically carpet-making, is the preserve of men. *Id.* at 95.

[47] *See* Brigid Foley Ltd. v. Ellott, R. P. C. 433 (1982).

[48] Wright at 91.

[49] Bartow at 565.

[50] *Id.*

[51] *Id.* at 566.

[52] Halbert at 437.

[53] *Id.*

[54] Craig at 224.

[55] *Id.* at 246.

[56] *Id.* at 243.

[57] *Id.* at 265.

[58] *Id.* at 262.

[59] Pollack at 620-1.

[60] *Id.*

[61] 17 U. S. C. § 107.

[62] Pollack at 620-1. Radical feminists attribute the decreased fertility of the public domain to the widespread adoption of the Berne Convention. *Id.*

[63] Bartow at 560.

[64] Gupta at 74.

[65] *See* Thomson v. Larson, 147 F.3d 195 (1998).

[66] *Id.* at 197.

[67] *Id.* at 202.

[68] *Id. Rent* tells the story of individuals from a marginalized community. It is bitterly ironic that Thomson's lawsuit for co-author status left her legally and economically destitute. *Id.*

[69] Tehranian at 378.

[70] Bartow at 577.

[71] Tehranian at 375.

[72] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (1884).

[73] Tehranian at 371.

[74] *Burrow-Giles Lithographic Co.* at 57-8 (quoting "Author," *Worcester's Dictionary* (1860)).

[75] *See* Garcia v. Google, Inc., 786 F.3d 733 (2015).

[76] *Id.*

[77] *Id.* at 744.

[78] Tehranian at 353-4.

[79] *Id.*

[80] *See* Foster v. Svenson, 126 A.D.3d 150 (2015).

[81] *Id.*

[82] *Id.*

[83] Tehranian at 355. One could argue that the actress in *The Innocence of Muslims* was aware that she was giving a performance, while Svenson's subjects were simply leading their lives. However, this distinction is belied by Svenson's own characterization of his subjects as "performing behind a transparent scrim on a stage of their own creation with the curtain raised high." *Foster* at 98.

[84] Tehranian at 361.

[85] *See* Andrews v. Marriott Int'l., IL App. (1st) 122731 (2016).

[86] 17 U. S. C. § 512.

[87] Tehranian at 359. In fact, there was a written assignment—two years after the video surfaced on the

Internet. *Id.*

[88] *Id.* at 362.

[89] *See* Cyber Civil Rights Initiative's Non-Consensual Pornography Research Results 1 (2013).

[90] *Id.* at 382. *Charging Bull* was relocated to Bowling Green two weeks after its installation. *Id.*

[91] *Id.* at 383. State Street Global Advisors (SSgA) commissioned *Fearless Girl* to serve as a commercial tie-in with the firm's celebration of International Women's Day, which featured the launch of SSgA's SHE index fund as part of a campaign to increase female representation on corporate boards. *Id.*

[92] *Id.* at 384.

[93] 17 U. S. C. § 106A.

[94] Tehranian at 387.

[95] *Id.* at 384.

[96] Pollack at 616.

[97] *Id.*

[98] *See* Rosemary J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy," Can. J. L. & Juris. 6, 259-65 (1993). *See, e.g.,* "Donate Profits from Offensive FW15 'DSquaw' Line to an Organization That Supports Native Women's Rights in Canada (2016), https://www.change.org/p/dsquared2-donate-profits-from-

offensive-fw15-dsquaw-line-to-an-organization-that-supports

-native-women-s-rights-in-canada, *archived at* https://perma.cc/6335-9VDV.

[99] *Id.*

[100] *See* K. J. Greene, "Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues," Am. U. J. Gender Soc. Pol'y & L. 16, 365-85 (2007).

[101] *See* Moore v. Regents of the University of California, 51 Cal. 3d 120 (1990).

[102] Pollack at 611. The patent was assigned to the university, which executed a lucrative contract with a biotechnology company. *Id.*

[103] *Id.* (citing *Moore* at 141-2).

[104] Emily Chaloner, "A Story of Her Own: A Feminist Critique of Copyright Law," ISJLP 6, 221-55 (2010).

[105] *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (2001).

[106] Chaloner at 250.

[107] *Id.* at 230.

[108] *Id.* at 246.

[109] *Id.* at 250.

[110] *Id.* at 247.

[111] *Id.*

[112] *Id.* at 224-5.

[113] Bartow at 574.

[114] *Id.*

[115] *See* Knitty, https://www.knitty.com/

ISSUEspring05/index.html, *archived at* https://perma.cc/

9YXN-BHHM; Another Knitting Blog, https://mimoknits.typepad.com/knitting/2013/08/a-shift-of-

perspective.html, *archived at* https://perma.cc/W6K7-FB3R; Wendy Knits, https://www.wendyknits.net, *archived at* https://perma.cc/6KSW-PVB2.

[116] Chaloner at 254-5.

[117] *Id.*

[118] Burk at 522. When media other than text, such as graphics, sound, or animation, are interconnected, the result is referred to as "hypermedia." *Id.*

[119] *Id.* at 524.

[120] *See* Stern Electronics, Inc. v. Kaufman, 669 F.2d 852 (1982).

[121] Burk at 540. *Façade* puts the player in the role of a close friend of Trip and Grace, a couple who invites the player to their New York City apartment for cocktails. The evening is soon marred by the palpable marital strife between the hosts. The player types phrases to converse with the couple, either supporting them through their troubles or driving them further apart. The conversations are stored as text files that resemble stageplays, which can be accessed after the player has completed a runthrough. *See* Playabl Studios, *Façade* (2005), https://www.playablstudios.com/facade, *archived at* https://perma.cc/2SML-LWD5.

[122] *Id.* at 543.

[123] Virginia Woolf, *A Room of One's Own*, 51 (1929).

[124] Wright at 81.

[125] Bartow at 569.

[126] Craig at 266.

[127] Craig at 619.

[128] Tehranian at 393.