

PERFORMANCE, PROPERTY, AND THE SLASHING OF GENDER IN FAN FICTION

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INTRODUCTION

Today, it is no secret that the regime of copyright law, once an often-overlooked footnote to our legal system of property, now occupies a central position in modern debates surrounding the relationship between freedom of expression, language, and

*Associate Professor, Fordham University School of Law. The author would like to thank the following individuals for helpful conversations and suggestions during the development of this work: Ann Bartow, Julie Cohen, Christine Haight Farley, John Alan Farmer, Llew Gibbons, Peter Jaszi, Michael Madison, Eduardo M. Peñalver, Pamela Samuelson, Ann Shalleck, Dana Schilling, and Fred Von Lohmann. A special word of thanks is due to Rebecca Tushnet, whose early work on fan fiction inspired this Article, and to the community at Washington College of Law for inviting Ann Bartow and myself to deliver a keynote address on the relationship between intellectual property and gender. Alan Avorgbedor, Genevieve Blake, and Heather Burke provided very helpful research assistance.

ownership. Curiously, while contemporary scholarship on copyright now embraces a wide range of political and economic approaches, it has often failed to consider how intellectual property, as it is owned, constituted, created, and enforced, both benefits and disadvantages segments of the population in divergent ways. This absence is both vexing and fascinating. While issues of distributive justice have permeated almost every other area of legal scholarship, the literature on intellectual property, while perfectly poised to grapple with these aspects, has traditionally reflected a striking lack of attention to these considerations.² This tendency becomes even more noticeable as we see a growing number of debates that continue to permeate the architecture of intellectual property, providing a silent subtext that forces us to confront which narratives receive protective license and which narratives receive legal prohibition.

At the same time, intellectual property law is uniquely poised to govern the most intimate aspects of the representations of human life, including the depiction and commodification of racial, sexual, ethnic, and political identities. Indeed, far from being a value-neutral regime, the history of intellectual property law reveals an astonishing number of incidences where the laws of copyright, trademark, and patent have been used—often with great success—to silence transgressive depictions of sexuality, sexual identity, and gender expression. Earlier in the history of intellectual property law, protection for patented inventions did not extend to so-called “immoral” innovations.³ Today, within the realm of trademark and copyright law, courts have routinely protected the rights of intellectual property owners to enjoin expressive uses of their works under the argument that sexualized depictions “tarnish” the

2. *But see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (criticizing both expansionist and minimalist views of copyright and setting forth a “democratic” framework that enhances both independent and pluralist aspects of society); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1 (2002) (concluding that copyright’s prohibition of unauthorized derivative works runs counter to the First Amendment and makes it unconstitutional); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000) (critiquing copyright law as too restrictive from a First Amendment standpoint); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005) (explaining how copyright disproportionately affects “poorly financed creators” and exploring reforms that would ease such burdens).

3. *See* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 142-44 (3d ed. 2003) (providing an abbreviated history of inventions that have been denied a patent for beneficial or moral utility); *Bedford v. Hunt*, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (No. 1217) (describing a useful invention as one without “obnoxious or mischievous tendency”); *Lowell v. Lewis*, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8568) (demonstrating how “immoral” inventions cannot satisfy patent law’s utility requirement).

wholesomeness of the original.⁴ More specifically, recent cases demonstrate an increasing interest in prohibiting suggestions of homosexuality in appropriated works.⁵ Consider the recent series of cease-and-desist letters sent by DC Comics to a New York art gallery and web site over a series of paintings that showed the superheroes "Batman and Robin" in homoerotic poses.⁶ Other examples involve a series of legal threats levied against the maker of a film, *Ernest and Bertram*, which depicted the two Sesame Street characters "Ernie and Bert" in a same-sex relationship,⁷ as well as against the makers of a

4. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (deciding that defendant's song "Cunnilingus Champion of Company C" was not fair use of "Boogie Woogie Bugle Boy of Company B," because the former was "neither a parody or burlesque" of the latter); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979) (holding that viewers of the movie *DEBBIE DOES DALLAS* would not be able to dissociate it from the Dallas Cowboys cheerleaders, causing confusion and harm to the cheerleader's reputation); *Hasbro, Inc. v. Internet Entm't Group, Ltd.*, No. C96-130WD, 1996 WL 84853, at *1 (W.D. Wash. Feb. 9, 1996) (deciding that defendant tarnished plaintiff's "Candy Land" mark by operating *candyland.com* as a pornographic web site); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp 1397, 1398 (S.D.N.Y. 1975) (holding defendant's use of the "Mickey Mouse March" as audio background to pornographic scene not protected by fair use). *But see* *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 252 (2d Cir. 1980) (finding parodists' transformation of "I Love New York" into "I Love Sodom" noninfringing); *Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 900-01 (N.D. Cal. 2002) (ruling that the creators of the *STAR WARS* films failed to establish that their trademark was tarnished by a pornographic parody); *Pillsbury Co. v. Milky Way Prods., Inc.*, Civil No. C78-679A, 1981 WL 1402, at *10 (N.D. Ga. Dec. 24, 1981) (holding that a picture in a magazine depicting characters resembling "Poppin' Fresh" and "Poppie Fresh" engaged in sexual acts was noninfringing because it was a fair use).

5. See *MGM-Pathe Commc'ns Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991) (granting a preliminary injunction to the owner of the trademark for the Pink Panther to prevent a gay rights group from using the same name); Michael Colton, *I'm Sorry, Tinky Winky*, SALON, Feb. 13, 1999, <http://www.salon.com/news/1999/02/13newsb.html> (describing Jerry Falwell's targeting of the television show *Teletubbies* for promoting homosexuality); *The Thirty Years War: A Timeline of the Anti-Gay Movement*, INTEL REPORT (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2005, <http://www.splcenter.org/intel/intelreport.article.jsp?aid=523> (documenting the progression of various antigay organizations over the past thirty years); Press Release, Nat'l Ctr. for Lesbian Rights, Trademark Office Says No to Dykes on Bikes National Center for Lesbian Rights and Brooke Oliver Law Group Vow to Keep Fighting for Lesbian Visibility (July 14, 2005), http://www.nclrights.org/releases/pr-dykesonbikes_071405.htm (criticizing the United States Patent and Trademark Office's denial of a request to register the name "Dykes on Bikes" because they used an incorrect legal standard in judging the word *dyke* to be vulgar). This case was later overturned on appeal. See Christopher Curtis, Trademark Office OK's 'Dykes on Bikes,' at <http://www.planetout.com/news/article-print.html?2005/12/08/2> (last visited May 30, 2006).

6. See *Gallery Told to Drop 'Gay' Batman*, BBC NEWS, Aug. 19, 2005, <http://news.bbc.co.uk/1/hi/entertainment/arts/4167032.stm>.

7. See *Sesame Street Legal: Furore Over Bert and Ernie Gay Flick*, GUARDIAN UNLIMITED, Apr. 10, 2002, http://film.guardian.co.uk/News_Story/Exclusive/0,4029,681812,00.html [hereinafter *Sesame Street*] (reporting that in 1993, the makers of Sesame Street issued a statement which vociferously defended their heterosexuality: "Bert and Ernie, who've been on Sesame Street for 25 years, do not portray a gay couple, and there are no plans for them to do so in the future. They are

series of greeting cards that featured John Wayne and Clark Gable with gay themes.⁸ Mattel also protested a film's depiction of its sterling commodity Barbie engaging in a sexual relationship with a female servant.⁹ A variant of this issue even reached the Supreme Court in a case that held that the United States Olympic Committee (USOC) could enjoin the use of the term the "Gay Olympics" on similar grounds.¹⁰

As these events demonstrate, queering mainstream works, while endlessly entertaining, can also be construed as a brazen act of civil disobedience against the frameworks of intellectual property.¹¹ While depictions of sex and sexuality have always been fraught with cultural controversy, these incidents demonstrate how such incidences of "semiotic disobedience" increasingly personify an underlying tension between our legal regimes of intellectual property and free speech, revealing how issues of distributive justice are invisibly intertwined within the interstices of commodified representations.¹² While constitutional speech frameworks tend to treat expression as part of an ongoing contribution to layers of democratic dialogue, intellectual property frameworks tend to honor expression as an excludable, privately owned resource. Even though fair use defenses are meant to mediate the boundaries between property and speech, their inherent lack of predictability sometimes contributes to the ongoing instability within the field at large. Often, as these cases show, the resolution of these conflicts results in the exclusion of certain types of recoding over others.

In sum, there is much more to be said about the relationship

puppets, not humans").

8. See Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 931 (1999) [hereinafter Hughes, *Recoding*] (discussing the greeting cards cases); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 145-46 (1993) (describing that in both greeting card cases, the heirs of both celebrities found the associations with homosexuality objectionable).

9. See *Lesbian Barbie Film Blocked by Mattel*, 365 GAY.COM, Mar. 11, 2002, <http://www.planetout.com/news/article.html?2002/03/11/4> (describing how Mattel obtained a court order to prevent a film depicting Barbie as a lesbian from being displayed).

10. See *S.F. Arts and Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 530, 535, 541, 546 (1987) (holding that the USOC could control the use of the term "Olympics" as the statute granting such power did not require that the unauthorized use be confusing).

11. See generally Sonia K. Katyal, *Semiotic Disobedience*, WASH. U. L.Q. (forthcoming 2006) [hereinafter Katyal, *Semiotic Disobedience*] (using the term "semiotic disobedience" to illustrate situations where authors and artists choose to aggressively rework and recode particular texts, often in opposition to the author's intended meaning).

12. *Id.* (claiming that the tension between intellectual property and speech protections conceals a more basic conflict between democracy and disobedience).

between intellectual property—as a governing body of law—and its distributive implications for the particular identities that it governs. As these examples suggest, intellectual property law plays significant roles in regulating the marketplace of speech. Depending upon its vantage point, the law can either empower or disable creativity, while also having a powerful impact on who actually receives access to and protection within the marketplace of cultural products. Further, as these examples might suggest, propertizing expression benefits some authors and artists, often within the mainstream, sometimes at the cost of chilling other types of artistic expression and commentary, often from “outsider” groups like women, people of color, and sexual minorities.¹³ Ignoring this result matters. If we construe a marketplace of copyrighted cultural products as akin to, or at least reflective of, the rich diversity of the marketplace of ideas itself, then the denial of the privileges of authorship to some suggests that we are missing an important and illuminating facet of the relationships between production, representation, and consumption within copyright law. Consequently, we must consider how the inability to access these markets can yield a lasting impression, one that relates to and fosters a greater and more permanent exclusion from the marketplace of speech itself.

Consider, perhaps, one of the most glaring pieces of evidence in this respect. It is perhaps no secret to academics and lawyers that women are disproportionately underrepresented in governing the ownership, production, and management of copyrighted content in the United States. One recent study conducted by the Annenberg Center noted that among the top media companies in telecommunications, publishing, printing, entertainment, and advertising women were grossly underrepresented.¹⁴ The study noted that on average women make up no more than fifteen percent of top executives, even less of board directors, and that no company has a

13. See Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1991) [hereinafter Coombe, *Objects of Property*] (noting that intellectual property laws are able to promote and restrict various expression due to the objectification of cultural forms).

14. See ERIKA FALK & ERIN GRIZARD, THE ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., *THE GLASS CEILING PERSISTS: THE 3RD ANNUAL APPC REPORT ON WOMEN LEADERS IN COMMUNICATION COMPANIES 4* (2003), available at http://www.annenbergpublicpolicycenter.org/04_info_society/women_leadership/2003_04_the-glass-ceiling-persists_rpt.pdf (reporting the key findings of the study which uses the number of women in executive positions at the nation's largest communications companies as well as the human resources policies at these companies to assess the “glass ceiling”); see also Lisa M. Bowman, *Women Leaders? Not in our Boardroom*, CNETNEWS.COM, Aug. 27, 2002, http://news.com.com/Women+leaders+Not+in+our+boardroom/2100-1017_3-955528.html (noting that several companies had no women executives and others had no women board members).

majority of women in top executive positions or on its board.¹⁵ The absence of women from the top positions governing the management and production of intellectual property is not simply structural—one could credibly argue that it extricably affects every aspect of the content industries, particularly regarding the logic and strategy behind content production and the creation of intellectual property.

Yet, here, the nature of cyberspace as an entity can teach us a host of lessons regarding the relationship between gender, sexuality, and intellectual property that real space cannot. Years ago, when the Internet was first beginning to permeate our ways of thinking and communicating, legal scholars proclaimed that cyberspace was a new, borderless entity—capable, in the words of John Perry Barlow, of transcending human concepts of space, identity, property, time, and governance.¹⁶ While many of his utopian predictions have failed to sustain themselves in the wake of increasing surveillance and private and public control, the Internet has today unleashed an enormous array of opportunities for individuals to participate in the creation and circulation of content. That invitation has extended itself to individuals from *all* walks of life—male, female, straight, gay, and those that challenge the boundaries of identity in particular.

The freedom of cyberspace, I would argue, has particular significance for “outsider” groups, particularly women and minorities. For example, in stark contrast to the disproportionality that we see in real space with respect to gender equity, in cyberspace, we see an almost breathtaking array of equity in participation. Some studies claim that women have far outpaced men when it comes to using the Internet.¹⁷ One study reports that women make up half of all Internet users, even though the American population is forty-eight percent male.¹⁸ In making these observations, I certainly do not mean to underestimate the comparable impact of race, class, location,

15. *Id.*

16. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, in CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS 27, 27-30 (Peter Ludlow ed., 2001) (introducing a mock Declaration of Independence for cyberspace).

17. See Eric Chabrow, *More American Women than Men Go Online*, INFO.WEEK, Apr. 7, 2005, <http://www.informationweek.com/showArticle.jhtml?articleID=160502074>; *It's a Women's Web*, EMARKETER.COM, Apr. 7, 2005, <http://www.emarketer.com/Article.aspx?1003337>; Nielsen NetRatings: *More and More US Women Online*, NUA INTERNET SURVEYS, Jan. 21, 2002, http://www.nua.com/surveys/index.cgi?f=VS&art_id=905357576&rel=true; *Women Outnumber Men on the Web in U.S.*, Study Shows, CNN.COM, Aug. 9, 2000, <http://archives.cnn.com/2000/TECH/computing/08/09/women.reut/>.

18. See AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, THE EVER-SHIFTING INTERNET POPULATION 6-7 (2003), available at http://www.pewtrusts.com/pdf/vf_pew_Internet_shifting_pop.pdf (presenting demographic data regarding users and non-users of the Internet broken down by gender, race, age, household income, educational attainment, and community type).