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Confining Cultural Expression: How the Historical Principles Behind Modern Copyright Law Perpetuate Cultural Exclusion

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CONFINING CULTURAL EXPRESSION: HOW THE HISTORICAL PRINCIPLES BEHIND MODERN COPYRIGHT LAW PERPETUATE CULTURAL EXCLUSION

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Copyright law is the primary means by which society preserves and protects valued cultural heritage. There is a clear correlation between that which is protected and that which is valued by society for the continued enjoyment of future generations. However, this truth becomes troubling when it is considered that modern copyright continues to espouse antiquated ideals of acceptable cultural production, to the exclusion of the cultural property of many historically marginalized people groups. This article takes a critical look at copyright law to deconstruct the ways in which historical values and assumptions continue to color the modern protection of cultural creation, thereby confining cultural expression and barring protection to the cultural work of the marginalized.

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I. INTRODUCTION

"In the end, we will conserve only what we love. We will love only what we understand." – Baba Dioum

Nowhere in the legal world do these words ring more true than in the area of copyright. Providing ownership rights in the cultural creations of society helps to ensure their preservation and survival for generations to come. However, when the very basis for those rights is predicated on antiquated values that exclude certain groups and types of cultural creation, then we run the risk of creating a narrowed view of what culture is and how it is reflected in the things we produce. Copyright was not—and is not—explicitly concerned with who could produce cultural creations and who could not, though the implications of copyright protection affect the opportunities of different groups for cultural production. A legal regime that confines protection to the particular creative endeavors of a particular group of people excludes the valuable contributions of those on the outside. Though these exclusions may be unintentional, they are just as harmful as if they had been expressly written into the law.

This article takes a critical look at modern copyright law in light of the values and conceptions highlighted in its early development. From its initial emergence as a means of protecting rights in the written word to the rise of the author as a vital hero to the creation of cultural works, copyright continues to espouse certain assumptions and value judgments about cultural creation. By examining these assumptions and values through a critical lens, with the aid of critical race, feminist, and queer theory in particular, I aim to expose the ways in which these assumptions continue to work to the exclusion of the creative works of already marginalized groups of people. As one critical legal scholar has already noted, "[I]ntellectual property law contributes to determining and maintaining a pervasive set of power relationships in society."[1] It is essential that we critique those relationships and deconstruct the ways in which they imbue this area of the law.

II. BIRTH OF COPYRIGHT AND THE IMPORTANCE OF THE AUTHOR

From its very inception into the canon of legal thought, copyright has

1. Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL'Y & L. 183, 185 (2007).

dealt primarily with the protection of the cultural creations of literate, white, heterosexual males, and this focus continues to color copyright law today. From the first copyright legislation arising out of the early 18th century to the succeeding rise of the Romantic author, the value principles behind providing ownership rights in cultural work have been rooted in the protection of a certain clearly defined cultural creator and his creation.

A. Cultural Control and the Statute of Anne

The British Statute of Anne of 1710 emerged in the midst of political, social, and religious upheaval as the very first formal existence of copyright legislation and served a key function in providing control of the majority over cultural output.[2] The statute was created to provide protection to authors who were discovering increasing instances of illegitimate printing and copying of their work.[3] The printed word had long since emerged from the sole province of clerics and religious leaders to become more accessible to the average person, and printing presses and booksellers were capitalizing off of the increased demand for printed material.[4]

Thus, the Statue of Anne provided for ownership rights to attach to published written material to permit authors to control the dissemination and distribution of their work:

> Whereas printers Booksellers and other persons have of late frequently taken the liberty of printing reprinting and publishing or causing to be printed reprinted and published Books and other writings without the consent of the authors or proprietors of such books and writings . . . [may it be enacted that] the Author of any Book or books already printed who hath not transferred to any other the copy or copies of such Book or Books share or shares thereof or the Bookseller or Booksellers printer or printers or other person or persons who hath or have purchased or acquired the copy or copies of any Book or Books in order to print or

2. *See* Shelly Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 67 (1994) (describing the use of copyright limitations as a means of controlling the distribution of literary and artistic works); Paul Gleason, *Copyright and Electronic Publishing: Background and Recent Developments*, *in* PUBLISHING AND THE LAW 5, 7 (A. Bruce Strauch ed., 2001) (describing the use of copyright as a means to control public discourse).

3. Statute of Anne, 1710, 8 Ann. c. 19 (Eng.), *in* Primary Sources on Copyright (1450-1900) (L. Bently & M. Kretschmer, eds., 2014), *available at* http://avalon.law.yale.edu/18th_century/anne_1710.asp.

4. *See* Wright, *supra* note 2, at 67 (noting that copyright did not arise until "the commercial development of printing in 15th century Europe made the economic potential of cultural exploitation feasible"); Gleason, *supra* note 2 (noting that "both secular and religious leaders" began regulating printing upon the invention of the printing press).

> reprint the same *shall have the sole right and liberty* of printing such Book and Books . . .[5]

There were two main ways in which the Statute of Anne functioned as a mechanism for controlling cultural creation and dissemination. For one, there were clear ties between the creation of ownership rights in written work and the Lockean theory of property rights that had been articulated just two decades before.[6] Authors were imbued by God with the natural resources, *i.e.* talents, ability, to create written work through their labor. They, therefore, had a divine ownership right in the fruits of that labor, *i.e.* the published, written text:[7]

> For such an author, everything in the world must be made available and accessible as an 'idea' that can be transformed into his 'expression,' which thus becomes his 'work.' Through his labor, he makes these 'ideas' his own; his possession of the work is justified by his expressive activity.[8]

This divine ownership right naturally excluded those not blessed with the divine mandate to "subdue the earth."[9] Property ownership only existed for the literate, white, heterosexual male; therefore, copyright only existed for that select group. Those who did not have recognized ownership rights in property did not enjoy the parallel rights in copyright.

The second way in which copyright law controlled the creation and dissemination of cultural property was through controlling the avenues of distribution. By limiting the ability of popular presses to reproduce and distribute written texts, the government was able to control the flow of information and the development of knowledge.[10] The Statute of Anne frames this control positively as an "encouragement of learned men to

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5. Statute of Anne, *supra* note 3 (emphasis added).

6. *See* Wright, *supra* note 2, at 68 (describing the tie between John Locke's theory of labor and the promotion of ownership rights in published writing); *see also* John Locke, TWO TREATISES OF GOVERNMENT ¶¶ 25-51, at 133-146 (Thomas I. Cook ed., Hafner Press 1947) (1689).

7. *See* Locke, *supra* note 6, ¶ 32, at 136-37 ("God, when he gave the world in common to all mankind, commanded man also to labor, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, *i.e.*, improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to this command of God subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.").

8. ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTY 211 (1998).

9. *See* Locke, *supra* note 7, ¶ 32, at 136 ("God and his reason commanded him to subdue the earth," referring to *Genesis* 1:28 of the Bible).

10. *See* Wright, *supra* note 2, at 67; Gleason, *supra* note 2, at 7.

compose and write useful books,"[11] but the function was much more restrictive. The definition of "useful books" resided with the government charged with enforcing copyright law and enabled the monarchy to prevent the dissemination of what could be considered seditious or heretical texts.[12] Thus, the very nature of cultural property was shaped by the majority rule through the function of early copyright law.

B. Rise of the Romantic Author

With the focus on the written word as a means of cultural exchange and the development of ownership rights in written text for authors, it is no wonder that the 18th and 19th centuries saw the rise of the author as a central figure in cultural creation.[13] Prior to this time, authors figured very little, if at all, in the importance of written text.[14] It was the text itself that carried weight in the realm of cultural relevance. However, as the argument arose for ownership rights in the tangible mental labors of authors, the function of the author himself experienced a shift and began to take center stage.[15] No longer were the literate merely concerned with reading a particular text; they had begun to read the works of particular *authors*, which carried new cultural importance. One did not just read the poems of William Wordsworth; one read Wordsworth himself.[16] One did not study the political philosophy of John Brand; one read Brand.

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11. Statute of Anne, *supra* note 3.

12. *See* Wright, *supra* note 2, at 67; Gleason, *supra* note 2, at 7.

13. *See* Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL'Y & L. 431, 447 (2006) ("During the eighteenth and nineteenth centuries, the idea of the author underwent a transformation. The focus shifted from the text to the author as original genius and authority of the work."); Wright, *supra* note 2, at 73 ("The individual as 'creator' or 'author' in the aesthetic sense did not reach full fruition until the late 18th century."); Malla Pollack, *Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. WOMEN & L. 603, 606 (2006) (explaining the importance of the author as to the early development of copyright).

14. *See* Halbert, *supra* note 13, at 447 ("It was not uncommon for early texts to be published anonymously, either to avoid attribution of controversial political ideas, or because authorship was not seen as essential to the text."); Wright, *supra* note 2, at 73, 80-81 (describing the relative unimportance of the author/artist until beginning in the 14th and 15th centuries and culminating in the 19th century).

15. Halbert, *supra* note 13, at 448; *see also* Pollack, *supra* note 13 (describing the rise of the author as the "fantasy hero of early copyright"); Wright, *supra* note 2, at 73 (noting that the rise in the importance of the author/artistic was accompanied by increased recognition of the author/artist's economic interest in his work).

16. For an interesting examination of Wordsworth's own view of the Romantic author, *see* KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW 24-25 (2001).

In this way, the very identity of the author became tightly enmeshed with his written creation.[17] The development of copyright law progressed as a means to protect the rights of the prototypical author in the creation of his vital cultural work. As Debora Halbert writes in her article providing a feminist interpretation of intellectual property, "Arguments regarding the author as the creator of original works manifesting a unique personality were made to justify copyright ownership."[18] Thus, the prevalent conception of the prototypical author became the mold by which all cultural creation was judged. This Romantic notion of the author displayed particular characteristics that shaped thought on cultural creation and guided the early development of copyright law. In particular, the epitome of the Romantic author was a heterosexual, paternalistic male, focused on individual creation.

1. Author as Male

Unquestionably, one of the primary characteristics of the Romantic author was his gender. While fiction novel-writing was largely considered a feminine pursuit prior to the development of copyright law, by the 18th century, all published writing, including that of fiction, had become a male-dominated form of cultural expression.[19] Women were still permitted to engage in writing as part of their private interactions and for their amusement, but the realm of public writing belonged entirely to men. As Halbert notes, "'Literature' was established as a male domain; great works of literature were not written by women."[20] While women were permitted to engage in private writing to pass the time, writing of any cultural significance was reserved entirely for men.

Moreover, the exclusion of women from the arena of true literature did not simply extend to women as authors. It also encompassed the exclusion of women as consumers of the written word and those who wrote for a female audience. This opinion was widely shared among those considered the great literary geniuses of the time, including Samuel Coleridge:

> Coleridge found it important to create distinctions between authentic authors, like himself, and those who were tainted by the company of women. In making these distinctions, Coleridge sought to criticize those

17. *See* Wright, *supra* note 2, at 77 ("Creation became a productive process closely identified with an author.")

18. Halbert, *supra* note 13, at 448.

19. *See id.* at 449 (describing the concern about the prior "feminization" of literature as men took on greater roles in fiction-writing during the 18th and 19th centuries); Wright, *supra* note 3, at 82 (describing the overall "masculinization" of novel-writing during the 18th and 19th centuries).

20. Halbert, *supra* note 13, at 450.

> aspects of literary culture he did not consider of appropriate artistic content, primarily texts whose predominant audience (and often authors) were women. The distinctions created between the authentic and inauthentic authorship premised upon the romantic notion . . . was possible at that time, because a masculine sense of authorship was privileged.[21]

Thus, writing of true literary merit had to be created for and by men. The all-important published text as cultural object could only gain significance from the masculine touch.[22]

It is important to note the privilege of male authorship at the time did not entirely preclude the rise of female authors. Shelley Wright notes, "Looking back at this period it is possible to rank such female authors as Jane Austen herself, the Bronte sisters, Elizabeth Gaskell, and George Eliot as equal or even superior to such male authors as Sir Walter Scott, Dickens, Thackeray, Trollope, or Wilkie Collins."[23] Nonetheless, many of these authors were not known or celebrated until long after their deaths, and even those who did achieve recognition during their lifetimes often did so by associating themselves with a male personage, such as a husband, father, or masculine pseudonym.[24]

Even if some females wrote and even published, it was still questionable the rights they had under a copyright regime predicated on existing property rights and the concept of the author as male. Copyright infused tangible property ownership rights into the realm of intangible ideas.[25] That being the case, the gendered norms of property ownership naturally transferred to the new rights created under copyright law. Married women were expressly prohibited from owning tangible property during the 18th and 19th centuries, and at best, their ownership in copyright was woefully

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21. *Id.* at 449.

22. Male privilege in cultural creation also extended to other art forms at the time, including artists in the fine arts. While women were permitted to create art, to paint, sculpt, and the like, they were not taken seriously and not permitted into the canon of "high art." As with writing, women were permitted to engage in artistic pursuits for their private amusement, but the realm of cultural creation remained entirely in the capable hands of men. *See* WHITNEY CHADWICK, WOMEN, ART, AND SOCIETY 9-11 (5th ed. 2012) (discussing the gendered notions of art that have permeated art history and artistic creation).

23. Wright, *supra* note 2, at 83.

24. *See id.* at 83-84.

25. *See* EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1 (1980) (describing copyright as a means of "linking the world of ideas to the world of commerce"); Wright, *supra* note 2, at 66 ("[I]ntellectual property law created, within European cultures, a peculiar collection of rights in the intangible nature of human creation.").

unclear.[26] The same could also be said for those who were non-white. Ownership of property was a privilege reserved for white men, and this same principle of property ownership infused the creation of copyright law. The only way to ensure complete ownership in one's written work was to be a white male.

2. Author as Father

The second characteristic of the Romantic author that colored the development of copyright law was that of the author as the heterosexual father. As the importance of the author as a central figure to the creation of a written text emerged, so too did the importance of identifying the "paternity" of a written text.[27] Cultural creation was an act of mental reproduction, an intangible, almost spiritual, analogue to the process of physical reproduction.[28] He fathered his written work using a feminine vessel, *i.e.*, a Muse, and exposed it to the world, just as he fathered his children, in particular his sons, upon his wife and set them loose to take over the world long after he was gone. In essence, the Romantic author was seen as the paternal lord over all his written domain, just as he was the lord of his wife, children, and lands:

> This paternal construct is also similar to the position of the bourgeois family, a political arrangement in which all economic rights inhered in and flowed towards the father. All family property, including all property of the wife and children, belonged to the husband/father for him to exploit as he saw fit . . . Even the persons of wife and children were themselves "property" completely under the control of the patriarchal head of the household.[29]

In this way, the author/father assumed proprietary authority over his creation and was responsible for ensuring not only its initial existence but its subsistence and distribution in the world.

A prime example of this patriarchal imperative can be seen in the right of reproduction, a stick in the bundle of copyright that has been recognized from the beginning. The Statute of Anne was created primarily as a means of protecting an author's right of reproduction from the illegal usurpation

26. *See* Wright, *supra* note 2, at 65-66 (describing the ambiguous ways in which English courts addressed women's intellectual property rights).

27. *See id.* at 79-80 (discussing the rights of paternity in authorship as they emerged in copyright law); MCLEOD, *supra* note 16, at 22 (discussing the longstanding "paternity metaphor" used in relation to creative work).

28. *See* Pollack, *supra* note 13, at 606-07 (comparing physical birth with the birth of ideas into copyrightable works); Wright, *supra* note 2, at 76-77 (comparing physical reproduction with the reproduction of copyrighted works).

29. Wright, *supra* note 2, at 78.

of printers and booksellers.[30] Likewise, copyright law in France developed out of the French Revolution as a means to protect authors' rights to reproduce their own work.[31] The prerogative of the author/father to both create and reproduce his work was a mainstay of early copyright law: "[F]rom the beginnings of copyright protection the major concern has been to prevent the production and dissemination of works already owned by someone else, i.e. illegitimate copies."[32] Just as the bourgeois father protected his estate and family legacy from the infringing presence of illegitimate offspring, so too the author/father protected his written work from the presence of illegitimate reproductions.[33] Moreover, this concept of author as father was deeply ingrained in the creative minds of the time. Daniel Defoe wrote in 1710 that "A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain; if he sells his property, it then becomes the Right of the Purchaser; if not, 'tis as much his own as his Wife and Children are his own."[34]

As father to his literary creations, the Romantic author was charged with taking care of his work. He did so by relying on copyright law to protect his proprietary interests in his written creation.

3. Author as Individual

Another characteristic of the Romantic author that has affected copyright is the conception of the author as an autonomous cultural creator. The construct of the author as individual arose from the prevailing theories of property ownership of the time that were centered on the concept of the individual owner of private property as distinct from the community.[35] Working as a "solitary male genius," the prototypical author created cultural property—in the guise of written text—which was based on public observations and destined for public consumption but created apart from

30. *See* Statute of Anne, *supra* note 3.

31. *See* Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991, 1014-21 (1990) (describing how litigation based on the French copyright laws of 1791-93 turned primarily on a recognition of the author's reproduction right).

32. Wright, *supra* note 2, at 77.

33. *See id.* at 78-80 (highlighting the comparisons between an author's relationship to his work and the bourgeois father's relationship to his children).

34. MCLEOD, *supra* note 16, at 22 (quoting Daniel Defoe).

35. *See* Locke *supra* note 6, at 134; *see also* Wright, *supra* note 2, at 68 (exploring the ties between Locke's theory of property and the author as individual owner of his creation); MCLEOD, *supra* note 16, at 20-21 (discussing the influence of the Lockean theory of property ownership on the concept of the author as individual); COOMBE, *supra* note 8, at 219 (describing how the author comes to own his work as an individual through the application of his labor).

societal interference.[36] Ever the rational individual, he gathered his observations and impressions of the world around him, he co-opted the ideas swirling through the community, and worked independently to give meaning to those observations and ideas by setting them to paper.[37] The community that served as the basis and the receptor of his work mattered little in the face of the autonomous author.

In this environment obsessed with individual achievement, copyright law developed as a means to protect the ownership rights of the autonomous author:

> The existing definition of copyright as both economic and personal within a political or civil context presupposes that individuals live in isolation from one another, that the individual is an autonomous unit who creates artistic works and sells them, or permits their sale by others, while ignoring the individual's relationship with others within [his] community, family, ethnic group, religion . . . Society itself is seen as an aggregate of anomic individuals, each separate, segregated, fragmented, and existing only as subjects of circumscribed civil rights.[38]

While the community was meant to enjoy the knowledge flowing from an author's work, the idea that written text, or any cultural creation, could be the product of multiple creators was both foreign and undesirable.[39] To the extent that a written creation was the work of multiple authors, it was evaluated in light of the individual contributions of each author.[40] Because the identity of the author was central to the work itself and because individualism and autonomy were central to identity, there was no room for cultural creations that encompassed the shared identities of multiple creators. For works of joint authorship, each author contributed a bit of his identity, as typified by his work, in a discrete manner that helped to make up the whole. All the while, however, the individual identities of the

36. *See* Wright, *supra* note 2, at 62 (describing the "solitary male genius, isolated both spatially and temporally from his community and the background of the art in which he works"); Pollack, *supra* note 13, at 606 (describing the Romantic author as an "autonomous individual who creates without support from his cultural network").

37. *See* COOMBE, *supra* note 8, at 211 ("In these constructions of authorship, the writer is represented in Romantic terms as an autonomous individual . . . For such an author, everything in the world must be made available and accessible as an 'idea' that can be transformed into his 'expression,' which thus becomes his 'work.'").

38. Wright, *supra* note 2, at 73-74.

39. *See* Burk, *supra* note 1, at 188 (describing collaborative work at the time as "a rare anomaly").

40. *See id.* (noting that a joint author has to provide an independent contribution to the original work); Pollack, *supra* note 13, at 616 (noting that joint authors "are still authors because of their individual contributions"); *see also, e.g.*, 17 U.S.C. §§ 101, 201(a) (2012) (outlining the requirements for joint authorship in the U.S.).

multiple creator-contributors remained intact. The act of cultural creation was ultimately the realm of the author as individual and could not and did not reside in the communal sphere.

4. Author as God

Each of the major characteristics of the Romantic author—the author as male, as father, and as individual—carried deep monotheistic undertones in keeping with the prevailing Protestant religious sentiments of 18th and 19th century Europe. The prototypical author, like God, rose above and existed beyond the masses to breathe life into his creation without the need for any sort of outside influence.[41] Like the Protestant God, he was a male father with deep patriarchal authority over his creation, controlling both how it came into being and how it was used upon its dissemination.[42] His ideas arose out of the formless void and were given life in the act of putting pen to paper and sending that paper out into the world.[43] Indeed, the act of creation took place in a realm deeply rooted in the written word. As related in the creation story of the Gospel of John, the Romantic author's work of cultural production began and ended with the written word: "In the beginning was the Word, and the Word was with God, and the Word was God."[44] The creation, this written word, was closely linked to the author/creator, fully imbued with his unique identity and closely held under his omnipotent authority. Copyright law, growing out of a cultural tradition that valued the cultural creator as a god-like being rooted in written text, carried the values of this tradition from its inception into the present day.

III. MODERN COPYRIGHT AND CULTURAL EXCLUSION

In many ways, modern copyright hardly differs from the copyright protection that first emerged in the early 17th century in response to the growing figure of the prototypical Romantic author. The focus of early copyright law continues to shape how the law functions and is applied today. Even though copyright has since expanded to include non-written forms of expression, including the visual and performing arts, it still focuses on the importance written word. This historical focus, carried into

41. *See* Wright, *supra* note 2, at 62 (describing the "solitary male genius, isolated both spatially and temporally from his community and the background of the art in which he works").

42. *See id.* at 79-80 (discussing the rights of paternity in authorship as they emerged in copyright law); MCLEOD, *supra* note 16, at 22 (discussing the longstanding "paternity metaphor" used in relation to creative work).

43. *See* COOMBE, *supra* note 8, at 215 (detailing the process by which the Romantic author gave form to ideas and made them his own).

44. *John* 1:1 (KJV).

the modern world, continues to color the values inherent in copyright protection and the production and distribution of cultural material. Those works that do not fit neatly into the mold of published written works by the male, heterosexual, god-like figure do not receive the same amount of protection, and therefore value, as those works that do. Modern copyright law continues to promote the value judgments of worthy cultural production first established in its infancy, to the exclusion of the cultural creations of other, minority groups.

A. Focus on the Published, Written Word

The early focus on the published, written word persists in the development and function of modern copyright law. Born out the realm of Western cultural values, the insistence on the inviolability of the written word represents a clear preference for the published text as the valid form of cultural production. In fact, the very language of copyright law reflects a focus on the written word over other forms of cultural creation. Derived from the Latin word *cōpia*, meaning "abundance," the term became synonymous during the 15th century with "transcript" in recognition of the development and widespread use of the printing press.[45] Today, the word "copy" still signifies, *inter alia*, "matter to be printed."[46] The very term used to refer to the rights a creator has in his cultural creation refers directly to the rights in the "copy," i.e., the right a creator has over his printed matter.

Emphasis on written cultural production is also evidenced in the application of modern copyright law. In some jurisdictions, the law requires that a cultural expression be fixed in a physical form in order for copyright protection to apply.[47] In other words, there is a preference for work that exists in the same context as the published, written word—cultural products that have been printed, or fixed, in a physical medium that ensures their dissemination and inclusion in the generally accepted collection of cultural heritage. Under the Berne Convention, the treaty by which the largely European concept of copyright has been extended throughout the world,[48] fixation is not required for the protection of a work; however, the treaty does allow for individual states to enact fixation

45. *See* OXFORD ENGLISH REFERENCE DICTIONARY 317 (2nd ed. 2002).

46. *Id.*

47. *See, e.g.*, 17 U.S.C. § 102 (2012); Copyright, Designs, and Patents Act, 1988, c. 48, § 3(2) (U.K.).

48. *See* Burk, *supra* note 1, at 187 ("The systems of intellectual property law developed by Western industrialized societies . . ., by virtue of aggressive treaty propagation, now extend to most jurisdictions in the world.").

requirements before a work can receive copyright protection.[49] Interestingly, the fixation requirement is most prevalent in common law countries, like the U.S. and the U.K., where copyright as a legal right first developed.[50] In the U.S., a work must be "fixed in any tangible medium of expression, now known or later developed" to qualify for copyright protection.[51] In the U.K., the fixation requirement is expressed negatively, denoting the circumstances under which copyright protection does not apply: "Copyright does not subsist in a literary, dramatic or musical work unless and until it is *recorded, in writing* or otherwise."[52] With such clear statutory preferences for the cultural creation in printed form, the cultural products of many minority groups fall through the cracks of copyright protection.

This continued focus on the published, written word as the only true means of cultural creation results in the exclusion of cultural production of many non-white, non-Western groups for whom literacy is not a priority when it comes to the creation of cultural heritage. Cultural production that focuses on non-fixed forms of expression, such as folklore, oral histories, and shared rituals, are largely excluded from modern copyright protection, particularly in nations that first developed copyrights.[53] In her survey of national copyright legislation, Agnès Lucas-Schloetter found that the

49. *See* Berne Convention for the Protection for Literary and Artistic Works art. 2(2), Sept. 9, 1886, *as revised at* Paris *on* Jul. 24, 1971 *and amended in* 1979, S. Treaty Doc. No. 99-27 (1986) ("It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.").

50. *See* Agnès Lucas-Schloetter, *Folklore*, *in* INDIGNENOUS HERITAGE AND INTELLECTUAL PROPERTY 259 (S. von Lewinski ed., 2004) (noting that fixation requirements are most prevalent in common law rather than civil law countries). The U.K. developed the first copyright law in the Statute of Anne of 1709. PLOMAN & HAMILTON, *supra* note 25, at 12. Copyright law in the U.S. followed shortly after, beginning with state legislation in twelve of the thirteen colonies from 1783 to 1786. *Id.* at 14. Federal U.S. copyright law emerged beginning with the drafting of Article I, Section 8 of the Constitution in 1789, followed by the first congressional copyright legislation the year after. *Id.* at 15-16.

51. *See* 17 U.S.C. § 102 (2012). This requirement grew out of the constitutional charge to Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. CONST. art. I, § 8, cl. 8. From the beginning, U.S. copyright law has focused on protecting the written word, and such focus extends to the current copyright statute.

52. Copyright, Designs, and Patents Act, 1988, c. 48, § 3(2) (U.K.) (emphasis added).

53. *See* Lucas-Schloetter, *supra* note 50, at 291-92 (discussing the fixation requirement of common law countries, like the U.S. and the U.K., as a barrier to copyright protection for folklore).

majority of national laws either did not mention folklore at all or explicitly excluded folklore from copyright protection, automatically relegating folk traditions to the public domain.[54] These national legislations came predominantly from countries in Europe, as well as the U.S., Canada, and Australia.[55] The exclusion of folk tradition from copyright protection, whether expressly or by omission, is based on a preference for the published, written word, and unduly bars the cultural products of indigenous people groups from the benefits of copyright protection.

For example, in her article on the importance of collective intellectual property rights for indigenous communities, Angela Riley tells the story of the Ami people from southern Taiwan and the appropriation of their cultural folk music by the famous German group, Enigma, during the 1990s.[56] Enigma's hit song "Return to Innocence" featured a performance of the traditionally Ami "Song of Joy," performed by one of the community's tribal elders.[57] The song had not been transcribed; rather, it was passed down over generations of Ami as part of their cultural tradition.[58] However, the ownership rights for the song now belong to the Western music group and its producers because Enigma incorporated it into their hit single, taking an ancient Ami cultural tradition and turning it into a written, published work—the preferred format for the application of copyright protection.[59]

While the Ami and other indigenous groups, who have suffered similar appropriations of their cultural heritage, can learn a lesson from these experiences—a new take on the adage "publish or perish"[60]—the option to transcribe and publish indigenous cultural creations is not necessarily a palatable or even viable one. Riley notes:

> The "fixation" condition of copyright places an immense burden on indigenous communities seeking to protect their intellectual property. The requirement, by definition, excludes all oral literature of indigenous

54. *Id.* at 284-85.

55. *Id.*

56. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L. J. 175, 175-77 (2000).

57. *See id.* at 176.

58. *See id.*

59. *See id.* at 176-77.

60. "Publish or perish" is a common phrase used in academic circles to refer to the imperative that professors publish scholarly works to ensure their welcome to the tenured ranks. *See generally* Eugene Garfield, *What is the Primordial Reference for the Phrase "Publish or Perish"?*, 10 The Scientist 11 (1996). I believe it is of equal value in this context, where cultural products risk being lost to copyright protection, unless they are published in a fixed, physical form.

> peoples from the paradigm of Western law. In order to satisfy this standard for copyright protection, indigenous peoples would be forced to abandon the method of knowledge transmission that goes to the very essence of Native life. Communicating cultural works from generation to generation in a written format is foreign to most indigenous societies, many of which have relied for thousands of years on oral tradition as a means of documenting history and culture, Oral traditions are the other side of the miracle of language; they are older and more universal than writing. The written word isolates, and requires putting spoken language into contrived, articulable rules. . . . [T]he written form simply cannot capture the nuances of a spoken text.[61]

Requiring that cultural production be fixed in order to warrant protection perpetuates an age-old exclusion of the cultural traditions of non-Western, indigenous people groups worldwide.

In addition to excluding the cultural works of indigenous groups, the primacy of the published, written word in modern copyright legislation creates an exclusion of women's traditional, cultural products. Certain creative endeavors, such as knitting, quilting, clothing design, and food preparation, have always been, and largely continue to be, associated with women's work.[62] Unfortunately, these same acts of cultural creation are also largely excluded from copyright protection because of the requirement that copyrightable works be fixed, which is the modern equivalent of the early focus on the published, written word. Designs for knitted work, quilts, and clothing are generally not covered under copyright laws unless they are written down or drawn out, like any other traditional literary or artistic work.[63] Creations that are made extemporaneously, without patterns or plans, would likely not receive protection unless they contain discrete creative elements.[64] Likewise, rituals and processes associated with food preparation are not covered by copyright laws, though a recipe for such processes would receive protection *once it is written*.[65]

Nevertheless, there are other modes of intellectual property that may provide protection for these creative endeavors, such as utility or design patents; however, the means of obtaining these protections are laborious, time-consuming, and expensive.[66] Unlike copyrights, they do not attach

61. Riley, *supra* note 56, at 195-96 (internal quotations omitted).

62. *See* Halbert, *supra* note 13, at 441-46 (discussing knitting and quilting); Pollack, *supra* note 13, at 607 (discussing food preparation and clothing fabrication).

63. *See* Halbert, *supra* note 13, at 441-46; Pollack *supra* note 13, at 607.

64. *See* Pollack, *supra* note 13, at 609-10 (discussing the "useful articles" rule of U.S. copyright law, restricting copyright protection to only the highly creative, non-functional elements of a functional item).

65. *Id.*

66. *Id.* at 608-09.

immediately upon the creation of the object.[67] Thus, many creative works typically associated with feminine efforts fall outside of the scope of protectable cultural expression because of the persistent focus on the published, written creation as the preferred form of cultural production.

B. Focus on the Romantic Author

Modern copyright law also perpetuates the traditional focus on the Romantic author and his characteristics. This author-centric focus can readily be seen in the language of the laws themselves. The Berne Convention, which has been ratified by 172 nations,[68] repeatedly uses the words "author" and "authorship" to refer to the creators of protected works, regardless of whether those works are written or not.[69] In the U.S. Constitution, copyrights are specifically defined as a means of "securing . . . to *Authors* . . . the exclusive Right to their respective Writings."[70] Likewise, American copyright legislation focuses on authorship as the basis for copyright protection: "Copyright protection subsists . . . in original works of *authorship* . . ."[71] In the definitions section of the statute, and throughout the statute in its entirety, U.S. copyright law refers repeatedly to the "author" or "authors" of a copyrighted work.[72] In fact, in the more than 50 terms defined in the first section of the U.S. Copyright Act, the term "author" or "authorship" shows up more than 20 times, though the term itself is never defined.[73] The American law assumes a knowledge and understanding of authorship and a concomitant acceptance of the language of the written word as integral part of copyright protection. The same is true for French copyright law, which is referred to as the "*droit d'auteur*" or "right of the author."[74] The Western concept of the Romantic author continues to serve as the philosophical and practical basis for modern-day copyright law, as evidenced by the legal language used.

Not only the author himself, but particular characteristics of the Romantic author appear throughout the terms of modern copyright law,

67. *Id.*

68. *Berne Convention for the Protection of Literary and Artistic Works: Contracting Parties*, WORLD INTELLECTUAL PROP. ORG. (Jan. 13, 2017), http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf.

69. *See generally* Berne Convention, *supra* note 49.

70. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

71. 17 U.S.C. § 102(a) (2012) (emphasis added).

72. *See generally*, Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (2012).

73. *See id.* § 101.

74. *See generally* Code de la Propriété Intellectuelle, [C.P.I] [Intellectual Property Code] article L121-1-9, L122-1 -12 (Fr.).

including the conception of the author as individual, as father, and as god-like creator. The author as individual is readily apparent in the copyright terms governing joint authorship and works created by multiple creators. Modern copyright law, as in the early days, envisions authorship as an activity primarily reserved for the autonomous individual, distinct from group influence. Joint authors are still treated as individuals, even as their collective contributions make up the whole of the work. Each author wholly possesses the rights to the work, based on their ability to be distinctly identified.[75] Moreover, determinations of the extent of copyright ownership rely heavily on the knowledge of each author's identity. In the U.K. and France, for instance, copyright duration is calculated based on the death date of the last known surviving author, emphasizing the importance of the authors' individual identities.[76] Moreover, joint authorship, while possible, is often complex and not readily navigable. Joint authors in the U.S. are not permitted to file online, must pay higher fees for registration, and must wait nearly twice as long for processing.[77] Additionally, the authors must be individually identified by their full name and the nature of their contribution to the work, described in detail.[78] Thus, even with works of joint authorship, identification of the author as individual is key in modern copyright law.

Modern copyright law also emphasizes the perspective of the author as father. The right of reproduction, so important to the development of early copyright law, continues to play a major role in the rights accorded to authors under the modern legal regime. Almost all copyright legislation explicitly lists the right of reproduction as one of the primary rights belonging to the author of a work.[79] There is also a strong persistence of the paternity metaphor of creative production that existed in the early days

75. *See, e.g.*, 17 U.S.C. § 201(a) ("The authors of a joint work are co-owners of copyright in the work."); Copyright, Designs, and Patents Act, 1988, c. 48, § 88 (U.K.) (describing how the rights of joint authors are held separately by each individual author); C.P.I. art. L113-3 (Fr.) ("Collaborative work is the common property of the coauthors.") (translated by author); Copyright Act 1968 (Cth), ss 78-83 (Austl.) (describing how the rights of joint authors are held separately by each individual author).

76. *See* Copyright, Designs, and Patents Act, 1988, c. 48, § 12(4) (U.K.); C.P.I. art. L123-2 (Fr.); *see also* Copyright Act 1968 (Cth), s 80 (Austl.).

77. *See generally* U.S. COPYRIGHT OFFICE ECO REGISTRATION SYSTEM, http://copyright.gov/eco (last visited May 8, 2017).

78. U.S. COPYRIGHT OFFICE, FORM TX (2012), http://copyright.gov/forms/formtx.pdf.

79. *See, e.g.*, 17 U.S.C. § 106(1); Copyright, Designs, and Patents Act, 1988, c. 48, § 16(1)(a) (U.K.); C.P.I. art. L122-1 (Fr.); Copyright Act 1968 (Cth), s 31(1)(a)(i) (Austl.).

of copyright. In France, "[t]he title of author belongs, absent proof to the contrary, to the one or to those under whose name the work has been disclosed."[80] Here, the creative work, like a newborn child, claims its paternity from the one who has given it his name, "absent proof to the contrary" that could arise from a "paternity test" of sorts, revealing the work to be that of a different author/father. The paternity of a creative work also arises in the emphasis on moral rights found in many of today's copyright regimes.[81] Moral rights ensure an author's right to protect his name in his work and control the integrity of his creative offspring from the presence of "bastard" reproductions or derivatives.[82] For the most part, this moral right is described as the right to attribution, but in other instances, this right is explicitly referred to as the moral right of "paternity" in one's work.[83] The paternalistic conception of the author is just as prevalent today as it was when copyrights first began.

Modern copyright laws also perpetuate the conception of the author as God, a characterization readily seen in the extensive list of powerful and long-lasting rights that rest on the author of a creative work. The tight rein an author exercises over his work is virtually all-encompassing and practically endless in its scope. Under modern copyright law, the author possesses exclusive control over the distribution and consumption of his work: he essentially controls when, how, where, and by whom his work is disseminated, copied, performed, broadcast, reproduced, or displayed.[84] He also exercises exclusive control over future works that are birthed from the original creation, such as derivatives and adaptations.[85] Thus, not only

80. C.P.I. art. L113-1 (Fr.) (translated by author).

81. Wright, *supra* note 2, at 79.

82. *See*, *e.g.*, 17 U.S.C. § 106A(a)(1)(A) ("[T]he author of a work of visual art . . . shall have the right . . . to claim authorship of that work."); Copyright, Designs, and Patents Act, 1988, c. 48, § 77(1) (U.K.) ("The author . . . has the right to be identified as the author or director of the work."); C.P.I. art. L121-1 (Fr.) ("The author enjoys the right to have his name, his caliber, and his work respected. This right is attached to his identity as a person.") (translated by author); Copyright Act 1968 (Cth), s 193 (Austl.) ("The author of a work has a right of attribution of authorship in respect of the work.").

83. Wright, *supra* note 2, at 79.

84. *See*, *e.g.*, 17 U.S.C. § 106 (providing authors the right to reproduce, prepare derivative works, distribute copies, and publicly perform and display copyrighted works); Copyright, Designs, and Patents Act, 1988, c. 48, § 16 (U.K.) (providing authors the right to copy; issue copies; publicly perform, show, or play; broadcast; and make adaptations of copyrighted works); C.P.I. arts. L121-1 to L121-9, L122-1 to L122-12 (Fr.) (providing authors the right to reproduce, publish, perform, distribute, transmit, and attach their names to copyrighted works) (translated by author); Copyright Act 1968 (Cth), s 31 (Austl.) (providing authors the right to reproduce, publish, perform, communicate, and make adaptations of copyrighted works).

85. Wright, *supra* note 2, at 79.

does the author's primary work fall under his purview, but the work of others that originated from his work often does as well. Furthermore, modern copyright law takes the exclusive and god-like rights of the author even further than what they were in the past, extending their terms to periods far beyond the author's lifetime. Whereas England's original copyright statute only provided limited protection to an author to control the printing and reproduction of his text for a period of fourteen to twenty-one years,[86] current copyright law extends to periods from fifty to seventy years after the author's death.[87] These extensive rights, both in scope and duration, perpetuate the characteristic of the author as a god-like figure with overwhelming power over the birth and future of his creation.

With modern copyright law continuing to view the author/creator as an autonomous, patriarchal, god-like figure, the protections it provides contain distinct holes that fail to include the cultural creations of several minority groups. For one, indigenous peoples like the Ami,[88] for whom oral traditions form the basis of their cultural creation, do not fall readily into a legal landscape predicated on protecting an individual, patriarchal, god-like author. In many indigenous groups, cultural creation is a shared activity, facilitated through oral transmission of stories, myths, ideas, and important cultural knowledge.[89] Each person contributes to the communal work and passes it on so that the next person may add their contribution to the mix. What results at any given moment is a cultural creation that never belongs to any one individual but is shared across the entire community.[90] In fact, the only true "owners" of the cultural product are often the deities worshipped by the group. These deities provide the people with the inspiration for their songs, stories, designs, rituals, etc., and the people in turn dedicate the resulting cultural products to the deities in gratitude.[91] No one person can claim ownership of or control over a work that is originally viewed as a gift to the entire community. With such a focus on creation

86. Statute of Anne, *supra* note 3.

87. *See*, *e.g.*, 17 U.S.C. § 302(a) (providing copyright protection for seventy years after an author's death for works created on or before January 1, 1978); Council Directive 93/98/EEC of 29 October 1993, Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 1.1, OFFICIAL J. OF EUR. CMTY. No. L 290/ 9 (1993) (requiring copyright protection in European Community Member States to extend for seventy years after an author's death); Copyright, Designs, and Patents Act, 1988, c. 48, § 12 (U.K.) (providing copyright protection for fifty years after an author's death).

88. *See* Riley, *supra* note 56, at 175-77.

89. *Id.* at 189-91.

90. *Id.* at 191.

91. *See id.* ("In indigenous societies, many members believe that ceremonies, music, and stories are communicated to the tribe by the Creator.").

that extends beyond the control of the individual, there is no place for a modern copyright regime that is predicated on protecting the extensive and exclusive rights of a clearly identified individual author.

Another area of exclusion that results from modern copyright law's focus on the autonomous Romantic author lies in the inequitable protection of Black music under copyright law. Like indigenous cultural products, Black music carries a strong tradition of communal development and open sharing as part of the cultural creative process. Born from the oral customs of pan-African traditions that favor a group development and dissemination of cultural heritage and folklore, Black music relies on a deeply iterative process of creation and re-creation within the community.[92] Blues, jazz, hip-hop, and rhythm-and-blues all arise out of a creative process that hinges on the sharing of creative elements and styles. Through the practice of "sampling," Black musicians often incorporate elements or entire excerpts of other musicians' work into their own music, at times doing so without first obtaining permission.[93] While this is a common facet of the creative process for many Black musicians, it is a practice that would amount to infringement under the tenets of modern copyright law. The owner of an original work[94] controls all aspects of that work and holds the exclusive right to reproduce, disseminate, and create derivative versions of the work.[95] Under copyright law, sampling without permission is unlawful, whereas in the cultural context of Black music, it is a natural part of creation. Regarding the development of funk music during the 1960s and 1970s, one Black musical artist noted, "We sampled from people who sampled from us . . . . It wasn't stealing. That's how music was made. Everyone sampled from everyone else."[96] Nevertheless, the restrictive rules of modern copyright laws have had, and continue to have, a confining effect on the development of Black music, as more and more artists choose to forgo widespread sampling as a form of creative cultural expression in fear of legal reprisal.[97] In this way, modern copyright law, with its focus on the individual, all-controlling author, delegitimizes the creative process

92. MCLEOD, *supra* note 16, at 75, 77.

93. *Id.* at 77.

94. This "owner" is often, though not always, the creator of the work, particularly in the realm of musical recordings. Oftentimes, recording labels own the copyright to the work created by their artists.

95. Wright, *supra* note 2, at 79.

96. Interview: Paul Holdengräber with George Clinton, FUNKADELIC, (Oct. 29, 2014), http://www.nypl.org/events/programs/2014/10/29/george-clinton-paul-holdengräber.

97. *See* MCLEOD, *supra* note 16, at 94-95 (discussing the chilling effect copyright law has had on sampling in hip-hop music).

for a minority cultural form, such as Black music.

One final way in which the Romantic author-centric nature of modern copyright law functions to exclude minority cultural creation is in its effect on GLBTQ culture. Unlike ethnic cultural products, queer culture is generally not developed and passed down through a hierarchical familial system. It is usually not a culture of patriarchal patrimony, flowing from father to son. As scholar Marvin Taylor notes, "Gay culture is a culture of aunts and uncles."[98] Cultural products from the GLBTQ community must be transferred laterally, rather than hierarchically, to persist and thrive. Under current copyright law, with such a firm emphasis on the author as father and supreme creator, such freedom of cultural sharing becomes stunted. When the protection afforded cultural production requires extensive permissions for works to be shared, further developed, or fully enjoyed, a chilling effect on the growth and spread of the underlying culture arises. This chilling effect is not of as much concern to more so-called mainstream forms of cultural production, but for cultural works that arise from minority groups, such as the queer community, such an effect can be overly constrictive.

IV. CONCLUSION

Examining the historical justifications for copyright law unveils a number of underlying principles that have guided the birth and development of property ownership over cultural works. In particular, copyright of the past and today betrays a focus on the development and protection of the published, written word, created by an autonomous and all-powerful male author. With the protection of cultural production manifesting such a distinct value system, cultural creativity becomes confined to that which falls under the auspices of the written work of the Romantic author-hero. Works that exist outside of this prescribed area of valued cultural production are either not protected at all—as is the case with many traditionally feminine forms of cultural production—or are protected in such a way that threatens their very existence—as is the case with Black music and queer cultural works. A critical examination of the value principles underlying modern copyright laws naturally leads to a challenge of those principles and the constraining effect they have on cultural posterity. Historical principles and biases must be challenged and, in some cases, rejected in favor of more equitable insights. As Halbert notes, "[T]here would ultimately have to be changes in the law that would

98. Marvin Taylor, Director, Fales Library and Special Collection, Presentation at the 45th Annual Meeting of the International Association of Labour History Institutions (Oct. 3, 2014) (on file with author).

reflect changes in the underlying social structure."[99] Copyright law needs to be made more equitable, both in its coverage and its application, to ensure that a broader, more accurate version of cultural reality is preserved for future generations.

99. Halbert, *supra* note 13, at 460.