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Symposium: My Fair Ladies: Sex, Gender, and Fair Use in Copyright

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MY FAIR LADIES: SEX, GENDER, AND FAIR USE IN COPYRIGHT

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2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, [and] as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.¹

In *Campbell v. Acuff-Rose Music, Inc.*, Justice Souter, writing for the Supreme Court, perceived 2 Live Crew's rap song based on Roy Orbison's "Oh, Pretty Woman" as a parody.² 2 Live Crew's "Pretty Woman" starts, like the original, with appreciation for a pretty woman but quickly switches to condemning a "big hairy," "bald headed," and "two-timin'" woman.³ According to Justice Souter, by twisting the words (and music), the later song made the original seem foolish and fantastic.⁴ But what makes street

* Associate Professor, Georgetown University Law Center. This paper benefited from comments by Amy Adler, Ann Bartow, Stephen Burt, Julie Cohen, Francesca Coppa, Rochelle Dreyfuss, Sonia Katyal, Zachary Schrag, and participants in the 2006 conference on IP/Gender: The Unmapped Connections sponsored by the Glushko-Samuelson Intellectual Property Law Clinic at the Washington College of Law.

1. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

2. *Id.*

3. *Id.* at 595-96.

4. *Id.* at 583.

life ugly and debased? Apparently, it is the presence of an ugly and debased woman. Making fun of a song about a man's romantic musings, it turns out, requires making fun of the woman described therein.

This pattern is not unique in copyright fair use disputes. Both parodies and legal opinions reflect the culture from which they come, and our culture has many anxieties about sexuality and women's bodies. This article explores the ways in which these anxieties play out in fair use cases. Part I addresses situations in which fair use cases turn on whether sexualizing a particular work is transformative; these days the answer is often "yes."⁵ Comparing sexual fair use cases in which defendants win to nonsexual fair use cases in which plaintiffs prevail, this Part argues that sexualization should not be a type of reworking that deserves *de facto* special fair use protection. Rather, courts should consider sexualization as one of many things that creative reworkings could add to, or take away from, an original.

Part II takes up the published/unpublished distinction courts apply as part of the second statutory fair use factor and connects it to ideas of privacy that feminist scholars have critiqued. The case law links publication and exposure to reinterpretation. This Part suggests that freedom of interpretation would be furthered by looking outside the four corners of a work to see if what has been kept private would further public discourse.

Part III analyzes market rhetoric in fair use cases. Part III-A discusses how courts use the presence of overt sexuality in a work to define markets within and without the copyright owner's control when analyzing the fourth fair use factor of whether the defendant's use harms the plaintiff's legitimate market. Current corporate practices and pornographers' infinite willingness to license works place increasing pressure on the judicial assumption of sexuality-defined markets. Nonetheless, this assumption seems necessary in order to sustain current fair use analysis. Courts accord sexualizing uses disparate treatment in factor four market harm analysis. This reinforces their special treatment in factor one transformativeness analysis.

Part III-B addresses the uses of market language in a different part of the fair use test, namely the first factor inquiry into whether the defendant's use

5. See Randall B. Hicks, Note, *Requiem for a Parody*, 8 HASTINGS COMM. & ENT. L.J. 55, 57 (1985) (describing how this marks a change from past practice in fair use cases, wherein explicit sexual content created an additional obstacle for parody defenses); see also *MCA, Inc. v. Wilson*, 677 F.2d 180, 181 (2d Cir. 1981) (holding that the song "The Cunnilingus Champion of Company C," from an erotic revue called *Let My People Come*, did not constitute a fair use of the words and music of "The Boogie Woogie Bugle Boy of Company B"); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (finding no fair use when Disney characters were depicted in compromising positions, such as taking drugs, having sex, and otherwise misbehaving).

is commercial. Copyright's reliance on an economic incentive theory results in a systematic disregard for non-market incentives, leading to a distorted view of creativity. While this benefits many defendants making commercial fair uses, the law need not disparage non-market creation in order to allow profit-making fair uses.

By favoring sexualization over other types of critique, fair use doctrine systematically treats sex as especially oppositional and liberating, when in fact it has no monopoly on critique and no necessarily disruptive effect on a copyright owner's message. Still, adding overt sexuality to a work could challenge our ideas about the original, as well as proper sex and gender roles. Thus, this article does not argue against sexuality or transformativeness, but rather against facile acceptance of an equation between the two, particularly against the idea that other kinds of transformation deserve less fair use protection and are more likely to fall within a copyright owner's legitimate market. Gender and sexuality play varied roles in signaling criticism, defining markets, and establishing a work's place in cultural hierarchies. Fair use doctrine should pay attention to these things, not sexuality itself.

I. WRITTEN ON THE BODY:⁶ TRANSFORMATIVENESS

A. Making Subtext Text

The public often subjects women's bodies to debate, from contraception and abortion to Katherine Harris's makeup during the 2000 election controversy. Where culture wars go, law usually follows. Amy Adler has explored the effect of the female body on First Amendment law through the nude dancing cases decided by the Supreme Court. In her account, the female body is threatening, disruptive, ungoverned, and carnivalesque, and this helps explain why the nude dancing cases themselves are full of uneasy puns and strained logic.⁷ She describes several "culturally entrenched views of the nude female form: that the female body is a site of unreason; that it is barely intelligible; that it is inviting yet dangerous."⁸

Fair use jurisprudence identifies transformable works as sites of unreason, inviting yet dangerous. If a work has an intelligible meaning and a creative re-use simply borrows the original to get attention, there is no

6. See JEANETTE WINTERSON, *WRITTEN ON THE BODY* (Vintage Books 2d ed. 1994) (1992).

7. Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1110-11 (2005) (arguing that "fantasies and anxieties" concerning female sexuality drove the Court to make illogical decisions in the nude dancing cases).

8. *Id.* at 1109, 1138 (claiming the female body poses a "threat to the possibility of stable singular meaning").

avored parody, only satire. By contrast, if a work has multiple meanings, only some of which the copyright owner endorses, a re-use that exposes disfavored meanings is transformative and fair.

In Judge Leval's influential words, a transformative use treats the original as the "raw material" to produce something new and culturally valuable.⁹ Such divisions between raw material and finished product, natural and cultural, resources and results have strong gender implications. Fair use law locates the *responsibility* for a transformative, parodic use—as opposed to a merely satirical use—in the original work itself, which contains subtext or other material that invites criticism. In cases of parody, the original text asked for it.¹⁰ Parody's transgressive, ungoverned relationship to the original turns out to depend on the original author's inability to fix a meaning. Particularly relevant is Adler's invocation of Judith Butler's position that "multiple meanings in language, as opposed to a unified message, always carry the association of femininity."¹¹ Judges see parody more readily when parodists use female bodies to show the uncontrollable multiplicity of interpretation.¹²

In line with this link between embodied sexuality and transgressive parody, recent cases have found sexually focused unauthorized derivative works to be fair. In *Campbell*, the Court found a potentially valid fair use because of the parodic view 2 Live Crew's version offered of the original Roy Orbison song. In a passage quoted by the Supreme Court, Judge Nelson's dissent from the court of appeals opinion argued that the parody

. . . reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is

9. Pierre Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). *Campbell* relied heavily on Judge Leval's analysis; in addition, other cases have specifically quoted Leval's argument about "raw materials." See, e.g., *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

10. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, L. & CONTEMP. PROB. (2006) (manuscript at 9, on file with Journal) (arguing that courts are more likely to find fair use when the original contains seeds of the critique brought to fruition by an unauthorized use). This view posits the parodist as the ultimate romantic author. As Dan Burk has written about notions of authorship as individual feats of creation, "[t]he text itself becomes the feminized 'other' against which the author is differentiated." Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL'Y & L. 519, 546 (2006).

11. Adler, *supra* note 7, at 1138.

12. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270 (11th Cir. 2001) (noting that the new female character invented by Alice Randall to critique Margaret Mitchell's *Gone With the Wind* "is the vehicle of parody; she is its means—not its end"); see also *id.* at 1279 (Marcus, J., concurring) ("Perhaps Randall based her story on the perceptions of a single character to underscore the inherent subjectivity of storytelling, in contrast to Mitchell's disembodied, 'objective' narrator.").

no hint of wine and roses.¹³

Note in particular how the opinion imputes the motivations of the narrators in the 2 Live Crew version to the narrator in the Orbison song. Because of the later song, we can recognize that Orbison's narrator has the "same thing"—sex—on his mind as the later singers, but he pretties it up and obscures his real desires with talk of wine and roses. The parody consists of exposing the earlier song's base and lustful nature, while also exposing the woman in the song as base and unworthy.¹⁴

Moreover, the women in *both* songs become "streetwalkers." This term usually means "prostitutes," even though neither set of lyrics says anything about the women's occupations. Because the men are attracted to the women they watch (at least initially, in 2 Live Crew's case), the women walking openly and shamelessly in public must sell sex.¹⁵ The meaning of the Greek root of "pornography" is "writing about whores."¹⁶ *Campbell*, then, is a case in which writing about women is turned, by the courts and by the parodists, into pornography.

Campbell is the most relevant and recent Supreme Court case, but it is far from alone in locating transformative value in commentary on women's bodies. Current fair use opinions treat sexualizing a text as automatically constituting relevant commentary on the original, unlike other forms of reworking. Many of the most well-known cases of parodic and transformative use involve sexualization and often mockery of women's (or dolls') bodies.¹⁷ Women's bodies are to be commented on, so the presence

13. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1442 (6th Cir. 1992) (Nelson, J., dissenting)). The reiteration that "there are several" singers, which was already apparent from the plural, suggests that the men were all targeting the same woman, emphasizing her status as a "public woman."

14. See *Acuff-Rose Music*, 972 F.2d at 1446 ("The original work may not seem vulgar, at first blush, but the 2 Live Crew group is telling us, knowingly or unknowingly, that vulgar is precisely what 'Oh, Pretty Woman' is.").

15. The film *Pretty Woman*, whose protagonist is a prostitute and whose title comes from Orbison's song, may have helped enable this conclusion. See *PRETTY WOMAN* (Touchstone 1990).

16. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595.

17. The cases discussed in the text are the canonical ones that usually come up in discussions of fair use/transformativeness, but there are others. See *Fisher v. Dees*, 794 F.2d 432, 434 (9th Cir. 1986) (finding fair use when a parody changed "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" to "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall"); *Ellsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (finding fair use in a skit titled *I Love Sodom*, which featured women dressed as caricatures of belly dancers as a replacement for the chorus line that sang *I Love New York*). Similar reasoning occurs in defamation and related privacy tort cases. See *Geary v. Goldstein*, No. 91 Civ. 6222 (KMW), 1996 WL 447776, at *1 (S.D.N.Y. Aug. 8, 1996) (holding that the unauthorized editing of a television commercial, which made it appear as if an actress was engaging in sexual relations instead of selling bread was an obvious parody and not defamatory); Lisa R. Pruitt, *Her Own Good Name*:

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of a woman's body in a work makes it fair game for fair use.¹⁸ In other words, when a woman's image becomes public, it is *so* public that ripping her clothes off is a natural critical response.

B. Sexual Fair Uses

The dynamics linking sexualization to transformativeness have played out in a variety of cases. In one prominent case, sexualization was employed as conscious feminist critique. "Food Chain Barbie" was a series of photographs, most of which portrayed "a nude Barbie in danger of being attacked by vintage household appliances," as in the following image.¹⁹



The defendant-artist Thomas Forsythe argued that his photos meant "to critique the objectification of women associated with [Barbie], and . . . the conventional beauty myth and the societal acceptance of women as objects, because this is what Barbie embodies."²⁰ The court accepted this

Two Centuries Of Talk About Chastity, 63 MD. L. REV. 401, 471-89 (2004) (discussing cases in which sexually derogatory speech was deemed to be hyperbolic and parodic and thus not defamatory). By contrast, right of publicity law has not developed around exceptions for sexualized parody. See *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996) (explaining that the First Amendment protects works using celebrity identities in many critical ways).

18. I thank Christine Haight Farley for this formulation.

19. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003); Tom Forsythe, *Malted Barbie* (1997), available at <http://www.tomforsythe.com/Graphics/FoodChain/MaltedBarbie.jpg>.

20. *Walking Mountain Prods.*, 353 F.3d at 796.

characterization, explaining that Forsythe exacts revenge for the harm Barbie has done to women by harming Barbie:

Forsythe turns [Mattel's carefully cultivated image of beauty, wealth, and glamour] on its head, so to speak, by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations In some of Forsythe's photos, Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament. As portrayed in some of Forsythe's photographs, the appliances are substantial and overwhelming, while Barbie looks defenseless. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts.²¹

The pictures can be interpreted as saying that being perfect and smiling all the time will not keep you safe. This is not necessarily a feminist message, but it can be if it is understood as a call to stop smiling and start fighting.

A similar result occurred when another artist used Barbie to create Dungeon Dolls, which were re-painted and re-costumed dolls with SuperStar Barbie heads.²² Susanne Pitt sold the dolls through her web site. Pitt dressed the dolls in sexually provocative costumes and altered Barbie's anatomy in ways the court's opinion does not describe (out of a concern for the doll's modesty?), but that at a minimum included the addition of nipples, as in the following image:²³

21. *See id.* at 802.

22. *See* Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315, 318 (S.D.N.Y. 2002).

23. Susanne Pitt, "Lily Van Fraeunau" (2001) (image on file with author).



On Pitt's web site, "Lily the Diva Dominatrix," a re-costumed and apparently physically altered Barbie doll, was the protagonist in a tale of sexual slavery and torture, the victim of which was another re-configured Barbie.²⁴ Pitt contended that this scenario was offered "as entertainment in the same free spirit as the original creator."²⁵ The court found transformation because "[t]o the Court's knowledge, there is no Mattel line of 'S & M' Barbie."²⁶ Putting nipples and bondage gear on Barbie acted as commentary on Barbie's always already sexual nature.²⁷

These critiques proceeded by way of stripping and threatening Barbie, not by providing an alternative beauty ideal.²⁸ Of course, an alternative beauty ideal probably would not have been substantially similar to Barbie and thus would not have posed a copyright issue in the first place. If the master's tools are required to tear down the master's house, fair use allows

24. *Pitt*, 229 F. Supp. 2d at 322.

25. *Id.* at 319 (describing Defendant's assertion that Barbie's original form may have been derived from a German "adult" cartoon and doll).

26. *Id.* at 322.

27. *See id.* at 322-23.

28. Another Barbie conflict recently erupted in Brazil over paintings depicting the doll as a lesbian. *See Stewart Who?, Come on Barbie, Let's Go Party*, GAY.COM, Aug. 25, 2006, <http://uk.gay.com/headlines/10294>. A Mattel spokesperson said, "Barbie is a very proper lady and she is not happy about being portrayed as something that she isn't . . . Also, Barbie is 46 years old, and she should be respected." *Id.* The article pointed out that "even 'very proper' 46-year-old ladies have sex, and it could be lesbian sex, anonymous sex or S&M sex." *Id.* The artist also responded: "Barbie is exploited by Mattel. She wears a bikini, she shows off her belly, has big breasts, and even has a boyfriend." *Id.*

the rebels to pick up those tools. For this reason, I do not claim that the courts wrongly decided the cases discussed in this section. The revelations that even nice girls have sex and that smiles and good behavior will not protect women from violence are worthwhile.²⁹

But transformative is not the same as liberating, nor would we want courts making such equations. Feminists and anti-feminists alike can use re-appropriation as a tactic. Like Roy Orbison, photographer Annie Leibovitz found her tribute to female beauty challenged.³⁰ Leibovitz posed her subject, a naked and very pregnant Demi Moore, in a manner reminiscent of Botticelli's Venus for the cover of *Vanity Fair*.³¹ The pose, known as "Venus Pudens," is meant to symbolize either modesty or shame.³² Moore's expression was serious. And sure enough, a man came along to tell her to lighten up. Paramount's ad agency proposed posters for the soon-to-be-released movie *Naked Gun 33 1/3* that superimposed comedian Leslie Nielsen's face over those of famous women.³³ Paramount approved the concept and had a photographer recreate the Leibovitz shot with an enormous fake diamond ring on the model's hand where Moore had worn a large but real diamond ring.³⁴

29. Cf. Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1524-31 (1996) (arguing that art can use pornographic images to critique the pornographic imagination). As Adler cogently argues, it can be difficult to put a clear feminist/anti-feminist label on political art, which often has as part of its aim the destabilization of meaning itself. See *id.* at 1542-44. Nonetheless, disempowered speakers may need the attention-getting benefits of appropriation, including appropriation of copyrighted works, more than empowered speakers who have other paths to audiences. See *id.* at 1569-71.

30. See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 110 (2d Cir. 1998).

31. See *VANITY FAIR*, Aug. 1991, front cover.

32. *Leibovitz*, 137 F.3d at 111 n.1.

33. *Id.* at 111.

34. *Id.* at 111-12. The case concerns Paramount's appropriation of Leibovitz's expression as shown in Moore's body, but there is actually another relevant body—that of the poster model. Her body, exposed to the world in the ad, is completely submerged in the court's analysis. Consider how the passive voice of the opinion and the manipulations performed on the photograph reduce the model to a mannequin rather than a person:

The model was carefully posed so that her posture and hands precisely matched those of Moore in the Leibovitz photograph. A large ring was placed on the same finger as the one appearing on Moore's hand. The photograph was digitally enhanced by a computer to make the skin tone and shape of the body more closely match those of Moore in the Leibovitz photograph. The final step was to superimpose on the model's body a photograph of Nielsen's face, with his jaw and eyes positioned roughly at the same angle as Moore's, but with her serious look replaced by Nielsen's mischievous smirk.

Id. at 111-12 (footnote omitted). The court says that "a photograph of Nielsen's face" was superimposed on "the model's body," rather than on "a photograph of the model's body," already slipping between the woman's body and its representation. *Id.* at 112. Computer manipulation reshaped the model to be more like Demi Moore, letting one woman stand in for the other. Even in this case where women's labor of all kinds seems so visible, there is a woman whose contribution is vital and yet at the same time irrelevant to the law.



The Second Circuit found that the poster served as a commentary on the seriousness, even pretentiousness, of the original.³⁵ The parody criticized the photograph's "undue self-importance."³⁶ It asked, "Who does she think she is?" The court does not specify which person is unduly self-important, the photographer or her subject, but maybe it does not matter.³⁷ Separately—or not so separately, despite the court's articulation of two distinct rationales—"the ad might also be reasonably perceived as interpreting the Leibovitz photograph to extol the beauty of the pregnant female body, and, rather unchivalrously, to express disagreement with this message."³⁸ By exposing her body, Moore invited ridicule, as Leibovitz did by exposing her art.

35. *Id.* at 114 (finding that the distinctly different facial expressions of Nielsen in the poster and Moore on the magazine cover highlight the parodic nature of the ad).

36. *Id.*

37. *See id.* at 114-15. Acting, a profession of artifice and thus femininity, generates disdain in right of publicity cases too, as if acting were something anyone could do (were it not for accident of beauty), compared to professional sports, which almost always requires actual talent. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996) ("[M]any people pay a lot of money to watch Demi Moore 'act' and Michael Jordan play basketball."); *id.* at 975 ("Professional athletes may be more responsible for their celebrity status, however, because athletic success is fairly straightforwardly the result of an athlete's natural talent and dedication. Thus, baseball players may deserve to profit from the commercial value of their identities more than movie stars.").

38. *See Leibovitz*, 137 F.3d at 115 (footnote omitted).

Jeff Koons, a conceptual artist and consummate self-promoter, has been sued a number of times for copyright infringement because his work depends on taking and reusing popular images.³⁹ As discussed in the next section, he has suffered some significant losses.⁴⁰ Recently, however, he prevailed in *Blanch v. Koons*.⁴¹ In that case, Koons copied a model's legs from a fashion photograph to use in the painting *Niagara*.⁴²



39. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 304-06 (2d Cir. 1992) (discussing one of Koons's sculptures, which was based on one of Rogers's photographs capturing a couple and their puppies posed on a bench).

40. See, e.g., *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 373-74, 385 (S.D.N.Y. 1993) (finding that Koons's sculpture of the dog in his "Wild Boy with Puppy" sculpture infringed the "Garfield" cartoon character Odie); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381, at *2 (S.D.N.Y. Apr. 1, 1993) (finding against Koons after he copied a photograph purchased from a gift shop); see also Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1367 (1990) (discussing a Koons Pink Panther sculpture that prompted another lawsuit, this one settled out of court). Christine Haight Farley suggested at the IP/Gender conference that, because the Pink Panther was not associated with a woman (or even with muted sexuality) initially, a court would be unlikely to find a Koons sculpture incorporating the Pink Panther to be fair use. Koons himself saw the Pink Panther as a sexual object that a woman might use as a masturbation aid; perhaps he was inspired by the sexual connotations of "pink." See JEFF KOONS, THE JEFF KOONS HANDBOOK 104 (1992).

41. 396 F. Supp. 2d 476, 480-82 (S.D.N.Y. 2005), *aff'd* 2006 WL 3040666 (2d Cir. Oct. 26, 2006). I thank Peter Jaszi for drawing my attention to this case.

42. See Jeff Koons, *Niagara* (2000), available at http://www.guggenheimcollection.org/site/artist_work_lg_P65.html.

Calling the legs “anonymous,” Koons insisted that the legs were “a fact in the world.”⁴³ “[T]hey are not anyone’s legs in particular,”⁴⁴ and thus he had the right to copy them to critique modern consumption-oriented culture. Koons was speaking about fair use, but he found it necessary to alienate the models’ body parts from the models.⁴⁵ Koons was wrong. Those legs were the models’ legs. That does not make his use of a fashion photo unfair, but it is telling that he explained himself as a re-user of materials (women’s images) that were just out there in the world, free for him to use, with no humans involved.

Finally, the court’s discussion—or lack thereof—of parody in the *Starballz* case, in which George Lucas sued the makers of a sexually explicit animated film, is particularly instructive.⁴⁶ According to the filmmakers, they based the story in part on *Star Wars* and in part on other well-known films.⁴⁷ In its opinion denying preliminary injunctive relief, the court analyzed the case as follows: “*Starballz* is a parody of *Star Wars*, in that it is a ‘literary or artistic work that broadly mimics an author’s characteristic style and holds it up to ridicule.’”⁴⁸ The most sexually focused work in the reported cases turns into the most obvious parody. *Star Wars* had no overtly sexual content and only a hint of romance. In that way, it was much like Roy Orbison’s song or Barbie’s carefully cultivated image. Adding sex therefore automatically worked as commentary because sex always plays a part in the subtext of human relations, especially when it involves a woman.

One way to see these cases is as being about competing interpretations of women as sexual objects—pretty woman or ugly woman, cheerful doll genuinely happy with the roles assigned her or naked and exploited doll possibly screaming inside.⁴⁹ But the criticism of the role seems to require criticism of the woman who fills it. Jeff Koons turns a woman’s body into anonymous fact, Paramount suggests that pregnant bodies are ridiculous, and so on. We lack a fair use case about a work that, through transformation, argues that the original was not serious enough about

43. *Blanch*, 396 F. Supp. 2d at 481.

44. *See id.* (quoting Koons’s statement that “[m]y paintings are not about *objects* or images that I might invent, but rather about how we relate to the *things* that we actually experience”) (emphasis added).

45. *See id.*

46. *See Lucasfilm Ltd. v. Media Mkt. Group, Ltd.*, 182 F. Supp. 2d 897, 901 (N.D. Cal. 2002).

47. Sophia, *George Lucas v. Star Ballz*, CINEMA ONLINE, Mar. 2002, <http://www.cinemaonline.com.my/news/news.asp?search=starballz> (explaining that *Starballz* also spoofed *The Full Monty* and *The Silence of The Lambs*).

48. *Lucasfilm Ltd.*, 182 F. Supp. 2d at 901.

49. Christine Haight Farley formulated the issue this way at the IP/Gender Conference.

women's bodies. Such works exist in literature, including *Wide Sargasso Sea* (revisioning *Jane Eyre*), *Ahab's Wife* (*Moby Dick*), *Mary Reilly* (*Dr. Jekyll & Mr. Hyde*), *Lo's Diary* (*Lolita*), and others,⁵⁰ but the case law has not yet dealt with them.

C. Contrasts: Commercialism, Violence, Desexualization

Sexuality and women's bodies have assumed an importance in the case law that is not ideal in that the case law constrains the options for parody and other reworkings. Adding sex is not the only route to fair use. Courts have deemed large-scale cataloging projects and reverse engineering of computer programs fair use.⁵¹ With creative re-uses of individual works, however, non-sexual transformativeness arguments are notably less likely to succeed.⁵²

Rogers v. Koons provides a useful example. *Rogers* involved the unauthorized conversion of a photo, *String of Puppies*, into a sculpture.⁵³ According to Koons, he chose the photo, which he found on a greeting card, because he thought it "typical, commonplace and familiar."⁵⁴ The content of the original did not really matter because the point of Koons's work was to defamiliarize and reinterpret the banal objects that surround us every day and generally pass unnoticed.⁵⁵ But for precisely this reason, the Second Circuit ruled that Koons had no justification for picking *this particular* image and thus no fair use defense.⁵⁶

50. See Abigail Derecho, *Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET: NEW ESSAYS* 61, 66-72 (Karen Hellekson & Kristina Busse eds., 2006) (arguing that, since before the birth of the novel, women's characteristic mode of production has been to rewrite canonical texts to make them tell "better" stories, sometimes following a traditional romance narrative and sometimes engaging in more disruptive interventions).

51. See, e.g., *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 609 (9th Cir. 2000) (finding that reverse engineering used to copy software from gaming console was fair use).

52. *But see* *MasterCard Int'l Inc. v. Nader* 2000 Primary Comm. Inc., No. 00 Civ. 6068 (GBD), 2004 WL 434404, at *13 (S.D.N.Y. Mar. 8, 2004) (finding that mockery of commercialism in political ad was fair use, even if the main target was not the copyright owner—a credit card company that encouraged free spending); *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 90 (S.D.N.Y. 2003) (finding that a commentary on the use of drugs and corruption was a legitimate parody of Louis Armstrong's *What a Wonderful World*).

53. *Rogers v. Koons*, 960 F.2d 301, 304-05 (2d Cir. 1992).

54. *Id.* at 305.

55. See *id.* at 304 (linking Koons's sculpture to a tradition of work that extracted meaning from everyday items, including Andy Warhol's reproduction of Campbell soup cans).

56. *Id.* at 310 (emphasizing that "public awareness of the original work" is critical to legitimate parody, the function of that rule is "to insure that credit is given where credit is due," and the audience must be aware that "underlying the parody there is an original and separate expression, attributable to a different artist" either because the work is well known or because its existence is acknowledged by the parodist).

Likewise, in *United Feature Syndicate v. Koons*, Koons admitted he did not know the name of the cartoon dog he copied, stating “I never had the slightest intention (or even knowledge) that I was including a special dog named ‘Odie.’”⁵⁷ The court therefore concluded that he could not be parodying that particular dog.⁵⁸ Koons used almost exactly the same reasoning defending his copying of a fashion photograph for *Niagara*—the “anonymous” models are no one in particular, the photo is “typical,” and identical images “can be found in almost any glossy magazine”—but the court accepted that critiquing the general culture of mass consumption was a legitimate justification for copying particular expressions of that culture.⁵⁹ It is hard to see how the cases differ, except that Koons won when he used women’s images.⁶⁰ Perhaps fashion photographs of women are so powerfully associated with the culture of consumption that each one can be blamed for overall societal values, while Odie and a single greeting card are harmless.

Rogers and *United Feature Syndicate* are not alone in rejecting fair use defenses based on critiques of banality. Michael Moore’s film *The Big One* used advertisements mimicking ads for the popular film *Men in Black*, showing the pudgy Moore with his microphone aping the heroic pose of Will Smith and Tommy Lee Jones with their guns.⁶¹ The court found no fair use even though the contrast between the two films highlights the frivolity of popular entertainment given that real corruption, rather than a fake alien invasion, poses a serious threat to Americans.⁶² Moore’s schlubby body is not a parody of Smith’s heroic one, whereas 2 Live Crew’s degraded women do parody Orbison’s pretty woman and Nielsen’s faux-pregnant body parodies Moore’s heroically pregnant body.

57. 817 F. Supp. 370, 384 (S.D.N.Y. 1993) (referring to the subject of the sculpture, a character from the “Garfield” comic strip).

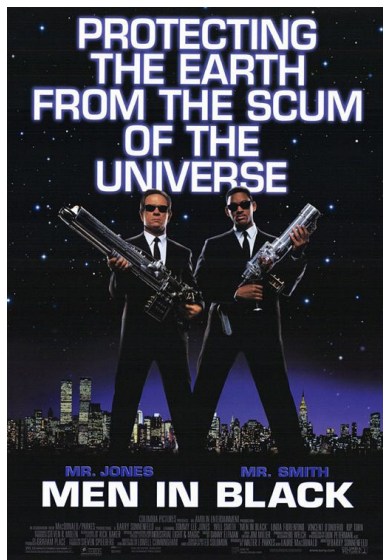
58. *Id.* (concluding that there was no fair parody because Koons could have used other images to make the same point and explaining that “since ‘Odie’ is not an object of the parody but merely is claimed to be ‘an animal figure’ that is part of a more general parody on the banality of life or criticism of the mass media culture at large, the teachings of *Rogers* require that Koons’ [sic] parody be rejected as a matter of law”).

59. *Blanch v. Koons*, 396 F. Supp. 2d 476, 482 (S.D.N.Y. 2005).

60. *See id.* at 483 (distinguishing *Rogers* as different on its facts, without further explanation). The recent court of appeals opinion declares *Niagara* a satire, not a parody, then cites *Rogers*, but fails to explain why Koons wins now and lost then. *See Blanch v. Koons*, 2006 WL 3040666, at *9.

61. *See Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1182-83 (C.D. Cal. 1998).

62. *See id.* at 1188-89 (holding that Michael Moore’s imitation of the poster and ads for *Men in Black* to advertise his anti-corporate film *The Big One* was not a fair use even though it contrasted the former’s fantastic enemies with actual, banal wrongdoing); *see also Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1300-01 (C.D. Cal. 1995) (finding that the James Bond-type character in a Honda commercial was not a legitimate parody).



Like critiquing banality, adding violence to an existing work rarely allows a parodist to succeed in a fair use defense. In *The Cat NOT in the Hat!* case, for example, the Ninth Circuit found the analogies between Dr. Seuss's famous feline and O.J. Simpson unfair.⁶³ The defendants argued that, like the Cat in the Hat, O.J. Simpson acted contrary to moral and legal authority by killing two people.⁶⁴ O.J. Simpson then relied on tricks to create a spectacle that created a big mess, just like the Cat.⁶⁵ While the original Cat comes off as benign, Simpson's violence shows that defying authority is not harmless fun, especially for the people authority should protect.⁶⁶ The court found this defense "pure schtick" and "completely unconvincing."⁶⁷

In another example of adding violence to an original work, the Famous Chicken, a costumed entertainer, successfully defended an act in which it danced with and then assaulted a compatriot dressed as Barney the Purple

63. *Dr. Seuss Entm't, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997).

64. *Id.* at 1402.

65. *Id.*

66. In essence, the defendants argued that *The Cat NOT in the Hat!* retold the story from a perspective similar to that of the mother who comes home at the end of the Seuss book and finds a mess that presumably will be up to her to clean. From her point of view, the story is not very funny. *The Cat NOT in the Hat!* might well have generated similar unease by emphasizing how popular coverage of the Simpson case turned violent death into gruesome entertainment. Or the defendants might be gleefully exploiting that crass public voyeurism. See Adler, *supra* note 29, at 1543 (noting that unconventional art often challenges mainstream attitudes by presenting images that allow multiple interpretations). Meaning is not under the parodist's control any more than it is controlled by the original author.

67. *Dr. Seuss Entm't, L.P.*, 109 F.3d at 1403.

Dinosaur.⁶⁸ His legal victory shows that adding violence *can* act as the foundation of a successful fair use, but it is not as predictable under current law. It is perhaps relevant that the violence against Barney had homophobic elements because The Famous Chicken described Barney as a “sissy.”⁶⁹ Sissies should be publicly exposed by real men (or real chickens)—like female bodies, gay male bodies are fair game.

Relatedly, courts have split on whether showing clips of the violent beating of Reginald Denny was fair use given its newsworthiness,⁷⁰ but reprinting a nude photo of Miss Universe Puerto Rico to illustrate her questionable morals was of enough public interest to justify the copying.⁷¹ Would a photograph of a Miss Universe casting a vote or snubbing a homeless person also reflect on her morals enough to allow unauthorized copying? One might distinguish those situations with the observation that the nude photo *is* the story, whereas photos of other behaviors are only evidence of the underlying facts. But, even aside from the ways in which photos may prove otherwise unsupported allegations, this distinction replicates what Catharine MacKinnon identifies as pornography’s ability to define, even create, women in its own image.⁷² The nude picture becomes the truth about the model; through her picture, she becomes public property.⁷³

The distinction between a photo in which a woman is nude (what she *is* becomes newsworthy) and one in which she is clothed (what she is *doing* may be newsworthy) is just another way that society singles out women’s sexuality for special treatment. Indeed, the fact that a woman poses for a nude photo may say nothing at all about her sexuality from her perspective. It may say much more about her financial situation and her alternative means of making money. She may perceive the modeling as authentic sexual expression, she may not think much about it at all, or she may

68. See *Lyons P’Ship, L.P. v. Giannoulas*, 14 F. Supp. 2d 947, 955 (N.D. Tex. 1998), *aff’d*, 179 F.3d 384 (5th Cir. 1999).

69. See *id.* at 950-51 (using “sissy,” a highly charged word, to enforce norms of masculinity and heterosexuality that Barney evidently failed to follow and describing Defendant’s Barney character as “prancing gingerly . . . as the real Barney would walk” and dancing in a “characteristic fairylike” manner). Homophobia and misogyny are connected, as evidenced here. A sissy is a boy who cannot or would not escape his mother. I thank Ann Bartow for pressing me on this point.

70. Compare *L.A. News Serv. v. Reuters Television Int’l*, 149 F.3d 987, 994 (9th Cir. 2002) (finding no fair use), and *L.A. News Serv. v. KCAL-TV*, 108 F.3d 1119, 1123 (9th Cir. 1997) (finding no fair use), with *L. A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002) (finding fair use when the clip was used in an opening montage).

71. See *Núñez v. Carribean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000) (finding fair use because, among other reasons, “the pictures were shown not just to titillate, but also to inform”).

72. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 147-48 (1987).

73. See *id.* at 148.

believe that it helps define her sexuality because the existence of the photos will affect how people react to her. Even the idea that the photo reveals some truth about the woman is bound up in gender and sexual norms.

What if the original is already sexual? The recent *Clean Flicks* case, involving “family-friendly” companies that created unauthorized edited versions of popular Hollywood films for sale, did discuss whether removing sexually explicit content was transformative.⁷⁴ Unfortunately, its reasoning was extremely limited.

The *Clean Flicks* court, refusing to find transformation, analogized the bowdlerization of *Titanic* and similar films to taking a sledgehammer to Michelangelo’s *David* and ruled that there was no right to “put a fig leaf” over sexual images.⁷⁵ The comparison is inapt: The *David* is in the public domain, and indeed a readily available magnet set allows anyone to put a fig leaf, or more elaborate clothing, over a picture of him. More important, the *David* is a unique physical object. Taking a sledgehammer to a copy would be a powerful way to make a claim about the problem of male nudity but would not deprive the world of the original, just as altering a copy of a movie arguably reveals a truth without destroying the original work.

The *Clean Flicks* defendants argued that their use was transformative: Editing produced a movie without extreme sex, profanity, or violence that was still entertaining.⁷⁶ Some audiences considered the altered version still worth watching, proving that objectionable content is not necessary for a movie to be a success. Rejecting the defendants’ argument, the *Clean Flicks* court adopted an unfortunately cramped view of transformation.⁷⁷ It held that the benefit of creating child-friendly movies “is inconsequential to copyright law”⁷⁸ because a creator has “right[s] to protect its creation in the form in which it was created.”⁷⁹ However, such reasoning does nothing to distinguish *Clean Flicks* from *Campbell*. *Clean Flicks* may have been rightly decided for other reasons,⁸⁰ but it unfortunately reinforces the idea that adding sex is somehow different in kind than other alterations of a

74. *Clean Flicks, LLC v. Soderbergh*, 433 F.2d 1236, 1241 (D. Colo. 2006) (concluding that “there is nothing transformative about the edited copies”).

75. *Id.* at 1240.

76. *Id.* at 1241.

77. *Id.* at 1242.

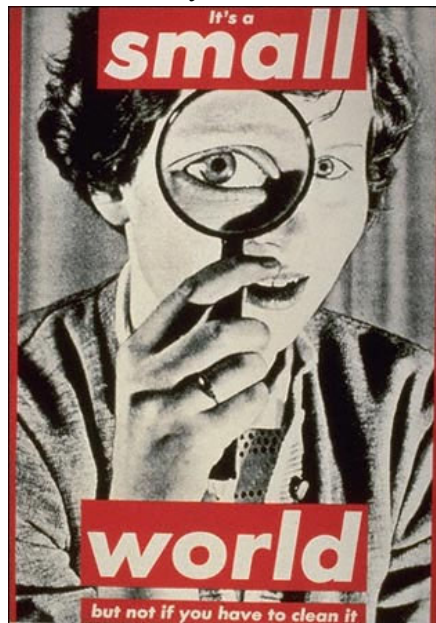
78. *Id.* at 1240.

79. *Id.* at 1242.

80. I think *Clean Flicks* was rightly decided because the transformative message—that sex and violence are unnecessary to good entertainment—is designed to be hidden from most viewers of the altered movies. 2 Live Crew did not set out to ensure that Roy Orbison’s song never reached listeners’ ears, whereas the *Clean Flicks* defendants explicitly sought to substitute and prevent comparison of the original to the altered version.

work.

Hoepker v. Kruger,⁸¹ though not a copyright fair use case, suggests some potential for a broadly feminist version of transformative fair use that does not require sexualization. Barbara Kruger, a collage artist known for her feminist position on issues of beauty, femininity, and power, copied a male photographer's picture, "Charlotte As Seen By Thomas."⁸² She cropped and enlarged the photo and superimposed three red blocks containing the words "It's a small world but not if you have to clean it."⁸³



The original work's title makes the woman, Charlotte Dabney, the object of the male gaze, contesting Dabney's agency even though she might initially appear to be actively looking. Kruger's slogan refocuses attention on what Dabney is doing and thinking—in Kruger's version, she seems to be cleaning, perhaps obsessively, though there is plenty of room for interpretation.⁸⁴ The court in *Hoepker* did not decide the copyright

81. 200 F. Supp. 2d 340 (S.D.N.Y. 2002).

82. *Id.* at 342.

83. *Id.*

84. See Nancy Spector, The Collection, Guggenheim Museum http://www.guggenheimcollection.org/site/movement_work_md_Neo_Conceptualism_81_1.htm (last visited Nov. 5, 2006) ("Kruger brings the issue of gender identification into question through her ambiguous use of the neutral pronouns 'I,' 'you,' and 'we' in her phrases, such as the following: YOUR GAZE HITS THE SIDE OF MY FACE; YOU MAKE HISTORY WHEN YOU DO BUSINESS; YOU INVEST IN THE DIVINITY OF THE MASTERPIECE; WHEN I HEAR THE WORD CULTURE, I TAKE OUT MY CHECKBOOK. To some extent, Kruger reconfigures the conventional gendered subject/object relationship by bestowing the female voice with authority, but quickly

question because it determined that the photograph's expired foreign copyright had not been properly restored, but it did state without analysis that Kruger's work was transformative for purposes of Dabney's right of publicity claim.⁸⁵ If that conclusion also applied to the copyright claims, *Hoepker* would be a heartening instance of fair use based on a playful, feminist use that did not depend on ridiculing a woman's sexuality (with a dollop of irony that the woman was denied payment for that reclamation). Perhaps if more feminist art enters the commercial sphere—a topic to which I return in Part IV *infra*—courts will have more opportunities to evaluate such reworkings.

II. PUBLIC WOMAN, PRIVATE MAN

The parody cases can be compared with the *Harper & Row Publishers, Inc. v. Nation Enterprises*⁸⁶ and *Salinger v. Random House, Inc.*⁸⁷ involving works by men who did not want the works published (or did not want them published in *The Nation*, in the former case). In the *Nations* case, in order to protect his privacy interests, the Supreme Court held that President Ford had a First Amendment right not to speak that factored into copyright doctrine by heavily weighing the unpublished nature of a work against a fair use defense.⁸⁸ In *Salinger*, the Second Circuit then applied an almost absolute rule against fair use of unpublished works when it found that a biography of J.D. Salinger infringed Salinger's unpublished letters.⁸⁹ Ford and Salinger had a right to stay silent, to keep their words from being used against them. Demi Moore and Annie Liebovitz did not.

The feminist critique of privacy rights argues that both sides of the public/private divide reinforce male power. Making fair game of women in public is part of patriarchy. The choice is to be open to the world or open to one man, so the one man often looks better by comparison.⁹⁰ Recall that copying Miss Puerto Rico's modeling photos was fair use because their very existence justified widespread publication. She was willing to let some people see images of her nude, so everyone had an interest in doing so.⁹¹ Jeff Koons got to use pictures of women's legs because their public

subverts this mere reversal of power by scrambling the identities of speaker and audience.”).

85. *Hoepker*, 200 F. Supp. 2d at 350.

86. 471 U.S. 539 (1985).

87. 811 F.2d 90 (2d Cir. 1987).

88. *Harper & Row*, 471 U.S. at 559.

89. *Salinger*, 811 F.2d at 95-96 (holding that fair use was not “traditionally” recognized as a defense to infringement of unpublished works, especially unpublished personal letters).

90. See, e.g., Pruitt, *supra* note 17, at 407-08.

91. See *Nuñez v. Caribbean Int'l News Corp.*, 235 F. 3d 18, 24 (1st Cir. 2000).

circulation made them “not anyone’s legs in particular.”⁹²

Privacy, on the other hand, has too often been used to keep women under control in the private sphere. Privacy rights keep outsiders from interfering with a man’s control over his women and make women’s attempts to speak out about their circumstances shameful and inappropriate contamination of the public with what should be kept secret.⁹³ Denying fair use when a man’s secret words are publicized is thus consistent with a tradition of letting men do what they want in private, without condemnation or control from outside.⁹⁴

Proponents of moral rights,⁹⁵ along with people who do not believe that the First Amendment requires any particular kind of fair use, have used the idea that free speech includes a right to stay silent to argue that transformative use can harm the original author’s speech interests.⁹⁶ In this argument, publication does not terminate the personality interest that the author retains in having his (or her) message remain untainted. Authors have a right not to be made to stand for something repugnant to them by having their works appropriated for someone else’s agenda.

A moral right against distortion assumes that iron control over interpretation is possible. By contrast, much transformative use rhetoric, including my own, claims that it is quixotic for copyright owners to claim integrity rights once their works have entered the public commercial sphere.⁹⁷ Some fair use cases employ a variant on this argument, holding that the fact that a work is published favors the defendant in a fair use

92. See *Blanch v. Koons*, 396 F. Supp. 2d 476, 481 (S.D.N.Y. 2005).

93. See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State*, in *FEMINISMS*, 345, 356-57 (Sandra Kamp & Judith Squires eds., 1997); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2153 (1996) (arguing that after the nineteenth-century abolishment of the privilege of wife-beating, courts have shielded perpetrators of domestic violence based on the right to marital privacy).

94. See *Salinger*, 811 F.2d at 93 n.2 (noting that one of the objectionable takings by Salinger’s biographer was his close paraphrase of Salinger’s written dismay at learning that a former girlfriend was marrying an older man (Charlie Chaplin)). The letter disparages Chaplin’s body freely, as someone speaking privately is more likely to do. *Id.*

95. For an overview of moral rights theories, see Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 *HARV. INT’L L.J.* 353 (2006).

96. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 358-61 (1988) (arguing that the First Amendment principle of allowing speakers to reach their audiences without distortion supports moral rights); David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 *FORDHAM L. REV.* 435, 454 (2005) (arguing against the “transformation is a First Amendment right” position).

97. See, e.g., Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 *CARDOZO ARTS & ENT. L.J.* 365, (1992) (arguing that re-appropriation of popular images is both inevitable and valuable for human flourishing); Rebecca Tushnet, Comment, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L.J.* 651, 675 (1997) (“The price of widespread popularity is a loss of control over reception.”).

analysis.⁹⁸ Public availability always leads to interpretation and the creation of multiple meanings.

I am not against interpretation. But what courts recognize as legitimate interpretation, it turns out, has predictable sexual and gendered components—to be a “public woman” is a far different thing than to be a “public man,” just as a “streetwalker” is different from a “man in the street.” Thus, in *Leibovitz*, a woman’s proud celebration of her pregnant body necessarily invited negative commentary from passersby.⁹⁹ We already know that Barbie is sexual, says Judge Kozinski, so her proprietors have no right to complain when someone makes that more explicit.¹⁰⁰ An unchaste doll cannot be raped.

Of course, a plastic doll cannot be raped, chaste or not. Bodies are funny, sex is funny, and anyone who deals in bodies can expect some rude surprises. But in a culture full of disputes over sexuality and gender norms, it should be no surprise that our copyright cases are not exempt from those battles¹⁰¹ and that women in particular may find themselves mocked mercilessly or exposed beyond what they were willing to reveal.

One response to my criticism of the use of the public/private division in fair use could be to reconceptualize the second factor, the nature of the work, in light of the importance of the use to the audience. Wide distribution could still matter because audiences may be powerfully affected by works to which they are exposed. An individual may need to respond to a work that has become part of her consciousness.¹⁰² This audience interest is not based on the author’s privacy interests, whether preserved or foregone, but on the effects of the text. Once the text is widely disseminated, it is no longer tied to the author alone.

Going beyond a test that only looks at what a particular work has put on display, analysis of the second factor could explicitly hold that the nature of

98. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.”); *Arca Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (explaining that the plaintiff’s work was “published work available to the general public,” and thus the second factor of the fair use analysis favored defendant); Barton Beebe, *An Empirical Study of the U.S. Copyright Fair Use Cases, 1978-2005*, at 10 (working precis), available at <http://www.bartonbeebe.com> (examining all the district court cases considering fair use defenses and finding twenty-two opinions where unpublished status disfavored fair use, and twenty-six where published status favored fair use).

99. See *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

100. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

101. See Adler, *supra* note 7, at 1155 (“[L]egal rules, especially when related to speech, are steeped in cultural anxieties, fantasies, and prejudices.”).

102. See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (arguing that there is a natural right to respond creatively to one’s environment, which presently includes many copyrighted works).

the work includes whether it is relevant to a matter of public interest.¹⁰³ The personal can be political, and the private can be publicized. Courts could thus evaluate fair use of unpublished works depending on the importance to the audience of using the unpublished material to evaluate what they already know, such as relevant facts about an important public figure.¹⁰⁴ This would allow fair use doctrine to harmonize its treatment of what is “exposed” within the confines of a published work, which includes the subtext that a transformative use may bring to the surface, with its treatment of unpublished works that illuminate publicly available works, such as letters from an author.

III. SEX SELLS: MARKETS IN FAIR USE

A. Meat Market: Sexuality and Market Segmentation

The most famous fair use case of the past few years is *Suntrust Bank v. Houghton Mifflin Co.*, involving Margaret Mitchell’s *Gone With the Wind* (*GWTW*) and Alice Randall’s *The Wind Done Gone* (*TWDG*).¹⁰⁵ Randall’s book is a retelling of the *GWTW* story from the point of view of a new character, Scarlett O’Hara’s mulatto half-sister. In finding that the book was likely a fair use, the Eleventh Circuit held that the book was “a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *GWTW*.”¹⁰⁶ In particular, Randall’s depictions of homosexuality and interracial sexual relationships served as an “attack” on *GWTW*.¹⁰⁷ Though the court did not link homosexuality to Randall’s racial critique, it nonetheless found that overt homosexuality had a special role to play in analyzing the potential harm to the Mitchell estate’s market.¹⁰⁸ The estate refused to allow licensed derivative works to refer to homosexuality, and therefore Randall was not usurping a market the estate

103. Cf. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004) (suggesting that publication of private emails regarding election machines was fair use because it was in the “public interest”).

104. One court raised this possibility as part of transformativeness analysis in discussing whether a magazine could disseminate unpublished early works of the white rap artist Eminem as part of an editorial position that Eminem’s massive success came from exploiting, rather than respecting, African-American culture. See *Shady Records, Inc. v. Source Enters., Inc.*, No. 03 Civ. 9944(GEL), 2005 WL 14920, at *19 (S.D.N.Y. Jan. 3, 2005) (“[As part of a news report,] the copying of the registered excerpts would be ‘transformative,’ and therefore potentially protected by fair use, in that the copying altered the message of the Works to one about the (co-) author himself.”).

105. 268 F.3d 1257 (11th Cir. 2001).

106. *Id.* at 1269. Of course, racial and sexual stereotypes are intertwined. What is your mental image of the woman in Orbison’s song? Is she the same race as the woman you imagine as 2 Live Crew’s target?

107. *Id.* at 1270-71.

108. *Id.* at 1271 n.26.

was likely to exploit.¹⁰⁹

This analysis is terribly incomplete. It is not usual to separate potential markets by plot and characterization. If the Mitchell estate had vowed never to authorize a version of *GWTW* set in outer space, that would not mean that retelling was free for unauthorized use. A copyright owner can decide to stay out of a market without forfeiting its rights in that market.¹¹⁰ The court may perceive the estate's reasons for foreclosing the possibility of a gay Ashley, no matter how well-written, as censorious and illegitimate. The estate has not, after all, disavowed any possibility of a space opera version.¹¹¹

Perhaps the estate's reasons for preventing versions with gay Ashleys are so likely to be shared by copyright owners that, in general, making a copyrighted character gay will not interfere with a traditional, reasonable, or likely to be developed market.¹¹² TBS's recent advertising campaign for *The Lord of the Rings* trilogy depicting Sam and Frodo as "Secret Lovers"¹¹³ challenges this assumption, and the success of *Brokeback Mountain*¹¹⁴ and the rise of gay-friendly productions will continue to put pressure on it. Moreover, this apparently objective reason collapses back

109. *Id.* at 1270-71 (finding that the portrayal of homosexuality in *TWDG* has "special relevance" for the fourth fair use factor); *see also id.* at 1282 n.6 (Marcus, J., concurring) (noting the Mitchell estate was "loath to license a derivative work that contained" elements such as homosexuality); *cf. Lyons P'ship, L.P. v. Giannoulas*, 14 F. Supp. 2d 947, 955 (N.D. Tex. 1998), *aff'd*, 179 F.3d 384 (5th Cir. 1999) (finding fair use of the loveable, and detestable, children's entertainer Barney when a competing entertainer, the Famous Chicken, made a mockery of Barney's "lovable, sissy" image).

110. *See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145-46 (2d Cir.1998) (declaring that copyright law allows copyright owners the ability to refuse to enter a particular market); *cf. Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 570 (2004) (discussing playwrights' ability to refuse to authorize unusual gender or racial casting of their plays).

111. *See The Patry Copyright Blog*, <http://williampatry.blogspot.com/2005/04/parody-political-correctness-and-first.html> (Apr. 29, 2005) (suggesting that the decision in *Suntrust* was motivated by political correctness). Patry suggests that an unauthorized derivative work of *GWTW* that expressed anti-gay sentiments would have been found unfair and that the court was uniquely solicitous of anti-racist critiques. *See id.* How such rewriting would have worked is unclear. Most works express normative attitudes towards sex and gender (that is part of what it means to be normative), so there may be an inherent bias in current transformative use doctrine based on what we find transgressive as a culture. Nonetheless, it would be possible to rewrite the Showtime series *Queer as Folk* to show anti-gay sentiments and that would be fair use, just as the preacher's story in which Harry Potter realizes that magic is anti-Christian and gives up his wand to save his soul is fair use (even though I think it is tripe). *See Bill Keller, Harry Potter and the Search for a King*, (Sept. 18, 2006), <http://www.liveprayer.com/potter.cfm>.

112. *See, e.g., Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (noting that "only traditional, reasonable, or likely to be developed markets" are relevant to market-effect analysis).

113. *See Lord of the Rings: Secret Lovers? Not That There's Anything Wrong With That*, TBS Broadband (2006), <http://tbs.com/broadband/videoplayer/0,,0636,00.html>.

114. *BROKEBACK MOUNTAIN* (Focus Features 2005) (adapting E. Annie Proulx's short story about two homosexual cowboys).

into discomfort with private censorship. Most owners of copyrights in historical or contemporary literature are unlikely to authorize science fiction versions. And there are separate market segments for science fiction and for gay and lesbian literature—if the cases mean what they say, either both should be cognizable markets for derivative works purposes or neither. The difference, if any, is in the social meanings of homosexuality and of science fiction.

More generally, the treatment of the market for sexualized works in parody cases is fundamentally confused. Though the accused work itself, if commercial, usually demonstrates that such a market exists, courts tend to ignore it or at least ignore that there are creative works in that market. Thus, the Court wrote in *Campbell* that “the market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”¹¹⁵ Courts responded by finding that copyright owners would not license sexually explicit versions of Barbie or *GWTW*.¹¹⁶ Yet creators of original *sexually explicit* works routinely develop successful series, from best-selling horror author Anne Rice writing as A.N. Roquelaure to the several incarnations of *Debbie Does Dallas*, now a musical as well as a film series. Pornographers are copyright owners too. (And holders of other rights, as illustrated by a *New York Times* report on celebrities who are willing to license distribution of their private sex tapes as long as they are being paid.)¹¹⁷

Parody threatens to put a work into both the legitimate and the sexually explicit markets at once, and, whether an accused work is found to be a fair use or not, fair use doctrine works to preserve the separation by presuming that no real copyright owner would have a presence in both.¹¹⁸ The doctrine draws this bright line even though there is at least one class of work that often exists in both markets: movies, which the studios edit for television to decrease sexual content and also release as DVDs with unrated footage as an extra feature, allowing increased sexual explicitness.¹¹⁹

115. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

116. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 793, 806 (9th Cir. 2003) (“Forsythe’s work could only reasonably substitute for a work in the market for adult-oriented artistic photographs of Barbie. We think it safe to assume that Mattel will not enter such a market or license others to do so.”).

117. *See Lola Ogunnaike, Sex, Lawsuits, and Celebrities Caught on Tape*, N.Y. TIMES, Mar. 19, 2006, at 9-1.

118. *See Clean Flicks, LLC v. Soderbergh*, 433 F.2d 1236, 1238, 1240 (appealing to artistic integrity by ruling for the movie studios’ rights to keep sex in their films, even while acknowledging that studios routinely create multiple edits for various distribution channels such as in-flight movies and broadcast television). The *Clean Flicks* court focused on the sex- and violence-laden versions released in theaters as the authentic expression of creative freedom. *See id.* at 1243.

119. Often the DVDs promise more on that front than they deliver. *See Josh Levin, The Naked Truth: A Slate Investigation Into Unrated DVDs*, SLATE, Jan. 19, 2006,

While the immediate battle over the right of third parties to edit movies to make them more family-friendly was resolved, the conceptual problem remains. Some copyright owners are perfectly willing to segment the market, licensing parodies and other licentiousness along with more traditional derivative works.¹²⁰ DC Comics orders an art gallery to take down paintings of Batman and Robin kissing,¹²¹ but introduces a lesbian Batwoman with much fanfare.¹²² Even Barbie has an authorized dominatrix side in her Catwoman guise contrary to the *Pitt* court's statement that "there is no Mattel line of 'S & M' Barbie."¹²³



Treating "explicit" and "mainstream" works as operating in entirely different markets reinforces the special role of sexuality in evaluating the first fair use factor. A sexualized work is presumptively transformative and presumptively not the sort of thing a normal copyright owner is likely to license, unlike everything else. With the first and fourth factors tilting in a defendant's favor, fair use inexorably follows.¹²⁴

<http://www.slate.com/id/2134503>.

120. See Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 995-97 (2004) (discussing examples of copyright owner-licensed parodies such as "Weird Al" Yankovic's songs); cf. Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155, 195-96 n. 206 (2002) (discussing instances in which unauthorized derivative works, especially sexually explicit works, have been adopted as new genres by Japanese manga (comic book) publishers).

121. See Blamplie Sog, *Lighten Up DC*, http://popuppupop.blogspot.com/2005_08_01_archive.html (Aug. 21, 2005).

122. See BBC NEWS, *Batwoman Hero Returns as Lesbian* (May 30, 2006), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/5030518.stm>.

123. *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 322 (S.D.N.Y. 2002).

124. See *id.*

Were courts to accept the existence of multiple levels of authorized explicitness, their current analysis of fair use might collapse. *Perfect 10 v. Google, Inc.* concerned Google's small "thumbnail" images of sexually explicit pictures that were available at sites lacking authorization from the copyright owner Perfect 10.¹²⁵ A previous precedent, *Kelly v. Arriba Soft Corp.*, had determined that a search engine's provision of thumbnail images of non-sexual pictures as part of image search results was fair use.¹²⁶ Nonetheless, the *Perfect 10* court rejected Google's fair use defense largely on the ground that Perfect 10, unlike Kelly and other copyright owners, had successfully monetized the market for small, low-resolution sexually explicit pictures delivered to subscribers' cellphones.¹²⁷ The pornographer's offer is always "I'll sell you anything—any body, any act," so pornography is naturally at the forefront of universal licensing.

Notably, part of the *Perfect 10* court's analysis intimated that consumers of sexually explicit images were less discriminating than consumers of other images.¹²⁸ They would get the same gratification from small thumbnail images as from full-size images because they may "pay little attention to fine details" when nude pictures are involved.¹²⁹ At the same time, the *Perfect 10* court rejected two claims about the special status of pictures of nude women: Google's position that Perfect 10's pictures were not particularly creative for purposes of the second fair use factor because they focused on nudes—essentially, they were masturbation aids rather than creative art—and Perfect 10's argument regarding the third factor that, unlike other pictures, nudes could be easily described in words without the need to copy the images themselves.¹³⁰ Though it correctly rejected both arguments, the court did not recognize that the two arguments were fundamentally the same as the "inattentive browser" position it endorsed—that the pictures were in important ways sex rather than images and should not be analyzed as ordinary creative works. It remains to be seen whether a court of appeals will agree that Perfect 10's indiscriminate, voracious licensing precludes Google's fair use defense.

Another court confronted a case in which a sexually oriented work was

125. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 831-34 (C.D. Cal. 2006).

126. 336 F.3d 811, 815 (9th Cir. 2003).

127. *Perfect 10*, 416 F. Supp. 2d at 851.

128. *See id.* at 847.

129. *See id.*; *see also* *Playboy Enter., Inc. v. Netscape Commc'n Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2004) ("We presume that the average searcher seeking adult-oriented materials on the Internet is easily diverted from a specific product he or she is seeking if other options, particularly graphic ones, appear more quickly."). Contrary to the courts' intuitions, my own is that people are very specific about their sexual needs, such that they will carefully seek out what they want, which may or may not include thumbnail images.

130. *See Perfect 10*, 416 F. Supp. 2d at 849-50.

excerpted and repurposed for a more general audience. Sandy Kane owns the copyright in *The Sandy Kane Blew Comedy Show*, which appears on public access television.¹³¹ On that show, Ms. Kane, a former stripper and comedienne, “sings, dances, and delivers explicit jokes while wearing little to no clothing.”¹³² Comedy Central’s *The Daily Show* used a clip from Kane’s show to introduce a segment called “Public Excess” about the weird and silly things shown on public access channels.¹³³ Kane’s show also appeared as a subject of one “Public Excess” segment in which she was dancing in a bikini while singing her signature song, *I Love Dick*.¹³⁴ A video clip also appeared in an ad for *The Daily Show* in which the clip played while a voice-over declared *The Daily Show* “offensive.”¹³⁵

Kane did not object to the ridicule, she simply wanted to be paid for the use of the clips of her show. She argued that the defendant’s use harmed her licensing market.¹³⁶ The court rejected her argument, reasoning that it posed insuperable problems of circularity; the defendant’s use would harm her market if licensing was part of her legitimate market, but would not present any harm to her market if the use was considered to be “fair use.”¹³⁷ While this is certainly true, it is also true of every other case that takes licensing into account, yet the dominant trend is to accept copyright owners’ claims of willingness to license. The only way to prevent circularity is to hold that certain licensing markets are not part of the copyright owner’s entitlement, regardless of willingness to license.¹³⁸

Just as it has affected assessments of transformativeness, sex has profoundly shaped courts’ evaluations of copyright owners’ legitimate markets. Catering to a minority is either the right of the copyright owner, to be exercised or not depending on its choice (*Clean Flicks*), or the right of the fair user (*Starballz*). The outcome turns on the degree of sexual explicitness the minority prefers. The movie studios have the right to license bowdlerized versions but not a monopoly on exaggeratedly sexual versions. The flip side is that the pornographer in *Perfect 10*, willing to license anything, gets all the rights.

131. Kane v. Comedy Partners, No. 00 Civ. 158 (GBD), 2003 U.S. Dist. Lexis 18513, at *1-2 (S.D.N.Y. Oct. 16, 2003).

132. *Id.* at *2.

133. *Id.* at *2-3.

134. *Id.* at *4.

135. *Id.* at *3-4.

136. *Id.* at *16-18.

137. *Id.* at *17-18.

138. See Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 LEGAL THEORY 347, 359-60 (1997) (pointing out that the ability to charge for a use no more gives a copyright owner a right to charge than a gangster’s ability to extort money does; one needs a normative theory about why a right to charge is justified).

Regardless of the ultimate resolution in *Perfect 10* and *Clean Flicks*, it is likely that sexual content will remain important in fair use market analysis. Despite changes in copyright owners' behavior and in the general acceptability of sexual material, courts will continue to interrupt the circularity of market analysis by drawing a line between sexually explicit and non-explicit works, such that rights in a work do not extend to licensing more explicit derivative works. By refusing to allow the market for smut to merge into the rest of the market for expression, copyright law helps preserve the historical separation between sex and other more socially valued subjects.

B. The Gender of Commercial Use

Copyright law operates under the assumption that commercial, profit-seeking uses are the core of creative production, the standard by which the value and effectiveness of copyright law is judged. In fact, noncommercial production is *also* everywhere, though legal academics are just beginning to theorize its pervasiveness and its relations to commercial production.¹³⁹

Campbell justified protecting commercial transformative uses with the quote, "No man but a blockhead ever wrote, except for money."¹⁴⁰ No *man*. Most transformative uses that get litigated, like the song at issue in *Campbell*, are commercial because that is where the money is and defendants making noncommercial uses rarely can afford or find legal representation. If commercial uses, no matter how transformative, were presumptively unfair, then there would be almost no judicially recognized fair use. The Court therefore had to minimize the relevance of commercial motive in order to reach a desirable result, but it did so by denigrating noncommercial production. The problem with this rationale from a feminist perspective is that noncommercial, non-market artistic production turns out to be what women do.¹⁴¹ Women's freely offered creations are

139. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 117 (2006) ("Social production of goods and services, both public and private, is ubiquitous, though unnoticed. It sometimes substitutes for, and sometimes complements, market and state production everywhere. It is . . . the dark matter of our economic production universe."); see also Francesca Coppa, *Writing Bodies in Space: Media Fan Fiction as Theatrical Performance*, in *FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET* 225, 236-37 (Karen Hellekson & Kristina Busse eds., 2006) (maintaining that although noncommercial production has a pedigree as long as human history, the *category* of "amateur" noncommercial production only makes sense in contrast to modern industrialized production of mass culture).

140. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting JAMES BOSWELL, 3 *BOSWELL'S LIFE OF JOHNSON* 19 (George Hill ed., 1934)).

141. See, e.g., Tushnet, *supra* note 97, at 657 n.23 (discussing female-dominated production of noncommercial fan fiction); Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 *CAN. J. WOMEN & L.* 59, 61-64 (1994) (describing classifications which distinguish between high art, which is more likely to be produced by a man, and crafts, which tend to be created by women).

invisible—or, possibly worse, blockheaded.¹⁴²

Nonetheless, hundreds of thousands of noncommercial, unauthorized derivative works exist. For example, “slash” is the term for fan fiction, unauthorized derivative works based on popular media properties like *Star Trek* and *Harry Potter*, that features homosexual, usually male, relationships.¹⁴³ Women are the major producers and consumers of slash, which is often distributed freely and thus entirely noncommercially on the Internet.¹⁴⁴ This noncommerciality, in turn, is one characteristic that outsiders use to dismiss the genre as irrelevant, silly, or otherwise unworthy.¹⁴⁵

Fan fiction offers hundreds, even thousands, of versions of the same story—how Harry Potter and Hermione Granger finally got together, or how Harry and Draco Malfoy did.¹⁴⁶ Fan fiction’s abundance, even overabundance, is anti-market in many respects. Along with its free circulation, its very premise that the same characters can be used again and again defies concepts of exhaustion and the tragedy of the commons. Exploitation of popular characters like Harry Potter, Superman, and Dana Scully can be incredibly intensive. No one person could read all the *Harry Potter* or *Lord of the Rings* fan fiction already in existence, and yet people

142. See Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 140-41 (1998) (arguing that we often do not notice limited common property regimes, which can include regimes relating to intellectual property, because they are run by people “somehow deemed inappropriate to make claims of entitlement,” like women). Disvalued groups’ properties are deemed improper by those in power, and “unconventional communal claims and unrecognized social status” combine to defeat outsiders’ recognition of a property regime. *Id.* at 141.

143. See Sonia Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 463, 470 (2006).

144. See *id.* at 471.

145. See Coppa, *supra* note 137, at 227-28 (“Few fan fiction writers will ever have access to the means of production for mass media storytelling. The bar is much higher; the funds needed are enormous; one still has to move to Los Angeles or Vancouver; the odds of writing a show you like, as opposed to one you’re assigned to, are small; until relatively recently, the gender bias in Hollywood was astounding. There is, in short, a very small chance of a fan fiction writer becoming a professional mass media storyteller, even if she was inclined to do so. Defiant amateurism in this case is both realistic and structurally smart, but that doesn’t stop some science fiction fans scoffing at the media fan’s refusal to write something potentially salable.”). Coppa notes that fan fiction suffers in the minds of both outsiders and insiders from being “neither art nor commerce.” *Id.* at 229. Cultural authorities do not consider fan fiction “art” because it is repetitive and character focused, not plot or idea based, and not commerce because it is, definitionally, excluded from markets. Seeing fan fiction as performance, like multiple iterations of the same Shakespeare play, helps us understand its artistic merits, but it does not move fan fiction any further up the market/non-market or amateur/professional hierarchies.

146. See Kristina Busse, *Rowling’s Ghost Effect: Reading and Authority in Harry Potter Fanfiction 2* (June 15, 2005) (unpublished essay, on file with author) (discussing the diverse pairings that may occur in a fan fiction community).

keep producing and reading it.¹⁴⁷ Stories, unlike computer code, can “fork” without destroying the communities built around them.¹⁴⁸

Fan artists are appropriating male images for their own uses, making men’s bodies public the way women’s bodies have been, telling overtly sexualized stories, and confounding gender norms. If rewriting Roy Orbison’s description of a woman to make it blatantly disparaging and sexual is transformative, rewriting mass media texts about men to foreground their sexuality (and make that sexuality queer) should also be transformative.¹⁴⁹ That is simple equality, as in the following image of a mock comic book cover that treats Superman’s body the way Wonder Woman’s body is routinely treated in the authorized versions:¹⁵⁰



147. See *id.* at 10.

148. See *id.* at 14-15; Dennis S. Karjala, *Congestion Externalities and Extended Copyright Protection*, 94 Geo. L.J. 1065, 1084-85 (2006) (refuting the “tragedy of the commons” argument with respect to popular characters generally).

149. See Anupam Chander & Madhavi Sunder, *The Right to Mary Sue*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 18, on file with the American University Journal of Gender, Social Policy & the Law) (analyzing *The Wind Done Gone* as a type of liberatory fan fiction).

150. Posting of Karen to Like Scratches in the Sand, <http://oddiycollector.livejournal.com/97166.html> (Apr. 19, 2006, 20:34 UTC). Unlike the Batman/Robin kiss, DC Comics does not appear to have taken any action against this work.

However, attaining equality may not be as simple as doing to images of men what men have done to images of women. As the responses to this parody cover revealed, many women are interested in looking at male bodies, but the image can also be read as fetishization of body parts for an imagined male, now homosexual, gaze.¹⁵¹ Even if this look at Superman's body helps balance the scales of representational justice, formal equality, as feminists have long emphasized, is not enough.¹⁵² Meanwhile, enforcement against noncommercial speech proceeds apace because most recipients of cease and desist letters lack the money and legal knowledge to resist—another way in which formal doctrinal equality is insufficient to produce equal freedom for male and female patterns of creation.¹⁵³

Along with regulating market relations, sex and gender factor into controlling protest, resistance, and disobedience in intellectual property. Fan fiction writers, who are mostly women, are less likely to go public and more likely to accept the idea that they should stay under the radar. When female fans write sexually explicit stories, publicly acknowledging their authorship (and thus, implicitly, their own sexual desires and fantasies) would be embarrassing and, for those with conservative families or communities, potentially devastating. Therefore, they cannot generally afford to risk exposure. They use pseudonyms and restrict access to their web sites so as not to attract too much attention, self-limiting the liberatory possibilities of their work.¹⁵⁴

Low-protectionists, a group of which I count myself a part, often argue that many people will create art even without legal protection because of the intrinsic, reputational, and other non-copyright rewards for creativity.¹⁵⁵ Empirically, this is true. Nonetheless, when we compare fields that get intellectual property protection (software, sculpture) with fields that do not (fashion, cooking, sewing), it becomes uncomfortably obvious that our cultural policy has expected women's endeavors to generate surplus

151. See, e.g., Posting of Anonymous to Like Scratches in the Sand, <http://oddiycollector.livejournal.com/97166.html?thread=584334#t584334> (May 15, 2006, 19:01 UTC) (concluding that sexual images of women appeal to the masses, while those of men attract homosexual men); Posting of Anonymous to Like Scratches in the Sand, <http://oddiycollector.livejournal.com/97166.html?thread=597390#t597390> (May 18, 2006, 06:58 UTC) (remarking that comic art derives from the unfulfilled homoerotic fantasies of authors and audiences).

152. Appropriating male bodies and turning them into objects of fantasy and raw material for appropriation, critique, and transformation, as slash fan fiction does, can be liberating for women but may not always be welcomed by the objects of such fantasy and may not translate into support for actual gay and lesbian causes.

153. See MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 4 (2005).

154. Cf. Katyal, *supra* note 143, at 480-81 (discussing the role of anonymity in enabling fan fiction as long as it stays anonymous).

155. See Tushnet, *supra* note 97, at 685-86.

creativity but has assumed that men's endeavors require compensation, just as our society has expected women to do the hard work of raising children and keeping house out of love and duty but has not expected men to show up at the factory for the same reasons.¹⁵⁶ Copyright's economic focus and the expense of litigation will systematically lead to case law undervaluing non-market production, including historically female creative practices.

It does not seem likely that society at large will soon honor women's creativity, particularly slash fan fiction, with the same indulgence and affection reserved for men's pastimes, such as fantasy baseball. Nonetheless, it is worth talking about these practices, if only to point out that even apparently neutral laws, far from the contested realms of family law and substantive due process, are entangled in ideas about gender and sexuality.

IV. CONCLUSION: FAINT HEART NEVER WON FAIR USE

At a time when fair use is under attack by copyright owners' ever-greater assertions of rights and courts seem willing to find viable markets in all sorts of new places, it may seem dangerous to suggest that low-protectionists' favorite fair use decisions contain deeply problematic gendered reasoning. It would be a mistake, however, to stay silent about the way sex works in so many prominent fair use cases. Copyright is not the only thing that counts, and criticizing a woman's body should not be the prototypical fair use.

Instead, fair use should have many prototypes, commercial and noncommercial, published and unpublished, transformations of all kinds, as well as some pure copying. A feminist insistence on heterogeneity and on the rejection of binaries that allow fair use only when the use is most blatantly opposed to the original¹⁵⁷ would improve the doctrine.

Both copyright cases and the works they analyze express ideas about gender and sexuality, and that deserves our attention. Fair use, like love, is a wonderful thing, but it is not above reproach.

156. Cf. Séverine Dusollier, *The Master's Tools v. The Master's House: Creative Commons and Copyright*, 29 COLUMBIA J.L. & ARTS 271, 287-88 (2006) (comparing the Creative Commons attempt to promote an ideology in which creators freely give to consumers to gendered systems of labor that require women to perform intimate services for free).

157. See Katyal, *supra* note 143, at 498 (describing the lack of protection that exists for works that do not oppose or build upon an original work).