

## **UC Irvine**

### **UC Irvine Previously Published Works**

**Title**

Copyright and Feminism in Digital Media

**Permalink**

<https://escholarship.org/uc/item/0fh5r132>

**Journal**

American University Journal of Gender, Social Policy & the Law, 14(3)

**ISSN**

1557-3753

**Author**

Burk, Dan L

**Publication Date**

2006

Peer reviewed

# COPYRIGHT AND FEMINISM IN DIGITAL MEDIA

DAN L. BURK\*

Introduction .....	520
I. Feminism and Hypertext.....	522
II. Text and Authority .....	528
III. Authority and Hypertext.....	530
IV. Copyright and Hypertext .....	535
V. Copyright and Feminism.....	544
Conclusion .....	549

*Although feminist perspectives have contributed substantially to the development of both theory and practice in many areas of law, feminism has contributed relatively little to discussions regarding intellectual property. This paper examines the relationship between hypermedia and feminist discourse and critiques the role of copyright in controlling or suppressing such discourses. Hypertext and related media may lend themselves to relational webs of meaning rather than linear progressions of meaning. Given the importance of non-hierarchical, associative webs to feminist discourse, digital media may lend itself to feminist modes of thinking or, at minimum, challenge dominant textual constructions. However, current copyright doctrine assumes that works remain linear, hierarchical, and controlled. The exclusive rights conferred by copyright, especially the right of adaptation, lend themselves to authorial control over not only the text, but also to a reader's use of the text. This deterrent characteristic of copyright has appeared in several recent legal disputes involving hypertext linking and annotation. Thus, copyright*

---

\* Visiting Professor, Cornell Law School; Oppenheimer, Wolff & Donnelly; Professor of Law, University of Minnesota. I wish to thank Julie Cohen, Cecile Konchar Farr, Mary LaFrance, Pam Samuelson, Rebecca Tushnet, and Molly Van Houwelling, as well as the participants of the American University workshop on "Gender and Intellectual Property" and of the Berkeley Intellectual Property Scholarship Seminar for helpful comments on earlier drafts of this essay.

*remains hostile to non-traditional collaborative or relational user engagement. This hostility may ultimately frustrate copyright's purpose of promoting the "progress" of knowledge.*

\* \* \*

#### INTRODUCTION

Over the past three decades, feminist theories on law have been applied to a wide range of legal subjects, challenging the conventional understanding of nearly every imaginable area from bankruptcy<sup>1</sup> to business associations<sup>2</sup> to torts<sup>3</sup> to evidence.<sup>4</sup> The application of feminist approaches to law has been far more than an academic abstraction. Although much remains to be said and done before gender bias in the law is completely understood or comprehensively addressed, feminist perspectives have already played a substantial role in reforming doctrine and practice in a wide variety of areas, including criminal law,<sup>5</sup> family law,<sup>6</sup> and employment law.<sup>7</sup>

---

1. See, e.g., Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1554-56 (1990) (advocating a feminist perspective in bankruptcy proceedings that focuses on women debtors and their experiences).

2. See, e.g., Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1446-56 (1992) (arguing that limited liability is not a desirable scheme for feminism); Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543, 571 (1985) (urging feminist scholars to research the creation and culture of business organizations in order to challenge the patriarchal nature of the corporate world).

3. See, e.g., Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 849, 885-86 (proposing that the more empowered party in tort litigation maintain the burden of proof in order to level the playing field between parties); Leslie Bender, *An Overview of Feminist Tort Scholarship*, 78 CORNELL L. REV. 575, 579-89, 595-96 (1993) (surveying feminist critiques of tort law and encouraging the continuation of feminist analysis of torts, especially in the areas of litigation strategies, compensation schemes, and the underlying gender biases of the common law).

4. See, e.g., Aviva Orenstein, *"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 212-217 (1997) (proposing a change to the excited utterance exception that would allow for the admittance of statements made by survivors of rape and sexual violence at any time after the incident).

5. See, e.g., SUSAN ESTRICH, REAL RAPE 7 (1987) (arguing that the law should treat "simple" rape, where the offender is unarmed and known by the victim, equally to aggravated rape).

6. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 183 (1989) (arguing that the family must be a just institution where men and women are genderless and participate equally in maintaining the family); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15 (1986) (promoting a feminist approach that focuses on relationships, connections with others, and context to further develop the concept of children's rights).

7. See, e.g., Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-

Curiously, intellectual property has not figured among the legal subject matters addressed or reformed by feminist perspectives. Indeed, intellectual property appears to have been largely overlooked in feminist critiques of law and, with only a few exceptions, has been entirely neglected by feminist commentators.<sup>8</sup> This oversight is surprising given the increasing prominence of intellectual property law and its potential impact on the quality of life for millions of men and women across the globe. Further, this area does not seem free from the gendered assumptions that infect other areas of law. From the gendered rhetoric of “conception”<sup>9</sup> and “paternity”<sup>10</sup> to the more subtle biases in protectable subject matter,<sup>11</sup> the law of intellectual property appears as ripe for feminist examination as any field of law to date.

In this essay, I offer a step toward such an effort by examining copyright and digital content through a feminist lens, specifically discussing the treatment of hypertext works under copyright law. My hope is to disclose certain biases latent in the treatment of digital works, suggest feminist approaches to these problems, and lay some groundwork for continued feminist study of copyright. I begin by reviewing feminist critique of hypertext and related digital media, linking such views to some of the broader commentary that has emerged regarding hypermedia. I then discuss the impact that current copyright law has upon these theories, in particular the

---

C.L.L. REV. 79, 135-54 (1989) (critiquing discrimination analysis because it focuses on biological sex rather than gender and it fails to effectively deal with patriarchal power).

8. To date, the most developed feminist examination of copyright law remains Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 94-96 (1994) (discussing copyright law's inadequate protection of the artistic creations of women, specifically Nineteenth century English novels and needlework). For other critiques see Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism and Feminist Futures*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 111, 113 (Lisa Buranen & Alice M. Roy eds., 1999) (critiquing the traditional “paternity metaphor” of intellectual property, in which the creation of an author is his child); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 102-09, 124-26 (1998) (discussing the protection of the celebrity through copyright and publicity rights from a feminist perspective); Linda Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1537 n.18 (employing the feminist methodology of personalization to illustrate flaws in copyright doctrine).

9. See 35 U.S.C. § 102(g) (2005) (requiring the use of the date an inventor conceived an idea if there is a patent related dispute between inventors over the same invention).

10. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 130 (1997) (noting that the right of attribution, also called the right of paternity, allows an artist to contest the use of his name in works he has not created, as well as to require his name to be associated with his work, even after parting with the copyright).

11. See Wright, *supra* note 8 at 62, 68, 87-89.

application of copyright as a canon of control by users of hypermedia. I then suggest how this analysis might lead to a more general feminist critique of copyright, to understand and to reform the “promotion of progress” objective for copyright law, and ultimately illustrate how copyright may be an exceptionally rich area for application of feminist theory.

### I. FEMINISM AND HYPERTEXT

Hypertext has its origins in digital media, in computer-mediated communications formats that are characterized by digitized content. Digital media in general has been noted for its “plasticity,” that is, for the malleable and mercurial nature of digitized content.<sup>12</sup> Hypertext partakes of this malleability. Perhaps the most familiar form of hypertext or hypermedia today is the World Wide Web protocol developed by Tim Berners-Lee for use on the Internet and related systems.<sup>13</sup> However, other species of hypertext vary. These electronic systems typically present automated textual associations, which, when activated by the user, call up linked blocks of text, allowing the user to choose more than a single path through the interconnected sequences of material.<sup>14</sup> When media other than text, such as graphics, sound, or animation, are interconnected in a similar fashion, the result is sometimes “hypermedia” rather than hypertext.<sup>15</sup> The medium will also frequently allow the user to create or generate new automated associations, linking the portions of text either to other portions of the work itself, or to other works.<sup>16</sup> In many such applications, the user also is able to make additional alterations to the work, such as by attaching or overlaying annotations on the text, creating “highlighted” or emphasized portions of text and generating customized indices or navigational aids.

---

12. See, e.g., YOCHAI BENKLER, RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY 676 (1996).

13. See Mark A. Lemley, *Patenting Nanotechnology*, 58 STAN. L. REV. 601, 609 n.32 (2005) (crediting Berners-Lee with inventing the World Wide Web protocol).

14. See THEODOR HOLM NELSON, LITERARY MACHINES 0/3 (90.1 ed. 1990) (describing the ability of hypertext to allow the reader to follow a train of thought instead of a mandatory direction).

15. See GEORGE P. LANDOW, HYPERTEXT: THE CONVERGENCE OF CONTEMPORARY CRITICAL THEORY AND TECHNOLOGY 3-4 (1992) (explaining the distinction between hypertext, which refers to text and the electronic links to other blocks of text, and hypermedia, which includes electronic links between text and a broad array of images, sounds, and text).

16. See Pamela Samuelson, *Some New Kinds of Authorship Made Possible by Computers and Some Intellectual Property Questions They Raise*, 53 U. PITT. L. REV. 685, 695-96 (1992) [hereinafter Samuelson, *Some New Kinds*] (noting that adapting a traditionally printed book into hypertext requires additional skills in order to make the converted electronic source navigable and useful).

With the emergence of such media, the potential congruence of these hypertext characteristics with feminist theory was quickly noted by a number of commentators who, at their most enthusiastic, depict hypertext as “a mode of thought and a language ripe with potential for speaking a new feminist critical voice.”<sup>17</sup> Admittedly, the feminist voice to which hypertext may lend itself might not be easily ascertainable. Feminism encompasses a diverse range of viewpoints and traditions, not all of which are compatible, and some of which are entirely contradictory.<sup>18</sup> It would be difficult to summarize a canonical perspective of what constitutes a “feminist voice,” and probably counterproductive to try. Indeed, a central tenet of many forms of feminist critique is the importance of alternative or neglected perspectives, making “feminism” by definition impossible to capture in a simple definition.<sup>19</sup> However, while feminist views do not lend themselves to bumper stickers or T-shirt slogans, it is possible for the present analysis to identify particular strands in the feminist tapestry, particularly those that have intersected with the literature on hypertext that may intersect with certain aspects of copyright.

A considerable body of feminist literature focuses on themes of contextuality and responsibility that seem lacking in dominant cultural discourse, which feminist commentators characterize as emphasizing the separation of self from others, adopting a linear or hierarchical approach to reasoning that defines the world in terms of isolated and oppositional categories.<sup>20</sup> Such categorical hierarchies tend to comprise strings of dichotomous pairs, one of which is either expressly or implicitly superior to the other. Feminist theory suggests that such evaluative structures both reflect and encourage habits of thought that lead to alienation and subordination of those categorized as “other.”

A variety of feminist commentators have proposed that, in order to counteract patriarchal dominance, it is desirable to develop discursive approaches that emphasize interconnectedness or relational

---

17. Carolyn Guertin, *Gesturing Toward the Visual: Virtual Reality, Hypertext and Embodied Feminist Criticism*, 8 SURFACES (Jun. 30, 1999), <http://www.pum.umontreal.ca/revues/surfaces/vol8/guertin.pdf>.

18. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 5 (1998) (explaining that individual feminists may have different priorities and outlooks on the world).

19. See Karen Engle et al., *Round Table Discussion: Subversive Legal Movements?*, 12 TEX. J. WOMEN & L. 197, 239-240 (2003) (noting that different groups of feminists define feminism in a variety of ways).

20. See generally CATHERINE KELLER, *FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF* (1986) (discussing that different conceptions of identity form a web of understanding of being).

thinking.<sup>21</sup> At least some commentators suggest that feminist thinking entails understanding the self in relation to, rather than in opposition to, others and the world.<sup>22</sup> Under this approach, it is frequently suggested that the feminine biology of procreation, gestation, and childbearing gives rise to a sense of self that is physically, mentally, and emotionally connected to others.<sup>23</sup> Thus, feminine experience may lend itself to collective and collaborative understanding, rather than to the individual and confrontational understanding that characterizes patriarchy.<sup>24</sup>

The writings of Carol Gilligan have been highly influential in this regard. Based on responses to interview questions that demonstrated differing problem-solving approaches by gender, Gilligan proposed that women tend to approach reasoning in a distinctly “feminine” manner that is contextual, relational, and personal.<sup>25</sup> By contrast, “masculine” reasoning appeared to emphasize objectivity, individuality, and abstraction.<sup>26</sup> Gilligan metaphorically characterized the feminine approach in terms of “webs” of interconnectedness and the masculine approach in terms of “ladders” of hierarchy. The feminine approach adopts rhetoric of responsibility and caring, whereas the masculine approach adopts rhetoric of rights and equality.<sup>27</sup> The “different voice” of feminine discourse, she suggested, has historically been ignored or drowned out in favor of the more dominant masculine approach.<sup>28</sup>

In the study of digital technologies, Gilligan’s intellectual and empirical successors include researchers who have demonstrated that

---

21. See Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 192-93 (1994) (noting that Carol Gilligan’s cultural/relational school of feminism emphasized that women could find happiness within their roles).

22. See *id.* (observing that the cultural/relational school of feminism stresses the differences between men and women, emphasizing that women are “separate but equal to” men).

23. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-15 (1988) (noting that cultural feminists believe that connections between people lead women to be nurturers, while radical feminists believe that the connection is forced and intrusive).

24. See *id.* at 50 (distinguishing between cultural feminism’s appreciation of women’s “ethic of care” from patriarchy’s appreciation of separate spheres for men and women).

25. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 160 (1982) (finding that they take into account a person’s obligations to others in determining what is morally correct in a particular situation).

26. See *id.* at 160-61 (noting that responses from men focused on their own personalities rather than their relationships with people).

27. See *id.* at 160 (noting women grounded their answers in their relationship with others, while men focused on their own achievements).

28. See *id.* at 173 (arguing that the dominance of males in psychological research has led to an assumption of one style of speech, thus silencing women’s voices and contributions).

women tend to engage computer-mediated communication differently than their male counterparts.<sup>29</sup> Studies conducted by these researchers find evidence that masculine and feminine styles of discourse occur in computer mediated communication, particularly in listserves, Usenet groups, and other fora on the Internet. Researchers find that men are prone to communicate in styles characterized by direct, terse, and even confrontative language, such as “flaming,” while women tend to adhere to rhetoric of politeness, support, and personalization.<sup>30</sup> The masculine style of discourse may be more compatible and even consonant with the relatively decontextualized design of the medium. Absent the cues of gesture, facial expression, and vocal tonal quality, women may be hampered in their preferred contextual communicative mode.

Such studies suggest that computer technology is by no means gender-neutral and imply that women might be systematically disadvantaged by either the design of the computer technology or by the social customs attending its use, if indeed women tend to communicate differently. This line of reasoning further suggests that by privileging certain forms of communication over others, some digital technologies may be better adapted to different discursive modes and therefore may encourage or promote certain types of cultural assumptions.

It seems only fair to note that Gilligan’s observations and analysis, though enormously influential, also have been controversial and vigorously critiqued.<sup>31</sup> As an initial matter, it is unclear whether Gilligan’s empirical observations were robust enough to support her proposals. It is similarly unclear whether the “difference” Gilligan describes, if it exists, arises as a matter of biology or as a matter of acculturation. Even among women, it is unclear whether variations in

---

29. See, e.g., Susan Herring, *Posting in a Different Voice: Gender and Ethics in Computer-Mediated Communication*, in *PHILOSOPHICAL PERSPECTIVES ON COMPUTER-MEDIATED COMMUNICATION* 115 (Charles Ess ed., 1996) (arguing that computer network etiquette standards are based on men’s communication styles, and that this male-oriented standard makes women feel less comfortable using computer-mediated communication (CMC)); Susan Herring, *Gender Differences in CMC: Findings and Implications*, 18 *CPSR J.* 1, 1 (Winter 2000) [hereinafter Herring, *Gender Differences*], <http://www.cpsr.org/previste/publications/newsletters/issues/2000/Winter2000/herring.html> (noting that traditional gender styles have permeated into CMC, as evidenced by the dominance of men in mixed-sex public discussion groups, where women post fewer messages and receive fewer responses than men).

30. See Herring, *Gender Differences*, *supra* note 29, at 1 (noting that while men tend to criticize insult and violate online rules, women are apt to apologize and thank other members of online groups).

31. See generally Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989) (acknowledging the idea of gender differences, yet rejecting Gilligan’s descriptions as inaccurate and destructive because they provide a respected academic context for reinforcing traditional gender stereotypes).



ethnicity, race, class, age, and sexual orientation might give voice to the same “difference” or to a chorus of differences. This leads to yet another concern: that, to the extent that such a difference exists, from whatever origins, injudicious emphasis on Gilligan’s “different voice” might paradoxically tend to reinforce another of the false oppositions that so many feminists have critiqued in masculine or patriarchal discourse.

For the purposes of this discussion, however, it is unnecessary to establish or defend any strong form of relational thesis, whether Gilligan’s findings are statistically robust, whether the “different voice” she identifies is biological or cultural, or even whether relational perception is gender-specific. The discussion here requires a far more modest and, I hope, uncontroversial premise: that relational reasoning exists as an alternative to abstract hierarchical reasoning, which is, at least for some, the preferred form of learning regardless of gender.

If, as Herring and others have suggested, such relational reasoning is stifled by the design characteristics of certain technologies, it may be that certain technologies are conducive to communication in Gilligan’s “different voice.” Hypertext may be an attractive candidate for such possible congruence between such reasoning and media characteristics. Certainly this connection has been suggested by feminist commentators.<sup>32</sup> Concerned as it is with themes of resisting hierarchy, reversing authoritarian dominance, reversing subordination, promoting relational reasoning, and exposing oppositional thinking, feminist theory seems naturally consonant with the deconstructive attributes of hypertext. The linked and associative structure of hypertext appears to reflect and embody the same relational motifs found in a great deal of feminist thought. Thus, hypertext in particular and digital media in general might serve both the positive and critical agendas of feminist theorists.

First, given the importance of associative, interconnected webs of

---

32. See, e.g., Barbara Page, *Women Writers and the Restive Text: Feminism, Experimental Writing and Hypertext*, 6 *POSTMODERN CULTURE: AN ELECTRONIC J. OF INTERDISCIPLINARY CRITICISM* 11-12 (Jan., 1996) (asserting that the hypertext medium realizes the feminist goal of inviting the discourse of others by allowing the reader to intervene in the text); Annette Comte, *Use of Feminist Literary Theory in Developing a Critical Language for Hypertext*, 4 *TEXT: J. AUSTRAL. ASS’N WRITING PROGRAMS* (2000), <http://www.gu.edu.au/school/art/text/oct00/comte.htm> (reasoning that the flexibility of the hypertext medium is compatible to the style of feminist writers such as Monique Wittig, Virginia Woolf, and Luce Irigaray); see also Donna LeCourt, & Luann Barnes, *Writing Multiplicity: Hypertext and Feminist Textual Politics*, 16 *COMPUTERS AND COMPOSITION* 55-56 (1999) (investigating the use of hypertext as a way to realize a feminist politic by disrupting the contexts and communities and by deconstructing the idea of the author as an individual not open to other perspectives and ideologies).

meaning in much of feminist theory, digital media might naturally foster such feminist modes of thinking. In particular, the linked characteristics of hypertext and related media might lend themselves to relational webs of meaning rather than a linear progression of meaning, offering an environment that is conducive to the “different voice” that relational feminism argues has long been suppressed. By substituting a web of textual relationships for a linear, dialectic progression of concepts, hypertext appears to eschew old habits of textual dominance and subordination and to upend established conceptual hierarchies.<sup>33</sup> The open and recursive nature of hypertext works may disrupt the textual appearances of coherence and unity.<sup>34</sup> This in turn suggests that digital media might accommodate novel or subversive modes of learning and authorship.

This end might also be furthered by hypertext characteristics that collapse the false dichotomy of reader and writer. By placing the reader and the writer on an equal footing in a creative environment, hypertext seems to merge the divided concepts of “author” and “reader” by which users and creators of text are defined as “other.” This in turn seems to nullify the dominance of authorial control in favor of shared textual interpretation, tending toward the collaborative and collective modes of understanding so important to relational feminist theory.

In a more negative or critical vein, hypertext might, at minimum, challenge textual constructions that have been characterized as masculine or dominating. The a-linear nature of hypertextual lexia appears to disrupt hierarchies prevalent in classical texts as much as feminism seeks to disrupt hierarchy in patriarchal society. Text embodies thought, and the form of text shapes the form of thought.<sup>35</sup> If classic texts take the form of linearity and hierarchy, those reading such texts might become accustomed to such forms. However, by subverting those forms, hypertext might subvert patriarchal habits of thought.<sup>36</sup> Thus, attributes of hypertext might expose, and ultimately

---

33. See Carlton Clark, *Surely Teaching Hypertext in the Composition Classroom Qualifies as a Feminist Pedagogy?*, 6:2 *KAÏROS* 1, 1 (2001), <http://english.ttu.edu/kairos/6.2/binder2.html?coverweb/gender/clark/index.htm> (stating that elite literature, because it was not created within a social vacuum, reflects social inequities and hierarchies and is therefore gendered).

34. See Wendy Morgan, *Electronic Tools for Dismantling the Master's House: Poststructuralist Feminist Research and Hypertext Poetics*, 1999 ACM CONFERENCE ON HYPERTEXT AND HYPERMEDIA 207, 209 (1999), available at <http://portal.acm.org> (discussing that the order in hypertext depends on the reader's decisions and it may seem fragmented although it is still inherently logical).

35. See *id.* at 209 (stating that hypertext promotes associative thinking, which is comparable to the mind creating metaphors through a series of jumps).

36. See *id.* at 211 (arguing that hypertext encompasses voice, discourse, and argumentation). This results in subverting a conclusive argument in the text, which is

help displace, the patriarchal assumptions latent in the nature of classic linear texts. By foregrounding the reader and loosing the constraints of authorial sequencing, hypertext might well fulfill the feminist imperative to free readers from “constricting habits of mind, encouraging them to critically question authority and arrive at a vision of possibility radically different from the existing social construction.”<sup>37</sup> Consequently, hypertext has been suggested as a medium uniquely suited for the embodiment of feminist discourse and equally suited for fostering the habit of feminist discourse.

## II. TEXT AND AUTHORITY

The interactive hypertext character that suggests to some feminists the basis for a new and liberating form of discourse has similarly been the subject of intense scrutiny using other theoretical approaches, most importantly those drawn from literary theory. These separate analyses have been highly influential and bear an important relationship to the feminist approach. The apparent interactivity and heightened user engagement of hypertext media captured the imagination of many early hypertext theorists, to whom such digital media appeared to present a practical example of postmodern literary theory.<sup>38</sup> These commentators have argued that the characteristics of hypertext make explicit the “re-coding” of texts theorized by Barthes, Derrida, and others.<sup>39</sup> Although postmodern literary theorists were primarily concerned with the interaction of the reader with standard print-based texts, their views on meaning, authorship, and interpretation of texts seemed readily extensible to hypertext. In particular, the distinction drawn by Barthes between “writerly” texts and “readerly” texts seemed directly applicable to hypertext.<sup>40</sup>

These terms were intended to designate certain textual qualities that resulted in certain types of reader interaction. The terminology is perhaps unfortunate, as these commonly employed translations of Barthes’ neologisms “lisible” and “scriptable” might at first glance

---

seen by feminists as patriarchal delusion of grandeur. *Id.*

37. Kristine J. Anderson, *Some Feminist Predecessors of Hypertext*, 1999 WOMEN’S WORLD ’99 INTERDISC. CONGRESS ON WOMEN PROC. & REP. 1, 3 (1999), available at [http://www.skk.uit.no/WW99/papers/Anderson\\_Kristine\\_J.pdf](http://www.skk.uit.no/WW99/papers/Anderson_Kristine_J.pdf).

38. See LANDOW, *supra* note 15, at 2-3 (explaining that the writings of Theodor Nelson and Andries van Dam argue for abandonment of traditional literary theory in favor of theory centered on multilinearity, nodes, and networks).

39. See *id.* (noting that these commentators argued for the rejection of conceptual systems that are founded on the ideas of “center, margin, hierarchy, and linearity”).

40. See ROLAND BARTHES, *S/Z* 4 (Richard Miller trans., Hill and Wang 1974) (1970) (noting the distinction between “writerly,” what can be written and re-written, and, “readerly,” which can be read but not written).

seem to refer to textual characteristics afforded by the classic roles of the author and reader. But this was a distinction that Barthes rejected and sought to eliminate. In fact the distinction is rather more subtle, referring to modes of interaction that the reader might assume. Barthes was concerned with the origination of meaning in texts and with textual characteristics that invited new meanings.

He defined writerly or scriptable texts as those that gain meaning from the reader and invite the reader to in essence become a writer by engaging in the writerly act of interpretation.<sup>41</sup> Thus, writerly texts will tend toward openness or even incompleteness and so may appear rough, unfinished, or disorderly. Making sense of such a text requires the reader to participate in the creation of meaning, re-inscribing the text to fill in interpretive gaps. Such reader participation happens, to some extent, with every text, but some texts will expose this process, while others will attempt to conceal it.

Writerly text, with its conspicuous gaps and lacunae and multiple points of entry, exemplifies the incomplete quality of texts generally. Barthes maintained that any text consists ultimately of fragments drawn from multiple named and unnamed precursor sources, linked together in a matrix of conceptual relations, some of which might be intended by the author assembling them, others which might be perceived by later readers.<sup>42</sup> Thus, the rough texture of the writerly text merely exposes the characteristics of any text. Its unfinished quality differs from other texts in degree more than in kind.

In contrast to the explicit writerly text, readerly or lisible texts resist reinterpretation, adhering to an interpretation dictated by the initial author. These texts distance themselves from the reader's reinterpretation by facilitating only a single, linear progression of meaning. They leave the reader in the classic role of the reader, merely absorbing or accepting the meaning that seems most obvious on the face of the text. Because such classic texts lull the reader into passivity, they characterize for Barthes "the pitiless divorce which the literary institution maintains between the producer of the text and its user, between its owner and its customer, between its author and its reader."<sup>43</sup>

Consequently, unlike the incomplete surface of the writerly text, readerly texts will tend to appear seamless and unified, and therefore convey the illusion of a pre-determined and fixed reading. Even if the reader is in fact supplying a good deal of the textual meaning, she is

---

41. *Id.*

42. *See id.* (stating that the goal of literary work is to change the reader from just a consumer of text to a producer as well).

43. *Id.* at 3.

not doing so consciously or purposefully as an act of writing or of re-writing. The reader thus falls into the role of a passive recipient of meaning, engaged only in the act of reading or accepting the “authorized” text, the text originating from the author.

Derrida equates this sort of passivity with a “dead” text, which is static, inert, and never conveys more than a single authorized message.<sup>44</sup> By contrast, when the text invites readers to imbue the text with new meaning, it becomes dynamic, evolutionary, and alive. The difference in textual quality can thus dramatically shift the reader’s role from mere consumption of text to production, making every reader in essence an “author.” Paradoxically, the text termed writerly may seem the least inviting to the reader because its incomplete nature forces the reader to engage in consciously interpretive work, whereas the “readerly” text may seem the most satisfactory to the initial author, as it appears the more complete and polished product.

### III. AUTHORITY AND HYPERTEXT

Many forms of digital media lend themselves to writerly manipulation, allowing the reader to re-order or link elements of the text, or to annotate and alter the content of the text. Readers have always mentally interpreted or re-coded texts, but the malleability of digital texts makes this process manifest. By re-configuring the elements of the text, readers may establish relationships within or between texts not originally contemplated by the initial author or authors. Hypertext thus tends toward the writerly appearance and facilitates deconstruction of the text by displaying the text’s cognitive skeleton, uncovering the relational structure of the constituent lexia.

Hypertext similarly foregrounds the relational linkages that postmodern theorists focus on as creating meaning within a text. As the reader moves from node to node in a hypertext document, the work takes its meaning, not so much from the intention of the initial author, but from the relationship between lexia and the re-writing that occurs as the text is being read. Thus, Jay David Bolter argues that readers of hypertext are no longer subject to authorial domination; instead, they are able to choose their own paths and their own meanings.<sup>45</sup>

---

44. See JACQUES DERRIDA, *DISSEMINATION* 136 (Barbara Johnson trans., Univ. Chi. Press 1981) (1972) (equating dead text with repetition of the same, which is unresponsive if questioned by the reader).

45. See JAY DAVID BOLTER, *WRITING SPACE: THE COMPUTER, HYPERTEXT, AND THE HISTORY OF WRITING* 134 (1991) (defining electronic writing as writing that invites the reader into a conversation with the author and where the reader can participate in the way the narrative is constructed).

Therefore, hypertext can be seen to work against authorial authority as the final arbiter of textual meaning. The characteristics of hypertext work against the illusion of textual unity, and in turn, against the assumption that the initial author constitutes the source of textual meaning. Hypertext allows the reader to more easily disintegrate the text and determine which textual relationships should be accorded meaning and which should not. The assumption that writing originates from a single fixed source of meaning is challenged by the possibility of collective authorship created when each reader has the ability to augment, alter, or edit the initial text. By reconfiguring digital texts, readers become collaborators with the initial creator, generating a new work that reflects the thought processes or learning style of the reader.

However, more recent commentators have cautioned that these purported deconstructive features of hypertext, upon which early postmodern paeans are based, may be less revolutionary than they seem. Rather, it may be that there is nothing particularly new or unprecedented in these features of hypertext. Thus, Espen Aarseth locates hypertext within the broader and long-established category of “ergodic” literature, which is non-linear, requires active reader participation, and lacks the familiar sequence of beginning, middle, and end.<sup>46</sup> He offers the ancient Chinese *I Ching*,<sup>47</sup> certain postmodern novels, and even James Joyce as examples of such works prior to the advent of electronic digital media.<sup>48</sup> Similarly, the venerable institution of scholarly footnoting constitutes a form of “linking” or referencing other texts and invites disruption in the linear progress of footnoted texts as readers peruse the footnotes.

Indeed, as the examples of footnotes demonstrates, random access to texts can to some extent be performed with more traditional textual embodiments by ignoring the linear invitation of a folio arrangement and accessing its pages out of order. For example, one may read the end of a mystery novel early. Certainly, many of the hypertextual operations that I describe above, such as annotation, cross-referencing, and highlighting, are mimetic of actions performed with hardcopy paper texts.

Other commentators have noted that far from consummating the

---

46. See ESPEN J. AARSETH, *CYBERTEXT: PERSPECTIVES ON ERGODIC LITERATURE* 2-3 (1997) (agreeing all literature can be non-linear, but that hypertext, as ergodic literature, has an added Para verbal dimension because the reader is always conscious that they will not know the results of their choices or what they missed by selecting a particular path).

47. See *id.* at 2 (noting that the *I Ching* is not meant to be read from beginning to end, but instead is meant to be read in a ritualistic fashion).

48. See *id.* at 52 (listing works by Kafka, Verlaine, and Brecht as examples).

“death of the author,” hypertext may simply perpetuate authorial control. Hypertext is not altogether chaotic and does not lack imposition of authorial form. Readers may proceed along more than one textual sequence, but they are still typically sequences chosen and enabled by an author. Just as classic print text channels reading in certain ways, hypertext does as well. Although readers of a hypertext document may have some ability to shape the reading by choosing and recombining the sequence of lexia, many documents will prescribe the availability of linkages or entry points, where those linkages will lead, and the choice of links available in each lexia. In some ways, hypertext may be even more constraining than traditional print texts. To the casual reader, the mechanics of a digital document, such as the mark-up code, will be largely inaccessible, allowing the reader relatively little autonomy beyond the prescribed autonomy afforded by the initial author.

Similar concerns urge caution from the feminist perspective. Just as the more extravagant claims regarding the deconstructive virtues of hypertext require qualification, so too do the claims regarding hypertext’s feminist virtues. Thoughtful commentators, while not abandoning the hope that hypertext might further feminist ends, caution that this medium may not inherently lend itself to that purpose.<sup>49</sup> First, as Michelle Kendrick observes, just because hypertext is not linear does not mean that it is necessarily feminist; she notes that when “lost recently in Pittsburgh, my wanderings were nonlinear and I must have past the same street corner eleven times, but I would hardly call my ramblings inherently feminist.”<sup>50</sup> Similarly, it is important not to confuse the discovery of an alternative to rational, linear thinking with resisting and transforming the structures that enforce and authorize such linearity.<sup>51</sup> Indeed the type of postmodern hypertext justification offered by many theorists runs the risk of re-creating the structure it seeks to subvert, just under a different guise.<sup>52</sup> The argument that styles hypertextual conduct in

---

49. See Morgan, *supra* note 34, at 214 (stating that technology such as hypertext can serve conservative ends, but it can also reinvent and criticize power structures).

50. Michelle Kendrick, *The Laugh of the Modem: Interactive Technologies and L’écriture Feminine*, 4 CYBERFEMINISMS 1, 7 (2002), <http://www.rhizomes.net/issue4/issue4.kendrick.html>.

51. See Diane Greco, *Hypertext with Consequences: Recovering a Politics of Hypertext*, 1996 PROCEEDINGS OF 7TH ACM CONF. ON HYPERTEXT 85, 88 (1996), available at <http://doi.acm.org/10.1145/234828.234837> (stating that while hypertext lends itself to an alternative “female” form of writing, in some cases it is no more than dominance disguised as support and concerned).

52. See *id.* (reasoning that the Brown University Writers Project runs the risk of ghettoizing or politically paralyzing the writers by using hypertext to present previously unknown writing by women before the Victorian period).

terms of individual “empowerment” may tend to undermine the very purposes it intends to embrace. Power relations are a matter of concern in feminist discourse and not all empowerment is beneficial. The claim that hypertext facilitates individual empowerment of the reader, overthrowing the hegemony of the author, is built upon the polarized concept of reader and author.<sup>53</sup> This may simply replace the image of the overly feminized, passive reader as consumer with a reader who becomes the new patriarchal author.<sup>54</sup>

To some extent, the structural concerns over authorial control rest upon the unwarranted conflation of hypertext with the World Wide Web. The Web allows ordinary readers only a relatively sparse opportunity to interact with the text and creation of permanent Web links or annotation requires a degree of technical sophistication beyond that possessed by most users. Admittedly, the Web is the most prominent and ubiquitous example of digital hypermedia, becoming so familiar online as to be mistaken in many instances for the Internet itself. Because following Web links is the most common hypertext experience for most users of digital media, it may seem synonymous with hypertext use in general.

Yet, just as the Web is not synonymous with the Internet, the Web also is not synonymous with hypertext. Many other hypertext systems exist or can be imagined, which would allow users a full range of easily accessible linking and revising tools. Such systems are the hypertext environment that Landow and other early theorists had in mind.<sup>55</sup> Such systems would be far less constricted by the choices of initial authors than more recent critics have realized.

Such systems would also, to some extent, answer the criticism that hypertext is nothing new, as they would unquestionably offer far greater opportunity for writerly re-inscription than the other form of “ergodic” literature. While it may be possible to read a book out of linear order or to follow its footnotes, paper media simply do not lend themselves to quick and easy re-ordering in a comprehensive manner. One can certainly cut the book apart and rearrange it; however, the

---

53. See Carlton Clark, *Hypertext Theory and the Rhetoric of Empowerment: A Feminist Alternative*, 7.3 *KAIROS* 1 (2002), <http://english.ttu.edu/kairos/7.3/binder2.html?coverweb/clark/page1.html> (concluding that the active writer/passive reader dichotomy is incorrect as many reader-response theorists have shown that reading conventional print text is an active process).

54. See Kendrick, *supra* note 51, at 1 (recognizing that mostly male theorists proclaimed that the associative and non-linear aspects of hypertext would free readers from print's passivity).

55. See George Landow, *Is This Hypertext Any Good? Judging Quality in Hypermedia*, 33 *DICHTUNG DIGITAL* 1, 1 (2004), <http://www.dichtung-digital.com/2004/3/Landow/index.htm> (arguing that the way to judge the success of a hypertext is by the extent to which the reader has control).



activity is not quick or convenient.

Thus, Landow argues that fully-fledged hypertext systems afford readers the opportunity to write against the initial text; thus, participating in the production of meaning by creating notes or linked lexia that may support or contradict the initial author's meaning.<sup>56</sup> Even in less robust systems, the reader is confronted with choices regarding which links to follow or skip. Consequently, the reader may control which lexia to foreground and which to discount. While digital media may be configured so as to constrain use of a digitized text, it may also be applied to permit unforeseen use of texts or novel navigation of texts.

Still, even if the initial assessments of user control were somewhat exaggerated, and the comparisons to postmodern theory somewhat overblown, there is something more to the writerly character of this new media than there was to the old. Automation of ergodic features makes a decided difference, rendering comparisons to previous media incomplete. Hypertexts are clearly not paper texts and footnotes are clearly not hyperlinks. As Fermat demonstrated, only a limited amount of reader annotations will fit in the physical margins of a paper text.<sup>57</sup> These annotations remain marginalized texts, relegated to the periphery of another text and given only marginal status.<sup>58</sup> Footnotes in paper texts do not call up and present the works referenced; physical retrieval is required. It is at least laborious, if not virtually impossible, to perform a full text search of a large printed text. The speed and extent of hypertext-user engagement differs markedly from that of previous media in magnitude, if not in kind. And, even if a given reader's pathway through the work does not permanently rearrange or alter the initial text, each new reading in some sense re-writes the text by reconsidering it, creating new orderings that subtly inflect the textual meaning.

Similarly, although the initial exuberance over the feminist possibilities of hypertext may have been a bit excessive, there is still reason to believe that we may recognize an enclave for feminist

---

56. See LANDOW, *supra* note 15, at 70 (asserting that the hypertext's decentralization makes it a democratic medium where no single conversation, discipline, or ideology overshadows another, and hypertext's essential purpose is to perpetuate conversation).

57. See SIMON SINGH, *FERMAT'S ENIGMA: THE EPIC QUEST TO SOLVE THE WORLD'S GREATEST MATHEMATICAL PROBLEM* 61-62 (1997) (describing the 300 year quest to confirm Pierre de Fermat's marginalia). "It is impossible . . . for any number that is a power greater than the second to be the sum of two like powers. I have discovered a truly marvelous demonstration of this proposition that this margin is too narrow to contain." *Id.*

58. See Morgan, *supra* note 34, at 209 (observing that intertextual references in social science scholarship are placed in fixed positions at margins and edges, which ultimately diminishes their influence).

thinking.<sup>59</sup> Unthinking re-inscription or re-enforcement or present power relation of course remains a real concern, and this concern may well define the point at which feminist and postmodernist conceptualization of the medium part company. Feminist approaches are less likely to view writerly behavior as a struggle for interpretive control, as this is of course precisely the type of oppositional assumption that a feminist conception of hypertext would hope to avoid. From the feminist perspective, textual approaches should not privilege any power relationship; instead, they should seek to subvert any such dominance.<sup>60</sup> However, if the conceptual traps of power and control can be skirted, even the most skeptical commentators find ample room to regard hypertext as conducive to feminist forms of expression and feminist content.<sup>61</sup>

#### IV. COPYRIGHT AND HYPERTEXT

Feminist commentators' observations suggest that the "writerly" characteristics of hypertext constitute a medium that may be conducive to learning, writing, and thinking outside the established linear and hierarchical structures of traditional media. However, feminist thinking also predicts that the dominant culture will resist such subversion of authority. Unsurprisingly, there is already evidence that this is the case. In particular, the current legal milieu may not be conducive to the development of such feminist or other non-traditional readings of digital texts. Rather, the exclusive rights conferred by copyright, specifically the right of adaptation, lend themselves to authorial control over not only the text, but also to a reader's use of the text. The "writerly" approaches to text described above are not contemplated within the law of copyright, which governs the ownership and control of such works. Any explicit or tangible re-coding of the material will likely constitute an infringing derivative work of the text, subject to legal sanction.

Copyright in the United States is typically justified under a utilitarian rationale, which assumes that more aesthetic works will be created if creators are offered an opportunity to benefit monetarily

---

59. See Greco, *supra* note 52, at 88 (arguing that hypertext's emphasis on decentralization and non-linearity comports with women's balanced, complicated, and detailed intuitive attention and reasoned care, which they inherit from their mothers).

60. See Pruitt, *supra* note 21, at 195 (noting that radical feminists stress gender hierarchies and male dominance as the basis for women's problems in society).

61. See Kendrick, *supra* note 51, at 8 (conceding that feminist content can have a place in hypertext if hypertext can provide space for poetics, such that feminist comments and musings can coexist with the contradictions of masculinity).

from their created works.<sup>62</sup> The copyright statute therefore specifies a series of exclusive rights that allow the copyright holder to legally control certain uses of a work in order to exclude the public from using the work without paying for those uses.<sup>63</sup> Statutorily created exclusive rights constrain the availability of copyrighted works in the hope that more works will be produced in the first instance. This general rationale purports to follow from the Constitutional mandate, allowing Congress the power to award copyright to “promote the progress of science”; that is, to benefit authors in the short term in order to benefit the public in the long term.<sup>64</sup>

The rights specified under the statute include the exclusive right of reproduction, the “copy” right, as well as exclusive rights to distribute, publicly perform, publicly display, and adapt protected works.<sup>65</sup> Moreover, the courts’ coercive powers are available to copyright holders to prevent the specified uses from occurring without the copyright holder’s permission. The subject matter covered by the statute includes original literary works (including software), audiovisual works (including motion pictures), dramatic works, pictorial or graphic works, musical compositions, and sound recordings.<sup>66</sup> Each of these subject matters may be digitized to electronic form. To be eligible for protection under the statute, the work must be fixed in a tangible medium of expression long enough to be perceived by others, either unaided or with the aid of a machine.<sup>67</sup> This requirement essentially is met any time a digitized work is stored in computer memory, on magnetic or optical media, or in other electronic storage devices.<sup>68</sup>

As a consequence, most digital texts, including hypertext, will meet the criteria for protection under the copyright statute. Specifically, because copyright arises spontaneously upon the work’s fixation, most digital texts will be subject to copyright. Although most digital texts will fall under the copyright regime, the relevant statute was neither drafted with such materials in mind, nor with any allowance for

---

62. See, e.g., William M. Landes & Richard E. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325 (1989) (explaining that finding the correct balance between public access and private incentive is copyright laws’ central challenge).

63. 17 U.S.C. § 106 (2002).

64. U.S. CONST. art. I, § 8, cl. 8.

65. 17 U.S.C. § 106 (2005).

66. 17 U.S.C. § 102.

67. 17 U.S.C. § 101.

68. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993) (holding that loading copyrighted software into the RAM creates a copy under copyright laws because RAM can be “perceived, reproduced, or otherwise communicated”).

reader manipulation or re-inscription of texts.<sup>69</sup> Whenever such manipulations occur in digital media, one or more of the exclusive rights of the original author will likely have been implicated, if not infringed. Almost certainly the exclusive right to prepare and authorize preparation of derivative works will be infringed by the alteration of the work, and other rights may be implicated as well. If unauthorized copies are made in the process of re-working the initial work, these rights may encompass the right of reproduction.

The long-standing assumptions in copyright law dictate that authorial rights are triggered by user manipulation even when the work is instantiated in a medium that invites such manipulation. Copyright tends to assume that protected works are the product of a single guiding genius and that the product of that mind remains static once fixed. Copyright law does not contemplate the interplay of serial writerly revisions predicted by postmodern literary theorists and facilitated by the malleability of hypermedia.

Admittedly, the statute is not entirely devoid of provisions addressing multiple or collaborative authorship, but the possibilities are discrete and sharply circumscribed. Under current United States copyright law, collaborative work falls into one of six categories. First, if one or more of the collaborators fail to contribute the requisite quantum of “original expression” required for authorship under the Act, that contribution is not legally recognized.<sup>70</sup> The contribution and its creator become invisible for legal purposes, and the result is considered the work of the author or authors who made recognized “original” contributions.

Second, if the collaborators are employees of the same institution, working within the scope of their employment, then their product may be deemed work made for hire.<sup>71</sup> In such a case the contributors similarly disappear for legal purposes, essentially becoming extensions of the institution. Consequently, the employer, rather than the natural persons collaborating, is considered the author of the resulting work, effectively turning a collaborative work into the work of a single, fictional creator.

---

69. See Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 257-276 (1996) (positing that the copyright statute’s “joint work” definition does not recognize the fluidity and flexibility of digitalized works, and proposing that the concepts of “recoding” and “intertext” can be expanded to account for collaborative works in computer networks environment).

70. See *Aalamammed v. Lee*, 202 F.3d 1227, 1233-35 (9th Cir. 1999) (finding that a consultant on Islam seeking a portion of the profits as a coauthor of the film *Malcolm X* could not recover because his contributions as a consultant did not demonstrate that he was a coauthor).

71. 17 U.S.C. § 101 (2005).

Third, the collaborators may be joint authors where individual collaborators each contributed original expression with the intent that the final product constitutes a unified and integrated product.<sup>72</sup> As joint authors, each collaborator enjoys ownership of the entire product, such that any one of them can exercise any of the privileges of an author over the entire work, subject to an accounting to the other authors.<sup>73</sup> Here each contributor is recognized as an author, but dual legal fictions treat each author as the author of the work in its entirety, and the work as if it were the work of a single guiding genius.

Fourth, if the collaborators add authorized original expression sequentially to an existing work of original expression, the product may be a derivative work of the initial work.<sup>74</sup> A derivative work is created whenever an existing work is re-cast, transformed, or adapted. In this case, each contributor is considered the author of his own original expression, holding copyright in the portions that he contributed to the final product. Here, each contributor is treated as a separate author under the assumption that the individual contributions are distinct and conceptually separable from the whole.

Fifth, in certain cases the product of collaboration, such as an anthology, may comprise a collective work, where each contributor holds a copyright in his particular contribution and an editor or compiler holds the copyright in the selection and arrangement of the collection as a whole.<sup>75</sup> Here, again, the assumption is that the contributions can be measured off in discrete packages, such that ownership is easily delineated for the constituent embedded works as separate from ownership of the whole.

Finally, if the collaborators add original expression to an existing work without authorization, the result is considered an infringement of the initial work.<sup>76</sup> The resulting work has no claim to copyright protection as a penalty for altering the initial work without the author's permission. Therefore, because the infringing work contains original expression protected under the initial author's copyright, that initial author is able to dominate or control any use of the infringing work.<sup>77</sup> Consequently, as in the case of the insubstantial alteration, the statute refuses to acknowledge the subsequent contribution, treating the resulting work as the property of the initial

---

72. *Id.*

73. *Aalamuhammed*, 202 F.3d at 1233-35.

74. 17 U.S.C. § 101.

75. *Id.*

76. *Id.*

77. 17 U.S.C. § 103(a).

author.

This regime of categories leaves unauthorized user manipulations of digital texts at best unrecognized and at worst illegal. In either case, whether unappreciated or impermissible, alterations of digital works will be subject to the control of the initial author and the initial author may deploy copyright infringement to deter precisely the kind of collaborative and writerly activity lauded by hypertext commentators. This scenario arose in some of the earliest digital media cases to reach the courts, specifically in cases dealing with computer video games.<sup>78</sup> Computer video games may be viewed as essentially a rudimentary form of hypermedia, in which the player chooses to access stored images, sounds, and image sequences by means of the game console controls—the buttons, trackball, and joystick. Therefore, video or computer games also raise the questions of authority and authorship outlined above because video games are considered hypermedia.

For example, in *Stern Electronics v. Kaufman*, the court considered the problem of player participation in the context of an infringement suit against the supplier of an allegedly infringing video game.<sup>79</sup> The defendant in the suit challenged the copyright in the plaintiff's game, arguing that player control of the video output voided its original expression, a prerequisite condition for an authorship claim in copyright.<sup>80</sup> However, the court reasoned that the player control generated only a variation on the plaintiff's game. Therefore, the court did not address the question of how much player participation is necessary before the producer of the game is no longer considered to have contributed enough original expression to be deemed the author.<sup>81</sup>

Subsequent courts facing the same issue adopted a similar stance, emphasizing the limited number of choices that could be made by the game player.<sup>82</sup> At least one court considered whether a given video

---

78. See Samuelson, *Some New Kinds*, *supra* note 16, at 703 (discussing that courts have rejected competitors' challenges to videogame copyrights where competitors argued that the players' role in determining videogames' action designated the players instead of the programmers as the videogames' authors).

79. 669 F.2d 852, 856 (2d Cir. 1982).

80. *Id.* at 853.

81. *Id.* at 857.

82. See *Midway Mfg. Co. v. Artic Int'l*, 704 F.2d 1009, 1011-12 (7th Cir. 1982) (asserting that the creative efforts in playing video games are not similar to arranging dictionary words into sentences or palette paints into a painting, rendering video games copyrightable as audiovisual works under the Copyright Act of 1976); see also *Williams Electronics v. Artic Int'l*, 685 F.2d 870, 874 (3d Cir. 1982) (concluding that audiovisual games are fixed and therefore warrant copyright protection because the audiovisual works are permanently embodied in memory devices and they are stable enough to be reproduced where the audiovisual features are repetitive).

output might be a work derivative of the game software, concluding in dicta that the game manufacturer was entitled to monopolize the work in any event.<sup>83</sup> In deciding these challenges to video game copyrights, these courts focused on the copyrightable contribution of the game manufacturers to the images and instructions embedded in the game software or semiconductor chips. The authorship of a given game sequence was not directly at issue. Consequently, the courts never squarely addressed player contribution to any given game, specifically the possibility that a player is contributing original expression to the output, or that the output might be a work of joint authorship or derivative work.

In the video game context, some implied license or authorization might be inferred from the nature of the game. Specifically, the player surely has some type of permission to generate a new game pattern, which is necessary and presumably intended by the manufacturer so that the player can play the game. This authorization may move the manipulation into the category of derivative work, where the reader's contribution qualifies for its own authorial copyright. Such authorization may similarly be inferred in other instances of digital manipulation. For example, authorization is inferred where the work is made publicly available in a format, which is commonly altered, such as works openly accessible on the World Wide Web that are available for hypertext linking.

Yet such inferred authorization may be explicitly revoked, perhaps by posted terms of usage indicating the initial author's objection to a particular activity. This has already occurred in cases involving the unauthorized annotation of web sites, or unauthorized "deep linking" between web pages. An early example of such authorial saber-rattling occurred in conjunction with the development of the "Third Voice" web annotation system.<sup>84</sup> The Third Voice system offered World Wide Web users a tool for annotating posted web pages, using a free web browser "plug-in."<sup>85</sup> By highlighting any piece of text displayed

---

83. See *Midway Mfg. Co.*, 704 F.2d at 1013-14 (concluding that the Copyright Act can be construed broadly to entitle the copyrighted game's owner a monopoly over the speeded-up version on parallel grounds that the speeded-up version is a sufficiently different).

84. See Aaron Rubin, Comment, *Are You Experienced? The Copyright Implications of Web Site Modification Technology*, 89 CALIF. L. REV. 817, 817-18 (2001) (noting that website owners have posited numerous legal theories during the course of their objections to the use of experience-modifying technologies, including copyright infringement); see also Susan Kim, Comment, *Selling Spray Paint in Cyberspace: Applying the Fair Use Defense to Inline Note Service Providers*, 34 U.C. DAVIS L. REV. 809, 819-20 (2001) (explaining that the fair use defense under 17 U.S.C. § 107 affords a viable defense where a court determines that finding infringement would undermine the creativity that copyright law seeks to facilitate).

85. See Dan Knight, *Third Voice Revisited* (Jun. 29. 1999), <http://www>.

on a web page, Third Voice users could create an accompanying annotation, much in appearance like a physical Post-It note. The annotations, but not the referenced web page, was stored in the Third Voice server. When Third Voice users would access a web page, the plug in software would search for annotations related to the page, and the plug in software would display the annotations in a layered fashion in the browser displaying the referenced text.

The service was never a great favorite with web users and eventually failed like many other Internet start-ups because it lacked a viable financial plan. However, in the interim, Third Voice attracted the ire of web site creators who claimed the service violated the integrity of their web documents.<sup>86</sup> Copyright theories figured prominently in the arguments directed against the service's propriety. Although the Third Voice service did not copy web pages that were served up from their usual hosts, detractors charged that the web page displays with annotations constituted the creation of an unauthorized derivative work.<sup>87</sup>

Similar copyright claims have been raised in cases involving unwanted links between documents on the World Wide Web.<sup>88</sup> In some cases, these disputes have involved so-called "deep links," which refer web site users to pages out of the sequence intended by the web site owner.<sup>89</sup> Other disputes have involved "in line" linking, by which

---

lowendmac.com/musings/thirdvoice3.shtml (observing that webmasters have objected to user annotations on web pages through the use of Third Voice because webmasters feel that they do not have control over the use or abuse of voices on their web pages).

86. See *id.* (noting that some webmasters believe Third Voice changed the nature of web pages).

87. See John Gartner, *Readers Speak with Third Voice*, WIRED 1 (May 17, 1999), <http://www.wired.com/news/technology/0,1282,19722,00.html> (detailing the story of Third Voice founder Eng-Siong, who felt that Third Voice would change web publishing's passivity by providing readers a voice via a free browser tool that merely "snaps onto" the bottom of a web browser window, similar to Post-It notes).

88. See Dan L. Burk, *Proprietary Rights in Hypertext Linkages*, 1998(2) J. INFO. L. & TECH. 1, 1, [http://elj.warwick.ac.uk/jilt/intprop/98\\_2burk/](http://elj.warwick.ac.uk/jilt/intprop/98_2burk/) (documenting a dispute between rival British newspapers, where one of the papers successfully obtained an injunction against the other's hypertext links, which offered competitors' news stories with verbatim headlines via hot links); see also Edward A. Cavazos & Coe F. Miles, *Copyright on the WWW: Linking and Liability*, 4 RICH. J.L. & TECH. 3, 13-14 (1997) (describing prominent news entities' suits against TotalNEWS, which used frame technology to offer a number of links to unaffiliated news sources while simultaneously displaying its own logo); Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 630-37 (1998) (noting that until recently, owners implicitly authorized access to auxiliary sites via linking by placing material on the web without restrictions, but Ticketmaster's suit against Microsoft questioning the validity of linking under copyright and trademark law presented new approaches to copyright infringement suits).

89. See Roberta Jacobs-Meadway, *Surveillance on the Internet: Police and Protect*, SK102 ALI-ABA 273, 279 (2005) (defining "deep links" as those which are found two or three levels within a web site).



files from one server are called up to be displayed in frames generated by a different server.<sup>90</sup> In such cases, no copy is ever made or distributed by the linking server. In the case of deep linking, the linking server only supplies the user with the information as to where the linked material can be found. In the case of in line linking, the linking server supplies the locational information and generates a “frame” within which the material will be displayed on the user’s computer. In both in line linking and deep linking, the linked material is served directly to the user’s machine at the user’s computer’s request.

Consequently, rights of reproduction or distribution cannot be at issue if the owner of the displayed material objects to the link—the site providing the link has neither reproduced nor distributed the linked files. Public performance and public display cannot seriously be at issue either, so long as it is the owner of the material that has done the displaying, serving the files up at the user’s request. Rather, it is the right of adaptation that may be at issue, especially in the case of the “in line” link—the linked material is associated by link with other material not of the owner’s choosing. Although the law relating to derivative works is unsettled,<sup>91</sup> there is fairly strong support in cases involving traditional media that unauthorized presentation or rearrangement of a copyrighted work infringes the right of adaptation.<sup>92</sup>

The right of adaptation is similarly at issue in recent controversy surrounding ClearPlay, a vendor of preset DVD controls for movie playback. The ClearPlay controls, incorporated either into computer software or into a specialized DVD player, are intended to eliminate objectionable language, violence, or sexual content from DVD movie playback.<sup>93</sup> Unlike many forms of movie media, DVDs allow the

---

90. See, e.g., *Kelly v. Arriba Soft. Corp.*, 336 F.3d 811, 816 (9th Cir. 2003) (noting that in-line linking creates the appearance that the in-lined image is a “seamless part” of the secondary web site).

91. Compare *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997) (ruling that a company’s ceramic tiles, which displayed another artist’s works, were not derivative works under the copyright act), with *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343 (9th Cir. 1988) (holding that a tile seller who transferred artworks from a commemorative book to individual tiles for sale to the public were derivative works that infringed the copyright).

92. See, e.g., *Agee v. Paramount Comm’ns, Inc.*, 59 F.3d 317, 324 (2d Cir. 1995) (explaining that an infringing derivative work of a sound recording requires the user to rearrange, remix, or otherwise alter the sequence or quality of the recording’s actual fixed sounds); *Gilliam v. Am. Broad. Co., Inc.*, 538 F.2d 14, 21 (2d Cir. 1976) (finding that unauthorized editing of an underlying work, such as a television script, would constitute an infringement of the copyright of the work because such a use would exceed the license granted by the proprietor and prevent him or her from controlling how the work is presented to the public).

93. Mike Snider, *Hollywood Riled Up Over Clearplay*, USA TODAY, May 6, 2004, at

viewer to access scenes out of the original sequence; skim forward or backward through images; pause, repeat, or skip certain images or sequences of images, effectively rendering the DVD a form of hypermedia. In theory a DVD viewer who was familiar with the content of a movie might fast forward through portions that might be inappropriate for children or objectionable on other grounds. ClearPlay provides movie-specific software that automates the process by skipping past material deemed objectionable during movie playback, but not altering the content stored on the underlying DVD.<sup>94</sup>

Movie directors object to such editing, arguing that even though movies played in an edited format may garner a new audience that might not otherwise have viewed the work, the edited movie is mutilated or altered from the original artistic intent.<sup>95</sup> Directors and studios have enlisted copyright law to fight such viewing, claiming that an unauthorized derivative work is created by these DVD controls.<sup>96</sup> Case law considering alterations to video games suggests that no derivative work is created when the underlying work is not permanently altered.<sup>97</sup> However, other cases suggest that a computer program which accesses the images of an underlying video game in a new sequence can itself constitute an unauthorized derivative work because it essentially tells a “new story” based on the original game.<sup>98</sup> Selective accessing of movie scenes to “tell a new story” might place the ClearPlay software into the latter category.<sup>99</sup>

---

ID.

94. ClearPlay Homepage, <http://www.clearplay.com/>.

95. See Brenda Sandburg, *Artistic Differences*, THE RECORDER May 11, 2004, at 1 (reporting that Steven Spielberg, Martin Scorsese, Robert Redford, and Steven Soderbergh teamed with seven motion picture studios to get ClearPlay off the market based on claims that it violated their trademarks and copyrights).

96. See *id.* (stating that the directors and studios claimed that ClearPlay’s deletion and editing of scenes is a distortion of the original movie and, thus, is a derivative work even though it is not fixed in a tangible form).

97. See, e.g., *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 968 (9th Cir. 1992) (finding that the Game Genie, a device used to alter up to three features of a Nintendo game, did not constitute an infringing derivative work because it does not produce output in permanent form); see also Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob, and Sega*, 1 J. INTEL. PROP. L. 49, 75-76 (1993) (stating that Congress meant for creators to invoke the derivative work right only when a second work incorporated expression from the first work, such as when a screenplay implements the plot of a novel, but not when a consumer experiments with the method of a videogame).

98. See, e.g., *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998) (finding that the “Nuke It” computer game, which contained new levels to be used in playing another company’s computer game, constituted an infringing derivative work because the audiovisual displays in the new levels assumed a permanent form in the computer game’s MAP files).

99. In the particular case of ClearPlay’s technology, Congress ultimately carved out

The result of such reasoning can be generalized to most hypertext applications by which the reader manipulates or alters the text as laid down by the author. Under the standard articulated in such decisions, the user-initiated reordering permitted by hypertext systems will essentially always result in the unauthorized adaptation of the underlying material. Although these adaptations might arguably be excused in some case by implied permission or by a user privilege such as fair use, the activity remains largely subject to the whim of the initial author. This implies that writerly alterations of hypertext are unauthorized under current law because they are made without the copyright owner's explicit permission by a user of the text who the law will not consider to be an author in the formal sense of the word, and who falls outside the canon of control implicit in the ideological development of the term "author."

#### V. COPYRIGHT AND FEMINISM

These instances of contested digital manipulation reviewed here suggest that the derivative work right confers upon authors the right not only to control the work, but also, as Justin Hughes has aptly stated, the right to control the *framework* in which the work is situated.<sup>100</sup> The upshot of such analysis, somewhat startling in its implications, is that copyright allows authors to control how readers read a text, particularly a digital text where Barthes' writerly manipulations become manifest. It is precisely the characteristics of hypertext, which most appeal to feminists and hypertext theorists, that violate the copyright owner's exclusive rights. Uses of a text that result in derivative works are not countenanced by the statute. Feminists may see within hypertext the potential for new relationships between writer and reader or for the flowering of interconnected, relational learning and thinking. But current copyright doctrine assumes that works remain linear rather than ergodic, static rather than dynamic, and fixed rather than fluid. The statute remains locked into a particular model of the relationship between author, reader, and text, and backs that relationship with the coercive power of the state.

---

an exception to the rights of the copyright owner, authorizing the use of the technology as parental controls to encourage family values via the Family Entertainment and Copyright Act of 2005. See Pub. L. No. 109-9, § 202 (2005) (codifying the FMA by amending § 110 of Title 17 to exempt "the making imperceptible, by or at the direction of a private household, of limited portions of audio or video content of a motion picture . . .").

100. See Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 30 (2001) (defining framework as the context in which the artist's work is presented).

It is no surprise that copyright displays an inherent hostility to such conjoint works. Over the past decade, copyright scholars have amassed a sizeable body of critical and historical commentary identifying the concept of the “romantic author” as a key assumption underlying current legal doctrine.<sup>101</sup> Copyright law embraces a romanticized version of authorship, arising out of Eighteenth and Nineteenth century notions of authorship, assuming that protectable works are the result of the creative efforts of a single heroic genius. This view tends to assume that collaborative work is an anomaly, and ignores or subordinates the predicate contributions of non-authors from whom an author may draw. It certainly offers no allowance for the “writerly” contribution that a reader or user of the work might make to the work’s meaning.

This scholarly literature on copyright’s latent assumptions regarding authors goes hand in hand with recent examination of the assumptions latent in the copyright statute regarding readers.<sup>102</sup> Examining the various doctrines and statutory provisions regarding users or recipients of copyrighted works, Joseph Liu concludes that the copyright statute assumes that such users fall into one of two categories: (1) they are passive recipients of the work who simply absorb the work as delivered by the author, much like Barthes’ passive consumer of readerly texts; or (2) they are recognized as follow-on authors themselves, who may be transforming old works into original new expression.<sup>103</sup> Little or no provision is made for recipients who may reinterpret or re-vision the work without creating original new works. This statutory assumption again reflects the sharp division between author and reader, designating the reader as “other.”

Recent scholarship has begun to identify and investigate the gendered origin and character of these statutory assumptions. Historical analyses of institutionalized publication show that the milieu from which notions of authorship and copyright are drawn were rife with notions of paternity over texts that the masculine

---

101. See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J., 455, 467 (explaining that this idea of authorship privileges the notion of creativity, originality, and inspiration over mastery of the rules of literature to establish ownership of the work); Martha Woodmansee, *On the Author Effect: Recovering Collectivity,* 10 CARDOZO ARTS & ENT. L.J. 279, 291-92 (1992) (arguing that today a creative work may claim legal protection only if it is a unique, original product from the intellect of the individual artist).

102. See Joseph Liu, *Copyright Law's Theory of the Consumer,* 44 B.C. L. REV. 397, 398-99 (2003) (concluding that despite the Copyright Act’s goal of benefiting the public, the Act rarely identifies the consumer and fails to define the shape and scope of consumer interest within copyright law).

103. See *id.* at 401 (noting that these conceptions of the consumer are incomplete and that the consumer has additional interests in autonomy and self expression).

author had “begotten.”<sup>104</sup> This biological formulation of creativity is reflected in the nature and character of the rights that became associated with authorship. Shelly Wright notes that copyright law hinges largely upon exclusive rights of “reproduction,” a concept with strong semantic and rhetorical association to procreation and family ordering.<sup>105</sup> Indeed, in jurisdictions that recognize moral rights, what is now called the right of attribution was classically denominated as the “right of paternity” that grants the author the right to demand identification as the progenitor and originator of a work.

This metaphor of masculine parentage is closely tied to the notion of the heroic author. Romantic notions of authorship, like patriarchal notions of fatherhood, entail a lineal and simple causality between the effort or activity of authors and the works they develop.<sup>106</sup> The romantic image encompasses the sense of masculine isolation identified by relational feminists.<sup>107</sup> The text itself becomes the feminized “other” against which the author is differentiated.<sup>108</sup> Moreover, the myth of singular paternity ignores the contributions of other, often invisible contributors to the work and raises the image of the author to iconic status.<sup>109</sup> The author is thus envisioned as a discrete and solitary individual, separate from both the community that consumes the work and from the relational network of shared understandings and cultural images within which the work arises.<sup>110</sup>

Gendered formulations of ownership stem from the paternity metaphor as well. Feminist commentators have noted that the “substantial similarity” test for copyright infringement echoes historical doctrines of family law in which patriarchal control over the purity of biological reproduction was premised upon familial likeness.<sup>111</sup> This parallel is graphically, if unwittingly, illustrated by recent directors’ comments that label ClearPlay and similar viewing

104. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 32 (1993).

105. See Wright, *supra* note 8, at 63 (finding that this concept is related to patriarchal notions of the roles of women and children).

106. See *id.* at 78 (emphasizing that copies or “reproductions” of a work that are similar to the original work will be assumed to be copies without having to prove authorship).

107. See *id.* at 74 (stating that the traditional, patriarchal perception of women is that they are naturally tied to other humans and thus cannot be individuals).

108. WENDY WALL, *THE IMPRINT OF GENDER: AUTHORSHIP AND PUBLICATION IN THE ENGLISH RENAISSANCE* 282 (1993).

109. See Wright, *supra* note 8, at 84 (noting that in contrast to men, female writers were historically denigrated, causing them to often use their husbands’ names for publishing).

110. See *id.* at 62 (arguing that the inspiration for the Copyright Act the “solitary male genius”).

111. See *id.* at 78 (noting that this is similar to marital laws that protect inheritance and ensure the legitimacy of children).

technologies as a “bastardization” of their films.<sup>112</sup> In this formulation, copyright closely parallels the character of paternalistic marriage, custody, and paternity laws that have been identified as intended to control female reproduction in order to ensure legitimacy of offspring and concomitantly control inheritance of land and chattels.<sup>113</sup> Debora Halbert thus notes that such discourses led inevitably from masculine notions of textual authorship to paternal conceptualizations of property and ownership; as much as a man’s child or wife was regarded as his chattel, so were his texts.<sup>114</sup>

This quality of masculine separation carries through to the present copyright statute, shaping doctrines such as the right of adaptation in ways inimical to collaborative or hypertextual re-formation of texts. Feminist critique of property notes that the separation between owner and owned sets the object of ownership apart, and that in turn engenders power over the thing so designated.<sup>115</sup> Power over a thing is effectively synonymous with property, especially private property.<sup>116</sup> The right to exclude others constitutes the canonical trope for defining property, meaning that canonical property by definition requires a boundary of separation from non-property. In the case of literary property, this necessitates clear separations between author and text, reader and text, and author and reader. To the extent that hypertext dissolves or blurs such boundaries, its qualities are altogether alien to the copyright regime.

This characteristic of the statute should in some sense be expected. Copyright comprises a form of control or power over users in part because the statute’s stated purpose under U.S. law is to allow authors to extract payments in exchange for permission to use the protected work.<sup>117</sup> This justification might be challenged under feminist theory, which might offer a differing view of the Constitutional

112. See Snider, *supra* note 94 (quoting film director Irwin Winkler).

113. See Wright, *supra* note 8, at 78 (observing that the copyright laws are similar to the historic family arrangement, in which all property belongs to and flows towards the husband and father).

114. See Halbert, *supra* note 8, at 113 (noting that in the area of intellectual copyright law, the author is considered the father and the work the child).

115. See Jennifer Nedelsky, *Laws, Boundaries, and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162, 177 (Robert Post ed., 1990) (arguing that the rules of property give a false sense of autonomy, privacy, and security and determines how much power or powerlessness a person will hold).

116. Carlton Clark, *Hypertext Theory and the Rhetoric of Empowerment: A Feminist Alternative*, 7.3 *KAÏROS* 11 (2002), <http://english.ttu.edu/kairos/7.3/binder2.html?coverweb/clark/page1.html>.

117. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (explaining that the economic philosophy behind Congress granting copyright is the idea that the encouragement of individual effort by personal gain is the best way to benefit the public).

mandate—an ambitious undertaking rather beyond the scope of this short paper. However, even within the current justification of the copyright regime, the present formulation of the copyright doctrine contemplates a specific canon of control that privileges some types of “progress” over others. The current assumptions embedded in the statute may in fact foreclose progress in the development of innovative, non-traditional works.

There is reason to believe that the term “Progress” as used by the framers in the Constitution may have meant something quite different than common usage of the term today, either colloquially or legally.<sup>118</sup> Under either definition, however, Margaret Chon points out that there is no reason to privilege a particular type of informational development at the expense of others.<sup>119</sup> Yet the danger of suppressing alternative forms of knowledge, learning, and scholarship on the basis of the copyright law’s unstated assumptions or hierarchy and linearity is real. The exclusive right of adaptation, suppressing unauthorized uses of the text, implements a bias against collaborative or non-linear uses of text that forecloses certain modes of thought and discovery that might be termed “feminist.” This perspective stands in stark contrast to some recent commentary suggesting that the development of digital media requires granting authors new rights over the manner in which audiences experience copyrighted works.<sup>120</sup> From a feminist perspective, such a move to expand authorial domination over the reader’s experience seems especially pernicious. Doing so promises to simply reinforce current patterns of thought and dominance and may serve to impede copyright’s stated goal of promoting the progress of science.

---

118. See Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 755 (2001) (discussing the meanings of “progress” in the Progress Clause and proposing that it means spread, diffuse, and distribute).

119. See Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 145 (1993) (advocating that it is inappropriate to accord the modernist view of progress a privileged status because the objective of copyright and patent law should not be sheer material growth, but rather understood as access to knowledge).

120. See, e.g., Jane C. Ginsburg, *Copyright and Control*, 101 COLUM. L. REV. 1613, 1613 (2001) (concluding that the emergence of new technology may justify granting copyright owners a higher degree of control over works); Jane C. Ginsburg, *From Having Copies to Experiencing Works*, in US INTELLECTUAL PROPERTY: LAW & POLICY (Hugh Hansen ed., 2000), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=222493](http://papers.ssrn.com/paper.taf?abstract_id=222493) (proffering that Congress should grant copyright holders an access right in the current digital online environment, allowing the author to control the manner in which the public apprehends the work).

## CONCLUSION

My goal in this essay has been primarily critical, pointing out the disparity between what feminists have seen in hypermedia and what current conceptions of copyright will allow, and suggesting that the legal constraint inherent in the right of adaptation may impoverish the progress that copyright is nominally intended to promote. What may be required in order to accommodate such progress is not only revision, but also a re-visioning of the statute. The tenets of feminist theory may beneficially guide such reform. Although only a scant handful of commentators to date have applied any aspect of feminist theory to the analysis of copyright, those that have begun to do so suggest that feminism might constitute a different formulation of copyright and of the incentives used to foster “progress.”<sup>121</sup> While such exposition of a feminist approach to copyright remains tentative, they suggest a construct within which creativity is not so much something to be controlled and possessed, but instead something to be reciprocated and shared where progress is driven by collaboration and connection, instead of by exclusion and separation. For example, a feminist approach might regard and reward an artist’s connections to other artists and their creative works, rather than focusing on authorial identity and attachment to a particular work.<sup>122</sup> Such a re-visioning of the statute would be ambitious, and perhaps impractical, but may be necessary before digital media can fulfill the promise that feminist and hypertext theorists foresee.

---

121. See, e.g., Halbert, *supra* note 8, at 119 (arguing that a feminist future would eliminate intellectual property law which impedes creativity by focusing on ownership and instead would emphasize the relational and communitarian aspects of creation and learning); Andrea Lunsford, *Rhetoric, Feminism, and the Politics of Ownership*, 61 COLL. ENGLISH 529, 534 (1999) (advocating for a shift in the values underlying ownership, which might redistribute intellectual property in new ways).

122. See Wright, *supra* note 8, at 80 (arguing in favor of emphasizing the communal nature of authorship, rather than obsessing about authorial identity).