

COPYRIGHT'S MALE GAZE: AUTHORSHIP AND INEQUALITY IN A PANOPTIC WORLD

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When Erin Andrews found out that an intimate recording of her had leaked online, the authorship-as-fixation doctrine told her that the felon who illicitly captured the footage owned the copyright, not her. When Lynn Thomson's creative partner, Jonathan Larson, died tragically just hours after the final rehearsal for the musical *Rent*, joint authorship's mutual-intent requirement told her that she had no copyright interest in the Broadway hit. When *The Fearless Girl* took on *Charging Bull* and challenged its unabashedly masculine celebration of American capitalism by calling attention to the underrepresentation of women on Wall Street, copyright law told her that she might constitute an unauthorized derivative work, both without copyright protection (i.e., no cognizable authorship) and subject to destruction. In all three of these scenarios, the legal meaning of authorship had far-reaching consequences—not just for copyright law itself, but for society at large.

This Article examines how the heuristics of authorship—the relationship of fixation to authorship, the role of intention in joint authorship, and the allocation of authorship in derivative works—have imbued rightsholders with the power to control representations of female (and non-white) bodies and to suppress narratives of resistance, with resulting adverse consequences for egalitarian and dignity interests. In the process, the Article not only adds to a burgeoning literature on the impact of copyright's ostensibly neutral principles on inequality, particularly in relation to gender, but also breaks new ground by applying film theorist Laura Mulvey's concept of the male gaze to the operation of copyright law. In examining a wide range of cases, from revenge porn and celebrity sex tapes to the voyeuristic art of Arne Svenson, the analysis demonstrates just how our reigning authorship regime has reified the male gaze and translated it into a property right rationalized along traditional binaries of activity and passivity, object and subject, male and female. All told, the Article calls for a broader conversation about the ways in which courts determine issues of authorship—not just as a matter of doctrinal consistency with copyright's four corners, but also as a vital matter of public policy in a society where the tools of creation and surveillance are at everyone's fingertips.

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TABLE OF CONTENTS

<i>Introduction</i>	345
I. <i>Authorship-As-Fixation and the Male Gaze</i>	352
A. <i>The Problematic Arrival at Authorship-As-Fixation</i>	352
B. <i>Authorship-As-Fixation and the Surveillance Society: To the Gazer Belong the Spoils?</i>	355
1. <i>The Neighbors: Arne Svenson, Voyeurism and Copyright in the Panopticon</i>	355
2. <i>The Internet Is Forever: Erin Andrews and Copyright's Peephole Problem</i>	359
C. <i>Revenge Porn, Authorship-As-Fixation, and the Male Gaze</i>	362
D. <i>Gender and the Camera: Performer Rights and the Male Gaze in Numbers</i>	365
E. <i>Copyright and the White Gaze</i>	366
II. <i>Joint Authorship and the Male Gaze</i>	368
A. <i>The Law's Quixotic Search for Authorial Singularity: The Mastermind, Joint Authorship, and Subordination Practices</i>	369
1. <i>The Origins of the "Master Mind" Concept</i>	369
2. <i>The "Master Mind" Concept and the Development of the Mutual-Intent Requirement for Joint Authorship</i>	371
B. <i>The Deployment of Mutual Intent in the Joint Authorship Doctrine</i>	374
C. <i>Joint Authorship, Gender, and the Dispute Over Rent</i> ..	377
D. <i>Mutual Intent, Performers, and the Male Gaze</i>	380
III. <i>From Bull to Bully: The Author as Authority and the Male Gaze</i>	381
A. <i>Charging Bull's Unwelcome Visitor</i>	382
B. <i>The Meaning of Authorship and Charging Bull's Male Gaze</i>	384
C. <i>Controlling Environs, Patrolling Meaning: Authorship, Derivatives, and Narratives of Resistance</i>	388
<i>Conclusion</i>	392

INTRODUCTION

Questions of authorship have permeated numerous legal controversies in recent years. The metaphysics of authorship took center-stage in the case of Naruto, the crested macaque who caused an internet sensation when he took a selfie and then claimed that he,¹ and not David Slater—the photographer who set up the shots and whose camera Naruto used—was its author.² Similarly, Cindy Lee Garcia, the actress who received death threats for her appearance in the controversial movie *The Innocence of Muslims*, famously claimed that her performance was a work of authorship entitling her to a copyright interest in the film so that she could enjoin its distribution.³ Less obviously, however, a growing number of legal controversies involving pan-optic technologies have also raised threshold issues of authorship. In Hulk Hogan's lawsuit against *Gawker*,⁴ the scope of Hogan's legal rights rested on whether the author, and therefore copyright holder, of the sex tape at issue was Bubba the Love Sponge, the man who set up the hidden surveillance camera that captured Hulk and Bubba's wife *in flagrante delicto*.⁵ In sportscaster Erin Andrews' legal battle against the peeping Tom who took and posted intimate footage of her online, the scope of Andrews' legal rights rested on whether her stalker, Michael David Barrett, had earned the copyright to the work (while committing a felony, no less). Finally, litigation against photographer Arne Svenson—who found himself in hot water after using high-powered telephoto lenses to snap voyeuristic shots of the unsuspecting TriBeCa elite ambling through their luxury apartments—could have turned out differently if the subjects of his work had claimed authorship in their “performances” and, therefore, copyright interests in the images of them captured by Svenson.⁶

In short, recent years have witnessed an explosion of litigation related to creative works where issues of authorship play a central role in the matter's resolution. In prior decades, issues of authorship rarely presented themselves in legal disputes. After all, in the past, the act of producing commercially viable creative works was largely the province of professionals—the Hollywood studios, the major labels, the big publishers, and other corporate media entities. Such parties have typically used contractual measures to legally preclude any question about authorship. As a result, all indi-

¹ The claim was brought via his “Next Friend,” People for the Ethical Treatment of Animals. See Complaint at 2, *Naruto v. Slater*, 2015 WL 5576925 (N.D. Cal. Sept. 21, 2015) (No. 3:15-cv-04324).

² *Id.* at ¶¶ 5, 31–34.

³ See *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258, 1262 (9th Cir. 2014), *amended and superseded by*, 766 F.3d 929 (9th Cir. 2014), *rev'd*, 786 F.3d 733 (9th Cir. 2015) (en banc).

⁴ *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1325 (M.D. Fla. 2012).

⁵ *Id.* at 1328 (referring obliquely to “[s]ignificant issues relating to the validity of [Hogan's claimed] copyright”).

⁶ See *Foster v. Svenson*, 7 N.Y.S.3d 96, 98–99 (N.Y. App. Div. 2015).

viduals who worked on a movie, wrote an article, or had a song recorded would have assigned away any conceivable copyright interest in a given work to the relevant corporate entity financing the production.⁷

But, with the dramatic growth in both the creation and economic value of amateur content, all of that has changed. With every member of modern society now armed with a camera-enabled smartphone in their pockets and a networked computer at their desks, the tools for the creation, publication, and distribution of copyrighted works to the four corners of the earth are at everyone's fingertips. Consequently, the sophisticated corporation, with its ability to mold the notion of authorship via contract, no longer automatically mediates the terms under which creative works reach the public. The explosion of social media and the widespread disbursement and use of panoptic technologies have given us all the ability to instantly record videos or capture images and share them worldwide on Tumblr, Facebook, Vine, Snapchat, Twitter, and Instagram. As the disputes involving Naruto, Cindy Lee Garcia, Hulk Hogan, Erin Andrews, and Arne Svenson illustrate, the question of authorship has come to the forefront of copyright litigation as never before.

Authorship, of course, has always been a foundational concept in copyright because, among other things, rights initially vest in a work's "author"—a result driven both by constitutional and statutory dictate.⁸ Yet for all the statutory authority and case law on copyright matters, we have received scant analysis on what authorship actually means.⁹ Although the Copyright Act defines hundreds of different terms, authorship is, quite curiously,

⁷ Actors would sign contracts that transferred any rights they might have in a motion picture to the studio; sound engineers, record producers, and performers would contract away any rights they might have to the record label; and subjects would sign releases waiving any rights that might encumber the use of photographs of them by the photographer. Thus, as John Schulman noted in congressional testimony many decades ago, the issue of default rules for copyright vesting is often irrelevant to the movie industry, as "the contract between the author and the picture companies will establish the status, whether [the work] is a work made for hire or whether it is not." *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the Comm. on the Judiciary*, 89th Cong. 1717 (1965) (statement of John Schulman), reprinted in 7 *OMNIBUS COPYRIGHT REVISION HISTORY 1717* (George S. Grossman ed., 2001) [hereinafter "Schulman Statement"].

⁸ The Constitution empowers Congress to "promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ." U.S. CONST. art. I, § 8, cl. 8 (emphasis added). Section 201(a) of the Copyright Act confirms this result. See 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

⁹ See, e.g., Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 *DEPAUL L. REV.* 1063, 1066 (2003) ("[C]opyright doctrine on authorship, both here and abroad, is surprisingly sparse. Few judicial decisions address what authorship means, or who is an author. Fewer laws define authorship."). Internationally speaking, such a state of affairs is not unusual. *Id.* at 1069. The Berne Convention, for instance, leaves the definition up to the determination of Member States, and few States have taken up its invitation with any kind of doctrinal ardor. See *id.* at 1069–70.

not one of them.¹⁰ All the statute tells us is that copyright “vests initially in the author or authors of [a] work,”¹¹ and that in the limited case of works made for hire, “the employer or other person from whom [a] work was prepared is considered the author.”¹² In short, the statute tells us nothing about how to pinpoint the identity of an author, especially when there are competing claims of authorship.

Meanwhile, the Supreme Court has provided only a modicum of guidance on the issue of authorship. Remarkably, as David Nimmer notes, “the constitutional reference to ‘authors’ went wholly unconstrued for over a century. When the moment came, the Court simply recited from the dictionary.”¹³ That moment arrived in 1884, when, in *Burrow-Giles Lithographic Co. v. Sarony*,¹⁴ the Supreme Court addressed whether photographs constituted original works of authorship eligible for copyright protection.¹⁵ The Court elided the task of defining authorship by merely citing to *Worcester’s Dictionary* and positing that an author is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.”¹⁶ Unfortunately, in the century-and-a-half since *Sarony*, we have received little additional clarity from the High Court on the meaning of authorship. As a result, the task has fallen to the lower courts to define the metes and bounds of the authorship doctrine. From the relationship of fixation to sole authorship, the role of intention in joint authorship, and the allocation of authorship in derivative works, the development of rules and presumptions regarding the vesting of authorial interests have far-reaching consequences for the organization of respective rights within the content-creation industries, such as the movie, recording, and publishing worlds.

But beyond copyright policy, the heuristics of authorship have a broader impact that has received little attention. This Article seeks to fill a void in the literature by examining how the courts’ predominant approach to authorship has raised significant and uncomfortable implications, including those along gender, socioeconomic, and racial lines, by facilitating the unequal distribution of the powerful copyright monopoly along key societal fault-lines. Copyrights, of course, vest by grace of the state and grant certain individuals and entities with a particularly robust set of exclusionary powers.¹⁷ The government’s role in doling out these monopolies—to whom and

¹⁰ See John Tehranian, *Sex, Drones & Videotape: Rethinking Copyright’s Authorship-Fixation Conflation in the Age of Performance*, 68 HASTINGS L.J. 1319, 1321 (2017) (noting that “authorship” is not one of the vast number of terms defined under the Copyright Act).

¹¹ 17 U.S.C. § 201(a).

¹² 17 U.S.C. § 201(b).

¹³ David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 11 (2001).

¹⁴ 111 U.S. 53 (1884).

¹⁵ *Id.* at 53.

¹⁶ *Id.* at 57–58 (citing *Author*, WORCESTER’S DICTIONARY (1860)).

¹⁷ See TOM BELL, INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW AND THE COMMON GOOD 1–2 (2014).

under what circumstances—therefore warrants special scrutiny. By employing the methodology of critical theory and applying it to the doctrinal development of copyright's authorship regime, particularly in the wake of technological change over the past century, the Article contends that the way in which courts have adjudicated the vesting of authorial rights has ultimately assisted, and even exacerbated, traditional subordination practices.

With its scrutiny of the egalitarian implications of copyright's rules governing the vesting of authorial interests, this Article builds on a burgeoning literature examining the impact of the ostensibly neutral principles of copyright law on inequality, particularly in relation to gender.¹⁸ In the process, the analysis draws heavily on the pioneering work of Laura Mulvey and her conception of the male gaze. In her celebrated psychoanalysis of film, *Visual Pleasure and Narrative Cinema*, Mulvey critiqued the way that popular culture—through the visual arts—has depicted the world, and women in particular, through a male gaze. “In a world ordered by sexual imbalance,” Mulvey famously argued, “pleasure in looking has been split between active/male and passive/female. The determining male gaze projects its phantasy on to the female figure which is styled accordingly.”¹⁹ The male gaze, or masculine point of view, replicates the patriarchal hierarchy of traditional society, thereby normalizing a world of subordination where women are deprived of agency.²⁰ In the shadow of the male gaze, a woman in front of the camera has no independent existence or value of her own outside of the impact she has on the male either in front of or behind the camera. She exists for visual pleasure—a passive erotic object only significant for how she “plays to and signifies male desire” and how she serves as a spectacle to the male role as “the active one [] forwarding the story, making things happen.”²¹

¹⁸ Ann Bartow, for example, has called attention to copyright jurisprudence's unusual failure—despite the low threshold for originality generally embraced by courts—to extend protection to works traditionally authored by women, such as cooking recipes, sewing patterns, and fashion designs. See Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U.J. GENDER SOC. POL'Y & L. 551, 573–76 (2006). Emily Chaloner has argued that copyright law's role in “discourag[ing] reimaginings of already existing works” has empowered mainstream rightsholders—who often produce art through hierarchic and patriarchic processes—to stifle countervailing narratives, especially those reflecting feminist voices resistant to “dominant cultural narratives.” See Emily Chaloner, *A Story of Her Own: A Feminist Critique of Copyright Law*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 221, 221, 223 (2010). Finally, Carys J. Craig has examined how the romantic mastermind conception of authorship has favored solitary modalities of masculine creation over “creative imitation” and “collaborative creativity.” See Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U.J. GENDER SOC. POL'Y & L. 207, 240 (2007).

¹⁹ LAURA MULVEY, *VISUAL PLEASURE AND NARRATIVE CINEMA* (1975), reprinted in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 833, 837 (Leo Braudy & Marshall Cohen eds., 1999).

²⁰ See Thomas F. Ryan, *Vision and Spirituality in Post-Katrina New Orleans*, 7 SEATTLE J. SOC. JUST. 101, 106 (2008).

²¹ MULVEY, *supra* note 19, at 837–38.

Mulvey's concept of the male gaze has generated widespread discussion in academic discourse, including in the literature on gender-based subordination practices in the law²² and in neighboring work on racial discrimination.²³ However, the relationship between copyright law and the male gaze has remained altogether unexplored. This analysis highlights how authorship heuristics have propertized the male gaze by imbuing rightsholders with the power to control representations of female (and non-white) bodies and to suppress narratives of resistance, with resulting adverse consequences for human dignity, privacy rights, economic and social power, and gender equality. This process is keenly felt in the way that copyright law, through its authorship rules, legitimizes the male gaze by giving it legal bite and by constructing intangible property rights that facilitate and even augment its authority.

In making this argument, this Article focuses on how three key aspects of copyright's (surprisingly nascent) authorship jurisprudence empower the male gaze. First, we examine the promotion of the male gaze through the authorship-as-fixation doctrine in the vesting of copyright interests. Second, we assess the origins of joint authorship's mutual-intent requirement and its impact on the male gaze. Finally, we look at how the derivative-rights doctrine defines the boundaries of authorship—i.e., where authorship by one ends and another begins—and the way in which such determinations both reflect and further the male gaze.

As we shall see, nowhere is the problematic impact of the male gaze more felt in copyright law than in its rules for ascertaining authorial identity. We consequently begin our examination of authorship and the male gaze by focusing on the emergence of the authorship-as-fixation doctrine. Through the annals of modern copyright jurisprudence, the federal courts have generally presumed that, absent work-made-for-hire status, authorship vests in the

²² See, e.g., Yxta Maya Murray, *We Just Looked at Them as Ordinary People Like We Were: The Legal Gaze and Women's Bodies*, 32 COLUM. J. GENDER & L. 252, 252 (2017) (drawing on the concept of the male gaze to analyze the gender-based dimensions of the legal battles over obscenity, disorderly conduct, and police brutality endured by musicians Wendy O. Williams and Lorien Bourne); Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER 183, 210 (2017) (criticizing rape shield rules as having "created the odd result of courts adopting a 'male gaze' and casting women as sexual objects rather than recognizing them as subjects"); Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 922 (1994) (arguing that the focus in rape trials on the victim's behavior rather than that of the defendant invokes the male gaze, allowing "the violence carried out against [the victim to] recede[] into the background").

²³ Margaret Russell, for example, has identified the "dominant gaze," see Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243, 244 (1991), the tendency within popular culture, particularly in visual representations, to "objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them," David Ray Papke, *Peace Between the Sexes: Law and Gender in Kramer vs. Kramer*, 30 U.S.F. L. REV. 1199, 1204 (1996) (quoting *id.*). Russell's work was influenced by both Mulvey's concept of the male gaze and Frantz Fanon's influential literature on the colonial/white gaze. See Russell, *supra* note 23; FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 90 (2008).

person controlling the equipment that fixes a creative work of authorship in a tangible medium—that is, the producer/engineer on a sound recording, the director behind the camera, or the photographer taking the snapshot.²⁴ While critics have debated the issue of performer copyright in the context of the copyright regime and its specific goals, they have seldom explored the role of our reigning authorship doctrine in exacerbating traditional subordination practices, particularly those along gender lines. In cases ranging from revenge porn and celebrity sex tapes to the voyeuristic art of Arne Svenson and peephole footage of broadcast journalist Erin Andrews, this analysis highlights just how the authorship-as-fixation regime has reified the male gaze in the performance arts and translated it into a property right rationalized along traditional binaries of activity and passivity, object and subject, and male and female.

Second, we examine the development and deployment of the mutual-intent requirement in joint authorship jurisprudence. As we document, the mutual-intent requirement²⁵ find its roots in the influential romantic conception of authorship, which has long fetishized the quest for a single “master mind”²⁶ superintending creative activity. After tracing the jurisprudence on the “master mind” trope and its role in developing the reigning standard for joint authorship claims—which requires all putative co-authors of a work to independently possess the intent to enter into a co-authorship relationship—we examine how this reading of the law has both betrayed the realities of the artistic process and transformed authorship from a concept serving creative utilitarianism to one subservient to existing power relations. With an examination of the history of authorial crediting, the dispute over joint authorship

²⁴ In the process, courts have typically conflated authorship with fixation and almost systematically denied copyright interests to individuals who appear in front of, rather than behind, the camera, despite the frequently invaluable creative contributions the former provide. Though hinted at for close to a century, the notion of authorship-as-fixation has taken full form in recent years, thereby limiting the range of possible authorial identities and denying recognition of copyright claims by such performers as actors, athletes, interviewees, daredevils, lecturers, and others. See Tehranian, *supra* note 10, at 1337–38.

²⁵ In its strictest form, the mutual-intent requirement requires that each author actually regard herself as a joint author. Although the possession of such a state of mind is not expressly dictated by the statutory framework of the Copyright Act, see F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. REV. 225, 260 (2001) (noting that “[t]here is no support for this requirement in the language of the statute”), this version of the mutual-intent requirement has gained significant traction with the federal courts charged with resolving joint authorship claims, see, e.g., Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 199–200 (2001) (“[J]udicial interpretations of the joint work definition have given the intent test a new dimension. In the Second and Seventh Circuits, in order to establish that a work is joint, it is now no longer sufficient to show that the co-creators intended, at the time they created their respective contributions, to merge those contributions inseparably or interdependently into a single work. Under the law of these circuits, it is also necessary to show that both authors intended to ‘regard themselves as joint authors.’”).

²⁶ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58, 61 (1884) (adopting the “master mind” conception of authorship introduced in *Nottage v. Jackson* [1883] 11 Q.B.D. 627 at 635 (Eng.)).

claims to the celebrated musical *Rent*, and the impact of the mutual-intent requirement on performer interests, we illustrate how copyright's joint authorship jurisprudence has empowered the narratives of (mostly male) dominant authors and suppressed the rights and visions of those lacking or unwilling to enforce bargaining power or those with different modalities of creative production. By situating rights to control the body and its representations in those already operating from a privileged vantage point, the mutual-intent requirement has systematically and disproportionately stymied authorial claims from traditionally marginalized groups within the creative classes, including women, indigenous communities, and performers.

Of course, the concept of authorship is not just about creative superintendence *ex ante*; it is also about the continued right to exert authority over a range of artistic expression *ex post*. In the final section of our analysis, we therefore turn our attention from copyright's rule for authorial vesting at the time of creation to its rules on the meaning and implications of authorship after the time of creation.²⁷ In drawing the line between "original" (i.e., permissible, non-infringing) works entitled to their own copyright and "derivative" (i.e., impermissible, infringing) works that are not, courts implicitly determine where authorship by one person ends and where authorship by another begins. Drawing on the legal standoff between Wall Street's *Charging Bull* and *The Fearless Girl*, we analyze how copyright's authorship rules can propertize and empower the male gaze by giving authorial primacy to patriarchal narratives and by enjoining, as derivatives, works of resistance to them. All told, our examination of copyright's authorship doctrine and the male gaze calls for a broader conversation about the treatment of performer rights, collaborative creativity, and derivative works—not just as a matter of doctrinal consistency within copyright's four corners, but also as a matter of public policy and concern for equality and dignity in a society where the tools of creation and surveillance are at everyone's fingertips.

²⁷ After all, authorship plays a central role in allocating credit for, and therefore control of, future creative enterprises. Those with express authorial credit reap both the economic and reputational benefits of the success of a project and are more likely to be given the opportunity—and backing—to create again. See, e.g., *Clemens v. Press Pub. Co.*, 122 N.Y.S. 206, 208 (App. Term. 1910) (Seabury, J., concurring) ("The position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing and thus impairs or increases his future earning capacity."); cf. *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981) ("Since actors' fees for pictures, and indeed, their ability to get any work at all, is often based on the drawing power their name may be expected to have at the box office, being accurately credited for films in which they have played would seem to be of critical importance in enabling actors to sell their 'services,' i.e., their performances.").

I. AUTHORSHIP-AS-FIXATION AND THE MALE GAZE

A. *The Problematic Arrival at Authorship-as-Fixation*

Our analysis begins by assessing the problematic relationship of copyright's authorial-vesting rules to the male gaze. To appreciate and assess the broader implications of copyright's reigning authorship regime, however, it is first helpful to examine just how we arrived at a position where courts presume, if not dictate, that the authorship of a particular creative work should vest in the individual who fixed it in the tangible medium. In order to do so, we turn our attention to the first Supreme Court case to expressly consider the concept of authorship, *Burrow-Giles Lithographic Co. v. Sarony*,²⁸ and its progeny.

In *Sarony*, the Supreme Court famously held that the rights to a celebrated posed shot of Oscar Wilde belonged to its photographer, Napoleon Sarony.²⁹ The Court therefore vested the exclusive rights to exploit the photograph in the individual behind the camera, rather than to the man in front of it.³⁰ In the process, the Court appeared to adopt a rule whereby the individual who fixes a creative work in a tangible medium was deemed its author.³¹ Such a conflation of authorship with fixation has had a strong influence on subsequent jurisprudence on the vesting of copyright interests.³²

However, two important observations temper this apparent triumph of authorship-as-fixation. First, the specific issue before the *Sarony* Court was photography's eligibility as copyright subject matter,³³ so the Court did not fully assess whether other competing claims to authorship rights, including by those in front of the camera or non-fixers behind the camera, could have been advanced. Secondly, the Court was legally precluded from doing so, at least with respect to the individual who had the most colorable competing claim to authorship—Oscar Wilde. The reason lies in a fact long overlooked by readers of the case: Wilde and Sarony had expressly contracted away the issue vis-à-vis each other and entered into an agreement that deemed Sarony, and not Wilde, the “author, inventor, designer, and proprietor of the photograph.”³⁴ Thus, the Court could not, and did not, entertain whether Wilde, rather than or in addition to Sarony, might have enjoyed a copyright interest in the work. Though perhaps unusual to a modern observer accustomed to an authorship-as-fixation default, the plausibility of an argument for Wilde's

²⁸ 111 U.S. 53, 60 (1884).

²⁹ *See id.*

³⁰ Technically, it was Sarony's long-time cameraman who clicked the proverbial button on the camera. *See* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 434 (2004).

³¹ *See Sarony*, 111 U.S. at 59–60.

³² *See* Tehranian, *supra* note 10, at 1337–38.

³³ *See id.* at 58–60.

³⁴ *Id.* at 54.

authorship absent the contract has strong support in the facts. After all, as a “self-proclaimed aesthete” who carefully constructed his persona, expression, and “trademark look with his head resting on his hand,” Wilde’s creative contributions to the ultimate work were substantial.³⁵ Thus, while *Sarony* may appear at first blush to support the notion of authorship-as-fixation, it does no such thing.

A century later, the High Court obliquely touched upon the vesting of authorship once again, but again served up little real guidance. In *CCNV v. Reid*, the Court offhandedly noted that, “[a]s a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”³⁶ But while this language seemed to indicate that authorship usually vests in the person who fixes a creative work in a tangible medium, it came with little discussion or authority for the proposition.³⁷ Just as importantly, the equivocating statement left open the door for instances where copyright would not vest in the fixer. The circumstances that would support such a tantalizing possibility remain shrouded in mystery, however, as the Court gave us no understanding whatsoever as to what conditions might call for a deviation from the general rule.

The 2014 controversy involving Cindy Lee Garcia’s role in the movie *The Innocence of Muslims* provided a high-profile opportunity to apply *CCNV*’s guidance. In its initial ruling in Garcia’s case, the Ninth Circuit subverted the authorship-as-fixation assumption by holding that Garcia owned a copyright interest in her performance and, as such, could demand it be taken down from YouTube.³⁸ In response to the holding, however, parties on all sides of the copyright wars—from Hollywood to Silicon Valley—gasped in horror and urged immediate reconsideration of the decision, something they received in short order when an en banc panel reversed.³⁹ In so doing, the en banc Ninth Circuit went a step beyond what any prior court had said, finding, in resoundingly absolute language, that Garcia could not hold a copyright interest in her performance because “she played no role in [the] fixation [of it].”⁴⁰ In effect, therefore, the Ninth Circuit held that “a performer must personally record his creative expression in order to retain any copyright interest in it.”⁴¹ With these words, the Ninth Circuit arguably

³⁵ See Farley, *supra* note 30, at 433.

³⁶ *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

³⁷ See *id.*; Tehranian, *supra* note 10, at 1322.

³⁸ See *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258, 1268–69 (9th Cir. 2014), *amended and superseded by*, 766 F.3d 929 (9th Cir. 2014), *rev’d*, 786 F.3d 733 (9th Cir. 2015) (en banc).

³⁹ See *Garcia v. Google, Inc. (Garcia II)*, 786 F.3d 733, 737 (9th Cir. 2015) (en banc).

⁴⁰ *Id.* at 744.

⁴¹ *Id.* at 753 (Kozinski, J., dissenting) (characterizing the majority holding in the en banc decision).

transformed authorship-as-fixation from a general presumption to an absolute rule.

Yet the concept of authorship-as-fixation is not at all dictated by the Copyright Act, which is silent as to whether creative input from performers in front of the camera or even non-fixers behind the camera (e.g., make-up artists, costume and set designers, lighting operators, and maybe even the long-suffering assistant key grip) can give rise to authorial interests.⁴² Similarly, the Supreme Court has only generally embraced the concept of authorship-as-fixation.⁴³ Nevertheless, by virtue of the en banc holding in *Garcia*, it is now a general rule in the “Hollywood Circuit.”⁴⁴ It is also the default presumption elsewhere. After all, in modern copyright jurisprudence, the federal courts have usually vested authorship in the person controlling the equipment that fixes a creative work in a tangible medium—the producer/engineer on a musical recording, the director behind the camera, and the photographer taking the snapshot.⁴⁵

This authorship-as-fixation standard reifies the male gaze with vested property rights in the form of copyrights that, with the imprimatur of the state, carry considerable power. The moment of fixation usurps the agency of the subject and all but extinguishes it by granting the (typically male) gazer/fixer copyright ownership. This ownership, in turn, enables the gazer/fixer to wield unilateral authority in exploiting the resulting image of the subject in any way he sees fit and to prevent others from presenting countervailing narratives.⁴⁶ The authorship-as-fixation regime therefore vests property rights in the interloper, the penetrator, the watcher/voyeur. It echoes gender-ridden binaries of passivity and activity as proxies for traditional visions of femininity and masculinity, casting the woman in front of the camera in the role of the subject, the gazed, the spectacle, and the captured (image), and conceptualizing the man behind the trigger as the doer, the

⁴² Section 102 of the Copyright Act, which governs authorship, makes no statement about authorship-as-fixation. Instead, it simply states that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102. If anything, section 102 goes out of its way to avoid saying *in whom* copyright subsists. Authorship-as-fixation might be one way to read the authorship requirement, but it certainly is not the only way. Moreover, since the requirement for vesting copyright in an author presumably stems from the Constitution, *see* U.S. CONST. art. I, § 8, cl. 8, the issue is ultimately one of constitutional, rather than statutory, interpretation.

⁴³ *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

⁴⁴ *See Garcia II*, 786 F.3d at 749 (Kozinski, J., dissenting).

⁴⁵ *See* Tehranian, *supra* note 10, at 1337–38.

⁴⁶ The right of publicity might represent a countervailing force in this context, though it did not develop in earnest until the latter half of the twentieth century and it only limits the rights of a copyright holder in certain contexts, such as express commercial uses. *See* Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 309–15 (2011) (charting the emergence and growing legal strength of the right of publicity, particularly from the 1950s onward). An interesting story could perhaps be told about the right of publicity’s emergence as a counter to the male gaze that, perhaps not coincidentally, emerged at the same time that pushback against the male gaze first began during the rise of modern feminism.

“master mind,” the author and, above all, the rightsholder. In short, the authorship-as-fixation regime has enabled the abstract “male gaze” to metastasize into a tangible series of intellectual property rights in a process that replicates dominant patriarchal narratives and, in the end, empowers masculine control over the female form and representations of it.

*B. Authorship-as-Fixation and the Surveillance Society:
To the Gazer Belong the Spoils?*

In a world where the tools of surveillance lie at everyone's fingertips, the authorship-as-fixation doctrine has powerful and troubling consequences, particularly along gender lines. When individuals become unknowing subjects in works of authorship fixed in a tangible medium, powerful exclusive rights vest in the voyeur. As a result, the ubiquity of panoptic technologies and our reigning vesting rules on authorship have combined to empower the male gaze, giving it the force of property over all those who “are watched.” While there is nothing inherently gendered about such surveillance technologies and their use, the implications of a regime that vests rights in the watcher rather than in the watched are inextricably gendered when such technologies are employed in a society where men are disproportionately behind the camera and female representations constitute the objects of their gaze—a posture celebrated not just throughout cinematic history, as Mulvey explains,⁴⁷ but in Western art more generally.⁴⁸ As a result, the debate over whether the watcher or the watched should enjoy authorial rights in captured images becomes an important consideration when evaluating the broader, egalitarian ramifications of the authorship-as-fixation trope. To illustrate this point, consider two examples: one from the world of high art involving the work of Arne Svenson and another from the world of criminal trespass involving sports broadcaster Erin Andrews.

1. The Neighbors: *Arne Svenson, Voyeurism and Copyright in the Panopticon*

In 2012, Arne Svenson, a fine art photographer living in New York, embarked on an ambitious new project called *The Neighbors*. From his TriBeCa loft, Svenson literally turned the camera towards his surroundings and began surreptitiously taking photographs of his well-heeled neighbors as they napped, cleaned, and engaged in other mundane activities in their luxury apartments, which were visible from Svenson's perch.⁴⁹ Using high-pow-

⁴⁷ MULVEY, *supra* note 19, at 837.

⁴⁸ The display of the female body, as depicted or captured by a man, for a primarily male audience, has long been a hallmark feature of Western visual culture. See Terry Barrett, *Approaches to Postmodern Art-Making*, 28 FATE REV. 1, 9 (2007).

⁴⁹ *New Yorkers Threaten to Sue Artist Who Secretly Photographed Them in Their OWN Apartments and Is Selling Prints for \$7500*, DAILY MAIL (May 16, 2013, 5:09 PM),

ered telephoto lenses intended for bird watching, Svenson captured a series of provocative images that formed the basis of a noted exhibition and commanded significant prices on the art market.⁵⁰

When they learned of their roles in his work, some of the subjects, including lead plaintiffs Matthew and Martha Foster, sued Svenson, who remained unapologetic about his actions and rebuffed allegations that he had invaded the subjects' privacy.⁵¹ "For my subjects, there is no question of privacy . . . They are performing behind a transparent scrim on a stage of their own creation with the curtain raised high."⁵² He added, "I am not unlike the birder, quietly waiting for hours, watching for the flutter of a hand or a movement of a curtain as an indication that there is life within."⁵³

The exquisite artistry in Svenson's work is unmistakable. There is a naked and unfiltered poignancy to the works precisely because the subjects are completely unaware that they are being watched. In Svenson's defense, he also took some pre-emptive measures to limit exposure of his subjects' identifying features.⁵⁴ "I was stringent about not revealing the identities of the subjects because I was not photographing these people as specific, identifiable personages, but more as representations of humankind, of us," he explained.⁵⁵ "I only reveal the turn of the head, the back against a window, the legs under a table. These tiny scenarios and actions reveal a humanness that is unconsciously truthful and tender."⁵⁶

That said, Svenson's anonymizing techniques were not entirely effective.⁵⁷ In fact, the face of the Foster's daughter was visible in at least one photograph and information about her address was made public in information about the project.⁵⁸ Furthermore, regardless of the downplaying of personal identity in the photographs, one cannot help but sympathize with the subjects who now unwittingly find an image of themselves captured in an unguarded moment in the privacy of their own home being strewn about in

<http://www.dailymail.co.uk/news/article-2325757/New-Yorkers-threaten-sue-artist-secretly-photographed-OWN-apartments-selling-prints-7-500-dollars.html> [hereinafter DAILY MAIL] [<https://perma.cc/K9SD-6QRR>].

⁵⁰ See *Foster v. Svenson*, No. 55, 2013 WL 3989038, at *1 (N.Y. Sup. Ct. Aug. 5, 2013).

⁵¹ See DAILY MAIL, *supra* note 49 (quoting promotional materials from Arne Svenson's website).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *Foster v. Svenson*, 7 N.Y.S.3d 96, 98–99 (N.Y. App. Div. 2015) (noting that "[d]espite defendant's professed effort to obscure his subjects' identity, plaintiffs' children were identifiable in these photographs, one of which showed their son in his diaper and their daughter in a swimsuit; the other showed plaintiff mother holding her daughter.").

⁵⁵ Laura C. Mallonee, *Artist Who Furtively Photographed His Neighbors Wins in Court, Again*, HYPERALLERGIC (Apr. 21, 2015), <http://hyperallergic.com/200601/artist-who-furtively-photographed-his-neighbors-wins-in-court-again> [<https://perma.cc/HJ4P-ZNZT>].

⁵⁶ *Id.*

⁵⁷ See *Foster*, 7 N.Y.S.3d at 98–99.

⁵⁸ *Id.* at 99.

promotional materials for Svenson's exhibits, hanging in a gallery, or on permanent display at some museum or wealthy collector's home. After all, as a society, we regularly send people to prison for being "peeping Toms," and the perpetrators of such crimes have not typically captured the fruits of their voyeurism and shared them with the world.⁵⁹ Yet the suit against Svenson was dismissed at the trial court level,⁶⁰ a decision affirmed by a New York appeals court.⁶¹ As both rulings reflected, Svenson's reasoned and poignant artistic purpose behind the creation and worldwide distribution of his work gave him a legitimate First Amendment defense that a peeping Tom would ordinarily lack.⁶²

The Fosters did not raise a copyright claim, however. The state of authorship jurisprudence, which fetishizes the work of the fixer at the expense of those in front of the camera, would make such a claim difficult. But if the authorship-as-fixation doctrine were not as rigidly applied, the Fosters might have had a legitimate claim to a copyright interest in their "performance" as it was captured by Svenson. After all, the initial Ninth Circuit holding in *Garcia* achieved nothing less for the actress who brought the suit.

Although the Fosters were not duped like Garcia, they did find themselves unwittingly (and from the "privacy" of their own home, no less) captured in works that were commercially exploited and distributed worldwide in a manner that caused them great embarrassment and, potentially, danger. Admittedly, Garcia knew she was giving a performance, while Svenson's subjects were simply leading their ordinary lives. But such a distinction is subverted by Svenson's own characterization of his subjects as "performing behind a transparent scrim on a stage of their own creation with the curtain raised high."⁶³ If Garcia had a plausible argument to a copyright interest, then so do Svenson's subjects. And, with such an interest, they would have likely rebuffed any claim that they had given Svenson an implied license or that their creative contributions were made for hire. Specifically, they could have pursued an infringement claim against Svenson and, assuming recognition of their copyright, enjoyed a strong likelihood of success given the gen-

⁵⁹ Although, increasingly, they do, as the *Andrews* case, discussed *infra* note 59, illustrates. See Complaint at ¶¶ 8–9, *Andrews v. Marriott Int'l, Inc.*, No. 11c4831 (Tenn. Circ. Ct. Dec. 1, 2011).

⁶⁰ See *Foster v. Svenson*, No. 55, 2013 WL 3989038 at *6 (N.Y. Sup. Ct. Aug. 5, 2013).

⁶¹ See *Foster*, 7 N.Y.S.3d at 98. Although it ruled in his favor, the New York appellate court characterized Svenson's actions as "disturbing," "intrusive," and "troubling" and called upon the New York legislature to consider new laws to protect individuals from these sorts of "heightened threats to privacy posed by new and ever more invasive technologies." *Id.* at 105–06.

⁶² *Id.* at 103–04 ("Defendant's used [sic] of the photos falls within the ambit of constitutionally protected conduct in the form of a work of art Since the images themselves constitute the work of art, and art work is protected by the First Amendment, any advertising undertaken in connection with the promotion of the art work was permitted.").

⁶³ *Id.* at 98 (quoting promotional materials on Arne Svenson's website).

eral immunization of copyright claims from independent First Amendment scrutiny⁶⁴ and the heavy (if not outcome-determinative) presumption against unauthorized use of unpublished works⁶⁵ in any fair use defense that Svenson might proffer.⁶⁶ In short, performer copyrights would empower the subjects of Svenson's work to have a say in his use of their performances and to enjoin Svenson's work, if they were so inclined—something they could not achieve through privacy law.

While those sympathetic to the Fosters might applaud, such an outcome may not be entirely unproblematic. Giving subjects veto rights over expressive activities raises legitimate concerns about the suppression of basic artistic freedoms. As a result, we must carefully balance the possibility of granting performance copyrights with appropriate respect for First Amendment protections. Moreover, given Svenson's own unquestionable creative input and artistry, he is certainly owed an authorial interest in the photographs—be it full or partial—too.

A default regime of granting authorship rights solely to the voyeur becomes far more troublesome in scenarios where our voyeur is not exercising credible artistic liberties and makes little in the way of artistic contributions to the ultimate work. The high-profile Erin Andrews case provides just such a situation and speaks to the potentially dangerous consequences of an authorship-as-fixation regime in a surveillance society. By invoking common gender dynamics involving the male gaze and copyright ownership, the case highlights the problems that emerge when our authorship regime automatically rewards voyeurs with a powerful monopoly over the fruits of their criminal activities.

⁶⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“[C]opyright’s built-in free speech safeguards are generally adequate to address [any conflict with free speech rights].”).

⁶⁵ The unpublished nature of the work strongly mitigates against any fair use right at all. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (holding that there is a heavy presumption against fair use of unpublished works as the “scope of fair use is narrower with respect to unpublished works.”); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987) (finding that unpublished works “normally enjoy complete protection against copying” in rejecting a fair use defense and enjoining the publication of a biography of J.D. Salinger that quoted and paraphrased unpublished letters by the reclusive author).

⁶⁶ Of course, this assumes that the “work” was unpublished, raising philosophical questions as to whether raising the curtains covering a home’s glass windows constitutes a “publication” of one’s performative work while in the house. See 17 U.S.C. § 101 (defining publication as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending” and “offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.”).

2. *The Internet is Forever: Erin Andrews and Copyright's Peephole Problem*

In 2016, Erin Andrews famously won a \$55 million judgment for the invasion of privacy she suffered after an intimate video of her was leaked online.⁶⁷ Andrews successfully sued Michael David Barrett—the peeping tom who sawed a hole from a hotel room adjacent to hers, recorded the video, and then shared it with the world—and the owners and operators of the Nashville Marriott—who carelessly gave Barrett her room number, thereby facilitating his conduct.⁶⁸ Despite Andrews' legal victory, however, she continues to suffer injury from the recording incident on an on-going basis. In particular, her invasion of privacy claims against Barrett and the Nashville Marriot only partially vindicated her interests, as they did little to address or account for the irreparable and accruing harm that came from internet users around the world continuing to view the video.⁶⁹ After all, the video, which was recorded in 2008 and leaked to the public in 2009, remains widely available online to anyone who puts even a modicum of effort into seeking it out⁷⁰ because, among other things, long-established First Amendment principles make invasion of privacy claims against internet entities who simply further the recording's distribution far more difficult to sustain than those against the individual who made the recording and his abettors.⁷¹

But if Andrews possessed a copyright interest in her performance, all of that could change. She could have arguably wielded a much more formidable weapon with which to seek relief, as copyright is largely immunized from express First Amendment checks,⁷² liability is easier to establish,⁷³ and

⁶⁷ See Meghan Keneally, *Erin Andrews Awarded \$55 Million in Lawsuit*, ABCNEWS (Mar. 7, 2016), <http://abcnews.go.com/US/erin-andrews-jury-set-deliberate-75-million-lawsuit/story?id=37460110> [<https://perma.cc/9AL5-WF3Qv>]; see Complaint at ¶¶ 8–9, *Andrews v. Marriott Int'l, Inc.*, No. 11c4831 (Tenn. Circ. Ct. Dec. 1, 2011).

⁶⁸ See Keneally, *supra* note 67.

⁶⁹ In Susan Sontag's seminal contemplation *On Photography*, she argues that “[t]o photograph people is to violate them, by seeing them as they never see themselves, by having knowledge of them that they can never have; it turns people into objects that can be symbolically possessed. Just as a camera is a sublimation of the gun, to photograph someone is a subliminal murder—a soft murder, appropriate to a sad, frightened time.” SUSAN SONTAG, *ON PHOTOGRAPHY* 14–15 (1973).

⁷⁰ As Andrews poignantly testified at the trial, “It’s on the Internet now . . . It’s going to be on the Internet until I die.” See Ahiza Garcia, *Why is the Erin Andrews Nude Video Still Online?*, CNN.COM (Mar. 6, 2016), <http://money.cnn.com/2016/03/06/media/erin-andrews-video-online-trial> [<https://perma.cc/VNF5-CFQZ>]. As CNN noted shortly after the beginning of the Andrews trial, “the video has consistently been one of the top searched items on Google and can still be found on various porn sites.” *Id.*

⁷¹ See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 517, 534 (2001) (holding that the First Amendment protects “speech that discloses the contents of an illegally intercepted communication,” albeit so long as the matter involves an issue of “public or general interest.”).

⁷² See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 150 (1998) (documenting the courts’ lack of hesitation in granting preliminary injunctions in cases of copyright infringement, even when the injunction amounts to a clear

damages can add up quickly.⁷⁴ Moreover, copyright law provides a series of potent extrajudicial means for enforcement, including the Digital Millennium Copyright Act's powerful takedown regime—something without comparison in the world of privacy torts.⁷⁵

Instead, perversely, Andrews had to acquire the putative copyright to the video (to the extent that one existed⁷⁶) from the very individual who perpetrated the invasion of her privacy: Michael David Barrett. Records with the Copyright Office indicate that Andrews received the copyright to the video by written assignment (presumably from its listed author, Michael David Barrett) and registered it with the Copyright Office in mid-2011—some two years after it hit the Internet.⁷⁷ As a result, Andrews was legally powerless for two years, due in large part to the authorship-as-fixation regime, to enforce the copyrights to the video since it was her tormenter, rather than she, who exclusively owned the rights to control reproduction, distribution, and public display of the recording.

Such a strange state of affairs, and one which literally proprietizes and rewards the male gaze in its most destructive form, is the direct product of the authorship-as-fixation trope running from *Sarony* to *Garcia*, which auto-

prior restraint of speech). For a critique of the dangerous consequences of such systematic immunization of copyright claims from First Amendment scrutiny, especially in light of the surging censorial use of infringement litigation, see John Tehranian, *The New ©ensorship*, 101 IOWA L. REV. 245, 245 (2015).

⁷³ To prevail, a plaintiff need merely show she owns a valid copyright in a work, defendant had access to her work, and defendant reproduced, publicly displayed, distributed, publicly performed, or created a derivative version of the work. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

⁷⁴ Assuming timely registration, federal law provides prevailing plaintiffs the right to elect recovery of statutory damages in the amount of \$150,000 per willful act of copyright infringement, 17 U.S.C. § 504(c)(2), and, subject to the discretion of the court, the ability to recover reasonable attorney's fees, 17 U.S.C. § 505.

⁷⁵ Although the DMCA grants internet service providers ("ISPs") immunity from liability for hosting infringing user-generated content, this so-called "safe harbor" is expressly conditioned on service providers meeting a number of conditions, including promptly removing infringing content upon receiving notice thereof from appropriate rightsholders. See 17 U.S.C. § 512(c). As a result, without even relying on litigation, a rightsholder can frequently have speech that makes unauthorized use of their copyrighted materials (even if it likely constitutes fair use) effectively removed from the online world. See Tehranian, *supra* note 72, at 273–74.

⁷⁶ One could argue that, as an "illegal" work, Barrett's recording potentially enjoys no copyright protection. See *Villa v. Pearson Educ., Inc.*, No. 03-C3717, 2003 WL 22922178, at *2–3 (N.D. Ill. Dec. 9, 2003) (suggesting that illegal graffiti may not be protected under copyright law); cf. *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 175–77 (S.D.N.Y. 1998) (denying a preliminary injunction against the infringement of a pornographic film on the grounds that, inter alia, the films were "obscene" and, therefore, being illegally distributed). In the neighboring field of trademark law, courts have systematically held that illegal trademarks do not enjoy protection. See *CreAgri, Inc. v. USANA Health Scis., Inc.*, 474 F.3d 626, 627–28 (9th Cir. 2007) (noting that the Lanham Act requires *lawful* use of a mark in commerce as a predicate for trademark protection).

⁷⁷ See *Nashville Hotel Video*, Registration No. PA0001790098 (July 28, 2011) (Authorship on Application: Michael David Barrett, Copyright Claimant: Erin Andrews, Transfer: Written Agreement).

matically vests copyright wholly in a peeping tom⁷⁸ who took the illegal recording without Andrews' consent or knowledge. In this way, copyright law weaponizes "the camera as phallus"⁷⁹ and allows full realization of photography's hunting metaphor, where, as Susan Sontag insightfully noted, "we talk about 'loading' and 'aiming' a camera, about 'shooting a film,'"⁸⁰ with the object as prey. If, however, Andrews had possessed a more plausible argument for copyright ownership the moment the video leaked online (e.g., that she possessed a copyright interest based on her "performance"),⁸¹ she would have had a far greater chance to limit the recording's dissemination.

Ownership of a copyright is no panacea to the problem of online infringement, but it certainly helps. Although it would not wipe the internet completely clean of the video, a broad DMCA takedown campaign, combined with targeted infringement claims, could have reduced the video's reach appreciably. Andrews' inability to bring a copyright claim to enjoin its further distribution and public display for its first two years of publication doubtlessly facilitated the video's widespread dissemination.⁸² And, in the process, in circumstances that were even more trying than those faced by Cindy Lee Garcia, she unwittingly found her "performance"—which was

⁷⁸ While peeping "Janes" certainly exist and men can be subject to the female gaze, this Article focuses on the more traditional pattern of the man behind the camera and the woman in front of the camera. The gender disparities in the identity of who controls the camera and who is in front of the camera in both the mainstream content creation industries, see *infra* Section II.D, and the world of amateur pornography, revenge porn, and criminal sexual surveillance, see *supra* Section II.B and *infra* Section II.C, arguably warrant such a focus.

⁷⁹ SONTAG, *supra* note 69, at 14.

⁸⁰ *Id.*

⁸¹ Per Judge Kozinski's original *Garcia* opinion, *Garcia v. Google, Inc. (Garcia I)*, 743 F.3d 1258, 1265 (9th Cir. 2014), the *Andrews* case would seem to be the "rare" instance where there was no waiver through implied license. See *id.* Furthermore, her performance rights would remain with her because there would be no plausible claim that her efforts were made for hire and there was no contract assigning/transferring such rights away. See *id.* ("[C]opyright interests in the vast majority of films are covered by contract, the work made for hire doctrine or implied licenses."). That said, unlike Cindy Lee Garcia (or Oscar Wilde in *Sarony*), since Andrews was unaware of the camera watching her, she was arguably doing anything but *performing*. Whether human activity conducted without knowledge of its fixation can constitute performance is a topic beyond the scope of this Article, but certainly one worth considering.

⁸² Certainly, empowering performer rights could have significant First Amendment consequences with which the courts would have to wrestle. As discussed *supra* Section II.B.1, the recognition and enforcement of performer rights would impact the creative freedoms of such artists as Arne Svenson. In other circumstances, it could have even broader ramifications. Consider, if you will, if the peeping tom had been Kenneth Starr, going rogue long after the expiry of his Independent Counsel position, and the persons captured on the video had been Monica Lewinsky and President Bill Clinton, reuniting in a private hotel room. Recognizing performer rights in such a scenario might threaten to stifle legitimate news-related uses of the video by media entities, though one imagines that appropriate application of the fair use doctrine could deal with issues regarding unauthorized use of the video.

certainly not intended for capturing, let alone publication—available to anyone with an internet connection.

C. Revenge Porn, Authorship-as-Fixation, and the Male Gaze

When one considers the legal controversies involving sex tapes in a broader context, the gender-based consequences of a copyright-vesting regime dominated by the notion of authorship as fixation become clear. Celebrity sex tapes have always garnered attention. But with the ubiquity of smartphones equipped with cameras, the problems surrounding unauthorized distribution of personal recordings have transcended fame and become a serious concern for private citizens and celebrities alike. For example, several websites have gained notoriety, large audiences, and financial success by serving as repositories for individuals to upload personal sexual recordings and share them with the world.⁸³ While some amateur sexual content is shot and distributed with the enthusiastic consent of all of its participants, not all of it is. In particular, jilted lovers and other malefactors bent on vengeance have leaked explicit recordings of their former sexual partners on these sites, often to humiliate and embarrass them.⁸⁴

There is an unmistakable gender-based dynamic to this phenomenon of revenge porn: a typical case features a man taking his recording of a sexual encounter with a woman and, without obtaining consent (or, in blatant violation of a specific request to keep the materials private), uploading the footage to a revenge-porn website. Indeed, the Cyber Civil Rights Initiative, the leading advocacy group for victims of revenge porn, estimates that approximately 90% of revenge porn victims are female.⁸⁵ The Internet is forever, and such actions can cause profound professional and personal harm and quite literally destroy the lives of their victims. The historical double-stan-

⁸³ The phenomenon of revenge porn first received international attention with the website *IsAnyoneUp*, where users would post naked images and videos and also link to the subject's social media profiles, thereby revealing their real names, addresses, and other identifying information. See Bob Garfield, *Revenge Porn's Latest Frontier*, WNYC (Dec. 2, 2011), <http://www.wnyc.org/story/173718-revenge-porns-latest-frontier/#transcript> [<https://perma.cc/RXX4-28XQ>].

⁸⁴ See State 'Revenge Porn' Legislation, NAT'L CONF. ST. LEGISLATURES (Dec. 3, 2014), <https://web.archive.org/web/20141211110621/http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx> [<https://perma.cc/KV69-WJRR>].

⁸⁵ See CYBER CIVIL RIGHTS INITIATIVE, CCRI'S 2013 NONCONSENSUAL PORNOGRAPHY (NCP) RESEARCH RESULTS 1 (2013), <https://www.cybercivilrights.org/wp-content/uploads/2016/11/NCP-2013-Study-Research-Results-1.pdf> [<https://perma.cc/L5FT-ALC9>]. A recent study by the Data & Society Research Institute pegged the gender disparity as slightly less severe (finding that women were twice as likely as men to have someone threaten to expose nude photos of them online), but nevertheless found that a whopping 1 in 10 women under the age of 30 "have experienced threats of nonconsensual image sharing." DATA & SOCIETY RESEARCH INSTITUTE, NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 6 (2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf [<https://perma.cc/XYL8-5WHK>].

dard on, sexual promiscuity and the prevalence of practices such as slut-shaming mean that the impact on a young woman who finds her naked body trending on Twitter may be quite different than that on a similarly-situated young man.⁸⁶

There are few viable legal remedies afforded to victims of revenge porn,⁸⁷ and recent pieces of legislation seem to face significant First Amendment challenges.⁸⁸ Thus far, the most meaningful potential relief, meager as it might be in many instances, appears to have come from copyright law.⁸⁹ But, of course, such relief is only available to those with ownership of a copyright or an exclusive license thereto.⁹⁰ And therein lies the rub: copyright's authorship-as-fixation doctrine, with its reification of the male gaze, makes reliance on copyright law a non-starter under many revenge-porn scenarios, where the woman-victim is not in control of the camera that fixed the sexual performance in a tangible medium. Without a colorable claim to be-

⁸⁶ See John A. Humbach, *The Constitution and Revenge Porn*, 35 *PACE L. REV.* 215, 216 n.6 (2014) (noting that, although both men and women can be victims of revenge porn, gender-slanted phenomena such as slut-shaming can cause revenge porn to have a more pernicious impact on the lives of women) (quoting Emily Poole, *Hey Girls, Do You Know? Slut-Shaming on the Internet Needs to Stop*, 48 *U.S.F. L. REV.* 221, 222, 232–33 (2013) (“When it comes to sexual expression, females are denied the freedoms enjoyed by men” and “[t]he emotional harms caused by slut-shaming [including revenge porn] can follow a woman around for years, damage her self-perception, and possibly cause her either to dismiss her own sexuality or be labeled as easy.”)).

⁸⁷ See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *WAKE FOREST L. REV.* 345, 349 (2014) (“Current civil law remedies, including copyright remedies, are an ineffective deterrent to revenge porn. If they were [effective], we would likely not be witnessing the rise in reports of victimization as well as the proliferation in revenge porn websites.”).

⁸⁸ See Humbach, *supra* note 86, at 217 (asserting that present revenge porn laws “seem to fly directly in the face of the free speech and press guarantees of the First Amendment . . . [by constituting] unconstitutional content discrimination, viewpoint discrimination and speaker discrimination, not to mention prior restraint.”). But see Citron & Franks, *supra* note 87, at 385 (arguing that targeted laws combating revenge porn would not violate the First Amendment because, *inter alia*, “[t]he nonconsensual disclosure of someone’s sexually explicit images does little to advance expressive autonomy and self-governance and does much to undermine private self-expression.”). California’s recent anti-revenge-porn legislation, passed as SB 255 & SB 1255, has not yet undergone full constitutional scrutiny by a court. See Cal. Pen. Code § 647(j)(4).

⁸⁹ Lawyers representing revenge porn victims recognize that the powerful legal and extrajudicial remedies afforded by copyright law make establishing ownership rights to the recordings in question the most potent means for achieving meaningful relief for their clients. For example, Elisa D’Amico, an attorney who cofounded the pro-bono Cyber Civil Rights Legal Project, which provides legal assistance to victims of revenge porn, has flagged the importance of “obtaining the copyright to videos and photos that have been posted online without consent” as a means to get them removed from the internet. See Garcia, *supra* note 70.

⁹⁰ See 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”); *McCormick v. Amir Constr. Inc.*, 279 Fed. App’x. 470, 471 (9th Cir. 2008) (“Section 501(b) [of the Copyright Act] grants standing to sue under the Copyright Act only to one owning a copyright [or an exclusive right thereto].”) (citing *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)).

ing the “master mind” who fixed the sexual performance in a tangible medium, the possibility of pursuing the DMCA’s takedown remedies or litigation for copyright infringement falls by the wayside.

By contrast, in celebrity sex-tape controversies, D-listers with colorable copyright claims (i.e., they controlled the camera and actually shot the video) have generally enjoyed relative success in suppressing distribution of racy recordings by making infringement claims. Bret Michaels, for instance, famously enjoined online dissemination of a sex tape featuring him and Pamela Anderson after Internet Entertainment Group claimed it had obtained rights to the recording and would begin making the recording available to members of its “Club Love” subscription service.⁹¹ Michaels had little trouble establishing the requisite copyright ownership over the tape—an instrumental element in his success—because as the maker of the tape, he was deemed the copyright holder.⁹² Similarly, Fred Durst recorded his sexual escapades on equipment that he owned and “set up the camera angle and position, turned on the camera, and held the camera throughout the recording of the [v]ideo,”⁹³ making him the copyright holder by conventional standards conflating fixation and authorship. As a result, Durst filed suit and successfully settled infringement claims against entities distributing the recording shortly after a copy of it leaked online.⁹⁴

Compare the success of men such as Michaels and Durst to the struggles of revenge-porn and peeping Tom victims, who are often women. Both Michaels and Durst were celebrities who made their sexual conquests a matter of public interest, and they clearly consented to the making of the recordings in question. But because they happened to be in control of the cameras that captured their sexual performances, they presumptively enjoyed copyright ownership and the rights to enjoin unauthorized use of the explicit recordings.

By sharp contrast, revenge porn victims are typically private citizens who have not even consented to the making of the explicit recordings, let alone their worldwide distribution. In addition, they are often not the ones in control of the camera. Erin Andrews and other victims of peeping toms, for example, are not even aware that they are on film. Revenge porn victims

⁹¹ See *Michaels v. Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823, 828–29 (C.D. Cal. 1998).

⁹² See *id.* at 830–31. Anderson Lee intervened in the case and separately registered the copyright to the video, claiming that she was, at a minimum, a joint author. See *Private Home Tape*, Registration Nos. Pau002256130 (March 3, 1998) and Pau002313975 (July 20, 1998) (supplement to Pau002256130) (listing Michaels and Anderson Lee as “authors of a work made for hire.”). Initially, Michaels registered the work as the sole author. See *Private Home Tape*, Registration No. Pau002215508 (Jan. 22, 1998).

⁹³ Durst Declaration in Support of Ex Parte Application for Temporary Restraining Order, *Durst v. Gawker Media LLC*, No. CV05-1575 (C.D. Cal. Mar. 2, 2005).

⁹⁴ See Stipulation and Order re Permanent Injunction at 3–4, *Durst v. Gawker Media LLC*, No. CV05-1575 (C.D. Cal. Mar. 2, 2005); Chris Harris, *Fred Durst Strikes Back After Sex Tape Leak*, MTV NEWS (Mar. 7, 2005), <http://www.mtv.com/news/1497823/fred-durst-strikes-back-after-sex-tape-leak> [<https://perma.cc/E2CH-NKFS>].

who are aware that they are being recorded have certainly not consented to the works' publication and distribution. Nevertheless, it is the person behind the camera—often the peeping tom or the vengeful ex-boyfriend bent on humiliating his former girlfriend—that owns the copyright under the authorship-as-fixation regime. Erin Andrews had to obtain the copyright by written transfer agreement after presumably striking a deal with her tormentor, Michael David Barrett, who presumptively enjoyed copyright to the recording he made while invading Andrews' privacy. Many revenge porn victims, however, are not able to acquire a copyright to the work, stymieing their best shot at legal relief. In the new-fangled world of intimate videos and privacy invasions, copyright's authorship-as-fixation doctrine appears to disproportionately disadvantage women over men.

D. Gender and the Camera: Performer Rights and the Male Gaze in Numbers

The authorship-as-fixation regime and its failure to recognize performer copyrights have an impact beyond issues related to revenge porn and sex tapes, however. The rights regime also accentuates existing inequalities within professional industries that exploit performative art. For example, consider the gender implications of the authorship-as-fixation doctrine in Hollywood. Ongoing disparities in motion-picture production help contextualize the gender dynamics behind an authorship regime that privileges activities behind the camera over those in front. While women are frequently represented in front of the camera (though still not equally with men),⁹⁵ they continue to be shockingly underrepresented behind the camera. In 2015, women accounted for just 9% of all directors in major Hollywood productions.⁹⁶ The numbers were not much better for all major behind-the-scenes jobs (director, writer, producer, executive producer, editor, and cinematogra-

⁹⁵ Even here, significant speaking roles in front of the camera continue to disproportionately go to men. Between 2014 and 2015, women represented 42% of all speaking characters on broadcast television programs. MARTHA M. LAUZEN, *BOXED IN: PORTRAYALS OF FEMALE CHARACTERS AND EMPLOYMENT OF BEHIND-THE-SCENES WOMEN IN 2014-15 PRIME-TIME TELEVISION 2* (2015), http://womenintvfilm.sdsu.edu/files/2014-15_Boxed_In_Report.pdf [https://perma.cc/9JDY-G2R8]. Yet women only "comprised 22% of [all] protagonists featured in the top 100 domestic grossing films in 2015." MARTHA M. LAUZEN, *IT'S A MAN'S (CELLULOID) WORLD: PORTRAYALS OF FEMALE CHARACTERS IN THE TOP 100 FILMS OF 2015 1* (2016) http://womenintvfilm.sdsu.edu/files/2015_Its_a_Mans_Celluloid_World_Report.pdf [https://perma.cc/6WPD-TTF4]. Furthermore, certain types of women (e.g., older women, women from minority racial groups) are disproportionately missing from the screen. *See id.*

⁹⁶ MARTHA M. LAUZEN, *THE CELLULOID CEILING: BEHIND-THE-SCENES EMPLOYMENT OF WOMEN ON THE TOP 100, 250, AND 500 FILMS OF 2015 1* (2016), http://womenintvfilm.sdsu.edu/files/2015_Celluloid_Ceiling_Report.pdf [https://perma.cc/5K3P-86TD].

pher), as women occupied just 19% of all such positions.⁹⁷ And these numbers are, generally, a large improvement from historical norms.

The Guerilla Girls, a feminist art group, once famously created a poster that wondered, “Do women have to be naked to get into the Met Museum?”⁹⁸ Their query, unfortunately, was no whimsical exaggeration. At the time, while 85% of the humans depicted nude at the Metropolitan Museum in New York were female, less than five percent of the modern artists exhibited at the Museum were women.⁹⁹ The pattern repeats itself in a variety of artistic milieus and fields: women continue to find themselves disproportionately in front of the artistic lens rather than behind it, at least in the works most celebrated by the cognoscenti.

The first large-scale study of the demographics of copyright registrations also confirms just how widely claims of ownership skew along gender lines even amongst a broader set of works. Robert Brauneis and Dotan Oliar, the study’s authors, found that men represented about 80% of the listed authors of motion pictures registered with the United States Copyright Office between 1978-2012.¹⁰⁰ And, in other areas of copyrightable subject matter, the numbers are not much better, as women are the listed authors of only about one-third of the works registered each year.¹⁰¹

By failing to recognize copyright interests arising from creative contributions in the act of performance, we are not merely reducing the economic leverage of performers: we are, effectively, diminishing the economic leverage of women in the industry. By vesting rights exclusively in those in front of the camera, we are not merely empowering those behind the camera: we are, effectively, granting greater agency to men under the aegis of the law.

E. *Copyright and the White Gaze*

The conflation of authorship with fixation does not merely have implications along gender lines; it also cuts along other societal schisms. Since the fixer obtains the spoils of creative industry, it is the owner of the equipment or the tools of production, rather than other creative contributors to a work of authorship, who typically enjoy the benefits of authorial designation. Thus, copyright vests in the studio that controls the expensive recording equipment, the photographer who owns the fancy camera, or the director who has access to the set, costly lighting, and filming technology—a series of results that grant intangible property interests to the owners of tangible production equipment rather than creative labor. Admittedly, the recent boom in relatively inexpensive recording and reproduction technologies of

⁹⁷ *Id.*

⁹⁸ Jeffrey Toobin, *Girls Behaving Badly*, *NEW YORKER* (May 30, 2005).

⁹⁹ *Id.*

¹⁰⁰ See ROBERT BRAUNEIS & DOTAN OLIAR, *COPYRIGHT’S RACE, GENDER AND AGE: A FIRST QUANTITATIVE LOOK AT REGISTRATIONS* 24 (2016).

¹⁰¹ See *id.* at 26.

all types has softened the socioeconomic inequities of such a regime. But its historical consequences can be seen in a variety of contexts, including along racial lines.

In his seminal work on colonialism, Frantz Fanon introduced the concept of the white gaze, whereby the black body is problematized as something less than fully human, characterized as anomalous and the other, and viewed with trepidation and foreboding. As he poignantly wrote in his classic inquiry on the psychology of racism, *Black Skin, White Masks*, “[w]e were given the occasion to observe the white gaze. An unusual weight descended on us. The real world robbed us of our share. In the white world, the man of color encounters difficulties in elaborating his body schema. The image of one’s body is solely negating. It’s an image in the third person. All around the body reigns an atmosphere of certain uncertainty.”¹⁰² By granting an author the right to control depictions of the body¹⁰³ captured as part of a creative work, copyright law grants remarkable power to rightsholders to both economically exploit the creative products of the body and to determine the presentation of the body. When the vesting of copyright interests cuts along racial lines, it risks propertizing reproductions of non-white bodies and placing them under white control, thereby facilitating a white gaze.

A powerful example comes from the history of the modern recording industry. What K.J. Greene has characterized as “the oral predicate of Black culture”¹⁰⁴ has, in the past, left many African-American artists without copyright law to protect their creative musical endeavors. Driven by rock ’n’ roll, the modern music industry saw much of its early success from the unauthorized exploitation of old blues riffs, many stolen directly from unacknowledged and uncompensated African-American folk artists.¹⁰⁵ And it was the authorship-as-fixation doctrine in copyright which gave legal blessing to this wholesale misappropriation.¹⁰⁶ The oral tradition in African-American folk and blues music and the improvisational nature of jazz ensured that a sizeable portion of the historical African-American musical legacy was not fixed

¹⁰² See FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 90 (2008).

¹⁰³ This reference to “body” includes the physical body as well as voices and other performances rendered through the body.

¹⁰⁴ K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 356–57 (1998).

¹⁰⁵ See SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 117–48 (2001) (tracing the appropriation of blues music by rock ’n’ roll artists over time); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL’Y & L. 365, 371–74 (2008); K. J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1193 (2008) (“The fleecing of Black artists was the basis of the success of the American music industry . . .”).

¹⁰⁶ See Greene, *Copyright, Culture & Black Music*, *supra* note 105, at 378 (“Perhaps the most taxing structural element of the copyright regime vis-a-vis Black artists has been the requirement of reducing works to a tangible form.”).

in a tangible medium and, therefore, did not enjoy copyright protection.¹⁰⁷ Thus, these works only earned copyright protection when they were fixed by the (usually white) owners of recording equipment who captured the works on early recording devices or re-recorded the works (or versions of them) with white artists.¹⁰⁸ And, with authorship-as-fixation to support them, these appropriators effectively seized the copyright interests to these musical works and reaped the benefits denied to the works' original creators. In short, copyright vested in the author who was defined as the fixer and fixation was not possible without access to vital capital resources, such as the recording and publishing equipment, which remained in the hands of almost exclusively white businessmen. Thus, just as share-cropping resulted in the "pervasive exploitation of agrarian Blacks, despite [its] theoretical race-neutrality,"¹⁰⁹ copyright law did the same with the creator class in the African-American community by rewarding ownership of capital resources and record keeping over artistry and creative activity.

While ostensibly neutral, the technicalities of our copyright regime exist in a "concrete social milieu"¹¹⁰ where "not all creators of intellectual property are similarly situated."¹¹¹ The privileging of certain modalities of creativity (those fixed in a tangible medium over those which are not) has broader consequences, including vesting powerful rights to control and exploit the body to an authorial class that is all too often not just male, but also white and privileged. In the process, the authorship-as-fixation regime has systematically devalued the creative contributions of individuals from minority racial groups and those from socioeconomically disadvantaged circumstances and has propertized the white gaze, giving it the power to control and exploit non-white bodies.

II. JOINT AUTHORSHIP AND THE MALE GAZE

As we have seen, the authorship-as-fixation doctrine has regularly impeded efforts by those in front of the camera (and non-fixers who provide meaningful contributions to copyright works) to earn recognition of a separate copyrightable interest in their creative efforts. Similarly, such individuals have also faced almost insurmountable challenges in making viable co-

¹⁰⁷ See Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1405 (1997) (arguing that copyright law "continues to cling needlessly to the fixation requirement, and does so to the detriment of whole classes of artists [including improvisational performers such as jazz musicians] and to the benefit of no one but the bootlegger.").

¹⁰⁸ See, e.g., Greene, *Copyright, Culture & Black Music*, *supra* note 104, at 368 (arguing that, regrettably, the defining characteristic of black cultural production in the United States has been "its one-way direction—white performers obtaining economic and artistic benefits at the expense of minority innovators.").

¹⁰⁹ *Id.* at 377.

¹¹⁰ *Id.* at 358–59.

¹¹¹ *Id.* at 343.

authorship claims in works that contain either their performances or other creative contributions. In this section of the Article, we detail how courts, driven by a romantic conception of authorship that attributes creative enterprise to a single “master mind,” have accomplished such a result through their adoption of a mutual-intent requirement for joint-authorship claims. Like the conflation of authorship and fixation, the mutual-intent requirement has served to further consolidate the power of those already with superior leverage, access to capital, and control over the tools of production. In the process, our extant joint-authorship regime has served the interests of the male gaze by granting agency only to certain types of authors employing certain modes of creation—much to the disadvantage of groups such as women and indigenous communities whose creative contributions have long gone underappreciated and under-recognized by the law.

A. *The Law's Quixotic Search for Authorial Singularity: The Mastermind, Joint Authorship, and Subordination Practices*

1. *The Origins of the “Master Mind” Concept*

To understand how the mutual-intent requirement came about and to analyze its consequences, it is first necessary to examine the origins of the “master mind” concept in copyright law and its influence on judicial construction of the rules of joint authorship. The term “master mind” entered the copyright lexicon with *Nottage v. Jackson*,¹¹² an English case decided just months before the United States Supreme Court's seminal decision in *Sarony*. In *Nottage*, the Court of Queen's Bench had its first major foray into the world of photographic copyrights, and the *Sarony* court would rely extensively on its holding in the matter.¹¹³ In fact, *Nottage* was the only case law cited in the *Sarony* opinion. As such, its impact on American copyright jurisprudence and the conception of authorship, in particular, is worth further examination.

Nottage was an infringement action brought by George Swan Nottage and Howard John Kennard, the owners of the London Stereoscopic and Photographic Company.¹¹⁴ Nottage and Kennard claimed that the defendants had unlawfully misappropriated their photograph of the Australian cricket team.¹¹⁵ The defendants demurred, arguing that Nottage and Kennard could not maintain the action since they were not the authors of the photograph in question.¹¹⁶ Unlike *Sarony*, the *Nottage* court did not ascertain the validity of

¹¹² *Nottage v. Jackson* [1883] 11 Q.B.D. 627 at 635 (Eng.).

¹¹³ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (“The question here presented is one of first impression under our Constitution, but an instructive case of the same class is that of *Nottage v. Jackson* . . .”).

¹¹⁴ *Nottage v. Jackson* [1883] 11 Q.B.D. 627 at 627, 633 (Eng.).

¹¹⁵ *Id.* at 628.

¹¹⁶ *Id.*

a statute which had extended copyright protection to photography.¹¹⁷ Instead, it determined who, as between two competing theories, would be the author of the cricket photograph: Nottage and Kennard, on one hand, or their employee-photographer (a certain Mr. Reynolds, whom Nottage and Kennard had sent at their behest to the Oval cricket-grounds in Kennington to take a portrait of the Australian national team), on the other.¹¹⁸ The court chose the latter option.¹¹⁹ And, in the process, all three members of the panel—Lord Justice Cotton, Lord Justice Bowen, and Justice Brett, the Master of the Rolls—undertook a similar approach to authorship by assigning the role to the individual who, among several choices, ultimately superintended the work's realization. Cotton formulated authorship as vesting in the “master mind” behind the work;¹²⁰ Bowen said the author is “the man, in fact, who . . . is most nearly the effective cause of the representation when completed”;¹²¹ and Brett proclaimed that the author is the person who “effectively is, as near as he can be, the cause of the picture which is produced.”¹²² By locating authorship in the “master mind,” or the person who most plausibly served as the but-for cause of the final work, all three justices seem to make an identical step in their reasoning: that authorship is usually, if not always, singular and the rights associated with authorship generally vest in a sole individual.¹²³ Bowen even expressly espoused this position, rationalizing that, since the statute used the singular term “author” and the term of protection was deemed to be the natural life of said author, the statute did not envision “the case of an author being more than one person.”¹²⁴ In short,

¹¹⁷ See generally *id.*

¹¹⁸ See *id.* at 629–30.

¹¹⁹ *Id.* at 638. Interestingly, the *Nottage* decision served to invalidate the concept of works-made-for-hire under UK copyright law for many years. See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 486–87 (1991) (noting how romantic Anglo-American notions of authorship, as epitomized by *Nottage*, cut against the recognition of a work-for-hire doctrine). This aspect of the *Nottage* holding was certainly not adopted in the United States, where works made for hire were, at a minimum, implicitly recognized by the Supreme Court in *Bleistein*. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903); see also I.T. Hardy, *An Economic Understanding of Copyright Law’s Work-Made-for-Hire Doctrine*, 12 COLUM.-VLA J. L. & ARTS 181, 181 & n.1 (1987) (noting that the work-made-for-hire doctrine was first codified in the United States with the Copyright Act of 1909, *id.* at 181, but that the *Bleistein* decision gave the doctrine its first Supreme Court recognition, *id.* at 181 n.1).

¹²⁰ *Nottage v. Jackson* [1883] 11 Q.B.D. 627 at 635 (Eng.) (Cotton LJ) (“In my opinion, ‘author’ involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.”).

¹²¹ *Nottage*, 11 Q.B.D. at 637 (Bowen LJ).

¹²² *Nottage*, 11 Q.B.D. at 632 (Brett MR).

¹²³ Interestingly, Bowen rejected the idea that the authorship could vest in a single corporate body as a work-made-for-hire. See *Nottage*, 11 Q.B.D. at 638 (Bowen LJ).

¹²⁴ *Id.* at 637–38. Bowen wrote, “[t]he person who drew this section evidently thought that in ninety-nine cases out of a hundred there would be only one author. The idea of there being two authors seems never to have presented itself to him; which shews that he took rather the notion I have formed in common with the rest of the Court as to

Nottage embraced a romantic vision of authorship that vests copyright in a lone creator.

Only months later, the Supreme Court adopted the single “master mind” notion wholesale. As such, *Sarony* formulates authorship in strictly unitary terms as “*he* to whom anything owes its origin; originator; maker; *one* who completes a work of science or literature.”¹²⁵ Epitomizing the romantic notion of the “solitary author[]” birthing original works “ex nihilo through their intellectual labors,”¹²⁶ *Sarony*’s foundational concept of the “master mind” pervades our jurisprudence and “lies at the normative heart of our vision of copyright.”¹²⁷

2. *The “Master Mind” Concept and the Development of the Mutual-Intent Requirement for Joint Authorship*

As we shall see, *Sarony*’s indiscriminate embrace of the “master mind” concept has played a central role in developing the reigning joint-authorship standard, which makes the possibility of co-authorship exceedingly difficult to achieve. Taking a step back, it is worth noting that federal courts have generally held that joint authorship cannot occur unless there is express intent on the part of *both* parties to perceive themselves as co-authors and to enter into a co-authorship relationship.¹²⁸ While this position has effectively become the law of the land, the relevant precedent and statutory authority hardly make such a reading of the requirements for joint authorship a foregone conclusion. Ironically, the very jurisprudence upon which we have based our quest for a “master mind” has long abandoned the fetishization of unitary authorship.¹²⁹ Among other things, copyright law in the United Kingdom does not require the mutual intent of both coauthors to support a finding

the definition of the term . . .” *Id.* at 637. Brett also struggled with the contention that two individuals could be deemed authors: “Can two people be the authors of a photograph? It is difficult to say, but, if they are, for whose life is it to last?” he asked. *Nottage*, 11 Q.B.D. at 631 (Brett MR).

¹²⁵ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (emphasis added).

¹²⁶ Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 188 (2008). See also Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 *EIGHTEENTH-CENTURY STUD.* 425, 427–30 (1984) (detailing the foundations of the romantic notion of author as a genius creating ex nihilo on copyright law).

¹²⁷ Bracha, *supra* note 126, at 188.

¹²⁸ See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000); *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991). See also Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 *EMORY L.J.* 193, 200 (2001) (arguing that courts have privileged intention over creative effort in formulating the joint authorship doctrine).

¹²⁹ See, e.g., *Fisher v. Brooker* [2009] UKHL 41, [80]-[81] (granting former Procol Harum organist Matthew Fisher a 40% interest in the copyright to *A Whiter Shade of Pale* based on his composition of organ parts for the song).

of a joint authorship,¹³⁰ making courts in the United Kingdom far more receptive to claims of joint authorship than American courts.¹³¹ Moreover, it is not as if the mutual intent to coauthor is explicitly required by our own Copyright Act. While the definition of “joint work” in Title 17 of the United States Code invokes some sort of intent requirement (i.e., that the work is prepared “with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”¹³²), the statutory reference to intent could be read and interpreted in a variety of different ways.¹³³ It could constitute a process-bound conception, achieved through an intent to merge one’s individual contributions; it could constitute an ends-based perception, achieved through the desire to conceive of oneself as a coauthor; or it could constitute a legal understanding, achieved through a design to enter into a co-authorship relationship.¹³⁴

¹³⁰ See Copyright Act 1956, 4 & 5 Eliz. 2, c. 74, § 11(3) (U.K.) (defining a “work of joint authorship” as “a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors.”). See also *Beckingham v. Hodgens* [2002] EWCA 143, [49] (Eng.) (expressly rejecting the view that the United Kingdom’s Copyright Act of 1956 “requires, as one of the elements of joint authorship, the existence of a common intention as to joint authorship.”).

¹³¹ See David M. Liston, *Songwriter, Side Musician, or Sucker?: The Challenge of Distinguishing Composers from Contributors Under U.S. Copyright Law and the Lessons of a Famous British Case*, 65 RUTGERS L. REV. 891, 911 (2013) (“It must be emphasized that United Kingdom copyright law . . . does not require mutual intent on the part of the alleged coauthors in order to find a work of joint authorship.”).

¹³² See 17 U.S.C. § 101.

¹³³ See, e.g., Shyamkrishna Balganes, *Unplanned Coauthorship*, 100 VA. L. REV. 1683, 1699–1700 (2014) (“While intention certainly entailed a scrutiny of the parties’ state of mind—either subjective or objective—the legislative history was silent on the question of what the intention needed to be directed at to meet the definition’s requirement. Was it sufficient if the parties evinced an intention to collaborate in the production of the work? Or did they need to additionally carry an intention to become coauthors as a legal matter, by producing a work of joint authorship and recognizing its consequences? Not surprisingly, courts have struggled to answer these questions—despite their continuing emphasis on the idea of intention.”).

¹³⁴ *Id.* In addition, intent could be read in either subjective or objective terms. On this issue, courts split. The Ninth Circuit has adopted a purely objective intent standard, see *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (“[P]utative coauthors make objective manifestations of a shared intent to be coauthors, as by denoting the authorship of *The Pirates of Penzance* as ‘Gilbert and Sullivan.’ . . . [W]here the mutual intent to be determined by subjective intent, it could become an instrument of fraud . . .”). However, the Second Circuit has adopted a more mixed standard that gives heavy consideration to subjective intent, see *Childress v. Taylor*, 945 F.2d 500, 507–08 (2d Cir. 1991) (holding that all participants must view themselves as joint authors); *Thomson v. Larson*, 147 F.3d 195, 201 (2d Cir. 1998) (“[C]o-authorship intent does not turn solely on the parties’ own words or professed state of mind.”), as has the Seventh Circuit, see *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068–69 (7th Cir. 1994). Some observers have argued that both the legislative history of the 1976 Copyright Act and the “common design” jurisprudence that preceded it suggest that courts should be properly using an objective, rather than subjective, standard when evaluating joint authorship claims. See, e.g., Therese M. Brady, *Manifest Intent and Copyrightability: The Destiny of Joint Authorship*, 17 FORDHAM URB. L. J. 257, 257–58 (1989) (noting that, among other things, “predicating these property rights on state of mind, when actions manifest the opposite, deprives authors of constitutional rights.”).

As a powerful barrier to otherwise viable joint-authorship claims, the intent requirement flows from romantic ideations of the author-as-mastermind.¹³⁵ With its uncritical embrace of a mastermind-driven, rather than collaborative, narrative about the creative process, “the Romantic view of authorship seems to pervade the operation of copyright’s joint authorship doctrine.”¹³⁶ The Ninth Circuit has expressly manifested its discomfort with the possibility of multiple authorship. In its leading case on joint authorship, *Aalmuhammed v. Lee*, the court invokes the romantic conception of the individual author creating ex nihilo by informing us, without any support, that “[t]he word ‘author’ is taken from the traditional activity of one person sitting at a desk with a pen and writing something for publication.”¹³⁷ The court then summarily concludes that, while it is “relatively easy to apply the word ‘author’ to a novel [or even to the work of] two people who work together in a fairly traditional pen-and-ink way, like, perhaps, Gilbert and Sullivan. . . [,] as the number of contributors grows and the work itself becomes less the product of one or two individuals who create it without much help, the word is harder to apply.”¹³⁸

The Second Circuit fares no better in succumbing to romantic ideations of the mastermind. In fact, it has explicitly justified its reading of the intent requirement as necessary to protect “master minds” from hangers-on or lesser talents swooping in and receiving authorship credit. In *Childress v. Taylor*—its leading case on the joint authorship doctrine—the Second Circuit held that the requirement of intent is particularly important when “one person . . . is indisputably the dominant author of the work and the only issue is whether that person is the sole author or she and another . . . are joint authors.”¹³⁹ Therefore, we are told, “care must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person render[s] some form of assistance.”¹⁴⁰ Notably, the

¹³⁵ The romantic view of authorship conceptualizes authors as solitary geniuses whose mythic individual efforts result in the creation of original works ex nihilo. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51–60 (1997). As various commentators have noted, the idea of the “master mind” is a key concept in the romantic conception of authorship. See James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 Am. U.L. Rev. 625, 629 (1988); Peter Jaszi, *supra* note 119, at 455–63.

¹³⁶ Roberta Rosenthal Kwall, *Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 44–45 (2001).

¹³⁷ *Aalmuhammed*, 202 F.3d at 1232.

¹³⁸ *Id.*

¹³⁹ *Childress v. Taylor*, 945 F.2d 500, 508–09 (2d Cir. 1991).

¹⁴⁰ *Id.* at 504. In part, such a tack might be influenced by the presumed alternative: that recognition of joint authorship would necessarily grant the non-dominant author a 50% share in the work, including all profits generated therefrom. See, e.g., Thomson v. Larson, 147 F.3d 195, 201 (2d Cir. 1998) (“[S]ince coauthors are afforded equal rights in the co-authored work, the ‘equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint author.’”) (citing *Childress*, 945 F.2d at 509). As Mary LaFrance notes, many courts incorrectly presume that coauthorship creates a duty to split profits evenly amongst coauthors. See LaFrance, *supra* note 128, at 194; see also 1–6 NIMMER ON COPYRIGHT § 6.08 (2016) (“In the absence of agreement to

Second Circuit's invocation of the concept of a "dominant author" is entirely novel. As Mary LaFrance points out, the idea of a dominant author "does not appear anywhere in the 1976 Act or its legislative history" and is even "inconsistent with both,"¹⁴¹ though it certainly reflects the mastermind/romantic view of authorship. Moreover, the court provides us no real reason why sophisticated dominant authors—those who are more visible and credited—would need such a munificent and protective intervention from the state when they are already blessed with superior bargaining power.¹⁴² However, the mastermind rubric of authorship jurisprudence tilts courts towards rejecting claims that fracture copyright ownership.¹⁴³ In the process, instead of rewarding originality and artistic innovation by vesting rights in the creative forces behind a work, courts have chosen to vest rights in those with the greatest bargaining power.

B. *The Deployment of Mutual Intent in the Joint Authorship Doctrine*

The reluctance to recognize coauthorship contradicts the realities of the artistic process and the multiplicity of creative contributions to works protected under the Copyright Act. By fetishizing the search for a mastermind through the adoption of the intent requirement, courts have mutated authorship from a concept serving creative utilitarianism to one subservient to existing power relations. Such a move deserves particular scrutiny. Peter Jaszi, for one, has criticized the "tendency to mythologize 'authorship,'" and the resulting failure "to recognize the foundational concept for what it is—a culturally, politically, economically, and socially constructed category rather than a real or natural one."¹⁴⁴ He therefore calls for a more critical inquiry into how the concept of authorship is "deployed."¹⁴⁵ Jaszi implicates the concept's service of broader interests through his careful use of the word "deploy" to reference the problematization of authorship in our jurispru-

the contrary, the traditional approach has been that all joint authors share equally in the ownership of the joint author . . . even when it is clear that their respective contributions to the joint work are not equal." But such a result is not at all dictated by law. A 50-50 split is a presumption, at best; courts are, in fact, free to allocate coauthorship shares along different lines if it comports with the parties' intention or better reflects the "relative proportion [of] their individual [creative] contributions" to the final work. See 1-6 NIMMER ON COPYRIGHT § 6.08 (2016); see also 17 U.S.C. § 201(a) (dictating no particular allocation of shares for co-authors).

¹⁴¹ LaFrance, *supra* note 128, at 223-24.

¹⁴² After all, dominant authors can easily contract away such a problem *ex ante* (and, potentially, even *ex post*) by using their leverage to have weaker parties sign work made-for-hire agreements and/or assignments of any conceivable copyright interest they might possess. See Schulman Statement, *supra* note 7.

¹⁴³ See Brief for Professors Shyam Balganeshrishna et al. as Amici Curiae in Support of Neither Party at 13, *Garcia v. Google, Inc.*, 786 F.3d 733 (2015) (No. 12-57302) ("The master-mind concept narrows the range of joint authors down to one or a few individuals for administrative convenience or to avoid unjustified windfalls, not out of fidelity to legislative intent.").

¹⁴⁴ Jaszi, *supra* note 123, at 459.

¹⁴⁵ See *id.* at 456.

dence.¹⁴⁶ In the process of defining joint authorship, courts have imputed an intent requirement that threatens to give dominant collaborators “the power to unilaterally ‘will away’ joint work status by forming the subjective intent to deny joint authorship to other collaborators.”¹⁴⁷ Entities and individuals with superior bargaining power will typically preempt the possibility of such coauthorship claims via contractual means, by having weaker parties sign work-made-for-hire agreements or assignments.¹⁴⁸ But, even when “dominant” authors (often negligently) fail to take such steps, courts have protected them from a loss of full control over collaborative works with the narrow reading of the joint authorship doctrine, which allows them to deny the possibility of joint authorship by relying on their intent to take full credit for the work.¹⁴⁹ In short, the intent standard adopted by courts has assured that joint authorship is an unlikely outcome in authorship disputes.

The elevation of bargaining power over creative contributions in the authorial calculus also dramatically disadvantages traditionally disenfranchised communities and individuals. Creators from underprivileged backgrounds are therefore caught in joint authorship’s double-bind. In the first instance, they have limited bargaining power and as a result, through the contracting practices of their more sophisticated collaborators/partners, they often waive and/or assign their rights away for limited consideration. But even if they should somehow avoid such a fate, their joint authorship claims can be swept aside—despite the scope of their creative contributions—based on the very fact that they do not enjoy bargaining power in the first place.¹⁵⁰ For example, low bargaining power will often result in artists receiving no crediting as authors, despite substantial creative contributions to a project. The absence of crediting will then, in turn, be read by a court as an “objective manifestation” preventing the recognition of joint authorship.¹⁵¹

¹⁴⁶ See *id.*

¹⁴⁷ LaFrance, *supra* note 128, at 224. The Ninth Circuit has acknowledged this problem and clarified that the intent requirement should be read objectively, rather than subjectively. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (“We say objective manifestations because, were the mutual intent to be determined by subjective intent, it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work.”).

¹⁴⁸ See Schulman Statement, *supra* note 7.

¹⁴⁹ See, for example, *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998), where the plaintiff’s independently copyrightable contributions were merged into the final version of the play *Rent* but the joint authorship claim was defeated because, among other things, the defendant/credited-author billed himself as a sole author and intended to retain sole discretion over the final version of the play. See *Thomson v. Larson*, 147 F.3d 195, 203–05 (2d Cir. 1998).

¹⁵⁰ The law already grants broad powers to those with superior bargaining power; there appears to be no need to concoct a joint-authorship test that doubles the impact of such power disparities, especially when those with greater leverage fail to secure appropriate rights when they have a chance. See Schulman Statement, *supra* note 7.

¹⁵¹ *Aalmuhammed*, 202 F.3d at 1234 (noting that “putative coauthors make objective manifestations of a shared intent to be coauthors, as by denoting the authorship of *The Pirates of Penzance* as ‘Gilbert and Sullivan.’”).

To illustrate the grave problems inherent to the courts' approach to mutual intent, consider their inquiry into crediting practices, which they have deemed a "significant" part of the mutual-intent determination.¹⁵² Crediting practices are notoriously disconnected from the realities of creative production,¹⁵³ and the risks of placing significant weight on such practices should be obvious to any student of history. For instance, when viewed through the prism of gender, crediting has a particularly undistinguished track record. The systematic undervaluing and under-recognition of female contributions in the sciences, for example, even has its own term: the Matilda effect.¹⁵⁴ Unsurprisingly, the phenomenon is no less prevalent in the world of arts and letters. To provide a few illustrations, Margaret Keane was the actual painter of the "big-eyed waifs" long credited to her husband, Walter;¹⁵⁵ Elizabeth Magie created the game of *Monopoly*, not Charles Darrow;¹⁵⁶ and although attributed to Marcel Duchamp, *Fountain*—the infamous urinal that rocked the art world at the 1913 Armory show—was likely the work of Elsa von Freytag-Loringhoven.¹⁵⁷ In short, crediting is often about who has the leverage (and, in the cases of some swindlers, the gall) to claim authorship, not who really created a work.

As the problematic reliance on formal crediting reveals, the mutual-intent requirement has transformed joint-authorship queries into a referendum on the relative leverage of the competing parties and their willingness

¹⁵² *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991); *Thomson*, 147 F.3d at 203. With the *Aalmuhammed* decision, the Ninth Circuit expressly elevated "control" as the most important determining factor in a joint authorship determination. *Aalmuhammed*, 202 F.3d at 1234. Yet, as Shyamkrishna Balganes, Justin Hughes, Peter Menell, and David Nimmer have argued, "[t]he fact that some members of the creative enterprise have more power or control than others does not categorically exclude less powerful creative collaborators from joint authorship." See Brief of Amici Curiae Professors Shyamkrishna Balganes et al., *supra* note 143, at 17.

¹⁵³ See, e.g., Kwall, *supra* note 136, at 52 n.238 (quoting Lynn Thomson, *The Rewards of Collaboration, Parabasis*, J.A.S.K. THEATER PROJECTS, at 12 (Spring 1997) (Thomson, in describing her litigation experience over her claims to joint authorship of *Rent*, writes that "[t]he primary experience of the lawsuit, especially in the Second Circuit and with the strangeness of the *Childress* decision, was that the law—or perhaps, the interpretation and application of the law—was remote from the truth of what happened to me, remote from the truth of how, in fact, art is actually made at the end of the century. What happens 'in the room' and what is protected in the law are so unconnected.")).

¹⁵⁴ Historian Margaret Rossiter coined this phrase as a reference to the systematic undervaluing and lack of crediting to women in the sciences. See Margaret W. Rossiter, *The Matthew Matilda Effect in Science*, 23 SOC. STUD. OF SCI. 325, 325–26 (1993).

¹⁵⁵ See *Keane v. Keane*, No. 87-1741, 1990 WL 2874, at *2–4 (9th Cir. Jan. 18, 1990).

¹⁵⁶ Mary Pilon, *Monopoly's Inventor: The Progressive Who Didn't Pass 'Go'*, N.Y. TIMES (Feb. 13, 2015), https://www.nytimes.com/2015/02/15/business/behind-monopoly-an-inventor-who-didnt-pass-go.html?_r=0 [<https://perma.cc/2RBV-EXBH>].

¹⁵⁷ WILLIAM A. CAMFIELD, MARCEL DUCHAMP, FOUNTAIN 72 (1989); Julian Spalding, *How Duchamp Stole the Urinal*, SCOT. REV. OF BOOKS (Nov. 4, 2014), <https://www.scottishreviewofbooks.org/2014/11/how-duchamp-stole-the-urinal/> [<https://perma.cc/UM2K-QC9A>] (citing an April 11, 1917 letter, not made public until 1983, wherein Duchamp admits that *Fountain* was the work of "one of my female friends," thereby contradicting future claims he made to sole authorship of the work).

to use it. As Bobbi Kwall has argued, "By virtue of its inevitable operation, this standard will always result in privileging the narrative of the dominant author over the nondominant author. Indeed, under a subjective standard focusing on what the parties said and thought, the dominant author or his representatives (as was the case in *Thomson*), will always dispute the intent of co-authorship."¹⁵⁸ Not only does such a vision of joint authorship disincentivize and fail to recognize modalities of creation that are more collaborative in nature, it also disproportionately burdens groups of people who may be more likely to engage in such collaborative activities.¹⁵⁹

C. Joint Authorship, Gender, and the Dispute Over *Rent*

The authorship dispute over the celebrated musical *Rent* illustrates this dynamic in action. In 1995, at the behest of the New York Theatre Workshop, which saw promise in his initial script, Jonathan Larson agreed to work with dramatist Lynn Thomson to prepare *Rent* for a hopeful Broadway stint.¹⁶⁰ Although Thomson was paid by the NYTW for her work and received an official billing credit as "Dramaturg," the relevant contracts related to this collaboration were notably silent on the issue of authorship or ownership of copyright interests.¹⁶¹ Larson died tragically just hours after the final dress rehearsal for the musical and the show premiered on Broadway shortly thereafter to universal acclaim.¹⁶² When Thomson's subsequent efforts to reach a deal regarding profit participation and final crediting with the Larson heirs broke down, Thomson brought suit claiming co-author status based on her creative contributions to the final version of *Rent* and seeking 16% of the author's share of the royalties to the work.¹⁶³

Thomson's claim to joint authorship was resoundingly rejected, both before a trial court and on appeal. While the Second Circuit ultimately agreed that Thomson may have made "major" contributions to *Rent*, including verbatim drafting of "significant language" in the work, the court deemed these facts irrelevant since Larson did not share in Thomson's desire to be co-authors.¹⁶⁴ Citing the vesting of ultimate decision-making authority in Larson, Larson's formal billing as the sole "author," and his reference to himself as a sole author in third-party agreements, the court found Larson

¹⁵⁸ Kwall, *supra* note 136, at 55.

¹⁵⁹ As Kwall contends, women and foreign born individuals are particularly disadvantaged under such situations. *Id.* at 54 n.249 ("[T]o the extent nondominant authors are women or foreign born individuals, the bargaining power may be further eroded.").

¹⁶⁰ See *Thomson v. Larson*, 147 F.3d 195, 197 (2d. Cir. 1998).

¹⁶¹ *Id.*

¹⁶² *Id.* at 198.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 202.

lacking such mutual intent.¹⁶⁵ Since Larson did not regard himself as a co-author, the court concluded he could not have been one.¹⁶⁶

In sweeping aside the relevance of Thomson's creative contributions and almost exclusively emphasizing the relative bargaining power of the parties, the *Thomson* court concocts a vision of joint authorship that "privileges the narrative of the dominant author by effectively ignoring the narrative of collaborative creation."¹⁶⁷ The potential gender-related implications of such a turn are troubling. As Ann Bartow notes, "male writers, male singers, male visual artists, male actors, male directors, male producers, male composers, male architects, and male authors of almost any form of copyrightable work dominate the cultural terrain and thereby acquire and control a substantial majority of the financial resources that creative works accrue."¹⁶⁸ To confirm this point, she suggests looking at any list featuring the most recognized or highest-paid individuals in various creative fields: invariably, they are disproportionately male.¹⁶⁹ With that in mind, given long-extant disparities in artistic recognition, any legal test that rests on bargaining power within the authorial class is, in the aggregate, inevitably going to favor males over females.

All the while, social imposition of behavioral norms may diminish the opportunity for women to receive authorial credit under the intent standard. For example, Bartow argues that women may feel pressure to avoid being labeled greedy or selfish if "they violate perceived gender-linked social norms of sharing, caring, and selfless collaboration because they seek to procure . . . authorship rights and attributive credit."¹⁷⁰ As Virginia Woolf once posited, "I would venture to guess that Anon, who wrote so many poems without signing them, is often a woman."¹⁷¹ In addition, there may also exist gender differences in typical modalities of creative production.¹⁷² Recent neuroscience and psychology literature has suggested the possibility. As Anna Abraham has noted, "gender differences in cognition and behavior may not necessarily be instantiated in actual behavioral outcomes, but may instead be observed in terms of employed strategy differences when performing a task."¹⁷³ Thus, there is "intriguing evidence that men and women

¹⁶⁵ *Id.* at 205.

¹⁶⁶ *Id.*

¹⁶⁷ Kwall, *supra* note 136, at 44–45.

¹⁶⁸ Bartow, *supra* note 18, at 552.

¹⁶⁹ *See id.* at 552 n.1.

¹⁷⁰ Bartow, *supra* note 18, at 578.

¹⁷¹ VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 51 (1929).

¹⁷² There is good reason to think that such differences may be culturally produced, rather than inherent, particularly in societies that reward collaborative activities by women while prizing male autonomy and independence. *See infra*, notes 173–76.

¹⁷³ Anna Abraham, *Gender and Creativity: An Overview of Psychological and Neuroscientific Literature*, 10 *BRAIN IMAGING AND BEHAV.* 609, 614 (2016).

enact their creativity in potentially disparate ways,¹⁷⁴ including collaborative processes that may reflect the greater role of social relationships in female, rather than male, creativity.¹⁷⁵ In fact, studies on the role of gender in team performance have strongly suggested heightened collaborative activities with the presence of women.¹⁷⁶

Lynn Thomson seems to capture these phenomena—the existence of potential gender differences in the norms surrounding creative production and in approaches to creative production—in describing her work with Larson: “I am often asked why I had no contract. The short answer is that I didn’t know Jonathan Larson was going to die. I trusted his decency and I still do. We discussed our relationship and his obligations and beyond that I made no efforts to draw attention to my contributions. I knew that was what I was supposed to do, focus on our work and give over to the larger good.”¹⁷⁷ Her words reflect her conscientious adherence (whether gender-based or not) to the “gender-linked social norms of sharing, caring, and selfless collaboration”¹⁷⁸ described by Bartow. Moreover, Thomson contextualizes her act of creation in communal, rather than individualistic, terms—a viewpoint reflected in the themes of her work itself. “I believed in the precepts of collaboration and community, and had faith that my community would stand by me as I stood by it. Out of that faith came many of my contributions to *Rent*—a play which is about community,”¹⁷⁹ she writes. There is, of course, deep irony in this reference to community. After all, *Rent* is a play about individuals in marginalized and disempowered communities. Whether or not she belonged to such a community before her work on *Rent*, the end result of Thomson’s quest for joint authorship led to her legal disenfranchisement from control of, and economic participation in, the intellectual property of the musical.¹⁸⁰

¹⁷⁴ Mark A. Runco et al., *Gender and Creativity*, in HANDBOOK OF GENDER RESEARCH IN PSYCHOLOGY, VOLUME 1: GENDER RESEARCH IN GENERAL AND EXPERIMENTAL PSYCHOLOGY 344, 351 (Joan C. Chrisler & Donald R. McCreary eds., 2015).

¹⁷⁵ See Sandra W. Russ, *Gender Differences in Primary Process Thinking and Creativity*, in THE PSYCHODYNAMICS OF GENDER AND GENDER ROLE 70–73 (Robert F. Bornstein & Joseph M. Masling eds., 2002).

¹⁷⁶ See Julia B. Bear & Anita Williams Woolley, *The Role of Gender in Team Collaboration and Performance*, 36 INTERDISCIPLINARY SCIENCE REVIEWS 146, 148 (2011).

¹⁷⁷ Kwall, *supra* note 136, at 54 (quoting Lynn Thomson, . . . *And an Artist Is an Artist Is an Artist*, AM. THEATRE, Sept. 1998, at 8).

¹⁷⁸ Bartow, *supra* note 18, at 578.

¹⁷⁹ Kwall, *supra* note 136, at 54 (quoting Lynn Thomson, . . . *And an Artist Is an Artist Is an Artist*, AM. THEATRE, Sept. 1998, at 8).

¹⁸⁰ See Kwall, *supra* note 136, at 54 (quoting Lynn Thomson, *To My Colleagues*, LITERARY MANAGERS & DRAMATURGS AM. REV., Aug. 6, 1997, at 4 (quoting the trial judge in *Thomson v. Larson* as saying that “[i]t seems equally clear that we wouldn’t be here if [Jonathan Larson] were alive because [Lynn Thomson’s] name might well be credited on the title page and an economic arrangement arguably more equitable would have been reached”)).

D. *Mutual Intent, Performers, and the Male Gaze*

The mutual-intent regime's impact also extends beyond gender lines. Indigenous communities and performers may be similarly disadvantaged under the standard. As Nzingha Hooker has argued, the mutual-intent requirement for joint authorship has enabled the law to "remain blind to collaborative authors commonly found in indigenous societies."¹⁸¹ By viewing "the community or society as the possessors of ideas, information, and knowledge," non-Western modalities of creation often eschew notions of a dominant author, or even an author at all.¹⁸² Since they often constitute the product of an entire cultural or ethnic group, communal enterprises such as folklore lack a clear author or set of authors. As such, many works of cultural patrimony struggle to gain protection under Western copyright regimes beholden to the mastermind conception of authorship.¹⁸³

In addition, the inherently collaborative work of performers also receives little legal respect under the mutual-intent doctrine. Since performers are rarely the "dominant" creator or the mastermind, they will typically be precluded from making viable claims of joint authorship. After all, without ownership and control over the tools of production, they almost certainly lack the bargaining power to generate the requisite intent to co-author with those who do hold ownership and wield control. Just as the conflation of

¹⁸¹ Nzingha Hooker, *Something More Than Intent: Redefining Joint Authorship to Include America's Native Communities*, 41 AIPLA Q.J. 771, 795 (2013).

¹⁸² LAUREN R. LENHART, *NORMATIVE NOTIONS OF AUTHORSHIP AND PARTICIPATION IN THE SOCIETY* (2009), https://www.ideals.illinois.edu/bitstream/handle/2142/15228/Notions_of_Authorship1.pdf [<https://perma.cc/8AM8-8B8Z>]. As an Australian court considering protection for aboriginal art noted, "[t]he right to create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well recognised totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually that right will not be with only one person, but with a group of people . . ." *Milpurrru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240, 245 (Austl.).

¹⁸³ See, e.g., SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 313 (1987) (noting that it is unlikely that copyright protection extends under the Berne regime to works of folklore that are authored by the community); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 30-31 (1997) (noting that, among other challenges to the protection of folklore under the United States Copyright Act and the copyright laws of other nations is the fact that "most artwork is actually executed by a group. The making of art in the indigenous community is not the lonely, secluded, individual process idealized in the west, but instead a group process in which many people participate at various levels. . . . This custom poses a problem for copyright law since copyright law vests the rights in the one who executes the work."); Michael Newcity, *Protecting the Traditional Knowledge and Cultural Expressions of Russia's "Numerically-Small" Indigenous Peoples: What Has Been Done, What Remains to Be Done*, 15 TEX. WESLEYAN L. REV. 357, 397 (2009) ("The justification for the exclusion of folklore from the list of works eligible for protection is simply that, though they would satisfy other criteria—e.g., creativity—these works are not created by a single author or group of coauthors, but are created by an entire ethnic group on the basis of its myths, legends, and beliefs."); see generally MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (2003) (exploring the difficulties faced by indigenous communities in defending their cultural creations).

authorship with fixation has frequently foreclosed actors from asserting copyright interests in their performances, the mutual-intent requirement has foreclosed the possibility of joint authorship claims. The result is a powerful one-two punch against the possibility of performer rights.

Thus, in the examples discussed in the earlier section on authorship-as-fixation, litigants such as Cindy Lee Garcia, Erin Andrews, Hulk Hogan, the Fosters, and victims of revenge porn would be unlikely to enjoy colorable joint-authorship claims based on the contribution of their performances to copyrighted works fixed in a tangible medium.¹⁸⁴ As a result, not only does the authorship-as-fixation doctrine occlude their ability to receive a separate copyright interest in their performances, they also have trouble earning co-author status that would at least enable them to participate economically in the exploitation of works featuring their performances.¹⁸⁵ By depriving performers of the possibility of co-authorship, the mutual-intent requirement further ossifies the power of those in front of the camera to control and profit from copyrighted works that employ the male gaze and scrutinize female and non-white bodies.

III. FROM BULL TO BULLY: THE AUTHOR AS AUTHORITY AND THE MALE GAZE

So far, our examination of the authorship regime has examined the concept of authorship at the moment of creation—both through the fetishization of fixation in determining copyright interests in cases of sole authorship and in vetting the intentions of competing authorial parties in developing the contours of joint authorship. But the assignation of authorship also impacts how credit (and therefore rights) are allocated to future expressive enterprises. In the process, copyright's authorship rules and the related derivative rights doctrine play a powerful role in privileging patriarchal narratives and propertizing the male gaze. The legal and ontological battle between Wall Street's *Charging Bull* and *Fearless Girl* statues provides an instructive example of this process in action.

¹⁸⁴ It is worth noting that Cindy Lee Garcia “unequivocally disclaim[ed] joint authorship of the film” as part of her litigation against Google. *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015) (en banc). Garcia likely elected this position for strategic reasons as joint authorship would not have achieved her chief goal: enjoining exploitation of the work by her putative co-author. See *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 522 (9th Cir. 1990) (noting that copyright law allows each co-author to exploit a work so long as they account for profits to other co-authors). However, even if her goal had been non-injunctive, any joint authorship claim she would have advanced would have been dead on arrival: it was indisputable that the “dominant” author—the director of the work—had no intent to be a co-author with her.

¹⁸⁵ See, e.g., *id.*

A. *Charging Bull's Unwelcome Visitor*

In the spring of 2017, the placement of a new statue in the heart of Manhattan's Financial District provoked a firestorm of controversy. The work, named *Fearless Girl* and cast in bronze, depicts a young Latin female standing proud and confident, with her pony tail and dress swishing in the wind and arms against her hips, a look of calm defiance on her face as she gazes assuredly ahead. By itself, the statue is certainly provocative. But, placed in context, it becomes something extraordinary. As it turns out, *Fearless Girl* was never intended as a stand-alone project; rather, it was meant to be placed in front of *Charging Bull*, Arturo Di Modica's iconic sculpture which has famously occupied the northern corner of Bowling Green since 1989.¹⁸⁶ *Fearless Girl's* very existence is dependent on, and related to, *Charging Bull*. Thus, to understand the debate surrounding the works, the history of both statues bears closer examination.

In 1987, Arturo Di Modica endeavored to make an artistic statement that would reverse the pall cast over the mood of his adopted hometown of New York in the wake of the stock market crash.¹⁸⁷ So he spent two years and dedicated \$320,000 of his own money¹⁸⁸ to cast a 3.5 ton, 16-foot-long bronze statue of a bull, nostrils flared, tail whipped, in graceful but ferocious balance. When he completed his project, he presented it as a Yuletide gift to the city by unceremoniously dropping the statue at the busy intersection of Wall and Broad Streets under cover of night on December 15, 1989.¹⁸⁹

Since Di Modica never bothered to permit the project and the statue badly obstructed traffic, his gesture did not initially receive the welcome he had expected. Not surprisingly, therefore, the New York Police Department and New York Stock Exchange removed the bull the very next day after it arrived.¹⁹⁰ But Di Modica's stunt garnered headlines and, more importantly, his work resonated with the public. As a result, the Bull returned to public view two weeks later when the Parks Commissioner elected to place the statue in Bowling Green, where it remains to this day.¹⁹¹

Until recently, the Bull enjoyed that prized position in the center of the Financial District all to itself. But its monopoly ended on March 7, 2017,

¹⁸⁶ Associated Press, *Wall St.'s Bronze Bull Moves 2 Blocks South*, N.Y. TIMES (Dec. 20, 1989), <http://www.nytimes.com/1989/12/20/nyregion/wall-st-s-bronze-bull-moves-2-blocks-south.html> [https://perma.cc/DWD6-7K2C].

¹⁸⁷ Robert D. McFadden, *SoHo Gift to Wall St.: A 3 1/2-Ton Bronze Bull*, N.Y. TIMES (Dec. 16, 1989), <http://www.nytimes.com/1989/12/16/nyregion/soho-gift-to-wall-st-a-3-1-2-ton-bronze-bull.html> [https://perma.cc/BRL6-PZ47].

¹⁸⁸ Bruce Lambert, *Neighborhood Report: Lower Manhattan; A Campaign to Save a Bull*, N.Y. TIMES (Oct. 3, 1993), <http://www.nytimes.com/1993/10/03/nyregion/neighborhood-report-lower-manhattan-a-campaign-to-save-a-bull.html> [https://perma.cc/SEJ6-8RZL].

¹⁸⁹ McFadden, *supra* note 187.

¹⁹⁰ *Id.*

¹⁹¹ Lambert, *supra* note 188.

when the Bull received a pint-sized visitor.¹⁹² Measuring just four feet, two inches in height, *Fearless Girl* was the brainchild of State Street Global Advisors (SSgA).¹⁹³ As part of a (now very successful)¹⁹⁴ marketing ploy, SSgA commissioned artist Kristen Visbal to create the statue to serve as a commercial tie-in with the firm's celebration of International Women's Day, which featured the launch of SSgA's SHE index fund as part of a campaign to increase female representation on corporate boards.¹⁹⁵

The commercial motivation for *Fearless Girl* is undeniable. The plaque beneath the actual Girl reads, "[k]now the power of women in leadership. SHE makes a difference," in a direct reference to State Street's new index fund.¹⁹⁶ But these facts do not mean that the statue is a commercial work, particularly for First Amendment purposes, which the Supreme Court has defined as something that *solely* effectuates a commercial purpose.¹⁹⁷ Indeed, *Fearless Girl* has transcended its commercial origins and struck a powerful chord with the public. U.S. House Representative Carolyn Maloney captured the response to the work when she noted that "[t]his statue has touched hearts across the world with its symbolism of the resiliency of women."¹⁹⁸ As a result, although she was originally permitted for just one week, *Fearless Girl* has had her run before the Bull extended at least through February 2018.¹⁹⁹

Fearless Girl's success has not pleased everyone, however. The work has caused particular consternation for Arturo Di Modica, who has argued that the statue's positioning in the immediate eye-line of his growling, menacing beast has fundamentally altered his work and subverted his artistic

¹⁹² See Bethany McLean, *The Backstory Behind That 'Fearless Girl' Statue on Wall Street*, THE ATLANTIC (Mar. 13, 2017) <https://www.theatlantic.com/business/archive/2017/03/fearless-girl-wall-street/519393/> [<https://perma.cc/N45F-9V7F>].

¹⁹³ See Jen Wiczner, *Why the Fearless Girl Statue's Controversial 'SHE' Plaque Was Removed*, FORTUNE (Apr. 17, 2017), <http://fortune.com/2017/04/17/fearless-girl-statue-nyc-plaque-she-nasdaq/> [<https://perma.cc/LWH3-6JKL>].

¹⁹⁴ In terms of publicity, SSgA is certainly getting more attention than it could have hoped for, even if the price tag for its advertising ultimately comes with significant legal fees (and a potential judgment down the road).

¹⁹⁵ See McLean, *supra* note 192; Wiczner, *supra* note 193.

¹⁹⁶ Wiczner, *supra* note 193. Notably, SSgA removed the plaque on April 2, 2017. See *id.* Even though they claim the move had nothing to do with the legal controversy, see *id.*, it is fair to speculate that they may have done so to de-emphasize the commercialism of the work in order to lower the possibility of legal liability.

¹⁹⁷ See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (defining commercial speech as speech that does "no more than propose a commercial transaction"). But see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64–67 (1983) (rejecting a *per se* test to determine what constitutes commercial speech).

¹⁹⁸ Roisin O'Connor, *'Fearless Girl' Statue Facing Down Charging Bull of Wall Street in New York to Stay Until 2018*, THE INDEPENDENT (Mar. 27, 2017), <http://www.independent.co.uk/arts-entertainment/art/news/fearless-girl-charging-bull-wall-street-new-york-boradway-2018-bronze-statue-stand-up-a7651471.html> [<https://perma.cc/F6ZL-5NML>].

¹⁹⁹ *Id.*

vision. While the Bull was once a “symbol of prosperity and for strength”²⁰⁰ and an awakener of the “animal spirits”²⁰¹ of the market, it now appears to be a pusillanimous oppressor, threatening a diminutive girl. In short, the Bull has become a *bully*.

To counter this unwelcome recasting of his work’s semiotics, Di Modica took a multi-faceted approach in the fight against *Fearless Girl* and appealed to the public, politicians, and the law. He worked public opinion by holding a press conference to raise awareness over his grievance and garner support for his cause.²⁰² He worked political channels by filing a complaint with the Mayor of New York.²⁰³ Finally, he worked the legal angle by threatening to initiate a lawsuit against the makers of *Fearless Girl* for violating his copyrights and attendant right of integrity in and to *Charging Bull*.²⁰⁴ In the process of all this activity, he provoked a wide-ranging dialogue over the legal rights of creators to control and patrol the integrity of their artistic visions. But while Di Modica’s cause has been unfairly characterized by some and the attack on his artistic integrity does deserve sympathy, there are troubling consequences to enforcing copyright along the lines of his legal vision. This is particularly true when one examines Di Modica’s position through a critical perspective that considers how the Bull, and his attendant copyright, literally embodies the male gaze and how the Girl—no matter what her crass commercial origins—represents a work of resistance to traditional patriarchal narratives.

B. *The Meaning of Authorship and Charging Bull’s Male Gaze*

Di Modica’s use of copyright law as a means to obliterate *Fearless Girl* from the Bull’s line of sight constitutes an effort to give the Bull (and, implicitly, its author) the authority to literally control his gaze and determine what can and cannot lie within his scrutiny. And, as Di Modica’s legal position suggests, the Bull will give no quarter to a proud and confident young girl in his immediate view. Modica’s authority to govern the Bull’s gaze—to sacralize his creative output in a context of his choice—is a direct function of the rights to which he claims entitlement by virtue of his authorship: cop-

²⁰⁰ Linda Massarella & Jeremy Olshan, *Wall Street Bull Artist Knows BS When He Sees It*, N.Y. POST (Mar. 20, 2017, 11:26 AM), <https://nypost.com/2017/03/20/that-is-not-a-symbol-wall-street-bull-artist-calls-out-fearless-girl-statue/> [https://perma.cc/JJ73-TMKQ] (quoting sculptor Di Modica).

²⁰¹ *Id.*

²⁰² Lisa Massarella, ‘Charging Bull’ Artist Plans Revenge Against ‘Fearless Girl,’ N.Y. POST (Apr. 12, 2017, 2:17 PM), <https://nypost.com/2017/04/12/charging-bull-artist-plans-revenge-against-fearless-girl/> [https://perma.cc/E7XZ-89Q2].

²⁰³ See Letter from Norman Siegel, Kate Fletcher, Steven Hyman & Oliver Chernin, Attorneys for Arturo Di Modica, to the Honorable Bill de Blasio, Mayor of New York City (Apr. 11, 2017), <https://www.scribd.com/document/344998311/Letter-to-Mayor-DeBlasio-on-Charging-Bull-vs-Fearless-Girl> [https://perma.cc/KT8U-7U5T].

²⁰⁴ O’Connor, *supra* note 198.

right and the neighboring right of integrity.²⁰⁵ Authorship therefore lies at the heart of battle to control the Bull's (male) gaze.

Given the etymological roots of the word "authorship," its link to the concept of authority should not be surprising. Sharing the same etymological root, the terms "authority" and "author" derive from the Latin word 'auctor,' which refers to an originator or promoter. As such, the search for authorship is a quest to determine the originator of a work or, quite literally, the person who possesses authority over it. In one sense, therefore, the idea of authorship speaks to the traditional search for a mastermind *at the time of creation*. But the idea also extends beyond the time of creation and speaks to the issue of continuing power—namely, the ability to control permissible uses and castings of the work *post-creation*. Thus, as Jamie Boyle has argued, authorship is a concept through which the "power to rule the interpretation of the text"²⁰⁶ is exercised. Boyle's view of authorship draws from the work of Michel Foucault, who grounded authorship in the idea of thrift, a heuristic tool meant to limit the range of meanings that text can possess. To Foucault, authorship serves as "a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction."²⁰⁷ In other words, authorship functions as a vehicle through which authority to control narratives and semiotics passes. And, the location of authorship and its attendant rights in one individual can result in demeaning and devaluing the authorial contributions of another individual. As David Lange has noted, "[w]e value authorship, or so we say insistently in the main theories of the field. And yet it appears, again and again, that we merely value some authors, and then at the expense of others."²⁰⁸ The *Charging Bull* and *Fearless Girl* provide a poignant example of this phenomenon: the broader we conceive *Charging Bull*'s authorship, the more we diminish that of *Fearless Girl*.

Consider, specifically, how extant copyright principles could enable Di Modica to control his vision, snuff out *Fearless Girl*, and give primacy to his particular narrative about Wall Street and New York. First, since *Fearless Girl* ineluctably (and by admission of its creator)²⁰⁹ exists in tandem with,

²⁰⁵ Absent a work-made-for-hire arrangement, Di Modica, as the creator of the Bull, is its copyright holder. Moreover, as the author of the statue, he is potentially entitled to the rights of integrity and attribution secured under the Visual Artist Rights Act, codified in section 106A of the Copyright Act. See 17 U.S.C. § 106A.

²⁰⁶ Boyle, *The Search for an Author*, *supra* note 135, at 635.

²⁰⁷ Michel Foucault, *What Is An Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 146, 158–59 (J. Harari ed., 1979).

²⁰⁸ David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 *L. & CONTEMP. PROBS.* 139, 143 (1992).

²⁰⁹ Sculptor Kristen Visbal readily admits that the statue was made to "go with *Charging Bull*" and, among other things, ensured that *Fearless Girl* had the same patina as *Charging Bull*. See Erin Arvedlund, *Wall Street's 'Fearless Girl' Speaks, Via Sculptor Kristen Visbal*, *PHILA. INQUIRER* (May 23, 2017), <http://www.philly.com/philly/business/>

and is dependent on, *Charging Bull*, one might view the former as an unauthorized derivative of the latter, something only copyright holders have the exclusive right to prepare.²¹⁰ On cursory examination, it might seem unusual to claim that *Fearless Girl* is an unauthorized derivative of *Charging Bull*. After all, unlike traditional derivative works (such as a sequel to a movie, a toy based on a video game character, or translation of a novel), the former does not appear to directly usurp any protectable elements, whether literal or not, from the latter. Moreover, *Fearless Girl*'s physical existence is separate from that of *Charging Bull*—unlike, say, works that build upon pre-existing works.

But section 101 of the Copyright Act defines derivative works quite broadly, as any “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”²¹¹ Thus, a derivative work need not reproduce any of the constituent parts of an original work.²¹² In fact, one could argue that placing such a limitation on the definition of a derivative work would render the exclusive right in section 106(2) superfluous and redundant to the exclusive right of reproduction contained in section 106(1).²¹³ Di Modica's interpretation of derivative might stretch the concept, but the concept has been pliable over the past century. After all, once upon a time, both translations and abridgements were not considered impermissible derivative works but, instead, new works of authorship that reflected significant originality and creativity by the translator and abridger.²¹⁴ Thus, regardless of one's position on the ultimate issue of legal liability, there is at least a colorable argument that *Fearless Girl* is “based upon” *Charging Bull*, per statutory definition. As Di Modica's lawyers put it, “[t]he statue of the young girl becomes the ‘Fearless Girl’ only

personal_finance/Fearless-Girl-Speak-Sculptor-Kristen-Visbal-to-Raise-Funds-For-Girls-Inc-of-Delaware-Speak-May-18.html [https://perma.cc/P3TG-KCCH].

²¹⁰ See 17 U.S.C. § 106(2).

²¹¹ See 17 U.S.C. § 101 (emphasis added).

²¹² See *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1342–44 (9th Cir. 1988) (finding that cutting up books and placing them onto ceramic tiles created an authorized derivative version of the books and therefore constituted copyright infringement, even though there was no copying of the original works). *But see Lee v. A.R.T. Co.*, 125 F.3d 580, 581–82 (7th Cir. 1997) (finding that placing of copyrighted postcards on tiles was akin to the framing of a work and did not constitute the creation of an unauthorized derivative work).

²¹³ See 17 U.S.C. § 106(1) (granting copyright holders the exclusive right to reproduce their protected works); § 106(2) (granting copyright holders the exclusive right to prepare derivative versions of their protected works).

²¹⁴ See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (finding that an unauthorized German translation of *Uncle Tom's Cabin* did not violate Harriet Beecher Stowe's copyright to the book since, *inter alia*, “[t]o make a good translation of a work, often requires more learning, talent and judgment, than was required to write the original”); *Wheaton v. Peters*, 33 U.S. 591, 651 (1834) (“An abridgement fairly done, is itself authorship, requires mind; and is not an infringement, no more than another work on the same subject.”).

because of the *Charging Bull*: the work is incomplete without Mr. Di Modica's *Charging Bull*, and as such it constitutes a derivative of the *Charging Bull*."²¹⁵

The ontological consequences of being deemed a derivative work are draconian, as they legally transform *Fearless Girl* into a violation of someone else's intellectual property rights (i.e., as an unauthorized reworking of someone else's copyrighted statue) and deprive the work of its own agency (i.e., as an original work of authorship imbued with the attendant rights attached thereto). As an infringement, *Fearless Girl* would arguably receive no copyright protection of its own²¹⁶ and could even face potential destruction.²¹⁷ In short, if *Fearless Girl* constitutes a derivative work, she ceases to have her own legal existence and loses any autonomy she might otherwise possess. Instead, copyright law will make her the property of the Bull, a mere subject of his (male) gaze.

Second, *Fearless Girl* arguably gives rise to a claim under the Visual Artist Rights Act ("VARA"),²¹⁸ which has imported limited moral-rights protection into American law by giving certain visual artists the right of integrity and attribution to their works.²¹⁹ Di Modica could claim that the placement of the Girl in opposition to the Bull on Bowling Green constitutes an actionable "intentional distortion, mutilation, or other modification of [the] work which would be prejudicial to [Di Modica's] honor or reputation."²²⁰ After all, by intentionally engaging the Bull in a standoff, the Girl effectively distorts and mutilates the Bull's meaning. As one critic put it, "intended as a symbol of strength by the artist, the bull takes on a menacing air in relation to the girl."²²¹ The Girl therefore fundamentally recasts the Bull from majestic to minacious, noble to nefarious, magnificent to misogynistic. Since Di Modica's artistic standing is inextricably linked with that of his most famous work, the resulting injury to his reputation seems colorable, at the very least.

²¹⁵ Letter, *supra* note 203, at 1 (emphasis added).

²¹⁶ See 17 U.S.C. § 103(a) (protection for a derivative work "employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully"); 1-3 NIMMER ON COPYRIGHT § 3.06 (noting that works that are infringements themselves are not entitled to copyright protection); *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *8 (C.D. Cal. April 26, 1989).

²¹⁷ See 17 U.S.C. § 503(a)-(b) (allowing for the "impounding" and "destruction or other reasonable disposition" of any infringing work).

²¹⁸ See 17 U.S.C. § 106A.

²¹⁹ Among other things, VARA does not apply to motion pictures, excludes works-made-for-hire, applies only to original works or limited editions of less than 350, and its integrity right can only be raised by works of "recognized stature." See 17 U.S.C. § 101 (defining "work of visual art"); 17 U.S.C. § 106A(a)(3)(B) (limiting to works of recognized stature).

²²⁰ 17 U.S.C. § 106A(a)(3)(A).

²²¹ Nicola Brown, *Why "Fearless Girl" Matters for Brands*, SKYWORD (Apr. 7, 2017), <https://www.skyword.com/contentstandard/storytelling/why-fearless-girl-matters-for-brands/> [<https://perma.cc/S248-554A>].

Despite substantial challenges Di Modica might face in establishing legal liability,²²² however, between his infringement and VARA claims, he has a potential case.²²³ And therein lies the rub. Empowered by copyright law, the bull becomes the male gaze, staring down and threatening with viable legal action anyone, including a little girl, who stands in his direct line of sight. Such a state of affairs betrays important First Amendment values by controlling the semiotics of gender and American capitalism. In the process, it therefore silences the views of subordinated communities attempting to resist dominant epistemologies.

Di Modica may be absolutely right: *Fearless Girl* fundamentally recasts the meaning of his work, and it does so to spectacular effect, in a manner that may well injure *Charging Bull*'s reputation and, with it, his own. But that is precisely the genius of *Fearless Girl*: it has tapped into the zeitgeist. With perhaps the unlikeliest of heroes, *Fearless Girl* has poignantly challenged the primacy of the Bull and business-as-usual on Wall Street and called on society to redouble its effort to fight persistent gender inequities. Our laws should encourage, not suppress, such artistic expression.

C. *Controlling Environs, Patrolling Meaning: Authorship, Derivatives, and Narratives of Resistance*

Although it may be tempting to portray the Bull as an absolute bully and *Fearless Girl* as an indefatigable hero, the players in this struggle to define Wall Street's semiotic landscape are not so easily categorized. First, *Fearless Girl* is not the paragon of feminism that some have claimed. As Christina Cauterucci has pointed out, by portraying "women's career empowerment with an image of a child" and focusing exclusively on the "incremental admission of a small number of women into traditional halls of

²²² Di Modica's success on a VARA claim is far from assured. First, since *Charging Bull* was created before 1990, title to the work must not have been transferred from the author prior to 1990 in order to qualify the Bull for VARA protection. See 17 U.S.C. § 106A(d)(2). In addition, VARA specifically states that "modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence." 17 U.S.C. § 106A(c)(2). This exemption—which appears to exclude "modification" that results from "public presentation . . . of the work" from liability in the absence of gross negligence—would create a potential defense for SSgA, though it is unclear what would constitute "gross negligence" in this context. Finally, all VARA claims are subject to a fair use defense. See 17 U.S.C. § 107. In particular, the third prong of the fair-use test, which examines "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," 17 U.S.C. § 107(3), could be particularly difficult for Di Modica to overcome. After all, that factor traditionally focuses on how much of an infringed work is literally taken by the infringer and, in this case, the amount is zero. Unless a court takes a more metaphysical, rather than physical, view of what "use" means, it would appear unprecedented to decline a fair-use defense when no new physical use is made of an allegedly infringed work.

²²³ Di Modica's lawyers also raised a thinly-supported Lanham Act violation in their correspondence with Mayor Di Blasio. See Letter, *supra* note 203, at 2.

power” instead of addressing systemic issues impacting women of all socio-economic backgrounds, the *Girl* hardly constitutes a broadside against gender inequality.²²⁴ But it is worth remembering that SSgA created the statue to market its new SHE index fund,²²⁵ and it is rare for a multinational corporation to advance broader societal interests that do not immediately impact the bottom line. Nevertheless, SSgA's gesture—no matter how self-interested and how much the product of “corporate feminism”²²⁶—has had a broader impact than SSgA's own economic gain. Perhaps what matters most is not SSgA's intent but how others might view the statue in relation to the bull: as an entreaty to reform traditionally gendered spaces and resist the old boys' club of Wall Street.

In addition, Di Modica's cause is also not without its sympathetic elements. His pain is real and appears to stem from a genuine concern for his artistic vision, not a repulsion to *Fearless Girl*'s message.²²⁷ But as understandable as Di Modica's position might be, that does not mean it should be given a legal voice. As Amy Adler has cogently reasoned, “[t]he bull sculpture captured something of that moment [in 1989]. The ‘Fearless Girl’ is capturing something of our moment . . . The possibility of changed meaning is . . . painful for an artist, but something we should celebrate as a public

²²⁴ Christina Cauterucci, *The Charging Bull Sculptor Is Right. Fearless Girl Should Go*, SLATE.COM (Apr. 12, 2017), http://www.slate.com/blogs/xx_factor/2017/04/12/the_charging_bull_sculptor_is_right_fearless_girl_should_go.html [https://perma.cc/G9Z8-X357]. Cauterucci adds that “*Fearless Girl*'s school of feminism, to the extent that she represents one, is shallow and apolitical. It doesn't help that the State Street Corporation counts just three women on its board of 11 . . .” *Id.*

²²⁵ SSgA only launched its campaign to promote female representation on corporate boards in an apparent response to criticism leveled by one of its largest clients, the California State Teachers' Retirement System, who had raised concerns about the lack of female representation on corporate boards and executive teams. SSgA appeased its client by launching the SHE index fund, which tracks companies that receive top marks for gender diversity in their leadership positions, and it created *Fearless Girl* to market the new SHE product. See Renae Merle, ‘*Fearless Girl*’ Ignites Debate about Art, Wall Street and the Lack of Female Executives, WASHINGTON POST (Apr. 20, 2017), https://www.washingtonpost.com/business/economy/fearless-girl-ignites-debate-about-art-wall-street-and-the-lack-of-female-executives/2017/04/20/47ec6d52-239b-11e7-a1b3-faff0034e2de_story.html?utm_term=.54f10d6332c9 [https://perma.cc/XLP4-SSKD].

²²⁶ Ginia Bellafante, *The False Feminism of ‘Fearless Girl’*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/nyregion/fearless-girl-statue-manhattan.html?_r=0 [https://perma.cc/U3VM-G7RB]. Bellafante goes on to say that corporate feminism “operates with the singular goal of aiding and abetting a universe of mothers who tuck their daughters in at night whispering, ‘Someday, honey, you can lead the emerging markets and sovereign debt team at Citigroup, and then become a director at Yahoo.’” *Id.*

²²⁷ As such, it is not fair to demonize Di Modica as a misogynist. For example, in the wake of the controversy, Mayor Di Blasio blustered that “[m]en who don't like women taking up space are exactly why we need the *Fearless Girl*.” See Mark Moore, *De Blasio defends ‘Fearless Girl’ Statue*, N.Y. POST (Apr. 12, 2017), <http://nypost.com/2017/04/12/de-blasio-defends-fearless-girl-statue/> [https://perma.cc/4WDJ-629W]. Such comments fail to distinguish the artist from the artwork and unfairly portray Di Modica and his representatives, who insist that they appreciate the feminist message of *Fearless Girl* but just wish it did not involve the Bull, as standing in the way of women's rights.

policy matter.”²²⁸ Art should not remain static, and a rightsholder should not be able to wield the long arm of the law to censor the expressive activities of other creative minds who come in the decades and centuries after them.²²⁹ Indeed, if Di Modica’s legal argument prevails, Lynyrd Skynyrd’s *Sweet Home Alabama* might well constitute an unauthorized derivative version, and therefore infringement, of Neil Young’s *Southern Man*;²³⁰ and Haruki Murakami’s novel *1Q84*²³¹ an unauthorized derivative and infringement of George Orwell’s *1984*.²³²

But putting aside the fact that there are understandable concerns on both sides of the debate, the controversy over *Charging Bull* and *Fearless Girl* amounts to a question over the ontology of authorship and authority. Does Di Modica, as author of *Charging Bull*, have authority over how his work is presented and how the space around his statue used? Or is *Fearless Girl* an original (i.e., not derivative) work of authorship in and of itself, imbued with its own legal existence and rights such that she can stand before the Bull without fear of legal liability? If Di Modica’s *Bull* is entitled to a zone of protection around it, then other works of authorship throughout the City would be entitled to similar bubbles. Such a situation would lace the physical geography of public spaces with a lattice of invisible artistic easements that hinder the natural development of the vernacular landscape, restrain the use of real property, and stifle expressive freedoms. Moreover, recognition of such rights would reconceptualize authorship to not only include the work one has fixed, but any other work which depends on, or

²²⁸ Ben Rosen, *Can the ‘Charging Bull’ Sculptor Control His Artwork’s Meaning?*, CHRISTIAN SCI. MONITOR (Apr. 14, 2017), <http://www.csmonitor.com/USA/Society/2017/0414/Can-the-Charging-Bull-sculptor-control-his-artwork-s-meaning> [https://perma.cc/9JH3-TAEN].

²²⁹ This is particularly true for pieces of art that are meant by their own creator to serve as public art and, as a result, to be consumed by the public as a whole. Artworks placed in public enjoy particular visibility and provide particular advantages to their authors, as they can become career-making events for artists who otherwise struggle to develop their reputations and feathers in the cap for established artists looking to burnish their brand. See, e.g., Rachel Donadio, *Jeff Koons Sent Paris Flowers. Can It Find the Right Vase?*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/arts/design/jeff-koons-bouquet-of-tulips-paris.html?_r=0 [https://perma.cc/KU9P-3AU4] (noting that, according to “[s]ome in French cultural circles,” Jeff Koons’s “donation” of the concept for a sculpture of balloon tulips to Paris to honor the victims of the 2015 terrorist attack at the Bataclan Theater “was practically foisted on the city . . . [and was] more of a coup for the artist and his private donors than for Paris”). In turn, it is important to recognize that public meanings can change and the artist cannot (and should not be able to) control such transformations.

²³⁰ LYNYRD SKYNYRD, *Sweet Home Alabama*, on SECOND HELPING (1974). Among other things, *Sweet Home Alabama* constitutes a direct response to, and recasting of, the image of the South presented in Neil Young’s *Southern Man*. As the famous second verse of the latter goes, “Well I heard Mister Young sing about her/Well I heard ole Neil put her down/Well I hope Neil Young will remember/A southern man don’t need him around anyhow.” *Id.*

²³¹ See generally HARUKI MURAKAMI, *1Q84* (2009). Murakami’s dystopian novel is loosely based on an alternative version of the world of 1984.

²³² See generally GEORGE ORWELL, *1984* (1949).

exists in tandem with, said work—a pernicious expansion of the derivative works doctrine and the very meaning of authorship.

To illustrate the dangers of Di Modica's legal arguments, consider that, if Di Modica's claim has any merit, the very statue he illegally "gave" to New York as an unwanted Christmas present could have exposed *him* to liability.²³³ After all, Di Modica complains that an unpermitted transformation has occurred in the meaning of his work; yet, as *Charging Bull's* genesis makes clear, unpermitted transformation of meaning was the very intention of Di Modica's own work. Profoundly impacted by the downturn in the national mood following the 1987 stock market crash, Di Modica wanted to revitalize New Yorkers' sense of optimism and Wall Street's commercial effervescence. He harnessed the symbolic power of public art to achieve this goal by creating a statue that would impact its surroundings and rewrite the semiotics of the Financial District.

The whole point of Di Modica's *Charging Bull* was, therefore, to morph the physical and psychological landscape of New York—to transform a space characterized by pessimism and weakness into one imbued with optimism and strength. When he dropped his work on Manhattan under the cover of night in 1989, he did not even bother to seek permission from the city that owned the land. Just as significantly, he did not bother to seek permission from the many other rightsholders of pre-existing works of authorship—the architecture of the surrounding buildings, the insignias of the extant commercial brands occupying nearby spaces, the design of Bowling Green²³⁴—dotting the same landscape that the Bull had invaded. It makes no sense to deprive the Girl of the same expressive right to transform the physical and psychological landscape—this time from one characterized by unbridled masculinity and domination—into one imbued with a spirit of feminism and resistance.

²³³ Di Modica did not play by the rules and violated the physical property rights of others when he presented *Charging Bull* to New York in 1989, making it ironic that he would now be complaining about the violation of his property rights. Vivian M. Warfield, the Director of the New York Arts Commission at the time of Di Modica's gift noted that, although she liked the *Bull*, she could not help but ask, "What about the artists who play by the rules?" As she observed, such artists "would love to have an extended exhibit in a prime spot free of charge." Lambert, *supra* note 188.

²³⁴ The use of the term "works of authorship" is more metaphoric than literal in this sentence, although, technically speaking, works of architecture are protected by copyright, *see* 17 U.S.C. § 102(a)(8) (placing architectural works within the subject matter of copyright protection), as are many commercial logos that have a modicum of creativity, *see, e.g.*, *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 354–57 (4th Cir. 2000) (noting the protection granted to the Baltimore Raven's former logo). Finally, even the design of a park could conceivably receive copyright protection. *See* 17 U.S.C. § 101 (noting that protection for architectural works extends to "the overall form as well as the arrangement and composition of spaces and elements in the design").

CONCLUSION

When Erin Andrews found out that intimate footage of her had leaked online, the authorship-as-fixation doctrine told her that the felon who illicitly captured the recording owned the copyright to the work, not her. She remained powerless for over two years as the law reduced her to a passive subject, deprived of control over representations of her own body. Copyright's male gaze, empowered by its authorial vesting regime, stripped Andrews of agency, allowing her to exist purely for the visual pleasure of those who watched the video online.

When Lynn Thomson's creative partner, Jonathan Larson, died tragically just hours after the final dress rehearsal for the musical *Rent*, joint authorship's mutual-intent requirement told her that she had no copyright interest at all in the Broadway hit. Regardless of the extent of Thomson's contributions to the final version of the musical, the so-called "dominant" author—Larson—did not share in her desire to be co-authors, and, therefore, *Rent* could not be a work of joint authorship. Based on the collaborative and non-hierarchical approach she took towards artistic endeavor, the mutual-intent requirement deprived Thomson of agency over her creative output. She suffered a loss of both economic participation in and control over her work, even though she never signed away any rights by contract. In short, copyright law's mutual-intent requirement achieved what private contracting, with its already broad deference to bargaining power, could not. *Rent* became the exclusive product of the Larson Estate's gaze, not hers.

When *Fearless Girl* took on *Charging Bull* and challenged its unabashedly masculine celebration of American capitalism by calling attention to the underrepresentation of women on Wall Street, copyright law told her that she might constitute an unauthorized derivative work, lacking in copyright protection (i.e., lacking cognizable authorship) and facing potential destruction. The viability of her narrative of resistance and her subversion of a dominant, patriarchal epistemology rested in the hands of the derivative-works doctrine, which patrols the lines designating where authorship by one person ends and authorship by another begins. The heuristics of authorship therefore determined the authority of the Bull to control just what can and cannot lie in its male gaze.

For all too long, we have viewed the laws of copyright as neutral principles designed to reward creative enterprise and advance progress in the arts. However, as our examination of the operation of the federal courts' jurisprudence on authorship reveals, our copyright regime often flouts these goals, with significant consequences for both egalitarian and dignity interests. The conflation of fixation with authorship has advantaged those who already have the economic might to control the tools of production, much to the disadvantage of those operating in front of the camera. In the process, the doctrine has deprived traditionally subordinated groups of authority over both their creative output and representations of their bodies. The develop-

ment and deployment of the mutual-intent requirement in joint authorship has performed similarly, privileging bargaining power over creative contribution. As a result, those who either lack economic leverage or adopt collaborative and non-hierarchical approaches to creative enterprise suffer. And the imposition of authorial constructions on future creative enterprises through the derivative-works doctrine can play a powerful role in privileging dominant narratives over resistive ones.

Elimination of the authorship-as-fixation rule could renew the agency that individuals in front of the camera possess over their body and representations of it. Relaxation of the mutual-intent requirement could allow joint authorship law to provide appropriate rewards to creators who lack significant economic leverage or who utilize non-hierarchical modes of production. And limitation of derivative rights could empower the expression of resistive narratives. Without these reforms, however, the authorship-as-fixation, mutual-intent, and derivative-rights doctrines will continue to empower the male gaze, giving legal bite to a system of production and rights-vesting that all too frequently reduces women, indigenous communities, minority racial groups, and the poor to passive objects in creative works, deprived of agency, operating only in the service of, and at the behest of, the traditional male mastermind. In a post-industrial society where rights to intellectual, rather than tangible, property increasingly drive economic wealth and political muscle, we can no longer afford to ignore the profound implications of copyright's male gaze.

