

# A QUEER ANALYSIS OF INTELLECTUAL PROPERTY

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Intellectual property (IP) is a legal framework associated with economic rationality and that is supposedly neutral toward diverse manifestations of sexuality, gender identities, and unorthodoxy in the cultural landscape. But is that the case? This Article proposes a queer analysis of IP, asserting that IP is a major mechanism through which sexuality, gender, citizenship, and normativity are institutionalized and hierarchized in cultural and social life.

Applying two interconnected methodologies—examining creative spaces in which queer creativity thrives, including drag, fanfiction, and the Queercore punk subculture, and appraising several IP doctrines through a queer theory lens—this Article demonstrates how queer creative communities organize and resist IP and mainstream culture and illustrates how IP law institutionalizes hegemonic notions of normativity, sexuality, and culture. This Article also exposes a counterintuitive nexus between IP law and queer theory, showing that while IP structures a hegemonic culture, it simultaneously defines a field of marginal cultural production based on a rejection of IP’s rules and aesthetics.

This Article then suggests a reparative reading of queer theory and IP, holding that queering IP allows us to better appreciate the value of queer theory and queer creativity to wider discourses around normativity and meaning, as well as to promote diversity and visibility of nonconforming sexualities and identities in cultural and social life.

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## INTRODUCTION

As a primary legal instrument regulating creative and cultural production, intellectual property (IP) law has profound consequences for the shaping of society, markets, and culture, as well as for individuals’ identity and wellbeing. IP law is presumed to be impartial, at least in the sense that it does not concern itself with the merits of a work or an invention, but rather with the question of whether the work or invention

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meets the relevant legal standards. Recent years, however, have seen a growing body of scholarship that engages in critical appraisal of IP through various lenses, including post-colonial, race, class, and feminist theories.<sup>1</sup> These studies illustrate that IP's procedural and substantive rules are far from neutral: for example, by unmasking the ways in which the IP-public domain binary functions more in the interests of traditional property owners than in the interests of commoners;<sup>2</sup> by demonstrating how the idea-expression dichotomy in copyright emboldened the mass appropriation of the work of Black artists and inventors;<sup>3</sup> or by demonstrating how copyright law doctrines allow a privileged cultural class to silence challenges to copyright's value hierarchy.<sup>4</sup> Other studies demonstrate how patent law's doctrines display gendered characteristics,<sup>5</sup> analyze the cultural gendering of copyright's fair use doctrine,<sup>6</sup> or

1. See, e.g., Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL'Y & L. 183, 185 (2007); Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL'Y & L. 431, 433 (2006); 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, 366 (2008); Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551, 551–54 (2006); Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 70–72, 74–75 (2000); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 274 (2007); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005); John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1237; Michael Birnhack, *A Post-Colonial Framework for Researching Intellectual Property History*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: LENSES, METHODS, AND APPROACHES 260, 260–61 (Irene Calboli & Maria Lilla Montagnani eds., 2021); Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 736 (2018).

2. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334–35 (2004).

3. Kevin Greene, "Copynorms," *Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1200 (2008); Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 591–92 (2019); see also Ariel Katz & Eden Sarid, *Who Killed the Radio Star? How Music Blanket Licensing Distorts the Production of Creative Content in Radio*, 71 AM. U. L. REV. 111, 131–32 (2021) (illustrating how racism and cultural snobbery in copyright Collective Management Organizations resulted in the exclusion of Black musicians' works in the 1930s and 1940s).

4. Rosenblatt, *supra* note 3, at 594.

5. Dan L. Burk, *Do Patents Have Gender?*, 19 AM. U. J. GENDER SOC. POL'Y & L. 881, 888, 904 (2011); Kara W. Swanson, *Getting a Grip on the Corset: Gender, Sexuality, and Patent Law*, 23 YALE J.L. & FEMINISM 57, 61 (2011) [hereinafter Swanson, *Getting a Grip*]; Kara W. Swanson, *Intellectual Property and Gender: Reflections on Accomplishments and Methodology*, 24 AM. U. J. GENDER SOC. POL'Y & L. 175, 185 (2015).

6. Bartow, *supra* note 1, at 560; Tushnet, *supra* note 1, at 274.

illustrate how rules regarding “immorality” in trademarks fetishize LGBTQ+ sexualities.<sup>7</sup>

This Article adds a new critical lens—that of queer analysis—to appraise IP, arguing that IP law and doctrine create a power matrix and cultural order that systematically subjugate certain cultural expressions and creators. IP produces a hierarchy of cultural categorizations that, in turn, channels groups and individuals into a hierarchal social order. More specifically, a queer analysis of IP law asserts that IP constructs creative production as a heteronormative endeavor, abetting the institutionalization of heteronormativity as the dominant cultural format in popular culture and the marginalization of alternative sexual, gendered, and intersectional cultural expressions, resulting in a cultural and a social hierarchy. IP law does so through doctrines that disadvantage queer cultural expressions, such as the categorization of certain queer creative expressions as folklore that is not copyrightable, and through sex-negative and queer-negative attitudes in courts—for instance, in courts’ reluctance to apply fair use provisions for cases involving the use of copyrighted material in sexualized or genderqueer contexts.<sup>8</sup>

At the same time, a queer analysis of IP also offers a new understanding of the relationship between IP law, mainstream culture, and counter-mainstream culture. The relationship between IP and queer creativity (and other countercultural expressions), this Article argues, is deeper and more complex than meets the eye: queer cultural production is often grounded in the rejection of IP’s concepts, rules, and aesthetics. So, while IP law structures hegemonic notions of cultural production, it simultaneously defines a field of marginal cultural production. Similarly, queer creativity often engages directly with mainstream works (which are often under copyright), transforming, rewriting, and “queering” mainstream culture.

A quick clarification of what a queer analysis encompasses can be helpful at this point. While queer theory resists definitions, viewing

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7. Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law After Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187, 189–91 (2005); Megan M. Carpenter & Mary Garner, *NSFW: An Empirical Study of Scandalous Trademarks*, 33 CARDOZO ARTS & ENT. L.J. 321, 326 (2015); Megan M. Carpenter & Kathryn T. Murphy, *Calling Bulls\*\*t on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks*, U. LOUISVILLE L. REV. 465, 476 (2011); see also Lindsay Hay, Note, “*The Taste of Any Public*”: *How Intellectual Property Law Illuminates the Failings of the Miller Test*, 45 SW. L. REV. 165, 176, 194 (2015); Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL’Y REV. 119, 120–21 (2012).

8. See *infra* notes 126–30 and accompanying text. Interestingly, however, Sarah Wasserman Rajec and Andrew Gilden argue that IP law is sex-positive relative to many other areas of the law. Andrew Gilden & Sarah R. Wasserman Rajec, *Pleasure Patents*, 63 B.C. L. REV. 571, 619–21 (2022).

“queer” as a fluid, plural, and continually negotiated term,<sup>9</sup> it is, as Andrew Gilden observes, profoundly “concerned about the relationship between the tangible and the intangible,” much like IP theory.<sup>10</sup> Queer theory understands that the organization of intangible things, such as what we see, feel, and touch, shapes our social landscape and the distribution of wealth, happiness, and political power.<sup>11</sup> Queer theory maintains that sex and gender are produced through certain patterns that are associated with certain social labels; thus, they are essentially performative.<sup>12</sup> A queer analysis would therefore endeavor “to reveal and disrupt narratives, conventions, institutions, and identities” that are structured around sex and sexuality and identify the ways in which certain kinds of stylizations of gender and sexuality are foregrounded and rewarded.<sup>13</sup> A queer exploration of IP law then would aim to investigate how IP foregrounds sexuality, normativity, and gender stylizations in cultural production and ask questions such as how the sexualization and gendering of certain methodologies, occupations, creative works, or the cultural landscape result in bestowing or withholding certain legal or social privileges.<sup>14</sup> The term “queer” also encompasses a sociological component that is related to, but not to be confused with, queer theory. Queer can also be a (personal or collective) identity, and queer sites can be seen as places where “traditional social correlations of bodies, desires, kinship, and temporality

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9. Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 *CRITICAL ANALYSIS L.* 23, 27 (2019); JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 228 (1993); ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION 1* (1996); Emily Jones, *The Corporation, Law and Capitalism: Reflections on Capitalist Law and Queer Resistance*, *LONDON REV. INT’L L.* 183, 188 (2020) (“Queer theory, while resisting definition, broadly seeks to challenge normative framings, reaching towards a utopia which is not pre-defined but, rather, is unlimited and dynamic, an image in which the colours, lines and curves are constantly moving.”).

10. Andrew Gilden, *Intellectual Property’s Queer Turn*, in *THE OXFORD HANDBOOK OF LAW AND HUMANITIES* 549, 550 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2019).

11. *Id.* at 550.

12. *Id.* at 551; see also Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 *WM. & MARY L. REV.* 1123, 1156 (2013).

13. Cossman, *supra* note 9, at 37.

14. See Gilden, *supra* note 10, at 550 (“Queer theory and, increasingly, IP scholarship understand that the organization of these intangibles can shape the distribution of wealth, happiness, and political power in the physical world. Whose beliefs are recognized and revered, whose intellectual labor is commodified and marketed, and whose conceptions of the good life are met with state-backed punishment combine to shape the tangible, physical layout of our social environment. The regulation of the intangible aspects of culture moves certain physical bodies into certain geographic spaces and certain material objects into the hands of certain groups of people. And these material distributions in turn shape the production of ideas and culture.”).

come apart and new ways of imagining their intersections come to the surface.”<sup>15</sup> Often, in these sites, queer creativity and culture flourish.

Heteronormativity is another term in need of some clarification. It may incorporate several different interrelated dimensions, including *sexuality*—heteronormativity positions non-hetero sexualities as invisible or deviant;<sup>16</sup> *patriarchal gender norms*—heteronormativity is a constituent dimension of female-male socialization and patriarchal gender roles, rendering sex and desire as normative or non-normative accordingly;<sup>17</sup> *power matrix*—heteronormativity joins a myriad of systematic oppressions at different intersections such as race, class, gender, origin, and sexuality.<sup>18</sup> This typology, suggesting several dimensions and manifestations of heteronormativity, is useful for a queer analysis of IP, as the typology indicates that heteronormativity is not merely the privilege of heterosexuality or the alignment of biological sex, sexuality, and gender, but a pervasive force through which rules are linked to social hierarchies.<sup>19</sup>

Applying queer theory to analyze IP would therefore focus on revealing how IP doctrine foregrounds heteronormative cultural and creative expression, privileging a certain dominant culture and subjugating queer culture and queer communities and individuals. Yet another useful methodology for queering IP is to explore and explain communities and sites in which queer creativity thrives. Exploring such domains can help in identifying what elements might be essential for queer cultural and creative expressions to thrive, the relationship between IP law and queer creativity, and whether and how these domains of queer creativity challenge IP. In addition, this methodology provides important evidence in an exploration of the alignment between queer theory and queer cultural expression in practice. This approach adds a new and important element to commonly used methodologies, as it engages directly with queer creative sites, asking how these domains are constructed and linking the knowledge gained from this inquiry back to the theoretical queer analysis of IP. Notable examples of creative domains where queer creativity thrives

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15. *Id.* at 552–53.

16. Joseph Marchia & Jamie M. Sommer, *(Re)defining Heteronormativity*, 22 *SEXUALITIES* 267, 279 (2019).

17. *Id.* at 279–81.

18. *Id.* at 279, 281.

19. See Michael Warner, *Introduction* to 6 *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY*, at vii, viii (Michael Warner ed., 1993). Note also Noa Ben-Asher’s work demonstrating that “normativity” does not necessarily or inherently follow a homo-hetero divide, but rather the principles of what is the desired or “dignified” version of certain social structures (such as family, marriage, couples, etc.); see, e.g., Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 *HARV. J.L. & GENDER* 243, 246–47 (2014).

include drag, fan fiction, roller derby skating, online gaming, queer cinema, queer art festivals, the ballroom scene, and queercore (a queer punk subculture). As this Article illustrates, a common feature that many of these creative areas share is resistance to, or rejection of, IP law, suggesting that the relationship between queer theory, queer creative expression, and IP law is multifaceted; queer theory aims to deconstruct IP law, while at the same time IP law may be an important element in queer creative expression. These two methodologies—a queer theoretical appraisal of IP doctrine and a practical examination of creative domains in which queer creativity thrives—suggest new ways to understand IP law and queer creativity. The methodologies reveal how mainstream concepts of normativity, sexuality, desire, and gender shape IP doctrine and how resistance to IP cultivates queer creative expression. These methodologies also can be useful for other critical approaches in IP scholarship, such as those focused on gender, race, socio-economic, and de-colonial contexts.

This Article proceeds as follows: Part I analyzes examples of creative sites and communities where queer creativity thrives, focusing on the examples of drag queens, queer fan fiction, and the queercore punk subculture. It shows that these creative communities share several common features, including the transformation and appropriation of existing works; creative production that often engages with sexuality; defiance of and active resistance to IP law and to mainstream culture; flexible identification practices (e.g., wide use of pseudonyms); and a social practice of attribution and gifts. In addition, the Article illustrates that these creative communities also function as safe spaces for individual explorations of identity and sexuality, for establishing friendships, and for community empowerment. Against this backdrop, Part II appraises several IP doctrines and rules through a queer theory lens. It demonstrates how these rules and doctrines foreground heteronormativity in creative and cultural production to produce a hierarchized social order. It also reveals how certain vocabularies in IP legislation, caselaw, and scholarship reflect a heteronormative order. Part III suggests some queer insights and sensibilities for IP law, asserting the specific value of queer cultural production as offering an ongoing critical destabilization of existing cultural forms and expanding fair use provisions for transformative works that do not conform to copyright's fair use economic model.

## I. QUEER CREATIVE SPACES

Off the mainstream cultural radar, there is a wealth of queer creativity: queer art festivals, the ballroom scene, fan fiction works, queer punk bands, and drag shows, among others. Yet with relatively few exceptions, queer creativity goes unnoticed and disregarded by

mainstream culture.<sup>20</sup> Queer creativity typically openly explores (and depicts) sexuality and desire, and it often involves appropriating popular culture and rewriting it through queer identities, pleasures, and sexualities.<sup>21</sup> For example, in fan fiction an iconic character such as Sherlock Holmes is reimaged as an emotionally complex character who struggles with issues of sexuality, desire, love, and identity as opposed to his current portrayal as a tough, unmoved exemplar of traditional masculinity.<sup>22</sup> Drag queens are performers who assume explicit female sexuality or idealized femininity, deconstructing sexuality and gender through their performance art.<sup>23</sup> Queer punk bands reimagine idealized hetero-identities and fetishize heteronormative symbols, such as cowboys, by describing them as queer, feminine, and gay.<sup>24</sup> Deborah Kass's *Warhol Project*, in which Kass replaces Warhol's screen-printed portraits with queer and female heroines, allows Kass and her audience to explore "the construction of racial, sexual and gendered identities screened through the classic pop art of Andy Warhol's work and style."<sup>25</sup>

This Part explores creative spaces where queer creativity thrives and analyzes the factors that may explain why they are successful in supporting queer creativity. This understanding will help both in terms of providing evidence on the nexus between IP law, cultural participation, and social hierarchies and as an essential background for a queer-theoretical analysis of IP. This Article will focus on three notable examples: fan fiction, drag

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20. See Jennifer Tyburczy, *Irreverent: A Celebration of Censorship*, QED: J. GLBTQ WORLDMAKING, Fall 2015, at 59, 59–60.

21. There is no common definition of "queer creativity," and much like queer theory, it assumes different meanings that might change and evolve in different contexts, spaces, and times. See Lauren Berlant & Michael Warner, *What Does Queer Theory Teach Us About X?*, 110 PUBL'N MOD. LANGUAGE ASS'N AM. 343, 344 (1995); Kate Shields, *What Is Queer Art?*, MEDIUM (May 4, 2017), [https://medium.com/@kate\\_shields/what-is-queer-art-46becf93a89](https://medium.com/@kate_shields/what-is-queer-art-46becf93a89) [<https://perma.cc/7ZRA-8B2P>].

22. Diana Koehm, *Revision as Resistance: Fanfiction as an Empowering Community for Female and Queer Fans* 11 (Dec. 15, 2018) (B.A. thesis, University of Connecticut) (Open Commons@UConn).

23. Eden Sarid, *Don't Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law*, 10 FLA. INT'L U. L. REV. 133, 136–37 (2014); Leila J. Rupp, Verta Taylor & Eve Ilana Shapiro, *Drag Queens and Drag Kings: The Difference Gender Makes*, 13 SEXUALITIES 275, 277 (2010); Katie R. Horowitz, *The Trouble with "Queerness": Drag and the Making of Two Cultures*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 303, 306–07 (2013).

24. PANSY DIVISION, *Cowboys Are Frequently Secretly Fond of Each Other*, on PILE UP (Lookout! Records 1995); Curtis Kularski, *I Don't Like Macho, Put It Away: Considering Queercore Men in Context* 7 (Dec. 12, 2012) (working paper) (term paper, University of North Carolina at Charlotte) (ResearchGate).

25. Michael Plante, *Foreword* to DEBORAH KASS: THE WARHOL PROJECT 7 (1996); see generally Deborah Kass, *The Warhol Project*, DEBORAHKASS.COM, <https://deborahkass.com/warhol-project.html> [<https://perma.cc/B9GU-6GUW>].

queens, and the queercore punk subculture.<sup>26</sup> For a more complete picture, this Article also provides evidence from other creative spaces where queer creativity flourishes, such as the ballroom scene, online gaming, video remixes, and women's roller derby.

*Fan fiction:* Fan fiction is a type of creative work created by fans who use existing works, plots, characters, or settings as a basis for their consecutive or reworked creations. Examples might include a fan writing a sequel to Harry Potter's adventures based on J. K. Rowling's works or a fan creating a comic strip depicting *Harry Potter* characters. Much of this type of activity takes place in online forums and websites.<sup>27</sup> Within the world of fan fiction, a notable genre is what this Article refers to as "queer fan fiction." These are fan works that portray non-heteronormative and queer plots, sexualities, relationships, genders, and identities.<sup>28</sup> A well-known example is *slash*. Slash is a genre of fan fiction that mainly focuses on homosexual romantic or sexual relationships and characters.<sup>29</sup> Interestingly, slash, and particularly slash about gay male characters and sexual relations, is mostly written by women, most of whom do not identify as LGBTQ+.<sup>30</sup> Fan writers upload their content to dedicated websites, where readers not only access and read fan works, but also comment on them, propose new storylines, participate in a gift economy, and express affection toward the writers.<sup>31</sup> This affection, which may include explicit sexual content, functions as a form of symbolic currency rather than a genuine sexual or romantic interest (after all, many do not know or have never met one another); thus, it also performs an important

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26. It should be noted that I am not arguing that these creative domains are categorically queer—rather, that queer creativity generally thrives in them. I am also aware that there could be cases of hetero- and homo-normative, non-queer, counter-queer, and even queerphobic creative expression in these creative domains. For example, fan fiction may serve as a reactionary outlet for cisgender heterosexuals rather than a genuine exploration of alternative sexualities, with one result being an antiseptic and homonormative portrayal of gay male loving; drag can sometimes be transphobic and serve a new "respectable" homonormativity (particularly in its most mainstream incarnations) rather than disrupt the status quo.

27. See Steven D. Jamar & Christen B'anca Glenn, *When the Author Owns the World: Copyright Issues Arising from Monetizing Fan Fiction*, 1 TEX. A&M L. REV. 959, 959 (2014) ("Fans of various books, films, and television series write their own versions of the stories and post them online in fan fiction communities.").

28. Natalie H. Montano, *Hero with a Thousand Copyright Violations: Modern Myth and an Argument for Universally Transformative Fan Fiction*, 11 NW. J. TECH. & INTELL. PROP. 689, 702–03 (2013).

29. *Id.* at 702; Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461, 468–69 (2006).

30. Koehm, *supra* note 22, at 5; see also Katyal, *supra* note 29, at 468.

31. See KRISTINA BUSSE, FRAMING FAN FICTION: LITERARY AND SOCIAL PRACTICES IN FAN FICTION COMMUNITIES 164 (2017); Pamela Kalinowski, *The Fairest of Them All: The Creative Interests of Female Fan Fiction Writers and the Fair Use Doctrine*, 20 WM. & MARY J. WOMEN & L. 655, 663 (2014).

queer element by placing sexuality and sensation as important currencies.<sup>32</sup> Fan fiction writers mostly write using pseudonyms or codes, though the writer's identity may still be known to some of their fans or contemporaries.<sup>33</sup> Similarly, commentators and discussants on fan fiction sites often identify using pseudonyms or codes, but their identities may still be known to some.<sup>34</sup>

Fan works, as Henry Jenkins notes, "raid mass culture, claiming its materials for their own use, reworking them as the basis for their own cultural creations and social interactions."<sup>35</sup> An important element of fan fiction forums is that they become a space not only where people, and especially women, write about, read, and discuss the sexualities and identities of fictional characters, but also where they feel free to explore and discuss their own sexualities, identities, and desires.<sup>36</sup> Fan fiction is an art form that reflects "feminine pleasures" and allows writers and readers to reject the hetero, male gaze of the original work and reimagine it in a way that appeals to their own sexualities, desires, and identities.<sup>37</sup> Much queer fan fiction reimagines existing works so that male characters experience the social, cultural, physical, and emotional realities of women, LGBTQ+, people of color, etc.<sup>38</sup> Furthermore, some fan fiction authors place macho identities in queer situations or introduce symbols of macho masculinity (like James Bond and Sherlock Holmes) as features of eroticized gay fetish.<sup>39</sup> By doing so, these fan works subvert traditional notions of gender identity, gender roles, and sexualities and suggest that these are not biological facts but rather social constructs.<sup>40</sup> This also creates important mechanisms for writers and readers to reflect on their

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32. BUSSE, *supra* note 31, at 162; Koehm, *supra* note 22, at 8–9.

33. Maria Lindgren Leavenworth, *The Paratext of Fan Fiction*, 23 NARRATIVE 40, 44 (2015).

34. See BUSSE, *supra* note 31, at 20.

35. HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 18 (updated 20th anniversary ed. 1992).

36. BUSSE, *supra* note 31, at 85–86; Katyal, *supra* note 29, at 492. This characterization of slash fan fiction forums alongside fan fiction's strong norms of trust and anonymity seems like a prime example of what Ari Waldman describes as a "safe social space." Ari Ezra Waldman, *Safe Social Spaces*, 96 WASH. U. L. REV. 1537, 1537–39 (2019) ("[S]afe social spaces are environments of information exchange in which disclosure norms are counterbalanced by norms of trust backed endogenously by design and exogenously by law.").

37. JENKINS, *supra* note 35, at xxv–xxvi; HENRY JENKINS, FANS, BLOGGERS, AND GAMERS: EXPLORING PARTICIPATORY CULTURE 44 (2006).

38. See, e.g., Rebecca Tushnet, *The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 294, 309 (Irene Calboli & Srividhya Ragavan eds., 2015) (describing racebending, a practice of replacing white heroes with non-white casts to envision how the story would change if white people were no longer the default).

39. See Kularski, *supra* note 24, at 6.

40. See BUSSE, *supra* note 31, at 61.

own identities and struggles: the fact that a beloved character grapples with issues or fantasies that are similar to theirs may assist them in facing and exploring such issues too.<sup>41</sup>

*Drag queens* are performers who often assume ostentatious female sexuality or idealized femininity in their performances (they typically, though not always, identify as men).<sup>42</sup> The term “drag queen” expresses the sensational component of a performance art, as well as the reversal of gender roles. There are many subsets of drag. For example, many drag queens display what can be described as hyper-femininity, fervent female sexuality, and a reality in which non-hetero sexualities are the norm. Other queens display male features such as beards and chest hair along with “conventional” female attire or makeup. Each queen has their own unique persona and a unique drag name—a pseudonym such as Sharon Needles, Penny Tration, or Brooke Lynn Hynes—yet the queens’ everyday identities are known to all.<sup>43</sup>

A key element of drag is its campy, countercultural nature. Challenging social convention is a defining feature of drag, or, as RuPaul, a globally famous drag queen, phrased it, “[D]rag is punk rock, because it is not part of the Matrix. It is not following any rules of societal standards. . . . We shape-shift. We can do whatever we want. . . . It’s the antithesis of mainstream. . . . [I]t is completely opposed to fitting in.”<sup>44</sup> Drag queens mainly perform in LGBTQ+ or gay-friendly bars and venues, though some queens were able to break the “pink glass ceiling” and perform in general-audience venues, at parties, and on television.<sup>45</sup> Social networks and communities evolve around drag and drag queens: there are groups of supporters, fans, and amateur performers that interact socially both off- and on-line.<sup>46</sup> These communities are often friendly places for their members to explore and express their sexualities and gender identities and find emotional as well as practical support.

*Queercore* is a subculture of queer creative and cultural expression. Queercore emerged in Toronto in the 1980s as a configuration of artistically minded gender and sex nonconformists who embraced both punk and queer practices and aesthetics to challenge mainstream

41. Koehm, *supra* note 22, at 43.

42. See, e.g., Sarid, *supra* note 23, at 136–37; Rupp, Taylor & Shapiro, *supra* note 23, at 277; Carlos A. Figueroa, Comment, “Oh [Yes], She Betta [Should]!”: *Dolling Up Drag Queens’ Intellectual Property Rights*, 28 UCLA ENT. L. REV. 127, 129 (2021).

43. See generally Sarid, *supra* note 23, at 147–49.

44. E. Alex Jung, *Real Talk with RuPaul*, VULTURE (Mar. 23, 2016), <https://www.vulture.com/2016/03/ru-paul-drag-race-interview.html> [<https://perma.cc/QQ7M-W7WD>]; see also Sarid, *supra* note 23, at 178.

45. See Figueroa, *supra* note 42, at 132.

46. Jessa Lingel & Adam Golub, *In Face on Facebook: Brooklyn’s Drag Community and Sociotechnical Practices of Online Communication*, 20 J. COMPUT.-MEDIATED COMMUN. 536, 541 (2015).

oppressions and assimilationist politics among many in the gay and lesbian community.<sup>47</sup> Punk emphasizes the crude, outrageous, and disorderly; it often is produced through the reworking of everyday objects and is anti-authoritarian, individualistic, and participatory.<sup>48</sup> Queercore embraces punk's chaotic, disjunctive, and participatory nature and queer's alternative notions of sexuality and gender to form a radical, counterhegemonic, queer cultural space.<sup>49</sup> Queercore cultural outputs include *zines* (magazines), music, film, and art. Zines are self-produced, inexpensive photocopied magazines.<sup>50</sup> Queercore music is a confluence of punk rock music and queer politics; its musical influences besides punk include industrial music, experimental music, and indie rock.<sup>51</sup> Both queercore music and zines typically explore sexuality, gender, and identity and voice anti-establishment and critical views.<sup>52</sup>

Strong communities unite around queercore bands, zines, and artists. Queercore offers its community a liberation from the ideological subjugation perpetrated by the dominant hetero- and homo-normative culture, offering new modes of communication and expression and allowing members to participate directly in cultural production.<sup>53</sup> Queercore artists share cultural, sexual, and personal identities or solidarity with their fans.<sup>54</sup> Moreover, queercore allows queer “misfits and malcontents” to participate, develop a sense of community and belonging, and nurture a communal identity that is independent from, and that even challenges, the mainstream gay community.<sup>55</sup> Queercore gatherings generally are open to all ages, indicating a particular concern for queer youth who have nowhere else to turn.<sup>56</sup>

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47. CURRAN NAULT, QUEERCORE: QUEER PUNK MEDIA SUBCULTURE 1, 16 (Mary Celeste Kearney ed., 2018); Adela C. Licona, *(B)orderlands' Rhetorics and Representations: The Transformative Potential of Feminist Third-Space Scholarship and Zines*, 17 NWSA J. 104 (2005); D. Robert DeChaine, *Mapping Subversion: Queercore Music's Playful Discourse of Resistance*, 21 POPULAR MUSIC & SOC'Y 7, 19 (1997).

48. NAULT, *supra* note 47, at 10–14.

49. Many zines can be accessed online through the Queer Zine Archive Project (QZAP). Here is a sample: GB Jones & Bruce LaBruce, *J.D.s #3*, QZAP (1987) [http://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/345](http://archive.qzap.org/index.php/Detail/Object/Show/object_id/345) [<https://perma.cc/53RS-W6VA>]. The Canadian LGBTQ2+ Archive (“The ArQuives”) has a huge collection of zines as well. See Maria Wiedlack, “I Don’t Give a Shit Where I Spit My Phlegm” (Tribe 8). *Rejection and Anger in Queer-Feminist Punk Rock*, 3 TRANSP. 1 (2013); see also Licona, *supra* note 47.

50. See ALISON PIEPMEIER, GIRL ZINES: MAKING MEDIA, DOING FEMINISM 1–4 (2009).

51. DeChaine, *supra* note 47, at 8, 16–17, 19.

52. Licona, *supra* note 47, at 109.

53. See DeChaine, *supra* note 47, at 8–9, 17.

54. See *id.* at 8; NAULT, *supra* note 47, at 19–21.

55. NAULT, *supra* note 47, at 23.

56. *Id.* at 26.

Each of these three creative communities in which queer creativity thrives—fan fiction, drag, and queercore—is unique in its social structure, its creativity and culture, and its engagement with mainstream culture and with its fans. Yet these three creative domains share certain notable features that are particularly important for analyzing and explaining why the domains are successful in supporting the flourishing of queer creativity. There are five common features: creative production in these domains engages with sexuality; defiance and resistance form an important part of creativity; the domains endorse and encourage transformation and appropriation of existing works; they practice flexible identification (e.g., wide use of pseudonyms); and they include a social practice of attribution and gifts.<sup>57</sup> Each of these features will be discussed below.

The *first* common feature is that creative and cultural production in these creative domains directly engages with sexuality, particularly non-hetero sexuality. A defining feature of slash fan fiction, for example, is the rewriting of characters' sexualities, their romantic and sexual relationships, and their personal identities from heteronormative into queer or homo sexualities, relationships, and identities.<sup>58</sup> Core elements in drag are explicit engagement with sexuality, manipulating gender, and campiness.<sup>59</sup> Queercore is characterized by, or expressive of, unflinching and often defiant aggressiveness in exploring and expressing non-normative sexuality in its cultural production.<sup>60</sup> An element that is repeatedly utilized in queercore music and zines is the sexualization of culture and the queering of macho masculinities.<sup>61</sup> Other domains of creativity in which queer creativity thrives also share this feature. For example, films in new queer cinema depict non-fixed, non-conventional sexualities, aggressively assert queer identities, and demand an acknowledgment of LGBTQ+ sexualities and related issues such as AIDS.<sup>62</sup>

A *second* common feature is that of defiance and resistance. For example, queercore both revolts against mainstream establishments and upsets the gay establishment.<sup>63</sup> Queercore zines “rebel against the sexism

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57. Of course, there could be other (non-queer) creative communities that manifest some or all of these features. The claim here is not that these are the only creative communities that manifest these features, but rather that these features seem to be defining aspects of queer creative communities. I develop this point further below.

58. BUSSE, *supra* note 31, at 57.

59. Sarid, *supra* note 23, at 136–37.

60. See Wiedlack, *supra* note 49, at 12–13.

61. Kularski, *supra* note 24, at 6.

62. See CLAUDE J. SUMMERS, THE QUEER ENCYCLOPEDIA OF FILM AND TELEVISION 221 (2005).

63. Camille Erickson, Querying Sex, Gender, and Race Through the Queercore Zine Movement: G.B. Jones and Vaginal Davis Protest Conformity 1, 3–4 (2012) (Gateway

and homophobia of mainstream publications,” as well as “against the commercialization and homogenization of queer and female cultural production.”<sup>64</sup> Drag queens resist male-female, men-women, masculine-feminine binaries by meddling with gender and sexuality and the social constructs associated with those.<sup>65</sup> Ella Greenhalgh, for example, demonstrates that the history of drag reflects its role as an inherently resistive and political art form.<sup>66</sup> Fan fiction is said to be “the lifeblood of fan resistance.”<sup>67</sup> Moreover, fan fiction depicting queer sexualities is a site of defiance and empowerment for queer fans vis-à-vis mainstream media and mainstream fandom.<sup>68</sup>

A *third* common feature is that of transforming and appropriating existing works. Drag queens use female singers’ songs, appearances, and personas in their shows; fan fiction authors use existing works as the basis for their sequential works; and bricolage and adaptation of existing popular works are central to queercore.<sup>69</sup> This is also the case in many other queer creative domains, such as queer art (e.g., the abovementioned Deborah Kass’s *Warhol Project*); queer video remixes;<sup>70</sup> and queer online gaming, where gamers use existing figures and customize them to assume non-hetero sexualities, identities, appearances, and gender roles.<sup>71</sup> “Queering” popular culture—that is, reworking, reinterpreting, and appropriating existing works—is fundamental to queer cultural

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Prize for Excellent Riting, Macalester College) (on file with DigitalCommons@Macalester College).

64. Angela Connie Asbell, *Cultivating Dissent: Queer Zines and the Active Subject* 28 (2006) (M.A. thesis, California State University, San Bernadino) (on file with CSUSB ScholarWorks).

65. Ella Greenhalgh, ‘Darkness Turned Into Power’: *Drag as Resistance in the Era of Trumpian Reversal*, 3 *QUEER STUD. MEDIA & POPULAR CULTURE* 299, 305–06, 313 (2018).

66. *Id.* at 305–07.

67. Koehm, *supra* note 22, at 57; see also Bronwen Thomas, *What Is Fanfiction and Why Are People Saying Such Nice Things About It?*, 3 *STORYWORLDS: J. NARRATIVE STUD.* 1, 13 (2011).

68. Koehm, *supra* note 22, at 4, 56–57.

69. See Sarid, *supra* note 23, at 136–37 (regarding drag); Koehm, *supra* note 22, at 4; BUSSE, *supra* note 31, at 12–13 (regarding fan fiction); Michael du Plessis & Kathleen Chapman, *Queercore: The Distinct Identities of Subculture*, 24 *COLL. LITERATURE* 45, 51 (1997); Wiedlack, *supra* note 49, at 6 (regarding queercore).

70. See, e.g., Elisa Kreisinger, *Queer Video Remix and LGBTQ Online Communities*, 9 *TRANSFORMATIVE WORKS & CULTURE* 1 (2012).

71. See Edmond Y. Chang, *Love Is in the Air: Queer (Im)Possibility and Straightwashing in FrontierVille and World of Warcraft*, 2 *QED: J. GLBTQ WORLDMAKING* 6 (2015); MIA CONSALVO, *IT’S A QUEER WORLD AFTER ALL: STUDYING THE SIMS AND SEXUALITY* 2–3 (2003); Adrienne Shaw & Elizaveta Friesem, *Where Is the Queerness in Games?: Types of Lesbian, Gay, Bisexual, Transgender, and Queer Content in Digital Games*, 10 *INT’L J. COMM’N* 3877, 3886 (2016); Lyndsay Michalik, *Stretching the Code: Sexual Performances and Online Gaming Economies*, 11 *LIMINALITIES: J. PERFORMANCE STUD.* 1 (2015).

expression. This does not mean that every queer creative work is based on an existing work, but rather that appropriation and transformation are central features of queer creativity. Moreover, cultural resistance does not necessarily entail direct engagement with mainstream cultural works. As Elisabeth Rosenblatt maintains, “Whether they explicitly ‘talk back’ to dominant culture or situate themselves in relation to it, remix works can . . . pose particularly powerful challenges to cultural hierarchies.”<sup>72</sup>

A *fourth* common feature is creators’ flexible identification and naming practices: In many cases, creators use pseudonyms, codes, stage names, and similar measures to indicate or conceal their identities. Pseudonyms, stage names, and the like serve several creative and communicative functions for queer creativity. They allow creators to assume a new identity that may better reflect who they are, their sexuality, or their gender.<sup>73</sup> They also allow creators to detach their ordinary selves from their identities as creators.<sup>74</sup> These identities may also be “shifting” and may change over time.<sup>75</sup> Pseudonyms also provide anonymity to those who wish to disguise their everyday selves, a function that can be particularly important for those struggling with societal constraints, such as those who wish to ensure that others do not know they engage in certain activities.<sup>76</sup> Anonymity, as U.S. Supreme Court Justice John Paul Stevens stated, “is a shield from the tyranny of the majority.”<sup>77</sup> Conversely, it allows creators to assume a certain lineage or cultural connection or indicate belonging to a certain community or family.<sup>78</sup> Drag queens, for

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72. Rosenblatt, *supra* note 3, at 645.

73. See Laura Heymann, *A Name I Call Myself: Creativity and Naming*, 2 U.C. IRVINE L. REV. 585, 597 (2012); Sarid, *supra* note 23, at 136–37.

74. See Heymann, *supra* note 73, at 612–13; see also Sarid, *supra* note 23, at 137 (noting that drag queens’ personas have “lives” independent from those of their everyday selves).

75. See Wendy Peters, *Queer Identities: Rupturing Identity Categories and Negotiating Meanings of Queer*, 24 CAN. WOMAN STUD. 102 (2005); see also Kishonna L. Gray, *Gaming Out Online: Black Lesbian Identity Development and Community Building in Xbox Live*, 22 J. LESBIAN STUD. 282 (2018); James B. Kelley, *Gay Naming in Online Gaming*, 60 NAMES 193 (2012) (also noting that algorithms may be biased against “gay names” in online gaming).

76. See Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 162, 164 (2003). On the other hand, some argue that this might open the door to appropriation by non-queer individuals who assume a certain identity for fun but are not “really” queer. See, e.g., ‘Nathan Burgoine, *Pseudonyms vs. Identities*, ‘NATHAN BURGOINE (Jan. 21, 2022), <https://apostrophen.wordpress.com/2015/09/19/pseudonyms-vs-identities/> [<https://perma.cc/WW2H-QZGH>].

77. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

78. Jayson A. Morrison, *La MaMa’s Squirts: Igniting Queer Intergenerational Dialogue Through Performance*, 35 TEXT & PERFORMANCE Q. 226, 229 (2015); Heymann, *supra* note 73, at 612–13.

example, often adopt the surnames of their mentors (“drag mothers”).<sup>79</sup> Using pseudonyms also fits with the campy and punky nature of queercore and women’s roller derby.<sup>80</sup>

The practice of flexible identification serves an important communicative function while deconstructing several key elements of heteronormativity. When an artist calls themselves by a nonbinary, gender-neutral, or “opposite” gender name, they challenge the heteronormative, traditional divide between boys’ and girls’ names.<sup>81</sup> This also reflects the idea that sex and gender are performative.<sup>82</sup> Additionally, it is an act of resistance that decenters the initial intention of those who gave the artists their legal names, which is often significant to queer identity-making.<sup>83</sup> Similarly, choosing a name other than the name given at birth allows creators to personalize an important element of their identity—their name—and receive recognition that is attached to their chosen name, not a name chosen for them.<sup>84</sup> Adopting the surname of one’s husband or giving a newborn their father’s surname are considered heteronormative conventions, so when drag queens, fan-fiction writers, or queercore zine authors adopt their mothers’ surnames or make one for themselves, they also challenge these institutions.<sup>85</sup> At the same time, this practice also demonstrates the campy nature of much queer creativity: drag names such as Sofonda Cox, Courtney Act, and Avery Goodlay and queercore zine authors’ names such as Slut Latex and Boy Toy provide good examples.<sup>86</sup> In a similar vein, drag queen Trixie Mattel’s name demonstrates how a chosen name establishes identity, camp, and

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79. Kelexis Davenport, for instance, a famous queen from Dallas, is drag mother to Sahara, Kennedy, Lady Deja, and Armani Nicole Davenport. Lady Deja’s drag daughter is Honey Davenport and Armani Nicole’s drag daughter is A’keria Chanel Davenport. See u/Colosus202, *The Davenport Family Tree*, REDDIT (Jan. 24, 2019, 3:12 PM), [https://www.reddit.com/r/rupaulsdragrace/comments/ajhayt/the\\_davenport\\_family\\_tree/](https://www.reddit.com/r/rupaulsdragrace/comments/ajhayt/the_davenport_family_tree/) [https://perma.cc/XNE5-3YRW].

80. David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1097 (2012) (describing roller derby as a countercultural, all-girls sport in which competitors use pseudonyms under which they compete).

81. See David R. Johnson & Laurie K. Scheuble, *What Should We Call Our Kids? Choosing Children’s Surnames When Parents’ Last Names Differ*, 39 SOC. SCI. J. 419, 428 (2002).

82. Cf. Gilden, *supra* note 10, at 551.

83. Cf. Jane Pilcher, *Names and “Doing Gender”: How Forenames and Surnames Contribute to Gender Identities, Difference, and Inequalities*, 77 SEX ROLES 812, 819 (2017).

84. Cf. Heymann, *supra* note 73, at 591–92.

85. See Laurie K. Scheuble & David R. Johnson, *Married Women’s Situational Use of Last Names: An Empirical Study*, 53 SEX ROLES 143, 143–44 (2005); Michele Hoffnung, *What’s in a Name? Marital Name Choice Revisited*, 55 SEX ROLES 817 (2006).

86. Sofonda Cox (so fond of cocks), Courtney Act (caught in the act), Avery Goodlay (a very good lay).

resistance and deconstructs heteronormativity: Trixie is a slur for feminine boys that her stepfather used to torment her because she was “feminine,” and “Mattel happened because I always had an affinity with dolls and children’s toys. Your last name is like the name of your manufacturer—your mom and dad—so I thought to make it the toy company.”<sup>87</sup>

Queer creators’ naming practices also evoke questions about the relationship between IP, anonymity/pseudonymity, and the closet. All statements of authorship (in any type of creative expression, queer or non-queer) are, as Laura Heymann notes, essentially pseudonymous, even when the name being used is textually equivalent to the writer’s legal or given name.<sup>88</sup> While the default in non-queer creativity is using one’s legal name,<sup>89</sup> the default in queer creativity is the use of pseudonyms.<sup>90</sup> Using pseudonyms by queer creators, as discussed, serves various functions (e.g., identity, performance, detachment/attachment, etc.). Yet this reality also reflects closet dynamics: queer creative expression—when communicated outside the queer space—often involves fear from the heteronormative majority, risk, and conflict.<sup>91</sup> The closet then structures queer lives in a way that limits their publicity.<sup>92</sup>

A *fifth* common feature can be found in the norms regarding attribution and gifts among community members. In fan fiction, for example, the premise is that the ideas, characters, and plots belong to the collective, but there are social norms according to which those using the works of other fan writers provide attribution and credit.<sup>93</sup> This norm, it should be noted, does not equally apply in the case of outsiders’ work (namely, non-fan works).<sup>94</sup> So if author X were to write a fan work based on J. K. Rowling’s *Harry Potter* and author Y were to subsequently write a fan work using X’s plot, Y would be expected to credit X but not necessarily Rowling. Queercore artists also practice norms of attribution.<sup>95</sup> This is evident in zines that often display acknowledgment, credit, and

87. Zach Brooke, *Q&A: Trixie Mattel*, MILWAUKEE MAG. (Sept. 8, 2015), <https://www.milwaukeeemag.com/qa-trixie-mattel/> [<https://perma.cc/5GBM-3PPD>]; see also Trixie Mattel, RUPAUL’S DRAG RACE WIKI, [https://rupaulsdragrace.fandom.com/wiki/Trixie\\_Mattel](https://rupaulsdragrace.fandom.com/wiki/Trixie_Mattel) [<https://perma.cc/95L8-SKBG>] (last visited Feb. 18, 2022).

88. Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1383, 1410–12 (2005).

89. See *id.* at 1379.

90. Cf. Stein, *supra* note 76.

91. See Michael Warner, *Publics and Counterpublics*, 14 PUB. CULTURE 49, 84–87 (2002); Stein, *supra* note 76, at 199; see also EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 70–71 (2d ed. 2008).

92. See SEDGWICK, *supra* note 91, at 70–73.

93. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 154–57 (2007).

94. See Koehm, *supra* note 22, at 21; Tushnet, *supra* note 93, at 157–60.

95. See Kularski, *supra* note 24, at 4–6.

attribution. The queercore zine *Chaos/Order* (1994), for example, declares itself “anti-copyright, pro credit.”<sup>96</sup> Drag queens also practice norms of attribution between performers.<sup>97</sup>

Social norms of affection and gift exchange are also prevalent in these creative communities. In fan fiction, readers and fellow writers provide feedback, comments, and other forms of appreciation, including explicitly sexual compliments.<sup>98</sup> Drag fans may express gratitude through gifts and affection, and drag queens conduct tribute shows to fellow queens.<sup>99</sup> Queercore fans contribute emotionally and financially to support artists and bands: fans and peers offer hospitality, money, affection, and sexual and erotic content in return for the cultural products.<sup>100</sup> For example, Joshua Ploeg, the author of the queercore zine “Fair Game Open Season,” describes how fans offered them admiration, a membership in a self-stimulation society, and personalized “sexual fantasy stories.”<sup>101</sup>

It is also important to note that creative spaces in which queer creativity flourishes are indeed more than just places of queer artistic and cultural expression; additionally, they are often spaces for queer people (and others) to come together.<sup>102</sup> Many women in the online fan fiction community describe fandom as the first place where they “created friendships with other women and discovered levels of intimacy and affection otherwise foreclosed to them,” the first place where they gathered the courage to come out or discuss different aspects of their identities and sexualities.<sup>103</sup> Queercore is a space where queer “misfits” can find a supportive community.<sup>104</sup> Likewise, ballrooms provide queer youth of color support for homosexual desire and identity and a sense of

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96. Sarit, *Chaos Order* #1 (1994), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/103](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/103) [<https://perma.cc/6B5M-CBW5>].

97. Sarid, *supra* note 23, at 158–59.

98. See Karen Hellekson, *A Fannish Field of Value: Online Fan Gift Culture*, 48 *CINEMA J.* 113 (2009). Hellekson also notes that “[i]n terms of the discourse of gift culture, fandom might best be understood as part of what is traditionally the women’s sphere: the social, rather than the economic.” *Id.* at 116; see also Koehm, *supra* note 22, at 22–23 (noting a social norm according to which feedback cannot be negative).

99. See Sarid, *supra* note 23, at 158–59.

100. See NAULT, *supra* note 47, at 25–26; Kularski, *supra* note 24, at 5–6.

101. Joshua Ploeg, *Zine: Fair Game Open Season*, QZAP (1992), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/577](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/577) [<https://perma.cc/KZ2C-74S5>] (“I also got asked to join a ‘masturbation society’” and a fan letter saying, “[I]f you let me know what you [sic] kind of story will excite you, I’ll do my best to write one and to take you to a climax.”).

102. Cf. Betsy Rosenblatt, *Belonging as Intellectual Creation*, 81 *MO. L. REV.* 91, 94–95 (2017); see also Waldman, *supra* note 36.

103. BUSSE, *supra* note 31, at 165.

104. NAULT, *supra* note 47, at 21–24.

“home” and “family,” along with multiple forms of support for HIV prevention.<sup>105</sup>

The discussion of these common features—engaging with sexuality, defiance, and resistance; transformation and appropriation of existing works; flexible identification; and a social practice of attribution and gifts—offers some valuable insights into the environments in which queer creative expression thrives. Yet the importance of these features for an understanding of queer creativity rests also on their explanatory power: these features are a defining aspect of queer creativity and queer creative spaces and communities. There could, of course, be other (non-queer) creative fields or communities that manifest some or many of these features. But when a creative community or artistic field engages with sexuality, defiance, and resistance; transformation and appropriation of existing works; flexible identification; and a social practice of attribution and gifts, they are, in their essence, queer (even if these communities or artists do not necessarily view their creativity as queer).

These common features also offer important insights into the relationship between queer creativity and IP, suggesting, *inter alia*, that queer creativity is a way through which artists and communities can resist cultural hegemony and that defiance and resistance of IP laws can be a significant constitutive part of queer creative and cultural expression. Queer resistance is often *particularly directed* at IP law, especially copyright, as well as at the traditional marketplace models that form the basis of several IP paradigms (although, as discussed below, this does not equate to a categorical rejection of IP).<sup>106</sup> In multiple examples of queer creativity, and for many queer creators, the communicative effect of infringing copyright law is in and of itself an act of creative expression and resistance.

Queering mainstream copyrighted works, as Sonya Katyal emphasizes, is “*a brazen act of civil disobedience against the frameworks of intellectual property.*”<sup>107</sup> Elisa Kreisinger notes that an important creative element in queer video remixes is an active “rejection of the dominant and acceptable notions of copyright.”<sup>108</sup> Queer remix, Kreisinger contends, “*demand[s] that producers physically deconstruct copyright images . . . displacing and thus queering the binaries on which copyright, ownership, and authorship are based.*”<sup>109</sup> Similarly, for many drag queens,

105. Emily A. Arnold & Marlon M. Bailey, *Constructing Home and Family: How the Ballroom Community Supports African American GLBTQ Youth in the Face of HIV/AIDS*, 21 J. GAY & LESBIAN SOC. SERVS. 171 (2009).

106. See *infra* notes 107–18 and accompanying text.

107. Katyal, *supra* note 29, at 464 (emphasis added).

108. Kreisinger, *supra* note 70.

109. *Id.* (emphasis added); see also Horace E. Anderson, Jr., “*Criminal Minded?*”: *Mixtape DJs, The Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 113–14 (2008) (arguing that remixes produce “productive

“[I]aw . . . turns mainstream society’s social conventions from mere social conventions into binding norms.”<sup>110</sup> Therefore, opposing it constitutes part of the “message that the creators wish to convey via their creations.”<sup>111</sup> In queercore music, bands and singers perform lyrics of imagined violence directed at the systems that subjugate them, including law, and the agents of those systems—law enforcement and legal institutions.<sup>112</sup> Imagining violence against the law (as an institution) is key to these queercore artists’ creative expression.<sup>113</sup>

Queercore zines present another notable example of resistance explicitly directed at copyright law. In an interview with the staff of the Queer Zine Archive Project titled “Queer Zinesters Do It on The Photocopier,” in *Homobody6* zine, the interviewees maintained that “[z]ines’ are created outside the traditional publishing industry and encompass a world of copyleft, anti-copyright, and creative commons-produced texts and documents.”<sup>114</sup> Other examples are even more explicit. *Raw/Idea #3* zine, for example, states, “[F]—k your bullshit laws and traditions” on its first page and, “anti-copyright (all Riots reserved)” on its back page.<sup>115</sup> *Life Has A Beard* zine declares itself “anticopyright” and advises readers thus: “Note to Zinesters: If you are still in high school or college, befriend the debate team; they do more copying than any other group at the school and have almost unlimited free access to copy-machines and printers.”<sup>116</sup> *That’s So Gay* zine states, “[O]ur anti-copyright goes like this . . . You can copy and redistribute this by the ZILLIONS, but keep it free! ♡ Free = Good ♡.”<sup>117</sup> *Queer Intercourse* zine takes a

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infringement,’ infringing-activity, or improper appropriation” that in fact adds value to the infringed intellectual good rather than leading to losses for the copyright owner).

110. Sarid, *supra* note 23, at 177; see also Haim Abraham, *A Family Is What You Make It: Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER & SOC. POL’Y L. 405 (2017) (discussing the influence of social conventions on family law in recognizing non-heteronormative family structures).

111. Sarid, *supra* note 23, at 178 (emphasis omitted).

112. Judith Halberstam, *Imagined Violence/Queer Violence: Representation, Rage, and Resistance*, 37 SOC. TEXT 187, 189–90, 192–93 (1993); NAULT, *supra* note 47, at 71–73.

113. Halberstam, *supra* note 112, at 189–90, 192–93.

114. Rio Safari, *Zine: Homobody #6*, QZAP (2010), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/290](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/290) [<https://perma.cc/XA7T-NTDP>].

115. Nickolas P, *Zine: Raw/Idea #3*, QZAP, [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/567](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/567) [<https://perma.cc/TLJ2-VB3S>] (last visited Feb. 18, 2022).

116. Basil Beardsley, *Zine: Life Has a Beard*, QZAP (2007), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/146](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/146) [<https://perma.cc/JE77-CMYP>].

117. Tuck & Muffins, *Zine: That’s So Gay!*, QZAP (2007), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/331](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/331) [<https://perma.cc/P3G5-3VET>].

similar approach, although, interestingly, it is more cautious with external contributors' materials, stating that "All contributors retain copyright of their own works. Queer I[ntercourse] as a whole, however, is anti-copyright and encourages you to duplicate the zine in whole or part to share it with as many people as possible. We only ask that you respect the authors/artists by crediting their work."<sup>118</sup>

Defying IP laws as an act of resistance and cultural expression is of note also because sexuality and erotica in general and LGBTQ+ sexualities in particular are often specifically targeted by IP right-holders. As discussed, many queer artists *directly* resist IP law by explicitly defying copyright and encouraging infringement.<sup>119</sup> Yet queer artists can also be seen as resisting IP *indirectly* by challenging right-holders and how such right-holders manage their copyrights. Sonia Katyal, for example, notes that right-holders tend to tolerate fan fiction *unless* it includes sexual content and that "slash fan fiction is considered to be especially transgressive because of its sexualization of mainstream characters and because its story lines often involve 'recoding' these characters as gay, bisexual, or involved in a same-sex relationship with another character."<sup>120</sup> Understood this way, sexualization of mainstream characters not only queers mainstream culture but also represents resistance to the privilege that copyright law bestows on right-holders.

A notable example of sexualization of mainstream characters as a means to resist popular culture and the privilege that copyright law bestows on right-holders is that of *Air Pirates Funnies*. Created in the 1970s by an underground comic group, *Air Pirates Funnies* was a series of comics, depicting Disney characters in explicit sexual and drug-related situations.<sup>121</sup> The comic group used Disney characters in sexualized

118. A Guerrilla Press Collective, *Zine: Queer Intercourse #4*, QZAP (1992), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/486](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/486) [https://perma.cc/H2MM-GERK]; see also Stephen Dedalus, *Zine: Going Homo #3*, QZAP (1994), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/493](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/493) [https://perma.cc/6KP4-BFD4]; Sarit, *supra* note 96.

119. See *supra* notes 114–16 and accompanying text.

120. Katyal, *supra* note 29, at 513 ("[M]ost copyright owners tend not to get involved with fan fiction unless a narrative involves graphic sexual content, in order to avoid 'tarnishment' of the original image. However, slash fan fiction is considered to be especially transgressive because of its sexualization of mainstream characters and because its story lines often involve "recoding" these characters as gay, bisexual, or involved in a same-sex relationship with another character."); see also Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 623 (2007).

121. Terence Chua, "Messing with The Mouse": Copyright, Parody and the Countercultural Wars in *Walt Disney v. The Air Pirates* (2005) (M.A. thesis, University of Georgia), [https://getd.libs.uga.edu/pdfs/chua\\_terence\\_s\\_200505\\_ma.pdf](https://getd.libs.uga.edu/pdfs/chua_terence_s_200505_ma.pdf) [https://perma.cc/7KAD-E2H4]; Betsy Gomez, *Disney's Bloody Attack on the Air Pirates*, COMIC BOOK LEGAL DEF. FUND (May 6, 2013), <http://cbldef.org/2013/05/disneys-bloody-attack-on-the-air-pirates/> [https://perma.cc/9XWF-UBL6]; Bob Levin, *Disney's War*

situations, *inter alia*, because they believed that Disney was likely to sue them for copyright infringement.<sup>122</sup> In fact, the group was so eager for Disney to take them to court for copyright infringement that they gave copies of their comics to a friend, “the gay son of the chairman of Disney’s board of directors,” and that friend “smuggled the comics into a board meeting and laid them out around the table like notepads.”<sup>123</sup> By choosing Disney characters, the group was “able to comment not just on the seeming asexuality of the Disney character,” but also on “the extent of control Disney held over its characters and the lengths it would go to in order to retain that control.”<sup>124</sup> Furthermore, the group *wanted* to lose their court case—or, in the words of one of the artists, “get nine to nothing at the Supreme Court. I had to lose all the way to the Supreme Court”—so that they could expose the courts’ negative attitudes toward sex-related parody.<sup>125</sup> Courts, as Terence Chua notes, are reluctant to apply fair use rules “if your parody is offensive to the court, and the likelihood of this is high if it puts the characters in explicitly sexual situations—then it will be disallowed, regardless of [legal merit].”<sup>126</sup>

In a similar vein, Anupam Chander and Madhavi Sunder suggest that “the masters of popular characters are unlikely to license the most disfavored uses.”<sup>127</sup> Chander and Sunder mention two examples. In the first case, DC Comics threatened legal action against an artist depicting Batman and Robin as gay lovers.<sup>128</sup> DC Comics, Chander and Sunder note, was not opposed to alternative plots and stories involving its characters so long as the plots did not include sexual or erotic content.<sup>129</sup> In fact, DC Comics itself produced “alternative Batman” comics, such as a strip featuring an evil Batman.<sup>130</sup> The second example Chander and Sunder discuss is that of *Gone with the Wind*, which requires for a license to use the work a condition according to which the licensee “will under no circumstances write anything about miscegenation or homosexuality.”<sup>131</sup>

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*Against the Counterculture*, REASON (Dec. 2004), <https://reason.com/2004/12/01/disneys-war-against-the-counte-2/> [<https://perma.cc/6DWR-4Z4C>].

122. Gomez, *supra* note 121; see Levin, *supra* note 121.

123. Gomez, *supra* note 121; Levin, *supra* note 121.

124. Chua, *supra* note 121, at 116.

125. *Id.* at 16.

126. *Id.* at 117.

127. Chander & Sunder, *supra* note 120, at 623.

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.* n.155 (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring)). Other examples include the Barbie doll and its manufacturer Mattel, which has been known to specifically target any derivative work that sexualizes Barbie. Emily Chaloner, for instance, contends that “[b]y preventing any type of sexual image of Barbie to be shown, Mattel is able to maintain its sanitized Barbie world and to perpetuate a de-sexualized image of women in general.” Emily

For some queer creators, defying copyright also constitutes resistance to traditional marketplace models that form the basis of several IP paradigms. For such creators, queer cultural production serves as an active route away from a traditional economic order and toward one characterized by queer pleasures and orientations as indicators of success.<sup>132</sup> Many queercore zine authors, for example, measure success through cultural engagement rather than profit.<sup>133</sup> An alternative to mainstream ideas about sexuality, normativity, and identity, according to this view, must also focus on alternatives to current marketplace models. Some queer creators explicitly reject IP's economic rights but request or encourage attribution.<sup>134</sup> *Going Homo* zine, for instance, states that it is “anti-copyright” and that “Going Homo may be reprinted at will for non-profit purposes . . . . It would be nice, tho, if you mentioned you found it in *Going Homo*.”<sup>135</sup> The notion that attribution and moral rights are elemental to creators is not exclusive to queer creators, and many scholars have long demonstrated the importance of attribution to authors in other creative arenas (in and outside of traditional IP industries).<sup>136</sup> However, some queer creators see financial success not merely as an irrelevance but as a problem because, in their view, commercial success indicates that they have lost touch with their audience and ethos.<sup>137</sup>

This is not to suggest that queer creators, or that queer creativity, are necessarily oppositional to market forces. Rather, some queer creators

Chaloner, *A Story of Her Own: A Feminist Critique of Copyright Law*, 6 J.L. POL'Y INFO. SOC'Y 221, 249 (2010); see also Rebecca Tushnet, *Make Me Walk, Make Me Talk, Do Whatever You Please: Barbie and Exceptions*, in INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP 405, 409–10, 417–18 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014); Katyal, *supra* note 29, at 464, 511; ORLY LOBEL, YOU DON'T OWN ME: HOW *MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE* (2017); Ann Bartow, *Barbie in Bondage: What Orly Lobel's Book "You Don't Own Me: How Mattel v. MGA Entertainment Exposed Barbie's Dark Side" Tells Us About the Commoditization of the Female Body*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 435, 436 (2018).

132. Cf. Janice Radway, *Girl Zine Networks, Underground Itineraries, and Riot Grrrl History: Making Sense of the Struggle for New Social Forms in the 1990s and Beyond*, 50 J. AM. STUD. 1, 25–26 (2016).

133. Kularski, *supra* note 24, at 3–6.

134. *Id.* at 5–6. (regarding queercore); Tushnet, *supra* note 93, at 154–55; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 664–65, 670, 680 (1997) (regarding fan fiction); Sarid, *supra* note 23, at 157–58, 170 (regarding drag).

135. Dedalus, *supra* note 118; see also A Guerrilla Press Collective, *supra* note 118.

136. See *supra* notes 132–35; see also Manuel A. Gómez, *The Tower of David: Social Order in a Vertical Community*, 10 FLA. INT'L U. L. REV. 215, 229–30 (2014) (noting the importance of reputational norms in non-IP industries).

137. See Kularski, *supra* note 24, at 3–4; Erickson, *supra* note 63, at 3; see also Sarit, *supra* note 96; A Guerrilla Press Collective, *supra* note 118; Dedalus, *supra* note 118.

work within the logic of the market to subvert or transform it in more nuanced ways. For example, RuPaul—an internationally famous drag queen—based their career on emulating and eventually stepping in for cisgender female models.<sup>138</sup> *RuPaul's Drag Race*, a successful reality television show hosted by RuPaul in which contestants compete to become “America’s Next Drag Superstar,” started out as a spinoff of Tyra Banks’s “America’s Next Top Model”<sup>139</sup> but has now, arguably, matched or exceeded its global cultural influence. *RuPaul's Drag Race* launched the successful careers of dozens of queer creators.<sup>140</sup> The show can be seen as an example of strategic commodification and supplantation—creating a commercially successful product and bringing greater visibility to queer voices through the machinery of the market, while arguably shifting the politics around it.<sup>141</sup>

In a similar vein, it should also be noted that queer resistance to IP does not equate to a categorical rejection of proprietary entitlements in creative works, IP law, or resistance to artists who benefit from (and often rigorously pursue) IP rights. The picture, as is often the case, is nuanced. Indeed, some queer creators exercise their IP rights; many in the queer community admire or worship artists who pursue their IP rights (and even actively support them), and, as this Article itself demonstrates, many queer communities and creative spaces maintain clear proprietary norms around intellectual creations.

To summarize, these queer creative communities—drag, queer fan fiction, and queercore—provide examples of creative sites where traditional social and cultural concepts of sexualities, desires, kinship, and temporality are deconstructed and reimagined, proposing new ways of imagining their intersections.<sup>142</sup> Furthermore, these examples also teach us that cultivating one’s identity and one’s cultural and creative voice requires opportunities for interaction and experimentation, including with

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138. See, e.g., Elizabeth Schewe, *Serious Play: Drag, Transgender, and the Relationship Between Performance and Identity in the Life Writing of RuPaul and Kate Bornstein*, 32 *BIOGRAPHY* 670, 672 (2009).

139. John Mercer, Charlie Sarson & Jamie Hakim, ‘Charisma, Uniqueness, Nerve and Talent’: *RuPaul's Drag Race and the Cultural Politics of Fame*, 11 *CELEBRITY STUD.* 383, 383 (2020).

140. See Max Merhan, ‘Tens, Tens, Tens Across the Board’: Representation, Remuneration, and Repercussion – *RuPaul's Drag Race* from Screens to Streets 21–24, 71 (Jan. 2020) (M.A. thesis, Concordia University), [https://spectrum.library.concordia.ca/id/eprint/986541/1/Mehran\\_MAFilm\\_S2020.pdf](https://spectrum.library.concordia.ca/id/eprint/986541/1/Mehran_MAFilm_S2020.pdf) [<https://perma.cc/9X7G-8RAW>]; Saul Lipchik, *RuPaul's Richest Drag Queens, Ranked: From Trixie Mattel to Bianca Del Rio, Which Drag Race Star Has the Highest Net Worth?*, *S. CHINA MORNING POST* (June 17, 2021, 7:00 AM), <https://www.scmp.com/magazines/style/celebrity/article/3137511/rupauls-richest-drag-queens-ranked-trixie-mattel-bianca> [<https://perma.cc/5Y95-9KA6>].

141. I thank Andrew Gilden for this important point and example.

142. See Gilden, *supra* note 10, at 553.

sexuality, desire, and gender, as well as with existing cultural creations. These examples also show that anonymity or flexible identification can play a crucial role in finding one's personal or cultural identity and that non-economic rewards, such as attribution, are an important currency in intellectual production.<sup>143</sup> In addition, these examples reveal an important and counterintuitive connection between IP and queer cultural production: while IP structures hegemonic notions of cultural production, it simultaneously defines a field of marginal cultural production based on resistance to, or rejection of, IP's concepts, notions of authorship and control, paradigms, perception of creativity, etc. These examples also set the stage for a critical analysis of IP doctrine from a queer-theoretical perspective, to which we now turn.

## II. A QUEER APPRAISAL OF IP DOCTRINE

IP's rules and doctrines, its categorizations, and its vocabulary create a certain legal order that generates a social and cultural order. That is, far beyond the immediate domain of producing and consuming cultural goods, IP produces social and cultural hierarchies.<sup>144</sup> A queer analysis of IP seeks to expose how IP doctrine and vocabulary manufacture a heteronormative cultural hierarchy. Accordingly, this Part evaluates from a queer-theoretical perspective the idea-expression, proprietary-public domain, economic-moral rights, and copyrightable-non-copyrightable subject matter divides, as well as IP's "protection" of IP rights terminology. This Part starts with a brief overview of each of these doctrines and introduces some of the current critical appraisals thereof. It then proceeds to a queer reading of each of these doctrines, exploring how these doctrines entrench certain (heteronormative) ontologies of identity in popular culture, resulting in a cultural and social hierarchy.<sup>145</sup>

*The idea-expression dichotomy:* The idea-expression dichotomy is a long-established principle in copyright. It limits the scope of copyright to expressions or manifestations of an idea, but not to the idea itself. While an author may enjoy exclusivity and control in their work, they cannot

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143. See Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789; Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006); Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000*, 32 BERKELEY J. EMP. & LAB. L. 215 (2011) [hereinafter Fisk, *The Role of Private IP*].

144. See Gildea, *supra* note 10, at 555.

145. These are not meant to be exhaustive, but rather representational. As Elisabeth Rosenblatt reminds us, "We cannot blame a single doctrine for these inequities. A combination of factors conspires to create this effect [of cultural hierarchy and discrimination]." Rosenblatt, *supra* note 3, at 605.

control the ideas abstracted from the work.<sup>146</sup> This creates a legal divide: expressions may be subject to copyright, while ideas belong in the public domain. So, for example, while an author of a book providing gardening advice holds the exclusive rights to print or publish their book, any person may freely practice the information that the book describes or illustrates, and any person may write a (different) book providing gardening advice.<sup>147</sup>

The rationale for the uncopyrightability of ideas is said to be twofold: First, ideas are intangible and as such cannot be the basis of a property interest; for an idea to be capable of attracting proprietary privilege, it must be capable of being identified. This reasoning is reflected in multiple court decisions, as well as in the legislative hearings for the Copyright Act of 1909, which state that “there can be no property in thoughts, conceptions, ideas, sentiments, etc., apart from their association, is clear, for they are then incapable of being identified or owned exclusively.”<sup>148</sup> Second, an idea-expression divide is said to reflect the balancing of society’s interest in the free flow of information with authors’ property interests.<sup>149</sup> Excluding expressions but not ideas is said to adequately incentivize authors to create and disseminate their works while leaving the building blocks of communication, culture, innovation, and expression free from monopolization.<sup>150</sup>

Various IP scholars have pointed to several problems with the idea-expression divide, noting, for example, the following observations: that it

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146. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . .”); WIPO Copyright Treaty, art. 2, Dec. 20, 1996, 2186 U.N.T.S. 121 (“Copyright protection extends to expressions and not to ideas . . . .”); Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(2), Apr. 15, 1994; 1869 U.N.T.S. 3.

147. Cf. *Baker v. Selden*, 101 U.S. 99 (1880).

148. Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 556–57 (1990) (quoting *Arguments Before the Comms. on Pats. of the S. and H.R., Conjointly, on the Bills S. 6330 and H.R. 19853*, 59th Cong. 217 (1906)); see also Gilden, *supra* note 10, at 560 (“IP laws are highly sensitive to processes of cultural inscription, to the distinction between the normative and the material. It even has a term to encompass inscription of the abstract into the material: ‘fixation.’”).

149. Jones, *supra* note 148, at 561.

150. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 559–60 (1985); *Eldred v. Ashcroft*, 537 U.S. 186, 217, 219 (2003); see also Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189–92 (1970); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Lionel Bently & Laura Biron, *Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, if Anything, Is to Be Done?*, in *THE WORK OF AUTHORSHIP* 237, 265 (Mireille van Eechoud ed., 2014); L. BENTLY, B. SHERMAN, D. GANGJEE & P. JOHNSON, *INTELLECTUAL PROPERTY LAW* 218 (5th ed. 2018); Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3, 9 (2003).

is amorphous and creates a chilling effect on expressions that may be constitutionally protected by the First Amendment,<sup>151</sup> that it fails to ensure that ideas freely circulate in the marketplace,<sup>152</sup> that in reality there are no “expressionless ideas” and no “idealess expressions,”<sup>153</sup> or that such a distinction inherently invokes value judgments on the part of judges adjudicating copyright infringement cases.<sup>154</sup> Yet the idea-expression divide remains the “first axiom of copyright.”<sup>155</sup>

*The proprietary-public domain distinction:* IP laws distinguish between creative works and inventions that enjoy IP rights and those that do not. The latter are said to belong in the public domain.<sup>156</sup> Like the term “property,” the term “public domain” is protean. There is, as Edward Lee notes, “a firestorm of debate about the public domain in intellectual property law.”<sup>157</sup> Legal scholarship describes the public domain in various ways, suggesting it is comprised of the residual leftovers after property rights have taken their share or expired,<sup>158</sup> the “outside” of IP,<sup>159</sup> a measure to correct market failure,<sup>160</sup> a restraint on government power,<sup>161</sup> a means and the end “to promote the progress of science,”<sup>162</sup> or a “home” where people can find inspiration and muse.<sup>163</sup> Regardless of exact definition, the central notion common to most definitions of the public domain is that it

151. See Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 393–94 (1989); Alfred C. Yen, Eldred, *the First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 675 (2003).

152. Patricia Loughlan, *The Marketplace of Ideas and the Idea-Expression Distinction of Copyright Law*, 23 ADEL. L. REV. 29 (2002).

153. Jones, *supra* note 148, at 553.

154. Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements*, 66 IND. L.J. 175, 178 (1990).

155. *Chuck Blore & Don Richman, Inc. v. 20/20 Advert. Inc.*, 674 F. Supp. 671, 676 (D. Minn. 1987).

156. *See id.*

157. Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 97 (2003); Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L.J. 783, 783 (2006).

158. David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 465 (2003); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990). *But see* Michael D. Birnhack, *More or Better? Shaping the Public Domain* 59–86, 60 (Tel Aviv Univ., Working Paper No. 50, 2008) (positing “that the public domain is not only a ‘negative’”).

159. James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 1 (2003).

160. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

161. Lee, *supra* note 157, at 116.

162. Birnhack, *supra* note 158, at 79.

163. Lange, *supra* note 158, at 470.

is free and accessible to all.<sup>164</sup> A rich and robust public domain, the argument goes, is key to continued economic growth and social welfare.<sup>165</sup>

Several IP scholars, however, have noted that the description of the public domain as a resource that is free and accessible to all is a romantic conviction that may be far from reality. Anupam Chander and Madhavi Sunder, for example, argue that some groups—often those from powerful social and economic classes—are better positioned to exploit and enjoy the resources in the public domain.<sup>166</sup> These scholars contend that the binary rhetoric of proprietary ownership versus the public domain creates an illusion according to which the public domain is egalitarian, free, and open to all.<sup>167</sup> Yet this binary masks the ways in which the public domain often works in the interests of traditional property owners to disadvantage and subordinate disempowered groups, impairs efforts of disempowered groups to assert agency and personhood, and may even reduce them to “mere objects, or someone else’s property.”<sup>168</sup> Similarly, Ruth Okediji shows that resistance to granting rights in Indigenous peoples’ knowledge is many times justified, at least partly, by reference to safeguarding the public domain.<sup>169</sup>

A queer analysis would suggest that private-public and property-common distinctions produce notions of cultural citizenship centered on a heteronormative status quo. Recognizing Western and “masculine” creative expressions as the types of works that attract proprietary rights and value and placing Indigenous and “feminine” creative expressions, such as traditional knowledge or cooking recipes, in the public domain, IP law constitutes the feminine and non-Western as “abject beings” who form the constitutive outside.<sup>170</sup> In other words, certain types of creative expression, such as Indigenous and “feminine” creativity, become

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164. Boyle, *supra* note 159; Chander & Sunder, *supra* note 2, at 1337–38.

165. Chander & Sunder, *supra* note 2, at 1340.

166. *Id.* at 1341.

167. *Id.*

168. *Id.* at 1335; see also Malla Pollack, *Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. WOMEN & L. 603 (2006).

169. See Ruth L. Okediji, *Traditional Knowledge and the Public Domain* (Ctr. for Int’l Governance Innovation, Paper No. 176, 2018); see also Simon Stern, *Creating a Public Domain in Eighteenth-Century England*, OXFORD HANDBOOKS ONLINE (Aug. 2015), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935338.001.0001/oxfordhb-9780199935338-e-39> [<https://perma.cc/2ERF-MTPW>] (showing how the public domain has developed from conceptions of copyright as property in the eighteenth century).

170. See April M. Hathcock, *Confining Cultural Expression: How the Historical Principles Behind Modern Copyright Law Perpetuate Cultural Exclusion*, 25 AM. U. J. GENDER SOC. POL’Y & L. 239 (2017); BUTLER, *supra* note 9, at 3; Rosenblatt, *supra* note 3, at 598.

categorically public, indicting these communities and individual members thereof as cultural outsiders.

Equally, both sides of the private-public divide reinforce notions of heteronormative domination over queer cultural expressions. Rebecca Tushnet notes that patriarchy makes fair game of women in the public sphere and keeps them under control in the private sphere.<sup>171</sup> The same could be said of queer bodies and queer creativity: they are, at the same time, fair game in the public sphere and kept under control in the private sphere. Queers' and LGBT+ people's attempts to express their sexuality, circumstances, desires, and fetishes are often regarded as "shameful and inappropriate contamination of the public with what should be kept secret."<sup>172</sup> Furthermore, the private-public divide is a constitutive feature of the closet.<sup>173</sup> The closet structures queer sexuality and identity in relation to binaries of secrecy and disclosure and of private and public.<sup>174</sup> The closet structures queer lives in a way that limits the publicity of queer voices while allowing the heteronormative majority to benefit from queer creators' creative labor. This sentiment is reflected, for example, in the leaflet *Queers Read This*, produced in 1990 for the NYC Pride March:

Since time began, the world has been inspired by the work of queer artists. In exchange, there has been suffering, there has been pain, there has been violence. Throughout history, society has struck a bargain with its queer citizens: they may pursue creative careers, if they do it discreetly. Through the arts queers are productive, lucrative, entertaining and even uplifting. These are the clear-cut and useful by-products of what is otherwise considered antisocial behavior. In cultured circles, queers may quietly coexist with an otherwise disapproving power elite.<sup>175</sup>

*Economic versus moral rights:* In the Anglo-American tradition, IP rights are primarily focused on economic privileges. This approach generally holds that IP rights incentivize creativity and the dissemination of creative works by providing authors with exclusive control over the exploitation of their works.<sup>176</sup> This control is established through economic rights that include control of reproduction, adaptation,

171. Tushnet, *supra* note 1, at 291–92 (discussing women).

172. *Id.* at 292 (discussing women).

173. SEDGWICK, *supra* note 91, at 71.

174. *Id.*

175. Zine: *Queers Read This!*, QZAP (2009), [https://archive.qzap.org/index.php/Detail/Object/Show/object\\_id/184](https://archive.qzap.org/index.php/Detail/Object/Show/object_id/184) [<https://perma.cc/GGB4-2NF5>].

176. Tushnet, *supra* note 1, at 300; Rochelle C. Dreyfuss & Justine Pila, *Intellectual Property Law: An Anatomical Overview*, in *The OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 3* (Rochelle C. Dreyfuss & Justine Pila eds., 2018).

distribution, and public performance of a copyrighted work.<sup>177</sup> On the other hand, moral rights—namely, rights reflecting authors’ associations and connections with their works—are deemed a negligible part of copyright law and are virtually non-existent in patents or design laws.<sup>178</sup> Moral rights include the right to be recognized as the author (attribution) and the right to prevent any alterations to the work that are prejudicial to the author’s honor or reputation (integrity).<sup>179</sup>

There is a vast literature advocating for critical appraisals of IP’s focus on economic rights and utilitarian incentives and its disregard of moral rights. Rebecca Tushnet, for example, suggests that the focus on utilitarian incentives “results in a systematic disregard for non-market incentives,” which leads to an inaccurate view of creativity.<sup>180</sup> Carys Craig suggests that the focus on economic rationality shifts authorship “from a situated, communicative act” to “an individual act that produces a commodifiable thing.”<sup>181</sup> Yet economic rights currently remain the focus of copyright law, and moral rights remain largely negligible.<sup>182</sup> As the U.S. Court of Appeals for the Second Circuit stated in *Gilliam v. ABC*,<sup>183</sup> “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”<sup>184</sup>

177. See 17 U.S.C. § 106.

178. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 955 (1990).

179. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, revised July 14, 1967, 828 U.N.T.S. 221.

180. Tushnet, *supra* note 1, at 275; Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517–19 (2009).

181. Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 208 (2007).

182. See Tushnet, *supra* note 143, at 790; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 805–08 (2001).

183. 538 F.2d 14 (2d Cir. 1976).

184. *Id.* at 24. It should be noted, however, that the United States has since enacted legislation for the rights of integrity and attribution in some cases in visual arts: Visual Artists Rights Act of 1990 (VARA), Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended at 17 U.S.C. §§ 101, 102, 106A). In addition, at times, U.S. courts—though sparingly—provided some protection for interests analogous to moral rights in certain cases of visual arts. For example, U.S. courts have considered attribution as a factor in deciding fair use. See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (finding that since the defendant did not attempt to secure the plaintiff’s permission to copy contents from her book or to credit her for the use of her materials, the defendant’s conduct weighed against a finding of fair use); *Weissmann v. Freeman*, 868 F.2d 1313, 1323–24 (2d Cir. 1989) (finding that a professor could not use a “fair use” defense for use of materials produced by his assistant due to lack of credit to his assistant and his contribution [and actually taking credit for that work himself]); *Williamson v. Pearson Educ., Inc.*, No. 00 Civ. 8240(AGS), 2001 WL 1262964, at \*5–6 (S.D.N.Y. Oct. 19, 2001) (deciding that the defendant—a book publisher—enjoyed the fair use defense, as the plaintiff’s book was given credit as the source of borrowed material and was added to a “recommended reading”

IP's prioritization of economic utilitarianism over moral interests consolidates a cultural hierarchy according to which only the types of creativity and cultural exchange that lend themselves to economic exploitation are socially beneficial. Furthermore, by prioritizing economic rights, as Elizabeth Rosenblatt notes, "the system reflexively protects itself. It encumbers—both through discursive denigration and legal impediment—the upturning of this expressive hierarchy."<sup>185</sup> While queer creativity may have high economic potential in practice, queer creators tend not to exploit their works and instead engage in other means of recognition and exchange, such as gift exchange, attribution, and sharing.<sup>186</sup> Additionally, economic utilitarianism is said to be associated with reason, whereas moral interests are said to be associated with emotions.<sup>187</sup> This notion corresponds to the culturally entrenched and essentialist view that the queer mind, queer sexuality, and queer body (like the female mind, sexuality, and body) are sites of unreason that are unintelligible.<sup>188</sup> It should be noted that, from a queer perspective, commodification and economic exploitation are not necessarily an undesired outcome. But this is beside the point. Given IP's focus on economic exploitation, the questions are, What hierarchy is created by IP's categorizations, and what implications for subjectivity exist beyond the immediate domain of producing or consuming intellectual works?<sup>189</sup>

*Copyright subject matter:* The Copyright Act includes a list of works in which "[c]opyright protection subsists."<sup>190</sup> This list includes literary, musical, dramatic, pictorial, audiovisual, and architectural works; pantomimes; and sound recordings.<sup>191</sup> Other creative products such as cooking recipes, fashion designs, and needlework generally do not enjoy copyright protection.<sup>192</sup> This means that certain types of creators enjoy

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list); see also Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 86–88 (2007); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 97 (1997).

185. Rosenblatt, *supra* note 3, at 608.

186. See *supra* Part I.

187. See Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 811–13 (1989). Williams, employing what can be described as a queer lens, in fact warns of falling into the trap of associating utilitarianism with masculinity and a feelings-based ethic of care with femininity. *Id.* at 813; see also Rosenblatt, *supra* note 3, at 598, 602.

188. Cf. Adler, *supra* note 1, at 1109 ("[The Supreme] Court accepted and acted upon culturally entrenched views of the nude female form: that the female body is a site of unreason; that it is barely intelligible; that it is inviting yet dangerous; and that it causes mayhem, disease, and destruction.").

189. Cf. Gildea, *supra* note 10, at 555.

190. 17 U.S.C. § 102(a).

191. *Id.*

192. See, e.g., Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 189 (2008); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's*

copyright in their works, whereas other types of creators do not usually enjoy copyright in their works or at least face substantial hurdles in applying copyright to key aspects of their intellectual products.<sup>193</sup> This is regardless of the fact that they may have invested much creativity and originality in their creative products.<sup>194</sup>

There is no compelling justification for providing copyright in songs but not in recipes, in photographs but not in needlework. Scholars have noted this contradiction and suggested various accounts, including historical explanations tracing this divide to powerful lobbying by certain guilds and groups,<sup>195</sup> explanations based on a division of the senses (“higher” senses such as sight and hearing versus “lower” senses such as

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*Recipes Be Per Se Copyrightable*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1122, 1125 (2006); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006); Annette Kur, *Protection For Fashion: The European Experience*, in INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP, *supra* note 131, at 180–81.

193. See, e.g., David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313, 1325–31 (2019); Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 525–29 (2013); Sarid, *supra* note 23, at 133–34; Fauchart & von Hippel, *supra* note 192, at 189; Raustiala & Sprigman, *supra* note 192, at 1689; Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1789–90 (2008).

194. In a similar vein, several of patent law’s doctrines and criteria used to ascertain patentability have been critically analyzed from multiple prisms. For example, Dan Burk’s analysis of patents from a feminist perspective demonstrates how the standard for patentability in several areas of patent law—the “person having ordinary skill in the art”—entails gender bias. Burk notes that certain scientific methods are viewed as appropriate and “scientific,” whereas feminine approaches and methodologies may be valued but are deemed “unscientific” and often unpatentable. Burk, *supra* note 5, at 883, 888, 890, 900; see also Swanson, *Getting a Grip*, *supra* note 5, at 60–61; see also Simon Stern, *Legal Fictions and Exclusionary Rules*, in LEGAL FICTIONS IN THEORY AND PRACTICE 157, 157 (Maksymilian Del Mar & William Twining eds., 2015) (noting that legal “fictions may have facilitated the development of exclusionary rules by inspiring [an unwarranted] confidence in their workability”); Jessica C. Lai, *The Role of Patents as a Gendered Chameleon*, 30 SOC. & LEGAL STUD. 203, 204 (2021); Jessica C. Lai, *Gendered ‘Objective’ Patent Law: Of Binaries and a Singularity*, 47 J.L. & SOC’Y 441, 441–42 (2020).

195. See, e.g., MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 31–48 (1993); RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775), at 31–50 (2004); BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911, at 150–51 (1999); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 7–8 (1968); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 193, 266 (2008).

taste),<sup>196</sup> and romanticism,<sup>197</sup> as well as feminist critical appraisals (traditional “feminine” versus “masculine” crafts) and class-based critical explorations (e.g., working-class versus higher-class crafts and pastimes).<sup>198</sup>

From a queer-theoretical perspective, it is important to note how these categorizations uphold a certain social order and cultural citizenship. These categories of copyright subject matter channel creators and users into separate classes that have broad social, financial, and cultural implications.<sup>199</sup> There are important societal implications for being classified as an author, innovator, user, consumer, free rider, pirate, infringer, and thief.<sup>200</sup> In other words, copyright’s categorizations do not simply govern types of cultural goods or market relations; they profoundly shape our social and cultural order.

Copyright doctrines such as idea-expression, proprietary-public domain, economic-moral rights, and copyrightable-non-copyrightable subject matter have an additional significant effect in terms of cultural citizenship: they position queer culture as particularly vulnerable to appropriation by the culturally powerful. Whereas mainstream cultural products are “protected” and their owners given broad entitlement and a backing by the courts, many queer cultural products are not the subject matter of copyright; rather, they are labeled as public domain and up for grabs. When these works are grabbed, not only are they vulnerable to appropriation, but they may also be stripped of their queer nature.

*Vogue* provides a solid example wherein cultural expressions of queer people of color have been appropriated, heteronormalized, and subsequently privatized. Emerging in Harlem ballrooms, vogue is a dance practiced both casually and formally in competitions wherein “houses” of queer and trans people of color compete in different themes and techniques (such as femme queen realness, executive realness).<sup>201</sup> Voguing is quintessentially queer and Black and Latinx; it is sexual, sensual, and “a

196. See Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 61–64 (1994).

197. Tushnet, *supra* note 38, at 294–95; Elton Fukumoto, *The Author Effect After the “Death of the Author”: Copyright in a Postmodern Age*, 72 WASH. L. REV. 903, 903–10, 933–34 (1997).

198. Wright, *supra* note 196, at 94–96; see also Tushnet, *supra* note 1, at 303–04.

199. See Gilden, *supra* note 10, at 556.

200. Of course, some might view being classified as a copyright pirate as a virtue. But this is beside the point. Jessica Silbey, *Comparative Tales of Origins and Access: Intellectual Property and the Rhetoric of Social Change*, 61 CASE W. RES. L. REV. 195, 198 (2010).

201. Marcos Becquer & Jose Gatti, *Elements of Vogue*, THIRD TEXT, Autumn/Winter 1991, at 65–66; Marlon M. Bailey, *Gender/Racial Realness: Theorizing the Gender System in Ballroom Culture*, 37 FEMINIST STUD. 365, 376–78 (2011); see also Jodie Taylor, *Claiming Queer Territory in the Study of Subcultures and Popular Music*, 7 SOCIO. COMPASS 194, 198 (2013).

site of intersection for the categories of race, class, gender, and sexuality.”<sup>202</sup> Yet voguing does not fit within the subject matter of copyright or its criteria for protection but is instead regarded as urban folklore that is in the public domain. And so in 1990 Madonna could take voguing, strip it (for the most part) of its queer, Black and Latinx, and sexualized nature, and privatize it, making the song “Vogue” her copyrighted property.<sup>203</sup> This has important cultural implications beyond the proposition that copyright doctrine enables appropriation by the culturally powerful: once subcultural creative expressions such as voguing are removed from their context, privatized, and commercialized, they may be distracted (or redirected) from their natural development.<sup>204</sup>

Importantly, the argument here is strictly about IP doctrine. Madonna’s specific actions and her inspiration from/appropriation of queer culture remain a contested topic beyond this Article’s scope. On the one hand, Madonna has brought queer creative expressions into the mainstream, advancing queer visibility, employment opportunities, and, as Samantha Thrift notes, “acting as mediator between the heteronormative and the queer.”<sup>205</sup> On the other hand, Madonna follows the typical pattern whereby the dominant group borrows from the subordinate group, strips the original expression from its meaning and context, and positions queer creators as “sideshows at which the dominant culture can gawk.”<sup>206</sup>

*IP vocabulary:* lastly, examining the vocabulary used in IP legislation, scholarship, and caselaw is helpful because terminology and textual narratives exert a great deal of power in entrenching epistemologies.<sup>207</sup> Language is heavily involved in the construction of

202. Becquer & Gatti, *supra* note 201, at 65–66.

203. See Taylor, *supra* note 201, at 198; Becquer & Gatti, *supra* note 201, at 80.

204. See DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 15–19 (Terrence Hawkes ed., 1979); Constantine Chatzipapathodoridis, *Strike a Pose, Forever: The Legacy of Vogue and Its Re-Contextualization in Contemporary Camp Performances*, 11 EUR. J. AM. STUD., no. 3, 2017, at 4–13.

205. Samantha C. Thrift, *Appropriate the Stereotype: Cultural Appropriations and the Queer, Lesbian, and Gay Spectatorships of Madonna and Martha Stewart*, *THIRDSPACE: J. FEMINIST THEORY & CULTURE* (Mar. 2003), <https://journals.lib.sfu.ca/index.php/thirdspace/article/view/thrift> [<https://perma.cc/WDS4-ATT6>].

206. *Id.* Bell Hooks goes further to argue that “Madonna is not breaking with any white supremacist, patriarchal *status quo*; she is endorsing and perpetuating it.” BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 163 (1992). Hooks further asserts that it is Madonna’s “white girl” cultural and ethnic background “that enables her to colonize and appropriate black experience for her own opportunistic ends even as she attempts to mask her acts of racist aggression as affirmation.” *Id.* at 159.

207. See Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519, 527–28 (2006); Silbey, *supra* note 200, at 221–31; see also Omri Ben-Zvi & Eden Sarid, *Legal Scholarship as Spectacular Failure*, 30 YALE J.L. &

sexual identities and desire, and queer theory “takes very seriously the significance of words and the power of language.”<sup>208</sup> Gendered nouns and pronouns and gendered speech styles are perhaps the more obvious examples of the normative association of language with sex and gender identities, yet discursive language and the use of stereotypically male or female genderlectal descriptions construct certain words and definitions as binary objects-subjects, male-female, hetero-homo.<sup>209</sup>

A notable example in IP is the use of the word “protection” to describe IP rights or the action of asserting IP rights. The word “protection,” as indicating what IP rights do or what they are about, is widely used in domestic American law and in international IP treaties and agreements. For example, the Berne Convention for the Protection of Literary and Artistic Works indicates from the outset that it is meant to *protect* works;<sup>210</sup> the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) opens by stating that the agreement was established to “tak[e] into account the need to promote *effective and adequate protection* of intellectual property rights”;<sup>211</sup> U.S. patent, copyright, and trademark laws all widely use “protection” to describe the action of IP rights, as do numerous court cases and academic texts.<sup>212</sup>

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HUMANS. 1, 1–5 (2018) (discussing the importance of narrative and language in legal scholarship).

208. Noreen Giffney, *Introduction: The ‘Q’ Word*, in THE ASHGATE RESEARCH COMPANION TO QUEER THEORY 1, 7 (Noreen Giffney & Michael O’Rourke eds., 2009); Heiko Motschenbacher & Martin Stegu, *Queer Linguistic Approaches to Discourse*, 24 DISCOURSE & SOC’Y 519, 525–56 (2013).

209. See Motschenbacher & Stegu, *supra* note 208, at 525–27.

210. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 179.

211. Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 146 (emphasis added).

212. See, e.g., Copyright Act, 17 U.S.C. § 102(a) (“Copyright *protection* subsists, in accordance with this title, in original works of authorship . . . .”) (emphasis added); 35 U.S.C. pt. III (titled “Patents and *Protection* of Patent Rights”) (emphasis added); Lanham Act § 4, 15 U.S.C. § 1054 (“[W]hen registered they shall be entitled to the *protection* provided in this chapter in the case of trademarks.”) (emphasis added); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (noting that the second statutory factor for fair use “calls for recognition that some works are closer to the core of intended copyright *protection* than others, with the consequence that fair use is more difficult when the former works are copied”) (emphasis added); *Mayo Collaborative Servs. v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 92 (2012) (“Patent *protection* is, after all, a two-edged sword.”) (emphasis added); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“When used to describe a product, [marks] do not inherently identify a particular source, and hence cannot be *protected*.”) (emphasis added); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 890 (1997) (“In some cases . . . intellectual property law will *protect* the moral rights of authors even when doing so imposes a cost on society, perhaps reflecting an excessive preoccupation with romantic authorship.”) (emphasis added).

Scholars have long noted that the edifice of protector-protected is based on a masculine-feminine, object-subject divide.<sup>213</sup> “The active roles of both protector and threat are masculinized—[control] and power being the foundations of masculinity.”<sup>214</sup> Similarly, using “protection” introduces into IP vocabulary the themes of dominance and control. From a queer perspective, this can be seen as an ideological formation creating a linguistic construction of object-subject divides.<sup>215</sup>

Furthermore, a queer analysis would ask just what the “danger” is against which “protection” is needed. Is it, as common accounts would suggest, a competitor taking unfair advantage of others’ labor, or, rather, does the law provide “protection” to the masters of popular characters against alternative voices? After all, is Alice Randall, the author of *The Wind Done Gone* (an alternative account narrating the story of *Gone with the Wind* through the eyes of one of Scarlett O’Hara’s slaves) free-riding on the labor of Margaret Mitchell (the author of *Gone with the Wind*), or is Margaret Mitchell’s estate attempting to use copyright law to silence marginalized voices and control historical narratives?<sup>216</sup>

A queer analysis might even go further and suggest that in fact the intellectual works *themselves* might need “protection” against the right-owners. A copyright holder who controls reproduction or commentary may be damaging the work in significant ways—for example, by making the work inaccessible or out of commerce or limiting its social and cultural importance.<sup>217</sup> The Disney corporation, for instance, may have a strong economic incentive to “protect” Mickey Mouse against sexualization in *Air Pirates*, but by doing so the corporation may be diminishing the character’s importance in American culture. There are fair uses, of course, but that is beside the point: the language used signifies the elemental values at the basis of IP law, providing right-holders with the edifice of “protector” when in many cases they may very well be anything but.

Other examples of how IP vocabulary denotes a certain social order include “piracy” to describe the act of making copyright works available without permission, “trafficking” to describe the act of providing devices

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213. See, e.g., Judith Hicks Stiehm, *The Protected, The Protector, The Defender*, 5 WOMEN’S STUD. INT’L F. 367 (1982); Cecilia Åse, *The Gendered Myth of Protection*, in THE ROUTLEDGE HANDBOOK OF GENDER AND SECURITY 273 (Caron E. Gentry, Laura J Shepherd & Laura Sjoberg eds., 2019).

214. Carol A. Stabile, “Sweetheart, This Ain’t Gender Studies”: *Sexism and Superheroes*, 6 COMM’N & CRITICAL/CULTURAL STUD. 86, 87 (2009).

215. See William L. Leap, *Queer Linguistics as Critical Discourse Analysis*, in 1 THE HANDBOOK OF DISCOURSE ANALYSIS 661, 661–63, 676 (Deborah Tannen, Heidi E. Hamilton & Deborah Schiffrin eds., 2d ed. 2015); see also Craig, *supra* note 181, at 220.

216. See Chander & Sunder, *supra* note 120, at 623 n.155 (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring)).

217. Cf. Stiehm, *supra* note 213, at 368 (proposing that the “protector” may very well also be a source of danger that the “protected” needs protection from).

that allow circumventing access-control measures in copyrighted works, and “users” to describe consumers who use infringing materials online.<sup>218</sup> “Piracy,” “trafficking,” and “users” indicate a certain social connotation beyond merely describing the act taking place. People making copyrighted works available without permission are not simply infringers of copyright; they are pirates, and pirates are associated with illegality, danger, and a threat to social order and commerce. People providing devices that allow circumventing access-control measures in copyrighted works are “trafficking,” a word associated with trading in illegal goods or the reprehensible act of benefiting from the forced labor or sexual exploitation of human beings. The term “users” is traditionally deployed to describe people who use drugs and other substances. Indeed, according to the well-known idiom, “[t]here are only two industries that call their customers ‘users’: illegal drugs and software.”<sup>219</sup>

To summarize, IP exclusions and inclusions, its vocabulary, and its doctrines channel producers and consumers of intellectual goods “into distinct categories.”<sup>220</sup> These categories create a legal hierarchy whose social implications far exceed the direct province of which intellectual goods are being produced; they cultivate a social order. As Madhavi Sunder notes, “Intellectual property does not merely incentivize and reward creators; it structures cultural and social relations.”<sup>221</sup> IP, then, may serve to perpetuate the tangible consequences of social hierarchies—for example, certain groups and individuals (and their cultural and creative expressions) vulnerable to appropriation by others who hold greater social power.<sup>222</sup> Furthermore, IP doctrine and vocabulary repeatedly channel certain activities into and out of certain cultural spheres, which in turn “feed back into the subjective experience of labor, creativity, and invention.”<sup>223</sup> “As this channeling displays ongoing patterns of skin color, gender, sexual desire, individuals who have or develop these traits internalize their social roles . . . .”<sup>224</sup>

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218. See Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2196 (2000); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 684–85 (2000).

219. Roy Priyanka, *Social Media Is A Drug that Controls and Manipulates Us: The Social Dilemma*, THE TELEGRAPH ONLINE (Sept. 14, 2020, 9:38 PM), <https://www.telegraphindia.com/entertainment/social-media-is-a-drug-that-controls-and-manipulates-us-the-social-dilemma-tells-us-what-we-already-knew-but-didnt-want-to-acknowledge/cid/1791961> [<https://perma.cc/FMT9-7QTA>].

220. See Gilden, *supra* note 10, at 555.

221. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 83 (2012).

222. Gilden, *supra* note 10, at 557.

223. *Id.* at 557.

224. *Id.*

## III. QUEERING IP: APPLYING QUEER INSIGHTS AND SENSIBILITIES

IP has dramatic consequences for cultural citizenship: it shapes social structures, individual behavior, visibility, and expression. From a queer perspective, IP laws can be seen as incorporating doctrinal biases that reinforce a hierarchal social order underpinning heterosexuality and heteronormativity and subverting queer culture, queer individuals, and queer communities. The model citizen of IP, according to this account, is the hetero, cisgender, masculine man who enjoys economic protection of his intellectual assets; the non-citizen outsider is the queer, the homo, the feminine “other” often at the intersection of race, class, and sexuality.<sup>225</sup> Furthermore, robust IP rights allow right-holders in intellectual products such as Mickey Mouse to maintain mainstream perceptions of normativity in these works “as the ‘official’ configuration of sex, gender, and commerce.”<sup>226</sup> Queer theory, however, would suggest that these configurations are, and ought to be, continually contested by the authors, artists, and fans who experiment with them.<sup>227</sup>

This raises the question of whether a reparative reading of this seemingly incongruous duo, IP law and queer theory, is at all possible. Some seem to suggest that the answer is negative, maintaining that law and queer theory are “fundamentally at odds.”<sup>228</sup> Queer theory, the argument goes, endeavors to disrupt the status quo, whereas law reflects and institutionalizes it; queer theory is committed to challenging norms and is fundamentally disruptive, while law codifies norms and may punish noncompliance.<sup>229</sup> In this Part, I will argue that even if we were to accept that IP law and queer theory are indeed at odds, this does not mean that queer theory and queer creativity should not be used as significant tools to better understand and critically appraise IP law and its assumptions. While queer theory should not necessarily abandon its hermeneutic of suspicion of IP, we should nevertheless consider the multiple levels of critique and the possibilities that queer creativity and queer theory offer for IP law, as well as the possibilities IP might have for queer creativity, participation, and visibility.<sup>230</sup> Indeed, without a queer critical analysis, our

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225. *See id.* at 562.

226. *Id.*

227. *Id.*

228. *See* Queer J. Thomas, *Constructing Queer Theory in Political Science and Public Law: Sexual Citizenship, Outspeech, and Queer Narrative*, 39 *NEW POL. SCI.* 568, 574 (2017).

229. *Id.*

230. *See* RITA FELSKI, *THE LIMITS OF CRITIQUE* (2015). In a similar vein, see Bridget J. Crawford’s work on bringing together third-wave feminism and law: Bridget J. Crawford, *Third-Wave Feminism, Motherhood and the Future of Legal Theory*, in *GENDER, SEXUALITIES AND LAW* 227, 228 (Jackie Jones, Annar Gear, Rachel Anne Fenton & Kim Stevenson eds., 2011) (“Third-wave feminism needs law, and law needs third-wave

understanding of IP remains partial. Eve Sedgwick, for example, contends that “an understanding of virtually any aspect of modern Western culture must be, not merely incomplete, but damaged in its central substance to the degree that it does not incorporate a critical analysis of modern homo/heterosexual definition.”<sup>231</sup>

One way of bringing together a theory of queer IP would be to provide a richer theory of queer cultural production. If we start by asserting the specific value of queer cultural production—for example, as offering an ongoing critical destabilization of existing cultural forms—we could then ask what IP could or should do to encourage not only mainstream status-quo-reproducing creativity, but also other forms of creativity.

Another step in furthering a queer understanding of IP would include widening the use of queer theory and queer methodologies in our assessment of IP—perhaps, for example, by looking at additional IP doctrines, laws, and court cases and analyzing them from a queer perspective, as well as by applying a queer lens to other areas of law that affect creative and cultural expression and participation, such as work made for hire or the First Amendment. Work made for hire is a copyright doctrine that recognizes only the creative mastermind as an author, such as a producer,<sup>232</sup> thereby overlooking or downplaying the contributions of (stereotypically) queer creators in wardrobe, styling, and design.<sup>233</sup> The First Amendment, as Amy Adler notes, is “a body of law that is weighed down with unacknowledged cultural baggage, that is surprisingly irrational and contingent.”<sup>234</sup> By considering the ways in which legal rules that impact expression and cultural participation are absorbed with cultural biases and hetero-predispositions, we could come up with better ways to not only widen cultural and creative participation, but also arguably achieve the goals enshrined in freedom of expression.

Queer theory is a critical endeavor that is related to other critical approaches, including feminist, race, class, and de-colonial explorations. Adding queer sensibilities to IP means that we must also realize how IP doctrine shapes and institutionalizes a power matrix that hierarchizes not only hetero-normativity and sexuality, but also gender, race, class, and more. Moreover, queer creativity, as this Article argues, is—among other things—about resistance to, and defiance of, the status quo. Many other creative communities such as the Black Arts Movement and feminist art collectives share this characteristic and perhaps other characteristics of

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feminism.” Joining third-wave feminism and law will help develop “an equality jurisprudence that acknowledges women’s reproductive capacities but neutralizes the role those capacities play in women’s legal subordination.”).

231. SEDGWICK, *supra* note 91, at 1.

232. 17 U.S.C. § 101.

233. I thank Andrew Gilden for this important example.

234. Adler, *supra* note 1, at 1155.

queer cultural production.<sup>235</sup> A queer account of IP can be fully realized only alongside a wider understanding of cultural hierarchy and dominance.

Another important step would be to investigate more cases and examples of queer creativity and creative spaces and seek to better understand the motivations of queer creators; the social ecologies of queer creative communities; and the nexus between mainstream culture, law, and queer creativity. It can be particularly helpful to look at the reality on the ground to better understand “queer” and its relationship with IP. For example, looking at fan fiction through a queer theoretical lens teaches us how queer fan fiction deconstructs popular culture. Yet only by investigating queer fan fiction communities in practice can we realize that these communities also produce a sense of belonging, empower people to explore their identity and sexuality, establish friendships, resistance, etc., thus providing a more expansive account of what queer creativity is and what it achieves.

Queering IP would also entail a recognition that sex and sexuality are not just an important part of human life and wellbeing; they are also vital to culture, innovation, and self-expression. Courts and legislators often display sex negativity, or, as Amy Adler labels it, “sex panic.”<sup>236</sup> Legislators, judges, and policymakers often cringe at the prospect of sexuality, especially non-hetero and female sexuality. For example, the Supreme Court’s decisions in cases discussing female nude dancing, are, as Amy Adler argues, “dramas of castration anxiety and fetishism.”<sup>237</sup> Trademark law is committed to “continued purification,” often treating sexuality, and non-hetero sexuality in particular, as obscene.<sup>238</sup> Queering IP, in this context, means actively seeking to expose cases in which sex negativity directs judicial decisions and IP policymaking and suggesting ways to address this entrenched sex negativity. Of course, we cannot simply shake off such embedded biases and prejudices, nor can we assume that sexuality can fully be detached from institutional predispositions and

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235. See Adrian J. Mack, *The Black Arts Movement, the Congress for Cultural Freedom, and Cultural Discourse*, 15 *COMPAR. AM. STUD. INT’L J.* 162, 167 (2017); Jill Fields, *Frontiers in Feminist Art History*, 33 *FRONTIERS: J. WOMEN STUD.* 1, 6, 11 (2012).

236. Adler, *supra* note 1, at 1124.

237. *Id.* at 1113, 1137–40. The cases include *City of Erie v. Pap’s A. M.*, 529 U.S. 277 (2000), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In a fascinating collection, scholars have reimagined key Supreme Court decisions from a feminist point of view, demonstrating how these key cases could have been written if feminist (and some queer) lenses were applied. See *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016); see also Andrew Gilden, *Punishing Sexual Fantasy*, 58 *WM. & MARY L. REV.* 419 (2016) (illustrating how courts have struggled to adapt free speech, privacy, and due process principles to sexual content and expressions online).

238. Sonia K. Katyal, *Trademark Intersectionality*, 57 *UCLA L. REV.* 1601, 1622–23 (2010); Gibbons, *supra* note 7, at 188, 191.

a power matrix. But problematizing the existing state of affairs is an important step toward any change.<sup>239</sup>

Taking stock of queer sensibilities in IP also involves developing a richer account of creativity and its meaning. Asserting the specific value of queer creative production—for example, as offering an ongoing critical destabilization of existing cultural forms—demonstrates the need for IP to encourage not only mainstream status-quo-reproducing creativity, but also other types of creativity if we truly want a richer and more diverse cultural landscape. Queer creativity, as evidenced by many of the examples of creative spaces in which queer creativity thrives, considers that every person—creators, fans, readers—contributes new meaning to a creative or cultural work. Moreover, examples from the creative spaces in which queer creativity thrives reveal time and again that creativity brings into existence not only products and things, but also other qualities such as wellbeing, communities, and a sense of belonging.<sup>240</sup>

Furthermore, queer sensibilities could also lead to more nuanced understandings of the scope of several IP doctrines, such as copyright's fair use. Rebecca Tushnet suggests that when people create transformative or derivative works, they do not intend to circulate those works in the money economy.<sup>241</sup> These works, Tushnet maintains, constitute fair use of the pre-existing works and therefore should be assessed differently from works that conform to fair use's economic model.<sup>242</sup> Multiple examples of queer creativity involve creative expression that is based on transforming works but without adhering to the classic economic models that form the basis of IP (and of fair use).<sup>243</sup> The scope of fair use provisions for this kind of creativity could be greater, acknowledging not only shortcomings in fair use's economic model, but also the importance of queer creativity to society and culture.

Similarly, transformation, appropriation, and rewriting of existing works is an important component in much queer creativity. Queer creativity cautions us that rigid, exclusive control over the interpretation of a work is not just unrealistic<sup>244</sup> but can also have severe consequences for free speech, art, cultural expression, and social participation, especially when it comes to marginalized groups, such as LGBTQ+, people of color,

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239. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 40 (2d ed. 1999); Adler, *supra* note 1, at 1154.

240. See Rosenblatt, *supra* note 102, at 104, 117–19.

241. Tushnet, *supra* note 180, at 543; see also Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 38–39 (2008).

242. Tushnet, *supra* note 180, at 543.

243. See, e.g., *id.* at 529.

244. See, e.g., Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 383–86 (1992); Tushnet, *supra* note 134, at 675.

and people from lower income backgrounds.<sup>245</sup> Yet, as Andrew Gilden notes, we must also remember that as much as the reworking of popular culture can dislodge the social constructs embedded in them (such as gender and sexuality), “the same legal mechanism . . . can be co-opted by . . . appropriators” who hold greater power and wealth and who can “build off the work of poorer, queerer, or otherwise marginalized creators.”<sup>246</sup> The challenge for IP, Gilden emphasizes, is to create space for the recoding of culture while remaining attuned to the slipperiness of power and the ability of social norms to persevere and adapt.<sup>247</sup>

The queer view that rejects the concept of exclusive control of meaning, as well as social norms regarding attribution, suggests several important insights for debates in IP scholarship around attribution and integrity rights. Current IP doctrine in the Anglo-American tradition, as well as some proponents of an economic approach to IP, typically views moral rights as a negligible fragment of IP.<sup>248</sup> Many other IP scholars, by contrast, point to the importance of moral rights to continued creativity and cultural production.<sup>249</sup> An analysis of queer creativity in queercore, drag, and fan fiction suggests that attribution and recognition indeed constitute a significant motivating factor in creating and sharing creativity, sometimes even if attribution is given to a mere stage name. In queer creativity, recognition is in many cases more important to creators than economic gain, thus providing a counter-narrative to the claim that only, or mainly, economic rights can motivate creativity. In addition, in some examples, such as drag, attribution and credit are sometimes used as forms of barter for economic entitlements and to alleviate their restrictive scope: a drag queen, for instance, may use another drag queen’s otherwise excluded materials in exchange for attribution.<sup>250</sup>

A reparative reading of queer and IP does not suggest that queer theory and queer creators should abandon their suspicion of, or resistance to, IP. But I would argue that both—a queer deconstructionist appraisal of IP and a reparative reading of queer and IP—fulfill an important function. I am also aware that some of my propositions could be criticized from a

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245. See Tushnet, *supra* note 134, at 653–54, 657 n.23.

246. Gilden, *supra* note 10, at 562.

247. *Id.* at 563; see also Peter Goodrich, Sonia K. Kayal & Rebecca Tushnet, *Panel I: Critical Legal Studies in Intellectual Property and Information Law Scholarship*, 31 *CARDOZO ARTS & ENT. L.J.* 601, 617 (2013) (“When First Amendment rights are expanded to allow upcoming and lesser-known artists to use parody, the doors open for well-financed artists like Richard Prince to come along and appropriate the work of less well-financed artists. The economic disparities become even more apparent where the expanding power of fair use winds up having distributive consequences that benefit some artists and leave others disadvantaged.”) (footnotes omitted).

248. Tushnet, *supra* note 143, at 789–90.

249. See, e.g., Fisk, *The Role of Private IP*, *supra* note 143, at 216, 218–19; Lastowka, *supra* note 184, at 68, 84; Tushnet, *supra* note 143, at 792, 808.

250. Sarid, *supra* note 23, at 172–73.

queer perspective. Still, we must bear in mind that IP law is a powerful tool, situated at the heart of discursive struggles over cultural citizenship, inculcation, and meaning,<sup>251</sup> and we also should be mindful of the multiple layers and limits of critique. Enriching IP law with queer sensibilities does not just make for better law; it also has the potential to widen cultural participation and empower queer creative voices.

#### CONCLUSION

IP law is a key tool in defining cultural citizenship and shaping society, far beyond the immediate domain of producing or consuming cultural goods. Approaching it critically and exposing biases entrenched in its doctrines are necessary steps toward better, more participatory, and diverse IP policies. A queer analysis of IP, as this Article illustrates, reveals that various IP doctrines and aesthetics do not simply control the production and consumption of culture but also institutionalize a heteronormative cultural and social order. Furthermore, an investigation of creative spaces and communities where queer creativity flourishes demonstrates a discord between IP's mission of spurring creativity and the achievement of that mission, at least in non-hetero culture. In fact, in many cases, IP law is exposed as a major impediment to promoting certain creative voices. Yet there is also an important inverse connection between IP and queer creativity, as resistance to IP constitutes its own creative sphere in many cases of queer cultural production.

We can never fully detach sexuality from power, and attempting to do so likely will only "postpone the concrete and contemporary task of rethinking subversive possibilities."<sup>252</sup> Nevertheless, a queer problematizing of IP is an imperative first step. Queer creativity offers an ongoing critical destabilization of existing cultural forms, evoking the question of what IP could or should do to encourage not only mainstream status-quo-reproducing creativity but also other forms of creativity. We should also remember that while queer creativity is inherently countercultural, enriching IP with queer sensibilities not only will result in a better account of creativity, but also has the potential to promote participation, agency, and literacy and to empower marginalized queer and non-queer communities and creative voices.

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251. See Tehranian, *supra* note 1, at 1294.

252. BUTLER, *supra* note 239, at 40.