

COPYRIGHT v. COPYLEFT: A FEMINIST PERSPECTIVE ON MARGINALIZATION UNDER COPYRIGHT LAWS

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Copyright law grants certain exclusive rights to the author of a work, aiming to encourage creativity. This article uses jurisprudential theory, particularly the feminist perspective, to bring out the fallacies in the existing copyright regime and advocates in favour of the emerging copyleft regime, which is against granting exclusive rights to the creator of the work. The article argues that copyright law is inadequate in incorporating the varied kinds of works of different and diverse sections of the society and promotes marginalization of oppressed groups. This exclusion flows from the basic fact that copyright is based on a patriarchal structure. On the other hand, the copyleft regime is based on both masculine and feminine values, and therefore, is a better regime to challenge the existing marginalization.

Copyright is a legal concept within intellectual property law which grants exclusive rights to the creator of certain works for a particular period of time,¹ after which the work enters the public domain. Copyright is available on original literary, dramatic, musical and artistic works; cinematograph films; sound recordings, etc.² Copyright authorizes its holder to reproduce the work on which copyright subsists, to distribute the work in public, to make any adaptation of the work, etc.³

Copyleft is emerging as a paradigm opposed to copyright which allows for the entry of the creation into the public domain. Copyleft enables the authors to grant the users of their works the right to use, modify, distribute and copy their works.

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¹ See Indian Copyright Act, 1957, § 22, according to which term of copyright extends to 50 years after author's death.

² *Id.*, § 13.

³ *Id.*, § 14.

This article presents a critique of the copyright regime, mainly from a feminist perspective, and advocates the copyleft regime. I argue that copyright laws exclude expression and creation by certain groups of society, the reason being copyright laws are structured on patriarchal values. I advocate copyleft as a more encompassing paradigm which takes into consideration the interests of these excluded groups. At the outset, I would like to clarify that although the analysis is based on the feminist perspective, I do not confine myself to women as oppressed groups. I am using the feminist perspective to analyze the oppression suffered by any marginalized group in general.

I. COPYRIGHT LAW AND EXCLUSION OF MARGINALIZED GROUPS

The copyright regime excludes the forms of expression attributable to marginalized groups of the society and fails to provide any means to challenge that exclusion. I will put forth this argument with the help of the three sub-arguments. Firstly, although the copyright law appears neutral, it is unjust and inadequate as it does not incorporate the creations of all the marginalized groups in the society. Secondly, the concepts of ‘authorship’ and ‘originality’ on which copyright laws are based do not enable the marginalized groups from challenging such marginalization. Lastly, the copyright laws are unjust as they further the social and economic marginalization of these excluded groups.

A. COPYRIGHT LAW AS INADEQUATE AND UNJUST

Here, I argue that the copyright law is inadequate and unjust as it does not take into account works or creations of marginalized sections of the society. The exclusion of certain forms of expression from the copyright law is detrimental to the interests of already marginalized groups in the society, like women, indigenous groups, blacks, people belonging to lower caste, etc. This point can be substantiated with some examples. Malla Pollack argues that the exclusions under copyright laws are gendered in an anti-feminist manner.⁴ For example, the extent of copyright protection is very limited with respect to certain works with which women are more commonly associated, like food and clothing. The existing regime of copyright law is also inadequate for protecting traditional knowledge.⁵ In addition, copyright laws threaten such traditional knowledge of appropriation by aliens.⁶ For example, recording, in a modified

⁴ Malla Pollack, *Towards a Feminist Theory of the Public Domain, or The Gendered Scope of United States’ Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. WOMEN & L. 603 (2006).

⁵ Traditional knowledge refers to the knowledge and innovations of the indigenous and local communities, which are often collectively owned and transmitted orally from generation to generation in the form of stories, songs, folklore, local languages, etc.

⁶ See Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, 12 No. 3 HUM. RTS. BRIEF 9 (2007); Ruchira Goswami & Karubakee Nandi, *Naming the Intellectual Property*

language, of a tribe's myths recited in their gatherings, gives a copyright on the work. As the recitation has never been written down, the author does not need permission from the community which gets no remuneration or control over the work.⁷ Similarly, copyright laws work against the interests of the black community. In the United States, copyright has caused appropriation, degradation and devaluation of works of black music composers.⁸

It may be argued that while copyright excludes these works, some of these forms can still get protection under Intellectual Property law by utility and design patents. For example, creative works located within the domestic sphere like cooking recipes, sewing techniques, knitting procedures, etc. are patentable. There are, however, significant differences between copyright and patents which this argument ignores. Firstly, copyright can be acquired automatically; registration has its own benefits but is not a mandatory condition for the acquisition of copyright. On the contrary, it is expensive and time-consuming to obtain patents as the applicant for patent has to comply with certain requirements at various stages of the application. A patent can be kept alive only by paying periodical renewal fees. Secondly, the term for which copyrights are issued is much longer than that of patents⁹. Thirdly, copyright is acquired by the mere fact of an original creation. It is not necessary that the work should be the expression of original or inventive thought. However, patents are granted only for innovations that would not be obvious to a person of ordinary skill in the relevant art. Designs are registered only if they appeal to the eye, irrespective of the functional considerations of the article.¹⁰ Thus, patents cannot be equated to copyrights. These difficulties associated with patents make it even more difficult for the marginalized to access protection of their works in the legal system, as compared to other sections of the society.

The expression-idea dichotomy under copyright law is also one of the reasons behind the exclusion of certain groups. Copyright subsists on expression of ideas, and not ideas themselves, which runs detrimental to the interests of the marginalized groups. For example, such a restriction ignores the indirect role played by many women who inspired but did not or could not write. Certain creations of women in the domestic realm also get excluded merely because they were not documented in tangible forms, for example, cooking recipes. Cooking recipes are copyrightable if they are collected into a cookbook. Studies, however, reveal that women are more likely to use Internet

Rights of Women Artists from India, 16 AM. U. J. GENDER SOC. POL'Y & L. 257 (2007).

⁷ Pollack, *supra* note 4.

⁸ 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 (2008).

⁹ The term for patents differs with the kind of invention. For example, under Indian law, process patents relating to drugs and food is granted for seven years, while for all patents the term is fourteen years from the date of the patent.

¹⁰ Pollack, *supra* note 4. Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551 (2006).

blogging than men and many women engage in free sharing of recipes over the Internet in the United States. Similarly, advice and instructions on knitting, another activity traditionally associated with women, are freely shared, both on and offline.¹¹ As the advice and instructions are not converted into any copyrightable tangible form, they do not get copyright protection. The idea/expression dichotomy also provided less protection to black composers, whose ground-breaking work was imitated so widely that it became the “idea” and thus couldn’t be protected. The requirement of fixation into a tangible form also worked against them as improvisation was a key concept of black cultural production.¹² Similarly, the intangibility of the forms of expression by indigenous communities is one of the main reasons behind their exclusion from copyright protection as a lot of these works remains only in the collective memories of the members of the groups.¹³ A lot of creation in the domestic realm thus gets excluded. I want to clarify that I am not suggesting the extension of copyrights to ideas or inspiration. I am merely trying to highlight that how the core concepts of copyright law are developed in a manner that excludes protection to the works of the non-dominant groups in the society.

Copyright law is flawed also because it fails to take into account the varied experiences of varied groups and is based on the experiences of the ‘common man’ prototype, who is normally the white/ Hindu male. Different experiences led to differences in the forms of expression by various groups. Historically, women were not entitled to education. Even educated women faced numerous social and other constraints which made writing, and especially publishing, a difficult prospect. Some women wrote anonymously or pseudonymously.¹⁴ As a result of this exclusion, women resorted to other forms of expressions like quilting,¹⁵ knitting,¹⁶ singing,¹⁷ etc. through which they expressed their feelings and narrated their stories. Similarly, the caste system organized society on the basis of the occupation of its various groups and did not permit one group to engage in the activities normally performed by the other. This confined a particular form of expression to one particular community, for example, as only Brahmins were entitled to education, literary works got confined to that community. Although on the face of it, the copyright laws are neutral, they achieve only formal equality, not substantive equality. According to the Rawlsian notion of substantive equality, it is permissible, and desirable,

¹¹ Bartow, *supra* note 10.

¹² Greene, *supra* note 8.

¹³ See Goswami & Nandi, *supra* note 6.

¹⁴ See STORYLINES: CONVERSATIONS WITH WOMEN WRITERS, (Ammu Joseph *et. al* eds., 2003); Debora Halbert, *Feminist Interpretations of Intellectual Property Feminist interpretation*, 14 AM. U. J. GENDER SOC. POL’Y & L. 431(2006); Bartow, *supra* note 10.

¹⁵ See Halbert, *supra* note 14.

¹⁶ *Id.*, 15.

¹⁷ See Goswami & Nandi, *supra* note 9.

to incorporate inequalities which are to the benefit of all.¹⁸ Copyright law operates on the basis that all individuals have had similar practices and an equal opportunity to claim copyright over their respective works, which is inherently flawed.

From the above, it can be concluded that copyright law is based on a utilitarian principle and not on the conception of the importance of each individual, and thus is not a just law. Utilitarianism focuses on maximum good of the maximum numbers. This approach sacrifices the interests of the minority for the good of the majority. Rawls, however, rejects utilitarian principles and propounds a theory of justice based on the notion of giving value to every single human being.¹⁹ Martha Nussbaum also argues that the capabilities approach, which aims at providing a minimum level of human capabilities to each individual, is better than the utilitarian one.²⁰ Copyright law falls short of the requirements imposed both by Rawls and Nussbaum in their respective theories of justice.

B. 'AUTHORSHIP' AND 'ORIGINALITY' AS FURTHERING MARGINALIZATION

The concepts of 'authorship' and originality', which form the basis of copyright law, disable the marginalized groups from challenging the marginalization that they are facing. Within the copyright model, authors are individuated, proprietary personalities who claim ownership of their intellectual works; which are original and are results of the authors' independent efforts. This approach is similar to Nozick's antagonist approach and his celebration of individualism and his autonomy.²¹ These notions of authorship and originality form the basis of copyright protection.

The concept of 'sole authorship' is untenable. I argue against this flawed conceptualization of authorship and originality based on separation and individual autonomy from the Marxist, postmodernist, communitarian and feminist perspectives.

Marxists refute the notion of sole authorship by viewing sociality as the human condition. They dispute the competitive epistemology generated by capitalism and advocate a social economy which simulates cooperative

¹⁸ John Rawls, *A Theory of Justice*, in LLOYD'S INTRODUCTION TO JURISPRUDENCE 566 (2001); race-specific patents may be mechanism to bring substantive equality, *see generally* Shubha Ghosh, *Race-Specific Patents, Commercialization, and Intellectual Property Policy*, 56 BUFF. L. REV. 409 (2008).

¹⁹ *Id.*, Rawls.

²⁰ Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21 (2007).

²¹ R. Nozick, *Anarchy, State and Utopia*, LLOYD'S INTRODUCTION TO JURISPRUDENCE 590 (2001).

thought and social relations.²² Copying and imitation never leave us. The creator of information is also the borrower of ideas and information from others.²³ Hence, there is nothing like sole authorship.

Postmodernists view any creation as a communicative tool thus deconstructing the separatist notion of copyright. They see the use of pre-existing artistic work as signifiers of information which assumes meaning by those who incorporate them in their daily lives. They believe in appropriating pre-existing artistic works to exploit their communicative properties. Artistic works function as letters, numbers and sounds, as building blocks of language. For example, the symbol for 'danger' with bones and skeleton has become a communicative tool.²⁴ They are tools necessary to describe experiences and help others communicate. Postmodernists Michel Foucault and Roland Barthes deconstruct the notion of author to the extent that they believe in the "death of the author".²⁵ Foucault argues that authors do not exist in nature but are socially constructed. Barthes shows how post-structuralism replaces authors with texts or language itself. Both of them strongly argue for the very removal of author.²⁶

Communitarian perspective also challenges the notion of sole authorship by establishing a connection between the author and the community where he or she develops. It argues that certain rights are inalienable by the individual because they really do not belong to the individual at all, at least not exclusively.²⁷ Communitarianism examines the influences of the historical context of the author on the creation and is premised on the contribution of unrewarded sources.²⁸ Michael Sandel points out that the need to develop a self with all its relationships creates the need for collective or communitarian notions of property.²⁹ Hence, even this theory forges a connection between the author and the society where the author is situated, thus challenging the autonomy associated with the author.

²² Beatrice Kachuck, *Feminist Social Theories: Theme and Variations* in SOCIOLOGY OF GENDER 68 (2003).

²³ PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM 2; Carys J. Craig, *Reconstructing the Author-self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207 (2007).

²⁴ Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL'Y 12 (2002).

²⁵ Craig *supra* note 23; Severine Dusollier, *Open Source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J.L. & ARTS 28 (1997) 1; Elton Fukumoto, *The Author Effect after the "Death of the Author": Copyright in a Postmodern Age*, 72 WASH. L. REV. 903 (1997).

²⁶ Fukumoto *id.*

²⁷ Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993).

²⁸ Lior Zemer, *"We-Intention" and the Limits of Copyright*, 24 CARDOZO ARTS & ENT. L.J. 99 (2006).

²⁹ Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999).

Feminists also deconstruct the notion of authorship by developing a relationship between the author and the social context in which he/she is situated. The author is socially situated and necessarily dependent upon the texts, languages, and discourses already at play in the cultural domain.³⁰ An essential portion of any work is not the author's creation but invocation. Part of the work cannot be made and must be received.³¹

The reason why I have demolished the notions of authorship and originality is because such notions do not allow for sufficient acknowledgement of the injustice faced by a marginalized group, thus do not provide an effective space for challenging such injustice. Laurie Finke's feminist argument supports this point. She argues that an author's subjectivity is shaped by historical, material and social forces, while the author shapes those discourses by contributing her voice. "Her contribution matters, not because she is the authoritative source of meaning, but because language cannot be cut loose from person, time and place."³² Hence, by viewing authorship as not originative but participative and by constructing an originality rooted in interdependence, members of an excluded group get a better ground to assert themselves and their experiences. Such construction also helps challenging the stereotype that every work is male-authored.³³ Since oppression is suffered as a group, denying group identity and treating its members as autonomous individuals which they are not, will not help develop a more egalitarian society.

These notions of authorship and originality also bring out the fallacies of using Locke's theory to justify copyright. According to Locke, each person has a right over that property on which he has put labour and skills.³⁴ If it is accepted that the creator borrows heavily from others, then the creation is not entirely his own as it involves the labour of others. Thus, the entire justification of Locke to support copyright regime falls flat.

My proposition that copyright misses the connection of the author with the society may face challenge by the presence of provisions like collective works and joint authorship, which can be seen as incorporating communitarian values. These concepts accept the fact that an author may not be a single individual secluded from the society and recognize joint authorship. I, however, argue that the concepts of collective works and joint authorship are a manifestation of the notion of sole authorship itself and not of the communitarian values. Collective works basically refers to compilations like encyclopedias, dictionaries, magazines, etc. where works of different authors are incorporated.

³⁰ Craig, *supra* note 23; E. Jane Burns, *Review of Feminist Theory, Women's Writing* by Laurie A. Finke, *Speculum*, Vol. 70, No. 3 (Jul. 1995) 614, available at <http://www.jstor.org/stable/2865290> (Last visited on 27 Sept. 2008).

³¹ Pollack, *supra* note 4.

³² Craig, *supra* note 23.

³³ *Id.*, 32.

³⁴ JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 139 (1698).

In such cases, there are two copyrights: copyright in the separate parts vested in the respective authors; and the copyright in the collective work vested in the person who collects the various material, edits them and/ or includes his notes and comments. In this case, it is clear that the construction of authorship still relates to separation and autonomy. In a work of joint authorship, the work is produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.³⁵ In this case, it is a mere recognition of the fact that a work has been jointly produced by two or more authors. The connection with the society which the Marxists, postmodernists, communitarians and feminists talk about is still missing. Hence, both these concepts treat authorship in the conventional way of separation and autonomy.

C. COPYRIGHT LAWS AS FURTHERING SOCIO-ECONOMIC MARGINALIZATION

Copyright laws are unjust as they even further the social and economic marginalization of these excluded groups.³⁶ Very often, women's inability to acquire copyrights on literary works is used to further the stereotype that women cannot write. Hence, copyright laws not only exclude certain groups, they also reinforce their social exclusion by justifying why such groups should not be incorporated within existing system. Moreover, since copyright regime is about allocation of economic resources, and since these marginalized groups are systematically excluded from the regime, it furthers their economic marginalization. Nozick argues that greater the extent of property owned by an individual, greater is the extent of individual liberty enjoyed.³⁷ By denying economic rights to certain groups, copyright law restrains their liberty, thus, enhancing oppression. By causing such marginalization, copyright law also fails to conform to the Rawlsian theory of justice. Rawls says that any law which makes the position of the least disadvantaged group even worse is bad.³⁸ By causing further oppression of marginalized groups, the copyright law is in violation of Rawlsian justice.

D. ADDRESSING A FEW COUNTER-ARGUMENTS

Before moving on to my second argument against copyright laws, I would like to address a few counter-arguments here.

³⁵ Indian Copyright Act, 1957, § 2(z).

³⁶ See Greene, *supra* note 8, which argues that the treatment of blacks, women and indigenous people under copyright laws in promoting derogatory stereotypes against them in the United States, facilitating their subordination.

³⁷ Nozick, *supra* note 21.

³⁸ Rawls, *supra* note 18.

Firstly, it may be argued that the Copyright Act, in today's world, actually protects the interests of members of marginalized groups by giving them autonomous rights over their own works and consequent economic benefits. For example, women's liberation movement has gone far ahead today and a generalized approach based on historical data will lead to rejection of even these rights to the independent women authors of today. In fact, some feminists allege that the postmodernist deconstruction of 'author' has been simultaneous with rise of women, thus they are trying to pull down successful women writers of today in the guise of being more inclusive of their interests.³⁹

This criticism is misplaced as it ignores the amount of diversity within a particular group; how copyright might further these hierarchies and inculcate patriarchal values within these groups; and how the actual distribution of resources takes place within the family and the society. The present regime may help those individuals who are already at advantageous position in the social hierarchy within their groups, but not others. For example, a black male might be better placed to take advantages of the rights flowing from copyright law than a black woman. A lot of women writers write secretly⁴⁰ and hence, never claim their autonomous or economic rights over their works. In fact, creation of such hierarchies within the marginalized group cannot succeed in countering marginalization as this leads to an inculcation of the patriarchal power and domination, leading to exclusion within the excluded group itself.⁴¹ Moreover, even when individuals acquire these rights, it is important to look behind the veil at the distribution of these benefits. For example, the distribution of economic resources within the family is usually gendered with women having minimal control over the resources.⁴² Similarly, copyrights of a number of black music composers in the United States were divested, and through inequitable contracts, their earnings pilfered.⁴³

Secondly, it may be argued that the fact that copyright is automatically acquired precludes exclusion of socially marginalized groups. Acquiring copyright does not require any technicalities as it is an automatic right acquired by the very fact of an original creation. Hence, the fact that certain groups are not able to assert themselves socially does not affect the acquisition of copyright. This counter-argument again ignores how the distribution of resources takes place once the copyright is acquired. The marginalized sections may lose control over their rights and resources.

³⁹ Halbert, *supra* note 14.

⁴⁰ Greene, *supra* note 8.

⁴¹ See Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819 (1992).

⁴² PAUL SEETON, THINKING ABOUT DEVELOPMENT 28-53 (1995); Amartya Sen, *Development as Capability Expansion*, in READINGS IN HUMAN DEVELOPMENT (2003).

⁴³ See Greene, *supra* note 8.

Lastly, it may be proposed that the present laws must be amended and expanded to make them more inclusive of the works of such groups instead of challenging the entire regime. It is possible to view the fair use doctrine as one such measure where certain kinds of 'postmodernist appropriation' may be accommodated.⁴⁴ The endeavor to expand copyright laws to include various forms of traditional knowledge shows that we have been following this expansive approach till now.

A common response to all these four counter-arguments is my next argument that the copyright law is based on patriarchal regime and thus needs an overhaul. Liberals may be satisfied by the expansive techniques followed by the law as they focus on an equal treatment of all emphasizing the 'sameness' of each individual. Pollack, however, argues that instead of focusing on short term goals of improving living condition which can be achieved by amendments, one should shift focus to the long term goal of changing basic social structure. Extending intellectual property rights would not solve the problems of marginalized groups, which are primarily rooted in lack of economic and political power. Stronger feminist arguments in favor of revitalizing the public domain are required.⁴⁵ Radical feminism, rather than assuming the present structures and values need to be reformed to cater to women, locates the basis of subordination within those structures and aims at a more fundamental transformation in the balance of power.⁴⁶ This means the entire copyright regime needs to be examined to see on what values it is based and whether those values themselves need to be reexamined in order to bring a more inclusionary culture.

II. THE PATRIARCHAL REGIME OF COPYRIGHT LAW

The structure of copyright law is essentially masculine and it is this structure which is responsible for exclusion and marginalization of various groups. There is a difference in feminine and masculine virtues. Cultural feminists acknowledge these differences.⁴⁷ According to relational feminists, a more humane social order would focus on relationships, not competition; negotiation, not combat; community not individual self-interest.⁴⁸ A feminist construction of knowledge would incorporate values of caring, sharing, selflessness, love as opposed to the masculine version which incorporates separation, autonomy, hierarchy, labour as commodity, recognition, abstract and

⁴⁴ See A. Michael Warnecke, *The Art of Applying the Fair Use Doctrine: The Postmodern-Art Challenge to the Copyright Law*, 13 REV. LITIG. 685 (1994).

⁴⁵ Pollack, *supra* note 4.

⁴⁶ Margaret Davis, *Asking the Law Question* 193 (1994).

⁴⁷ Joan Williams, *Deconstructing Gender*, 87 MICH. LAW REVIEW 797(1989).

⁴⁸ *Id.*, 47.

rational knowledge, etc. Masculine knowledge exists within a capitalist mode of production. A feminist way of knowing emphasizes the relationships built, rather than dominion over others.⁴⁹ A woman's rational mind has feelings and is engaged with, and is not in opposition to, other things and persons.⁵⁰

It is evident that copyright regime is based on patriarchal values. By trying to portray the author as an autonomous individual, solely responsible for his creations, copyright imbibes masculine virtues. Men subscribe to an ethic of rights to protect individual autonomy. A feminist worldview would deny the isolated, original, and individual construction of authorship. Copyright commodifies creation and considers self-interest as the basis of creation. A feminist perspective, however, would advocate sharing of creation and functioning as a community.

The masculine structure of copyright regime perpetrates marginalization and exclusion. The masculine mode of operation is exclusionary. The concept of patriarchy revolves around a hierarchical paradigm where one dominates and other submits.⁵¹ Hence, such a structure, whose very basis is domination, will automatically cause and also legitimize marginalization of the group being dominated.

It may possibly be contended that this theory is generalizing the varied experiences and values of different groups. Feminine values may not necessarily be associated with those oppressed on the basis of grounds other than gender, like race, caste, class, etc. Hence, an argument based on gender differences cannot encompass the interests of groups who face oppression due to other reasons. In fact, such generalization is sidelining their unique experiences and thus, is equally, if not more, disempowering as operating in a masculine structure.

This criticism is not based in the correct understanding of the feminist theory which can be effectively employed to challenge all kinds of oppression. Gender subordination is the archetype of all subordination.⁵² The transformative feminist movement seeks the eradication of domination in all human relationships, combining the interests of those oppressed by sex, race, class, sexual orientation, etc. Feminist theories are based on 'differences' which is also the asserted reason for the marginalization of any group. Feminists use these differences as their strengths and challenge oppression, for example, cultural feminism which celebrates the differences between men and women. In the present context, the relevance of feminism lies in the different conceptions of power by men and women. The patriarchal vision of power

⁴⁹ Halbert, *supra* note 14.

⁵⁰ Kachuk, *supra* note 22.

⁵¹ Crain, *supra* note 41.

⁵² Pollack, *supra* note 4.

is considered synonymous with domination and control.⁵³ On the other hand, a feminist concept of power is based on cooperation. This concept of power also includes empowerment. Women exercise power in a community, which emanates horizontally, expanding outward in a web-like fashion, rather than vertically in a hierarchy.⁵⁴ Power belongs to the group rather than to an individual. Community is the source of power.⁵⁵ Since feminist perspective is about working in groups and not in hierarchies, domination and marginalization is automatically avoided. It is evident that any society functioning in a web, rather than a pyramid, will exclude domination and will be a more egalitarian society. Hence, my argument is valid as it implies not that feminine values are common to all excluded groups, but that any structure based on feminine values will be more egalitarian than one based on patriarchy.

III. COPYLEFT REGIME: THE WAY TO GO

Here, I suggest that copyleft is a regime founded on feminine value and thus, is better equipped to deal with issues of marginalization. Copyleft is a licensing mechanism whereby the owner of copyright has the freedom to grant subsequent users of his or her work the freedom to copy, disseminate, interpret, and modify the original work, provided the same freedom is granted by the user of the original work to the subsequent users of this modified work. Copyleft comes one the work is copyrighted. Copyright protects the rights of the creator by providing control of distribution and modification of the work. Copyleft goes a step further and uses copyright to give the users the freedom. The user of the original work, however, is not free to disentitle the subsequent users of this freedom and must necessarily pass along the freedom to further copy and change the work. Copyleft is thus based on the goals of promotion of knowledge through widest distribution of work.

Copyleft is a regime more based on feminine values than patriarchal ones and is therefore, more inclusionary. Copyleft rests on the belief that mutual exchange of knowledge is mandated by an understanding of such work as the “collective property of humanity.”⁵⁶ Copyleft is a model based on the premise of giving and sharing, qualities which are attributable to the feminine. Copyleft is not afraid of putting the work in the public domain; rather, it encourages and allows for communication in the public domain. Pollack argues that the public domain is essentially feminine. Public domain consists of those aspects of culture that someone may use without permission from or

⁵³ Crain, *supra* note 41.

⁵⁴ *Id.*, 53; She argues that the feminist way of management is transformation (as opposed to the patriarchal transactional way) and their management structure is a web expanding in circular fashion in contrast to the patriarchal hierarchical pyramid. This facilitates inclusion as well as power and information sharing.

⁵⁵ *Id.*, 54.

⁵⁶ Dusollier, *supra* note 25.

payment to some owner.⁵⁷ Feminism believes that each human develops his or her individuality inside some specific society and creation involves reprocessing communal material. Thus, according to feminism, free sharing of your creation with the community is morally appropriate.⁵⁸ Copyleft defines work as the common work which includes the original work and the derived works. It provides for the creation of a common foundation to which each person can add, but from which no one can remove⁵⁹; rather than on the patriarchal logic of the monopoly over the work. The notion of authorship and originality under copyleft are more in tune with the postmodernist model. The author does not consider the work in the singular autonomous sense but as material which can be appropriated by others who have the goal of participating in a larger discourse.⁶⁰ Copyleft paradigm imbibes the feminine values of building relations with each other while functioning in a community. Feminists challenge the boundaries established by intellectual property law as seeking to divide and control instead of facilitating exchange. They locate text within the reciprocal world of ideas.⁶¹ Copyleft regime encourages this exchange of information by allowing for the postmodernist connection between the author and the readers and refuting the notion of autonomy. By enlarging and protecting the public domain, copyleft enables the society to move towards a more feminine, and therefore more humanist, culture.⁶² I have already mentioned that incorporation of feminine values in any structure will make it more inclusionary. Hence, the copyleft regime is an effective solution to the problems of exclusion and marginalization prevalent in the copyright.

It may be argued here that even copyright permits the use of copyrighted work on payment and even allows for relinquishment of copyright, thus also incorporating the element of choice of the creator. Under copyright, the user may pay for the amount of work borrowed and use that work with consent of the owner. In fact, a lot of postmodern artists who appropriated artistic work acknowledged the fact of borrowing and were willing to pay for it. In fact, they considered it immoral to use a work without paying for it.⁶³ Further, copyright laws also permit the author to relinquish the copyright on his or her work. Thus copyright laws incorporate the element of consent or choice of the creator of a work. In fact, Martha Nussbaum treats the element of choice in a person's life as an inherent human capability which no individual must be deprived of.⁶⁴ Copyright laws provide for this element of choice.

⁵⁷ Pollack, *supra* note 4.

⁵⁸ *Id.*, 57.

⁵⁹ See Dusollier, *supra* note 56.

⁶⁰ *Id.*

⁶¹ Halbert, *supra* note 14.

⁶² Pollack, *supra* note 4.

⁶³ Shimanoff, *supra* note 24.

⁶⁴ Nussbaum, *supra* note 20.

This counter-argument, however, fails to adequately observe the differences between copyright and copyleft. Copyleft also has the element of consent or choice of the author incorporated in it. In fact, the author grants the users the right to use and modify the work. But in addition to that, copyleft also does away with the requirement of paying consideration for such use, thus allowing any person, irrespective of his or her economic resources, to contribute to information and knowledge dissemination. Further, there is also a difference between 'relinquishing' a right and 'granting' the users the freedom to use and modify the work. Copyleft enables the author to retain some rights over the work, being the original creator, while also providing mechanism of bringing the work in the public realm. Under copyright, however, the author to relinquish his or her rights over the work before it enters the public domain. This takes away even the little benefits that the marginalized groups acquire from copyright by holding rights over their works.

Another potential criticism against the advocacy of copyleft is that it again falls into the trap of exclusion; the only difference being that this time the excluded group is the dominant class. Copyleft creates a feminist structure which excludes masculine perspective.

The copyleft regime, however, incorporates both masculine and feminine values and provides a midway where none is excluded. Feminists themselves put a caution to avoid essentializing and excluding. Carol Gillian advocates recognition of differences between feminine and masculine virtues and argues that both have a contribution to make in the world. Incorporation of both these values will create a more humane social order.⁶⁵ Critical feminism commits to neither embrace nor suppress difference between men and women but to challenge the dualism and make the world safe for differences.⁶⁶ A feminist critique of copyright seeks a true balance between circulation and ownership of texts.⁶⁷ The copyleft regime works on a middle path. Copyleft allows authors to share their work only *after* copyright is acquired. This system allows for a midway where texts may not be the private property of their authors, but at the same time some authorial autonomy is retained, thus incorporating both masculine and feminine values. This also answers critics who argue that copyright regime, by granting recognition to the authors for their work, is actually beneficial to the marginalized sections of the society. Copyleft regime is more holistic as it ensures recognition of their work while also incorporating feminist values within the system itself.

⁶⁵ Williams, *supra* note 47.

⁶⁶ Deborah Rhode, *Feminist Critical Theories*, 42 STANFORD L. REV. 617 (1990).

⁶⁷ Halbert, *supra* note 14.

IV. CONCLUSION

Through this article, I have attempted to bring out the fallacies of copyright regime and advocate the copyleft regime, using jurisprudential concepts. Copyright laws are unjust because they are unable to incorporate the works of all sections of the society; this exclusion flows from the fact that copyleft is based on a patriarchal structure; and copyleft, by incorporating both masculine and feminine virtues, is a better regime to challenge this marginalization.

At the end, I would both caution and admit that I do not wish to convey that copyleft is panacea for all evils. In fact, the very requirement of copyright before acquiring copyleft rights makes way for some ill-effects of the copyright regime. For example, it cannot answer the problems of illiteracy and traditional exclusion of women or people belonging to lower castes from writing. I only argue here that the copyleft regime is a better incorporation of feminine values, at the same time not excluding masculine ones, thus enabling the bringing about of a structural change in Intellectual Property law. Such a regime gives marginalized sections a better ground to represent themselves and their concerns by establishing the link among the author, the work, the readers and the previous writings, instead of treating the author as autonomous male-equivalent.⁶⁸ It challenges the patriarchal societal structures which pose a threat to the creations by members of the marginalized groups and the legal systems that remain discriminatory in the garb of fairness and equality.

⁶⁸ See Crain, *supra* note 41; which argues how labour unions based on feminine virtues like solidarity are better empowered than labour unions based on patriarchal values of self-interest and lacking a sense of connection and empathy.

