

## LEADERS AND LITIGANTS: LOOKING FOR WOMEN IN COPYRIGHT CASES

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Jill McKeough as a Leading Casebook Author

On International Women’s Day 2017, several months before #metoo would start to sweep the globe, a bronze statue of a young girl was placed in Bowling Green in New York’s financial district, taking up a position directly in front of the famous *Charging Bull* statue which had dominated the space since 1989. The statue of the young girl, known as *Fearless Girl*, created by sculptor Kristen Visbal, had been commissioned by an asset manager called State Street Global Advisors Trust Company (SSGA) as part of its campaign to promote gender diversity in senior leadership positions. What began as a story that appeared to be about empowering women leaders has since descended into a legal quagmire, in which issues of copyright and gender have become entangled. Litigation over *Fearless Girl* has spread from the USA to Australia, and has already created a number of ‘teachable moments’ for students of both copyright and gender. This case strikes us as providing a useful launch pad to discuss four of the themes of this volume and the life and work of Jill McKeough: teaching, copyright law, gender, and leadership.

In 1987, Jill McKeough and her UNSW colleague Michael Blakeney published the first intellectual property law casebook in Australia.<sup>1</sup> In that same year, Jill produced the intellectual property edition of Butterworths’ Student Companions.<sup>2</sup> In writing a casebook, authors must identify the key principles of an area of law, develop a structure appropriate for teaching those principles, and then select and edit the cases that most appropriately illustrate them. This can be challenging, especially in the absence of decisions of an apex court and where courts (either within or outside the relevant jurisdiction) have taken competing approaches to particular legal issues. There is relatively little room for exposition of how the law developed – that is the role of a textbook – and the cases must do most of the explanatory work. The ‘casebook method’ of teaching<sup>3</sup> requires students to engage closely with the extracted cases and to identify and explain not merely the ratio of important decisions but also problems with or gaps in legal reasoning. It is also a method that can provide a stimulus for class discussion as to why certain cases might have been litigated, whose interests were being privileged in those cases, and what issues or values might have been ignored. Authors of casebooks become household names to successive cohorts of law students. Their choices as to structure and to the identity of ‘leading cases’ are imprinted upon receptive nascent legal minds, and their impact in shaping the field for practitioners is consequently significant.

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<sup>1</sup> Michael L Blakeney and Jill P McKeough, *Intellectual Property: Commentary and Materials* (Law Book, 1987).

<sup>2</sup> Jill P McKeough, *Butterworths’ Student Companions: Intellectual Property* (Butterworths, 1988).

<sup>3</sup> On the reception of casebooks and the casebook method in Australia, see H Tarlo, ‘Book Review: *Cases and Materials on Real Property*, by PJ Butt, GL Certoma, CM Sappideen and RTJ Stein’ (1982) 9(3) *Sydney Law Review* 715, 715–7. On UNSW’s historical role in pioneering this model of teaching, see Chief Justice Robert French, ‘University of New South Wales Law School 40th Anniversary’ (Speech, Sydney, 17 September 2011) 5 <<https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj17Sep11.pdf>>.

Blakeney and McKeough were thus entering at the ground floor to take up real estate in the minds of the intellectual property lawyers of the future.<sup>4</sup>

Our aim in this chapter is to situate a discussion of the current *Fearless Girl* case alongside a selection of copyright cases considered ‘leading’ or important to copyright doctrine in Australia – many of which can be found in the first four editions of Jill McKeough’s casebook<sup>5</sup> and/or the three editions of the McKeough Student Companion – in order to uncover and shed light on some of the gendered aspects of copyright law. Our approach draws on a long history of feminist legal analysis. Recognising the influence of casebooks, feminist scholars (mainly in the United States) have sought to criticise the biases inherent in the selection of cases, how casebooks support the ideology of gender, and how women appear as ‘characters’ in the extracted cases.<sup>6</sup> Our purpose is not to critique the casebooks per se; rather, it is to show, primarily through an exploration of some of the leading cases in those books, that Australian copyright law is inherently gendered, and that this gendering has been hidden.<sup>7</sup>

The message of copyright law, like other areas of law, is that gender is irrelevant. In Australia, as in the United Kingdom and other common law countries, the use of surnames to identify the parties in proceedings hides the gender of participants and gender is never an explicit aspect of legal reasoning. As Ann Bartow has observed, copyright laws ‘allocate dominion over creative works in seemingly gender-neutral ways, facially appearing to uniformly affect the creators and consumers of copyrightable works without regard to the sexes of the interested parties’.<sup>8</sup> The problem is that this obscures the fact that copyright law was constructed by (white) men, for (white) men, and therefore ‘embod[ies] a male vision of the ways in which creativity and commerce should intersect’.<sup>9</sup> The sleight of hand lies in creating the illusion that this law is neutral. In fact, copyright law contains a number of doctrines that have operated in ways that have impacted disproportionately harshly on women. For example, Rebecca Tushnet has examined the extent to which US courts, in considering whether defendants have engaged in a ‘fair use’ of copyright material, have too readily accepted that uses involving the overt sexualisation of such material are transformative, and thus non-infringing.<sup>10</sup> Other scholars have questioned the extent to which

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<sup>4</sup> They were not, however, alone, and tipped their hats at their colleague tilling in the same field down south, noting with generosity that ‘[u]ntil recently the Australian literature on industrial and intellectual property was fairly sparse, but over the last few years a number of excellent texts have been written on the major categories of property, culminating in Ricketson’s excellent treatise (Ricketson, *The Law of Intellectual Property* (1984))’: Blakeney and McKeough (n 1) 8.

<sup>5</sup> Michael Blakeney departed the authorial team after the second edition. For the third and fourth editions, Jill McKeough was joined by Kathy Bowrey and Philip Griffith.

<sup>6</sup> See, eg, Mary Joe Frug, ‘Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook’ (1985) 34(4) *American University Law Review* 1065; Carl Tobias, ‘Gender Issues and the Prosser, Wade, and Schwartz *Torts Casebook*’ (1988) 18(3) *Golden Gate University Law Review* 495; Rosemary Hunter, ‘Representing Gender in Legal Analysis: A Case/Book Study in Labour Law’ (1991) 18(2) *Melbourne University Law Review* 305; Reg Graycar, ‘Teaching Torts as if the World Really Existed: Reflections on Harold Luntz’s Contribution to Australian Law School Classrooms’ (2003) 27(3) *Melbourne University Law Review* 677.

<sup>7</sup> Our chapter supplements the significant body of work by Australian feminist scholars on this more general issue, the most notable example of which is Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002).

<sup>8</sup> Ann Bartow, ‘Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law’ (2006) 14(3) *American University Journal of Gender, Social Policy & the Law* 551, 555.

<sup>9</sup> *Ibid* 557. There is also more work to be done on the racial dimension of copyright authorship, but for some important initial studies in the US context see, eg, Anthea Kraut, *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance* (Oxford University Press, 2015); Anjali Vats, *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans* (Stanford University Press, 2020).

<sup>10</sup> Rebecca Tushnet, ‘My Fair Ladies: Sex, Gender, and Fair Use in Copyright Law’ (2007) 15(2) *American University Journal of Gender, Social Policy & the Law* 273. See also Sonia K Katyal, ‘Performance, Property,

the courts' relatively recent acceptance of copyright subsistence in immoral material might have resulted in the more widespread circulation of harmful pornographic imagery.<sup>11</sup> Using a handful of well-known copyright cases, we will explore some of the ways in which women appear in Anglo-Australian copyright litigation, in particular as parties to lawsuits in which they are, or are seeking to be recognised as, authors. We look at some of the ways that female authors are marginalised, through the legal construction of authorship itself, before turning to consider how this can occur through the construction of the fruits of authorship, that is, the copyright work. Before turning to these cases already accepted as important in establishing the boundaries of copyright, we examine in more detail the various disputes that have arisen over the *Fearless Girl* statue, one or more of which may yet emerge as a leading copyright case of the future.

## I. Who's Afraid of Fearless Girl?

As noted at the start of this chapter, Kristen Visbal's creation of the *Fearless Girl* statue set in train a series of events that would implicate copyright law in various ways and around the world. SSGA had commissioned the statue to celebrate the launch of a fund designed to track the performance of companies with the greatest number of women amongst their senior leadership, and placed it at Bowling Green in New York City.<sup>12</sup> Visbal's statue, cast in bronze, comprises a young girl, standing with her hands on her hips, her ponytail flying, and her eyes raised to stare defiantly at another statue which had, until then, had the square to itself. That statue is *Charging Bull*, created by sculptor Arturo Di Modica and placed on Bowling Green in 1989.

Tourists, locals and politicians flocked to have their photos taken with *Fearless Girl*,<sup>13</sup> and she quickly became an online sensation.<sup>14</sup> In an interview in March 2017, Ron Hanley, SSGA's CEO, explained that the message of *Fearless Girl* was 'not "You versus me"'. The point was that where there was once just a you, now there's a me, and we're here together'.<sup>15</sup> It was not long, however, before the apparent unity was revealed to be a mirage. Several months after the statue was installed, SSGA reportedly paid \$US3.5 million in part to settle claims it had engaged in pay discrimination against 305 female employees and 15 Black vice presidents.<sup>16</sup> Some commentators condemned the statue as 'fake corporate feminism',<sup>17</sup> and

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and the Slashing of Gender in Fan Fiction' (2006) 14(3) *American University Journal of Gender, Social Policy & the Law* 461.

<sup>11</sup> See, eg, Ann Bartow, 'Copyright Law and Pornography' (2012) 91(1) *Oregon Law Review* 1. For critical counter-arguments, see Jennifer Rothman, 'Sex Exceptionalism in Intellectual Property' (2012) 23(1) *Stanford Law & Policy Review* 119; Amanda Levendowski, 'Using Copyright to Combat Revenge Porn' (2014) 3(2) *New York University Journal of Intellectual Property & Entertainment Law* 422.

<sup>12</sup> State Street, 'State Street Global Advisors Launches Gender Diversity ETF to Help Investors Seek a Return on Gender Diversity' (Press Release, 7 March 2016) <<https://newsroom.statestreet.com/press-release/corporate/state-street-global-advisors-launches-gender-diversity-etf-help-investors-se>>.

<sup>13</sup> Sandra E Garcia, "'Fearless Girl' Statue Finds a New Home: At the New York Stock Exchange', *The New York Times* (online, 10 December 2018) <<https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange.html>>.

<sup>14</sup> For details of the online impact over the first three months of the campaign, see *State Street Global Advisors Trust Co v Maurice Blackburn Pty Ltd (No 2)* [2021] FCA 137, [32].

<sup>15</sup> Bethany McLean, 'The Backstory Behind That "Fearless Girl" Statue on Wall Street', *The Atlantic* (online, 13 March 2017) <<https://www.theatlantic.com/business/archive/2017/03/fearless-girl-wall-street/519393/>>.

<sup>16</sup> Garcia (n 13).

<sup>17</sup> Jillian Steinhauer, 'The Sculpture of a "Fearless Girl" on Wall Street Is Fake Corporate Feminism', *Hyperallergic* (10 March 2017) <<https://hyperallergic.com/364474/the-sculpture-of-a-fearless-girl-on-wall-street-is-fake-corporate-feminism/>>. See also Ginia Bellafante, 'The False Feminism of "Fearless Girl"', *The New York Times* (online, 16 March 2017) <<https://perma.cc/72F6-FJM8>>.

‘pinkwashing’.<sup>18</sup> However, the gender equality message remained effective enough for other companies around the world to become interested in partaking of *Fearless Girl*’s success by acquiring their own versions. One such company was Australian law firm Maurice Blackburn, which entered into an agreement with Visbal to supply it with a replica of *Fearless Girl* that would be displayed in Federation Square in Melbourne around the time of International Women’s Day 2019 to signal the shared commitment of Maurice Blackburn and the campaign sponsors (Australian superannuation funds Cbus and HESTA) to gender equality.<sup>19</sup>

While Visbal had successfully registered the copyright in *Fearless Girl* in the United States,<sup>20</sup> Australian law does not require registration. However, SSGA had registered FEARLESS GIRL as a trade mark in the United States and Australia.<sup>21</sup> More importantly, SSGA had entered into three contracts with Visbal, under which SSGA owned the exclusive rights to use the *Fearless Girl* sculpture in relation to financial services and gender diversity issues in corporate governance, and which prevented Visbal from selling, licensing or distributing copies of the sculpture for various commercial or political purposes.<sup>22</sup>

In Australia, SSGA launched proceedings in the Federal Court against Maurice Blackburn, claiming it had induced Visbal to breach her contract with SSGA, and had engaged in misleading or deceptive conduct, passing off, trade mark infringement and copyright infringement. In February 2021, in *State Street Global Advisors Trust Co v Maurice Blackburn Pty Ltd (No 2)*, Beach J found in favour of Maurice Blackburn on all counts,<sup>23</sup> stating that SSGA had ‘sought to weave its web of statutory and tort claims in such a fashion as to effectively assert monopoly rights in an icon that it does not have’.<sup>24</sup> In New York, however, SSGA brought proceedings against Visbal herself,<sup>25</sup> and both the legal documents and media reports surrounding the case are particularly noteworthy for the way in which Visbal’s authorship of *Fearless Girl* was constructed.

In its Complaint filed with the New York Supreme Court, SSGA placed its corporate identity at the heart of its argument. It was SSGA which ‘in the pre-dawn hours of International Women’s Day 2017, introduced the world to *Fearless Girl*’.<sup>26</sup> It claimed that ‘*Fearless Girl* and SSGA together inspired more than 300 companies to add a female director to their previously all-male boards’.<sup>27</sup> Positioning itself as the visionary behind the statue, SSGA asserted that ‘*Fearless Girl* is the visual representation of the company’s commitment to asset stewardship’.<sup>28</sup> Animating the company with human attributes, it stated that SSGA ‘has poured its “heart and soul” into *Fearless Girl*’.<sup>29</sup> Despite not owning the copyright per se,

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<sup>18</sup> Emily Peck, ‘Why the “Fearless Girl” Statue is Kinda Bull’, *Huffpost* (10 March 2017)

<[https://www.huffingtonpost.com.au/entry/fearless-girl-statue-wall-street\\_n\\_58c19095e4b0d1078ca4d223?ri18n=true](https://www.huffingtonpost.com.au/entry/fearless-girl-statue-wall-street_n_58c19095e4b0d1078ca4d223?ri18n=true)>.

<sup>19</sup> *State Street Global Advisors Trust Co v Maurice Blackburn Pty Ltd (No 2)* [2021] FCA 137, [4], [11]–[12].

<sup>20</sup> *US Copyright Registration No VAu001281157* (Registration date 16 March 2017).

<sup>21</sup> *US Trademark Registration No 5728466*, filed on 16 March 2017 (Registered on 16 April 2019); *AU Trade Mark No 1858845*, filed on 27 April 2017 (Registered on 29 November 2017).

<sup>22</sup> *State Street Global Advisors Trust Co v Visbal*, 431 F Supp 3d 322, 330 (Woods J) (SDNY, 2020).

<sup>23</sup> [2021] FCA 137. Of particular interest is that in the course of considering the issue of interference with contractual relations, Beach J was not prepared to find that Visbal had breached any of her obligations to SSGA: at [433]–[465], [577], [628]–[630].

<sup>24</sup> *Ibid*, [23]. At the time of writing, the only outstanding issue is whether the further display of the replica statue in Australia should be with a disclaimer: at [937].

<sup>25</sup> *State Street Global Advisors Trust Co v Visbal*, 431 F Supp 3d 322 (SDNY, 2020).

<sup>26</sup> Complaint, *State Street Global Advisors Trust Co v Visbal* (Supreme Court of New York, 14 February 2019)

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<sup>27</sup> *Ibid* 1.

<sup>28</sup> *Ibid* 3.

<sup>29</sup> *Ibid* 3.

SSGA nevertheless emphasised its ownership credentials of, and moral entitlement to, the physical statue and its reputation, stating: '[a]s the owner of the *Fearless Girl* statue and trademark, SSGA will always be associated with *Fearless Girl*'.<sup>30</sup>

Visbal's role was cast quite differently, as merely 'an artist who was hired to sculpt the *Fearless Girl* statue pursuant to the concepts and designs that SSGA developed with its agents and consultants'.<sup>31</sup> In addition to being portrayed as little more than an uncreative labourer (a theme we will return to in Part three), Visbal's subsequent conduct was described in coded, gendered language as being petulant and irresponsible. Attempts to communicate with her were said to 'have fallen on deaf ears'.<sup>32</sup> It was claimed that she 'persistently refuses to cooperate and employs delay tactics. She has withheld information ... She has failed to acknowledge her breaches ... She neglected to timely pursue mediation',<sup>33</sup> and 'neglected her responsibility to negotiate in good faith to reach resolution'.<sup>34</sup>

In none of the documents is there any reference to an earlier copyright-inflected dispute that arose immediately after the statue was installed in its place. This was the complaint aired extensively in the media by the late Arturo di Modica, the sculptor of *Charging Bull*. Di Modica threatened to bring proceedings, alleging copyright infringement<sup>35</sup> as well as infringement of his rights under the Visual Artists Rights Act of 1990 ('VARA') by the distortion, mutilation and modification of *Charging Bull* in a way which was prejudicial to his honour.<sup>36</sup> Di Modica claimed that the placement of *Fearless Girl* meant that *Charging Bull*'s message changed from being one of strength and optimism into 'a negative force and a threat',<sup>37</sup> 'a symbol of male chauvinism'.<sup>38</sup> In a press conference he sought to resist being cast as misogynist for objecting to *Fearless Girl*, stating: 'I am not against women, I am against this advertising trick'.<sup>39</sup>

Di Modica's reaction might be seen by some as coming straight out of the male oppressor's playbook. Resentful and incredulous at the suggestion that strength portrayed as aggression might in fact be perceived as hostile by one section of the population, he undermined the female artist by characterising her work not as 'art' but as 'advertising'. Further, he presented himself as the victim, not just of a legal violation, but also of a personal attack, telling the press conference the artwork made him 'sick'.<sup>40</sup> Meanwhile, SSGA's reaction seemed to validate the points made by the statue's critics, responding meekly that *Fearless Girl* was not expected to be 'a challenge' and 'wasn't intended to be confrontational'.<sup>41</sup> Analysing Di Modica's claims, John Tehranian has pointed out that authorship 'lies at the heart of the battle to control the Bull's (male) gaze'.<sup>42</sup> Drawing on Foucault he argues that 'authorship

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<sup>30</sup> Ibid 7.

<sup>31</sup> Ibid 2.

<sup>32</sup> Ibid 5.

<sup>33</sup> Ibid 8.

<sup>34</sup> Ibid 13.

<sup>35</sup> 17 USC § 106.

<sup>36</sup> 17 USC § 106A(a)(3)(A).

<sup>37</sup> Letter from Norman Siegel et al, Attorneys for Arturo di Modica, to the Honourable Bill de Blasio, Mayor of New York, 11 April 2017, <<https://www.scribd.com/document/344998311/Letter-to-Mayor-DeBlasio-on-Charging-Bull-vs-Fearless-Girl>>.

<sup>38</sup> Renae Merle, "'Fearless Girl' Ignites Debate about Art, Wall Street and the Lack of Female Executives', *The Washington Post* (online, 20 April 2017) <<https://perma.cc/TA9R-CX8M>>.

<sup>39</sup> Linda Massarella, "'Charging Bull' Artist Plans Revenge against 'Fearless Girl'", *The New York Post* (online, 12 April 2017) <<https://perma.cc/E7XZ-89Q2>>.

<sup>40</sup> Ibid.

<sup>41</sup> Bourree Lam, 'Why People Are So Upset about Wall Street's "Fearless Girl"', *The Atlantic* (online, 14 April 2017) <<https://www.theatlantic.com/business/archive/2017/04/fearless-girl-reactions/523026/>>.

<sup>42</sup> John Tehranian, 'Copyright's Male Gaze: Authorship and Inequality in a Panoptic World' (2018) 41(2) *Harvard Journal of Law & Gender* 343, 385.



functions as a vehicle through which authority to control narratives and semiotics passes'.<sup>43</sup> Characterising *Fearless Girl* as a derivative work deprives the work of its own status as an original artistic work and transforms it into a violation of someone else's work.<sup>44</sup> Meanwhile, the moral rights found in VARA allow Di Modica to retain control of the narrative of his work, and to '[silence] the views of subordinated communities attempting to resist dominant epistemologies'.<sup>45</sup>

These affordances of copyright law might be particularly stark in a case such as this which is, from beginning to end, about gender politics. However, many of the same themes – such as the denigration of women's authorial contributions, or the idea that some types of artistic production ought to be privileged over others – can be detected in a number of leading or important Anglo-Australian copyright cases that are not, ostensibly, about gender. We now turn to examine how women are treated, as authors, in some of these cases.

## II. Female Authors in Copyright Cases

A number of scholars have noted the gendered construction of authorship. Debora Halbert traces this as emerging during the eighteenth century, with the rise of the concept of romantic authorship that began in literary debates and moved into legal ones.<sup>46</sup> Shelley Wright places it still earlier, noting that that preamble of the first copyright statute, known as the Statute of Anne, specifically introduced a gendered division of roles when it proclaimed the purpose of the statute was the 'encouragement of Learned Men' to write and receive protection against 'the Ruin of them and their Families'.<sup>47</sup> Both Halbert and Wright explain how literary and artistic authorship are constructed as male domains and how this has come to be codified in copyright law. In this Part, we look at what this has meant for women involved in copyright litigation in the UK and Australia, considering how their authorship roles have been constructed by courts and how they have often struggled to articulate their authorial contribution, or had it denigrated.

The first case we will consider is *Glyn v Weston Feature Film Co*,<sup>48</sup> from 1916. The case stands for the proposition that copyright cannot subsist in works of an immoral character. The work in question was a novel entitled *Three Weeks* and law students are generally told, in a truncated manner, that the novel was found to be immoral because it dealt with adultery. This

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<sup>43</sup> Ibid 385.

<sup>44</sup> Ibid 387.

<sup>45</sup> Ibid 388. See also Annemarie Bridy, 'Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality' (2019) 9(2) *UC Irvine Law Review* 293, 311 (arguing that Di Modica's reaction 'reveals his commitment to a monologic vision of his work that forecloses voices from the outside and admits only a single voice – his own').

<sup>46</sup> Debora Halbert, 'Feminist Interpretations of Intellectual Property' (2006) 14(3) *American University Journal of Gender, Social Policy & the Law* 431, 447–50. See also Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993) 38 (discussing the importance of the 'paternity' metaphor in eighteenth century literary debates); Kathy Bowrey, 'Copyright, the Paternity of Artistic Works and the Challenge Posed by Postmodern Artists' (1994) 8(3) *Intellectual Property Journal* 285 (exploring the ways in which copyright came to protect the paternity of artists' creations); Carys Craig, 'Feminist Aesthetics and Copyright Law: Genius, Value and Gendered Visions of the Creative Self' in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests and Intersections* (Cambridge University Press, 2015) 273; Rebecca Tushnet, 'The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity' in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests and Intersections* (Cambridge University Press, 2015) 294 (both exploring the role played by the concept of Romantic authorship and aesthetics in gendering copyright law).

<sup>47</sup> Shelley Wright, 'A Feminist Exploration of the Legal Protection of Art' (1994) 7(1) *Canadian Journal of Women and the Law* 59, 70.

<sup>48</sup> [1916] 1 Ch 261. The case is referred to in the first and second editions of the Blakeney and McKeough casebook as authority for the non-subsistence of copyright in immoral works and as an example of a parody.

is usually considered faintly amusing as there is, in fact, nothing in it that would be considered sexually explicit or pornographic in today's world. Yet the back story is far more complex and interesting. Elinor Glyn wrote over 30 novels during her life, becoming a celebrity-author, Hollywood screenwriter and director, and sought-after adaptation adviser.<sup>49</sup> She was in the vanguard of cross-media licensing and cooperation, and became an icon of glamour and fashion. Her novella, *It*, adapted into the film starring Clara Bow in 1927, gave to the world the concept of the 'it' girl, a term still in currency today, although few have now heard of Glyn herself.<sup>50</sup>

Her successful career was built on the success of *Three Weeks*, her fifth novel, published in 1907. The novel describes a three-week adulterous affair between a mysterious Slavic noblewoman and a younger, aristocratic Englishman, to whom the noblewoman delivers a sexual and emotional education, transforming him into the ideal lover and romantic partner. The noblewoman returns to her realm, where she bears an illegitimate child by the Englishman, and is murdered by her wicked husband, the king of the country. The king is then assassinated and the child becomes king in his place. The book was immediately and wildly popular, and continued to be a best seller over the next decade.<sup>51</sup> But it also spurred scandalised reviews and a public outcry, with critics declaring it immoral, silly, badly written or all of the above. *The New York Times* declared it 'Prurient and Worse Yet ... Dull'.<sup>52</sup> It was banned by the American Library Association in the United States and by six of the largest circulating libraries in Britain.<sup>53</sup> However, none of this prevented it from being adapted in several productions for the stage and film by Glyn and with her permission. There were also a number of unauthorised adaptations, parodies, and purported sequels.<sup>54</sup>

In 1915, Glyn finally took legal action against one such unauthorised production, a film with the title 'Pimple's Three Weeks (without the Option)'. Pimple was a serial character who featured in a number of comedic films between 1912 and 1918, mostly lampooning popular novels.<sup>55</sup> Glyn's action for copyright infringement was financially supported by the Society of Authors, and the action was brought against the film company, Weston. Weston denied copyright infringement, arguing that their film was a burlesque, which did not reproduce a substantial part of Glyn's novel.<sup>56</sup> Younger J found in favour of the film company, agreeing that the two works were so different that it could not be said a substantial part had been copied. However, he considered that a much more important matter standing in the way of the plaintiff's success was the 'clear law that copyright cannot exist in a work of tendency so grossly immoral as this'.<sup>57</sup>

The judge had from the outset made his view of the work quite plain. He set out the plot, describing it as 'as hackneyed and commonplace a story as could well be conceived',<sup>58</sup> full of

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<sup>49</sup> Vincent L Barnett and Alexis Weedon, *Elinor Glyn as Novelist, Moviemaker, Glamour Icon and Businesswoman* (Routledge, 2014).

<sup>50</sup> *Ibid* ch 6.

<sup>51</sup> *Ibid* 31.

<sup>52</sup> *Ibid* 94–5.

<sup>53</sup> Hilary Hallett, 'A Mother to the Modern Girl: Elinor Glyn and *Three Weeks* (1907)' (2018) 30(3) *Journal of Women's History* 12, 26.

<sup>54</sup> Stacy Gillis, 'Sin and a Tiger Skin: The Stickiness of Elinor Glyn's *Three Weeks*' (2018) 29(2) *Women: A Cultural Review* 216, 220. Perhaps most enduringly, the book gave rise to a piece of Edwardian doggerel: 'Would you like to sin/With Elinor Glyn/On a tiger skin?/Or would you prefer/To err/With her/On some other fur?' (the verse referring to a notorious scene of seduction in the novel involving a tiger skin rug).

<sup>55</sup> Stacy Gillis, 'Pimple's Three Weeks (Without the Option), with Apologies to Elinor Glyn' (2014) 12(3) *Early Popular Visual Culture* 378, 379. Other novels targeted by Pimple included *Ivanhoe* by Walter Scott and *Trilby* by George du Maurier.

<sup>56</sup> *Glyn v Weston Feature Film Co* [1915] 1 Ch 261, 263.

<sup>57</sup> *Ibid* 269.

<sup>58</sup> *Ibid* 266.

‘exaggerated incidents’ that were ‘quite absurd enough to be destitute in novelty in literature of the kind’.<sup>59</sup> However, he did not stop there. Turning to consider the moral attributes of the novel he warmed to his theme. The novel was ‘grossly immoral in its essence, its treatment, and in its tendency. Stripped of its trappings, which are mere accident, it is nothing more or less than a sensual adulterous intrigue’.<sup>60</sup> Worse, Glyn did not excuse or justify this conduct, but rather ‘stopped to glorify the liaison in its inception, its progress and its results ... she has not hesitated to garnish it with meretricious incident at every turn’.<sup>61</sup>

Jeremy Phillips, in discussing *Glyn*, is bemused by the ‘unnecessary’ attack of the ‘usually ... benign’ judge, speculating that as ‘an *afficionado* of literature’ Younger J was concerned with its literary impact, or perhaps intended to send a message to Conservative Party statesman Lord Curzon, Glyn’s lover, to try to rescue him from her clutches.<sup>62</sup> Yet this underplays the challenging nature of *Three Weeks* for its contemporaries. The novel has been classed by literary scholars as a ‘sex novel’ – a loose group of novels published around the turn of the century that spoke openly about ‘sexuality and its discontents’.<sup>63</sup> The previous thirty years had seen growing social concern with moral purity, in the form of social campaigns for moral reform and the political influence of groups such as the National Vigilance Association. Erotic novels were considered unhealthy, dangerous and corrupting of social cohesion.<sup>64</sup> Like works by the so-called ‘New Woman’ authors,<sup>65</sup> *Three Weeks* challenged established gender and marital roles, by depicting a married woman as sexual initiator and seductress. It also celebrated female desire and sensuality in ways deeply transgressive to conservative Edwardian society.<sup>66</sup> That Younger J considered the work dangerous is clear from the analogy he drew between *Three Weeks* and the penny dreadful, a form of Victorian popular fiction, the moral panic surrounding which has been likened to fear of the influence of video games in today’s society.<sup>67</sup> His disquiet reflected in his convoluted prose, Younger J finished by labelling it a work of a ‘cruelly destructive tendency’.<sup>68</sup> A closer examination of the context of *Glyn*, using a feminist lens, allows us to see how tension and conflict around the changing role of women in society, shifting attitudes towards sex and marriage, and deep disquiet over the expression of female sexual desire and sensuality played a key role in cementing a doctrine of copyright law which had emerged as an equitable principle at the start of the 19<sup>th</sup> century in a different political context and which many had thought no longer relevant to 20<sup>th</sup> century society.<sup>69</sup> Despite Elinor Glyn’s lack of success in the courtroom, the fact that she was supported in bringing the action by the Society of Authors (which she had joined in 1912) represents a growing acceptance of female authors

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<sup>59</sup> Ibid 267.

<sup>60</sup> Ibid 269.

<sup>61</sup> Ibid.

<sup>62</sup> Jeremy Phillips, ‘Elinor Glyn and the “Three Weeks” Litigation’ (1982) 4(12) *European Intellectual Property Review* 336, 338–9.

<sup>63</sup> David Trotter, ‘Edwardian Sex Novels’ (1989) 31(1) *Critical Quarterly* 92; Gillis, ‘Sin and a Tiger Skin’ (n 54) 219.

<sup>64</sup> Trotter (n 63) 95.

<sup>65</sup> Hallett (n 53) 19.

<sup>66</sup> Gillis, ‘Sin and a Tiger Skin’ (n 54) 223.

<sup>67</sup> John Springhall, *Youth, Popular Culture and Moral Panics: Penny Gaffs to Gangsta Rap, 1830-1996* (Macmillan Press, 1998).

<sup>68</sup> *Glyn v Weston Feature Film Co* [1915] 1 Ch 261, 270.

<sup>69</sup> For a discussion of the development of the doctrine that copyright would not subsist in seditious or immoral works, see Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, 2010) 63–79.



as professionals.<sup>70</sup> At the same time, it is also important to remember that conservative fear of female desire and attempts to control the female body are far from being relegated to history. Our next two cases deal with female composers, and how they or their authorial contributions were belittled in copyright litigation. The first case, *Francis Day & Hunter Ltd v Bron*,<sup>71</sup> decided in 1963, features in almost every English or Australian copyright text, including Jill McKeough's, as standing for the proposition that copyright infringement can occur subconsciously.<sup>72</sup> However, most students would be surprised to learn that the composer of the work that was claimed to have been copied was a woman, and a notable female composer at that. American songwriter Mabel Wayne was a prolific songwriter, penning a number of hit songs in the 1920s – one of the first women to do so. The song that was the subject of the copyright infringement action, 'In a Little Spanish Town', was performed by Bing Crosby in 1926, and a 1927 recording by Paul Whiteman and his Orchestra topped the US charts.<sup>73</sup> By 1951 it had sold a million copies, with *Billboard* magazine proclaiming: '[i]n Tin Pan Alley Mabel Wayne ranks as America's first lady of song'.<sup>74</sup> Yet, in the case report, Wayne is mentioned precisely once, after the male writers of the lyrics (which were not even in issue in the case).<sup>75</sup> Wayne's song was treated just as dismissively. The first instance judge, Wilberforce J, brushed off the verses of 'In a Little Spanish Town' (which were not alleged to have been copied), writing: '[t]here are songs, of course, whose verses are a memorable and significant part of the composition, but this is not one'.<sup>76</sup> Concentrating on the chorus, the judge dealt with Wayne's composition in somewhat patronising terms. He accepted evidence from witnesses that the theme was made up of 'commonplace elements' or 'clichés', although they did produce 'character and charm',<sup>77</sup> before ultimately finding that copying had not occurred.

Around fifty years later, another song by a female composer became the subject of two leading cases, *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd*<sup>78</sup> from 2009 and *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*<sup>79</sup> from 2011. The song was the popular children's round, 'Kookaburra Sits in the Old Gumtree', written by Marion Sinclair in the 1930s, which became embroiled in litigation when a popular game show revealed that part of the melody of the song had been incorporated into Men at Work's 1981 hit, 'Down Under'. Sinclair's authorship was not obscured in the various judgments, as Mabel Wayne's had been. However, there was a similar (unsuccessful) attempt on the part of the defence, as seen in the 2011 case, to denigrate 'Kookaburra' itself. This was through an argument that the song was too simple for it to exhibit the requisite originality except in respect of its performance as a round, and that because the song was not reproduced as a round in 'Down Under' there could not be a reproduction of a substantial part.<sup>80</sup> This argument was implicitly recognised to sit uncomfortably alongside the evidence that the

<sup>70</sup> Martin Hipsky, *Modernism and the Women's Popular Romance in Britain, 1885-1925* (Ohio University Press, 2011) 13–14.

<sup>71</sup> [1963] Ch 587.

<sup>72</sup> The case is extracted in the first and second editions of the Blakeney and McKeough casebook, the third and fourth editions of the McKeough, Bowrey and Griffith casebook, and the three editions of the McKeough *Companion*.

<sup>73</sup> 'Songs from the Year 1927', *The World's Music Charts* (Web Page) <<https://tsort.info/music/yr1927.htm>>.

<sup>74</sup> Jack Burton, 'The Honor Roll of Popular Songwriters: No 92 – Mabel Wayne', *The Billboard* (19 May 1951) 39. Bing Crosby recorded a version of the song in 1956 for Decca Records, which reached number 49 on the Top 100: *The Billboard* (21 April 1956) 44.

<sup>75</sup> *Francis Day & Hunter Ltd v Bron* [1963] Ch 587, 589.

<sup>76</sup> *Ibid* 592.

<sup>77</sup> *Ibid* 594–5.

<sup>78</sup> (2009) 179 FCR 169.

<sup>79</sup> (2011) 191 FCR 444.

<sup>80</sup> *Ibid* 460–1 [67], 465 [85] (Emmett J), 495–6 [203]–[206] (Jagot J), 509 [267] (Nicholas J).

composers of ‘Down Under’ had included part of the melody of ‘Kookaburra’ for its iconic status.<sup>81</sup>

The perhaps more troubling aspect of the litigation relates to the defence’s argument in the 2009 case that the plaintiff, publishing company Larrikin, was not the owner of copyright in ‘Kookaburra’, and the way this required the defence to characterise Sinclair. Sinclair had submitted ‘Kookaburra’ to a competition conducted by the Victorian Girl Guides in 1934. She was a teacher who had been heavily involved in her school’s guiding company, and had devoted her life to welfare causes for women and girls.<sup>82</sup> Throughout her life, she had routinely granted permission to guiding organisations for the use of ‘Kookaburra’, allowing them to retain the proceeds of sales of published versions.<sup>83</sup> While she received performing rights royalties from APRA, as late as the 1980s she only charged a modest licence fee of \$10 for the publication of ‘Kookaburra’, and never charged the Girl Guides for this purpose.<sup>84</sup> According to her biographer, her musical works and poems ‘brought her little financial reward’.<sup>85</sup> Sinclair passed away in 1988 and, as she had no children, she bequeathed her estate to the Public Trustee to sell and the proceeds to be held on trust for the Animal Welfare League and the Helping Hand Centre, the place where she had lived in the final years of her life.<sup>86</sup> In 1990 the Trustee sold the copyright in ‘Kookaburra’ to Larrikin for the sum of \$6,100,<sup>87</sup> and it was Larrikin who brought that action against the composers of and owners of copyright in ‘Down Under’. In the litigation, the defence sought to argue that Sinclair had, in fact, assigned her copyright in ‘Kookaburra’ to the Victorian Girl Guides in 1934 when she submitted the song to the competition (such that no copyright passed from Sinclair to the Trustee to Larrikin). This effectively required the defence to characterise Sinclair as, at best, ignorant of what she was alleged to have done in 1934 – even though this characterisation presented Sinclair in a light that was entirely inconsistent with her subsequent actions over the remainder of her life, where she showed herself to have been acutely aware of the principles of copyright licensing and the control her copyright could give her over how her song was disseminated. The defence’s argument was roundly rejected, although on narrower evidentiary grounds, and without adverse comment on the disconcerting way Sinclair and her behaviour had been constructed by the defence.

The final female plaintiff we will consider is Nora Beloff. *Beloff v Pressdram*,<sup>88</sup> decided in 1972, is a leading case on the importance of determining whether the author of a work is an employee or an independent contractor, and also on the operation of fair dealing defences, the defence of public interest and the calculation of damages.<sup>89</sup> The background to the case has been explored in detail by Jose Bellido, but its strongly gendered context was not

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<sup>81</sup> Ibid 498 [219] (Jagot J).

<sup>82</sup> PA Howell, ‘Sinclair, Marion (1896–1988)’, in Melanie Nolan (ed), *Australian Dictionary of Biography* (Melbourne University Press, 2012) vol 18 <<http://adb.anu.edu.au/biography/sinclair-marion-15924/text27125>>.

<sup>83</sup> *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169, 174–5 [50]–[58] (Jacobson J).

<sup>84</sup> Ibid 176–7 [74]–[75].

<sup>85</sup> Howell (n 82).

<sup>86</sup> *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169, 177 [85]–[86] (Jacobson J).

<sup>87</sup> Ibid 178 [91]. One of the many sad features of the litigation is that the charities Sinclair had sought to benefit through her will did not see any of the royalties generated from the use of ‘Kookaburra’ in one of the most successful pop songs of the 1980s (this amount being 5% of the performing rights royalties of ‘Down Under’: *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd (No 2)* (2010) 188 FCR 321).

<sup>88</sup> [1973] RPC 765.

<sup>89</sup> The case is extracted in the first and second editions of the Blakeney and McKeough casebook, and was cited several times in the third and fourth editions of the McKeough, Bowrey and Griffith casebook. It is also in the three editions of the *Companion*.

emphasised.<sup>90</sup> Nora Beloff was a ‘pioneer woman journalist of formidable intelligence, courage and tenacity’.<sup>91</sup> The first woman to be the political correspondent in a major British newspaper, her obituarist in *The Independent* noted that ‘[s]he belonged to a generation in which women needed to be brighter and more fearless than male rivals for plum jobs’ and that ‘[h]er obvious qualifications did not always make her friends amongst her male colleagues’.<sup>92</sup>

The case involved an internal memorandum written by Beloff, which was leaked to and published by *Private Eye* magazine. The publication occurred in the context of a running print battle. Beloff had attacked *Private Eye* for its inaccuracy, while *Private Eye* had targeted her under the sobriquet of ‘Nora Ballsoff’. On 12 March 1971, *Private Eye* ran a satirical report by Auberon Waugh that implied Beloff would sleep with politicians in exchange for information and, on the following page, published the text of the memorandum she had written to her editor. The memorandum referred to a talk Beloff had had with a Conservative politician about the chances that Reginald Maudling would become the next Tory party leader, as well as *Private Eye*’s campaign against him. Beloff determined to bring two actions against *Private Eye* – one in defamation and the other in copyright. The end result was that Beloff was successful in her defamation action but failed in her copyright infringement suit when the court determined that *The Observer* was the owner of the copyright in the memorandum, because Beloff was an employee.<sup>93</sup>

Unsurprisingly, in its reporting on the case the media was particularly interested in whether the leak was ‘in the public interest’. *The Guardian* reported on an exchange with Beloff’s counsel Mervyn Davies QC in which Ungood-Thomas J observed that the press was ‘not a gentleman’s club’.<sup>94</sup> However, an examination of the way the witnesses were treated suggests that the court might well have been and, to our mind, this is most revealing part of the case. Ungood-Thomas J began his discussion of the evidence by referring to ‘the distasteful but necessary task of assessing [its] reliability’.<sup>95</sup> It is not immediately clear why the judge would have considered this task to be distasteful, but some inferences can be made.

Ungood-Thomas J was impressed by David Astor, Beloff’s editor, calling him ‘clearly experienced, wise and most kindly’.<sup>96</sup> He detected some potential capacity for bias but dismissed it, noting: ‘He has the virtue of great loyalty to his staff and this came through in his evidence but without ever affecting in the least the accuracy of his evidence on factual occurrences’.<sup>97</sup> The judge also praised the defence’s first two witnesses, Richard Ingrams, editor of *Private Eye*, and Paul Foot, who had written the article incorporating the memorandum. He called them ‘very able and serious-minded ... Except on one or two occasions of no great significance, when dealing with matters of opinion or where their loyalty was involved, they were forthright and unrestrainedly outspoken ... There was nothing devious or muffled about them, and any criticism of them must be of very opposite qualities. They were excellent witnesses’.<sup>98</sup> Counsel for Beloff suggested to the judge that, in the case of Foot, it was ‘distasteful that a man should say he is prepared to protect his own

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<sup>90</sup> Jose Bellido, ‘The Failure of a Copyright Action: Confidences in the Papers of Nora Beloff’ (2013) 18(3) *Media & Arts Law Review* 249.

<sup>91</sup> William Millinship, ‘Obituary: Nora Beloff’, *The Independent* (online, 15 February 1997) <<http://www.independent.co.uk/news/people/obituary-nora-beloff-5580821.html>>.

<sup>92</sup> *Ibid.*

<sup>93</sup> Under s 4(4) of the *Copyright Act 1956*, 4 & 5 Eliz 2, c 74, an employer was the owner of works created by its employees.

<sup>94</sup> John Ezzard, ‘Law Leaves Journalists in a Quandary’, *The Guardian* (18 July 1972) 5.

<sup>95</sup> *Beloff v Pressdram* [1973] RPC 765, 780.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

sources and at the same time to betray those of others in the same trade or profession’, to which the judge responded, as noted above, that this merely demonstrated the press was not ‘a gentleman’s club’.<sup>99</sup> The defence’s two other witnesses, Anthony Bambridge, *The Observer*’s business editor, and Anthony Howard, former deputy editor at *The Observer*, were more surprising: as Bellido has pointed out, they ‘were instrumental in revealing that the plaintiff was not wholly supported by her professional colleagues, including some working in the very same office’.<sup>100</sup> Bellido explains that Richard Ingrams later considered the evidence given by these two as being significant in that ‘it allowed the “anti-Beloff” faction at *The Observer* to back the defendants’ position’.<sup>101</sup> Ungoed-Thomas J, however, thought they were ‘objective, reliable and most helpful’, stating: ‘I accept their evidence on fact without qualification and their opinions deserve the highest respect’.<sup>102</sup> These views can be seen as still more extraordinary in hindsight, as we now know that it was Bambridge who had leaked the memorandum to the *Eye* in the first place.<sup>103</sup> The contrast between the judge’s treatment of the male witnesses and Nora Beloff is striking. Of Beloff, the judge said:

The plaintiff has an exceptionally quick mind and fluent speech, is sensitive to all around her and is very adaptable. She is also forceful. She seemed conscious of being very much involved in this action and it might have been this that, understandably, affected her evidence.

The judge’s language inflected Beloff’s good qualities with subtly negative undertones – her intelligence made her ‘sensitive’, ‘adaptable’ and ‘involved’, all of which had the potential to influence her evidence in a way that made it less reliable. It is not clear why he labelled her as ‘forceful’ but, in the context, and compared to the language used to describe her colleagues, it speaks to the common trope of depicting an ambitious or powerful woman as inappropriately aggressive or assertive, even monstrous. Beloff is presented as the least sympathetic figure in her own action.

### III. Women’s Work

The previous Part selected a number of leading copyright cases and revealed the ways in which female authors have been marginalised in litigation and, in particular, how their authorial contributions have often been denigrated (something, unfortunately, that continues to the present day, as seen in the *Fearless Girl* litigation). In this Part we explore a different way in which female creators have been disadvantaged in copyright law. We do so by focusing on the long-standing requirement in Anglo-Australian law that for copyright to subsist in creative content, that content has to fall within one of a number of fixed categories of ‘work’, showing how this has, in many cases, resulted in women’s creativity being excluded from copyright protection.

All students of Australian copyright law will spend at least a couple of classes considering what sort of creative outputs fall within and outside the boundaries of a ‘literary, dramatic, musical or artistic work’. This usually involves discussing a series of fun, even absurd cases involving attempts to argue that single words,<sup>104</sup> TV formats,<sup>105</sup> firework displays,<sup>106</sup> face

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<sup>99</sup> Ezard (n 94) 5.

<sup>100</sup> Bellido (n 90) 260.

<sup>101</sup> Ibid.

<sup>102</sup> *Beloff v Pressdram* [1973] RPC 765, 780.

<sup>103</sup> Bellido (n 90) 251.

<sup>104</sup> *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119.

<sup>105</sup> *Green v Broadcasting Corporation of New Zealand* [1989] RPC 900.

<sup>106</sup> *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333.

make-up<sup>107</sup> and frisbees<sup>108</sup> are copyright works.<sup>109</sup> These cases, however, tend to hide a somewhat darker history of how Anglo-Australian law came to privilege specific types of creative output over others – particularly in the fields of art and craft – with adverse consequences for many female creators.

As is well known, after the Statute of Anne copyright protection was extended to artistic content in a piecemeal manner – first to engravings,<sup>110</sup> then to models, busts and sculptures,<sup>111</sup> and later to paintings, drawings and photographs.<sup>112</sup> The eighteenth century reforms were introduced in response to the direct lobbying of a small number of professional, male engravers and sculptors, who complained about the piracy of, and their inability to extract fair returns from the mechanical reproduction of, their engravings and models.<sup>113</sup> The nineteenth century reforms were spearheaded by the Society of Arts, Manufactures and Commerce, which set up a male-dominated artistic copyright committee in the late 1850s that recommended that copyright protection be extended to works of ‘fine art’, but specifying that it was painters, designers and architects who should benefit.<sup>114</sup> Copyright laws were therefore structured around protecting marketable commodities falling within established categories of ‘art’, which was undertaken largely by male professionals.<sup>115</sup> Parliament showed no discernible interest at this time in seeking to afford copyright protection to the outputs of closely analogous forms of creativity for which markets had not yet fully developed. This meant that protection was unavailable, for example, for works of craft, no matter how creative, skilful or aesthetically attractive they were. Thus, many types of work commonly produced by women, often in the domestic sphere, through crafts such as needlework and embroidery, lacework, quilt-making, filigree, japanning and shell work,<sup>116</sup> went unrecognised. As Kathy Bowrey has argued, ‘copyright serves a gatekeeping function that secures the legitimacy of artistic works by segregating these from basic commodity items and from work naturally associated with women’s reproductive labour’.<sup>117</sup> To the extent that any form of legal protection was even available for the products of such labour, it was through the

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<sup>107</sup> *Merchandising Corporation of America v Harpbond Ltd* [1983] FSR 32.

<sup>108</sup> *Lincoln Industries Ltd v Wham-O Manufacturing Co* [1984] 1 NZLR 641.

<sup>109</sup> All of these cases are extracted or referred to in the first four editions of McKeough’s casebook (except for *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* (1999) 48 IPR 333 which appears only in the third and fourth editions).

<sup>110</sup> *Engravers’ Copyright Act 1735*, 8 Geo 2, c 13.

<sup>111</sup> *Models and Busts Act 1798*, 38 Geo 3, c 71; *Sculpture Copyright Act 1814*, 54 Geo 3, c 56.

<sup>112</sup> *Fine Arts Copyright Act 1862*, 25 & 26 Vict, c 68.

<sup>113</sup> R Deazley, ‘Commentary on the Engravers’ Act (1735)’ and ‘Commentary on the Models and Busts Act (1798)’ in L Bently and M Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* <[www.copyrighthistory.org](http://www.copyrighthistory.org)> (referring to the petition lodged with the House of Commons in 1735 by engravers William Hogarth, George Vertue, George Lambert, Isaac Ware, John Pine, Gerrard Vandergucht and John Goupy, and referring to the influence of ‘agricultural sculptor’ and Royal Academy member George Garrard in securing copyright protection for models and busts). A notable exception is Elizabeth Blackwell who was involved in seeking protection for her botanical prints in the eighteenth century: see Isabella Alexander and Cristina S Martinez, ‘The First Copyright Case under the 1735 Engravings Act: The Germination of Visual Copyright?’ in Will Slauter and Stéphanie Delamire (eds), *Circulation and Control: Artistic Culture and Intellectual Property in the Nineteenth Century* (Open Book Publishers, forthcoming 2021).

<sup>114</sup> Elena Cooper, *Art and Modern Copyright: The Contested Image* (Cambridge University Press, 2018) 22–48.

<sup>115</sup> American art historian Linda Nochlin examines the institutional barriers preventing women from becoming artists in her seminal 1971 essay, ‘Why Are There No Great Women Artists?’ in Vivian Gornick and Barbara K Moran (eds), *Women in Sexist Society: Studies in Power and Powerlessness* (Basic Books, 1971) 344.

<sup>116</sup> Clive Edwards, ‘“Home Is Where the Art Is”: Women, Handicrafts and Home Improvements 1750-1900’ (2006) 19(1) *Journal of Design History* 11.

<sup>117</sup> Bowrey (n 46) 296–7. It is worth noting in addition that practices categorised as ‘crafts’ are often also those engaged in by Indigenous women, providing yet another avenue for devaluing them.

ornamental designs regime, which was aimed more at providing short-term protection over designs applied to articles intended for commercial exploitation.<sup>118</sup>

It was only in 1911 in the UK, and the following year in Australia, that it was recognised that copyright could subsist in a ‘work of artistic craftsmanship’.<sup>119</sup> This concept was left undefined in legislation, and the precise reasons why Parliament chose to afford protection to applied art using this terminology, or exactly how broadly the concept was intended to be interpreted, are unclear.<sup>120</sup> However, when we turn to look at some of the case law on what constitutes a work of artistic craftsmanship, we see a revealing trend. Courts have sought to interpret the concept narrowly, by implicit reference to the boundaries of what was accepted under particular artistic categories and movements of the nineteenth century. The effect of this is that numerous female litigants bringing infringement actions in relation to their craft works (such as garments and bedspreads) have been denied protection.

An early example of this narrow approach can be seen in the English High Court’s 1936 decision in *Burke v Spicers Dress Designs*.<sup>121</sup> Designer Marjorie Burke had made sketches of a red frock, and female seamstresses employed by Burke’s company made frocks based on those sketches. Both Burke and her company were unsuccessful in their copyright infringement action against a business that had made identical frocks. Clauson J dismissed the argument that Burke’s company’s frocks were works of artistic craftsmanship. He stated that ‘all that [her company’s] workwomen have done is ... certain acts of craftsmanship’, but that ‘they were not “artistic” craftswomen; they borrowed the artistic qualities of the article from the inspiration of Mrs Burke in her sketch’.<sup>122</sup> This aspect of the decision is surprising in not countenancing that the frock might have been a work of joint authorship, with different parties providing the artistry and the craft.<sup>123</sup> What is of even greater interest is Clauson J’s obiter musings on whether, if Burke herself had made the frock, it would have been a work of artistic craftsmanship. Here, Clauson J fell back on an Oxford English Dictionary definition of ‘artistic’ by stating that the relevant question was: ‘Does a designer who herself designs and makes a frock cultivate one of the fine arts in which the object is mainly to gratify the aesthetic emotions by perfection of execution whether in creation or representation?’<sup>124</sup> He went on to say:

A possible view is that what she does is merely to bring into being a garment as a mere article of commerce. If that is the right view there may be a difficulty in holding that even a lady who designs and executes a beautiful frock is necessarily the author of an original work of artistic craftsmanship. The frock when one looks at it, qua frock ... goes a very little way towards gratifying the aesthetic emotions. It is quite a different matter when the frock is placed upon a

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<sup>118</sup> Lionel Bently, ‘The Design/Copyright Conflict in the United Kingdom: A History’ in Estelle Derclaye (ed), *The Copyright/Design Interface: Past Present and Future* (Cambridge University Press, 2018) 171, 177–83; Wright (n 47) 90–1.

<sup>119</sup> *Copyright Act 1911* (Imp), 1 & 2 Geo 5, c 46, s 35(1); *Copyright Act 1912* (Cth) s 8.

<sup>120</sup> See Patrick Masiyakurima, ‘Copyright in Works of Artistic Craftsmanship: An Analysis’ (2016) 36(3) *Oxford Journal of Legal Studies* 505, 511–13 (challenging the orthodox view that the category was introduced in response to lobbying from the Arts and Crafts movement).

<sup>121</sup> [1936] Ch 400. The case is referred to in the first and second editions of the Blakeney and McKeough casebook and the third edition of the McKeough, Bowrey and Griffith casebook.

<sup>122</sup> *Ibid* 407–8.

<sup>123</sup> This view was only embraced in the 1990s (see *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216; *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 86 FCR 154), but may be in tension with the High Court’s holding in *Burge v Swarbrick* (2007) 232 CLR 336 that the work must be the product of an ‘artist craftsman’ (see below n 146) which suggests that each joint author must be able to be described this way.

<sup>124</sup> *Burke v Spicers Dress Designs* [1936] Ch 400, 408.



lady of the figure and colouring which it is designed to suit, then the frock in that connection may help to gratify the aesthetic emotions.<sup>125</sup>

There are certainly strong policy reasons for interpreting ‘work of artistic craftsmanship’ in a circumspect manner, to avoid giving overbroad protection to articles that are better protected through the registered designs system. However, Clauson J’s interpretation shows a strong bias towards established, male-constructed categories of ‘fine art’, and a gendered view of the sort of product that would ‘gratify aesthetic emotions’ and the circumstances in which it would do so. The idea that a dress would gratify such emotions only when seen worn by a woman is particularly troubling. Moreover, such an approach casts doubt on whether protection could ever be available not only for skilfully made and aesthetically appealing garments,<sup>126</sup> but also a wide range of other works of craft whose making could not be said to have involved the cultivation of a ‘fine art’.<sup>127</sup>

By mid-century the view started to take hold that a work of artistic craftsmanship was not designed to include industrially-produced items, but rather the work of ‘silversmiths, potters, woodworkers, hand embroiderers’<sup>128</sup> and the like. Judges in Australia and the UK gave examples of the work of male artisans, such as ‘Chippendale’s chairs, Grinling Gibbons carvings [and] [C]ellini’s candelabra’,<sup>129</sup> and of the applied and decorative arts produced in the Arts and Crafts movement (associated with William Morris and John Ruskin),<sup>130</sup> as the sort of things that were intended to be protected as works of artistic craftsmanship. Drawing on these established categories of artisanal production from the sixteenth to nineteenth centuries, with their predominantly male authorial traditions, to provide a boundary for the modern concept of a work of artistic craftsmanship, had the effect of excluding from protection more modest works of craft, traditionally produced by women in domestic settings, that fell outside the scope of such historical categories.

A striking example of this can be seen in *Merlet v Mothercare plc*,<sup>131</sup> an English case from 1986 that involved a stylish rain coat for a baby (the Raincosy), made by Mme Merlet. Walton J was barely prepared to accept that the garment involved craftsmanship, noting that it was made by Merlet ‘domestically, using a domestic sewing machine’, and emphasising the evidence of the defendant’s ‘most distinguished witness, Mr Herbert ... to the effect that the tension setting of the machine used was incorrect; that the stitching was not attractive where the hood was attached to the body, being wavy; and that the hood itself was cut “off grain”’.<sup>132</sup> Dismissing the evidence of the plaintiff’s witness, Ms Key-Scott (said to have been given ‘in an overtly Freudian manner’<sup>133</sup>), of how the Raincosy would be perceived when worn by a baby carried by its mother, the judge had little difficulty in finding that the Raincosy was not a ‘work of art’,<sup>134</sup> but rather, as Mr Herbert had argued, a ‘basic commodity item’.<sup>135</sup> That Merlet did not see herself, or was not seen by others, to be an ‘artist’ was a key consideration. Art here is elevated ‘to a pure space above the sphere of social production’ and is treated as completely separate from commerce; yet Merlet, as a

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<sup>125</sup> Ibid 408–9.

<sup>126</sup> Ibid.

<sup>127</sup> See Wright (n 47) 94.

<sup>128</sup> United Kingdom, *Report of the Copyright Committee* (Cmd 8662, 1952) [260].

<sup>129</sup> *Cuisenaire v Reed* [1963] VR 719, 729 (Pape J).

<sup>130</sup> *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64, 89–91 (Lord Simon).

<sup>131</sup> [1986] RPC 115. The case was extracted in the first and second editions of the Blakeney and McKeough casebook.

<sup>132</sup> Ibid 122.

<sup>133</sup> Ibid 123.

<sup>134</sup> Ibid 125–6.

<sup>135</sup> Ibid 127.

woman and a mother, can participate in neither.<sup>136</sup> Aesthetics were not entirely absent from the court's consideration, however, with Walton J commenting that 'on an attractive lady the garments would appear to have been capable of giving very considerable aesthetic satisfaction to a not inconsiderable section of the public'.<sup>137</sup> Once again, the court displayed a disturbing preoccupation with the female body, managing to objectify the body wearing the work while denying that work's status as object of copyright protection.

Much the same approach can be seen in twenty-first century English cases. For example, in *Guild v Eskandar Ltd*,<sup>138</sup> fashion designer Shirin Guild failed in her attempt to argue that three prototype garments (a woman's shirt, sweater and cardigan), each of unusual width and geometric design, were works of artistic craftsmanship. Like in *Merlet*, Rimer J did not consider that the garments exhibited 'any special elements of craftsmanship', and thought it decisive that there was insufficient evidence that Guild 'intended to create works of art, or even regarded herself as an artist'.<sup>139</sup> This was so notwithstanding that Guild designed the garments knowing they would 'appeal as an original and attractive style to a material section of the buying public',<sup>140</sup> and that her garments were exhibited in the Victoria & Albert Museum, with curator Amy de la Haye describing Guild's designs as 'strikingly unique'.<sup>141</sup> Similarly, in *Vermaat v Boncrest Ltd*,<sup>142</sup> bedspreads and cushion covers, handmade by seamstresses in accordance with a design provided to them by claimant Stephanie Powell, were held not to be works of artistic craftsmanship. Evans-Lombe J simply asserted: 'The result of [Powell's] designs may be pleasing to the eye but do not seem to me to exhibit the necessary requirement of creativity'.<sup>143</sup>

Since the publication of the McKeough casebooks, Australia has moved in a different direction from the UK on 'works of artistic craftsmanship'. In 2007 in *Burge v Swarbrick* the High Court set up a test that 'does not turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility' but rather looks to 'the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations'.<sup>144</sup> It has been suggested that the application of this test would have led to different outcomes in *Guild* and *Vermaat*.<sup>145</sup> Yet the modern Australian approach still looks back to traditional, nineteenth century understandings of artistic production to help determine the boundaries of the legal category. The High Court considered that the introduction of the concept of a work of artistic craftsmanship in 1911 was intended to carry forward the objects of the Arts and Crafts Movement,<sup>146</sup> and to protect the products of those who could be described as 'artist-craftsmen'.<sup>147</sup> The effect of this approach is that it may well continue to exclude from protection the sort of craft falling outside that produced within the Arts and Crafts Movement that was not traditionally understood as being 'artistic'.<sup>148</sup>

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<sup>136</sup> Bowrey (n 46) 302.

<sup>137</sup> *Merlet v Mothercare plc* [1986] RPC 115, 123.

<sup>138</sup> [2001] FSR 38.

<sup>139</sup> *Ibid* [162].

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid* [111].

<sup>142</sup> [2001] FSR 5.

<sup>143</sup> *Ibid* [18].

<sup>144</sup> *Burge v Swarbrick* (2007) 232 CLR 336, 364 [83] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ).

<sup>145</sup> L Bently et al, *Intellectual Property Law* (Oxford University Press, 5<sup>th</sup> ed, 2018) 84. Fabric designers have fared better in more recent UK cases: see, eg, *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC).

<sup>146</sup> *Burge v Swarbrick* (2007) 232 CLR 336, 359 [62] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ).

<sup>147</sup> *Ibid* 363 [81], 364–5 [85].

<sup>148</sup> *Masiyakurima* (n 120) 521–5. See, eg, *State of Escape Accessories Pty Ltd v Schwartz* [2020] FCA 1606, where Davies J held that a stylish neoprene tote bag was not a work of artistic craftsmanship. Davies J emphasised at [122] that the designer, Brigitte MacGowan, was not an 'artist-craftsperson', and at [120] that

## Conclusion

As we noted at the outset, copyright law presents itself as neutral on the issue of gender. But an analysis of the way female creators and their works have been characterised and marginalised in leading Anglo-Australian cases, over more than a century, shows otherwise, providing further support for the arguments developed by US scholars as to the inherently gendered nature of copyright law. And, sadly, as the ongoing *Fearless Girl* litigation demonstrates, female creators and their labour continue to be denigrated. Indeed, as recently as September 2020, days after the death of US Supreme Court justice Ruth Bader Ginsburg, SSGA and its advertising agency placed a lace collar over the *Fearless Girl* statue in New York, and then used the image in a full page advertisement for SSGA in *The New York Times*.<sup>149</sup> Visbal's authorship was acknowledged only in the fine print of the advertisement, underneath SSGA's much larger brand name.<sup>150</sup> Once again, in its rush to signal its homage to a trailblazing woman leader, SSGA's actions demonstrated its lack of respect for the female artist who brought the original work into existence. But, to conclude on a more personal and positive note, our ability to identify, engage with and reinterpret the abovementioned 'leading' copyright cases involving female litigants (and, through our teaching, to pass on this knowledge to future generations of law students) is something that has been greatly facilitated by the leadership role played by Jill McKeough as a pioneering casebook author in the field of Australian intellectual property law. This role is something for which we should all be eternally grateful.

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'once the fabric had been selected, the design choices embodied within the bag were constrained by functional considerations'.

<sup>149</sup> Ann-Christine Diaz, "'Fearless Girl'" Dons a Lace Collar in Tribute to Ruth Bader Ginsburg', *AdAge* (20 September 2020) <<https://adage.com/creativity/work/fearless-girl-dons-lace-collar-tribute-ruth-bader-ginsburg/2281746>>.

<sup>150</sup> *Ibid.*