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**COPYRIGHT LAW
AND THE PROCREATIVE AUTONOMY
OF WOMEN**

by

M. L. (MARNIE) McCALL

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts
Department of Law

Carleton University
Ottawa, Ontario

September 17, 1993

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"Copyright Law and the Procreative Autonomy of Women"

submitted by M.L. (Marnie) McCall, B.A., L.L.B.

in partial fulfilment of the requirements for
the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

Carleton University
September 17, 1993

ABSTRACT

Concerns with the extent to which women's procreative decision-making is externally regulated prompt a search for new ways of thinking about procreation. Taking as a starting point a comparison of anti-abortion legislation and the fair use provisions of copyright law which concludes that women are treated neither as owners nor creators in relation to their fetuses, the copyright concepts of ownership and the moral rights of the author are examined. While the concept of ownership has limited utility, the emphasis in the doctrine of moral right on the bond between the creator and the work created could be applied in the procreative context to significantly advance women's autonomy.

ACKNOWLEDGMENTS

This work represents much more than the two years it has taken me to complete it. It has represented a change in lifestyle, in residence, in relationships. Embedded in this project are memories of countless hours of discussion with classmates, professors, relatives, friends, and anyone else who could be persuaded to listen to a madwoman trying to compress a project which began as "What is the meaning of life and how did the universe begin?" into sensible proportions.

Many thanks to Wendy Bryans, Kim Crosbie, Havi Echenberg, Tina Head, Leslie Kenney, George Kiefl, Heather Menzies, and Neil Sargent for saying right things at right times. James Keelaghan and Cathy Miller contributed greatly to the maintenance of my sanity. My thesis advisors, Diana Majury and Brettel Dawson, could not have been more helpful and I will be forever grateful for the faith they had in me and the demands they made of me. The support of my partner, Ray Kaduck, has been especially appreciated throughout the last two years.

Finally, I would like to dedicate this thesis to Robert J. Bird, my Grade 9 home room teacher, who believed in my abilities and expected that I would go to graduate school. Better late than never, Mr. Bird.

Ottawa

August, 1993

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CHAPTER ONE

INTRODUCTION

Background

Women bear children. This is a biological fact and a necessity for the continuation of the human race. Women also raise the children we bear. This is not a biological fact¹; it is a social (arti)fact and is not a necessity for the survival of the human species. That it is primarily women who raise children reflects a particular social organization in which the responsibility for caring for children from infancy until adulthood has been assigned to women. The fact that women bear children has been translated into the "fact" that women are mothers and mothers raise children. When being female is equated with being "mother" and being mother is equated with caring for children until they can make their way independently, the consequences of any act of heterosexual intercourse can continue for years. For women, reproduction means more than simply the biological process through which new life is created; it includes both child-bearing and child-rearing and the circumstances in which those activities take place.²

¹It might be argued that breastfeeding is a biologically determined fact which requires women to care for children. The practice of wet-nursing, however, reveals that the source of the infant's nourishment is irrelevant. Even if breastfeeding is necessary, once a child has been weaned, there is no biological reason requiring women, rather than men, to care for children.

²In order to distinguish the biological from the social aspects of the process of continuing the human race, the term "reproduction" will be used for the former and "procreation" for the latter meaning.

Women do the majority of childrearing and household labour (often including food production); women also occupy a subordinate position in society. While the specifics of women's subordination vary over time and in different cultures, the similarity of women's roles across cultures has often been taken to establish that the inequality and subordination of women is "natural."³

When women "naturally" do all the work and have all the responsibility for childrearing⁴ and when this work is not valued,⁵ the ability to determine when and under what circumstances one becomes a mother assumes great importance. Women have attempted for centuries to choose the conditions in which we mother, through celibacy, contraception, abortion, and infanticide.⁶ Birth control has been associated with women's efforts to liberate ourselves from a subordinate social position both

³See, for example, Marilyn French (1992), *The War Against Women* (New York: Ballantine Books). Feminists have interpreted this subordination as an essential element of patriarchal social organization: see, for example, Jane Ursel (1986), "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada," in James Dickinson and Bob Russell (Eds.), *Social Reproduction Process Under Capitalism* (pp. 150-191) (London: Croom Helm).

⁴Karen Czapanskiy (1991), "Volunteers and Draftees: The Struggle for Parental Equality," 38 *U.C.L.A. Law Review* 1415-1481, describes women as "draftee" parents who have extensive duties toward their children and little autonomy in parenting and fathers as "volunteers" with few duties and a great deal of autonomy. See also Janice Drakich (1987), "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood," 3 *Canadian Journal of Women and the Law* 69-87. Czapanskiy and Ursel (1986) both claim that family law reinforces the gendered division of household labour and the subordination of women.

⁵For example, Marilyn Waring (1988), *If Women Counted: A New Feminist Economics* (San Francisco: Harper & Row) estimates the value of women's household labour to be about 40% of Gross Domestic Product in industrialized countries. If women are also members of the paid labour force, the work of mothering and homemaking is additional, rather than alternative, to the paid work: Meg Luxton (1980), *More Than a Labour of Love: Three Generations of Women's Work in the Home* (Toronto: Women's Press); Arlie Hochschild (1989), *The Double Shift: Working Parents and the Revolution at Home* (New York: Viking).

⁶Linda Gordon (1990), *Woman's Body, Woman's Right: Birth Control in America* (2nd Ed.) (New York: Penguin Books), Ch. 2. For the importance of abortion and infanticide as methods of birth control in early Canada, see Constance D. Backhouse (1991), *Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press).

historically and in the contemporary world.⁷ The control of reproduction has been called "the essential emancipation."⁸

In the 1960s and 1970s, there were a number of indications that this emancipation was imminent. The hormonal contraceptive ("the Pill") became available and the sale of contraceptives and the distribution of contraceptive information were no longer crimes.⁹ With the enhanced ability to control childbearing which the Pill could provide,¹⁰ many women believed that a major impediment to achieving economic equality (often viewed as a necessary precursor to truly egalitarian relations between men and women) had been removed.¹¹ The next target for increasing women's control over procreation was the legalization of abortion.¹² During the later 1970s and early

⁷Linda Gordon (1990).

⁸Hania W. Ris (1976), "The Essential Emancipation: The Control of Reproduction," in Joan I. Roberts (Ed.), *Beyond Intellectual Sexism: A New Woman, A New Reality* (pp. 85-110) (New York: David McKay Company, Inc.).

⁹Use of the pill as a contraceptive did not become widespread until the 1970s. While the pill became available in the early 1960s, distribution of information about and sale of contraceptives was illegal in Canada until 1969 and in the United States until 1967: see Constance D. Backhouse (1983), "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada," 3 *Windsor Yearbook of Access to Justice* 61-130. Prior to those dates, however, it was commonly (and legally) prescribed to "regulate" a woman's menstrual cycle.

¹⁰When it was first introduced, the Pill was believed to be completely safe, highly reliable, easy to use, and relatively inexpensive, in contrast to withdrawal, douching, diaphragms, condoms and traditional herbal suppositories.

¹¹Gordon (1990), at 403. Shulamith Firestone (1970), *The Dialectic of Sex* (New York: Morrow) argued that only if reproduction were completely separated from women's bodies could equality be achieved. The late 1960s and early 1970s saw a dramatic increase in the number of women enrolling in professional education, a phenomenon which can be attributed partly to the women's liberation movement, partly to an expanding job market, and partly to the pill: Rosalind Pollack Petchesky (1990), *Abortion and Woman's Choice: The State, Sexuality, & Reproductive Freedom* (Rev. Ed.) (Boston: Northeastern University Press), at 170.

¹²In Canada, the *Criminal Code* was amended in 1969; under these amendments, abortion remained illegal unless certain conditions were met, including the approval of a hospital abortion committee: *Criminal Law Amendment Act*, S.C. 1968-69, c. 38. The law was declared unconstitutional in 1988 (*R. v. Morgentaler*, [1988] (continued...))

1980s, the idea of procreative freedom expanded to include concerns about the safety of contraceptives, the medicalization and technologization of pregnancy and childbirth, and limitations on access to reproductive and medical services, as well as articulating a demand for the right to bear and raise children in healthy and positive circumstances.¹³

Statement of the Thesis

Despite the changes in the legal and employment status of women,¹⁴ and despite the optimism of the women's liberation movement in the 1960s and 1970s, the autonomy women thought we had gained through the legalization of abortion and the availability of the birth control pill seems now to have been a mirage. Women's decisions are ignored, controlled, or overridden at all stages of the reproductive spectrum: whether or not to become pregnant, whether to continue or to terminate a particular pregnancy, what kind of pre-natal and delivery care to have, how to behave during pregnancy, whether to mother, how to mother, and whether to continue to mother. This interference comes from individual men, the legal system, the medical profession, and the state in varying combinations and roles. The purpose of this

¹²(...continued)

1 S.C.R. 30) and an attempt to recriminalize abortion in 1991 failed. In the United States, the effect of the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113 (1973) was to allow abortion freely during the first trimester and to permit states to set some limitations in the second trimester and prohibit abortion in the third trimester with some exceptions. As will be discussed in the next chapter, the fact that abortion was legalized in both countries has not meant that women now have access to abortion. The legalization of abortion can justly be described as an empty right for many, perhaps even most, women.

¹³Gordon (1990), at 448. See also Robert H. Blank (1990), *Regulating Reproduction* (New York: Columbia University Press), at 5. Health services, and particularly reproductive health services for women, have suffered considerably in the neo-conservative mania for deficit reduction.

¹⁴For a chronology of legal and other changes affecting the status of women, see T. Brettel Dawson (Ed.) (1990), *Relating to Law: A Chronology of Women and Law in Canada* (North York, Ont.: Captus Press).

project is to search for new ways to think about and theorise procreation with a view to reducing the extent of interference in the procreative lives of women and increasing women's autonomy through control over reproduction.¹⁵

In this thesis, I examine concepts contained in copyright law in order to assess their usefulness in understanding procreation in a way which furthers women's autonomy and control. Copyright law offers this possibility because it is one of the few types of law which has anything to say about creators.¹⁶ The purpose of copyright law, broadly speaking, is to provide the creators of artistic works with certain rights in relation to their works. Two kinds of rights are protected: rights of ownership, which protect the creator's ability to benefit economically from their work,¹⁷ and moral rights, which protect the bond between the creator and the work. Rights of the first kind are proprietary, capable of being exercised by the creator or any other person who is defined as an owner of the work. Moral rights are personal to the creator of the work and can only be exercised by the creator, regardless of who may own the work.

The impetus to pursue the possibilities presented by copyright law came from a serendipitous reading of "The Ideology of Fair Use: Xeroxing and Reproductive

¹⁵Linda Gordon (1990); Hania Ris (1976).

¹⁶The other major, and related, areas of law which concern themselves with creators are patent law and laws relating to industrial design.

¹⁷The use of plural pronouns with singular nouns is frowned on by grammarians, even though this usage is current in speech and informal writing and was common in English literature until as recently as the beginning of this century: *Fowler's Modern English Usage* (2nd Ed. Rev. by Sir Ernest Gowers) (1983) (Oxford: Oxford University Press), at 635. Although I attempt to avoid the she/he problem by using the plural, plural forms do not always accurately convey the meaning intended; in these cases, I prefer to use the singular noun, plural pronoun construction.

Rights" by Judith Roof.¹⁸ In this article, Roof searches for an explanation for the limitation of women's right to terminate a pregnancy. After examining the purposes served by anti-abortion legislation, Roof concludes that property rights have been (implicitly) attached to the fetus and women are not able to claim ownership of or exercise these rights. She compares the relationship among father, mother, and fetus to that among copyright owner, medium of expression, and artistic work. She argues that principles of private property ownership form the basis of both types of legislation and that these principles must be eliminated from human reproduction before women will be able to exercise procreative autonomy. She works backward from the lack of control women experience in reproduction to conclude that the pregnant woman in whose body a fetus is sustained is currently treated neither as its creator nor as its owner.

If Roof has accurately captured in her analogy the current theoretical and legal status of women in procreation, her conclusion seems to fly in the face of the realities of procreation. It simply does not make sense to say that the woman whose ovum initiates fetal life, whose body sustains the fetus, and whose labour brings a child into the world, to say nothing of the years of her life spent raising that child, is not a "creator" of a fetus nor entitled to pre-eminent control in the procreative processes. It is this disjuncture between the apparent legal status of women in relation to procreation and the realities of women's procreative lives that I wish to address.

¹⁸Judith Roof (1992), "The Ideology of Fair Use: Xeroxing and Reproductive Rights," 7(2) *Hypatia* 63-73.

My project in this thesis is twofold. Firstly, I determine whether women must necessarily be excluded from being considered to be creators of fetuses or owners of rights attaching to fetuses. This analysis works forward, examining the copyright law concepts of ownership and moral rights of the creator of a work, essentially asking whether Roof's insight about copyright concepts and procreative relations can be extended to transform existing theoretical or legal outcomes. Secondly, I assess whether, if women can be regarded as creators or owners of fetuses in an analogy with copyright law, the application of these concepts to reproduction would increase the autonomy of women.

Organization of the Thesis

In the next chapter, I elaborate on some of the ways in which women's procreative decision-making has been and continues to be circumscribed, thus demonstrating the pervasiveness of the control which is exercised over women through the regulation of procreation. In Chapter 3, I examine Judith Roof's analogy between anti-abortion legislation and the fair use provisions of copyright law in order to elucidate her argument that women lack reproductive decision-making autonomy because the fetus is treated as property which women neither create nor own. In the following two chapters, I consider whether it is possible for women to be regarded as either creators or owners. The fourth chapter addresses the possibility that women could be considered owners of the property rights in the fetus and the implications for women's procreative decision-making power and autonomy if women were regarded as

owners. The fifth chapter concentrates in particular on the doctrine of the moral rights of the artist as creator and explores the potential contribution these concepts might make to women's autonomy. In the final chapter, I assess the usefulness of the analysis of copyright law to the goal of improving women's autonomy in procreative decision-making.

CHAPTER TWO

LIMITATIONS ON WOMEN'S PROCREATIVE AUTONOMY

State¹ interests in regulating activities relating to reproduction are extensive.²

While the state cannot directly legislate procreation, it can endeavour to encourage certain outcomes by the laws and policies it chooses to promote.³ These choices are one of the sets of factors that affect women's decision-making at all stages of the procreative spectrum: whether or not to become pregnant, whether to continue or to terminate a particular pregnancy, what kind of pre-natal and delivery care to have, how to behave during pregnancy, whether to mother, how to mother, and whether to continue to mother.

¹A society has a long-term interest in maintaining itself. To this end, it must, among other things, ensure that there are sufficient physical and human resources to support the population; the state is the principal mechanism by which it does so. For the purposes of this discussion, the state includes the legislature and laws it passes and the administrative bureaucracy and the policies it implements. It also includes the regulations and policies of other bodies to which state powers have been delegated, such as Children's Aid Societies, school boards, hospitals, and the regulating bodies of disciplines such as medicine.

²For example, public health interests in levels of maternal and neonatal morbidity and mortality; economic interests in the size of the population and the proportion of workers to non-workers; political interests in the cultural and racial makeup of the population and the relationship between natural increase and immigration; social interests in marriage and family structures, the care and protection of children, and the support of those unable to support themselves.

³For example, the government of Quebec was concerned about the declining percentage of the population which is francophone; to encourage larger families, the allowance paid on the birth of the third and subsequent children was substantially increased: Daniel Sanger (1992), "Quebec Budget," Canadian Press [machine readable database CP93], May 14. See also Jane Ursel (1986), "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada," in James Dickinson and Bob Russell (Eds.), *The Social Reproduction Process Under Capitalism* (pp. 150-191) (London: Croom Helm).

Individuals also have interests in regulating procreation. Women may want to choose whether or when to undertake the lengthy commitment to childrearing. Individuals with some relationship to a particular woman (sperm donors, boyfriends, husbands, ex-husbands, the woman's parents) and individuals with no relationship to a particular woman (doctors, hospital administrators, fetal "guardians") may seek to compel her to continue or to terminate a pregnancy, undergo certain treatments, keep a child or give it up for adoption, or they may challenge her right to raise her child. Individual doctors and the medical profession attempt to establish standards for reproductive conduct and demand compliance. Any of these people may assume the right to call on the state, through the court system, administrative procedures, economic entitlements, etc., to have their decisions override or replace those of the woman concerned. Even women's apparent "consent" to proposed courses of action may be obtained through threats to invoke state intervention; even the knowledge that such a step is possible may lead women to accede to the wishes of others.⁴

The Spectrum of Procreative Decision-Making

Given the variety of interests exercised by individuals, groups, and the state, it is not surprising that involvement, intervention, and interference in procreation is extensive, takes a variety of forms, and is punctuated by apparent inconsistencies.

⁴Such "agreement" can be seen as voluntary and rational in the face of the likely outcome in court: see, for example, Robert Mnookin and Lewis Kornhauser (1979), "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950-997. However, extorted compliance of women with the dictates of (generally) male medical authority may more resemble the ways in which women accommodate our lives and our beings to our knowledge of the extent of the threat of male violence against women: Marilyn French (1992), *The War Against Women* (New York: Ballantine Books), at 197.

Nevertheless, sites of control are discernible. In this chapter, I describe some of the ways in which women's decisions related to conception, pregnancy, childbirth, and childrearing are interfered with and our reproductive behaviour controlled. I do not discuss menstruation or menopause, the beginning and ending points of women's biological reproductive capacities, although these too are points at which control over women is exercised.⁵ Nor do I address issues related to infertility, although the analysis provided in this chapter could easily be applied to these other issues of reproduction.⁶ As with pregnancy and childbirth, the medical and psychiatric professions have colonized menstruation, menopause, and infertility and transformed them into pathological conditions which require women to submit to professional intervention "for our own good."⁷

⁵Consider, for example, the messages about women's bodies and their functioning contained in advertisements for tampons, sanitary napkins, feminine hygiene sprays. For discussion of the treatment of menopause, see Emily Martin (1987), *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press).

⁶This is not because there are no important issues to be discussed. The development of the so-called new reproductive technologies has made it "impossible" for women to refuse to become mothers: Robyn Rowland (1992), *Living Laboratories: Women and Reproductive Technologies* (Bloomington and Indianapolis: Indiana University Press), at 261: "for many women there is no legitimate way to avoid mothering apart from being infertile." The existence of these techniques can lead to women being encouraged or coerced to "keep trying." Women are not, then, allowed to come to terms with their own (in)fertility. See also Heather Bryant (1990), *The Infertility Dilemma* (Ottawa: Canadian Advisory Council on the Status of Women) and Linda S. Williams (1989), "No Relief until the End: The Physical and Emotional Costs of In Vitro Fertilization," in Christine Overall (Ed.), *The Future of Human Reproduction* (pp. 120-138) (Toronto: The Women's Press).

⁷Barbara Ehrenreich and Deirdre English, (1978), *For Her Own Good: 150 Years of the Experts' Advice to Women* (New York: Doubleday); Emily Martin (1987), *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press). For example, Dr. Boyd Eaton of Emory University in Atlanta, an anthropologist and radiologist, has suggested that one possible way of reducing the number of deaths from breast cancer, the occurrence of which he believes to be related to the length of time between first menstruation and first pregnancy, is to postpone puberty in girls: CBC Radio (1993), *Quirks and Quarks* [radio program], May 15. Dr. Eaton believes such mass interference with women's bodies, the consequences of which are not known, is justified by the fact that about 10% of women get breast cancer and most of those women die from it.

Other doctors have developed hormonal methods of postponing menopause in order to extend women's childbearing capacity: see, for example, Samantha Conti (1993), "Italy Debates Right of Elderly Women to
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Whether or Not to Become Pregnant

Lack of information about and lack of access to methods of contraception make meaningful decision-making about conception nearly impossible for many sexually active heterosexual women. Resistance to sex education programs in schools and funding cuts to public health clinics for teenagers limit young women's ability to learn how to protect themselves from pregnancy and sexually transmitted disease.⁸ The most popular contraceptive methods, the birth control pill and condoms (with or without spermicidal foams or jellies), are not covered by health insurance plans.⁹ Information and money are two things often in short supply for poor and teenaged women, those most at risk for and from unplanned pregnancies.¹⁰ Doctors are often reluctant to provide contraception to women under 18 without parental consent, even though there is no legal or professional prohibition against providing services to teenagers.¹¹ The lack of services in Canada in languages other than English or French erects an information and access barrier to medical services for many immigrant and First Nations women. Common myths about their sexuality and sexual capacities, as

⁷(...continued)

Have Children," Canadian Press [machine readable database CP93], Jan. 10. That the medical profession is concerned with biological reproduction rather than with procreation is especially clear in this case; when a woman bears a child at the age of 62, who do these doctors think is going to raise that child?

⁸Linda Gordon (1990), at 479, notes the serious implications for women of AIDS and points out that younger women especially may find it difficult to resist men's refusal to use condoms.

⁹Sterilization, however, is an insured service, as is abortion, at least for the present.

¹⁰See, for example, Linda Gordon (1990), at 458.

¹¹M. L. (Marnie) McCall and Gerald B. Robertson (1991), "Legal Rights of Children to Health in the Common Law Jurisdictions of Canada," in B. M. Knoppers (Ed.), *Canadian Child Health Law* (Toronto: Thompson Educational Publishing, Inc.), at 163-167.

well as their communicative abilities, are barriers for many physically and mentally disabled women.¹²

Many contraceptive methods are not completely reliable or involve serious and potentially health-damaging or even life-threatening "side"-effects.¹³ The birth control pill has been linked to strokes, blood clots, breast cancer, cardiovascular disease, and other medical problems.¹⁴ Intra-uterine devices (IUDs) have been found to cause infections, perforation of the uterus, ectopic pregnancy, spontaneous abortion, sterility, and even death.¹⁵ The fear of lawsuits for injuries caused by contraceptive methods has resulted in several pharmaceutical companies ending their contraception research programs entirely.¹⁶

¹²Janice T. Tait (1986), "Reproductive Technology and The Rights of Disabled Persons," 1 *Canadian Journal of Women and the Law* 446-455, at 450-451 and Adrienne Asch (1989), "Reproductive Technology and Disability," in Sherrill Cohen and Nadine Taub (Eds.), *Reproductive Laws for the 1990s* (pp. 69-124) (Clifton, N.J.: Humana Press).

¹³Scarlet Pollock (1989), "Refusing to Take Women Seriously: 'Side Effects' and the Politics of Contraception," in Rita Arditti, Renate Duelli Klein and Shelley Minden (Eds.), *Test-Tube Women: What Future for Motherhood?* (pp. 138-152) (London: Pandora Press). For an overview of problems associated with various contraceptive methods, see Rosalind Pollack Petchesky (1990), *Abortion and Woman's Choice: The State, Sexuality, & Reproductive Freedom* (Rev. Ed.) (Boston: Northeastern University Press), Ch. 6.

¹⁴See Petchesky (1990), at 182-188. Manufacturers have incurred substantial liability for damages as a result of failure to warn users of the pill of the risk of stroke: see, for example, *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, [1986] 25 D.L.R. (4th) 658 (Ont. C.A.).

¹⁵The Dalkon Shield was removed from sale in 1974 and recalled in 1975, but women were not advised to have it removed until 1985, in the midst of a massive lawsuit against the manufacturer, A. H. Robins Co.: Barb Livingstone (1988), "Shield's Shameful History," *The Calgary Herald*, Aug 7, p. B5 and Linda Gordon (1990), *Woman's Body, Woman's Right: Birth Control in America* (2nd Ed.) (New York: Penguin Books) at 429-430. The Copper-7 IUD was removed from sale in 1986 by G. D. Searle and Co., maker of the Copper-7 IUD: "Copper-7 Suits Settled" (1989), *The Calgary Herald*, June 25, p. F7.

¹⁶Upjohn closed its laboratories in 1985, partly because of ongoing lawsuits and partly because of the cost of conducting the research necessary to obtain government approvals: Linda Gordon (1990), at p. 432, n. 68. According to sources cited in Hilary Rose (1987), "The Politics of Reproductive Science," in Michelle Stanworth (Ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (pp. 151-173) (Minneapolis: University of Minnesota Press), at n. 9, funding for research on safe contraception has been inadequate for some time and
(continued...)

Even when an individual woman is fully informed about the range of contraceptive choices and has access to a satisfactory contraceptive method, or has determined that no satisfactory method exists for her, or has chosen not to engage in heterosexual intercourse, the extent of sexual coercion in North American society means that her choices and preferences may not be respected. Pregnancy may be a result of rape or incest, actions over which a woman has no control. A woman's decision not to become pregnant may be overridden by a stubborn or violent partner who refuses to permit her to use contraception.¹⁷ Conversely, employers have made the availability of some types of work contingent on proof that women have been sterilized.¹⁸

Whether to Continue or Terminate a Particular Pregnancy

In 1988, Canada's anti-abortion legislation was struck down by the Supreme Court.¹⁹ Since that date, any woman who wishes to terminate her pregnancy can,

¹⁶(...continued)

was decreasing by the mid-1980s. Infertility research appears to be more intellectually and financially rewarding.

¹⁷Linda Gordon (1990), at 437.

¹⁸Marianne Levitsky (1986), "Protecting Workers from Reproductive Hazards," 1 *Canadian Journal of Women and the Law* 488-497; Nancy Gertner (1989), "Interference with Reproductive Choice" in Sherrill Cohen and Nadine Taub (Eds.), *Reproductive Laws for the 1990s* (pp. 307-328) (Clifton, N.J.: Humanu Press). See also the description in Susan Faludi (1991), *Backlash: The Undeclared War Against American Women* (New York: Crown Publishers, Inc.), at 437-453 of women's challenges of the fetal protection policies at Johnson Controls (unconstitutional) and American Cyanamid (constitutional).

¹⁹*R. v. Morgentaler*, [1988] 1 S.C.R. 30. Anti-abortion laws were first introduced in Canada in New Brunswick in 1810; in 1869, the various provincial laws were replaced by a federal law banning the procedure: Backhouse (1983). For a history of anti-abortion laws in the United States, see Petchesky (1990), ch. 2, and Laurence H. Tribe (1992), *Abortion: The Clash of Absolutes* (New York: W. W. Norton & Company), Ch. (continued...)

theoretically, do so. Access to abortion, however, varies widely across the country.²⁰ Many hospitals refuse to permit the procedures²¹ and many doctors no longer perform the operation because of low fees provided by health insurance plans or harassment by anti-abortion groups. The governments of several provinces have considered removing abortion services from health insurance coverage entirely.²² Free-standing clinics are only allowed in some provinces and are usually only located in major cities.²³ Even where clinics are allowed, health insurance coverage is sometimes limited to abortions

¹⁹(...continued)

3. For England, see Gillian Douglas (1991), *Law, Fertility and Reproduction* (London: Sweet and Maxwell), at 79-81.

²⁰Sheilagh L. Martin (1989), *Women's Reproductive Health, the Canadian Charter of Rights and Freedoms, and the Canada Health Act* (Ottawa: Canadian Advisory Council on the Status of Women), at n. 32, provides a Canada-wide summary of abortion accessibility one year following the Supreme Court decision. The situation has not changed much in the interim. For example, Prince Edward Island will only reimburse out-of-province abortions if they are performed in a hospital after the approval of five doctors: "Morgentaler Files Suit Against PEI" (1993), *The Globe and Mail*, April 24, p. A7. Only Stanton Hospital in Yellowknife performs abortions in the Northwest Territories; this hospital was the centre of controversy in 1992 when several women reported that abortions were performed without adequate anaesthesia: "NWT Orders Abortion Inquiry," (1992), *The Globe and Mail*, April 2, pp. A1, A5. These reports were confirmed by a review committee: "North-Abortion-Report" (1992), Canadian Press (from *The Edmonton Journal*) [machine-readable database CP92], June 25.

²¹During the mid-1980s, anti-abortion activists in British Columbia packed election meetings for many local hospital boards; when they were able to take over a board, they prohibited the performance of abortions. Similar actions took place in Manitoba: "Town Erupts Over Abortions: 'Stacked' Hospital Board Sparks Split in Community," *The Calgary Herald*, April 10. The current NDP government of B.C. has now directed 33 hospitals in the province to provide abortion services; some hospital boards have resigned in protest: Deborah Wilson (1992a), "NDP Backs Abortions in B.C.: 33 Hospitals Ordered to Provide Services; 2 clinics get funding," *The Globe and Mail*, March 21, pp. A1, A6; Deborah Wilson (1992b), "Abortion Ban ends at Hospital: Board Members Quit over Issue," *The Globe and Mail*, April 2, p. A6.

²²In conjunction with the last Saskatchewan election, voters approved a non-binding resolution to de-insure abortion services; the newly elected NDP government, however, decided to continue coverage: "Saskatchewan to Ignore Abortion Vote" (1992), *The Globe and Mail*, May 14, A5." The British Columbia government's de-insuring of abortion services was overturned following a court challenge: Sheilagh Martin (1989), at 8.

²³The NDP government of Saskatchewan, for example, is opposed to free-standing clinics: "Saskatchewan to Ignore Abortion Vote" (1992). The majority of abortion clinics in Canada have been established by Dr. Henry Morgentaler, most despite strong opposition. Dr. Morgentaler has gone to court to compel municipal authorities to issue building permits, to compel provincial medical associations to grant him a licence to practice, to compel provincial health insurance plans to pay for the procedures.

performed in hospitals.²⁴ And even when health insurance coverage is extended to clinic abortions, low fees in some provinces may mean clinics have to charge additional fees.²⁵ Storming and fire-bombing of clinics is not uncommon in the United States²⁶ and a Toronto clinic has also been firebombed.²⁷

Pressures are often exerted on women experiencing unplanned pregnancies, either to terminate or continue them. Some women, especially young women, are encouraged to have an abortion.²⁸ Other women are pressured to continue their pregnancies.²⁹ Women seeking abortions at many clinics and even some hospitals

²⁴Statistics Canada data for 1990 showed that no clinic abortions were covered anywhere in Canada; by June, 1991, health insurance coverage was provided in Ontario: Alanna Mitchell (1992) "Abortion in Clinics Soar: StatsCan data indicate trend away from hospitals," *The Globe and Mail*, March 13, p. A7. In 1992, Dr. Henry Morgentaler challenged Manitoba's regulation limiting payment to hospital abortions; on June 12, the regulation was struck down in Manitoba Court of Queen's Bench as discriminatory. Government lawyers, however, said the effect was to de-insure all abortions: David Roberts (1992), "Abortion Issue Unsettled in Manitoba: Procedure could be Removed from Health-care Insurance," *The Globe and Mail*, July 11, A5. In a previous court case in 1989, Dr. Morgentaler challenged the New Brunswick policy of paying for out-of-province abortions only if they met certain stringent conditions: Martin (1989), at 29.

²⁵The cost of an abortion in a clinic can be several hundred dollars, while the fee paid by health insurance plans is usually a fraction of that amount: "Newfoundland Changes Policy on Abortions," *The Globe and Mail*, Nov. 18, p. A8; David Roberts (1993), "Manitoba Must pay for Clinic Abortions," *The Globe and Mail*, March 3, p. A6. To address this differential and reduce financial barriers for women seeking abortions, Everywoman Health Centre in Vancouver won a fight with Revenue Canada to become a registered charity in order to raise funds to subsidize the cost of running the clinic: Geoffrey York (1991), "Abortion Clinic a Valid Charity, Appeal Court Says: Services Beneficial to Community, Three Judges Rule Unanimously," *The Globe and Mail*, Nov. 29, p. A3.

²⁶See figures cited by Susan Faludi (1991), at 412. The actions of one of the more aggressive anti-abortion organizations are summarized by Tribe (1992), at 171-172.

²⁷Timothy Appleby (1992), "Blast destroys abortion clinic, Morgentaler vows to rebuild controversial downtown Toronto centre," *The Globe and Mail*, May 19, pp. A1, A5.

²⁸With respect to young women, see, for example, B. Mark Podolak (1991), "On the other hand ..." [letter to the editor], *The Ottawa Citizen*, Nov. 23, p. J6, who responded to a column on a program for teenage mothers by writing, "Rather than implicitly promoting teenage motherhood, with its ongoing call on public funds, the Health Department should be promoting early abortion . . ."

²⁹Young white women especially may be pressured to continue their pregnancies in order to surrender their children for adoption. The majority of the pressure, of course, comes from "pro-life" individuals or organizations.

have to make their way through throngs of anti-abortion protestors shouting at them and calling them murderers and baby-killers.³⁰ Harassment of women seeking abortions and doctors providing them has become so severe, the Ontario attorney-general has sought an injunction against picketing and other harassing activities; similar action is being considered in British Columbia.³¹ In the United States, it appears to have been a common practice to make abortion for poor or non-white women conditional on their "consent" to be sterilized at the same time.³² Young women who have decided to abort have had to fight their parents in order to obtain the operation.³³ Other women have had to fight their husbands, boyfriends, or former

³⁰See Task Group of Abortion Service Providers (1992), *Report on Access to Abortion Services in Ontario* (Toronto: Ontario Ministry of Health) for a summary of the types of harassment directed at service users and providers.

³¹See, respectively, "Abortion-Ban" (1993), Canadian Press [machine readable computer database CP93], April 20; and "Abortion Injunction" (1993), Canadian Press [machine readable database CP93], July 28.

³²For a discussion of sterilization abuse in general, see Linda Gordon (1990), at 437-442. Adele Clarke (1984), "Subtle Forms of Sterilization Abuse," in Rita Arditti, Renate Duelli Klein and Shelley Minden (Eds.), *Test-Tube Women: What Future for Motherhood?* (pp. 188-212) (London: Pandora Press), at 200-201 notes the disproportionate sterilization of women on welfare and aboriginal women. For hospital practices requiring consent to sterilization prior to abortion or delivery, "elective" hysterectomies among poor minority women, and differential rates of sterilization by racial background, see Patricia Williams (1991), *The Alchemy of Race and Rights* (Boston: Harvard University Press), at 218-219, and Rosalind Petchesky (1992), at 15. For sterilization as a condition of employment, see Robyn Rowland (1992), *Living Laboratories: Women and Reproductive Technologies* (Bloomington and Indianapolis: Indiana University Press), at pp. 130-132; Rose Jones (1990), "The Politics of Reproductive Biology: Exclusionary Policies in the United States," in W. Penn Handwerker (Ed.), *Births and Power: Social Change and the Politics of Reproduction* (pp. 39-51) (Boulder: Westview Press, Inc.); Marianne Levitsky (1986), "Protecting Workers from Reproductive Hazards," 1 *Canadian Journal of Women and the Law* 488- 497; Lynn Kaye (1985), *Danger Keep Out! Exclusionary Hiring Practices by Employers: Reproductive Hazards at Work* (Ottawa: National Association of Women and the Law); and Susan Faludi (1991), at 437-453.

³³See, for example, *C. (J. S.) v. Wren*, [1987] 2 W.W.R. 669 (Alta. C.A.), where the parents of a 16-year-old girl applied for an injunction against the doctor who was to perform the abortion.

boyfriends who have opposed the abortion decision.³⁴ The availability of abortion in the range of reproductive health services is also threatened by repeated efforts to recriminalize abortion or establish a constitutional fetal right to life.³⁵

Conditions of Pre-natal Care and Childbirth

Women have historically received advice and assistance during pregnancy and childbirth from other women in their communities, either family members and neighbours, or midwives. In many parts of the world, including some European countries, this is still the case. During the 18th and 19th centuries in Canada and the United States, the supervision of pregnancy and childbirth shifted from the female world of midwifery to become the territory of the male medical profession.³⁶ During

³⁴*Mock v. Brandenburg* (1988), 61 A.L.R. (2d) 234 (Alta. Q.B.); *Murphy v. Dodd* (1989), 63 D.L.R. (4th) 515 (Ont. H.C.J.); *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 all involved current or former boyfriends. *Medhurst v. Medhurst* (1984), 7 D.L.R. (4th) 335 (Ont. H.C.) involved a husband.

³⁵In Canada, the Supreme Court refused to decide whether a fetus had the right to life under the *Charter of Rights and Freedoms*, since it had previously struck down, for other reasons, the abortion law which was being challenged as an infringement of the fetus' right to life: *Borowski v. A-G Canada*, [1989] 1 S.C.R. 342. Two years later, the same court ruled that, for the purposes of the criminal law, the fetus is not a person: *R. v. Sullivan* (1991), 63 C.C.C. 97 (S.C.C.). In 1989, the creation of a new crime of fetal destruction or harm was recommended by the Law Reform Commission of Canada (1989), *Crimes Against the Foetus* (Working Paper 58) (Ottawa: Law Reform Commission of Canada); no government has yet acted on this recommendation. In 1990, the federal government introduced legislation to recriminalize abortion. This attempt failed in early 1991, when the Senate failed to ratify Bill C-43.

In the United States, several states have passed "feticide" laws, which provide criminal sanctions for the deliberate, reckless, or negligent killing of a fetus: Gertner (1989), at p. 309. Although these laws were generally intended to address the effects on the fetus of crimes such as impaired driving or assault committed directly against the pregnant woman, many of them have been applied to the actions of pregnant women themselves: Susan Faludi (1991), at p. 423. Attempts to include a declaration that life begins at conception in the federal or in state constitutions have so far been unsuccessful: Linda Gordon (1990), at 412; Patricia Ireland (1992), "The State of NOW," *Ms.* (July/Aug.):24-27, at 26. See also Marilyn French (1992), at 85-94, for a summary of the activities of the Roman Catholic Church in both countries.

³⁶For accounts of this shift see, for example, Lois James-Chételat, (1989), "Reclaiming the Birthing Experience: An Analysis of Midwifery in Canada from 1788 to 1987" (unpublished doctoral dissertation, Carleton University, Ottawa); C. Lesley Biggs (1990), "The Case of the Missing Midwives: A History of (continued...)

the same time that the medical profession was attempting to gain a monopoly over the provision of health care, the functioning of women's bodies came to be viewed by doctors as pathological, thus making medical supervision of pregnancy and childbirth a necessity.³⁷ Once childbirth was brought substantially under the purview of the medical profession (at least in the urban areas),³⁸ it began increasingly to move into a hospital setting. By the middle of this century, almost all births were taking place in hospitals.³⁹

The transfer of childbirth from midwife-assisted home-based births to physician-assisted, increasingly hospital-based births also marked a dramatic change in the level of supervision of pregnant women and the degree and frequency of technological intervention in the birthing process. The use of ultrasonography and amniocentesis screening in the monitoring of pregnancy, and the use of anaesthetics,

³⁶(...continued)

Midwifery in Ontario from 1795-1900," in Katherine Arnup, Andrée Levesque and Ruth Roach Pierson (Eds.), *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries* (pp. 20-35) (London: Routledge); Judy Barrett Litoff (1978), *American Midwives: 1860 to the Present* (Westport, Conn.: Greenwood Press); and Jane B. Donegan (1978), *Women & Men Midwives: Medicine, Morality, and Misogyny in Early America* (Westport, Conn.: Greenwood Press).

³⁷For a discussion of this development, see Emily Martin (1987) and Wendy Mitchinson (1991), *The Nature of their Bodies: Women and Their Doctors in Victorian Canada* (Toronto: University of Toronto Press).

³⁸Doctors have always been tolerant of midwifery where there are not enough (or any) doctors – especially in rural, isolated, or northern areas.

³⁹For Canada as a whole, hospital birth increased from 17.8% in 1926 to 99.7% in 1976: James-Chételat (1989), at 29. In Vancouver, as early as 1940, 84% of births took place in hospitals: Veronica Strong-Boag (1990), "The Confinement of Women: Childbirth and Hospitalization in Vancouver, 1919-1939," in Katherine Arnup, Andrée Levesque and Ruth Roach Pierson (eds.), *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries* (pp. 75-107) (London: Routledge), at p. 76. Hélène Laforce (1990), "The Different Stages of the Elimination of Midwives in Quebec," in Katherine Arnup, Andrée Levesque and Ruth Roach Pierson (eds.), *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries* (pp. 36-50) (London: Routledge) at 46, reports that hospital birth was the norm in Quebec by 1960.

forceps, electronic fetal monitoring during labour, and Caesarian section deliveries are now commonplace.⁴⁰

Ever since the medical profession gained control over the provision of health care, doctors have issued instructions to pregnant women. While these instructions have changed over time,⁴¹ what has not changed is the doctor's expectation that these instructions will be followed without fail and without question.⁴² This expectation is reflected in the legal arena. For example, child protection legislation in one Canadian province has been extended to include "unborn children."⁴³ In recent years in both Canada and the United States, judges have interpreted laws passed for other purposes in such a way as to encompass the conduct of pregnant women. Even where child protection statutes do not specifically include "unborn children," courts have interpreted the provisions to include fetuses⁴⁴ and to permit the incarceration of

⁴⁰Baker, Maureen (1988), *Midwifery: A New Status* (Ottawa: Political and Social Affairs Division, Research Branch, Library of Parliament), at 8, 13.

⁴¹Jessica Mitford (1992), *The American Way of Birth* (New York: Dutton), at 115, notes, for example, the complete reversal in medical opinion about the routine use of X-rays in pre-natal care between 1937 and 1960. Barbara Katz Rothman (1989), *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W. W. Norton & Company), at 93, notes a similar shift in medical beliefs about weight gain during pregnancy. Breastfeeding has suffered a similar fate: Julie Delahanty (1993), "Breasts, Babies, and Big Business: Regulating Breastmilk Substitutes with Women in Mind" (Unpublished Honours Research Essay, Carleton University, Ottawa).

⁴²Ann Oakley (1984), *The Captured Womb: A History of the Medical Care of Pregnant Women* (London: Basil Blackwell), at 265. An extreme example of this expectation is found in an interview with the police officer in charge of the investigation against Pamela Rae Stewart for "fetal abuse" (see *infra*, n. 46). Lieutenant Ray Narramore thought she should have been charged with murder because "we have a lady here who was not following doctor's orders": Susan Faludi (1991), at p. 426.

⁴³*Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1 "child."

⁴⁴*Baby R., Re* (1987), 9 R.F.L. (3d) 415 (B.C. Prov. Ct.). The decision was overturned by the British Columbia Supreme Court at (1988) 15 R.F.L. (3d) 225.

pregnant women as a means of ensuring the safety of the fetus.⁴⁵ Women have been prosecuted under various statutes for "prenatal abuse."⁴⁶ Yukon child protection authorities have been given the power to order pregnant women into supervision or counselling to prevent fetal alcohol syndrome or other drug-related effects.⁴⁷ Laws against drug trafficking have been used to prosecute drug-addicted pregnant women for "distributing" narcotics to their children in the period between their birth and the

⁴⁵*Re Children's Aid Society of City of Belleville, Hastings County and T.* (1987), 59 O.R. (2d) 204 (Ont. Prov. Ct.). This case is discussed by Sanda Rodgers (1989), "Pregnancy as Justification for Loss of Juridical Autonomy," in Christine Overall (Ed.), *The Future of Human Reproduction* (pp. 174-181) (Toronto: The Women's Press) at 178. The fetus was found to be "a child in need of protection" on the second application in this case, decided on April 2, 1987. The same judge (Kirkland, Prov. J.) had ruled on March 27 that, although a "child en ventre sa mère" could be found to be in need of protection, the case had not been made out by the child protection authorities: [1987] W.D.F.L. 005. In a similar Ontario case, *Re A.* (1990), 28 R.F.L. (3d) 288 (U.F.C.), the court ruled that the child protection legislation did not extend to a fetus and that the court could not order the detention of the mother to undergo medical treatment.

⁴⁶In 1985, Pamela Rae Stewart was charged under the California Penal Code provision making it an offence for a parent to fail to provide medical care for their child (an equivalent provision is found in s. 215 of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, failing to provide the necessities of life); she was acquitted of the charge, the court ruling that the definition of "child" did not include an unborn fetus: Sheilagh Martin (1989), at 5. Stewart was charged for not following her doctor's instructions concerning her level of physical activity and diet, continuing to smoke and use inappropriate drugs, and for having sexual intercourse with her husband (who was not charged, although he was aware of this instruction). For accounts of this case, see Sanda Rodgers (1989), at 178-179; Kary Moss (1990), "Substance Abuse During Pregnancy," 13 *Harvard Women's Law Journal* 278-299; and Susan Faludi (1991), at 426, who adds the not inconsequential information that Stewart's husband battered her. Legislation has been introduced in New South Wales under which women who smoked, ate unhealthful foods, or did anything else that adversely affected fetal development could be prosecuted: Mary Anne Warren, (1992), "The Moral Significance of Birth," in Helen Bequaert Holmes and Laura M. Purdy (Eds.), *Feminist Perspectives in Medical Ethics* (pp. 198-215) (Bloomington and Indianapolis: Indiana University Press), at 211.

⁴⁷*Children's Act*, R.S.Y. 1986, c. 22, s. 133. This provision was challenged in *Joe v. Yukon Territory (Director of Family and Children's Services)* (1986), 5 B.C.L.R. (2d) 267 (Y.T. S.C.). The court held that a pregnant woman could not be ordered into supervision or counselling; authorities could only recommend it to her. The decision was not appealed; however, neither has the legislation been amended or repealed. The fact that the law remains on the books means it could be used as a threat against First Nations women, who may not be aware that they cannot be forced into treatment or counselling.

Concerns about the incidence of fetal alcohol syndrome have led to calls for legislation authorizing the detention of pregnant women for treatment: Canadian Press (1992), "Radical action urged on fetal abuse: Drunk pregnant women must be stopped, a child abuse expert says," *The London Free Press*, July 21, p. C3.

severing of the umbilical cord.⁴⁸ The threat of legal sanctions and the increasing use of courts to regulate the conduct of pregnant women can be viewed as a means to force women to fit into an image of them as self-sacrificing mothers who comply with their doctors' orders, as well as a means of punishing deviance from norms of feminine behaviour.⁴⁹

Routine pre-natal and delivery care now includes such things as ultrasound⁵⁰ and electronic fetal heart monitors, notwithstanding that neither the safety nor efficacy of these procedures has been established.⁵¹ Developments in technology and medicine have made it possible to diagnose and even treat a number of conditions in the fetus while still in the womb.⁵² This ability has led to the fetus being referred to as the

⁴⁸Kary Moss (1990) describes the case of Jennifer Johnson, the first woman convicted of trafficking drugs in this manner. In 1989, Ms Johnson was sentenced to one year under "community control" (intense supervision), followed by 14 years' probation. Conditions of her sentence included participation in a drug treatment program, finishing high school education, 200 hours of community service, abstinence from alcohol and other drugs, avoiding anyone in possession of drugs, and receiving her probation officer's permission to enter a bar. If she becomes pregnant during her sentence, her prenatal care must be judicially approved. See also Faludi (1991), at 427-430 for a discussion of the effect of the "war on drugs" on pregnant women.

⁴⁹Janet Gallagher (1989), "Fetus as Patient," in Sherrill Cohen and Nadine Taub (Eds.), *Reproductive Laws for the 1990s*, (pp. 185-235) (Clifton, N.J.: Humana Press). See also Shelley Gavigan (1986), "On 'Bringing on the Menses': The Criminal Liability of Women and the Therapeutic Exception in Abortion Law," 1 *Canadian Journal of Women and the Law* 279-312, at 283 et seq. for a discussion of the social significance of law.

⁵⁰See Abby Lippman (1986), "Access to Prenatal Screening Services: Who Decides?" 1 *Canadian Journal of Women and the Law* 434-445, at p. 442, for a concise discussion of ultrasound as a non-voluntary prenatal screening technique, with serious implications for decision-making by pregnant women.

⁵¹For discussions of safety issues related to ultrasound and fetal monitoring, see Jessica Mitford (1992), Ch. 6. Ann Oakley (1986), Ch. 7, reviews the development of methods to learn about the fetus, including their safety and efficacy.

⁵²Ultrasound can be used to diagnose certain conditions and microsurgery enables "repairs" to be done. Doctors can perform surgery on the fetus in utero or can remove it from the body of the pregnant woman and replace it after surgery: Nicole Baer (1992), "The Brave New World of Fetal Surgery," *The Ottawa Citizen*, Aug. 21, p. B6, who also reviews non-surgical interventions.

"second patient,"⁵³ setting the scene for conflicts between what may be beneficial for the pregnant woman and what may be "beneficial" for the fetus she carries.⁵⁴

Labour and delivery have been placed on a timetable.⁵⁵ Failure to "progress" according to the timetable often results in intervention by way of rupturing the membranes, the use of labour-inducing or strengthening drugs, forceps, or Caesarean-section operations.⁵⁶ Women who disagree with their doctors about the necessity for such interventions or refuse to consent to them are often labelled "difficult"⁵⁷ and doctors have appealed to the courts to dispense with the woman's consent, particularly with regard to Caesarean-section operations. The courts have, more often than not, granted the doctors' applications.⁵⁸

⁵³See John A. Robertson (1983), "Procreative Liberty and the Control of Conception, Pregnancy and Childbirth," 69 *Virginia Law Review* 405 and Edward Keyserlingck (1984), *The Unborn Child's Right to Prenatal Care: A Comparative Law Perspective* (Montreal: McGill Legal Studies); but see George Annas (1986), "At Law: Pregnant Women as Fetal Containers," 16(6) *Hastings Center Report* 13-14.

⁵⁴See, for example, Sanda Rodgers (1986), "Fetal Rights and Maternal Rights: Is There a Conflict?" 1 *Canadian Journal of Women and the Law* 456-469; Janet Gallagher (1989); Alan R. Fleischman (1989), "The Fetus is a Patient," in Sherrill Cohen and Nadine Taub (Eds.), *Reproductive Laws for the 1990s* (pp. 249-257) (Clifton, N.J.: Humana Press).

⁵⁵Emily Martin (1987), at 59.

⁵⁶Emily Martin (1987), in Ch. 8, discusses the many ways in which women avoid these interventions.

⁵⁷Emily Martin (1987).

⁵⁸Isabel Grant (1989), "Forced Obstetrical Intervention: A Charter Analysis," 39 *University of Toronto Law Journal* 217-257 discusses the Canadian situation, while Veronika E. B. Kolder, Janet Gallagher and Michael T. Parsons (1987), "Court-Ordered Obstetrical Interventions," 316 *New England Journal of Medicine* 1192-1196, review the American cases.

Whether to Mother

A woman's decision whether to keep and raise the child of an unplanned pregnancy or place it for adoption is not always freely made.⁵⁹ Women may be subject to pressure both to keep the baby and to give the baby up. Women, especially teenaged women, who wish to keep their babies are often encouraged or even coerced to place them for adoption. Women who have decided to place their babies for adoption may be dissuaded by friends or family. In many situations, the parents of a pregnant woman persuade her to keep the baby, which they will then raise.⁶⁰ Teenaged women may also be subject to peer pressure from friends who have kept their babies. In the present climate emphasizing "traditional family values" and extolling permanent matrimony and motherhood, it may well be more difficult for a woman of any age to decide to place her child for adoption.⁶¹

Some women never have the chance to decide whether or not to keep their children. The newborn children of women with drug or alcohol addictions, mental health problems, or a history of having had previous children declared to be wards of

⁵⁹One might argue that, given the economic and social difficulties of being a single parent in our society, this decision can never be freely made.

⁶⁰Twenty or thirty years ago, it was fairly common for such a child to be raised as a sibling of its mother. Passing off a grandchild as a child hid the "shame" of the non-marital pregnancy. While the stigma of unwed young motherhood is far less today, it has not disappeared and this situation probably still occurs, perhaps especially if the pregnancy is the consequence of incest.

⁶¹This is a Hobson's choice. Included in the present-day notion of "traditional family values" are attacks on the unemployed, the poor, and welfare recipients, as well as single parenthood for any reason. How is one to decide between being condemned as an "unnatural" woman and being condemned as a parasite on the public purse? Few single mothers have the income of Murphy Brown to buffer them from these charges and even she was not immune to criticism.

the state are often apprehended by child welfare authorities as soon as they are born.⁶² The justification for removing these children from their mothers has increasingly shifted from one based on a prediction that these mothers will be inadequate parents to one based on a conclusion that the woman's behaviour during pregnancy (substance abuse, poor diet, failing to seek or follow medical advice) was, in its very occurrence, abusive.⁶³

How to Mother

Women are also not free from interference in the way we raise our children. Although few men share childrearing activities, the "character" of a man who lives in a household with a woman and her children may bring the woman's childrearing capabilities into question.⁶⁴ Child welfare authorities are more prone to intervene in poor, immigrant, and non-white families than in middle- and upper-class and white

⁶²See, for example, *Superintendent of Family and Child Services v. M. (B.)* (1982), 28 R.F.L. (2d) 278 (B.C. S.C.), where Proudfoot, J., held that a drug-addicted baby had been born abused.

⁶³See cases cited in Sheilagh Martin (1989), at n. 42. Recent studies of so-called "crack babies" in the United States strongly suggest that children's problems attributed to their mothers' use of cocaine during pregnancy are more likely to be related to the poor nutrition and lack of prenatal care generally experienced by these women, a consequence of their poverty rather than their addiction: Susan Faludi (1991), at 428. In addition, while exposure of the fetus is through sharing blood with the pregnant woman, researchers have discovered that cocaine may attach itself to sperm, penetrate the egg in the process of fertilization, and affect the fetus during conception: Reuters (1991), "Science-Shorts," Canadian Press [machine-readable database CP91], Oct. 18.

⁶⁴In my own experience practising family law, child welfare authorities often seemed more concerned with whether it was "appropriate" for a particular woman to be involved with a particular man than with the actual welfare of the child. A good mother would not be involved with a drug user, or a man of a different race from the woman and/or child, or an uneducated man, or a man with a "lowly" occupation or who was unemployed, or a man with a criminal record, or a "biker."

families.⁶⁵ Single mothers are particularly open to scrutiny because they are often receiving welfare benefits.⁶⁶ Limits on the numbers of child care spaces, especially subsidized ones, means the child care arrangements of many employed single mothers may not be seen as "acceptable."⁶⁷

The women who face the most challenges in the way they mother are heterosexual women who choose to have children without having a male partner and lesbians, with or without partners. The use of alternative insemination⁶⁸ with donor sperm is a simple, non-technological procedure. Despite its simplicity, it has been defined as a medical procedure in the United States and its use by laypeople may constitute the unauthorized practice of medicine, conduct which can result in criminal

⁶⁵For descriptions of the origins of child protection legislation in Canada and its focus on particular groups in society, see Nicholas Bala (1991), "An Introduction to Child Protection Problems," in Nicholas Bala, Joseph P. Hornick and Robin Vogl (Eds.), *Canadian Child Welfare Law: Children, Families and the State* (pp. 1-16) (Toronto: Thompson Educational Publishing, Inc.); Marge Reitsma-Street (1989), "More Control than Care: A Critique of Historical and Contemporary Laws for Delinquency and Neglect of Children in Ontario," 3 *Canadian Journal of Women and the Law* 279-312; and Jane Ursel (1986) at 180-187; for the United States, see Anthony Platt (1976), *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press).

⁶⁶Figures for 1986 show that 44.1% of single mothers lived in poverty; poverty rates are significantly linked to employment status and number and age of children. For those with at least one child under 7, 25.7% of those employed full-time year-round, 75% of those employed part-time, and 91.2% of non-employed women fall below the poverty line: Morley Gunderson and Leon Myszynski with Jennifer Keck (1990), *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women), at 18-19.

⁶⁷The child care situation in Canada creates another Hobson's choice for many women. It is usually necessary to have a job in order to obtain a subsidized space (the need for child care being a criterion), yet it is very difficult for a woman to accept a job without knowing whether she will be able to get child care. The unrealistically low ceilings for the termination of subsidy also make it very difficult for women to leave welfare for the labour market. The structure of welfare thus discourages self-sufficiency and reinforces poverty for women and children. The alternatives for many women are either the provision of informal care by friends, relatives, or neighbours or simply leaving their children to fend for themselves.

⁶⁸The term "alternative insemination" is used in preference to the more frequent "artificial insemination" in order to avoid the implicit heterosexist bias in the latter term.

charges.⁶⁹ A similar approach has been recommended in some jurisdictions in Canada.⁷⁰ Doctors and clinics which provide infertility services typically do not accept single or lesbian applicants.⁷¹ Women who arrange for alternative insemination through friends or self-help groups may not be able to prevent a future involvement of the sperm donor in their lives or the lives of their children.⁷²

Whether to Continue to Mother

Intervention in a woman's decision to mother her child may also occur if there is a breakdown in her relationship with her husband (whether or not he is the biological father of the child), the child's father, or a cohabitant partner. In the majority of cases where the mother receives custody of the children following a divorce, this result is the mutual decision of the husband and wife.⁷³ In contested

⁶⁹Lori B. Andrews (1989), "Alternative Modes of Reproduction," in Sherrill Cohen and Nadine Taub (Eds.), *Reproductive Laws for the 1990s* (pp. 361-403) (Clifton, N.J.: Humana Press).

⁷⁰See Ontario Law Reform Commission (1987), *Report on Human Artificial Reproduction and Related Matters* (Toronto: Minister of the Attorney-General) and the discussion by Mary Anne Coffey (1986), "Of Father Born: A Lesbian Feminist Critique of the Ontario Law Reform Commission Recommendations on Artificial Insemination," 1 *Canadian Journal of Family Law* 424-435.

⁷¹Robert H. Blank (1990), *Regulating Reproduction* (New York: Columbia University Press), at 151.

⁷²In a number of cases, men who have provided sperm for lesbian women or single heterosexual women have later claimed and won parental rights. For examples, see Phyllis Chesler (1988), *Sacred Bond: The Legacy of Baby M* (New York: TimesBooks), at 52-53.

⁷³This is a continuation of long-standing practice. Prior to the early part of this century, fathers had the absolute right to the custody of their children (as well as their earnings). In many cases, fathers left young children with their mothers. Once women were granted the legal right to obtain custody, this practice evolved into the "tender years" presumption. The older form is still visible in the practice of awarding sole legal custody to one parent (father), with care and control to the other (mother), and in the more recent trend to joint legal custody, with physical custody to the mother: Anne Marie Delorey (1989), "Joint Legal Custody: A Reversion to Patriarchal Power," 3 *Canadian Journal of Women and the Law* 33-44. For the politics of the joint custody movement, see Susan Crean (1988), *In the Name of the Fathers: The Story Behind Child Custody* (Toronto: Amanita Enterprises).

cases, however, a greater proportion of husbands obtain custody than in uncontested cases.⁷⁴

In contested cases, the custody decision is often based on factors other than the respective parenting histories of the couple.⁷⁵ The formerly extensive rights of custodial parents are being eroded and limited in various ways. Custody legislation authorizes the provision of certain kinds of information directly to the non-custodial parent.⁷⁶ The right of custodial parents to determine their children's religious education⁷⁷ and residence⁷⁸ has been undermined through legislation and court challenges. Mothers who cannot provide a nuclear family for their children are likely

⁷⁴Crean (1988), at p. 38; Department of Justice Canada (1993), *Custody and Access: Public Discussion Paper* (Ottawa: Ministry of Supply and Services Canada), at 13.

⁷⁵The resistance to the primary caregiver presumption, which would take past parenting behaviour as a major factor in deciding custody, and the number of cases in which fathers receive custody based on their greater economic ability or their ability to provide a surrogate (in the true sense) mother for their children suggest that the notion of automatic "father right" to custody still exists in the background of current custody laws: see, for example, Susan B. Boyd (1990), "Potentialities and Perils of the Primary Caregiver Presumption," 7 *Canadian Family Law Quarterly* 1-30 and E. Diane Pask and M. L. (Marnie) McCall (1991), *K. (M. M.) v. K. (U.)* and the Primary Care-Giver," 33 *Reports of Family Law* (3d) 418-429.

⁷⁶See, e.g., *Divorce Act*, 1985, R.S.C. 1985 (2nd Supp.), c. 3, s. 16(5), which authorizes an ex-spouse with access to request and receive information from third parties about the child's health, education, and welfare.

⁷⁷In *Young v. Young* (1990), 29 R.F.L. (3d) 113 (leave to appeal granted [1990] S.C.C.A. 505, appeal argued Jan. 25-26, 1993, decision reserved), the British Columbia Court of Appeal ruled that, before an access parent will be prevented from sharing his religion with the child, the custodial parent must show that such exposure is detrimental to the child's best interests. In this case, the father's "right" to exercise his freedom of religion under section 2 of the *Charter of Rights and Freedoms* was upheld, notwithstanding that his religion teaches that non-members of the faith are heathens and will go to hell. Mr. Young has, in effect, been given the right to teach his children to hate their mother, with whom they primarily reside.

⁷⁸Section 16(7) of the *Divorce Act* permits a court to order a custodial parent to notify any person with access of an intended change of residence. The person with access may then apply to the court to prevent the move or to change custody. Whether or not such a notification order has been made, the ability of a custodial parent to relocate can be challenged on the basis that it interferes with the maximum amount of contact with the access parent encouraged by section 16(10). The contrasting approaches are clearly illustrated in *Klachefsky v. Brown* (1988), 12 R.F.L. (3d) 280 (Man. C.A.), where the custodial mother's right to determine the child's residence was upheld, and *Jones v. Jaworski* (1989), 98 A.R. 378 (Alta. Q.B.), where the non-custodial father's right to maximum contact with the child was upheld.

to lose custody to fathers who can.⁷⁹ Economic and social status, colour,⁸⁰ sexual orientation, and disability are often taken into account inappropriately. Women whose cohabiting partners are female are particularly at risk of losing custody of their children.⁸¹ Women who are employed are at a disadvantage compared with men who have stay-at-home women who can look after the children, even though divorce laws create an expectation that wives are and must be employed.⁸² Women who wish to remain at home with their children find themselves characterized as parasites on the state or their ex-husbands or as providing an inappropriate role model for the children.⁸³

⁷⁹E. Diane Pask and M. L. (Marnie) McCall (1989), "*Klachefsky v. Brown: A Case of Competing Values*," 4 *Canadian Family Law Quarterly* 73-93. A judicial preference for nuclear families is prejudicial to women, as the likelihood of women remarrying is substantially lower than that of men, particularly if the women have children: see M. L. (Marnie) McCall, Joseph P. Hornick, and Jean E. Wallace (1988), *The Process and Economic Consequences of Marriage Breakdown* (Calgary: Canadian Research Institute for Law and the Family), at 36-38, for a summary of international statistics on remarriage after divorce.

⁸⁰See, generally, Phyllis Chesler (1987), *Mothers on Trial: The Battle for Children and Custody* (Rev. Ed.) (Seattle: The Seal Press). In *N. (K.) v. M. (K. M.)* (1989) 67 A.L.R. (2d) 420 (Q.B.), affd. (1989), 71 A.L.R. (2d) 42 (Alta. C.A.), leave to appeal refused 71 A.L.R. (2d) 42n (S.C.C.), a Vietnamese child placed for adoption with caucasian parents was ordered returned to the birth mother 27 months after placement. The Court of Appeal upheld the trial judge's ruling that cultural and genetic factors outweighed the risks of removing the child from the people she had known as her parents from the day of her birth.

⁸¹It has become less acceptable to say lesbians cannot by definition be acceptable parents. The reasons for denying custody now tend to focus on how visibly lesbian the mother or her partner are, the necessity of heterosexual role-modelling for children (especially boys), and the social opprobrium which may be directed at the children. See, for example, Wendy L. Gross (1986), "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent," 1 *Canadian Journal of Women and the Law* 505-531; Katherine Arnup (1989), "Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada," 3 *Canadian Journal of Women and the Law* 18-32.

⁸²Susan B. Boyd (1987), "Child Custody and Working Mothers," in Sheilagh L. Martin and Kathleen E. Mahoney (Eds.), *Equality and Judicial Neutrality* (168-183) (Calgary: Carswell); and (1989), "Child Custody, Ideologies and Employment," 3 *Canadian Journal of Women and the Law* 111-133.

⁸³*Ibid.*

Conclusion

Many of the interventions described in this chapter can be understood as logical and justifiable if one accepts that the fetus can be considered to be either a person or property, depending on the circumstances. The use of screening technology in pregnancy and child birth and the forced obstetrical intervention cases appear to be based on the premise of fetus as person ("unborn child") for their rationale. Disputes in contract motherhood ("surrogacy") cases and the claims of unmarried fathers for custody of children their mothers wish to place for adoption are based on the man's supposed property right in his genetic material and any fetus which carries his genes.

Either premise confers on the fetus an identity separate from that of the pregnant woman and has the potential to deny legal consequences to the physiological connection between them. Once conceptually separated from the pregnant woman,⁸⁴ the fetus can become the object of external regulation. As we have seen in this chapter, women then become the subjects of, and subjected to, regulation and control in all aspects of our procreative lives, not just in pregnancy. It is important, then, to look at the legal and analytic underpinnings that support the practices that I have described in this chapter. In the next chapter, I examine Judith Roof's analysis of women's lack of procreative autonomy based on the construction of the fetus as property to which are attached rights that cannot be exercised by the pregnant woman.

⁸⁴This conceptual separation of the fetus from a pregnant woman facilitates the actual separation of fetuses, embryos, and ova required by most of the so-called new reproductive technologies and both permits and promotes the splintering of motherhood into isolated segments: see, for example, Rosalind Pollack Petchesky (1987), "Foetal Images: the Power of Visual Culture in the Politics of Reproduction," in Michelle Stanworth (Ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (pp. 57-80) (Minneapolis: University of Minnesota Press).

CHAPTER THREE

FETUS-AS-PROPERTY

In the previous chapter, I described some of the ways in which women's procreative decision-making autonomy is circumscribed and suggested that these limitations could be understood if the fetus is regarded either as a person or as property. If the fetus is regarded as a legal person, then it would be vested with rights which must be protected. As both judicial and academic writing attest, if the rights of persons conflict, a balance must be found. Thus, were the fetus to be regarded as a "person" whose rights come into conflict with those of the pregnant woman in whose body it is sustained, the rights of each would need to be balanced. Contrariwise, if the fetus were regarded as a form of property, the owner of the property would have rights which a non-owner would not. Whether the fetus is conceptualized as a person or as property, the priority given to the rights of the fetus or to the rights of the owner of the fetus may outrank the priority given to the rights accorded to the pregnant woman, unless she is also considered the "owner" of the fetus.

In this chapter, I examine an argument by Judith Roof that women's lack of procreative autonomy stems from the conceptualization of the fetus as property and that the rationale for the limited circumstances under which women may terminate pregnancy can only be understood if women are presumed to be neither the creators nor the owners of this property. I set out her argument in some detail as a prelude to analyzing in subsequent chapters the nature of the rights attached to the ownership and

creation of property and who is entitled to claim those rights in order to exercise control over procreation.

In "The Ideology of Fair Use: Xeroxing and Reproductive Rights,"¹ Judith Roof provides one explanation for instances of reproductive control described in the previous chapter when she asserts that women do not have decision-making power over our reproductive lives because our fetuses and children do not belong to us. Rather, fetuses and children are conceptualized as being the property of the men whose sperm contributed to their existence. Roof argues that, as long as the relationship between fathers, mothers, and fetuses is based on principles associated with the ownership of private property, women will not be able to control our own reproductive capacities and activities. Roof discovers the property-based nature of human reproduction by comparing Delaware's abortion-regulating statute and the fair use provisions of United States copyright law.² A close examination of this legislation leads Roof to propose an analogy in which the father is equivalent to the creator/owner of copyright material; the mother is equivalent to the artistic medium of expression; and the fetus is equivalent to the artistic work. Her purpose in proposing this analogy is to uncover the rationale for the exceptions to the prohibition against abortion in

¹Judith Roof (1992), "The Ideology of Fair Use: Xeroxing and Reproductive Rights," 7(2) *Hypatia*, 63-73. Further references in this chapter will be indicated by page numbers in brackets in the text. Excerpts from this article are reproduced with the permission of the author.

²The essence of these provisions can be summarized as follows: A woman has the right to refuse to reproduce (by having an abortion), with some exceptions. A copyright owner has the right to refuse reproduction of the copyrighted work, with some exceptions.

anti-abortion legislation in order to clear the way for an alternative approach to reproduction and women's autonomy not based on principles of private property.

Roof begins by noting the frequent use of pregnancy and childbirth metaphors by male authors, "who depict writing as giving birth and the ensuing book as a child" (63).³ Roof asserts that the use of these metaphors reveals "an anxiety of ownership underlying both artistic creativity and human reproduction" (63). The paternal birth metaphor forges "an inalienable 'natural' link between the 'parental' owner/artist and his or her property/creation" (63). According to Roof,

Metaphorical language can thus reveal the symptomatic but unrecognized affinity between realms whose apparent difference is ideologically sustained and dissolve the categories that maintain a politically useful illusion of dissimilarity. In this instance, paternal birth symptomatically exposes the collusion of its parentage: property, paternity, and creation are ideologically entwined in an uncertain relation whose maintenance depends partly upon the categorical cloaking of their mutual interest and identity. The literary repetition of the metaphor of paternal birth points to the underlying relation of property and reproduction in other texts, one of which -- the law -- is devoted to legislating property and reproduction as distinctly separate categories. (64)

At first glance, anti-abortion laws and copyright laws appear to have little in common: abortion statutes set conditions under which human reproduction can be

³Nuclear scientists also use birth imagery to discuss their work: Marilyn French (1992), *The War Against Women* (New York: Ballantine Book), at 158.

terminated,⁴ while fair use provisions set conditions under which reproduction of artistic works can proceed. Roof concludes, however, that

they share the same underlying party in interest -- the male (pro)creator -- and shaping motive. Inducing laws treating both kinds of reproduction is the need to protect an investment by creating a certain link between an absent creator or owner and a creation or work where such bonds might otherwise not obviously exist. In both cases, the laws focus on the "work" (the fetus, the art) or on its medium (the mother, the text) and, through these, certify and continue the originary potency of the "creator," who is remarkably absent from either kind of legislation. (64)

In Roof's view, both copyright and anti-abortion legislation contain strong elements of property law, the most important feature of which is that "it provides a visible, legally inscribed connection [between an owner and his property] where none is otherwise readily apparent" (64).⁵ Further, the ways in which copyright laws and reproductive laws are administered differ, "reflecting a difference in the cultural

⁴Roof (1992), at 66, states that "our [United States] culture would not countenance statutes that defined when one could or should reproduce." While that may be true, laws which once required the involuntary sterilization of the mentally handicapped in both the United States and Canada have defined who could or should not reproduce. Pressures on women of non-European origin to have abortions and hospital policies of tying the availability of abortion to sterilization make clear statements about who should and who should not have children: see Adele Clarke (1984), "Subtle Forms of Sterilization Abuse," in Rita Arditti, Renate Duelli Klein and Shelley Minden (Eds.) [1989], *Test-Tube Women: What Future for Motherhood?* (pp. 188-212) (London: Pandora Press); Linda Gordon (1990), *Woman's Body, Woman's Right: Birth Control in America* (2nd Ed.) (New York: Penguin Books), 437-442; and Patricia Williams (1991), *The Alchemy of Race and Rights* (Boston: Harvard University Press), at 218-219. The concerns of doctors and politicians earlier in this century about the falling birthrate and the possibility of "race suicide" resulted in middle- and upper-class women of northern European heritage being exhorted to have more children as a form of civic duty: see, for example, James Reed (1978), *From Private Vice to Public Virtue: The Birth Control Movement and American Society Since 1830* (New York: Basic Books, Inc., Publishers), at 201; Angus McLaren and Arlene Tigar McLaren (1986), *The Bedroom and the State* (Toronto: McClelland and Stewart, Inc.), at 11, 15, 28; and Jane Lewis (1983), "Motherhood Issues During the Late Nineteenth and Early Twentieth Centuries: Some Recent Viewpoints," 75 *Ontario History* 4-20, at 5-6.

⁵At the same time as the legislation legally inscribes this connection, the transfer of the rights to the property itself rather than their retention by the creator/owner renders the connection invisible. As Roof describes, the "creator" is absent from the legislation and exercises their rights through, or in the name of, the rights attached to the property, the creation itself.

understanding of who owns the right to be protected" (65). Roof argues that, while copyright is exercised by individuals; controlling reproduction is a right exercised by the state in the public interest, an interest that largely coincides with the father's property right in the fetus. Through criminal statutes proscribing abortion,

the state protects both the fetus (in whose ostensible right the state speaks) and the father, whose interests may conflict with the mother over the use of the mother's body. The question of life that presumably inspires the participation of the state obscures the issue of the father's proprietary interest that is protected, as if abortion were analogous to theft or burglary. (65)

The underlying assumptions of copyright and abortion statutes are very similar:

Both laws protect a *vestment* rather than either an idea or an object. Copyright law provides "original works of authorship" ... with "copyright protection." Like abortion statutes, copyright law protects the *work*: the idea must be more than merely conceived. And just as the father is absent from abortion statutes, the artist is mainly absent from copyright statutes, present only by indirect reference. Couched in a preposition phrase, "authorship" is a noun instead of a verb, referring to a state of authoring resulting from a past act of creation that becomes an attribute of an object. (65-66)⁶

Despite the protection provided to the copyright owner, the connection between the artist and the work is not strengthened:

While we might expect copyright law to reaffirm the connection between creator and creation, copyright law subordinates the link between artist and work to rights resident in the work itself. This is a reflection of the tendency in property law to situate rights and power in the property or in the fact of ownership rather than in the owner.

⁶Similarly, we speak of children as having been "fathered" or "sired," a past act which also becomes an attribute of the fetus or child. It is not without interest that the term "sired" is also used in animal "husbandry."

Locating the source of rights in the property makes those rights permanent, rather than personal. (66)⁷

Roof suggests that there is an anxiety underlying property law that has its roots in a fear that continuity and permanence will not be established, that property will not be able to be handed down through the generations, that the genetic line will die out (66).⁸ The trade-off for the sense of permanence gained by having the rights linked to the property is an inherent uncertainty about the tie between the owner and the property, the father and the child. In human reproduction, the difficulty of establishing the link between father and child is illustrated by the presumptions for establishing parentage contained in paternity laws (66).⁹

Anti-abortion laws parallel copyright laws, in that one of the parties in interest (the biological father) is not mentioned, while the focus is on the fetus "as a species of property wherein continuity is vested" (66). Anti-abortion laws are based on the assumption that reproduction is a valuable and valued activity the interruption of which by abortion is "a limitation on pregnancy that must be regulated" (66). As in

⁷Rights *in rem* attach to the subject of litigation (a piece of property such as land or a ship, usually) and a declaration of a particular right is binding on the whole world. Rights *in personam*, on the other hand, attach to an individual and a declaration of a particular right (such as privacy or compensation for damages) are binding only between the parties to an action.

⁸The great concern with female adultery is clearly related to this issue. The case of *Baby M*, 525 A.2d 1128 (1987), N. J. Super. Ct., rev'd on other grounds 537 A.2d 1227 (1988), N. J. Sup. Ct., amply demonstrates this situation. William Stern based his custody claim to the child born to (not of) Mary Beth Whitehead under a pre-conception contract on his need to have a child genetically related to him to carry on his "line." The fact is that this child does carry his genes. If what was of concern to him was a genetic descendant, it seems irrelevant where that child lives and by whom she is raised.

⁹In Canadian law, a man is presumed to be the father of a particular child if, for instance, he is married to its mother. This presumption governs even in situations where the child is the result of artificial insemination to which the husband has consented or of which he is unaware. For a discussion of the presumptions, their operation, and their effect: see Margrit Eichler and M. L. (Marnie) McCall (1993), "Clarifying the Legal Dimensions of Fatherhood," 11(2) *Canadian Journal of Family Law* (in press).

copyright, "the act of creation is past and assumed; ... What the statute limits is the termination or the divestment of that act of creation -- the trespass on the object already created" (66-67).

The Delaware statute analyzed by Roof provides certain exceptions to the general prohibition on abortion: where death or permanent physical or mental injury to the mother are likely, where the fetus is likely to be severely "defective," or where the pregnancy is the result of rape or incest, an abortion may be performed during the first 20 weeks of pregnancy (67).¹⁰ Roof summarizes this type of law:

The statutory exceptions supposedly balance the interests of the parties, though only the mother and fetus are named. The main import of the law is to protect the fetus -- "the work" -- of reproduction. The work may be disturbed only if its continuation would kill or severely damage the mother -- the medium in which the fetus has vested -- or if the fetus itself is so damaged as to not be a fetus. (67)

In the case of pregnancy resulting from rape or incest, neither the pregnant woman nor the fetus are directly mentioned. The rationale for abortion in these situations is something quite different, based not in the pregnancy, but in the nature of the sexual acts which resulted in the pregnancy. Under Delaware law, incest appears to automatically entitle a woman to an abortion, while rape must be proven by "documented violence or threat" (68). "That rape and incest provide exceptions at all

¹⁰These are fairly typical provisions for statutes governing abortion in the United States and other countries: see Law Reform Commission of Canada (1989), *Crimes Against the Foetus* (Working Paper 58) (Ottawa: Law Reform Commission of Canada), Appendix A, Table I. A rape/incest exception was never explicitly part of Canadian law, although such circumstances would no doubt have been a factor in authorizing an abortion on the grounds of "health" needs.

points directly to the putative, but absent, father."¹¹ Roof takes the existence of the rape/incest exception as a symptom which "exposes the underlying property interest inherent to reproductive law" (67). The differential treatment of these two forms of non-consensual heterosexual intercourse reflects the differing interests of absent males:

Incest denies the exchange of women among men and thus threatens the "rights" of males to procreate upon women of different bloodlines. While we might declare a societal and species interest in this, societal and male interests seem to coincide, the paternal interest becoming the "societal" interest. The product of a rape is a part of the kinship exchange; it can only be divested in the event that it is unfairly gotten -- by documented violence or threat. What is at stake in the limitation on the termination of pregnancy is the vested right of the invisible "creator"/father, whose genetic opportunity and continuity are protected at all cost except the life or health of the mother. (68)¹²

Allowing abortion during the first 20 weeks of pregnancy suggests the existence of a vesting mechanism in pregnancy which Roof analogizes to the "fair use"¹³ concept in copyright law:

"Fair use" is a statutory "limitation" on the "exclusive rights" of the owner of material to which copyright protection extends. "Fair use" permits the "reproduction" of copyrighted work under certain circumstances. As in the law governing the termination of pregnancy, determination of "fair use" means balancing competing interests under circumstances keyed to the economic value of the property right being

¹¹This can be demonstrated by rewording the phrase "pregnancy resulting from rape or incest" to the active voice: "where the woman was impregnated by [her father, her uncle, her priest, a stranger, etc.]."

¹²The incest exception could also be conceptualized in a slightly different way. The abortion of a fetus produced through incest would not be prohibited because there would be no property right in such a fetus in the same way as an object which is legally prohibited from being defined as property cannot be stolen: *R. v. MacEwen*, [1947] 2 D.L.R. 62 (P.E.I. S.C.), reprinted in Michael Mac Neil, Neil Sargent, and Brett Dawson (Eds.), *Introduction to Private Law Relationships* (Rev. Ed.) (North York: Captus Press), at 183-185. An abortion in a case of incest would not, therefore, be analogous to theft as suggested by Roof at 65.

¹³Non-creators/owners of copyright material have limited rights to make use of the material without infringing on the property rights of the copyright owner. These limited rights are referred to as "fair use" exceptions.

used: "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes"; "the nature of the copyrighted work"; "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and "the effect of the use upon the potential market for or the value of the copyrighted work" (17 U.S.C. section 107).¹⁴

The rape/incest exception to the abortion prohibition operates inversely to the "purpose and character of the use" consideration: reproduction of copyrighted material is only permissible if it does not damage the commercial viability of that work, while abortion is only permissible if the means of impregnation "infringe upon the exchange of women or the prerogatives of the husband" (68). The nature of the fetus is analogous to the nature of the copyrighted work: "if reproduction of the copyrighted work does not substantially invade the vested rights of the work's owner, the work may be reproduced or the pregnancy might be terminated" (69).

This leads Roof to ask who the owner is and what the nature of the owner's rights are. She compares the first trimester of pregnancy with the fair use test of the "amount and substantiality of the portion reproduced in relation to the work as a whole":

Though the ostensible argument for first-trimester abortions is that the fetus has not yet acceded to personhood, another way to look at it is that the sperm is not yet sufficiently vested. To vest is to obtain authority or control over, to have a "quicken" power, mature enough to exist in its own right. Permitting abortions in the first twenty weeks of pregnancy is an indication that the rights of the "owner" have not yet vested sufficiently to endow power or control. But whose rights are these? Those of the fetus? The father? The state? That it may be any of the three reveals that the rights of the father, the state and the fetus

¹⁴The actual exemptions in Canadian law (called "fair dealing") are narrower, permitting reproduction without permission or compensation only "for the purposes of private study, research, criticism, review or newspaper summary": *Copyright Act*, R.S.C. 1985, c. C-42, para. 27(2)(a).

are coterminous, because protecting any one protects them all and does so sometimes against the interests of the mother. (69)¹⁵

Where, then, does this leave the mother? According to Roof, the mother is not treated as an owner; rather, she is analogous to the medium of expression through which an artist creates a work. Whether reproduction of a work falls within the "fair use" exceptions depends on the extent of the trespass, both quantitative and qualitative, on the medium. Similarly, the extent to which a particular pregnancy threatens the health of the pregnant woman is a factor to be considered in the abortion decision.

But because the fetus and the pregnancy rather than the mother herself are central to abortion statutes, the mother is treated more like a medium than an author or owner. She becomes the location of another kind of transaction -- one between father and child. Her body stops being her own at the point where the sperm is sufficiently vested to be protected and the sperm's rights, now considered identical with those of the fetus, outweigh the right of the mother to make any choice about whether or not she wishes to reproduce. (69)

If the abortion decision is left up to women, the right of men to see a return on their "investment" is jeopardized. That this is so becomes readily apparent in so-called "surrogate mother" cases where the woman refuses to give up the baby she birthed:

¹⁵Roof's conclusion that protection of the rights of any one of the fetus, the father, or the state protects the rights of all three is questionable. While the rights of the fetus, father, and state may frequently coincide, this is not always, or necessarily, so. In collapsing the three, Roof oversimplifies the analysis of the father as the owner. I would argue instead that the rights of ownership are ultimately held by the state, which may delegate those rights to fathers or hospitals or other institutions or individuals, or even to mothers. The state will step in either to enforce the rights of its delegates or to assert its supremacy. As in Roof's analysis, the connection to the state as owner is strong, but invisible, because the property is vested in the fetus itself, not in the owner: *supra*, n. 5. For an example illustrating that the rights of the father and those of the state or its delegates do not always coincide, see *In the Matter of A.C.*, 533 A.2d 611 (D.C. 1987), where a hospital administrator was pressured by a "pro-life" organization to seek a court-ordered Caesarean to "save the baby" of a woman dying from cancer after she had refused to permit the procedure, a decision she made with the support and agreement of her husband, her parents, and her own physicians. A trial court ordered the procedure, the 24-week-old fetus died soon after, and the woman, Angela Carder, died two days later. The decision was overturned on appeal, 573 A.2d 1235 (D.C. Ct. App., 1990). This case is discussed in detail by Lynn Paltrow (1989), *Maternal and Fetal Rights* (Ottawa: National Association of Women and the Law).

The surrogate is treated exactly like a medium and the fetus's genetic parents claim ownership rights -- a right to a return on their investment. The fact that genetic parents try to assert their rights through contract law is an indication of the proprietary nature of their interest. Lawsuits arise when the surrogate refuses the role of "medium" and asserts an ownership right of her own. The conflict is between the right of genetic parents to "own" their investment in genetic continuity, which brings perpetuity and genetic connection together, and the surrogate mother's biological and psychological ties to the infant. (69-70)¹⁶

Roof argues that viewing paternal interests in unborn children as a form of property interest explains some inconsistencies in attitudes:

Although second- and third-trimester fetuses are protected *as life*, after birth the baby no longer enjoys such a degree of anxious preservation. While the protection of fetuses reflects a reverence for life, that same reverence ... is not extended in an equal degree toward the life of the mother. ... [one] reason is precisely the fact that the interests of the mother conflict with the interests of the father. Yet the paternal interest remains obscured by the law, which pretends to treat only mother and fetus. (70)

¹⁶In the most frequent type of "surrogate" case, the genetic parents of the fetus are the surrogate herself and a contracting man. In the Baby M case, the trial judge, upholding the contract and awarding custody to the genetic father, concluded: "It is his own biological genetically related child. He cannot purchase what is already his": Robyn Rowland (1992), *Living Laboratories: Women and Reproductive Technologies* (Bloomington and Indianapolis: Indiana University Press), at 161. That the case law tends to uphold the claim of the contracting "parents" suggests that the proprietary interest being recognized is that of the father. However, when both contracting parents supply genetic material (so-called IVF or "full" surrogacy), the genetic connection becomes primary and overrides the physical contribution. Anna Johnson was denied parental rights with respect to the child she bore for Mark and Crispina Calvert; on her appeal of this ruling, the judge said: "We must resolve the question of Anna's claim to maternity as we would resolve the question of a man's claim or liability for paternity" -- that is, parental rights are based on genetic, rather than personal, relationships: Murray Campbell (1991), "Ruling Upheld, Surrogate has no Rights," *The Globe and Mail*, Oct. 9. Ms Johnson's further appeal to the California Supreme Court was also denied: "Surrogate is Ruled 'Genetic Stranger'" (1991), *The London Free Press*, May 22, p. D14. See also Barbara Katz Rothman (1989), *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W. W. Norton & Company), at 36-37: "Women do not gain their rights to their children in this society as *mothers*, but as *father equivalents*, as equivalent sources of seed." Rowland notes, at 165, that medical professionals involved in IVF surrogacy consider it preferable to surrogacy by artificial insemination, arguing that a woman who carries a child originating from another woman's egg does not regard it as "hers," an assumption which totally denies the relationship between woman and fetus which develops during pregnancy.

The decision in the "full" surrogacy situation, however, does not finally resolve the question of whether what is being recognized is the genetic parentage of both gamete donors or only that of the genetic father. If it is genetic parentage which is determinative in surrogacy situations, a contracting pair who separate before the baby is born should, theoretically, be awarded joint custody of the child over any claim of the woman who bore the child.

The general lack of enforcement of legislated obligations on fathers to support fetuses and children is also more understandable if fetuses and children are seen as the property of fathers, "to be cared for at will" (71).¹⁷

Roof concludes by arguing that the increasing limitations on the "fair use" provision of copyright law and the limitations on women's ability to make abortion decisions, while appearing to be based on values of continuity and immortality, are actually based on values of limiting the "trespass of property rights increasingly linked to owners" (71). In both cases, Roof believes society

would be better served by recognizing and eliminating the property rationale behind all reproductions, permitting the free flow of media and ideas and giving us all the choice about when, what and how to reproduce [so we can] begin to pursue reproductive policies that directly relate to issues of knowledge, choice and life. (71)

If Roof is correct that women are treated in law neither as creators of the fetuses which depend on pregnant women's bodies for their sustenance nor as owners of the rights attaching to those fetuses, the implications for women's procreative autonomy extend far beyond the conditions under which a woman is entitled to terminate a pregnancy through abortion. The attribution of rights in property entitles the owner to assert control over the property. In addition to the right to determine whether the property should be preserved or destroyed, the concept of ownership carries with it the right to determine how the property is to be dealt with, including the conditions under which it is to be maintained and whether it should be altered or

¹⁷The difficulties unmarried women have obtaining support from putative fathers during their pregnancies and the high default rate of child support payments due from fathers are well known: see studies cited in E. Diane Pask and M. L. (Marnie) McCall (Eds.), *How Much and Why? Economic Consequences of Marriage Breakdown: Spousal and Child Support* (Calgary: Canadian Research Institute for Law and the Family).

repaired. In the reproductive context, this aspect of ownership would permit many of the interventions into women's procreative lives described in the previous chapter: regulation of the conduct of pregnant women which might affect the fetus, surgery for the benefit of the fetus, intervention in labour and delivery, and regulation of women as we raise children. It is very important, then, to explore Roof's conclusion that the copyright analogy leads to the perception of fathers as the owners/creators of fetuses.

In arguing that the pregnant woman is not an owner in relation to a fetus and therefore is subject to limitations on her procreative autonomy, Roof has worked back from existing limitations to conclude that women's lack of procreative autonomy necessarily means that women are excluded from the category of owner. In the next two chapters, I take the opposite approach and work forward from the basic principles of copyright law concerning owners and creators to determine whether, by analogy, women can be regarded as either creators or owners of rights attaching to fetuses. I go on to consider whether the possibility of conceptualizing women as creator/owners of their fetuses, akin to creator/owners under copyright law, would assist in furthering women's reproductive autonomy.

CHAPTER FOUR

OWNERSHIP UNDER COPYRIGHT

Copyright law deals with both creation and reproduction of artistic, literary, and musical works. It recognizes the creators of works and also provides for ownership of rights in the work by others than the creator in mechanisms of sale, transfer, employment, and commissions. By drawing on copyright law for an analogy to assist in understanding the dynamics by which women's procreative autonomy has been limited, Judith Roof has identified one possible way to reconceptualize procreation.¹ The potentiality of this approach lies in the legal recognition it gives to the role of "creator."

Roof located in one aspect of copyright law an explanation for women's lack of procreative autonomy, concluding that principles of property law underlie both copyright and anti-abortion legislation. She suggests those principles need to be removed from the arena of human reproduction to remove limitations on women's autonomy. The key element of her argument is that, insofar as the fair use provisions of copyright law can be analogized to anti-abortion laws, pregnant women are like "mediums of expression" rather than creators of fetuses or owners of rights attaching to them. However, "fair use" provisions of copyright law override the rights of owners and, by basing her analogy on this aspect of copyright law, Roof did not directly address the concept of ownership or the rights of creators found in copyright law as a

¹Judith Roof (1992), "The Ideology of Fair Use: Xeroxing and Reproductive Rights," 7(2) *Hypatia*, 63-73.

whole. As a result of this analytical choice, Roof did not address or explore the potential which a property- or creation-based model of copyright law might allow for shifting understandings about the relations of reproduction. It is this potential that engages my thesis.

In this chapter, then, I expand the analysis, still using the framework of copyright law suggested by Roof, but considering more fully the positions of mother, father, and fetus in light of the purpose of copyright law, the rights it protects, who is entitled to the ownership² of those rights, and the relationship between the creator of an artistic work and the owner of copyright in the work. I hope to explore whether the concepts of copyright ownership and/or the moral rights of creators can contribute to the formulation of an understanding of procreation which fosters women's autonomy; in other words, a formulation that recognizes, respects, and centres women's procreative role. I argue that, as creation involves the application of effort and labour to an idea to create a work, women should be considered to be the creators of fetuses and therefore the first owners of the rights attached to fetuses. What this would mean for women's autonomy is that women, as owners and/or creators, would be entitled to

²It is beyond the scope of this project to discuss the nature of ownership in general. It has been argued, for example, that women have not traditionally been regarded as autonomous individuals entitled to own property in the liberal state, and indeed were outside of the "social contract" regulating state and individual rights and obligations. For discussion of these issues and the relationship of women and the law in the liberal state, see, for example, Zillah R. Eisenstein (1984), *Feminism and Sexual Equality: Crisis in Liberal America* (New York: Monthly Review Press); Catharine A. MacKinnon (1989), *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press), esp. Ch. 8; Carol Smart (1989), *Feminism and the Power of Law* (London and New York: Routledge); Kathleen O'Donovan (1985), *Sexual Divisions in Law* (London: Weidenfeld and Nicolson); Carole Pateman (1988), *The Sexual Contract* (Cambridge: Polity Press); and Lorenn Clark (1986), "Boys Will be Boys: Beyond the Badgley Report," 2 *Canadian Journal of Family Law* 135-149.

control the conditions of procreation for ourselves, rather than having those conditions determined by others.

In general, the purpose of copyright law³ is to grant rights to authors or their legal successors.⁴ The rights protected by copyright law attach to the work, rather than to the individual creator. These rights, then, can only be exercised by the person who owns the copyright in the work. The creator of the work is the first owner⁵ of the copyright and thus has the initial right to control the use of that work. The creator/owner has the sole right to decide whether a work may be published, performed, translated, adapted for another medium, or reproduced (copied).⁶ A creator/owner may undertake any of these activities for their own benefit or may allow others to do so in exchange for financial compensation.⁷ The creator/owner may sell the copyright interests in a work in part or in whole. A right can also be licensed by the creator/owner for one-time or continuing use by a third party. In certain circumstances, anyone can use the work, but must pay the creator/owner a set fee, or royalty, for each use.

³Canadian law is found in *Copyright Act*, R.S.C. 1985, c. C-42, as am. S.C. 1988, c. 15. Relevant provisions are reproduced in Appendix A. In this chapter, I have also drawn on the discussion of Canadian law in Lesley Ellen Harris (1992), *Canadian Copyright Law* (Whitby, Ont.: McGraw-Hill Ryerson Limited).

⁴Copyright law uses the term "author" regardless of the form of the work created. In discussions of copyright law, the terms "author," "artist," and "creator" are used interchangeably and I do so here.

⁵The exceptions to the general rule that the creator is the first owner will be discussed below.

⁶*Copyright Act*, s. 3.

⁷These rights are often referred to as economic rights to distinguish them from the other type of rights, moral rights, protected by copyright law. Moral rights will be discussed in Chapter 5.

A creator/owner or an owner may only exercise these rights of ownership over works which are eligible for copyright protection. For a work to be eligible for copyright protection, it must be the original product of effort and labour. Copyright does not protect ideas or facts; rather, it protects the form in which those ideas or facts are expressed. So, for example, the idea of a detective solving a mystery is not eligible for copyright protection, although every novel or movie based on that idea is eligible. Equally, the principles of physics or the day's news are not eligible for copyright protection, but physics textbooks and news stories on television or in newspapers are protected. Judith Roof has equated the fetus with a work and the father with the owner of the copyright in it, while the pregnant woman is neither owner nor creator.

But who, then, is the creator of the fetus?⁸ There are two reasonable possible answers to this question.⁹ One possible answer is that each man and each woman could be viewed as the creator of a fetus, since each produces the genetic material necessary for the creation of a new human being.¹⁰ Each can therefore be said to

⁸For the sake of simplicity, I will refer throughout to fetuses, rather than fetuses and children, since the lack of procreative autonomy experienced by women is most pronounced during pregnancy.

⁹Roof does not directly answer this question, although it can be implied that she takes the father to be the creator as well as the owner, since she identifies one of the anxieties underlying these laws as a fear of loss of continuity, the dying out of the male genetic line (at 66). This answer to the question would only be reasonable if it were true that male sperm contains in miniature a complete human being which simply needs to pass through the medium of a woman's body.

¹⁰Considerable debate has taken place on whether human bodies or parts thereof can be owned and, if so, by whom. This debate has taken place both with respect to bodily tissues, such as blood and organs, and with respect to genetic material. Randy W. Marusyk and Margaret S. Swain (1989), "A Question of Property Rights in the Human Body," 21 *Ottawa Law Review* 351-386 discuss the implications if property rights existed in human bodies and parts. They conclude that the negative consequences which are likely to result make it imperative that such property rights not be created. Researchers would still be able to study and experiment with

(continued...)

contribute equally to the creation of a zygote. Once the union of egg and sperm has taken place, the work would be complete and the woman and the man would be co-creators and therefore co-owners of the rights in the work. Yet joint authorship¹¹ and joint ownership are only recognized in copyright law if the work has been created in such a way that "the contribution of one author is not distinct from the contribution of the other author."¹² If women and men are to be conceptualized as having equal "ownership" rights in the fetus, therefore, the zygote would necessarily be equated with the fetus (as well as with a child) and the woman's contribution of nourishment and labour through pregnancy must be ignored. Ignoring the very existence of the process by which a zygote is transformed into an infant is neither an appealing nor a satisfactory understanding of procreation.

The second possible answer to the question "who is the creator of a fetus?" is the woman alone. Although both the man and the woman produce necessary genetic material, the genetic material of one person alone is not sufficient to create a fetus.¹³

¹⁰(...continued)

donated human tissue provided the donor gave a fully informed consent to use proposed to be made of their tissues, organs, blood, genetic material, etc. See also discussions in Barbara Katz Rothman (1989), *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W. W. Norton & Company); Christine Overall (1987), *Ethics and Human Reproduction: A Feminist Analysis* (Boston: Allen & Unwin); and Susan Sherwin (1992), *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press). For a discussion of recent cases in which property notions have been raised in connection with human reproductive material, see Kevin Doyle (1990), "The *In Vitro* Conceptus: Why Not Property?" (unpublished manuscript, The University of Calgary).

¹¹The Copyright Act uses the phrase "joint authorship" to encompass all forms of joint creation: Harris (1992), at 65.

¹²*Copyright Act*, s. 2, "work of joint authorship."

¹³While some animals reproduce by parthenogenesis and scientists have experimented with artificial parthenogenesis, including cloning mammals, this feat has not (yet) been achieved in humans: Philip J. Pauly (continued...)

Genetic material can be equated with an idea. The existence of an idea does not, and cannot, amount to a copyrightable work; something more is necessary. The existence of the genetic material of one person does not amount to a fetus, let alone a child; once again, something more must take place. Even when the genetic material of a man and a woman combines, the f/act of combination does not amount to a fetus. The combination of genetic material (or the creation of a new idea) while a necessary condition for the creation of a fetus, is no more a sufficient condition than is the existence of the genetic material of one person. In order to become first a fetus and then a child, nourishment and labour are required. This nourishment¹⁴ and labour¹⁵ must be provided by a woman. The combination of the genetic material of a man and

¹³(...continued)

(1990), *Controlling Life: Jacques Loeb & the Engineering Ideal in Biology* (Berkeley: University of California Press), passim. For discussions of some of the implications of cloning, see Gena Corea (1979), *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (New York: Harper & Row, Publishers), Ch. 13; Jane Murphy (1984), "From Mice to Men? Implications of Progress in Cloning Research," in Rita Arditti, Renate Duelli Klein and Shelley Minden (Eds.) [1989], *Test-Tube Women: What Future for Motherhood?* (pp. 76-91) (London: Pandora Press); and Peter Singer and Deane Wells (1985), *Making Babies: The New Science and Ethics of Conception* (Rev. Ed.) (New York: Charles Scribner's Sons), Ch. 6.

¹⁴There are those who believe that it would be best if gestation did not take place in women's uteruses, which have been described as unsanitary and dangerous for the fetus, and others who argue that it is (or soon will be) possible to gestate a fetus in the abdomen of a male. For a discussion of ectogenesis, see Gena Corea (1979), Ch. 12, and Peter Singer and Deane Wells (1985), Ch. 5. Some researchers believe that it is only a matter of time until the abortion "problem" can be solved by transferring an unwanted fetus from the body of a pregnant woman to an artificial uterus: see sources cited by Corea (1979), at 254. Technology already exists to keep alive premature babies at such an early stage of gestation they are referred to as "extra-uterine fetuses": Barbara Katz Rothman (1989), *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: W. W. Norton & Company), at 41.

¹⁵The disturbingly high rate of delivery by Caesarean section in the United States and Canada can be interpreted as an attempt to remove the process of labour from women: see, for example, Ann Oakley (1986), *The Captured Womb: A History of the Medical Care of Pregnant Women* (London: Basil Blackwell), Ch. 8.

a woman can be likened to a new idea,¹⁶ one which finds expression through the nourishment and labour given to it by a woman. If creation consists of an idea plus effort and labour, the creator of a fetus is the woman. I take this answer to be the more accurate one, both as a matter of logic and as a matter of personal conviction. Accepting any other answer to the question renders invisible the physical embodiment of the fetus in real women, denies the interconnection of two lives in the most intimate fashion imaginable, and turns women from persons into "fetal containers."¹⁷

Carrying this analogy forward, as the creator of the fetus, the woman should be viewed as the first owner and therefore exclusively entitled to exercise the rights of ownership which attach to the fetus.¹⁸ However, when compared with existing legal regulation, even though the woman might be taken to be the creator of the fetus and the first owner of the rights attaching to the fetus, the success of third parties in overruling her decisions suggests that she is not always able to exercise these ownership rights. The result of these limitations may be that women's procreative

¹⁶Barbara Katz Rothman (1989), at 19. It is not insignificant that we use the word "conceive" to describe both the union of ovum and sperm and the generation of an idea.

¹⁷George Annas (1986), "At Law: Pregnant Women as Fetal Containers," 16(6) *Hastings Center Report* 13-14. One implication of this answer is that the woman who gestates a fetus for others would be legally recognized as the real, rather than the "surrogate," mother of the child she bears, whether or not that woman has a genetic connection with that child.

¹⁸The formulation "ownership rights attached to the fetus" is used in preference to the phrase "ownership of the fetus" for two reasons. The first is my own unease with the denial of humanity implied by the characterization of the fetus as property. Secondly, this preferred phrase reflects an understanding of property rights "as a relationship not between an owner and a thing, but between the owner and other individuals in relation to the thing": R. D. Gibbens (1989), "The Moral Rights of Artists and the Copyright Act Amendments," 15 *Canadian Business Law Journal* 441-470, at 443. Gibbens continues, at 443-444:

Property rights are seen today merely as a bundle of rights fashioned to further societal ends. There is nothing predetermined or ineluctable about either their scope or content. The question then becomes one of distributing these rights among competing societal interests.

autonomy is no greater than it would be if women were not considered to be owners or creators at all, as Roof suggests. However, there is an important difference between a limitation on one's ability to act on one's rights and not having any rights at all.

If women can conceptually be regarded as owners, the next question becomes how to account for women apparently not having ownership rights. This situation could come about in a number of ways. First, the creator of a work, as the first owner of the rights in the work, has the power to sell or otherwise dispose of some or all of those rights. Secondly, in certain circumstances, someone other than the creator of the work may be deemed to be the first owner of the rights. Finally, third parties are entitled to make certain uses of copyright works without the creator/owner's knowledge or permission and without providing compensation to the owner (the "fair use" exceptions).

If the first exception applies and third party interventions are successful because women/creators have sold or otherwise transferred our ownership rights or had them transferred, then the question is to whom have the rights been transferred and in exchange for what? One possible means by which a woman/creator may have disposed of her rights in the fetus is by marriage. The implicit marriage contract in English common law consisted of a woman providing homemaking, childrearing, and sexual services to a man in exchange for monetary support; the right of the wife to be maintained by the husband could only be forfeited by adultery on her part.¹⁹ In social

¹⁹For descriptions of the historical relationship between husband and wife, see, for example, Alistair Bissett-Johnson and David C. Day (1986), *The New Divorce Law: A Commentary on the Divorce Act, 1985* (Toronto: Carswell) and Freda M. Steel (1987), "Alimony and Maintenance Orders," in Kathleen E. Mahoney and Sheilagh L. Martin (Eds.), *Equality and Judicial Neutrality* (pp. 155-167) (Toronto: Carswell).

systems where women are primarily dependent on marriage as a means of subsistence, this exchange may be far from an equal bargain. Moreover, this traditional understanding of marriage as the exchange of a woman's reproductive and caretaking capacities in return for the means of subsistence has given way in the face of women's increased entry into the paid labour force and laws permitting divorce. The advent of no-fault divorce and the elimination of legal barriers to women's employment have resulted in the social and legal expectation that women are as able as men to support ourselves financially.²⁰ These expectations have undermined the basis for the traditional view of the marriage contract; if marriage once involved a transfer of women's reproductive rights to husbands in exchange for maintenance, it no longer does so.²¹

²⁰The *Divorce Act*, R.S.C. 1970, c. D-8, for the first time applied the grounds for divorce equally to husbands and wives, allowed the granting of a divorce without a determination of fault following fairly lengthy periods of separation, and imposed on each the liability to contribute to the support of the other: Bissett-Johnson and Day (1986). The *Divorce Act*, 1985, R.S.C. 1985 (2nd Supp.), c. 3, effectively introduced no-fault (or unilateral) divorce by shortening the necessary period of separation to one year. The last remnants of the husband's obligation to support his wife for her lifetime have been substantially eroded by the introduction and judicial interpretation of a spousal support objective of self-sufficiency for both spouses: M. L. (Marnie) McCall (1991), "Options for Reform of the Law of Spousal Support Under the Divorce Act, 1985" (Background paper prepared for the Department of Justice Canada, May). This incorporation of an apparently gender-neutral standard of self-support masks the gender inequalities which exist in Canadian society: women's average earnings at best amount to about 2/3 of the average earnings of men, and women with children often support two or three people from those earnings while the fathers of their children are only supporting themselves: Morley Gunderson and Leon Myszyński with Jennifer Keck (1990), *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women).

²¹The high default rate on support payments following divorce suggests that men have had no difficulty accepting a belief that women ought to support ourselves after a divorce. A common reason men who default on child support payments give for their failure to pay is that the children belong to their mothers and fathers have no responsibility for them: see, for example, Canadian Institute for Research (1981), *Matrimonial Support Failures: Reasons, Profiles, and Perceptions of Individuals Involved* (Edmonton: Institute for Law Research and Reform); Andy Wachtel and Brian E. Burch (1981), *Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders* (Vancouver: United Way of the Lower Mainland); and David L. Chambers (1979), *Making Fathers Pay: The Enforcement of Child Support* (Chicago: University of Chicago Press).

(continued...)

In certain circumstances, someone other than the creator of the work is deemed to be the first owner of the rights. Copyright law specifies that the creator of a work is not the first owner of the rights in it if the work was created in the course of employment or was a specified type of work commissioned by a third party.²² In these situations, the first owner of the rights is deemed to be the employer or the party commissioning the work. In either case, the deeming rule can be superseded by a contract between the creator and the employer or commissioning party under which the creator retains copyright in the work.

In the first exemption, the father could be the owner of the rights in the fetus, as Judith Roof contends he is, if the father is considered to be the employer of the woman and the fetus is considered to be created in the course of the employment.²³ The current legal treatment of marriage as a relationship in which the exchange of services for support is terminable, rather than perpetual, bears considerable similarity

²¹(...continued)

At the same time, the incidence of men who batter or kill wives who want to leave them, who contest custody vengefully to punish their wives for having left, or who kidnap or even kill their children suggests that this traditional view of the roles of women and men in marriage has not yet been abandoned: Marilyn French (1992), *The War Against Women* (New York: Ballantine Books), at 188. According to U.S. Department of Justice statistics cited by French, as many as 3/4 of reported assaults take place after separation. See also Standing Committee on Health and Welfare, Social Affairs, Seniors, and the Status of Women (1991) *The War Against Women* (Ottawa: House of Commons) and Susan Crean (1988), *In the Name of the Fathers: The Story Behind Child Custody* (Toronto: Amanita Enterprises).

²²*Copyright Act*, s. 13 and see Lesley Harris (1992), at 74-77. First ownership of works created under the direction or control of government departments also do not belong to the author. I do not discuss this as a separate topic, since such works would, with very rare exceptions, be covered under one of the other two exceptions. The only substantive differentiation is that the duration of copyright for government works is 50 years from the date of creation; in all other cases, copyright continues for 50 years following the death of the author.

²³Harris (1992), at 76, provides a list of questions to be considered in determining whether a work has been created pursuant to an contract for services.

to a contract for services in exchange for money.²⁴ The employment analogy would also apply to situations not involving marriage, such as cohabitation, the "keeping" of a "mistress," and other, less formal, relationships involving some element of support of a woman on the part of the man.²⁵ An employment type of relationship can be inferred from the attempts of some men to prevent women from having abortions on the basis that the women had previously lived with and been supported by the men. They argued that the women were therefore not entitled to have abortions, as that was a breach of an agreement to have a child.²⁶

Similar to the employment circumstance is the situation with respect to commissioned works. The commissioning party is deemed the first owner of the rights in certain works (engravings, photographs, or portraits) if they would not otherwise have been created and if the creator is remunerated for them.²⁷ So-called "surrogacy" arrangements can be seen to fit this pattern if the fetus is likened to one of the specified works²⁸: a "commissioning" man²⁹ pays a woman to carry for him a child,

²⁴The aptness of this comparison in any particular instance will depend on the specifics of the particular marital arrangement under consideration, applying most closely in the increasingly rare breadwinner husband-homemaker wife marriage. Women continue to provide the largest part of the services required by the husband and family, while, in general, men continue to provide the largest part of the financial support.

²⁵The expectation (still) of many men that spending money on a woman (even the price of one drink) entitles them to the woman's sexual services illustrates this point.

²⁶See, for example, *Mock v. Brandenburg*, (1988), 61 A.L.R. (2d) 234 (Alta. Q.B.) and *Tremblay v. Daigle*, [1989] 1 S.C.R. 530.

²⁷Harris (1992), at 74-75.

²⁸For the purposes of this project, I assume that the characteristic common to engravings, photographs, and portraits which was seen to justify this exception to the general rule is shared by the fetus. Without undertaking a detailed analysis, I suspect that the common characteristic is the unique nature of the specified works; i.e., that they are singular and, while perhaps capable of being copied, are not capable of being identically re-created even by their creator.

which would not otherwise have come into existence. Unlike a woman in the employment contract situation discussed earlier, the "commissioned" woman provides no other services. The end result, however, is the same. Whether the "surrogacy" is partial (the commissioned woman is inseminated with the commissioning man's sperm and therefore is biologically in the same situation as the employed woman) or full (the contracting woman is implanted with an embryo genetically unrelated to her),³⁰ the commissioned woman's only right is to receive the agreed fee.³¹ This result cannot be avoided by trying to characterize the commissioned woman as an independent contractor, even though both may be regarded as self-employed. An independent contractor works for more than one client at a time, while a commission involves the expectation of exclusive services for the duration of the project.³²

²⁹(...continued)

²⁹The typical surrogacy contract is between a man who contributes his own sperm and a woman who is inseminated with that sperm, contributing her own ovum. The man's wife, who will most likely actually raise the child, is not usually a party to the contract: see Phyllis Chesler (1988), *Sacred Bond: The Legacy of Baby M* (New York: TimesBooks), Appendix A. See also Susan Ince (1984), "Inside the Surrogate Industry," in Rita Arditti, Renate Duelli Klein and Shelley Minden (Eds.) [1989], *Test-Tube Women: What Future for Motherhood?* (pp. 99-116) (London: Pandora Press).

³⁰"Full surrogacy," also known as "IVF surrogacy," appears to have been originally intended for the situation where the commissioning man and woman are both fertile, but the woman is unable to carry a fetus to term. The embryo could equally be created with donor sperm, donor ova, or both.

³¹See, for example, *Baby M, Re*, 525 A.2d 1128 (1987), N.J. Super. Ct., rev'd on other grounds 437 A.2d 1227 (1988), N.J. Sup. Ct. (partial surrogacy) and the case of Anna Johnson (full surrogacy) reported in Murray Campbell (1991), "Ruling Upheld, Surrogate has No Rights," *The Globe and Mail*, Oct. 9.

³²Additionally, independent contractors control their own working conditions and are not subject to the direct supervision of their clients, whereas the conditions under which women in surrogacy arrangements perform their work are typically closely controlled and supervised. For example, the contract between William Stern and Mary Beth and Richard Whitehead required Ms Whitehead to undergo amniocentesis, to abort the fetus on demand of Mr. Stern, to obey all medical instructions, not to smoke cigarettes, drink alcohol, use illegal drugs, or take any medication without written permission. She assumed all the risks of insemination, pregnancy, and birth. If she miscarried before the fifth month, she would only be paid expenses; if she miscarried after the end of the fourth month, or if the baby was stillborn, she would only be paid \$1,000: Chesler (1988), Appendix A. See also Susan Ince (1984).

In each of these situations, works created in the course of employment and commissioned works, the creator of a work may retain ownership of copyright by agreement. However, the typical imbalance in the bargaining strength of the two parties, whether in the artistic or the reproductive sphere, suggests that a creator will only be able to retain these rights if the employer or the commissioning party does not want them.

Finally, there are other potential limitations on the creator/owner's exercise of property rights. Actions which would otherwise be copyright violations are declared not to be infringements if they are carried out for certain purposes specified in the legislation.³³ Among these are the "fair use" exemption discussed by Judith Roof³⁴ and the more restrictive Canadian concept of "fair dealing" for the purpose of, among others, private study and research.³⁵ Whether a particular act falls within the fair use exception depends on a number of factors, including the nature of the work, the purpose of the use, how substantial the use is in relation to the work, and the potential effect on any commercial interests of the owner.³⁶ This determination involves a

³³See, for example, *Copyright Act*, s. 27(2), reproduced in Appendix A. One of the most familiar of these is the right to make one copy of a computer program for backup purposes.

³⁴Roof (1992), at 68-70.

³⁵*Copyright Act*, s. 27(2)(a) reads:

The following acts do not constitute an infringement of copyright:

(a) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary; ...

The "fair use" exception is much broader than the Canadian concept of "fair dealing"; in addition, fair use is an exception to the general rule against copyright infringement, while fair dealing is a defence to a charge of copyright infringement: Harris (1992), at 111.

³⁶Roof (1992), at 68; Harris (1992), at 111-112; Normand Tamaro (1991), *The Annotated Copyright Act 1991* [Tr. Christopher McGuire] (Toronto: Carswell), at 250-265.

balancing of interests. For example, Judith Roof's assessment of anti-abortion legislation as protecting the investment of fathers in fetuses, particularly in a surrogacy situation, involves balancing the interest the pregnant woman may have in terminating the pregnancy with the interest the man has in (be)getting a child.³⁷ The scope of this exception in Canadian law is much narrower, suggesting that "fair dealing" could rarely be called on to justify an infringement of a woman's ownership rights. For example, it would be difficult to justify placing limits on a woman's right to have an abortion on the basis that doing so was analogous to the conditions under which exemptions for the purpose of private research or study are granted. However, the removal of tissue from a fetus, either in utero or following an abortion, without the consent of the pregnant woman (a situation which has taken place),³⁸ might be defended by a physician as fair dealing with the fetus because the portion removed was not substantial (i.e., that he has a "fair dealing" right in relation to the "real" owner, whether that is taken to be either the pregnant woman or the father). The removal of certain kinds of tissue, such as ova or zygotes, for research or study could be seen to come within this exception if genetic materials, rather than the fetus, were

³⁷Roof (1992), at 69. Roof suggests that the typical statute permitting abortions in the early stages of pregnancy, while severely restricting them in later stages, reflects this idea of (in)vestment.

³⁸It is not at all clear, for example, whether the fetal tissue used in experiments to cure Parkinson's disease or Alzheimer's disease was used with the consent of the women from whose bodies the fetuses were removed, nor whether those women even knew that such use was contemplated. If these doctrines can be applied in the reproductive context, they would seem to override any requirement for informed consent in any medical situation. The typical treatment of human tissue either as common property or the property of no one (see Randy W. Marusyk and Margaret S. Swain (1989), "A Question of Property Rights in the Human Body," 21 *Ottawa Law Review* 351-386), and therefore not subject to any notion of informed consent, is seen in situations where women's eggs have been removed during the course of a hysterectomy.

considered to be the work.³⁹ This interpretation, however, would necessarily involve accepting women as first owners, rather than displacing them as Roof argues is the case.

Conclusion

Judith Roof's analysis of the fair use provisions of copyright law and anti-abortion legislation led her to conclude that women are not treated as equivalent to the creators of artistic works or owners of rights in them. In contrast, after examining directly the concept of ownership in copyright law, I concluded that women could be regarded as analogous to creators of fetuses and therefore entitled to exercise ownership rights in relation to those fetuses. However, establishing that women could be regarded as creators and therefore owners in the copyright analogy does not appear to significantly advance women's autonomy in reproductive decision-making because of the way the right to claim ownership is structured. The possibility of transfer of ownership rights by the creator of a work, the number of circumstances under which the creator is deemed not to be the owner of a work, and the exceptions permitting the infringement of ownership rights suggests that women may not often be in a position to exercise those rights.

As Judith Roof has elucidated, locating the rights in the work obscures the connection between the creator and the work: it becomes a "past act of creation,"⁴⁰

³⁹This situation could be covered by the exception if the first answer I proposed to the question "who is the creator of the fetus?" were the correct one.

⁴⁰Roof (1992), at 65-66.

thus providing the basis for the state and/or other non-owners to exercise control over the "creation." Yet it is this element of connection between creator and created which seems most relevant as the source of women's autonomy in procreation. In order for the copyright ownership model to promote women's procreative autonomy, that connection, rather than the fetus itself, would have to become the site and source of the ownership rights.⁴¹

In addition to recognizing rights of ownership, copyright law addresses the relationship between the creator and the work through the doctrine of moral right. Moral rights are personal rights which are exercisable only by the creator of the work. As they are protected independently of ownership rights, moral rights may be a potentially stronger basis on which to argue for women's procreative autonomy. It is to an examination of moral rights, therefore, that I proceed in the next chapter.

⁴¹Rights based on the bodily relationship between a woman and her fetus are not likely to closely resemble our current understanding of property rights. Such rights would probably tend to reflect a concern with inclusion, rather than the concern with exclusion which is a fundamental element of property rights.

CHAPTER FIVE

MORAL RIGHTS OF THE CREATOR

In the last chapter, I examined the implications for women's ability to exercise control over our reproductive lives if Judith Roof's analogy were revised to equate women with copyright owners. After examining the nature and extent of ownership rights granted by copyright law, I concluded that the concept of ownership was not in itself a particularly promising vehicle for promoting women's reproductive decision-making authority because of the many situations in which creators are not entitled to exercise rights of ownership. In this chapter, I go on to examine the possibilities which may emerge from a consideration of the doctrine of moral right. Moral rights are guaranteed to the creator of a work independently of rights of ownership.

Moral rights can only be exercised by creators of artistic works; the creator need never have been an owner and the rights can be exercised regardless of who owns the work. In this way, moral rights are independent of property rights, but are nonetheless powerful legal rights. The basis of the doctrine of moral rights is the bond between the creator and the work, the work being viewed as an extension of the personality of the artist.¹ There is no more intimate relationship between a creator and

¹I have drawn primarily on the following sources for this discussion: Normand Tamaro (1991), *The Annotated Copyright Act 1991* [Trans. Christopher McGuire] (Toronto: Carswell); Mark L. Rudoff (1991), "The Dancer and the Dance: An Essay on Composers, Performers, and Integrity Rights," 29 *Alberta Law Review* 884-904; Christopher Aide (1990), "A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right," 48 *University of Toronto Faculty of Law Review* 211-228; R. D. Gibbens (1989), "The Moral Rights of Artists and the Copyright Act Amendments," 15 *Canadian Business Law Journal* 441-470; and David Vaver (1987), "Authors' Moral Rights – Reform Proposals in Canada: Charter or (continued...)"

her work than that arising from the connection between a pregnant woman and the fetus she nurtures inside her body.² The connection begins with conception and continues through pregnancy, labour, delivery, infancy, primary school, secondary school, and long after our children have become adults. This is what procreation means for women. Locating the source of rights in the connection between the creator and the work, therefore, has the potential to recognize and respect the importance of this connection for women's autonomy.

In the realm of copyright law, moral rights function to protect the original vision of the artist in creating the work and presenting it to the public, as well as emphasizing the continuing importance of the work's creator.³ Being personal in nature, rather than proprietary,⁴ moral rights cannot be sold or otherwise transferred,⁵

¹(...continued)

Barter of Rights for Creators?" 25 *Osgoode Hall Law Journal* 749-786. Aide contends that moral right protects "the idea of an author" which arose in the Romantic period. Historically, authors were seen as imitators of the world around them, and were considered artisans rather than artists. The only protection an author had in law until the end of the Middle Ages was against plagiarism. By the 1500s, attention was also being paid to the relationship between authors and audiences, rather than between authors and the universe; in this view, authors were expected to instruct their audiences. The Romantic period saw a shift from the author's relationship to the audience to the relationship between the author and the work. According to Aide, Romanticism celebrated genius and placed a great emphasis on the unity of the author and the work, an emphasis which was also influenced by the emerging philosophy of individualism. This identification of author and work forms the basis for the doctrine of moral right.

²For some women or at some times, pregnancy may be undesirable and negative; nevertheless, it is an intimate relationship. Whether or not women wish to maintain and foster this connection, or terminate it, the connection between fetus and pregnant woman exists.

³Vaver (1987), at 753.

⁴While this is the generally accepted view, it is not unanimous. See Rudoff (1991) for an argument that the right of integrity is a property right, discussed *infra*.

⁵Canadian law allows the waiver of moral rights in favour of another. The implications of this position will be discussed below.

although the creator can consent to what would otherwise be an infringement of them.⁶

A number of interests of the creator of a work are protected by the doctrine of moral rights: the right to "paternity,"⁷ the right of integrity, the right of disclosure, and the right of withdrawal. These rights are not universally recognized and countries which do recognize the doctrine do not necessarily include all of these rights.⁸ Canada, for example, has recognized only the moral rights of paternity and integrity.⁹ As my interest in the doctrine of moral rights is its utility as a potential analogy, rather than in any particular formulation of the doctrine, all four of these rights will be examined.

⁶See, for example, *Copyright Act*, R.S.C. 1985, c. C-42, as am. S.C. 1988, c. 15, s. 28.1.

⁷The very term "right to paternity" lends support to Roof's analysis of the similarities between copyright and anti-abortion legislation. Christopher Aide (1990) discusses the Romantic metaphor of author as creator, a metaphor which, he says, implies divinity. This is the basis for the belief that authors were somehow superior human beings. Describing a right to have one's work attributed to oneself as a "paternity" right can be understood if the inspiration for creativity is seen to come from God (the Father), particularly since the right was formulated at a time when women were not recognized as artists.

⁸France protects all of them. Signatories to the Berne Convention on copyright, one of which is Canada, must protect the rights of paternity and integrity: Aide (1990), at 223-224. England and the United States have historically been antagonistic to the concept of moral rights, although creators have been able to achieve some protection of these rights through a variety of tort actions. In the mid-1980s, three U.S. states enacted legislation which addressed aspects of moral right: New York concerned itself with damage to an artist's reputation, while California and Massachusetts emphasize the public interest in the preservation of cultural artifacts rather than the rights of creators: Gibbens (1989). Proposals to include protection for moral rights have been made in England: Aide (1990), at 222, and the impetus has been increased by the necessity to harmonize domestic laws throughout the European Community.

⁹The relevant provisions of the *Copyright Act* read as follows:

14.1(1) The author of a work has . . . the right to the integrity of the work and . . . the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

28.2(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified; or

(b) used in association with a product, service, cause or institution.

The right to paternity most broadly includes the following: the right to have one's name attached to a work, to use a pseudonym in relation to a particular work, or to issue a work anonymously; the right to prevent the false attribution of one's work to another; and the right to disclaim a false attribution of work to oneself or remove one's name from a work which has been distorted or mutilated.¹⁰ If these rights could be taken to apply to human reproduction, a woman as the creator of a fetus would be entitled to decide whether her connection with the fetus would be identified. The right to have one's name attached to a work could entitle a woman to claim a connection with a child she had placed for adoption, for example. The right to prevent false attribution of one's work to another could similarly be invoked to prevent an adopting or commissioning woman's name from appearing on a birth registration as the mother of a child in the place of the woman who gave birth. Conversely, the right to disclaim a false attribution could be used by an adopting or contracting woman to ensure that the woman who gave birth to the child was recognized on the birth registration as the mother.

Limitations may be placed on the exercise of the right of paternity. In Canada, for example, creators are only entitled to exercise the moral right of paternity if doing so would be "reasonable in the circumstances."¹¹ This limitation has been criticized

¹⁰Canadian law does not include the right to disclaim: Gibbens (1989), at 450.

¹¹A court might agree with an employer's contention that it is not reasonable for an employee to be identified as the author of a work created during the course of employment. This example is given by Vaver (1987), at 761. Lesley Harris (1992), *Canadian Copyright Law* (Whitby, Ont.: McGraw-Hill Ryerson Limited) at 103, states that an author's paternity right depends on whether the author has a copyright interest in the work. If this is true, no one who creates works on commission or in the course of employment is entitled to be recognized as the creator of the work, a proposition which would seem to substantially defeat one of the main purposes of the doctrine of moral rights, protection of the bond between the creator and the work.

for its circularity¹² and for leaving the determination of the existence of a moral right in a particular instance up to the courts to decide.¹³ Such a reasonableness limitation might prove a major impediment to women in the exercise of their moral rights.¹⁴ The criterion of "reasonableness" itself has been challenged in many areas of law as being based on an understanding which has largely excluded, for example, the experience of women.¹⁵

The second right included within the doctrine of moral right is the right to integrity, which has two branches: the right to protect the integrity of one's honour and reputation and the right to protect the integrity of one's work.¹⁶ The right of integrity is infringed by any treatment or use of a work which would injure the creator's honour and reputation, either directly or indirectly. Any change to a painting, sculpture, or engraving is deemed to be prejudicial to the reputation of its creator

¹²Vaver (1987), at 780.

¹³Aide (1990), at 225.

¹⁴A court might determine that the claim of a woman placing her child for adoption to have her name continue to be registered as the mother of the child to whom she gave birth after an adoption has been finalized is an unreasonable claim. In Canada, once an adoption order has been granted, the birth registration is "corrected" to show the adopting parents in place of the genetic parents, thus eradicating the connection between the genetic parents and the child.

¹⁵Feminists in particular have challenged the application of the fictive "reasonable man" test in a variety of areas of law, most notably with respect to the defence of self-defence in homicide cases. The legal "objective" understanding of what constituted reasonable behaviour in defence of self until very recently excluded the experience of many women who killed the men who battered them: *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.). See, for example, Kent Greenawalt (1992), *Law and Objectivity* (New York: Oxford University Press) for a review of feminist and other critiques.

¹⁶Aide (1990), at 226. Since the starting point for these arguments is Judith Roof's equation of the fetus with an artistic work, it is not necessary to address the question of whether the doctrine of moral right encompasses works in progress.

because the altered work no longer presents the artist's intended vision.¹⁷ In the case of other kinds of works, the creator must demonstrate that the use made of the work is prejudicial to the creator's honour or reputation. The broadest formulations of the right accept the creator of the work as the only legitimate arbiter of the effect of the particular infringement, applying a subjective test to determine the question.¹⁸

Narrower formulations of the right appear to incorporate an objective test, or reasonableness standard.¹⁹ In the reproductive context, a broad version of the right of integrity of the author could enable a pregnant woman to determine, according to her own criteria, what, if any, testing, screening, or interventions she would permit during her pregnancy and labour. Such a right could also extend to protect decisions made by women in their rearing of children, so long as the decisions were reasonably arrived at.²⁰

In some formulations of the right of integrity, certain kinds of uses of the work -- changes in its physical location or its surroundings and good faith efforts to preserve

¹⁷Aide (1990), at 226.

¹⁸The Berne Convention gives authors "the right to restrain any distortion, mutilation, or other modification of the work that would be prejudicial to his honour or reputation": Vaver (19867), n. 10. This formulation suggests that the focus of the right is the possibility of prejudice. Aide (1990), at 226, notes that this view reflects the Romantic idea of the creator as being the only legitimate arbiter of taste concerning their work, a view which has been accepted by the courts. See, for example, *Snow v. Eaton Centre* (1982), 70 C.P.R. (2d) 105 (Ont. H.C.), discussed in Tamaro (1991), at 287, where the court held that the judgment of the author, reasonably arrived at, should be respected.

¹⁹Rudoff (1991) argues that the current Canadian formulation of the right, *Copyright Act*, s. 28.2(1), has probably eliminated the right to prevent an infringing use, leaving the right only to claim damages for injury already caused.

²⁰For example, a rearing parent (male or female) would be entitled to choose palliative care over aggressive chemotherapy or radiation treatment for a terminally ill child without risking losing custody of the child to child protection agencies so a doctor or hospital could impose a different form of treatment.

or restore the work -- are specifically excluded from the ambit of the creator's right to the integrity of the work.²¹ If the fetus is considered to be a work, an equivalent to this exempting provision in the reproductive context could justify overriding the decisions of pregnant women about the conduct of their pregnancies in order to protect the integrity of the fetus. The exemption of a change in the physical location or surroundings of the work could, in principle, authorize the removal of a fetus from a woman seeking an abortion and its transfer to the uterus of another woman or to an artificial womb. The preservation/restoration exemption could be used to justify the supervision and control of the behaviour of pregnant women, as well as authorizing surgery on the fetus without the consent of the woman in whose body the fetus is.

The requirement that changes to a work be prejudicial to the honour or reputation of the creator can also be understood as incorporating a "reasonableness" test. If the distortion, mutilation, or modification does not "change the essence, character or impact of the work," then, however offensive the creator may find the change, it would not be considered reasonable for the artist to object.²² In the reproductive context, this kind of reasonableness criterion could limit a woman's ability to refuse to undergo such procedures as ultrasound or amniocentesis screening, induction of labour, or Caesarean section, since these procedures would not affect the "essence" of the fetus. As is evident from the broad version of the right of integrity

²¹See, for example, the Canadian provision in *Copyright Act*, s. 28.2(3). This provision can be seen as similar in nature to the fair use exceptions on the exercise of copyright ownership rights.

²²See Rudoff (1991), at 902. This limitation appears to incorporate the legal principle of "de minimis non curat lex": the law does not deal with trivialities.

described above, there is no argument in principle against leaving it up to the creator, whether artist or women, to decide whether something affects them prejudicially.

A third aspect of the doctrine of moral right is the right of disclosure, which permits creators to determine whether or not to make a work public and the circumstances under which any public presentation of the work will be made.²³ This right can be analogized to the right of a woman to decide whether or not to have an abortion and under what circumstances to bear a child. A decision not to make a work public because, for example, the creator is not satisfied with its quality can be likened to a woman's decision to abort a fetus which she perceives (or is persuaded to perceive) as "defective" or otherwise undesirable.²⁴ The right to determine the circumstances in which an artistic work is made public is relevant to adoption as well as abortion. Many women decide to place for adoption children they do bear because they do not regard as satisfactory the circumstances into which their children would otherwise be born. This is also the reason many women decide to abort.²⁵ An equivalent to the right of disclosure could thus provide positive support for women's ability to decide whether and under what circumstances to raise children.

²³Gibbens (1989).

²⁴I do not address the question of whether the existence of a right to abortion ought to permit the abortion of fetuses because they are "defective" or of the "wrong" sex, for example, but see Janice T. Tait (1986), "Reproductive Technology and The Rights of Disabled Persons," 1 *Canadian Journal of Women and the Law* 446-455, and Nivedita Menon (1992), "Abortion and the Law: Questions for Feminism," 6 *Canadian Journal of Women and the Law* 103-118, respectively.

²⁵See, for example, Rosalind Pollack Petchesky (1990), *Abortion and Woman's Choice: The State, Sexuality, & Reproductive Freedom* (Rev. Ed.) (Boston: Northeastern University Press), Ch. 10; and Susan Sherwin (1992), *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press).

The fourth element of the doctrine of moral right is the right of withdrawal. This right permits creators to change their minds and modify a work which has already been published or remove it from the public whether or not the artist is or ever was the owner of copyright in the work.²⁶ The only restriction on this right is the requirement that the author compensate the copyright owner for the expenses associated with the modification or withdrawal.²⁷ A similar procreative right of withdrawal could permit a gestating woman in a "surrogacy" arrangement or a birthing woman in a private adoption to decide, once the baby had been born, not to relinquish the baby or to reclaim the baby from the commissioning party.²⁸ A procreative right of withdrawal would permit women to reconsider decisions, made prior to or during pregnancy, and decide to raise the children they bear. Such a right of withdrawal might also be invoked to support the decision of a woman to allow her severely compromised newborn to die.²⁹

²⁶Aide (1990), at 227. The right of withdrawal probably does not include a right to destroy the work. An analogous right in the reproductive context would probably not encompass infanticide.

²⁷These expenses could be substantial, putting this right beyond the ability of an author to exercise.

²⁸A somewhat comparable right already exists in the reproductive context. In many jurisdictions, a woman who has consented to the adoption of a child she birthed may revoke that consent (within certain time limitations) and reclaim the child: see, for example, *Child and Family Service Act*, R.S.O. 1990, c. 11, s. 137(8).

A requirement that the woman reimburse the expenses of the men or couples who would otherwise have received the child would probably render such a right illusory. Reimbursement of expenses has not been made a condition of revoking consent to adoption, I suggest, because adoptions were generally arranged by state agencies and expenses were minimal. With the shift to private adoption and the involvement of private sector lawyers and adoption agencies, it is probably only a matter of time until a couple expecting to receive a child through a private adoption arrangement sues for reimbursement a woman who revokes her consent.

²⁹Equally, the broad version of the right of integrity of the creator could be invoked in support of a woman's decision to seek all possible medical assistance for her child.

According to the doctrine, as traditionally understood, moral rights are personal to the creator, incapable of being transferred, and perpetual. Following the death of the creator and any heirs, the law may provide for the creator's moral rights to pass to a state authority, which is then entitled to enforce them.³⁰ The establishment of public bodies to enforce these rights after the creator's death challenges the view that moral rights are an extension of the personality of the creator. If personal to the creator, moral rights would terminate on the death of the creator.³¹ The purpose of passing on moral rights to public agencies, then, reflects a state interest in the preservation of a society's cultural artifacts.³² Anti-abortion legislation and the regulation of the conduct of fertile and pregnant women could, similarly, be regarded as the expression of a posited public interest in the preservation of the fetus. The transfer of moral rights to a public body attaches rights to the work, once again obscuring the connection between author and work.

The principle of the inalienability of moral rights is predicated on their character as personal rights. However, Mark Rudoff argues that moral rights are a species of economic, or property, right, rather than a personal right.³³ In order to earn an income from their creative work, artists must be known to be producing that work (the paternity right). The building and maintenance of a good reputation can be

³⁰Gibbens (1989), at 462.

³¹As with any other personal right, moral rights can continue to be exercised on behalf of the creator by the creator's estate.

³²Gibbens (1990), at 462-463.

³³Rudoff (1991).

compared with the goodwill a proprietor builds up in a business. In both situations, damage to one's reputation (the integrity right) has economic consequences. The right of integrity, according to Rudoff's analysis, is more aptly likened to a statutory restrictive covenant which attaches to the creation, rather than the creator. In his view, "moral rights stand for exactly what we think of as the fundamental property entitlement: the right to exclude others from interfering with what we own."³⁴ Rudoff finds support for his argument that moral rights are proprietary in nature in the following: while continuing to prohibit the assignment of moral rights, Canada has permitted waiver of the rights, in whole or in part³⁵; moral rights can only be exercised by the author and their heirs; and moral rights endure only for the duration of copyright. In linking the existence of moral rights to the duration of copyright, Rudoff concludes that moral rights in Canada have been defined as an aspect of copyright, rather than as independent rights. As copyright is a proprietary interest, any right which depends on copyright for its existence is also a proprietary right.

Whether or not moral rights are proprietary or personal, the possibility of waiver attaches to them an economic element and commodifies them. It is in the interest of purchasers of creative works, such as publishers and record companies, for creators to waive their moral rights; the greater bargaining power of the companies

³⁴Rudoff (1991), at 889.

³⁵*Copyright Act*, s. 14.1(2). Prior to the amendments of 1988, moral rights were taken to be both inalienable and perpetual. A Parliamentary Subcommittee in its report, *A Charter of Rights for Creators*, recommended that moral rights be fully alienable: Vaver (1987). The thrust of the report, in Vaver's assessment, was to place freedom of contract above all other considerations, including the consequences of inequality in bargaining strength between artists and the entrepreneurs who seek to exploit their works. Despite the new provision authorizing it, Vaver suggests that a waiver of moral rights in toto would not be permissible under the terms of the Berne Convention on Copyright.

means they will almost certainly obtain those waivers.³⁶ In the reproductive context, waivers of analogous reproductive rights are already being sought and obtained. Women who enter contracts of "surrogacy" explicitly waive a number of rights: to custody, by agreeing to the termination of their parental rights following the birth of a child; to consent to or refuse particular medical tests and treatments; to regulate their own conduct during pregnancy.³⁷ Women who can only obtain medical "assistance" by consenting to a Caesarean section or an abortion by "consenting" to be sterilized could be taken to have waived their moral right to refuse surgery. Women who are dependent on men or on the state for their subsistence could be viewed as having waived their moral rights in exchange for support in the same way as women could be said to have sold their ownership rights. If this more economic property-based concept is the future direction of moral rights, the potential of this notion to promote women's reproductive autonomy will be undermined.

³⁶Vaver (1987) points out that up to 90% of contracts in the arts field are standard-form contracts drawn up by company lawyers; very few artists in any field have the economic stature to bargain on equal terms.

Unlike the assignment of copyright, Canadian law does not require a waiver of moral rights to be in writing, but allows it to be inferred from the circumstances. In addition, unless there is an express provision to the contrary, a waiver of moral rights in favour of the copyright owner can be further transmitted without the consent of the creator if the copyright owner transfers their interest. The failure to require waivers to be in writing and to detail the extent of the waiver may suggest either that moral rights are not regarded as particularly important or an expectation that moral rights will automatically be waived whenever copyright is assigned.

³⁷See Susan Ince (1984) "Inside the Surrogate Industry," in Rita Arditti, Renate Duelli Klein and Shelley Minden (Eds.), [1989] *Test-Tube Women: What Future for Motherhood?* (pp. 99-116) (London: Pandora Press) and Phyllis Chesler (1988), *Sacred Bond: The Legacy of Baby M* (New York: TimesBooks), Appendix A, for examples.

Conclusion

In this chapter, I examined the doctrine of moral right to determine whether the rights guaranteed to the creator of an artistic work could suggest a basis for analogous rights relating to procreation. All four rights, the rights of paternity, integrity, disclosure, and withdrawal, explicitly address aspects of the relationship between the creator and the work and were found to suggest analogous rights in the procreative context. In their most expansive form, these rights provide the creator with the ability to control almost every aspect of the creative process, including decisions about whether and when to make their work public. Some formulations of the right of integrity, however, were found to resemble economic rights normally associated with owners rather than creators and these versions of the right are therefore subject to the same criticisms as those which apply to ownership rights. These limitations would have to be avoided in order for procreative moral rights to be effective.

In the next chapter, I assess the usefulness of the analysis of copyright law to the goal of improving women's autonomy in procreative decision-making.

CHAPTER SIX

CONCLUSIONS

Procreation is a process which can consume years of a woman's life. Women have always sought to control the conditions under which we engage in it. Women's control of procreation has been achieved by various means: abortion or infanticide when unwanted pregnancy or birth has occurred,¹ by various contraceptive techniques when control of the timing of childbearing is desired, and by sterilization when a woman wishes or needs to prevent childbearing entirely.²

Judith Roof examined one of these means women use to control procreation: abortion.³ She suggested that women's right to terminate pregnancy has been restricted in law because the fetus appears to be treated as a form of property in which the father of the fetus and/or the state can assert rights of ownership of copyright to the exclusion of the (pregnant) woman. Roof concluded that pregnant women have not been considered to be either creators or owners. Accordingly, she has not been permitted to exercise any associated (copy)rights. Roof appeared to have come to this conclusion by working backward from the outcome in search of a cause: that is, a woman's actions are restricted, therefore she has no rights, therefore she is not an

¹It is important to remember that a desired pregnancy may become unwanted because circumstances have changed.

²Linda Gordon (1990), *Woman's Body, Woman's Right: Birth Control in America* (2nd Ed.) (New York: Penguin Books).

³Judith Roof (1992), "The Ideology of Fair Use: Xeroxing and Reproductive Rights," 7(2) *Hypatia*, 63-73.

owner. My goal in this thesis has been to work forward from the concepts of copyright/ownership and the moral rights of the creator to see whether an analysis of the concepts themselves might yield useful insights for working toward an understanding of procreation in which women would be entitled to exercise rights akin to copyright or moral rights. I examined what is necessary to constitute one as an owner or a creator under copyright law and what rights copyright law authorizes creators and owners to exercise. I discussed whether, by analogy, it can be argued that women are entitled to exercise those rights; and, if so, what the practical consequences might be if women can be viewed as equivalent to creators or owners. I concluded that women can be conceptualized as the creators and therefore the first owners of rights attaching to the fetus.

Copyright law entitles the creator of a copyrightable work to ownership of two kinds of rights with respect to the work: economic or proprietary rights and moral or personal rights. The creator of a copyrightable work is the first owner of the property rights which attach to the work. I argued that the creator of a fetus is the woman who transforms the idea of a fertilized egg into a fetus and later a child and an adult through her effort and labour in pregnancy, childbirth, and childrearing. As the creator of the fetus, the woman is the first owner of the rights attaching to it. However, the employment and commissioned work exceptions to the first ownership rights and the other limitations on these rights render the creator/owner analogy a somewhat futile route through which to pursue women's reproductive autonomy. I concluded that, even when women can be seen as equivalent to copyright owners, reliance on principles of

property ownership which underlie copyright would be of limited utility in assuring greater procreative autonomy for women. I therefore proceeded to consider whether the doctrine of moral right, which guarantees to the creator of the work certain exclusive personal rights, had any potential for advancing women's procreative autonomy.

The doctrine of moral right appears to be a more promising avenue to explore because of its focus on the bond between the creator and the work. This focus indicates a concern for, and recognition of, the process of creation and the author's relationship to the process, as well as to the work. I concluded that the rights of paternity, disclosure, and withdrawal suggested the potential for analogous rights in procreation to shift the focus from the fetus back to the pregnant woman. A right analogous to the right of disclosure could extend beyond pregnancy to include decisions about whether to bear a child or whether to rear a child. The right of integrity protects the creator's right to make decisions about the work based on their own criteria and priorities; however, care must be taken to ensure that the aspect of the right of integrity which relates to the work itself does not come to resemble the economic rights associated with ownership.

The strength of the doctrine of moral right as the basis for formulating procreative rights is its focus on the bond between creators and their works. However, the ability to apply the concept of the moral rights of the author as a direct analogy to women as creators of fetuses may be limited. The doctrine is not universally recognized and even where it is recognized, there is no consensus about the moral

rights which are recognized and the extent to which they are protected. The potential of the doctrine of moral right to contribute to women's greater procreative rights is substantial, centring as it does on the creator and the creator's connection with the work. The conflation of moral rights with rights of ownership can be avoided by maintaining a steady focus on the creator, rather than on the work.

This analysis of the concepts of ownership and the doctrine of moral right contained in copyright law suggests some possibilities for increasing women's procreative autonomy. It is possible for women to be considered to be creators of fetuses; as creators, it is also possible for women to be thought of as the first owners of the proprietary rights attaching to fetuses. Considered as the creators of fetuses, women's autonomy in relation to conception, pregnancy, childbirth, and childrearing could be extended through rights analogous to the moral rights accorded creators under copyright law. However, as with other creators, the moral rights of women may be rendered meaningless in the face of more powerful interests. The concept of moral rights provides a promising position from which to argue, but unless the state recognizes the supremacy of the moral rights of creators, women and other creators are left with little protection of the relationship between themselves and their creations.

APPENDIX A

RELEVANT PROVISIONS OF

COPYRIGHT ACT, R.S.C. 1985, c. C-42

3.(1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right,

- (a) to produce, reproduce, perform or publish any translation of the work,
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
- (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered,
- (e) ... in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work by cinematograph, if the author has given the work an original character,
- (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication, and
- (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work ... other than a map, chart or plan or cinematographic production that is protected as a photograph;

and to authorize any such acts.

6. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after the death of the author.

12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for a period of fifty years from the date of the first publication of the work.

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

(2) Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, ...

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to territorial limitations, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent.

14. (1) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein ... is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

(4) Where a waiver of any moral rights is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

14.2(1) Moral rights in respect of a work subsist for the same term as the copyright in the work.

(2) The moral rights in respect of a work pass, on the death of its author, to

- (a) the person to whom those rights are specifically bequeathed;
- (b) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed;

or

- (c) where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies intestate.

27.(1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do.

(2) The following acts do not constitute an infringement of copyright:

- (a) any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary; ...
- (b) where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, case, sketch, plan, model or study made by the author for the purpose of the work, if he does not thereby repeat the main design of that work ... ;
- (c) the making or publishing of painting, drawings, engravings or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place or building ... ;
- (d) the publication in a collection, mainly composed of non-copyright material, intended for the use of schools ... ;
- (e) the publication in a newspaper of a report of a lecture delivered in public ... ;
- (f) the reading or recitation in public by one person of a reasonable extract from any published work;
- (g) the performance without motive of gain of any musical work at [an exhibition or fair that is funded or presented by a level of government];
- (h) the reproduction ... for deposit in an institution ... ;
- (i) the disclosure, pursuant to the *Access to Information Act*, of a record ... [or under provincial legislation];
- (j) the disclosure, pursuant to the *Privacy Act*, of personal information ... [or under provincial legislation];
- (k) the making of a copy of a recording [for the National Archives];
- (l) the making by a person who owns a copy of a computer program ... of a single reproduction [to make it compatible with a particular computer];
- (m) [copying computer program for backup purposes].

(3) [exemption from requirement to pay compensation for public performance of copyright musical work by a charitable organization for charitable purposes]; ...

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

28.2(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

(3) For the purposes of this section,

- (a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or
 - (b) steps taken in good faith to restore or preserve the work
- shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

41. An action in respect of infringement shall not be commenced after the expiration of three years immediately following the infringement.

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STATUTES

Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, ch. 11.

Children's Act, R.S.Y. 1986, c. 22.

Copyright Act, R.S.C. 1985, c. C-42, as am. S.C. 1988, c. 15.

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