

Memorandum

To: UCLA Colleagues and Williams Project Works in Progress Attendees
From: Sonia K. Katyal
Re: *The Intellectual Commons of Gender*
Date: March 7, 2007

Greetings and thanks so much for inviting me to lead this presentation. As you'll see, the ideas for both accompanying papers stem from my fascination with the way in which theories of property and intellectual property inform the legal and social constructs of sex, gender, sexual orientation, and provide us with new theoretical models for the future.

Towards that end, I have enclosed a precis of a work in progress, *The Intellectual Commons of Gender*, and a previous article entitled *Performance, Property, and the Slashing of Gender in Fan Fiction*. Both of these pieces are meant to build off of each other; while the *Performance* piece looks at intellectual property (specifically fan fiction) through the lens of gender theory, the *Intellectual Commons* piece does just the reverse: here, I explore how traditional property and intellectual property theory informs our legal thinking on gender expression and identity. In doing so, these papers draw on classic theories of intersectionality, in addition to contemporary scholarship on cyberfeminism and new media.

My basic argument in the *Intellectual Commons* paper is both descriptive and normative in character, and concerns the metaphor of the commons—a nonexclusive, public resource in which everyone has access to its attributes and resources. In this paper, which is still somewhat preliminary in nature, I posit that the relationship between sex and gender within Title VII and elsewhere is very similar to the architectural constructs of property and intellectual property: the law treats sex as a largely fixed, bordered, and stable type of *property*, whereas gender is treated more like a malleable, nonrivalrous, and borderless type of *intellectual property*. This suggestion carries another, more normative, implication: instead of insisting on rigid polarities of male and female, I argue that the law should embrace a broader notion of gender as a type of intellectual commons, that is that it exists as a type of resource that is both nonrivalrous and nonexclusive in nature, and one that embraces the notion of fluidity and multiple possibilities for expression.

I earnestly look forward to our discussion and hearing your thoughts and suggestions.