Foreword
By Justice Sandra Day O’Connor

As an Arizona state legislator and appellate judge, I did not have much opportunity to think about copyright issues, due to the federal nature of the subject matter. That changed when I joined the Court in 1981. My first exposure to copyright was a difficult case. It was the Sony Betamax dispute.¹ The Court wrestled with the case for two years, through shifting majorities and several opinions by different Justices. The difficulty the Court faced in Sony was not new: The Court’s two prior efforts to confront the fair-use issue, Benny v. Loew’s, Inc.,² and Williams & Wilkins Co.,³ ended with affirmation by an equally divided Court. I was assigned to write an opinion the year following Sony, in Harper & Row,⁴ involving President Ford’s soon-to-be-published memoirs. The result was only slightly less contentious, with a 6-3 vote.

The difficulty with copyright has extended beyond fair use: In the same year as Harper & Row, the Court split 5-4 in a case involving the derivative works exception.⁵ In Lotus v. Borland,⁶ there was another affirmation by an equally divided Court, as the Court struggled to come to grips with the thorny issues presented by software copyright. And just last year, in the Grokster case,⁷ while there was a unanimous opinion on one point, that point was not the major focus of the briefing or argument. The difficulty of deciding those other issues was reflected in two concurring opinions, each with three members, the three others not joining either opinion.

⁷ 125 S. Ct. 2764 (2005).
It would be exaggeration, though, to think that all copyright cases are so contentious: The Feist\(^8\) opinion was decided 9-0, as were Chief Justice Rehnquist’s opinions on the standard for awarding attorney's fees\(^9\) and on the right to a jury where statutory damages only are sought.\(^10\)

Clearly, copyright is a field of considerable complexity and importance. I am, therefore, pleased that Bill Patry has written this thorough new treatment of this fascinating subject. I first became familiar with Bill’s work in 1985, in drafting the Harper & Row opinion. I trust that this book will be one of assistance to those seeking answers in a difficult area of law.

Foreword
A Quartet of Courageous Female, Jewish Lawyers

In our current environment, where hatred, anti-Semitism, and misogyny are actively and constantly encouraged at the highest levels of government, it is important to point to those who devoted themselves to making the world a better place, to those, in the words of a former leader, who led lives free “from ideology and small thinking, prejudice and bigotry” and who “appeal[ed] not to our easy instincts but to our better angels.”

Below are four female, Jewish lawyers who contributed to improving society at large and copyright law in particular. There are a number of connections among them besides being female, Jewish lawyers who worked in copyright law: all were Columbia Law School graduates, and two of them, Harriet Pilpel and Nancy Wechsler worked at the same firm and were active together in women’s rights issues. Harriet Pilpel and Thea Zavin, while not working together, co-wrote books with each other on both copyright law and on women’s issues. All, despite their stellar academic achievements, were spurned by the legal establishment due to being female and being Jewish.

Harriet Pilpel

Harriet Pilpel was born Harriet Fleischl, in the Bronx on December 2, 1911. She died of a heart attack in Manhattan on April 23, 1991. She graduated from Vassar College, Columbia University, and Columbia University Law School (in 1936) where she was second in her class. Her accomplishments were not enough to overcome the misogyny of the federal judiciary, which refused her the clerkship that others who finished in her ranking had regularly achieved. On graduation she therefore joined the firm of Greenbaum, Wolff and Ernst, one of a number of Jewish law firms founded in reaction to the open anti-Semitism of Wall Street and other “white shoe” law firms. She served as general counsel of Planned Parenthood and of the ACLU. She was a member of the Kennedy and Johnson Commissions on the Status of Women. An entry in the Jewish Women’s Archive states:
Pilpel became deeply involved with reproductive freedom litigation, first in the birth control movement and then in the abortion rights movement. Among the birth control cases she worked on with Ernst and others were State v. Nelson (1940), decided in the Connecticut Supreme Court, and Tileston v. Ullman (1943), Poe v. Ullman (1961), and Griswold v. Connecticut (1965), all of which were decided by the Supreme Court of the United States. Pilpel authored Planned Parenthood's amicus curiae briefs in the latter two cases.

Pilpel's career encompassed both the pre-Griswold phase of birth control advocacy and the extraordinary developments that would link the Supreme Court's rulings on contraception to the abortion issue. Thus, she could lay claim to having worked closely with Margaret Sanger and other birth control advocates in their efforts to repeal or overturn state-level birth control laws, and also to having strategized with Linda Coffee, Sarah Weddington, and numerous others concerning Roe v. Wade and related cases. Pilpel was profoundly influenced by arguments that the right to privacy holding in Griswold—the state may not peek into the bedroom and forbid the use of birth control—could be extended to contend that a woman had a fundamental right to abortion, and she participated in the swell of activism and litigation that sought to link the two issues in legislatures, in courts, and in the public imagination. Finally, as the abortion issue came to the forefront in the late 1960s and early 1970s, she helped to shift the emphasis of activists from reform to repeal of legislative restrictions on abortion.

With Thea Zavin (see below) she wrote the 1952 book “Your Marriage and the Law.” Showing her breadth of interest and her great expertise in copyright, with Ms. Zavin she also published, in 1960, “Rights and Writers: A Handbook of Literary and Entertainment Law,” and that same year with Morton David Goldberg “A Copyright Guide.” In 1965 with Minna Post Peyser, she wrote “Know Your Rights: What a working wife should know about her legal rights.” She regularly published in Harper's magazine and was a frequent sparring partner of William Buckley's on his “Firing Line” television show.

The connection between Ms. Pilpel’s work on reproductive rights, her copyright and First Amendment work, and her Jewish upbringing was nicely captured in an article in Lilith magazine. The article notes her criticism of the Warren Burger Court:

> [T]he Court majority consists of middle-aged or elderly gentlemen of the upper middle class ... [who] are not completely comfortable about sex and therefore objectify their subjective
concerns” and who display “conventional middle class distaste for the vulgar and profane.” “I’m all in favor of good taste,” she went on, “but I don’t think it should be enshrined as a matter of constitutional law” — precisely because she understood that “taste” so often works to reproduce the privilege of “gentlemen of the upper middle class.”

Raised as a Reform Jew, active as an adult in the Ethical Culture Society, and married to an employee of the Joint Distribution Committee, Pilpel, like most lawyers, never seems to have attributed her commitments in the field of obscenity law to her Jewishness. But she emphasized the way that prosecutors use “obscenity charges as a means of suppressing views which are dissident, satirical, irreverent, or merely unpopular” — an argument with particular resonance for American Jews who were self-conscious about their vulnerability as members of a demographic minority. Contraception was also personal, given her commitments to her career and family: “Birth control and the freedom of women to choose whether or not to have children was of burning interest to me,” she said, “partly because I always wanted to have a career and children, but if I had no control over when I had the children it wouldn’t have been possible for me to plan my career.” It may be just a historical accident that the battles begun at the turn of the 20th century by Emma Goldman and Margaret Sanger to deliver safe and effective contraception to Jewish immigrant women were fought and largely won, decades later, by a professionally empowered American Jewish woman. But if so, it is an enormously satisfying one.¹

Barbara Ringer
Barbara Ringer was born May 29, 1925 in Lafayette, Indiana. Her mother was the only woman in the University of Michigan School of Law Class of 1923. Ms. Ringer died on April 9, 2009 in Bath County, Virginia. She was a Phi Beta Kappa graduate of George Washington University in 1945, and received her MA from the same school in 1947. She graduated from Columbia Law School in 1949, where she was one of only a few women in her class. Despite her great academic credentials, she couldn’t get a job even as a government lawyer, and so she joined the Copyright Office as an examiner after graduating. She then served as head of the Renewal and Assignment Section; the assistant chief, acting chief and chief of the Examining Division; assistant Register of Copyrights for Examining; and the assistant Register of Copyrights. She became the first woman to serve as the Register of Copyrights but only after she successfully sued the

Library of Congress for sex and race discrimination.

In the suit, brought in 1971 after she was passed over for Register in favor of yet another (and lesser qualified) white male, Ringer also pointed to her advocacy for the rights of African American employees as evidence of racial discrimination, a problem in the Library both before and long after the suit.\(^2\) Ms. Ringer worked as the Director of the Copyright Division of the United Nations Educational, Scientific, and Cultural Organization in Paris from 1972 to 1973, while her litigation took place. She returned as Register in 1973, and retired in May 1980. She briefly returned as an interim Register in 1993.

There is no way to describe the stunning contributions made by Ms. Ringer in her 33-year career at the Copyright Office. To say, accurately, that she was the architect of the 1976 Act is to woefully underplay her role: she was architect, engineer, carpenter, bricklayer, permit getter. There would have been no 1976 Act but for her. She cajoled private sector interests, Congress, the Executive Branch and did all the hard work, selflessly and without the need for recognition that her male counterparts so often sought. For her leadership in the revision of the U.S. copyright law, Ringer received the President’s Award for Distinguished Federal Civilian Service, the highest honor designed for extraordinary achievement in federal service, in a White House ceremony in 1977. Ms. Ringer was simply the greatest copyright lawyer of all times in all countries, and a tireless advocate for women and minority groups. I treasure the discussions we had about copyright law, especially about our favorite topic, the metaphysics of conceptual separability.

**Nancy Wechsler**

Columbia University has the following well-written entry on Ms. Wechsler, although it fails to note her connections with Harriet Pilpel both at the Greenbaum law firm and on women’s rights litigation:

Nancy F. Wechsler, who graduated at the top of the Columbia Law School Class of 1940 at a time when few women were admitted, died July 27. She was 93.

Wechsler, a noted champion of civil liberties, was also a prominent copyright and intellectual property lawyer for seven decades.

Wechsler began her studies at the Law School in 1937, just 10 years after women were first admitted. She earned a James

Kent Scholarship, awarded in recognition of outstanding academic achievement. She also won the John Ordronaux Prize, awarded annually for overall excellence and usually recognizes the student achieving the highest academic average in each graduating class.

However, Wechsler soon found her accomplishments did not matter when she tried to get a job, as she recalled years later in an interview.

“At one firm, the receptionist told me they’d hired female stenographers only two years ago, and they were not about to hire women lawyers,” she said. “At another firm, one of the partners who knew my father emerged from his office to tell me, very politely, but words leaving no doubt, that women had no place in this firm.”

But Wechsler, also one of the first women admitted to the New York state bar, did find work, and spent six years working in several federal agencies. Those positions culminated in her role as counsel to President Harry Truman’s Committee on Civil Rights in 1946. It was an area of law that had long been familiar. Her father, Osmond Fraenkel, served for many years as counsel for the American Civil Liberties Union. Father and daughter would later serve together on the board of the New York Civil Liberties Union.

In 1948, Wechsler joined Greenbaum, Wolf & Ernst, and began a storied career as a copyright and intellectual property lawyer. She garnered even more attention because of the firm’s representation of Planned Parenthood Federation of America, at a time when contraception and abortion were essentially outlawed.

“We were really the specialists in the law of birth control,” Wechsler recalled in an oral history of the Law School’s early women graduates.

Wechsler co-wrote an influential amicus brief for the watershed case of Griswold v. Connecticut, in which the Supreme Court, for the first time, recognized a right to privacy in striking down a law that banned the prescription or sale of contraception. She was also an author of a prime amicus brief for Roe v. Wade, the 1973 landmark abortion decision.

But the bulk of her career was spent representing publishers, authors, agents, and literary estate, while also taking on cases involving libel, obscenity, right of publicity, and other First Amendment issues.

“It was a big deal to review a book for libel,” she recalled. “You sat with the author and worked through the whole book. I did a lot of that.”

Among her clients was Robert F. Kennedy, with whom she recalled having “all kinds of arguments” about his first book The Enemy Within.

Like her father, who died at age 94 while walking to work, Wechsler was in her office at the law firm of McLaughlin &
Stern until just days before she died when she suffered a stroke.3

Theodora Zavin

Theodora (known as Thea) Zavin was born in 1922 and died June 21, 2004. She was a graduate of Hunter College and Columbia Law School, where she was the Notes and Comments Editor of the Law Review.

She served at BMI, the collecting society, for 49 years, joining the company in 1952 as Resident Counsel. She then headed the company's Legal Department. She was later appointed Assistant Vice President, Publisher Relations, and in 1965 was named Vice President, Performing Rights, and later became Senior Vice President and Special Counsel. She founded the BMI Foundation, Inc. in 1985, serving as its President until her retirement in 2001. The foundation supports the creation, performance, and study of music through awards, scholarships, grants, and commissions. She was a former President of the Copyright Society of the USA.

Ms. Zavin served as Co-Chairman of the Music Division of the United Jewish Appeal-Federation of Jewish Philanthropies and in 1976, was honored as UJA’s Executive of the Year.

She was a tireless advocate for performing artists and composers. In an April 5, 1988 interview, Brazilian composer Antonio Carlos Jobim said: “BMI is the base of my career, you know. It’s the – everything that I have here, is BMI. You know [it] is my friends … Thea Zavin, everything that I have comes from BMI.”4

With Harriet Pilpel she wrote two books, one on copyright, the 1960 “Rights and Writers: a Handbook of Literary and Entertainment Law,” and one in 1966 on women’s rights, “Your Marriage and the Law.” She also wrote two cookbooks, “The Working Wives Cookbook” (with Fredda Stuart), and “The Everybody Bring a Dish Cookbook.”
