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Copyright Law and Pornography

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ABSTRACT

Sex-for-hire is usually illegal, unless it is being filmed. Debates about pornography tread uneasily into legal terrain that implicates freedom of expression under the First Amendment, the specter of censorship, and genuine concerns about the function and role of pornography in persistent gender inequality. It is less common for conversations about pornography to include a discussion of copyright law. Yet copyright law is a powerful tool that operates to protect the financial interests of pornographers. Owners of copyrighted pornography frequently threaten public exposure of an alleged infringer’s consumption habits in order to force a financial settlement. Thus copyright law operates as both a metaphoric legal shield and sword in the hands of pornographers. This Article introduces to the scholarly conversation consideration of how copyright law might be used by opponents of pornography, particularly those who oppose specific types of pornography such as child pornography, so-called “revenge porn,” “crush porn,” or

filmed physical abuse. A strong case can be made that such materials do not warrant copyright protection. Copyright protection is not a necessary prerequisite to authorship, publication or circulation. Withholding copyright protection would sharply reduce the economic value of these particular works, but might also give rise to inconsistent or even incoherent decisions by government actors who would be called upon to make difficult assessments between and among types of pornography.

INTRODUCTION

Sex-for-hire is usually illegal, unless it is being filmed.¹ Debates about pornography tread uneasily into legal terrain that implicates freedom of expression under the First Amendment, the specter of censorship, and genuine concerns about the function and role of pornography in persistent gender inequality. It is less common for conversations about pornography to include a discussion of copyright law. Yet copyright law is a powerful tool that operates to protect the financial interests of those pornographers who rely heavily on the copyright laws to deter unauthorized copying. It is not uncommon for the owner of copyrighted pornography to threaten public exposure of an alleged infringer's consumption habits to force a financial settlement of unauthorized copying claims. Copyright law operates both as a metaphoric shield and sword in the hands of pornographers. This Article turns the scholarly conversation to consider how copyright law might be used by those who oppose specific types of pornography such as child pornography,² "crush porn,"³ so-called "revenge porn,"⁴ or filmed physical abuse.⁵

To the extent that actual people are harmed during the production of pornographic material or as a consequence of its distribution and consumption, a strong case can be made that the government constitutionally may decline to provide copyright protection. The rationale for declining to provide copyright protection is that these materials cannot reasonably be construed as promoting "progress" or

¹ See *infra* Part I.C.

² See *infra* Part III.B.2.

³ See *infra* Part III.B.3.

⁴ See *infra* Part III.B.4.

⁵ See *infra* Part III.B.5.

“useful arts”⁶ because their production or distribution directly harms people. Withholding copyright protections would sharply reduce the economic value of these particular works without unconstitutionally preventing their authorship or precluding their publication or circulation. Such an approach to copyright protection, however, would require government actors to make difficult assessments about which pornographic works belonged in the nonprotected categories, and their decisions might not be consistent or even coherent.

This Article proceeds in five parts. Part I provides an overview of the relationship of copyright law to pornography. Copyright law, viewed in a certain light, plays a structural role in the commoditization of sex and sexual images. In most jurisdictions in the United States, buying and selling sex is illegal, but when sex-for-hire is fixed in a tangible medium of expression, it becomes an act of free speech protected by the First Amendment.⁷ That tangible medium also gains protection under copyright law. Pornographers use copyright law to facilitate profitable commercial exploitation of their works.

Against this background, Part II explores the ways in which copyright law in general is not content neutral. Indeed, in order to obtain a protectable copyright, one must demonstrate the existence of “original” content. Once a copyright is secured, copyright law constructs operate to suppress (by labeling as “infringing,” and thus illegal) any content that is substantially similar to or derivative of the copyrighted work. From an analytic perspective that suppression operates as a form of content-based, government-sponsored censorship in the broadest sense of the word. To be sure, copyright law allows for “fair use” as a right or privilege, or as an affirmative defense to an allegation of copyright infringement. In this way, copyright law includes a mechanism that seeks to soften the suppressive aspect of copyright enforcement. Whether an unauthorized use is “fair” is a legal determination that is, by definition, not content neutral (i.e., it requires substantive consideration of the allegedly offending work). Thus robust copyright protection for any book, image, film, or other copyrightable work

⁶ Article I, Section 8 of the U.S. Constitution provides that “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

⁷ See *infra* Part I.

requires (at least) two content-specific inquiries by the government: first as to the originality of the initial work, and second as to any fair use by any allegedly offending work.

Part III considers the relationship between pornography and copyright law. Numerous legal scholars have offered critiques and defenses of pornography that are sophisticated and sustained.⁸ One of the most well-known critiques of pornography takes a harms-based approach.⁹ It considers the potential harm to actual human beings during the production, distribution, or consumption of pornography. This part of the Article applies this harms-based framework in the copyright context and considers how labeling such works non-progressive or non-useful would put them beyond the purview of the Intellectual Property Clause of the U.S. Constitution. Types of pornography that would lose copyright protection under this framework include child pornography, crush pornography, revenge pornography, and pornography in which the performers are physically abused or endangered.

Part IV argues that the government's withholding of copyright protection from this narrowly defined band of pornographic works will reduce the incentives for its creation and distribution. Thus copyright law could become a powerful tool in the hands of pornography's opponents.

Part V argues that there is, in fact, a clear precedent for amending the Copyright Act to deny protection to "non-progressive" and "non-useful" pornographic works. In the trademark context, the Lanham Act¹⁰ prohibits the federal registration of "scandalous" or "immoral" marks. Such content-specific restriction has been found to be constitutionally permissible.¹¹ Although that prohibition is enforced inconsistently, it nevertheless suggests the contours of legitimate, content-based denial of formal governmental protection for certain intellectual property.

⁸ See, e.g., Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986); Robert Jensen & Debbie Okrina, *Pornography and Sexual Violence*, VAWNET.ORG (July 2004), http://www.vawnet.org/sexual-violence/print-document.php?doc_id=418&find_type=web_desc_AR.

⁹ See *infra* Part III.A.

¹⁰ Lanham (Trademark) Act of 1946, Pub. L. No. 79-489, 60 Stat. 427 (codified in scattered sections of 15 U.S.C.).

¹¹ See *infra* Part V.B.

I

COPYRIGHT LAW AND THE COMMODITIZATION OF SEX

Pornography is a wildly lucrative copyrightable commodity.¹² And though this sounds like a bad joke, the reproduction right is heavily relied upon by commercial pornographers.¹³ Anyone on the Internet is generally only a click or typographical error away from pornography, much of which is profitably distributed by mainstream American corporations.¹⁴ Copyright law has played an important role in the law and economics of pornography since 1979, when a federal court concluded that pornographic films were eligible for copyright protection just like any other kind of movie.¹⁵ Instantiation of a legal norm protecting the making of commercial pornography under the auspices of dominant First Amendment jurisprudence if all parties are eighteen or older came almost a decade later.¹⁶ The importance of copyright protection to pornographers has increased greatly since the Internet has become their primary distribution mechanism.¹⁷ To

¹² See Michael Brush, *Porn Stocks Worth, Um, Watching*, MSN MONEY (Oct. 31, 2007, 12:01 AM), <http://web.archive.org/web/20071102065704/http://articles.moneycentral.msn.com/Investing/CompanyFocus/PornStocksWorthUmWatching.aspx> (accessed by searching for original URL in the Internet Archive “Wayback Machine”); Jerry Ropelato, *Internet Pornography Statistics*, TOP TEN REVIEWS, <http://internet-filter-review.tiptenreviews.com/internet-pornography-statistics.html> (last visited Feb. 9, 2011) (“The pornography industry has larger revenues than Microsoft, Google, Amazon, eBay, Yahoo, Apple and Netflix combined. 2006 Worldwide Pornography Revenues ballooned to \$97.06 billion.”); see also Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME (Mar. 29, 2005), available at <http://www.time.com/time/arts/article/0,8599,1043267,00.html>.

¹³ See generally Copyright Act of 1976 (“Copyright Act”), 17 U.S.C. § 106(1) (2006).

¹⁴ See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 806–07 (2008) (describing mainstream commercial success of consumer goods bearing Playboy logo and brand, Playboy’s separate investments in hardcore pornography business, and financial profit from pornography by hoteliers and communications industry concerns); *Advertising Policies*, GOOGLE, <http://support.google.com/adwordspolicy/bin/answer.py?hl=en&answer=176004> (last visited Sept. 9, 2012) (noting that Google allows advertising for adult sites, with limitations); see also DAVID A. VISE, *THE GOOGLE STORY* 165 (updated ed. 2005) (“Google makes millions of dollars annually on pornography ads displayed alongside search results. . . . [B]oth Google and its biggest competitor, Yahoo, profit handsomely by selling sex-related ads.”).

¹⁵ See *infra* note 83 and accompanying text.

¹⁶ See *infra* notes 74–75 and accompanying text (discussing the *Freeman* case).

¹⁷ See Nicholas Confessore, *Porn and Politics in a Digital Age*, PBS FRONTLINE (Feb. 7, 2002), <http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/politics.html> (observing promulgation of home computers facilitates production and distribution of pornography); see also Katie Hafner & Matt Richtel, *Google Resists U.S. Subpoena of Search Data*, N.Y. TIMES, Jan. 20, 2006, at A1, available at <http://www.nytimes.com/2006/01/20/technology/20google.html?pagewanted=all> (“American Web sites that show

illustrate briefly, Google received more copyright-rooted cease and desist letters related to adult content than to mainstream movies. Adult-content complaints were second in number only to complaints pertaining to music.¹⁸

A. *The Contours of Copyrightable Sex*

Pornography can take the form of written accounts¹⁹ or visual images, moving or static, of human beings explicitly engaged in sex acts, or depicted in overtly sexualized poses. Pornographic works are potentially vested with copyright protection upon creation and fixation in tangible mediums of expression²⁰ as literary works,²¹ dramatic works,²² pantomimes and choreographic works,²³ pictorial, graphic, and sculptural works,²⁴ motion pictures and other audiovisual works,²⁵ or compilations or derivative works.²⁶

If commoditized sex follows the same commercial patterns as other kinds of physical performances such as dance choreography, pantomimes, or yoga, most of the sex-related copyrights in contemporary currency are fixed in the form of literary, pictorial and audiovisual works.²⁷ Alternative means of fixation such as notation

explicit content get as many as 60 million visitors a day, according to testimony given to the Senate Committee on Commerce, Science and Transportation by Paul Cambria, general counsel for the Adult Freedom Foundation, an organization that represents the interests of the pornography industry.”)

¹⁸ *Data from the Chilling Effects Clearinghouse*, CHILLING EFFECTS, <http://www.chillingeffects.org/stats.cgi> (last visited Mar. 30, 2011) (reporting number of complaints in 2010 was 966 for movies, 2,021 for adult content, and 3,906 for music).

¹⁹ The production of written pornography is extremely unlikely to be harmful to the author, unless there is direct coercion at play. Whether exclusively textual works can even constitute pornography is disputed. *See, e.g.*, Dana Wollman, *Amazon No Longer Selling Guide for Pedophiles*, SEATTLE TIMES (Nov. 11, 2010, 9:17 AM), http://seattletimes.nwsourc.com/html/localnews/2013405553_apustecamazonpedophiliabook1stldwritethru.html (revealing President of American Booksellers Foundation for Free Expression takes the view that entirely textual works are not pornography).

²⁰ *See* Copyright Act, 17 U.S.C. §§ 101, 102 (2006).

²¹ *Id.* § 102(a)(1).

²² *Id.* § 102(a)(3).

²³ *Id.* § 102(a)(4).

²⁴ *Id.* § 102(a)(5).

²⁵ *Id.* § 102(a)(6).

²⁶ *Id.* § 103.

²⁷ *See Dramatic Works: Scripts, Pantomimes, and Choreography*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/fls/fl119.html> (last visited Dec. 27, 2011) [hereinafter Copyright Office, *Dramatic Works*]. *Cf.* Lhendup Gyatso Bhutia, *Saving Yoga From*

may be possible,²⁸ but would likely be expensive, overly complicated, and of uncertain monetary value.²⁹

Commercial control of traditional choreographic works probably relies more on norms about copying and attribution within the dance industry than on formal copyright protections.³⁰ This makes analogizing sex and dance moves analytically unhelpful in discerning the impact of copyright law, despite the fact that dancing has been characterized as “the vertical expression of a horizontal desire, legalized by music.”³¹ Whether there are similar norms within the pornography industry is unknown to this author, but I have not seen any evidence of them. Commercial pornographers seem to make their creative choices in direct response to perceived consumer demand,³² which apparently leads to heavy concentrations of very similar audiovisual works within popular genres such as gonzo, all-girl, older woman-younger girl, young girl, anal-themed, big butt, oral, ethnic-themed, interracial, big bust, MILF, internal, orgy, gangbang, BDSM, squirting, strap-on, transsexual, three way, and double penetration.³³

Copyright Mongers, DNA DAILY NEWS & ANALYSIS (July 18, 2010, 12:22 AM), http://www.dnaindia.com/lifestyle/report_saving-yoga-from-copyright-mongers_1411206-all.

²⁸ Copyright Office, *Dramatic Works*, *supra* note 27.

²⁹ See Joi Michelle Lakes, *A pas de deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1853–55 (2005) (discussing notation-based means of fixing choreographic works); see also Julie Van Camp, *Copyright of Choreographic Works*, in 1994–1995 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 59, 67 (Stephen F. Breimer et al. eds., 1994), available at <http://www.csulb.edu/~jvancamp/copyrigh.html>.

³⁰ See William Patry, *Choreography and Alternatives to Copyright Law*, THE PATRY COPYRIGHT BLOG (Aug. 18, 2005, 1:45 PM), <http://williampatry.blogspot.com/2005/08/choreography-and-alternatives-to.html> (observing relatively low number of copyright registrations by choreographers suggests “choreographers’ decision not to rely on copyright and to instead develop their own ‘community’ system of protection”).

³¹ Compare *George Bernard Shaw Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/dancing-the_vertical_expression_of_a_horizontal/259005.html (last visited Mar. 5, 2012) (crediting the quote to George Bernard Shaw), with *Robert Frost: Quotes*, GOODREADS.COM, <http://www.goodreads.com/quotes/show/123294> (last visited Mar. 5, 2012) (crediting the quote to Robert Frost).

³² Some pornography is likely produced for reasons other than commercial exploitation. See generally Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, FLA. ST. U. L. REV. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746343 (arguing that there are natural and intrinsic reasons for creation above and beyond the incentives provided by the copyright regime).

³³ These are all awards categories for the Adult Video Network annual awards. *Nominations for the 2011 AVN Awards*, AVN MEDIA NETWORK, http://avnawards.avn.com/2011_nominations.pdf (last visited Mar. 5, 2012).

Elements such as dialogue, plot, costumes, and scenery are copyrightable just as they are in non-pornographic works. But what the scope of copyright protection might be in a choreographed sequence of explicit sex acts is unclear. One commentator has advocated for a very broad definition of choreography, which could conceivably include sex acts, writing:

The precise meaning of “choreographic works” is not clear, however, from prior statutes or case law. Nor is there any evidence that Congress intended to limit “choreographic works” to those which were protected previously under the category of dramatico-musical work. Indeed, the creation of the new category of “choreographic works” in the copyright law suggests that Congress intended to create a broader class of protection. Clearly, Congress intended that the Copyright Act provide categories eligible for protection with “sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories.”

Human movement would seem to be the central element of dance, but it is at least arguable that even this requirement is too narrow. In *Duet*, Paul Taylor and his partner do nothing but sit on stage, in silence, for three minutes. In 1942, George Balanchine choreographed *Circus Polka* to music by Stravinsky “for 50 elephants and 50 beautiful girls” for the Barnum and Bailey Circus. Another problem with focusing solely on human movement is that it is also central in gymnastic routines and figure skating routines, which arguably might be subject to protection as “choreographic works.” An issue for dance scholars is where to draw the line between choreographic movement and other movement. Are there some movement designs which should not be protected by this copyright provision? On what grounds?³⁴

Protectable dance choreography was described in *Horgan v. MacMillan* as “the composition and arrangement of dance movements and patterns, [which] is usually intended to be accompanied by music.”³⁵ The Second Circuit concluded that “social dance steps and simple routines” are not copyrightable.³⁶ Analogously pedestrian sexual encounters would not be either. Heterosexual intercourse in the missionary position might be one very staid example of an uncopyrightably banal erotic routine. Any sex act that is prevalent in real life or pornography has arguably been dedicated to the public

³⁴ Van Camp, *supra* note 29, at 60–61 (footnotes omitted).

³⁵ 789 F.2d 157, 161 (1986) (quoting U.S. COPYRIGHT OFFICE, 2 THE COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.01 (1984)).

³⁶ *Id.* at 161 (quoting U.S. COPYRIGHT OFFICE, 2 THE COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.03(a) (1984)).

domain by virtue of copyright's merger and *scènes à faire* doctrines; courts will not enforce a copyright monopoly on words expressing an idea if the concept can only be expressed in a limited number of ways, or if the expression embodied in the work flows from a commonplace idea.³⁷ Sets, props, camera angles, dialogue, and the overall sequence of sex acts would confer copyright in a particular performance, but it might be thin, especially with respect to the sexual component.

Like sex, yoga can be comprised of a series of widely practiced and fairly predictable physical moves. In a lawsuit involving claims of infringement of an allegedly copyright-protected series of yoga asanas, one of the works at issue was described by the plaintiff as a "compilation of exercises."³⁸ The case ultimately settled, but before it did there was a district court opinion denying the defendant's motion for summary judgment, based on a rather doctrinally dubious conclusion that if the plaintiff established at trial that his copyright in the Bikram yoga style was valid, under Section 106(a)(4) he would retain the exclusive right to authorize the public performance of his sequence of asanas.³⁹ This claim is highly contested in the context of cultural commoditization,⁴⁰ and has subsequently been undercut by a decision by the U.S. Copyright Office to stop registering yoga poses and their sequences as choreographic works.⁴¹ The Copyright Office

³⁷ See *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) (explaining the merger doctrine); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (explaining the *scènes à faire* doctrine).

³⁸ William Patry, *Yoga and Copyright*, THE PATRY COPYRIGHT BLOG (Aug. 22, 2005, 10:30 PM), <http://williampatry.blogspot.com/2005/08/yoga-and-copyright.html> (referring to *Open Source Yoga Unity v. Choudhury*, No. C 03-3182 PJH, 2005 U.S. Dist. LEXIS 10440 (N.D. Cal. Apr. 1, 2005), and arguing that "[a] decision that Bikram had a copyright in a pictorial compilation of 26 exercises or in narration about them would be uncontroversial, no more so than a compilation of someone's choices of the best Indian restaurants in New York City," but that the court's extending copyright protection to public performance of the exercises was "controversial, indeed, outrageously wrong").

³⁹ See *id.* (expressing surprise that "a court would entertain the possibility that one could acquire exclusive rights over the performance of yoga exercises").

⁴⁰ See, e.g., Paul Vitello, *Hindu Group Stirs a Debate Over Yoga's Soul*, N.Y. TIMES, Nov. 27, 2010, at A1, available at http://www.nytimes.com/2010/11/28/nyregion/28yoga.html?_r=1&sq=hindu&st=cse&scp=1&pagewanted=all; Meredith Hoffman, *Off the Mat, Into Court: Lawsuit Pits Bikram and Yoga to the People*, N.Y. TIMES CITY ROOM (Dec. 1, 2011, 7:22 PM), <http://cityroom.blogs.nytimes.com/2011/12/01/off-the-mat-into-court-lawsuit-pits-bikram-and-yoga-to-the-people/?hp>.

⁴¹ See, e.g., Tarsha Luke, *Hold Your Flow! Yoga Sequences Not Copyrightable*, MEDIA LAW BYTES & PIECES (June 27, 2012), <http://www.medialawbytesandpieces.com/2012/06/27/hold-your-flow-yoga-sequences-not-copyrightable/#page=1>. See also Ellen Rosen, *Yoga Pose Copyright Bid Too Much of a Stretch, U.S. Says in Bikram Battle*, BLOOMBERG

also issued a related statement on June 12, 2012, that said in pertinent part:

An example that has occupied the attention of the Copyright Office for quite some time involves the copyrightability of the selection and arrangement of preexisting exercises, such as yoga poses. Interpreting the statutory definition of “compilation” in isolation could lead to the conclusion that a sufficiently creative selection, coordination or arrangement of public domain yoga poses is copyrightable as a compilation of such poses or exercises. However, under the policy stated herein, *a claim in a compilation of exercises or the selection and arrangement of yoga poses will be refused registration. Exercise is not a category of authorship in section 102 and thus a compilation of exercises would not be copyrightable subject matter.*⁴²

Efforts to monopolize depictions of sexual intercourse would likely be similarly resisted. In addition, though unique sequences of sex acts might be adequately expressive and original enough to warrant copyright protection as a theoretical matter, whether judges would be willing and able to comfortably articulate a coherent standard for the copyrightability of copulation variations is uncertain.⁴³

B. Literal Copying and Infringement Allegations

Fairly extensive case law research by this author suggests that the vast majority of copyright infringement cases that have been brought in which the plaintiff works were articles of commercial pornography have been premised on allegations of literal copying. No case in which infringement liability related to unauthorized use of a commercial work of pornography was based on copying that constituted substantial similarity or an unauthorized derivative work was uncovered by this author’s research.⁴⁴ The reproduction right

(Dec. 9, 2011, 10:39 PM), <http://www.bloomberg.com/news/2011-12-10/yoga-poses-can-t-be-registered-for-copyrights-u-s-says-1-.html>.

⁴² Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (June 22, 2012) (to be codified at 37 C.F.R. pt. 201) (emphasis added), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-22/pdf/2012-15235.pdf>.

⁴³ See Lakes, *supra* note 29, at 1853–55; see also S. COMM. ON THE JUDICIARY, 86TH CONG., STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-SIXTH CONGRESS, SECOND SESSION PURSUANT TO S. RES. 240 (Comm. Print 1961) (Borge Varmer), available at <http://www.copyright.gov/history/studies/study28.pdf>.

⁴⁴ In *International Media Films, Inc. v. Lucas Entertainment, Inc.*, the plaintiffs alleged facts that, if proven, might have resulted in a finding of infringement based on the distribution of an unauthorized derivative work, but were unable to show they held the

provided to copyright holders in Section 106 of the Copyright Act has been successfully exercised by pornographers only in the most direct manner. The scope of copyright protection in a work of mainstream pornography appears to be judicially untested.⁴⁵ Literal copying has either been found infringing⁴⁶ or held to be fair use.⁴⁷

1. *Pornography as Creative Endeavor?*

Not everyone views pornography as a creative endeavor. Some observers perceive a distinction between, for example, artistic audiovisual works in which there happens to be “unsimulated” (by which they mean actual) sex performed, and works of pornography in which there is little imaginative concern about plot, dialogue, scenery, or any other variable that is not directly related to the depicted sexual exploits.⁴⁸ This reflects an entertainment industry perspective, which may or may not be widely held, that audiovisual pornography is a less

restored copyright in the plaintiff’s work. 703 F. Supp. 2d 456, 460 (S.D.N.Y. 2010) (finding disputed chain of title in restored copyright). In *Lucasfilm Ltd. v. Media Market Group, Ltd.*, the plaintiff’s work was a nonpornographic work, *Star Wars*, while the defendant’s work was a pornographic parody, *Star Ballz*. 182 F. Supp. 2d 897, 899 (N.D. Cal. 2002).

⁴⁵ See John Schwartz, *The Pornography Industry vs. Digital Pirates*, N.Y. TIMES, Feb. 8, 2004, at BU1, available at <http://www.nytimes.com/2004/02/08/business/the-pornography-industry-vs-digital-pirates.html> (correction appended Feb. 29, 2004) (referencing only copyright infringement actions brought against competing companies for acts of literal copying).

⁴⁶ See *Blackman v. Hustler Mag., Inc.*, 800 F.2d 1160, 1161 (D.C. Cir. 1986); *Flava Works, Inc. v. Wyche*, No. 10 CV 0748, 2010 U.S. Dist. LEXIS 64165, at *1 (N.D. Ill. June 28, 2010); *Io Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926, 2007 U.S. Dist. LEXIS 31639, at *3 (N.D. Cal. Apr. 13, 2007); *Nova Prods., Inc. v. Kisma Video, Inc.*, No. 02 Civ. 3850(HB), 02 Civ. 6277(HB), 03 Civ. 3379(HB), 2004 U.S. Dist. LEXIS 24171, at *3 (S.D.N.Y. Dec. 1, 2004); *Sefton v. Webbworld, Inc.*, No. 3:00-CV-0042-AH, 2003 U.S. Dist. LEXIS 6431, at *8–9 (N.D. Tex. Apr. 16, 2003); *Sefton v. Jew*, 204 F.R.D. 104, 107 n.3 (W.D. Tex. 2000); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 515 (N.D. Ohio 1997). Cf. *United States v. Gottesman*, 724 F.2d 1517, 1519 (11th Cir. 1984); *Brush Creek Media, Inc. v. Boujaklian*, No. C-02-3491 EDL, 2002 U.S. Dist. LEXIS 15321, at *16 (N.D. Cal. Aug. 19, 2002).

⁴⁷ See, e.g., *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1536 (D.C. Cal. 1985). Cf. *The Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124, 128 (N.D. Ga. 1981) (detailing how plaintiff claimed copyright in wrapper for cinnamon rolls; defendant made pornographic parody).

⁴⁸ See Kristin Hohenadel, *FILM; Film Goes All the Way (In the Name of Art)*, N.Y. TIMES, (July 1, 2001), <http://www.nytimes.com/2001/07/01/movies/film-film-goes-all-the-way-in-the-name-of-art.html?pagewanted=all&src=pm> (referencing unsimulated sex in films).

creative or perhaps even noncreative commodity.⁴⁹ Pornography is sometimes characterized as something that is “used,” distinguishable in some qualitative way from mainstream literary or audiovisual works that contain sex scenes.⁵⁰ Jim Mitchell reportedly quipped that the only “art” in pornography was his brother Artie, a fellow pornographer with the given name of Arthur.⁵¹ As law professors Christopher Sprigman and Kal Raustiala have noted, “Pornography is, in large part, a utilitarian product, and for most consumers, the purpose for which it is employed is served . . . by a five-minute porn-tube clip.”⁵² Another commentator observed that “in hotel rooms where pornography is available, two-thirds of all movie purchases are for pornos; and the average time they are watched is 12 minutes.”⁵³

Nevertheless, it is unlikely that a jurist would, sua sponte, determine that a pedestrian pornographic work was an “idea, procedure, process, system, method of operation, concept, principle, or discovery” within the meaning of Section 102 of the Copyright Act, and therefore outside the purview of copyright protections altogether.⁵⁴ The utilitarian nature of some pornography does not preclude copyright protection but may render it thin, perhaps so limited in scope that it could be infringed only by literal copying.

⁴⁹ See Schwartz, *supra* note 45 (“Mr. Cambria suggests that the mainstream entertainment industry is much more combative when it comes to consumers partly because the songs and movies are so carefully and expensively made and distributed. Movies in [the pornography] industry, by contrast, are often made in a few weeks, and on budgets that a major studio may spend on coffee and pastries, so piracy is not taken quite as seriously. ‘Maybe a classic is one thing,’ he said, ‘but they’re not all classics.’”).

⁵⁰ See, e.g., Irving Kristol, *Pornography, Obscenity, and the Case for Censorship*, in *SEX, MORALITY, AND THE LAW* 174, 176 (Lori Gruen & George E. Panichas eds., 1997) (asserting that pornography and obscene materials “in the end [are] identical in effect”).

⁵¹ Michael Carlson, *Spiking Deep Throat: Gerard Damiano And Jim Mitchell’s Guardian Obituaries*, IRRESISTIBLE TARGETS (Mar. 6, 2009), <http://irresistibletargets.blogspot.com/2009/03/buried-deep-throat-gerard-damiano-and.html>; see also Corliss, *supra* note 12 (“There’s a lot of porn out there. . . . For the weary businessman it’s just a combination [sic] Viagra and Ambien.”).

⁵² Kal Raustiala & Chris Sprigman, *Copyrighting Porn: A Guest Post*, FREAKONOMICS (May 5, 2010, 12:00 PM), <http://freakonomics.blogs.nytimes.com/2010/05/05/copy-righting-porn-a-guest-post/>.

⁵³ Corliss, *supra* note 12.

⁵⁴ 17 U.S.C. § 102(b) (2006).

2. *Knowing Pornography When One Sees It*

Unlike audiovisual works, a judge might well conclude that elements of pornographic pictorial, graphic, or sculptural works were functional and therefore unprotectable through copyright.⁵⁵ Sex toys such as vibrators, dildos, butt plugs, nipple clamps, and cock rings can certainly simultaneously evince artistic as well as utilitarian aspects. But in at least one dispute, a court found dildos lacking conceptual separability because they were cast from molds of the genitals of pornography performers, and therefore uncopyrightable.⁵⁶ In and of themselves, sex toys would not generally constitute pornography.

Pornography is difficult to qualitatively define beyond “unambiguous depictions of sexual activity.”⁵⁷ When the Supreme Court decided *Miller v. California* in 1973, Chief Justice Burger characterized the dispute as “one of a group of ‘obscenity-pornography’ cases being reviewed by the Court,”⁵⁸ implying that the terms obscenity and pornography were interchangeable.⁵⁹ This is no longer true, if it ever was.

In *American Booksellers Association v. Hudnut*, the City of Indianapolis defined pornography in a civil rights ordinance as “the graphic sexually explicit subordination of women, whether in pictures or in words” that also includes one or more of six other listed characteristics.⁶⁰ This definition of pornography was held to be

⁵⁵ See *id.* § 113; see also ABA Committee No. 304, PICTORIAL, GRAPHIC, SCULPTURAL AND CHOREOGRAPHIC WORKS (2005–2006), available at http://meetings.abanet.org/webupload/commupload/PT030400/otherlinks_files/304.pdf.

⁵⁶ *ConWest Res, Inc. v. Playtime Novelties, Inc.*, No. C 06-5304 SBA, 2006 U.S. Dist. LEXIS 85461, at *5 (N.D. Cal. Nov. 17, 2006).

⁵⁷ See Erick Janssen, *Why People Use Porn*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/why.html> (last visited July 6, 2012) (“Although lawyers, feminists, priests, and scientists all have tried to describe it, a satisfactory definition of porn does not exist.”).

⁵⁸ 413 U.S. 15, 16 (1973).

⁵⁹ He also used the term “hardcore pornography” as if it had a generally accepted meaning. See, e.g., *id.* at 27.

⁶⁰ *Am. Bookseller’s Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985). Those conditions were:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

unconstitutional when it was proposed as the basis for redress for civil rights violations through administrative and judicial means.⁶¹ It was criticized for being “considerably different” from the judicially constructed definition of obscenity that is met when the average person, applying contemporary community standards, would find that a work holistically appeals to the prurient interests, contains patently offensive depictions or descriptions of specified sexual conduct, and has no serious literary, artistic, political, or scientific value.⁶² This “considerable difference” was entirely intentional, part of a conscious effort to promote recognition of the harms of pornography outside of the confines of the *Miller* test.⁶³ After *Hudnut* it became less common for courts or legal commentators to use the terms “pornography” and “obscenity” interchangeably. The current practice is to divide pornography into two categories: that which is obscene, and that

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

. . . [T]he use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

Id.

⁶¹ *Id.* at 332 (“The definition of ‘pornography’ is unconstitutional. No construction or excision of particular terms could save it. The offense of trafficking in pornography necessarily falls with the definition. We express no view on the district court’s conclusions that the ordinance is vague and that it establishes a prior restraint. Neither is necessary to our judgment. We also express no view on the argument presented by several amici that the ordinance is itself a form of discrimination on account of sex.”).

⁶² *Id.* at 324 (“Indianapolis enacted an ordinance defining ‘pornography’ as a practice that discriminates against women. ‘Pornography’ is to be redressed through the administrative and judicial methods used for other discrimination. The City’s definition of ‘pornography’ is considerably different from ‘obscenity,’ which the Supreme Court has held is not protected by the First Amendment.”).

⁶³ See, e.g., *Pornography: An Exchange: Catharine A. MacKinnon, reply by Ronald Dworkin*, N.Y. REV. OF BOOKS (Mar. 3, 1994), <http://www.nybooks.com/articles/archives/1994/mar/03/pornography-an-exchange/> (“Since then, every argument [Andrea Dworkin and I] have advanced to support this initiative has been an equality argument. Every harm pornography does is a harm of inequality, and we have said so.”).

which is not.⁶⁴ Obscene pornography, to paraphrase and streamline the *Miller* test, is pornography which the average person would feel appeals to prurient interests, depicts or describes sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value, if that person was framing her conclusions by consciously making reference to contemporary community standards.⁶⁵

Rare is the legal test that does not require a fact finder to objectively apply subjective criteria to something or another. Consider what a jury is asked to do when evaluating the negligence of a defendant in the context of a tort action, or when comparing two works to discern whether they are substantially similar in a copyright infringement dispute. Nevertheless, obscenity inquiries are especially thorny. Whether a work is legally obscene, and therefore illegal, depends upon the viewpoint of an observer and that observer's assumptions about fellow community members: who they are, what they think generally, and how they might react, emotionally and aesthetically, to a particular work.⁶⁶ Because this is so subjective, the meaning of "obscene" can vary widely from person to person.⁶⁷ This would be problematic if criminal obscenity charges were commonly brought, but they are not.⁶⁸

C. *Buying and Selling Sex Legally*

Though commoditized sex may sometimes constitute expressive conduct, prostitution is either regulated as commerce or criminalized. When commoditized sex is fixed in a tangible medium of expression, however, it becomes protected speech—commoditized sex that is legal, socially acceptable, and copyrighted.

⁶⁴ See, e.g., *Obscenity and Pornography: Behavioral Aspects—Obscenity and Pornography Defined*, L. LIBR. – AM. L. & LEGAL INFO., <http://law.jrank.org/pages/1609/Obscenity-Pornography-Behavioral-Aspects-Obscenity-pornography-defined.html> (last visited Jan. 24, 2011).

⁶⁵ See *Miller v. California*, 413 U.S. 15, 24 (1973).

⁶⁶ See *id.*; Brief Amici Curiae of the Nat'l Ass'n of Broadcasters, et al. in Support of Appellees, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (No. 96-511); see also Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 700 (2007).

⁶⁷ The most frequently quoted Supreme Court opinion on obscenity is Justice Stewart's "I know it when I see it" concurrence. *Jacobellis v. Ohio*, 378 US 184, 197 (1964) (Stewart, J., concurring).

⁶⁸ See *Bartow*, *supra* note 14, at 821–22.

When it is not filmed, prostitution is illegal in most, though not all, U.S. jurisdictions.⁶⁹ In regions where it is illegal, it is zealously prosecuted in some contexts but virtually ignored in others.⁷⁰ Selling sex is far more likely to result in an arrest or criminal conviction than buying sex.⁷¹ Prostitutes and pimps are usually targeted, but johns ignored, based on choices made by law enforcement officials rather than the criminal code that is in effect.⁷² When it is filmed, the operative definitions change. The sellers of sex are “performers” rather than “prostitutes” and those who orchestrate the activities are “pornographers” rather than “johns” or “pimps.”

For over two decades, obscenity prosecutions related to pornography have been very rare; the U.S. government has overwhelmingly ignored pornography as long as the performers in any given work are eighteen years old or over.⁷³ State governments have largely followed suit because in *California v. Freeman*,⁷⁴ the U.S. Supreme Court sharply curtailed states’ ability to regulate the production of pornography by declining to review the California Supreme Court’s decision that hiring and paying people to engage in sexual acts pursuant to the production of pornographic films did not constitute pandering under the relevant provision of the California Penal Code.⁷⁵ This instantiated the perception that producing pornography is legal even in jurisdictions where prostitution is not.

⁶⁹ Daniel J. Franklin, *Prostitution and Sex Workers*, 8 GEO. J. GENDER & L. 355, 356–57 (2007) (listing state prostitution statutes).

⁷⁰ See, e.g., Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1726 (2006) (“Police response times are slow citywide by national standards—and they’re worst in the highest-crime areas. And the officers patrolling those neighborhoods are the department’s least experienced.”) (citation omitted).

⁷¹ Steven D. Levitt & Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution*, 4–5 (Sept. 2007) (unpublished manuscript), available at <http://economics.uchicago.edu/pdf/Prostitution%205.pdf>.

⁷² See Sergio Herzog, *The Lenient Social and Legal Response to Trafficking in Women: An Empirical Analysis of Public Perceptions in Israel*, 24 J. CONTEMP. CRIM. JUST. 314 (2008), available at <http://ccj.sagepub.com/content/24/3/314>; Elaine Pearson, *Half-hearted Protection: What Does Victim Protection Really Mean for Victims of Trafficking in Europe?*, 10 GENDER & DEV. 56 (2002).

⁷³ See Bartow, *supra* note 14, at 821–22 (observing a decline in adult obscenity charges during administration of George W. Bush).

⁷⁴ *California v. Freeman*, 488 U.S. 1311 (1989).

⁷⁵ *Id.* at 1313 (Justice O’Connor acknowledging state interest in controlling prostitution but deferring to state law determination that paying for sexual performances for pornographic films is not pandering under state-law definition).

The impact of this Supreme Court non-decision has been profound. Acts that otherwise qualify as prostitution transmogrify into pornography when they are recorded. If a camera is present, an illegal act of selling sex becomes a legal exercise of free expression. That may sound facially absurd, but consider the recent holding in *State v. Theriault*, in which the legality of paying people to watch them have sex was at issue.⁷⁶ The Supreme Court of New Hampshire overturned one of the defendant's convictions for prostitution because it was based on his offering to pay a couple for having sexual intercourse while he videotaped them.⁷⁷ However, the *Theriault* defendant was unable to successfully appeal another prostitution conviction under the same statute where he had simply "offered to pay [a] couple to engage in sexual intercourse with each other, and explained that he would need to watch them."⁷⁸ A request to pay two individuals to make a sexually explicit video was held to be protected under the free speech guarantees of the New Hampshire State Constitution.⁷⁹ But the First Amendment offered no cognizable protection for mere voyeurism.⁸⁰ The presence of a camera was the difference between legal and illegal conduct, pornography and prostitution, even though in both cases the couple was to be paid for having sex while an observer was present.⁸¹

The camera-based divide between pornography and prostitution has important commercial and cultural ramifications.⁸² While it may be hard to imagine companies like General Motors, Google, Marriott, or Fox News openly operating brothels, their engagement in the pornography industry means that commercial sex that directly profits them is bought and sold.⁸³ Pornography and prostitution are treated

⁷⁶ *State v. Theriault*, 960 A.2d 687 (N.H. 2008).

⁷⁷ *Id.* at 692.

⁷⁸ *State v. Theriault*, 949 A.2d 678, 679 (N.H. 2008).

⁷⁹ *Theriault*, 960 A.2d at 692.

⁸⁰ *See Theriault*, 949 A.2d at 681.

⁸¹ *Compare id. with Theriault*, 949 A.2d. at 692. *See also* Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 996–97 (2005) ("To distinguish pornography from prostitution, for example, California courts notwithstanding, is to deny the obvious: when you make pornography of a woman, you make a prostitute out of her.").

⁸² *See generally* Sherry F. Colb, *The Legal Line Between Porn and Prostitution*, CNN.COM (Aug. 12, 2005), http://articles.cnn.com/2005-08-12/justice/colb.pornography_1_prostitution-ring-sexual-services-pornography?_s=PM:LAW.

⁸³ *See* GAIL DINES, *PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY* 51–53 (2010).

disparately by these mainstream corporations because one is legally and culturally acceptable while the other is not, even though the constitutive sex acts may be identical. In both cases people are paid to have sex for the benefit of others, but pornography can be commoditized and consumed at a remote distance from the human bodies used in its production. Intellectual property laws play integral roles in this commoditization, offering to the creators and distributors of pornography the branding opportunities facilitated by trademarks and the incentives, legal protections, and artistic legitimacy associated with copyrights.⁸⁴

II

THE COPYRIGHT ACT AND CONTENT-BASED REGULATION OF EXPRESSIVE SPEECH

Copyright law is even more pornography-friendly than the First Amendment. The First Amendment will only protect pornography if it is not obscene or illegal for other reasons; for example, if it contains depictions of children. Copyright law offers protections to pornography no matter what material it contains.⁸⁵ The First Amendment merely prevents the government from interfering in the creation, distribution and consumption of pornography that is not obscene or otherwise illegal. Copyright law actually incentivizes the creation and distribution of pornography and enables pornographers to employ government resources to prevent and punish infringing uses by government actors and private parties alike.

When an adequately original work is fixed in a tangible medium of expression, it is a copyrighted commodity that can be bought or sold, licensed or traded.⁸⁶ This is why even though copyright law facilitates the production and distribution of free speech in the form of fine art, literature, music, and drama, the Copyright Act, as written and interpreted, often manifests as a particularized form of commercial

⁸⁴ See, e.g., Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 799 (discussing role of copyright in creating branding opportunities).

⁸⁵ See, e.g., *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979) (“[P]rotection of all writings, without regard to their content, is a constitutionally permissible means of promoting science and the useful arts.”).

⁸⁶ See generally Copyright Act, 17 U.S.C. §§ 101–1332 (2006) (setting out the requirements for copyright protection and regulating the many ways a copyrighted work can be exploited).

law.⁸⁷ The relationship between the First Amendment and pornography is often characterized as freedom of speech, while the relationship between the Copyright Act and pornography is mostly, if not exclusively, about money. Pornography is no different than any other creative work in that regard.

Originality, the essential requirement of copyrightability, is assessed in a content-specific manner, and the level of originality required to trigger copyright protection, both doctrinally and in practice, is low.⁸⁸ As long as a work exhibits some improvement upon preexisting materials, the copyright holder can defend its unique creative aspects from unauthorized copying, subject to constraints such as fair use.⁸⁹ The copyright holder owns the work's words and images, not in an absolute manner as one might own real estate or chattels, but in a copyright sense. Anybody who wants to use the work substantively without potentially triggering an infringement suit needs to ask the copyright holder's permission and pay her for the privilege; thus, the exchange requires an offer, acceptance, capacity, and consideration—the elements of a valid contract. The copyright holder is generally free to withhold permission, which freights any unauthorized use of her words or images with the threat of legal action in response.

Copyright protections facilitate governmentally promulgated regulation of speech in ways one unfamiliar with contemporary copyright jurisprudence might understandably but incorrectly assume that the First Amendment did not allow. Copyright law establishes a legal framework for injunctions that chill and censor speech if the content of the speech infringes or potentially infringes a copyright, and damages awards that punish speakers who use copyrighted words, or words that are deemed too similar to copyrighted words. Despite this, First Amendment grounded objections to copyright-based

⁸⁷ Copyright law has been treated more like commerce than speech by the Supreme Court. See Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633 (2004), available at <http://www.wmitchell.edu/lawreview/Volume30/Issue5/3Okediji.pdf>.

⁸⁸ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991); see also *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53 (1884); cf. *Bridgeman Art Libr., Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999).

⁸⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (explaining fair use inquiry focus is whether and to what extent the allegedly offending work is “transformative” and alters original work with new expression).

ensorship have not found much traction in the courts.⁹⁰ In *Harper & Row Publishers v. Nation Enterprises*, the Supreme Court explicitly held that there are no First Amendment rights to use the copyrighted works of others, not even in small excerpted increments.⁹¹ Attempts to communicate uncopyrightable facts or ideas using alternative words or images can also be enjoined if these words or images are deemed substantially similar to copyright-protected expression.⁹²

Some courts and commentators perpetuate a facile trope about copyright law being nondiscriminatory with respect to content because copyright law can protect any kind of content that is adequately original and fixed in a tangible medium of expression.⁹³ But nothing about copyrights is content neutral.

The Supreme Court may occasionally deploy the power of fair use to prevent copyright protections from trumping the First Amendment,⁹⁴ but at most, fair use unambiguously carves out only limited and highly contextual speech rights with respect to contested words or images,⁹⁵ and even those may only be available after expensive and protracted litigation. The late Justice William Rehnquist noted in his dissent in a flag burning case in 1974 that copyright law is an example of a constitutional speech restriction.⁹⁶ One scholarly take on his views is that “Copyright law restricts speech: It restricts you from writing, singing, painting, or otherwise communicating what you please. If your speech copies ours, and if the copying uses our ‘expression,’ not merely our ideas or facts, it can be enjoined and punished, civilly and sometimes criminally.”⁹⁷ A

⁹⁰ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

⁹¹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

⁹² *See, e.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867 (2d Cir. 1986) (holding jeans maker enjoined from using stitching pattern substantially similar to those on the back of Levi’s jeans).

⁹³ *See generally* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2000).

⁹⁴ *See, e.g., Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 589 (1994).

⁹⁵ *Id.* (“This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting . . . context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original.”).

⁹⁶ *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting).

⁹⁷ Lemley & Volokh, *supra* note 90, at 165-66 (citing Spence, 418 U.S. at 417) (Rehnquist, J., dissenting)).

little over a decade later a Supreme Court majority illustrated this point by holding in *Harper & Row Publishers v. Nation Enterprises* that fair use would not necessarily give a journalist the right to use brief verbatim quotes from the memoirs of a public figure in a news story.⁹⁸

Through the Copyright Office and the courts, the federal government already makes content-based decisions about the copyright worthiness of creative works. Some works are deemed inadequately creative to warrant copyright protection.⁹⁹ Others may be treated as uncopyrightable because they contain infringing material.¹⁰⁰ The artistic merit of a creative work is not supposed to drive administrative or judicial decisions about either copyrightability or the robustness of the scope of the copyright with which a work is vested.¹⁰¹ Lousy songs, awful novels, and ugly paintings get just as much copyright protection as fine melodies, riveting sagas, and beautiful pictures. Boring or inane works are accorded the same level of copyright protection that gripping and insightful ones receive. Political speech gets no more or less copyright protection than any other sort of speech. All this gives copyright law a thin veneer of content neutrality in the First Amendment sense, but that does not survive sustained analytical scrutiny.¹⁰² Both obscenity laws and copyright laws are content-based restrictions on speech.¹⁰³ Copyright laws facilitate speech regulation by the government that takes the form of refereeing business transactions and adjudicating commercial disputes. In consequence, First Amendment considerations are often

⁹⁸ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) (finding no fair use by *The Nation* magazine where thirteen percent of article quotes original language from unpublished manuscript).

⁹⁹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Brandir Int'l, Inc. v. Cascade Pacific Lumber, Co.*, 834 F.2d 1142 (2d Cir. 1987); *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989 (8th Cir. 1986).

¹⁰⁰ See *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983); *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161 (C.D. Cal. 1989).

¹⁰¹ See, e.g., *Copyright and Fair Use Overview: Copyright Basics FAQ*, STANFORD U. LIBRS. & ACADEMIC INFO. RES., http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-a.html (last visited Dec. 29, 2011) ("It doesn't matter if an author's creation is similar to existing works, or even if it is arguably lacking in quality, ingenuity or aesthetic merit. So long as the author toils without copying from someone else, the results are protected by copyright.")

¹⁰² See, e.g., C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 897 (2002).

¹⁰³ See *id.* Cf. Tushnet, *supra* note 93.

minimized.¹⁰⁴ Because copyright protection grants the copyright holder an exclusive right to specific forms of expression only, it does not, according to the Supreme Court, inherently impermissibly restrict free speech.¹⁰⁵ But restrict free speech it can.¹⁰⁶ In this author's view, the effects of copyright laws are inadequately appreciated by mainstream media consumers. The First Amendment may be interpreted to confer a right to possess a particular work of pornography, but if someone's copy is unauthorized, copyright laws may render that possession criminal. Illegal downloading is a form of socially deviant speech that pornographers themselves condemn and seek to arrest and eradicate when they enforce their copyrights.

A copyright holder's control over a work is not unqualified. Portions of otherwise copyrighted creative works are noncommoditizable through copyright for a host of policy reasons.¹⁰⁷ A copyright holder cannot monopolize facts or ideas, as doing so would disadvantage competitors and unduly discourage the creation of new works without sufficient compensatory benefits to society.¹⁰⁸ That may sound like a fairly straightforward limitation, but defining facts and ideas and coherently extricating them from the sticky grasp of copyrightable expression can be difficult.¹⁰⁹

Ambiguous confections of facts, ideas, and putatively protectable expression may float outside the confines of copyright control through the merger and *scènes à faire* doctrines, which are supposed to prevent certain kinds of overreaching by copyright holders.¹¹⁰ But

¹⁰⁴ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

¹⁰⁵ E.g., *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (holding that “extension of existing and future copyrights does not violate the First Amendment”).

¹⁰⁶ See, e.g., Rob Beshizza, *DMCA Used To Try And Silence Movie Reviewer*, WIRED (Jan. 14, 2008, 4:57 AM), <http://www.wired.com/gadgetlab/2008/01/dmca-used-to-tr/>; Rashmi Rangnath, *U.S. Chamber of Commerce Uses the DMCA to Silence Critic*, PUBLIC KNOWLEDGE (Oct. 26, 2009), <http://www.publicknowledge.org/node/2721>.

¹⁰⁷ See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130 (1990).

¹⁰⁸ See, e.g., L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215, 321–41 (2009).

¹⁰⁹ See Jane C. Ginsburg, *No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992); see generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

¹¹⁰ See Ginsburg, *supra* note 109; see also Michael D. Murray, *Copyright, Originality, and the End of the Scènes à Faire and Merger Doctrines for Visual Works*, 58 BAYLOR L. REV. 779, 781–83 (2006) (explaining no copyright protection is available “if an idea and the expression of the idea are so tied together that the idea and its expression are one”).

there are no guarantees. Some words and images can be controlled through copyright law, but others cannot.¹¹¹ How much power a copyright holder wields is not known until a judge or jury rules. The scope of copyright protection is uncertain. Unauthorized uses are adjudicated individually and similar appropriations could drive different outcomes. In an infringement suit, a court makes highly content-specific determinations about which elements of a plaintiff's work fit in the protected category and which do not, which unauthorized uses are fair and which are not, and when something facially different from protected expression such as a paraphrase is still too similar and can therefore be enjoined.¹¹² Paraphrasing could constitute an infringement, while literal copying might be fair use. Uncertainty reigns.

Simply sending a "takedown" notice under the Digital Millennium Copyright Act (DMCA) is a powerful non-content-neutral tool developed and backed by the federal government that a copyright holder can use to pressure an online content provider to remove expressive speech from an online venue.¹¹³ The incentives to comply with a takedown notice are powerful, and counterincentives are virtually nonexistent.¹¹⁴ The parry and thrust of the DMCA notice and takedown regime look a lot like, if not the prior restraint of speech, then at least almost contemporaneous silencing. Expressive speech is removed from a website in prudent response to representations about the copyrighted nature of its content. Silencing the speaker carries no risk to the silencer, but failing to silence the speaker renders an Internet service provider potentially liable for the illegal actions of third parties.¹¹⁵ The incentives all weigh in favor of

¹¹¹ Murray, *supra* note 110, at 790–91.

¹¹² *Id.*

¹¹³ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, 11–13 (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

¹¹⁴ See Kurt Opsahl, *YouTube Wins Summary Judgment in Viacom DMCA Lawsuit*, ELEC. FRONTIER FOUND. (June 23, 2010), <http://www.eff.org/deeplinks/2010/06/youtube-wins-summary-judgment-viacom-dmca> ("The DMCA safe harbors give service providers like YouTube a strong incentive to remove content upon receipt of a takedown notice (Viacom sent 100,000 notices to YouTube in one day; virtually all the videos were gone by the next business day). In exchange, those service providers are shielded from copyright infringement liability.").

¹¹⁵ Section 230 of the Communications Decency Act of 1996 (CDA) broadly immunizes Internet service providers from civil liability based on claims related to content. See 47 U.S.C. § 230(c) (1998).

takedown but this does not, according to any court that has yet considered the question, rise to the level of censorship that implicates the First Amendment.¹¹⁶

The Copyright Act already regulates speech in myriad ways that are obviously not content neutral. Denying copyright protection to harmful pornographic works would not additionally burden lawful speech in a manner that violates the First Amendment. Rather, it would simply reduce the government-provided incentives for the production and distribution of harmful pornography.

III

WHAT IS “NON-PROGRESSIVE” AND “NON-USEFUL” PORNOGRAPHY?

A. *Pornography as Cultural Construct*

The difference in social status between men and women is both illustrated and reinforced by endemic highly sexualized depictions of women in the media. At the far end of a very long and dense continuum is hardcore pornography. As Catharine MacKinnon has eloquently explained, pornography reflects and reinforces the unequal and inferior position of women.¹¹⁷ Pornography has an impact on the media that is visible in advertisements for products that are not related to sex. Consider three illustrative examples. An ad for Arby's positioned two round meat sandwiches in the place of breasts with a disembodied woman's arms crossed over the burger-chest.¹¹⁸ Old Spice exhorts potential customers to “Keep it Clean,” next to an unsubtle picture of a woman suggestively licking an ice cream cone, as if performing fellatio, with the text, “She is only eating it because it tastes good and it is hot where she happens to be.”¹¹⁹ An advertisement for a Clinique skin moisturizer uses a common visual

¹¹⁶ See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, 63 LAW & CONTEMP. PROBS. 337 (2000); Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397 (2007); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529 (2000).

¹¹⁷ See CATHARINE A. MACKINNON, ONLY WORDS (1993).

¹¹⁸ See Darren Rovell, *Arby's Scores in Swimsuit Issue*, CNBC (Feb. 11, 2009), <http://www.cnbc.com/id/29139052> (describing the ad that appeared in the 2009 *Sports Illustrated Swimsuit Edition*).

¹¹⁹ See CARMINE SARRACINO & KEVIN M. SCOTT, THE PORNING OF AMERICA 120 (2008).

pornography trope with fluid splattered on a woman's face.¹²⁰ The cultural effects of pornography are felt by everyone.¹²¹ But it is the people who sell sex directly who are most deeply marginalized. Most of the people working as prostitutes or in pornography are doing so because they are subject to some form of coercion—actual or threatened violence and intimidation or financial coercion.¹²² A poor economic climate has driven more people into prostitution and

¹²⁰ See *id.* at 118.

¹²¹ See Ana J. Bridges, *Pornography's Effects on Interpersonal Relationships* (unpublished research paper, Dep't. of Psychol., University of Arkansas), available at http://www.socialcostsofpornography.org/Bridges_Pornographys_Effect_on_Interpersonal_Relationships.pdf; Ryan Singel, *Internet Porn: Worse Than Crack?*, WIRED (Nov. 19, 2004), <http://www.wired.com/science/discoveries/news/2004/11/65772>; cf. David Lee, *What is the Influence of Pornography on Rape?*, CALCASA (Mar. 19, 2010), <http://calcasa.org/prevention/what-is-the-influence-of-pornography-on-rape/> (detailing two research papers that reach opposite conclusions about the effect of pornography on the rate of sexual assaults).

¹²² See Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 134 (2006) (“We found that prostitution was multitraumatic: 71% [of prostitutes interviewed in multi-national study] were physically assaulted in prostitution; 63% were raped; 89% . . . wanted to escape prostitution, but did not have other options for survival”); Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 136 (1993) (“[P]rostitution . . . isn't about choice. Instead, prostitution is about the absence of meaningful choices . . .”); Catharine A. Mackinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER AND L. 13 (1993), available at <http://www.prostitutionresearch.com/mackinnon2.html>; Melissa Farley, *Human Trafficking and Prostitution*, <http://www.prostitutionresearch.com/faq/000175.html> (“The conditions that make genuine consent possible are absent from prostitution: physical safety, equal power with johns and pimps, and real alternatives”); *Prostitution FAQ, Human Trafficking and Prostitution*, PROSTITUTION GENDERBERG, http://www.genderberg.com/phpNuke/modules.php?name=FAQ&myfaq=yes&id_cat=2&categories=Prostitution+FAQf (last visited Aug. 20, 2012). Max Waltman, Stockholm Univ. Dep't of Psychology, *Paper to Be Presented at the Swedish Political Science Ass'n (SWEPSA) Annual Meeting, Sept. 30 to Oct. 2, 2010: RETHINKING DEMOCRACY: Legal Challenges to Pornography and Sex Inequality in Canada, Sweden, and the United States*, available at http://www.pol.gu.se/digitalAssets/1315/1315857_waltman.pdf (“Although some question that pornography is produced under such coercive or violent conditions as those documented in this sample, a significant body of evidence below unfortunately shows this study was not an exception. Rather, violence, force, and coercive circumstances seem endemic in its production which, considering among other things the gender inequality in its consumption, suggest that it is strongly related to male social dominance.”). Cf. Chuck Neubauer, *Most Human Trafficking Related to Prostitution*, WASH. TIMES (Apr. 28, 2011), <http://www.washingtontimes.com/news/2011/apr/28/most-human-trafficking-related-to-prostitution/> (discussing a report by the U.S. Department of Justice stating that most human trafficking involves prostitution).

pornography because alternative avenues of employment have declined, and most of these people are women.¹²³

Johns, pimps, and prostitutes are all committing crimes in most jurisdictions of the United States, but prostitutes are disproportionately targeted for arrest by law enforcement officials.¹²⁴ Despite a few high profile exceptions, most johns are ignored or even protected by social norms that favor punishing and shaming prostitutes.¹²⁵

As explained previously, when a camera is brought into a room in which a commercial sex transaction is occurring, what was illegal prostitution suddenly becomes pornography, which is generally legal if all parties are eighteen or older, and which is protected under the auspices of dominant First Amendment jurisprudence.¹²⁶ Pornographers are much less likely than pimps to be arrested for arranging monetized sex acts, and are subject to far less governmental supervision or scrutiny than anyone involved in the production of mainstream movies or television programs.¹²⁷ Pornographers enjoy a broad zone of autonomous anonymity, while at the same time the distribution of pornography strips the performers they film of visual and informational privacy, both legally and as a practical matter. The performers' real names may be kept on record so that government actors can insure they are legally adults,¹²⁸ and their faces and bodies may remain in Internet circulation in perpetuity.¹²⁹

¹²³ See Kristi Jourdan, *Ex-Prostitutes Walk Tough Road to Economic Freedom Amid Recession*, LAS VEGAS REV.-J. (Jan. 24, 2010, 10:00 AM), <http://www.lvrj.com/news/ex-prostitutes-walk-tough-road-to-economic-freedom-amid-recession-82543682.html> (last updated April 10, 2012, 10:44 AM); *For 4, Life of Prostitution and Death by 1 Killer*, CBS N.Y. (Jan. 29, 2011, 10:01 PM), <http://newyork.cbslocal.com/2011/01/29/for-4-life-of-prostitution-and-death-by-1-killer/>.

¹²⁴ See Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33 (2003), available at <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>.

¹²⁵ See *infra* notes 144–51 and accompanying text.

¹²⁶ See *supra* notes 74–75 and accompanying text (discussing the *Freeman* case).

¹²⁷ See Donna M. Hughes, *The Demand for Victims of Sex Trafficking* (June 2005) (unpublished manuscript), available at http://www.uri.edu/artsci/wms/hughes/demand_for_victims.pdf; Max Waltman, Stockholm Univ. Dep't of Psychology, Midwest Political Science Association Conference: The Ideological Obstacle: Charging Pornographers for Sexual Exploitation (Apr. 11–15, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050290.

¹²⁸ 18 U.S.C. § 2257 (2006). See generally Ann Bartow, *Why Hollywood Does Not Require "Saving" From the Recordkeeping Requirements Imposed by 18 U.S.C. Section*

While prostitution is badly policed by the government in ways that disproportionately target women, pornography is barely regulated at all. Consumer-oriented statements about animal welfare can be seen on cans of tuna bearing “dolphin safe” labels,¹³⁰ or general release movies that includes notices that that no animals were harmed during the making of the film. In stark contrast, pornographic works are often advertised in ways that highlight actual violence that was done to performers during production, such as “bloody first times,” “blondes getting slammed,” “big mutant dicks rip small chicks,” and “men fucking that teen virgin bitch’s ass so hard she couldn’t sit for days.”¹³¹ Apparently, this is an effective way to sell pornography to average pornography consumers. One wonders how the same audience would respond to cans of tuna bearing labels that said, “Now with more brutally slaughtered dolphins than ever!” It may be that pornography consumers falsely believe all pornography performances are voluntary and consensual, but the violent sales pitches compellingly suggest that it is more likely consumers derive extra pleasure from the possibility of real women’s suffering.

Many works of mainstream pornography promote a dangerously distorted vision of female sexual response. Many of these works are produced in ways that endanger the health and safety of the performers, with practices ranging from unprotected sex acts among multiple partners in ways that are especially likely to facilitate the spread of diseases, to heavy-handed, body-damaging, unstimulated violence.¹³²

The U.S. Department of State’s June 2007 *Trafficking in Persons Report* noted that trafficked women and children are the primary

2257, 118 YALE L.J. POCKET PART 43, 43 (2008), available at <http://yalelawjournal.org/images/pdfs/701.pdf>.

¹²⁹ Once information is posted to the Internet, it is difficult, if not impossible, to remove it. Jeffrey Rosen calls this the “infinite memory” of the web. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at MM30, available at http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?_r=1&pagewanted=all.

¹³⁰ *Dolphin Safe Tuna: Consumers*, EARTH ISLAND INST., <http://www.earthisland.org/dolphinSafeTuna/consumer/> (last visited Mar. 5, 2012).

¹³¹ A reader can verify this statement by entering these phrases into an Internet search engine.

¹³² See Maria de Cesare, *Rxxx: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 684 (2006); Christina Jordan, *The XXX-Files: Cal/OSHA’s Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421, 424 (2005).

victims of commercial sexual exploitation.¹³³ The Report emphasized the commercial sexual exploitation that human trafficking makes possible, decrying the forced prostitution of trafficked women and children. The Report also references child pornography multiple times, but the forced participation of women aged eighteen or over in pornography is not mentioned at all. There is plenty of evidence that women who are “prostituted” (to use the terminology of the Report) are also force-filmed so that videos of their rapes can be distributed commercially, but this category of sexual exploitation did not merit mention by the State Department’s Report, though surely no one believes that women held captive and forced into prostitution are contemporaneously appearing in pornography voluntarily.

However, pornography is a very lucrative product for mainstream American corporations¹³⁴ that are unlikely to open brothels. They will sell only copyrighted sex to their clients. Pornography is prostitution sanitized by physical remoteness from the commoditized bodies and by the independent contractors who provide companies like Google and General Motors with plausible deniability when people are harmed during its production.

Pornographic pictures and movies in which the humiliation of women is the central theme, fusing sexual desire with cruelty, are extremely common in the United States.¹³⁵ One of the few large-scale academic studies of pornography on the Internet, now over a dozen years old, ascertained that women are used disproportionately to men in violating ways, such as being subjected to bestiality.¹³⁶ The aggressive, vitriolic, and highly personal backlash against this study by libertarian organizations like the Electronic Frontier Foundation is undoubtedly responsible for the paucity of interest in pornography

¹³³ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2007), available at <http://www.state.gov/documents/organization/82902.pdf>.

¹³⁴ See DINES, *supra* note 83; see also *supra* note 14.

¹³⁵ See, e.g., THE PRICE OF PLEASURE: PORNOGRAPHY, SEXUALITY & RELATIONSHIPS (Media Educ. Found. 2008).

¹³⁶ Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times By Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1898–1901 (1995); see also Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1963 (1995).

research.¹³⁷ Sociologist Diana Russell has also argued that researchers avoid or downplay research that negatively characterizes pornography for professional reasons because being pro-pornography is a more lucrative career strategy than exposing the harms of pornography.¹³⁸ Linda Williams, an academic in film studies, has stressed the need for more scholarly analysis of pornography¹³⁹; others have echoed this sentiment as well.¹⁴⁰

Given the pornography industry's production of relentlessly sexist, degrading, and racist¹⁴¹ photos, films, and websites, one might expect politically liberal people to be receptive to critiques of pornography, but one would be very wrong.¹⁴² Rather than open-minded intellectual curiosity, criticisms of pornography are met with accusations of prudery, censoriousness, and alignment with the

¹³⁷ See Peter H. Lewis, *The Internet Battles a Much-Disputed Study on Selling Pornography Online*, N.Y. TIMES, July 17, 1995, at D5, available at <http://www.nytimes.com/1995/07/17/business/tech-net-internet-battles-much-disputed-study-selling-pornography-line.html>; David Farber, *IP: Martin Rimm and the Anti-Porn Activists – From the EFFector*, INTERESTING-PEOPLE (Oct. 20, 1995, 4:39 PM), <http://www.interesting-people.org/archives/interesting-people/199510/msg00056.html>.

¹³⁸ Diana E. H. Russell, *The Experts Cop Out*, in MAKING VIOLENCE SEXY: FEMINIST VIEWS ON PORNOGRAPHY 151 (Diana E. H. Russell ed., 1993).

¹³⁹ Linda Williams, *Porn Studies: Proliferating Pornographies On/Scene: An Introduction*, in PORN STUDIES 1 (Linda Williams ed., 2004).

¹⁴⁰ See Hughes, *supra* note 127; Daniel Linz et al., *Civil Liberties and Research on the Effect of Pornography*, in PSYCHOLOGY AND SOCIAL POLICY (Peter Suedfeld & Philip E. Tetlock eds., 1992), available at http://www.sscnet.ucla.edu/comm/malamuth/pdf/92PSP_C10.pdf; Neil M. Malamuth & Victoria Billings, *The Functions and Effects of Pornography: Sexual Communications Versus the Feminist Models in Light of Research Findings*, in PERSPECTIVES ON MEDIA EFFECTS (Jennings Bryant & Dolf Zillmann eds., 1986), available at http://www.sscnet.ucla.edu/comm/malamuth/pdf/86PME_C5.pdf.

¹⁴¹ See, e.g., Gail Dines, *The White Man's Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 YALE J.L. & FEMINISM 283 (2006); Gail Dines, *King Kong and the White Woman: Hustler Magazine and the Demonization of Black Masculinity*, 4 J. VIOLENCE AGAINST WOMEN 291 (1998), available at http://www.hustlingtheleft.com/CRAPP_E_LIB/dines.html.

¹⁴² See, e.g., Danny Scoccia, *Can Liberals Support a Ban on Violent Pornography?*, 106 ETHICS 776 (July 1996); Gail Dines, *How Some Men React When They Think You Want to Take Away Their Porn: Penn, Porn and Me*, COUNTERPUNCH (June 23, 2008), <http://www.counterpunch.org/dines06232008.html>. But see *The Price of Pleasure: Pornography, Sexuality, and Relationships: Noam Chomsky on Pornography* (Media Educ. Found. 2008), available at <http://www.youtube.com/watch?v=SNIRoaFTHuE>; but see also Robin Wilson, *Tenured Professor is Placed on Leave After Showing a Film About Pornography*, CHRON. OF HIGHER EDUC. (Apr. 20, 2012), <http://chronicle.com/article/Tenured-Professor-Is-Placed-on/131607/?key=Tmh6JAI7NyAXYSpnZjdBZDoAOiM4YR17YH9Nbnl/bIFQFA%3D%3D> (reporting that a professor was punished for showing *The Price of Pleasure*, which is very critical of pornography, to her sociology class).

political right wing.¹⁴³ The liberal perspective seems to be that feminists should not attack pornography because social archconservatives attack pornography, and they cannot possibly have the correct view of this (or any) issue.¹⁴⁴ But right-wing religious fundamentalist cultural warriors do not evidence any particular driving passion to regulate pornography. Pornography's widespread existence seems very useful to them culturally as a mechanism to illustrate the depravity of liberals.¹⁴⁵ It has been this author's strong impression that they rarely exhibit concern about the people damaged during the production of pornography. Their agenda actually appears to be very different: governmental regulation of sex and interpersonal relationships; government-based persecution of homosexuals; legal restrictions upon access to contraceptives and to instruments of sexual pleasure, such as vibrators; and the re-illegalization of abortion.¹⁴⁶ Principled expressions of concern about the harms of pornography production from either the left or right are rare indeed.

In this author's view, prostitution is also tolerated and normalized within mainstream American society. But because prostitution is generally illegal, the intersections between law and the people involved with the industry are different, even though some women who perform in pornography also sell sex directly to consumers¹⁴⁷

¹⁴³ See, e.g., Robert Jensen, *A Call for an Open Discussion of Mass-Marketed Pornography*, ALTERNET (Feb. 10, 2007), <http://www.alternet.org/media/47677?page=entire>.

¹⁴⁴ See, e.g., Nina Hartley, *Thus I Refute Chyng Sun: Feminists for Porn*, COUNTERPUNCH (Feb. 2, 2005), <http://www.counterpunch.org/hartley02022005.html> ("If I have the right to choose abortion, then I have the right to choose to have sex for the camera. Sexual freedom is the flip side of the coin of reproductive choice.").

¹⁴⁵ See, e.g., Whitney Strub, *Perversion for Profit: Citizens for Decent Literature and the Arousal of an Antiporn Public in the 1960s*, 15 J. HISTORY OF SEXUALITY 258 (2006), available at http://muse.jhu.edu/journals/journal_of_the_history_of_sexuality/v015/15.2_strub.html; see also Austin Cline, *Christian Attitudes Towards Sex, Pornography*, ABOUT.COM (Oct. 20, 2009), <http://atheism.about.com/b/2009/10/20/christian-attitudes-towards-sex-pornography.htm>; Green Point, *Hotel Porn Gets Spanking From Religious Right: Conservatives Push Marriott to Drop Pay-Per-View Sex Flicks*, NEWSER (July 23, 2008, 9:20 PM), <http://www.newser.com/story/33072/hotel-porn-gets-spanking-from-religious-right.html>.

¹⁴⁶ See generally CULTURE WARS: AN ENCYCLOPEDIA OF ISSUES, VIEWPOINTS, AND VOICES (Roger Chapman ed., 2009).

¹⁴⁷ JoAnna, *Prostitution in Las Vegas*, WHYGO LAS VEGAS, <http://www.lasvegaslogue.com/prostitution> ("Former and current porn stars sometimes base themselves at the brothels for a week or two at a time, and they can charge \$1,000 or more.") (last visited July 4, 2012).

and many johns are probably also pornography users.¹⁴⁸ The threat of arrest or exposure impacts both the providers and consumers of commoditized sex. Men who are exposed as patrons of prostitutes (such as former New York Governor Elliot Spitzer¹⁴⁹ and former Dean of the Villanova School of Law Mark Sargent)¹⁵⁰ are publicly shamed, but the impact of this may be only temporary. Spitzer resigned as Governor of New York, but is now enjoying a high-profile media career.¹⁵¹ Sargent resigned his Deanship, but he avoided criminal charges by helping the Commonwealth of Pennsylvania send the women who had sexually serviced him to jail.¹⁵²

Women culturally identified as prostitutes are also publicly shamed,¹⁵³ but arguably that is the least of their problems. They are arrested and jailed at much higher rates than male pimps or johns and are extremely vulnerable to violence and coercion.¹⁵⁴ Due to the

¹⁴⁸ See Richard Tewksbury & Seana Golder, *Why Do Johns Use Pornography? Predicting Consumption of Pornography by Clients of Street Level Prostitutes*, 2 SOUTHWEST J. CRIM. L. 101 (2005), available at <http://swacj.org/swjcl/archives/2.2/Tewksbury.pdf>; Leslie Bennetts, *The John Next Door*, NEWSWEEK (July 18, 2011, 1:00 AM), <http://www.thedailybeast.com/newsweek/2011/07/17/the-growing-demand-for-prostitution.html>;

¹⁴⁹ See *Emperors Club: All About Eliot Spitzer's Alleged Prostitution Ring*, HUFFINGTON POST (Oct. 18, 2008, 11:37 AM), http://www.huffingtonpost.com/2008/03/10/emperors-club-all-about-e_n_90768.html (last updated May 25, 2011, 1:25 PM).

¹⁵⁰ See Jeff Blumenthal, *Villanova Dean Resigned Over Prostitution*, PHILADELPHIA BUS. J. (July 7, 2009, 11:36 AM), http://www.bizjournals.com/philadelphia/blogs/law/2009/07/villanova_dean_resigned_over_prostitution.html?surround=etf (last modified Oct. 16, 2010, 3:40 AM); Gina Passarella, *Questions Arise After Law School Dean's Resignation in Wake of Prostitution Investigation*, LAW.COM (July 7, 2009), http://www.law.com/jsp/article.jsp?id=1202432042292&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20090707&kw=Questions%20Arise%20After%20Law%20School%20Dean%27s%20Resignation%20in%20Wake%20of%20Prostitution%20Investigation&slreturn=1&hblogin=1.

¹⁵¹ See Jan Hoffman, *Spitzer's Long Road to Redemption*, N.Y. TIMES, Apr. 8, 2010, at E1, available at http://www.nytimes.com/2010/04/08/fashion/08Spitzer.html?_r=1&adxnml=1&ref=style&adxnmlx=1298045180-PTPxe9qf1azDCzdD5bLdQQ; Brian Montopoli, *Elliot Spitzer Gets Primetime CNN Show*, CBS NEWS (June 23, 2010, 11:29 AM), http://www.cbsnews.com/8301-503544_162-20008567-503544.html.

¹⁵² See Kathleen BradyShea, *Ex-Dean Helped Police, Report Says*, PHILLY.COM (July 03, 2009), http://articles.philly.com/2009-07-03/news/25288787_1_sargent-prostitution-ring-customer.

¹⁵³ See Katie Escherich, *Ashley Dupré: 'I've Made So Many Mistakes'*, ABC NEWS (Nov. 21, 2008), <http://abcnews.go.com/2020/story?id=6302149&page=1>.

¹⁵⁴ See Gene Johnson, *New Murder Charge Filed in Seattle in Green River Killings; Ridgway Won't Face Death Penalty*, STAR TRIB. (Feb. 7, 2011),

illegality of their livelihood, they cannot expect protection from police officers, and instead are often exploited by them.¹⁵⁵

But there is little reason to believe that wholesale legalization of prostitution would improve the lives of women who sell sex. The fact that pornography production is legal does not mean that performing in pornography is safe; quite the contrary, as is explained below.¹⁵⁶ In countries such as the Netherlands, Austria, Germany, Belgium, Denmark, France, Finland, Greece, Israel, Mexico, Singapore, Switzerland, and the United Kingdom where prostitution is legal, women working legally as prostitutes¹⁵⁷ still suffer from high rates of violence and substance abuse.¹⁵⁸ In addition, high rates of demand combined with greed foster sex trafficking and a giant and extremely lucrative illegal prostitution trade carried on outside the strictures of government regulations within these jurisdictions.¹⁵⁹ Women infected with HIV cannot work legally as prostitutes, but they still have bodies that men are willing to buy. Women who sell sex legally in brothels that actually care about their health and well-being may not have to submit to unprotected sex, or to sex acts they find distasteful or worse, but the customers making these demands can simply go to other “providers”; those without any power or options at all.

http://www.startribune.com/templates/Print_This_Story?sid=115501659 (reporting how a serial killer “preyed upon women and girls at the margins of society—runaways, prostitutes and drug addicts”).

¹⁵⁵ See, e.g., Steven D. Levitt & Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution* (2008), available at <http://economics.uchicago.edu/pdf/Prostitution%205.pdf>.

¹⁵⁶ See *infra* Part III.B.4.

¹⁵⁷ *100 Countries and Their Prostitution Policies*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000772> (last updated Dec. 12, 2011, 10:26 AM).

¹⁵⁸ E.g., Kimberly Schupp, *Another Craigslist Killer? Bodies of 4 Women ID'ed*, WISTV.COM (Jan. 25, 2011, 8:14 AM), <http://www.wistv.com/Global/story.asp?S=13903767> (last updated Feb. 22, 2011, 8:41 AM); see also M.L. Burnette et al., *Prevalence and Health Correlates of Prostitution Among Patients Entering Treatment for Substance Use Disorders*, 65 ARCHIVES GEN. PSYCHIATRY 337 (Mar. 2008), available at http://archpsyc.jamanetwork.com/data/Journals/PSYCH/11858/yoa70078_337_344.pdf.

¹⁵⁹ See Kevin Bales, *Because She Looks Like a Child*, in GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY 207, 226–28 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2002) (noting that the exportation of enslaved prostitutes is a robust business in Thailand, supplying brothels in Japan, Europe (mentioning Switzerland and Germany particularly) and America); SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE* 152, 173 (2009).

Pornography and prostitution are cruelly symbiotic. One drives demand for the other, and there is little practical difference between prostitution and performing in pornography. In pornography a director or pornographer is in control of the sex; in prostitution a client or john is, and often a pimp as well. Addressing the harms that are inflicted on even voluntary performers involved in the manufacturing of pornography justifies regulating the production of pornography. It does not require censorship of content except to the extent necessary to reduce disease transmission and the infliction of other physical injuries. Nonpornographic audiovisual works are generally created subject to the costs and logistical constraints imposed by industry norms, regulations, and legislation that establish minimum levels of health and safety considerations accorded performers and stunt people.¹⁶⁰ Simply leaving them subject to the base line negligence avoidance incentives and injury compensation frameworks provided by tort law was deemed inadequate.¹⁶¹ Pornography performers should receive the same level of concern and protection, as they are no less worthy and no less human.

*B. Toward a Content-Based Focus on the Constitutionality of
Copyright Protecting Individual Works of Pornography*

Article I of the U.S. Constitution authorizes Congress to promote only the progress of science and useful arts through copyright legislation.¹⁶² Congress itself has never specifically taken up the issue

¹⁶⁰ See Nikki Finke, *Feds Fine 'Spider-Man – Broadway' Production Company For Cast Injuries*, DEADLINE HOLLYWOOD (Mar. 4, 2011, 6:09 PM), <http://www.deadline.com/2011/03/feds-fine-spider-man-broadway-production-company-for-cast-injuries/>; Karen Idelson, *High Stakes in Flying Game: Tech Tussle: Aerial Stunt Pros Stand Up for Safety*, VARIETY (Mar. 9, 2011, 4:00 AM), <http://www.variety.com/article/VR1118033594>; Ann Oldenburg, *Still Willing to Take the Fall*, USA TODAY (June 6, 2003, 1:42 PM), http://www.usatoday.com/life/movies/news/2003-06-05-stunt_x.htm.

¹⁶¹ See, e.g., *Safety Bulletins: Recommended by Industry-Wide Labor-Management Safety Committee for the Motion Picture and Television Industry*, CSATF, <http://www.csatf.org/bulletintro.shtml> (last visited July 4, 2012); Michael McCann, *Stunt Injuries and Fatalities Increasing*, available at http://www.uic.edu/sph/glakes/harts1/HARTS_library/stunts.txt (last visited July 4, 2012) (providing this and other articles on stunt safety). But see Joan Whitley, *OSHA Not Reviewing Death of Stagehand*, LAS VEGAS REV.-J. (Jan. 27, 2011; 7:36 AM), available at <http://www.lvrj.com/news/osha-not-reviewing-death-of-stagehand-114707049.html>.

¹⁶² Article I, section 8, clause 8 of the U.S. Constitution gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

of whether a creative work, otherwise eligible for copyright protection, might be denied as a consequence of the work's lack of progressiveness or usefulness. Nor has it addressed the copyrightability of pornography.¹⁶³

Before 1979, pornographers did not attempt to reap the benefits of the Copyright Act. Copying and attribution norms were driven by the business practices of organized crime.¹⁶⁴ Then in *Mitchell Brothers Film Group v. Cinema Adult Theater*, the Fifth Circuit held that obscenity was not a defense to copyright infringement because nothing in the Copyright Act of 1909 precluded the copyrighting of obscene materials.¹⁶⁵ The Fifth Circuit specifically used the term "obscenity" rather than "pornography," and concluded that holding obscene materials copyrightable furthered the pro-creativity purposes of the Copyright Act and of congressional copyright power generally.¹⁶⁶

The *Mitchell Brothers* court also asserted that the First Amendment and copyright are "mutually supportive," writing: "The financial incentive provided by copyright encourages the development and exchange of ideas which furthers the first amendment's purpose of promoting the 'exposition of ideas.'"¹⁶⁷ The article quoted by the court linked this to a right to reach an audience or readership that is economically facilitated by copyright protections.¹⁶⁸

The *Mitchell Brothers* court expressed enthusiastic support for increasing incentives for the production and distribution of pornography without expressing concern for any negative consequences. In the years following the *Mitchell Brothers* decision, courts agonized over the costs and benefits of extending copyright protections to categories of works such as computer game

¹⁶³ See Bartow, *supra* note 14, at 833–35.

¹⁶⁴ See U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, ORGANIZED CRIME INVOLVEMENT IN PORNOGRAPHY pt. 4, ch. 4 (1986), available at <http://www.porn-report.com/404-organized-crime-and-pornography.htm>; *Mitchell Brothers*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mitchell_brothers (last visited July 4, 2012).

¹⁶⁵ 604 F.2d 852, 854 (5th Cir. 1979) (noting that the now superseded Copyright Act of 1909 was the applicable statute).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 857 n.8 (quoting *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158, 1177–78 (1977) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

¹⁶⁸ *Id.*

interfaces,¹⁶⁹ where any harm from an overly expansive construction of copyright was likely to be strictly economic in nature. Pornography apparently presented a much easier case.

Three years later, in *Jartech, Inc. v. Clancy*, the Ninth Circuit adopted the *Mitchell Brothers* court's reasoning unquestioningly, relying on an endorsement by *Nimmer on Copyright*, which it referred to as "[t]he leading treatise on copyright."¹⁷⁰ Although *Mitchell Brothers* was the only case on point at that time, the *Jartech* court observed that "Nimmer also considers *Mitchell Brothers* to represent the prevailing view on this issue,"¹⁷¹ and followed the prescriptions of the copyright treatise by rote.¹⁷²

In 2002, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, a federal judge stated that the protection of pornographic copyrights was "consistent with the public interest."¹⁷³ In 2004, in *Nova Products, Inc. v. Kisma Video, Inc.*, a third court decided to follow *Mitchell Brothers*, observing:

In its well-reasoned and scholarly opinion, the Fifth Circuit [in *Mitchell Brothers*] reviewed the history of the copyright legislation and found that all-inclusive language of the Copyright Act of 1909, 17 U.S.C. § 34 (1970) (repealed), which encompassed "all the writings of an author,"¹⁷⁴ did not bespeak of an obscenity exception to copyright protection.

The author of *Nimmer on Copyright*, David Nimmer, appears to view the issue of the copyrightability of pornography as somewhat of a joke, having written a mocking fictional account of a debate over the issue set in the year 2016.¹⁷⁵ Yet courts are not in complete

¹⁶⁹ See, e.g., *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.* 964 F.2d 965 (9th Cir. 1992); *Capcom U.S.A., Inc. v. Data East Corp.*, No. C 93-3259 WHO, 1994 U.S. Dist. LEXIS 5306 (N.D. Cal. Mar. 16, 1994); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982).

¹⁷⁰ 666 F.2d 403, 406 (9th Cir. 1982).

¹⁷¹ *Id.*

¹⁷² See generally Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581 (2004) (offering a critique of courts' over-reliance on the Nimmer treatise).

¹⁷³ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1165 (C.D. Cal. 2002).

¹⁷⁴ *Nova Prods., Inc. v. Kisma Video, Inc.*, No. 02 Civ. 3850 (HB), 02 Civ. 6277 (HB), 03 Civ. 3379 (HB), 03 Civ. 4259 (HB), 2004 U.S. Dist. LEXIS 24171, at *10 (S.D.N.Y. Nov. 30, 2004).

¹⁷⁵ David Nimmer, *Codifying Copyright Law Comprehensively*, 51 UCLA L. REV. 1233, 1282 (2004) (providing analysis of fictive "The Gazette Memmilania, Gm.; Jan. 14, 2018"); cf. DAVID NIMMER, *COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA*

accord on this matter. In 1998, Judge Martin of the Southern District of New York refused to grant a copyright infringement-grounded preliminary injunction or pretrial impoundment and seizure order for movies he believed to be obscene.¹⁷⁶ He concluded that, “[g]iven the clearly criminal nature of plaintiff’s operations, it is self-evident that the Court should not use its equitable power to come to plaintiff’s assistance,” and he refused to commit the resources of the U.S. Marshals Service “to support the operation of plaintiff’s pornography business.”¹⁷⁷ The holding reflected an assumption that obscene works were not eligible for copyright protection in the interval between 1790, when the first U.S. copyright law took effect, until almost two hundred years later, when the *Mitchell Brothers* case was decided.¹⁷⁸

1. *Defining and Promoting Progress*

Legal scholars have debated the meanings of various textual components of the Intellectual Property Clause of the U.S. Constitution quite vigorously.¹⁷⁹ Many older cases talk about “promot[ing] the Progress of . . . the useful Arts” in connection with copyright, but the modern view is that the “Progress of the useful Arts” refers to technology and therefore patents, while the part of the clause relevant to copyrights is the part that invites Congress to “promote the Progress of Science,” with science meaning knowledge.¹⁸⁰ This has the advantage of using the same order, copyright then patent, in both halves of the clause.¹⁸¹

336–37 (2003) (arguing that online pornography is analogous to a peep show with a legitimate claim to an admission price).

¹⁷⁶ *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 177-77 (S.D.N.Y. 1998).

¹⁷⁷ *Id.* at 175.

¹⁷⁸ The copyrightability of pornography is the subject of legal debate currently. See Chris Matyszczyk, *Copyright Defendant: Porn May Be, Um, Unprotected* (Feb. 6, 2012, 5:42 PM), http://news.cnet.com/8301-17852_3-57372240-71/copyright-defendant-porn-may-be-um-unprotected/?part=rss&subj=latest-news&tag=title.

¹⁷⁹ See Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause*, 80 NEB. L. REV. 754 (2001).

¹⁸⁰ See Orrin G. Hatch & Thomas R. Lee, “To Promote the Progress of Science”: The Copyright Clause and Congress’s Power to Extend Copyrights, 16 HARV. J.L. & TECH. 1, 7 (2002) (explaining the meaning of “science” as used in Constitution).

¹⁸¹ Thanks to Jessica Litman for this observation and framing of the issue.

Non-progressive, non-useful works cannot constitutionally receive copyright protection and the Copyright Act could be modified to make this explicit. I propose the following definition:

A “non-progressive, non-useful” work is a pornographic work in which the level of originality or creativity is low, but the likelihood that harms were inflicted on living beings during the production of the work, or the risk of harms resulting from distribution and consumption of the work, is high.

Specific categories of works may be presumptively “non-progressive” and “non-useful.” When the Supreme Court ruled in *Eldred v. Ashcroft* in 2003 that the 1998 Copyright Term Extension Act did not exceed constitutional boundaries with respect to the “limited times” restraint upon Congressional copyright powers, it signaled a high level of deference to Congress in the copyright context.¹⁸² The Court reinforced this jurisprudential position when it held that Congress could constitutionally restore copyright protection to works that were in the public domain in *Golan v. Holder*.¹⁸³ If the proposed change to the Copyright Act was analyzed as an exercise of power under the Copyright Clause, it could withstand constitutional challenges¹⁸⁴ even though it might further fragment what little coherence copyright law retains.¹⁸⁵

As a practical matter of law and economics, this proposal rests heavily upon the assumption that the benefits of reducing monetary incentives for producing non-useful and non-progressive pornography outweigh the additional costs inflicted upon those who have already been harmed by corresponding incentives to increase the distribution of existing works. Harms accrue to a person who has already been abused in the production of pornography when that pornography is distributed. More extensive distributional harm is inflicted when the

¹⁸² *Eldred v. Ashcroft*, 537 U.S. 186, 188 (“The CTEA is a rational exercise of the legislative authority conferred by the Copyright Clause. On this point, the Court defers substantially to Congress. . . . The CTEA reflects judgments of a kind Congress typically makes, judgments the Court cannot dismiss as outside the Legislature’s domain.”).

¹⁸³ *Golan v. Holder*, SCOTUSBLOG (Jan. 18, 2012), <http://www.scotusblog.com/case-files/cases/golan-v-holder/> (“Holding: Section 514 of the Uruguay Round Agreements Act does not exceed Congress’s authority under the Copyright Clause.”).

¹⁸⁴ *Cf. Golan v. Holder*, 609 F. 3d 1076, 1095 (2010), *cert. granted*, 131 S. Ct. 1600 (2011) (“In sum, Congress acted within its authority under the Copyright Clause in enacting Section 514 . . . Section 514 does not violate plaintiffs’ freedom of speech under the First Amendment because it advances an important governmental interest . . .”).

¹⁸⁵ See Nimmer, *Codifying Copyright Law Comprehensively*, *supra* note 175.

rate of distribution increases. If stripping certain pornographic works of copyright protections causes their production to decline, but demand remains the same, existing works become more valued and will circulate more widely. People who have already been victimized will thus bear some of the burden of reducing the number of future victims. But the likelihood that they will be victimized further in the production of new harmful works will also decline. In other words, a smaller number of works would be circulated more widely, bringing greater harms to the people traumatized by the distribution of those works. But disincentivizing future harmful works would reduce the total number of people subject to this abusive treatment overall. And even the people injured by the circulation of existing works would benefit if the production of new works further victimizing them were derailed by a lack of economic incentives.

I expect the more virulent objections to this proposal to come from people who call themselves liberal. One might expect left-identifying observers to experience intense cognitive dissonance when speech seems to inflict harms upon vulnerable people whom, as liberals, they might actually care about in other contexts. But it is an instantiated part of the liberal canon that the “worst” speech should receive the most protection from the First Amendment, victims of the speech notwithstanding. That the negative consequences of a vibrant First Amendment fall more harshly upon women than men has made little difference so far to most of the free speech theorists regarded as important culturally or even within legal academia. There are, however, some specific categories of pornography in which at least some of the harms might be recognizable to even ardent libertarians: child pornography, crush pornography, and revenge pornography. Production of these works should not be incentivized or rewarded with copyrights or the associative benefits. In addition, any pornography in which the performers are engaged in unsimulated acts that are coerced or compromise their health and safety should also be denied copyright protections. I concede at the outset that establishing the boundaries of these categories is vexingly complicated, but important tasks are rarely easy.

2. *Child Pornography*

One hugely complicating variable with this category is the fact that people have widely differing opinions about what constitutes child pornography. Defining child pornography for purposes of eligibility for copyright protection would be no harder than it is in the First

Amendment milieu, but it might not be any easier or less contested either. Audiovisual depictions of real children engaged in explicit sex acts can be unambiguously described as child pornography. At the other end of the continuum, however, are works like still photographs of fully or mostly clothed teenagers who are posed in stances or contexts that strike some observers as sexualized. The lines between legal treatment of children as sex objects and illegal child pornography can be blurry.¹⁸⁶

The children depicted in pornography made with living performers are generally treated as victims and the consumers of child pornography as criminals, and rightly so. Pedophilia acted out in real space poses serious dangers to children and should be discouraged by every legal tool available, including exclusion from copyright protections. This may be largely symbolic, as no holder of copyright in a work that unambiguously constitutes child pornography has to date legally asserted copyrights or brought an infringement action.¹⁸⁷ Given the shadowy nature of the industry due to fear of arrest, it seems unlikely that unambiguous works of child pornography in which real children are depicted have even been registered with the Copyright Office.¹⁸⁸

Some observers argue that there is a moral panic about the sexualization of children that manifests itself through hyperaggressive prosecution of anyone associated with producing, distributing, or consuming child pornography.¹⁸⁹ Certainly the use of the age of the subject as the single bright line that divides creative works with any sort of sexual aspect into one of two stark categories: “acceptable”

¹⁸⁶ See SARRACINO & SCOTT, *supra* note 119, at 20–29.

¹⁸⁷ Based on the author’s extensive research. See also *Court: Child Porn Victims Can Get Restitution*, ASSOCIATED PRESS (Oct. 1, 2012, 4:23 PM), available at http://www.nytimes.com/aponline/2012/10/01/us/ap-us-child-porn-paying-victims.html?hp&_r=0. The possibility of restitution claims make it even less likely that an “author” will assert copyright in child pornography.

¹⁸⁸ Pornography using adults who look like children or computer generated children may be registered, though its legality may be uncertain. See generally James Joyner, *Supreme Court Upholds Virtual Child Porn Law*, OUTSIDE THE BELTWAY (May 19, 2008), http://www.outsidethebeltway.com/supreme_court_upholds_virtual_child_porn_law/; David Stout, *Supreme Court Upholds Child Pornography Law*, N.Y. TIMES (May 20, 2008), <http://www.nytimes.com/2008/05/20/washington/19cnd-scotus.html>.

¹⁸⁹ See Jesse P. Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STANFORD L. & POL’Y REV. 545 (2011).

and “profoundly unacceptable, and also disgusting and criminal” is deeply problematic.¹⁹⁰ As a definitional matter, drawing consistent and principled lines about what does and does not constitute child pornography is a daunting proposition in any context, copyright eligibility most definitely included.

The average age of entry into both pornography and prostitution in the United States is twelve years old.¹⁹¹ In sharp contrast to children depicted in pornography, children who work as prostitutes are often treated as criminals,¹⁹² while the johns that patronize them are prosecuted much less frequently.¹⁹³ Sometimes the johns are perceived by law enforcement actors as being victims of the seductive wiles of the child prostitutes.¹⁹⁴ The notion that commoditized sex between children and adults is less damaging if it is not recorded by a camera defies credulity. There may not be a lasting public record of the event, but that does not undo acts of violence and victimization. It may actually be less risky for men to actually rape prostituted children than it is to possess photographs of other people raping prostituted children. The ugly and profound disparity between the ways child pornography and child prostitution are treated by the criminal justice system severely undermines any claim that the zero tolerance approach toward child pornography is aimed at protecting children.¹⁹⁵ But at least as a matter of rhetorical consistency,

¹⁹⁰ MacKinnon, *supra* note 81, at 998 (“The majority of adults enter the industry as children and are exploited in ways that do not disappear when they reach the age of majority, including through materials in which children are used as women and women infantilized as children.”).

¹⁹¹ *Child Prostitution: Domestic Sex Trafficking of Minors*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/ceos/prostitution.html> (last visited Mar. 30, 2011); *Sexual Trafficking*, WASH. ST. OFFICE OF THE ATT’Y GEN., <http://www.atg.wa.gov/HumanTrafficking/SexTrafficking.aspx> (last visited Mar. 30, 2011).

¹⁹² As Rebecca Tushnet astutely pointed out to me, the contrast blurs when girls are prosecuted for “sexting,” sending pictures of themselves that fit the legal definition of child pornography and then being arrested for it. See generally John A. Humbach, ‘Sexting’ and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010).

¹⁹³ Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1075, 1103 (2011).

¹⁹⁴ See MARY ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920* 33 (1995) (detailing how state legislators “assigned the image of female depravity to working-class women, depicting working girls, servants, and prostitutes as licentious seducers of men”).

¹⁹⁵ See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 213 (2001) (arguing that “[t]he growth of child pornography law has opened up a whole arena for the elaborate exploration of children as sexual creatures”).

declaring child pornography beyond the bounds of constitutional copyright protection because it is not useful accomplishes something, though admittedly it may be a very small advance indeed.

Finally, though it is well beyond the scope of this Article, some hard questions need to be asked about why society seems to tolerate child prostitution so much more readily than child pornography.¹⁹⁶ A child caught selling sex will often be arrested for it, despite clear indicia that she has been coerced into it. People caught buying sex from child prostitutes may only be punished lightly, or not at all, even with evidence the child was forced into the situation.¹⁹⁷ Yet if the event is photographed, recorded on video, or filmed, the child is far less likely to be arrested and has an improved likelihood of being viewed and treated as a victim. Conterminously, people caught viewing or possessing child pornography are often harshly punished well beyond what might have befallen them had they had sexual contact with the children themselves. The wrongs perpetrated against child prostitutes are in many respects the same as those inflicted upon children in pornography. All that is missing is fixation in a tangible medium of expression and the copyright-protected commoditization this facilitates. That having sex with children is treated as less illegal and viewed as more socially acceptable than viewing images of other people having sex with children is baffling and unjustifiable.

3. *Crush Pornography*

A federal statute formerly in effect provided that “[w]hoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.”¹⁹⁸ It was passed because

¹⁹⁶ For a discussion of the statistics on prosecution of child sex offenders, see Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUSTICE STATISTICS BULL. 1, 1 (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf> (“During 2006, 3,661 suspects were referred to U.S. attorneys for child sex exploitation offenses. *Child pornography constituted 69% of referrals*, followed by sex abuse (16%) and sex transportation (14%).”) (emphasis added).

¹⁹⁷ See Caroline Heldman, *No Jail Time for Lawrence Taylor*, MS. MAG. BLOG (Jan. 24, 2011), <http://msmagazine.com/blog/blog/2011/01/24/no-jail-time-for-lawrence-taylor/> (discussing football linebacker Lawrence Taylor paying \$300 to have sex with sixteen-year-old girl who had been given black eye and punched by her pimp before encounter).

¹⁹⁸ 18 U.S.C. § 48 (2006), *invalidated by United States v. Stevens*, 130 S. Ct. 1577 (2010).

while all individual states criminalize cruelty to animals, none has a statute that prohibits the sale of depictions of cruelty to animals.¹⁹⁹ So distributors of “crush porn,” in which animals were tortured, could not be effectively prosecuted because human participants could not be identified if the faces of the women inflicting torture on animals in crush porn were not shown, and neither the location of filming nor the date of the activity was ascertainable by scrutinizing the pornography itself. Defendants arrested for violating a state cruelty to animals statute in connection with the production or sale of crush porn could successfully assert as a defense that the state could not prove its jurisdiction over the place where the acts occurred. Only if the people involved in the production of the crush porn were caught in the act could state anticruelty laws be invoked, and then only for the torture itself, not for the production and sale of depictions of the same.

The Third Circuit held that this statute was an unconstitutional infringement on the First Amendment right to free speech.²⁰⁰ The court noted that there were already laws in all states against animal cruelty, and the intent of Congress was to supplant those laws with a law to prohibit the depiction of the cruelty. The Third Circuit rejected the analogy made to laws prohibiting the depiction of child pornography, finding that animals are not like children when it comes to the First Amendment analysis because animals do not perceive the injury of the depiction of the cruel act (as would a child) and thus the injury is not in the depiction but in the cruel act (which is already illegal under state statutes).²⁰¹

The ability to federalize the prosecution of animal cruelty cases was effectively terminated when the Third Circuit ruling was affirmed by the Supreme Court in *United States v. Stevens*.²⁰² However, the Court held that since its enactment, the First Amendment has permitted restrictions on categories of speech such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct that “have never been thought to raise any Constitutional problem,”

¹⁹⁹ See generally *State Animal Cruelty Laws*, ASPCA, <http://www.aspc.org/Fight-Animal-Cruelty/Advocacy-Center/state-animal-cruelty-laws.aspx> (last visited Jan. 3, 2012) (providing information on animal cruelty laws in each state).

²⁰⁰ *United States v. Stevens*, 533 F.3d 218, 220 (3d Cir. 2008).

²⁰¹ See *id.* at 230.

²⁰² *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010).

but that depictions of animal cruelty should not be added to that list.²⁰³

That the First Amendment precludes censoring speech that is cruelly harmful or deadly to nonhuman animals does not mean that the federal government has to supply copyright-based incentives for it. Defining crush porn as non-useful and non-progressive could discourage its production and distribution to the extent that it is commercially distributed. And if it is constitutional and socially desirable to criminally prosecute people such as Michael Vick for cruelty to animals,²⁰⁴ surely it is appropriate to withhold government-provided copyright benefits from audiovisual recordings of activities such as killing animals for sexual gratification.

4. “Revenge Porn”

“Revenge Porn” is pornography in which at least one of the subjects was unaware that sexual acts were being fixed in a tangible medium of expression or was unaware of or opposed to the work’s distribution, usually over the Internet.²⁰⁵ One object of its creation and distribution is to encourage and facilitate the humiliation and harassment of the victim subject. If one enters the words “revenge porn” into an Internet search engine, both the popularity and the profitability of the genre become immediately apparent.

Victims can be photographed or filmed by hidden cameras.²⁰⁶ Other times they may agree to be photographed or filmed but believe the works will be kept private.²⁰⁷ Still other victims could be drugged

²⁰³ *Id.* at 1584–86 (quoting *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1941)).

²⁰⁴ See *Apologetic Vick Gets 23-Month Sentence on Dogfighting Charges*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=3148549> (last updated Dec. 11, 2007) (discussing the football star’s conviction and sentence for financially contributing to a dogfighting enterprise).

²⁰⁵ See David Kluff, *Revenge Porn: “Is Anyone Up” on Copyright Law?*, TRADEMARK & COPYRIGHT LAW BLOG (Dec. 20, 2011), <http://www.trademarkandcopyrightlawblog.com/tags/dmca/>.

²⁰⁶ See Aja Styles, *School Bullying Revenge Attack Sees Boy Jailed for Child Pornography*, WA TODAY (July 26, 2011), <http://www.watoday.com.au/wa-news/school-bullying-revenge-attack-sees-boy-jailed-for-child-pornography-20110725-1hx9c.html>.

²⁰⁷ See Adrian Chen, *Meet the Hollywood Hackers Coming for Your Nude Pics*, GAWKER (Aug. 29, 2011, 8:21 PM), <http://gawker.com/5835611/meet-the-hollywood-hackers-coming-for-your-nude-pics>; Marlene Naanes, *Bad Breakup? Police Warn Posting Photos of Ex-lovers Online for Revenge Can Lead to Jail*, NORTHJERSEY.COM (last updated Feb. 21, 2012, 10:29 AM), http://www.northjersey.com/news/Ex-lovers_can_be_charged_for_posting_explicit_photos.html.

or coerced with threats, weapons, or actual violence to facilitate the recording of images.²⁰⁸ Once revenge pornography is circulated in cyberspace, there is no effective technological way to stop its distribution.

Victims of revenge pornography rarely have effective options in terms of legal recourse either.²⁰⁹ Under Section 230 of the Communications Decency Act, internet service providers are broadly immunized from liability for harms caused by online content that these companies host, and these companies do not generally have any legal obligation to assist parties injured by online content in identifying the human wrongdoers who post damaging materials.²¹⁰ The economic incentives fall in favor of allowing customers to upload and circulate anything they like, as broadly as they choose.²¹¹ While a full discussion of the merits and risks of Section 230 is beyond the scope of this Article, at the very least copyright law could be reconfigured so that it does not provide financial incentives for the commercial exploitation of revenge pornography.

One alternative to denying copyright protections to works of revenge pornography would be to permit revenge porn copyrights to be recognized and even registered, but then to vest ownership of the copyrights in the victims, so that they could use the notice and takedown provisions of the DMCA to try to reign in the online distribution of works of revenge pornography. Admittedly, the practical efficacy of either approach is likely to be limited at best, because the goals of true revenge porn are not usually financial in

²⁰⁸ See *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 161 (Ct. App. 2009), available at <http://caselaw.findlaw.com/ca-court-of-appeal/1489196.html>.

²⁰⁹ See Nancy Kim, *Imposing Tort Liability on Websites for Cyber-Harassment*, YLJ ONLINE (Dec. 15, 2008), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/tort-law/imposing-tort-liability-on-websites-for-cyber%11-harassment/>. But see Zhang Dongya, *'Aids Prostitute' a Victim of Ex's Revenge*, YNET.COM (Nov. 3, 2009, 6:23 PM), <http://bjtoday.ynet.com/3.1/0910/23/3954297.html>; Mike Masnick, *As Expected, Backpage is Not Liable for Prostitution Ads*, TECHDIRT (Aug. 19, 2011, 1:48 PM), <http://www.techdirt.com/articles/20110819/02211215597/as-expected-backpage-is-not-liable-prostitution-ads.shtml>.

²¹⁰ See Ali Ziegrowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307 (2010), available at http://uchastings.edu/hlj/archive/vol61/Ziegrowsky_61-HLJ-1307.pdf.

²¹¹ See David Ardia, *Free Speech Savior or Shield for Scoundrels? An Empirical Study of Intermediary Immunity Under Section 230*, CITIZEN MEDIA LAW PROJECT (June 30, 2010), <http://www.citmedialaw.org/blog/2010/free-speech-savior-or-shield-scoundrels-empirical-study-intermediary-immunity-under-sectio>.

nature. Broad distribution is usually the goal of the revenge pornographer. But stripping copyright protections from revenge at least has expressive value.²¹² And victims could perhaps take a tiny bit of solace from the inability of their tormentors to fully commoditize revenge pornography with government assistance.

5. *Works in Which Performers Have Been Coerced, Physically Abused, or Endangered*

There are marked differences in the level of overt women-hating present in the vast array of currently copyrighted pornographic works.²¹³ In pornography without overt violence or degrading acts or language, it may well appear that everyone is enjoying themselves. But off-camera coercion will not be apparent simply by viewing a work. At least one feminist commentator suggests that pornographers prey on women in precarious financial situations, citing the example of Nadya Suleman—the mother of octuplets—who received offers to appear in pornographic films when it became known that she was behind on her mortgage payments.²¹⁴

Physical abuse is common in pornography, and so is endangerment; performers' bodies are injured, and they are exposed to dangerous diseases.²¹⁵ Pornographers have mostly successfully

²¹² See, e.g., MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004); Danielle Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352442.

²¹³ See, e.g., Gail Dines & Robert Jensen, *The Anti-Feminist Politics Behind the Pornography that "Empowers" Women*, ZNET (Feb. 1, 2008), <http://www.zcommunications.org/the-anti-feminist-politics-behind-the-pornography-that-empowers-women-by-gail-dines>.

²¹⁴ See *What Porn is About*, SKEPIFERM (Jan. 3, 2011, 2:57 AM), <http://skeptifem.blogspot.com/2011/01/what-porn-is-about.html>; see also Melissa McEwan, *The Porn King with a Heart of Gold*, SHAKESVILLE (Dec. 31, 2010), <http://shakespearesister.blogspot.com/2010/12/porn-king-with-heart-of-gold.html>; Shaya Tayefe Mohajer, *'Octomom' Eviction on Hold as Landlord Meets with Porn Producer*, WASH. POST (Dec. 31, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004737.html>; *Octomom's Calif. Home May be Sold to Porn King*, CBS NEWS (Dec. 30, 2010, 6:22 PM), <http://www.cbsnews.com/stories/2010/12/30/entertainment/main7198788.shtml>http://news.yahoo.com/s/ap/us_octomom_eviction; *Porn Company 'Vivid' Offers to Help "Octomom" with Mortgage*, KTLA.COM (Dec. 31, 2010, 4:26 AM), <http://www.ktla.com/news/landing/ktla-octomom-eviction,0,4426841.story>.

²¹⁵ See STOP PORN CULTURE!, <http://stoppornculture.org/watch/> (last visited June 28, 2012). But see Shira Tarrant, *Porn: Pleasure or Profit? Ms. Interviews Gail Dines, Part II*, MS. MAG. BLOG (July 7, 2010), <http://msmagazine.com/blog/blog/2010/07/07/porn-pleasure-or-profit-ms-interviews-gail-dines-part-ii/>.

avoided health and safety regulation²¹⁶ and they routinely put performers in situations that require them to eat the vomit, urine, ejaculate, and feces of strangers; to endure penetration of their bodily orifices by large objects that tear and damage tissue and organs; and to engage in unprotected sex that results in rampant disease transmission.²¹⁷ The rate of sexually transmitted disease infection among pornography performers is very high.²¹⁸ Protecting copyrights in pornographic works without protecting the workers involved in producing these creative works is wrong at every level. Keeping the government out of the sex and reproductive lives of its citizenry has been a very important and extremely laudable goal of activist liberals and civil libertarians for decades,²¹⁹ even though frank discussions about sex may not always be officially welcome.²²⁰ But changing the copyright laws to facilitate withholding copyright protections from harmful pornography is an appropriate intervention that simply reduces governmental involvement in incentivizing the production and distribution of these harmful works.

²¹⁶ Molly Hennessy-Fiske, *Clinic Blasts Calls for Added Oversight of Porn Industry*, L.A. TIMES BLOG (Oct. 13, 2010, 5:09 PM), <http://latimesblogs.latimes.com/lanow/2010/10/following-the-announcement-this-week-that-an-adult-film-performer-tested-positive-for-hiv-a-san-fernando-valley-clinic-relea.html>. *But see* Alex Dobuzinskis, *Los Angeles Mayor Signs Porn Star Condom Requirement*, N.Y. TIMES (Jan. 24, 2012, 9:53 PM), http://www.nytimes.com/reuters/2012/01/24/us/24reuters-condoms-porn-california.html?_r=1&hp (reporting City of Los Angeles' ordinance requiring condom use applies only "to porn productions that approach the city for a permit, but officials said a permit was not required when filming in a soundstage").

²¹⁷ Gabriel Mephibosheth, *Calif. Wants Improved Occupational Health in Porn Industry*, CULTURE NEWS (June 11, 2009, 9:50 PM), <http://culturecampaign.blogspot.com/2009/06/calif-wants-improved-occupational.html>; Tristan Taormino, *Danger on the Set*, VILLAGE VOICE (Sept. 4, 2007), <http://www.villagevoice.com/2007-09-04/columns/danger-on-the-set/>.

²¹⁸ Molly Hennessy-Fiske & Rong-Gong Lin II, *Porn Film Performer Tests Positive for HIV*, L.A. TIMES, Oct. 13, 2010, at AA3, available at <http://articles.latimes.com/2010/oct/13/local/la-me-porn-hiv-20101013>; Ian Lovett, *Condom Rule Sought for Sex-Film Sets*, N.Y. TIMES, Feb. 10, 2011, at A18 (detailing high rates of sexually transmitted diseases among performers in pornography).

²¹⁹ See, e.g., NAT'L ORG. FOR WOMEN, *NOW: Always on the Front Lines*, http://www.now.org/issues/abortion/reproductive_justice.html (last visited Jan. 4, 2012).

²²⁰ When then U.S. Surgeon General Jocelyn Elders recommended promoting masturbation to children as a safe and risk-free sexual outlet, she was fired. Douglas Jehl, *Surgeon General Forced to Resign by White House*, N.Y. TIMES, Dec. 10, 1994, at A1.

IV CONSEQUENCES OF COPYRIGHT WITHHOLDING

Works produced by U.S. citizens must be registered with the U.S. Copyright Office before they can be the basis for claims made under the Copyright Act.²²¹ Under Section 408(c)(1) of the Copyright Act, “[t]he Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration.”²²² While it is true that the statute specifies that “[t]his administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title,” this can be changed.²²³ The Copyright Act should be amended to make pornography a specific category of copyrightable work with the express stipulation that harmful pornographic works are not eligible for registration or protection.²²⁴ The Copyright Office would make the initial, appealable decision about whether a pornographic work qualified as non-progressive and non-useful. This would obviously require an increase in the size and mandate of the Copyright Office.²²⁵

Copyright registrations that were improperly issued could be invalidated if harmfulness was proven at any time. Pornographers empirically care only about unauthorized literal copying, so as a practical matter it is only the reproduction right that would be contested.²²⁶ Harmfulness would also be available to defendants as a defense to allegations of copyright infringement. If a party accused of copyright infringement convinced a fact finder that a pornographic work was non-progressive and non-useful and therefore unworthy of copyright protection, there would be no enforceable copyright in the work, and therefore nothing to infringe. While that could have the troubling effect of incentivizing the distribution of harmful works by third parties, because they would have nothing to fear from copyright

²²¹ 17 U.S.C. § 408 (2006).

²²² *Id.*

²²³ *Id.*

²²⁴ This may require some finessing with respect to the United States’ obligations vis-à-vis the WTO. In conversation, Kenneth Crews suggested one possible solution would be to allow all porn to be copyrighted, but to deny remedies to harmful pornography.

²²⁵ See U.S. COPYRIGHT OFFICE, WORKFORCE AND ORGANIZATION, available at <http://www.copyright.gov/reports/s-plan2008/s-plan2008-2013-3.pdf> (describing staffing and operations of the U.S. Copyright Office).

²²⁶ This is somewhat amusingly ironic.

law for doing so, it would simultaneously strongly disincentivize the creation of harmful works in the first place, since they would not be copyright protected.²²⁷ Surely it is more preferable to have one work in which the performers were harmed copied a million times than to have tens of thousands of works in which the performers are harmed incentivized by governmental promulgation of the copyright laws.

Singling out pornography for disparate copyright treatment is a radical proposition, but less extreme than it may seem at first blush. The Copyright Act already covers some genres of creative works while excluding others. For example, computer programs are protectable as literary works,²²⁸ but cooking recipes are not protectable at all,²²⁹ photographs are copyrightable,²³⁰ but hairstyles are not.²³¹ The exclusive rights a copyright secures differ across categories of works.²³² Even within the statutorily prescribed categories, some works get different protections than others.²³³

In *Eldred v. Ashcroft*, the Supreme Court held that the Copyright Term Extension Act was constitutional in part because “Congress has not altered the traditional contours of copyright protection” and this made heightened First Amendment scrutiny unnecessary.²³⁴ Legislatively establishing a category of works for which copyright protections may be limited or denied based on their content almost certainly alters the traditional contours of copyright law. But amending the copyright laws to reduce the ways in which the economic value of an original work of authorship can be exploited would not rise to the level of “censorship” within the First Amendment’s meaning of the word.

²²⁷ A pornography film or video can cost approximately \$50,000 to produce. See *Private Worlds 2: Porn Sells?*, FILM IRELAND, <http://www.filmireland.net/exclusives/privateworlds2.htm> (last visited Jan. 4, 2012).

²²⁸ U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR COMPUTER PROGRAMS, available at <http://www.copyright.gov/circs/circ61.pdf>.

²²⁹ *Recipes*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/fls/fl122.html> (last updated Feb. 6, 2012).

²³⁰ *Copyright Registration of Photographs*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/fls/fl107.html> (last visited Jan. 4, 2012).

²³¹ Dennis Crouch, *I Almost Cut My Hair: Haircut Property*, PATENTLYO (Jan. 31, 2011), http://www.patentlyo.com/patent/2011/01/i-almost-cut-my-hair-haircut-property.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+PatentlyO+%28Dennis+Crouch%27s+Patently-O%29&utm_content=FaceBook.

²³² See generally Copyright Act, 17 U.S.C. § 106 (2006).

²³³ See, e.g., §§ 104A, 106A.

²³⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

It is true that government actors would have to make content-based decisions about which pornographic works belonged in the “non-useful” category and that would be problematic for a number of reasons. Achieving consistent application of an even clearly articulated standard of non-usefulness would be difficult; political pressures might lead the relevant administrators to deprive certain pornographic works of copyright protections overly expansively and the buckets of money that pornographers have at their disposal to spend on lobbyists and lawyers would ensure that the sorting process was complicated and expensive.

Many of the early Internet-based copyright cases involved pornographic materials, leading some practitioners to describe the emerging field of Cyberspace Law as “The Law of Porn.”²³⁵ Companies like Playboy brought suit against online Bulletin Board services, usenet groups, and even browser companies to try to prevent the unauthorized uploading, hosting, and downloading of images in which they claimed copyrights.²³⁶ Once bandwidth increased enough so that movies could be widely sold or gifted online by so-called pirates, pornographic works were commonly among those distributed.²³⁷ According to one observer, “[t]he porn industry produces 13,000 films a year, generating \$10 to 15 billion in revenue. In comparison, the Hollywood film industry produces about 600 films a year and generates around nine to 10 billion dollars.”²³⁸ It is hard to predict how significant the impact would be of making copyright protections unavailable for some portion of pornographic works. At present, pornographers take robust advantage of copyright law.²³⁹ In

²³⁵ I first heard this observation in about 1997 from Robert Hamilton, who litigated some early Internet disputes on behalf of Compuserve and taught Cyberspace Law as an adjunct at The Ohio State University, Moritz College of Law. *See generally Robert W. Hamilton*, JONES DAY, <http://www.jonesday.com/rwhamilton/> (last visited Jan. 4, 2012).

²³⁶ *See, e.g., Playboy Enters. v. Netscape Commc'ns*, 354 F.3d 1020, 1022–23 (9th Cir. 2004).

²³⁷ *See, e.g., Jon Swartz, Free Porn on 'Tube Sites' Puts a Big Dent in Industry*, USA TODAY, http://www.usatoday.com/tech/news/2010-03-02-porn02_ST_N.htm?csp=Tech (last updated Mar. 2, 2010, 9:59 PM).

²³⁸ Carly Perez, *Professor Points Out Inequality, Racism in Porn*, FOGHORN ONLINE (Nov. 13, 2008), <http://foghorn.usfca.edu/2008/11/professor-points-out-inequality-racism-in-porn/> (citing Robert Jensen, Interfaith Summer Institute for Justice, Peace, and Social Movements Public Forum: Pornography and the Perfect Storm of Inequality: Sexism, Racism, and Economic Exploitation in Contemporary Pornography, (Aug. 12, 2008)).

²³⁹ *See EnigmaX, Porn Studios Set To Target 65,000 Movie Uploaders*, TORRENTFREAK (Sept. 12, 2009), <http://torrentfreak.com/porn-studios-set-to-target-65000>

2009, one group of about fifty pornography companies brought infringement suits against ten thousand people alleged to have made infringing downloads of copyrighted pornographic works.²⁴⁰ The pornography company Perfect 10 has been described as being on “a litigation frenzy.”²⁴¹

Another pornographer recently filed suit against over five thousand defendants on behalf of four pornographers.²⁴² Using the implicit threat of exposing defendants’ pornography proclivities through copyright litigation may be one effective way pornographers are reaping quick and lucrative settlements.²⁴³ Folks who would not greatly mind being publicly tagged as downloaders of bad mainstream movies might be much more reluctant to be publicly identified as consumers of works entitled “Explicit Violent Sexual Acts Involving Performers Identified by Abhorrent Racial Epithets” or something similar but far more specific. Removing the threat of copyright-based prosecutions might lead to increased unauthorized distribution of extant harmful works because infringing downloaders would no longer fear infringement liability or the public censure it might trigger. But loss of a legal tool with which to coerce cash out of pornography consumers who feared exposure would surely also disincentivize the production of new pornographic works if squeezing alleged infringers is a significant source of revenue.

Pornography that was not accorded copyright protection could still be produced in any form, and pornographers would doubtlessly

-movie-uploaders-090912/; Greg Sandoval, *Porn Maker Sues 7,098 Alleged Film Pirates*, CNET (Nov. 2, 2010, 4:34 AM), http://news.cnet.com/8301-31001_3-20021438-261.html; Swartz, *supra* note 237.

²⁴⁰ See Enigmax, *supra* note 239.

²⁴¹ Eric Goldman, *Ninth Circuit Opinion in Perfect 10 v. CCBill*, ERIC GOLDMAN TECH. & MARKETING LAW BLOG (Mar. 29, 2007), http://blog.ericgoldman.org/archives/2007/03/ninth_circuit_o.htm (“Perfect 10 publishes a pornographic magazine and operates a pornography website. It appears that Perfect 10 photos are routinely infringed by others because Perfect 10 has been on a litigation frenzy. They have brought at least four enforcement actions that have produced important Internet law opinions (involving the defendants Cybernet Ventures, Visa and Google in addition to this one).”).

²⁴² See Sandoval, *supra* note 239; Greg Sandoval, *Porn Studios’ Copyright Lawyer: ‘I Will Sue’ (Q&A)*, CNET (Oct. 5, 2010, 8:49 AM), http://news.cnet.com/8301-31001_3-20018566-261.html.

²⁴³ In the United Kingdom, there are privacy laws that might apply, but the same is not true in the United States. See, e.g., David Cairns, *ACS: Law Faces Lawsuit After ‘Porn Pirates’ Leak*, THE WEEK, <http://www.theweek.co.uk/technology/11229/acs-law-faces-lawsuit-after-%E2%80%98porn-pirates%E2%80%99-leak> (last updated Sept. 28, 2010, 4:14 PM).

continue to peddle non-progressive and non-useful pornographic wares using technologies that obstruct unauthorized copying or redistribution. Pornographers could also continue to distribute pornography via subscription models, for which customers enter into enforceable contracts which impose harsh economic penalties on subscribers who exceed the terms and conditions of their use agreements.²⁴⁴ The government would not be silencing pornographers; it would simply be reducing the economic incentives copyright laws provide them with respect to certain categories of pornographic speech.

V

LESSONS FROM PATENT LAW AND TRADEMARK LAW

A. *Patent Law*

Until the 1950s, patent examiners sometimes denied patents to otherwise patentable inventions on moral grounds. The Patent Act²⁴⁵ did not direct them to do this; the practice probably originated in *Lowell v. Lewis*, an 1817 patent case in which the concepts of moral utility and non-useful inventions were raised.²⁴⁶ This became far less common by the 1970s in part because courts became wary of denying patents based on nonstatutory moral concerns raised by unelected government functionaries.²⁴⁷

Patent law, however, is not analogous enough to copyright law to be usefully illustrative. Adding moral dimensions to copyright law by denying copyright protections to harmful pornography would be effectuated via the legislative process through changes to the Copyright Act. If a work is deemed unworthy of copyright protection by the Copyright Office, the decision would be based on a targeted administrative review, rather than being one small component of the lengthy, detailed, and expensive examination process that patent applications undergo.

Moreover, a patent describing a non-useful, non-progressive product or process can issue without the invention ever being made or

²⁴⁴ See, e.g., Schwartz, *supra* note 45.

²⁴⁵ 35 U.S.C. §§ 1–293 (1952).

²⁴⁶ See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 177 (5th ed. 2009).

²⁴⁷ *Id.*

practiced. A patent that teaches people skilled in the relevant art how to construct something dangerous can be secured, its circulation limited, and laws can be passed to prevent people from practicing harmful inventions as necessary.²⁴⁸ This is a different situation from copyright law where, for example, a movie in which children are raped or performers are injured receives copyright only after the work is completed and the production-based harm is already done.

Morality is a patentability consideration in Europe, and there are still moral questions that are bound up with U.S. patent law.²⁴⁹ Professor Margo Bagley, for example, has questioned the “patent first, ask questions later” approach of the United States, particularly with regard to controversial biotechnology-related subject matter.²⁵⁰ Moral considerations could become explicitly addressed by the Patent Act in the future.

B. Trademark Law

Pursuant to Section 2(a) of the Lanham Act, a trademark shall be refused registration on the principal register “on account of its nature” if it “[c]onsists of or comprises immoral, deceptive or scandalous matter.”²⁵¹ The body of law that has developed from judicial interpretations of this statutory limitation over time is admittedly incoherent.²⁵² Trademarks referencing sex, race, religion, sexual orientation, and scatological imagery have all been denied registration under Section 2(a), apparently constitutionally. To list just a few examples, the following marks were found to be too immoral and scandalous to warrant federal registration on the principal registry: (1)

²⁴⁸ See, e.g., Shawn J. Kolitch, *The Proper Scope of Patentability in International Law*, 11 MARQ. INTELL. PROP. L. REV. 149, 165–77 (2007) (describing legal approaches in other countries to harmful inventions).

²⁴⁹ See, e.g., Astrid Burhöi, *Moral Exclusions in European Biotechnology Patent Law* (Ekonomi HÖGskolan, Lunds Universites), available at <http://biblioteket.ehl.lu.se/olle/papers/0002294.pdf> (last visited Feb. 16, 2011); OLIVER MILLS, *BIOTECHNOLOGICAL INVENTIONS: MORAL RESTRAINTS AND PATENT LAW* (2005).

²⁵⁰ See Margo A. Bagley, *Patent First, Ask Questions Later, Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469 (2003), available at <http://scholarship.law.wm.edu/wmlr/vol45/iss2/3/>.

²⁵¹ 15 U.S.C. § 1052(a) (2006).

²⁵² See, e.g., Llewellyn Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law after Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870321.

“Cocaine” as the trademark for a soft drink;²⁵³ (2) “Pussy” for an energy drink;²⁵⁴ (3) “Bullshit” for a wide variety of beverages;²⁵⁵ (4) the terms BONG HITS 4 JESUS²⁵⁶ and DE PUTA MADRE (“whore mother”) for clothing;²⁵⁷ (5) “Dick Heads” for a restaurant;²⁵⁸ and (6) “You cum like a girl” for clothing.²⁵⁹ Marks that survived Section 2(a) challenges include “Big Pecker’s” for a restaurant, “Redskins” for a football team, “Bad Frog” for beer (depicting a frog holding up its “middle finger”), “Dykes on Bikes” for a women’s motorcycle club, and “Black Tail” for an adult entertainment magazine featuring photographs of both naked and scantily-clad African-American women.²⁶⁰

Despite the stunning lack of discernible consistency in the rulings under Section 2(a) on what constitutes a mark that is scandalous and immoral,²⁶¹ this provision has never been held to violate the First Amendment.²⁶² Marks that cannot be federally registered can still be

²⁵³ *In re James T. Kirby*, 2008 WL 4674566, at *1 (T.T.A.B. 2008) (not precedential), available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=77006212-09-22-2008&system=TTABIS>. Mr. Kirby’s company is Redux Beverages, which started marketing the soft drink in 2006. *Id.*

²⁵⁴ See Ann Bartow, *Too Scandalous to be a Registered Trademark: “Pussy Natural Energy”*, FEMINIST L. PROFESSORS (June 2, 2009), <http://www.feministlawprofessors.com/2009/06/too-scandalous-to-be-a-registered-trademark-pussy-natural-energy/>.

²⁵⁵ *In re Red Bull GmbH*, 2006 WL 478985 (T.T.A.B. 2006), available at <http://www.uspto.gov/web/offices/com/sol/foia/ttab/2aissues/2006/75788830.pdf>.

²⁵⁶ U.S. Trademark Application Serial No. 77,305,946 (filed Oct. 17, 2007), available at <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=77305946>.

²⁵⁷ *In re Mexico 69 SRL*, 2006 WL 2558009 (T.T.A.B. 2006) (not precedential), available at <http://www.uspto.gov/web/offices/com/sol/foia/ttab/2aissues/2006/78361172.pdf>.

²⁵⁸ *In re Wilcher Corp.*, 40 U.S.P.Q.2d, 1929, 1931 (T.T.A.B. 1996).

²⁵⁹ See Ann Bartow, *I Don’t Own a Tee Shirt, or Any Other Garment, that Says: “You Cum Like a Girl”*, FEMINIST LAW PROFESSORS (Sept. 9, 2006), <http://www.feministlawprofessors.com/2006/09/i-dont-own-a-tee-shirt-or-any-other-garments-that-say-you-cum-like-a-girl/>.

²⁶⁰ *In re Mavety Media Group Ltd.*, 33 F.3d 1367 (Fed. Cir. 1994), available at <http://ftp.resource.org/courts.gov/c/F3/33/33.F3d.1367.93-1464.html>.

²⁶¹ See *T.M.E.P. § 1203.01, Immoral or Scandalous Matter*, BITLAW, http://www.bitlaw.com/source/tmep/1203_01.html (last visited July 2, 2012) (noting that “Section 2(a) of the Trademark Act, 15 U.S.C. 1052(a), is an absolute bar to the registration of immoral or scandalous matter on either the Principal Register or the Supplemental Register”).

²⁶² Though marks may constitute commercial speech, the commercial speech doctrine, to the extent one still exists, has had a meaningful role in First Amendment analyses of section 2 of the Lanham Act. See Sonya Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010); see also Gibbons, *supra* note 252.

used in commerce, and that appears to keep this content-based trademark registration restriction within the bounds of constitutionality. One can hope that sorting out which pornographic works should be deemed non-useful, and therefore outside the scope of copyright protections, could be accomplished with more consistency and predictability, given that the bases on which to deny copyright protection discussed above allow for more evidence-based determinations that do not take subjective social morality concerns into account. The concerns driving this denial of government resources are for people directly harmed by the production and distribution of the pornography, not for an anonymous audience of consumers.

CONCLUSION

The First Amendment may secure citizens with the right to produce and distribute harmful works of pornography. Certainly that is the current state of free speech jurisprudence. But there is no legal requirement that the government provide economic incentives for the creation of harmful pornographic works. With the current practice of indiscriminately according pornographic works copyright protection, the government encourages and incentivizes the production of pornography that is non-progressive and non-useful and therefore beyond the scope of the Intellectual Property Clause of the U.S. Constitution. This must cease. Amending the Copyright Act to reduce the ways in which the economic value of harmful pornography can be exploited via copyright law is a legitimate policy choice that Congress can and should make immediately.

