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Copyright Law and Pornography

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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. 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, so-called “crush porn,” “revenge porn,” or filmed physical abuse.

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

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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

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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.
Copyright Law and Pornography 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. One of the most well-known critiques of pornography takes a harms-based approach. 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 Act prohibits the federal registration of “scandalous” or “immoral” marks. Such content-specific restriction has been found to be constitutionally permissible. Although that prohibition is enforced inconsistently, it nevertheless suggests the contours of legitimate, content-based denial of formal governmental protection for certain intellectual property.

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9 See infra Part III.A.


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

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15 See infra note 83 and accompanying text.

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

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.  

A. The Contours of Copyrightable Sex

Pornography can take the form of written accounts 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 expression as literary works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, or compilations or derivative works.

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. Alternative means of fixation such as notation

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 .nwsource.com/html/localnews/2013405553_apustecamazonpedophileabook1stldwritethru.html (revealing President of American Booksellers Foundation for Free Expression takes the view that entirely textual works are not pornography).


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.

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

Commercial control of traditional choreographic works probably relies more on norms about copying and attribution within the dance industry than on formal copyright protections. 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.” 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, 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.


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

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.” The Second Circuit concluded that “social dance steps and simple routines” are not copyrightable. 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

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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.  

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.” 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.

This claim is highly contested in the context of cultural commoditization, 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. The Copyright Office

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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”).


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.

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.

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. The reproduction right
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 infringing\(^{46}\) 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


creative or perhaps even noncreative commodity.\textsuperscript{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.\textsuperscript{50} Jim Mitchell reportedly quipped that the only “art” in pornography was his brother Artie, a fellow pornographer with the given name of Arthur.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{53}

Nevertheless, it is unlikely that a jurist would, \textit{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.\textsuperscript{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.

\textsuperscript{49} See Schwartz, \textit{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.’”).

\textsuperscript{50} See, e.g., Irving Kristol, \textit{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”).

\textsuperscript{51} Michael Carlson, \textit{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, \textit{supra} note 12 (“There’s a lot of porn out there. . . . For the weary businessman it’s just a combination [sic] Viagra and Ambien.”).


\textsuperscript{53} Corliss, \textit{supra} note 12.

\textsuperscript{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


\(^{57}\) 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.\textsuperscript{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.\textsuperscript{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 \textit{Miller} test.\textsuperscript{63} After \textit{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

\begin{itemize}
\item[(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
\item[(4)] Women are presented as being penetrated by objects or animals; or
\item[(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
\item[(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.
\end{itemize}

... [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.

\textit{Id.}\textsuperscript{61} 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.”).

\textit{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.”).

\textsuperscript{63} See, \textit{e.g.}, \textit{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. 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.

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. Because this is so subjective, the meaning of “obscene” can vary widely from person to person. This would be problematic if criminal obscenity charges were commonly brought, but they are not.

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.

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. In regions where it is illegal, it is zealously prosecuted in some contexts but virtually ignored in others. Selling sex is far more likely to result in an arrest or criminal conviction than buying sex.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. 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. State governments have largely followed suit because in California v. Freeman, 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. This instantiated the perception that producing pornography is legal even in jurisdictions where prostitution is not.

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).
73 See Bartow, supra note 14, at 821–22 (observing a decline in adult obscenity charges during administration of George W. Bush).
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. 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. 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.” 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. But the First Amendment offered no cognizable protection for mere voyeurism. 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.

The camera-based divide between pornography and prostitution has important commercial and cultural ramifications. 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. Pornography and prostitution are treated

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77 *Id.* at 692.
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.”).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{84} See, e.g., Sonia K. Katyal, \textit{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).

\textsuperscript{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.”).

\textsuperscript{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. 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. 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. 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

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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.


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).
censorship 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

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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.”).
⁹⁷ Lemly & 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.\(^9^8\)

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.\(^9^9\) Others may be treated as uncopyrightable because they contain infringing material.\(^1^0^0\) 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.\(^1^0^1\) 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.\(^1^0^2\) Both obscenity laws and copyright laws are content-based restrictions on speech.\(^1^0^3\) 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

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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.”).


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 conflations 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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{113} The incentives to comply with a takedown notice are powerful, and counterincentives are virtually nonexistent.\textsuperscript{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.\textsuperscript{115} The incentives all weigh in favor of

\textsuperscript{111} Murray, supra note 110, at 790–91.

\textsuperscript{112} Id.


\textsuperscript{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.”).

\textsuperscript{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).
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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” PORNGRAPHY?

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


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.


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

Despite a few high profile exceptions, most johns are ignored or even protected by social norms that favor punishing and shaming prostitutes.\footnote{125}{See infra notes 144–51 and accompanying text.}

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.\footnote{126}{See supra notes 74–75 and accompanying text (discussing the \textit{Freeman} case).}


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,\footnote{128}{18 U.S.C. § 2257 (2006). See generally Ann Bartow, \textit{Why Hollywood Does Not Require “Saving” From the Recordkeeping Requirements Imposed by 18 U.S.C. Section} 2257}} and their faces and bodies may remain in Internet circulation in perpetuity.\footnote{129}{See infra notes 144–51 and accompanying text.}
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, 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.” 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, unsimulated violence.

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

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

victims of commercial sexual exploitation.\textsuperscript{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 corporations\textsuperscript{134} 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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{134} See DINES, supra note 83; see also supra note 14.

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

research. 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. Linda Williams, an academic in film studies, has stressed the need for more scholarly analysis of pornography; others have echoed this sentiment as well.

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

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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/dines/06232008.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=Tmh6Al7NyAXYSnpZdBZitDoAOiM4YR17Y9Nbh/b1fQFA%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. 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. 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. 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. Principlized 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 consumers


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.”).


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. 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 Spitzer and former Dean of the Villanova School of Law Mark Sargent) 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. 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.

Women culturally identified as prostitutes are also publicly shamed, 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. Due to the


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.\textsuperscript{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.\textsuperscript{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 prostitutes\textsuperscript{157} still suffer from high rates of violence and substance abuse.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{156} See infra Part III.B.4.


\textsuperscript{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. Simply leaving them subject to the baseline negligence avoidance incentives and injury compensation frameworks provided by tort law was deemed inadequate. 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. Congress itself has never specifically taken up the issue


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

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165 604 F.2d 852, 854 (5th Cir. 1979) (noting that the now superseded Copyright Act of 1909 was the applicable statute).
166 *Id.*
168 *Id.*
interfaces, 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.” 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,” and followed the prescriptions of the copyright treatise by rote.

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.” 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,” 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. Yet courts are not in complete

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

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. 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. This has the advantage of using the same order, copyright then patent, in both halves of the clause.

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


177 Id. at 175.


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 challenges\(^ {184}\) 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.”).


\(^{184}\) 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.


and “profoundly unacceptable, and also disgusting and criminal” is deeply problematic. 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. In sharp contrast to children depicted in pornography, children who work as prostitutes are often treated as criminals, while the johns that patronize them are prosecuted much less frequently. Sometimes the johns are perceived by law enforcement actors as being victims of the seductive wiles of the child prostitutes. The notion that commoditized sex between children and adults is less damaging if it is not recorded by a camera defies credibility. 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. But at least as a matter of rhetorical consistency,

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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.”).


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).


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”).

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.\footnote{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).} 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.\footnote{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).} 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. Conversely, 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.”\footnote{198 18 U.S.C. § 48 (2006), invalidated by United States v. Stevens, 130 S. Ct. 1577 (2010).} It was passed because
while all individual states criminalize cruelty to animals, none has a statute that prohibits the sale of depictions of cruelty to animals. 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. 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).

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. 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,”

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201 See id. at 230.
but that depictions of animal cruelty should not be added to that list.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{206} Other times they may agree to be photographed or filmed but believe the works will be kept private.\textsuperscript{207} Still other victims could be drugged

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


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


nature. Broad distribution is usually the goal of the revenge pornographer. But stripping copyright protections from revenge at least has expressive value.\textsuperscript{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.\textsuperscript{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.\textsuperscript{214}

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


avoided health and safety regulation 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. The rate of sexually transmitted disease infection among pornography performers is very high. 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, even though frank discussions about sex may not always be officially welcome. 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.


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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{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.
\textsuperscript{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.

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233 See, e.g., §§ 104A, 106A.
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.” 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. 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. 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.” 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.

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).


239 See Enigmak, 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. The pornography company Perfect 10 has been described as being on “a litigation frenzy.”

Another pornographer recently filed suit against over five thousand defendants on behalf of four pornographers. Using the implicit threat of exposing defendants’ pornography proclivities through copyright litigation may be one effective way pornographers are reaping quick and lucrative settlements. 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

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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).”).
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. 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 Act 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. 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.

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

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

250 See Margo A. Bagley, Patent First, Ask Questions Later, Morality and
http://scholarship.law.wm.edu/wmlr/vol45/iss2/3/.


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.
abstract_id=870321.
“Cocaine” as the trademark for a soft drink; (2) “Pussy” for an energy drink; (3) “Bullshit” for a wide variety of beverages; (4) the terms BONG HITS 4 JESUS and DE PUTA MADRE (“whore mother”) for clothing; (5) “Dick Heads” for a restaurant; and (6) “You cum like a girl” for clothing. 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.

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


261 See T.M.E.P. § 1203.01, Immoral or Scandalous Matter, BrtLaw, 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.