COPYRIGHT LAW AND THE COMMODITIZATION OF SEX

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INTRODUCTION

Can the government constitutionally decline to provide copyright protections for creative works of pornography that cause harm? Yes, it can, and it should. Some pornographic works cannot reasonably be construed as promoting "progress" or "useful arts"[1] either because people are harmed during their production, or as a consequence of their distribution and consumption. Some pornographers rely heavily on the copyright laws to reduce and obtain compensation for unauthorized copying, particularly online. Withholding copyright protections would sharply reduce the economic value of these works without unconstitutionally preventing their authorship or precluding their publication or circulation. Government actors would have to make difficult assessments about which pornographic works belonged in the "non-progressive" and "non-useful" category, and their decisions wouldn't always be consistent or even coherent. Nevertheless, depriving a work of the copyright protections it would otherwise automatically be vested with does not rise to the level of government censorship, because the consequences of a wrong decision are simply a reduction in the economic incentives provided by the government. Denying copyright protection to problematic works does not constitute censorship, and when the harms associated with non-useful works are severe enough, doing so is justifiable and important.

This Article proceeds in four parts:

1. **Copyright law has a structural role in the commoditization of sex**. When a generally illegal act of buying and selling sex is fixed in a tangible medium of expression, it becomes an act of free speech that is protected by the First Amendment and an article of intellectual property that is protected by copyright laws. Pornographers use copyright laws to facilitate profitable commercial exploitation of their works quite aggressively, effectively commoditizing sex, which is then traded in by mainstream corporations.
2. **Copyright is not a content neutral construct**. Copyright laws facilitate the suppression of speech that is copyrighted, speech that is substantially similar to speech that is copyrighted, and speech that is an unauthorized derivative work of speech that is copyrighted. Injunctions premised on

[1] Article I, Section 8 of the U.S. Constitution states: The Congress shall have power . . .:

(Clause 8) 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;

allegations of copyright infringement are acts of content based censorship by the government. Fair use is a right (or privilege, or affirmative defense) that seeks to reduce the silencing powers of copyright enforcement by facilitating unauthorized uses of otherwise protected works. Whether an unauthorized is fair is a legal determination that is completely non-content neutral, driven entirely by context.

3. **Some pornographic works may cause harms during production, or as a consequence of distribution, or both.** These works are non-progressive and non-useful, and therefore beyond the purview of the Intellectual Property Clause of the U.S. Constitution. They include child pornography, crush pornography, "revenge" pornography, and pornography in which the performers are physically abused or endangered.
4. **Withholding copyright protection from non-progressive and non-useful pornographic works would appropriately reduce the government's role in creating economic incentives for their creation and distribution.** Amending the Copyright Act to reduce the ways in which the economic value of harmful pornography can be exploited is a legitimate policy choice that Congress can and should make. The government should not continue to provide copyright incentives for the production and distribution of harmful works. Trademark law is instructive on this point in both positive and negative ways. The Lanham Act's prohibition of the federal registration of scandalous and immoral marks provides an example of government promulgated content based restrictions that do not offend the Constitution. Admittedly, however, the unpredictable, inconsistent manner in which the prohibition is enforced is problematic and worrisome.

I. COPYRIGHT LAW PERFORMS A STRUCTURAL ROLE IN THE COMMODITIZATION OF SEX

Sex in the form of pornography is a wildly lucrative[2] copyrightable commodity. And though this sounds like a bad joke, the reproduction right is heavily relied upon by commercial pornographers.[3] Anyone on the Internet is generally only a right click or typographical error away from pornography, much

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[2] Jerry Ropelato, *Internet Pornography Statistics*, INTERNET FILTER REVIEW, http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html (last visited Feb. 9, 2011); Michael Brush, *Porn stocks worth, um, watching*, MSN MONEY, http://articles.moneycentral.msn.com/Investing/CompanyFocus/PornStocksWorthUmWatching.aspx ; *see also* Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME (Mar. 29, 2005), *available at* http://www.time.com/time/columnist/corliss/article/0,9565,1043267,00.html.

[3] Copyright Act, 17 U.S.C. § 106(1), *available at* http://www.copyright.gov/title17/92chap1.html#106.

of which is profitably distributed by mainstream American corporations.[4] 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.[5] Instantiation of a legal norm, under which making commercial pornography is

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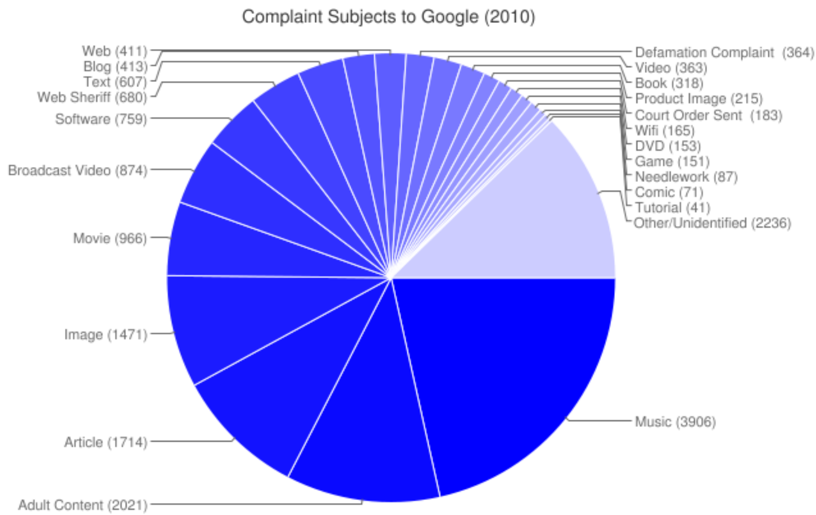
[4] As noted in Ann Bartow, *Pornography, Coercion, and Copyright 2.0*, 10 VAND. J. ENT. & TECH. L. 101, 108 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1137973:

> Pornography has become corporatized in two important ways. First, entities that focus primarily or even exclusively on producing pornography are accorded mainstream acceptance and respectability. Playboy Inc., for example, markets its brand as one of wholesome, patriotic entertainment in contexts like the television show *The Girls Next Door*, appearing on the E! Entertainment Television, Inc. network. An associated online store, The Bunny Shop, offers clothing, jewelry, and workout videos. Similarly, Playboy's eponymous magazine may be fairly tame in comparison to many competing "lad's mags." However, the Playboy corporation also produces and distributes large quantities of hardcore pornography chock full of violent and degrading acts, but they do so under subsidiary trademarks, because, according to Playboy CEO Christy Hefner, "the racier fare 'is a complementary and separate business from the Playboy business'—one in which the Playboy logo and brand" are obfuscated. Playboy also owns hardcore pornography cable channels such as The Hot Network, Vivid TV, and The Hot Zone. The movies on these channels are advertised with descriptions like: "a comical adventure with 10 of the nastiest sex scenes ever filmed!" It is through the production and distribution of hardcore pornography that Playboy generates the majority of its revenue.
>
> The second corporatizating phenomenon is that large mainstream corporations have begun earning enormous revenue streams from the production and distribution of pornography. *The New York Times* reported in 2000: "The General Motors Corporation, the world's largest company, now sells more graphic sex films every year than does Larry Flynt, owner of the Hustler empire." Search engines such as Yahoo! and Google derive ad revenues through their copious advertising of pornography. Pornography producers broadcast "hard-core movies to TV screens across America through hotel chains like Marriott and Hilton and satellite and cable operators Comcast, DirecTV, and AOL Time Warner." As a review of a Frontline documentary about pornography that aired on PBS noted:
>
> The corporate giant AT&T is reaping huge financial benefits through ownership of its cable network AT&T Broadband, which shows explicit porn on channels such as the Hot Network. General Motors, which owns Direct-TV, receives big profits every time an adult movie is purchased by viewers across America. Now, it seems, there are infinitely more ways to sell a dirty picture, and pornography has become associated with some big American brand names. Hotel chains are part of the association, too. As an amenity in large hotel chains, pay-per-view adult films are made available by one of two major distribution companies—Lodgenet or On-Command Video. Even internet [sic] companies such as Yahoo!, a search engine used in millions of American households, make money by selling ads and links to porn websites. Both sides of the business equation are satisfied: the mainstream companies receive large profits and the porn industry gets the stamp of approval by legitimate businesses.

The Marriott hotel chain recently announced it may not be featuring pornography in new hotels it opens. *Marriott Bans Porn in Hotels*, HUFFINGTON POST, Jan. 24, 2011, *available at* http://www.huffingtonpost.com/2011/01/22/marriott-bans-porn-in-hot_n_812539.html ("The hotel chain is aiming to ban all porn entertainment in their new properties that will be opening in the next few years. . . ."). *See also* Barbara De Lollis, *Large hotel chain to start phasing out porn in 2013*, USA TODAY, *available at* http://travel.usatoday.com/hotels/post/2011/01/lodgenet-hotel-in-room-porn-movies/139332/1?csp=Travel (last visited Jan. 24, 2011).

[5] *See infra* note 68 and accompanying text.

protected under the auspices of dominant First Amendment jurisprudence if all parties are 18 or over, came almost a decade later.[6] The importance of copyright protection to pornographers has increased greatly since the Internet has become their primary distribution mechanism.[7] To illustrate briefly, the chart below shows that copyright-rooted cease and desist letters received by Google in 2010 that related to adult content outpaced those of the mainstream movie industry and were second in number only to complaints pertaining to music.[8]



A. *The Copyrightable Contours of Sex*

Pornography can take the form of written accounts[9] or visual images, moving or static, of human beings explicitly engaged in sex acts, or depicted in

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[6] *See infra* notes 61–62 and accompanying text (discussing the *Freeman* case).

[7] *See infra*

[8] Data from the Chilling Effects Clearinghouse, CHILLINGEFFECTS.ORG, http://www.chillingeffects.org/stats.cgi (last visited Mar. 30, 2011).

[9] 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, for example, Dana Wollman, *Amazon no longer selling guide for pedophiles*, THE STATE (Columbia, S.C.), Nov. 10, 2010, *available at* http://www.thestate.com/2010/11/10/1555213/book-defending-pedophilia-for.html, which notes:

Amazon is no longer selling a self-published guide for pedophiles.

It wasn't immediately clear whether Amazon.com Inc. had pulled the item, or whether the author withdrew it. Amazon did not immediately return messages Thursday.

The book, "The Pedophile's Guide to Love and Pleasure: A Child-lover's Code of Conduct," offers advice to pedophiles on how to make a sexual encounter with a child as safe as possible. It includes first-person descriptions of such encounters, purportedly written from a child's point of view.

overtly sexualized poses. Pornographic works are potentially vested with copyright protection upon creation and fixation in tangible mediums of expression[10] as literary works,[11] dramatic works,[12] pantomimes and choreographic works,[13] pictorial, graphic and sculptural works,[14] motion pictures and other audiovisual works,[15] and/or compilations or derivative works.[16]

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.[17] Alternative means of fixation such as notation may be possible,[18] but would likely be expensive, overly complicated, and of uncertain monetarily exploitable value.[19]

The availability of the book calls into question whether Amazon has any procedures - or even an obligation - to vet books before they are sold in its online stores. The title is an electronic book available for Amazon's Kindle e-reader and the company's software for reading Kindle books on mobile phones and computers. Amazon allows authors to submit their own works and shares revenue with them.

Amazon issues guidelines banning certain materials, including those deemed offensive. However, the company doesn't elaborate on what constitutes offensive content, saying simply that it is "probably what you would expect." Amazon also doesn't promise to remove or protect any one category of books.

Once discovered Wednesday, the book triggered outrage from commenters on sites such as Twitter. Some people threatened to boycott the online store until Amazon removed the book. Two petitions on Facebook alone won more than 13,500 supporters.

On Wednesday, child online safety advocacy group Enough is Enough says it isn't surprised that someone would publish such a book, but believes that Amazon should remove it. It says selling the book lends the impression that child abuse is normal.

But Christopher Finan, president of the American Booksellers Foundation for Free Expression, said Amazon has the right under the First Amendment to sell any book that is not child pornography or legally obscene. Finan said Greaves' book doesn't amount to either because it does not include illustrations."

[10] Pursuant to Sections 101 and 102 of the Copyright Act, *available at* http://www.copyright.gov/title17/92chap1.html (last visited Nov. 15, 2010).

[11] Copyright Act, 17 U.S.C. § 102(1).

[12] *Id.* § 102(3).

[13] *Id.* § 102(4).

[14] *Id.* § 102(5).

[15] *Id.* § 102(6).

[16] *Id.* § 103.

[17] U.S. Copyright Office, Works: Scripts, Pantomimes, and Choreography, *available at* http://www.copyright.gov/fls/fl119.html. *Cf.* Lhendup Gyatso Bhutia, *Saving yoga from copyright mongers*, DNA DAILY NEWS & ANALYSIS, July 18, 2010, *available at* http://www.dnaindia.com/lifestyle/report_saving-yoga-from-copyright-mongers_1411206-all.

[18] U.S. Copyright Office, In answer to your query, *available at* http://www.copyright.gov/fls/fl119.pdf.

[19] *See* Joi Michelle Lakes, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1853–55 (2005), *available at* http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__law_review/documents/documents/ecm_pro_064534.pdf (discussing notation based means of fixing choreographic works). *See also* Julie Van Camp, *Copyright of Choreographic Works*, *in* 1994-1995 ENTERTAINMENT, PUBLISHING AND THE

Commercial control of traditional choreographic works probably relies more on norms about copying and attribution within the dance industry than on formal copyright protections.[20] This makes analogizing sex and dance moves

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ARTS HANDBOOK (Stephen F. Breimer et al. eds. (1994), *available at* http://www.csulb.edu/~jvancamp/copyrigh.html.

[20] See William Patry, *Choreography and Alternatives to Copyright Law*, THE PATRY COPYRIGHT BLOG, Aug. 18, 2005, *available at* http://williampatry.blogspot.com/2005/08/choreography-and-alternatives-to.html, noting:

> Given all the attention copyright law gets, one would think copyright protection is of vital interest to creators of original works of authorship. The copyright industries are fond of pointing out the relative importance of their industries to the GDP, and indeed they are important. This too might make one believe copyright protection is pervasively important. How can one measure the importance of copyright protection though (without going into the scope or extent of that protection, which is obviously also an important question)?
>
> One way, an imperfect one, is to look at copyright registrations, since for U.S. works, registration (or rejection) is a prerequisite to bringing suit and for all works it is a prerequisite for getting statutory damages and attorney[']s fees. In FY 2004, the Copyright Office received 614,235 claims and registered 661,469 claims (the larger number being attributable to the processing of claims received in FY 2003 as well). More copyrighted works are created in part of one day in New York City alone. Not more economically valuable works necessarily, and that's part of why registration figures can't supply a complete answer. But 600,000 plus works a year is a very small number (and that number also includes registrations for foreign works).
>
> Even within the 600,000 plus figure, the numbers are heavily weighted toward some groups and away from others. The fine arts are one example of a class of works that have, historically, been underrepresented in registrations. Choreography is another. The Register of Copyrights' 2004 Annual Report lists registration numbers for the broad class of performing arts, a class that also includes music, motion pictures and other audiovisual works, and other dramatic works. This class represented 170,512 registrations in FY 2004. More detailed breakdowns are given though in the number of registered works transferred to the Library's collections. Here, while the category includes dramatic works, it does not include music or motion pictures and other audiovisual works. Only 1,115 registered dramatic works, choreography, and pantomimes were transferred to the Library.
>
> This very low figure corresponds to the legal literature on copyright and choreography, which repeatedly notes choreographers' decision not to rely on copyright and to instead develop their own "community" system of protection, protection believed to be better suited to choreography and providing better protection. The community system works in large part because of the concentration of choreographers in New York City, the tight-knit nature of dance companies, and the reputation within the community enjoyed by choreographers.
>
> In brief, the dance community recognizes the choreographer's right to control his or her works even after they have been performed. Where a dance company different from that for whom the work was originally written wishes to perform the work, the choreographer ensures that the company is capable of performing the work and that it will ensure the integrity of it. A formal license agreement is entered into. This sounds like contract law, and it is. But the recognition of a choreographer's interest goes well beyond this, including rights of attribution where the work is revised, and a right to withdraw the work from performance. Interesting discussions can be found in Barbara Singer, "In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Community, 38 U. Miami L. Rev. 287 (1984)

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."[21] Whether there are similar norms within the pornography industry is unknown to this author, but I haven't seen any evidence of them. Commercial pornographers seem to make their creative choices in direct response to perceived consumer demand,[22] which apparently leads to heavy concentration 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.[23] Elements such as dialogue, plot, costumes, and scenery are copyrightable just as they are in non-pornographic works. But what the scope of copyright 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:[24]

> 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."
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> . . . .
>
> 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,

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and Leslie Wallis, "The Different Art: Choreography and Copyright," 33 UCLA L. Rev. 1442 (1986).

[21] *George Bernard Shaw quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/dancing-the_vertical_expression_of_a_horizontal/259005.html (crediting quote to George Bernard Shaw) (last visited Mar. 30, 2011). *Cf. Robert Frost quotes*, GOODREADS.COM, http://www.goodreads.com/quotes/show/123294 (credited to Robert Frost) (last visited Mar. 30, 2011).

[22] Some pornography is likely produced for reasons other than commercial exploitation. *See generally* Eric E. Johnson, *Intellectual Property's Great Fallacy* (University of North Dakota School of Law Working Paper, Jan. 23, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746343.

[23] These are all awards categories for the Adult Video Network annual awards. Nominations for the 2011 AVN Awards, *available at* http://avnawards.avn.com/2011_nominations.pdf (last visited Jan. 24, 2011).

[24] Van Camp, *supra* note 19 (citations omitted).

> 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."[25] The Second Circuit concluded that "social dance steps and simple routines" are not copyrightable.[26] Analogously pedestrian sexual encounters wouldn't 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 domain by virtue of copyright's merger and scenes a 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.[27] Sets, props, camera angles, dialogue

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[25] 789 F.2d 157, 161 (1986).

[26] *Horgan*, 789 F.2d at 161.

[27] Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (1986), *available at* http://openjurist.org/784/f2d/44/walker-v-time-life-films-inc ("Elements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx. These similarities therefore are unprotectible as 'scenes a faire,' that is, scenes that necessarily result from the choice of a setting or situation. . . . Neither does copyright protection extend to copyright or 'stock' themes commonly linked to a particular genre. Foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop, are venerable and often-recurring themes of police fiction. As such, they are not copyrightable except to the extent they are given unique—and therefore protectable—expression in an original creation." (citations omitted)); Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d 763, 765 (9th Cir. 2003) ("Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the work can be expressed only in one way, lest there be a monopoly on the underlying idea. In such an instance, it is said that the work's idea and expression 'merge.' Under the related doctrine of scenes a faire, courts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a commonplace idea . . . ."); Stephen M. Kramarsky, *A Missed Opportunity on Creative Works*, N.Y. L.J. (Sept. 25, 2007), *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1190624579882&slreturn=1&hbxlogin=1 ("Generally, if there is only one practical way to express a given fact, the fact and its expression are said to have "merged" and the expression will not be protected. The merger doctrine is entirely judge-made and varies in its particulars from court to court, but it is a reasonably well-established part of the copyright law."). *But see* Michael Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works* (Illinois Public Law and Legal Theory Research Papers Series, Research Paper No. 06-09, May 24, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900148.

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(4) he would retain the exclusive right to authorize the public performance of his sequence of asanas.[28]

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[28] William Patry, *Yoga and Copyright*, THE PATRY COPYRIGHT BLOG, Aug. 22, 2005, *available at* http://williampatry.blogspot.com/2005/08/yoga-and-copyright.html.

> . . . Until April 1, 2005, I would never have thought a court would entertain the possibility that one could acquire exclusive rights over the performance of yoga exercises. Leaving aside serious questions of origination, yoga routines are intended to bring about physical, mental, or emotional results and are, therefore, excluded by Section 102(b). Nor does a book about them convey any rights in the routines; that's been the law since Baker v. Selden, 101 U.S. 99 (1879), which rejected a claim by the author of a treatise on bookkeeping that a registration for the book gave him exclusive rights over the system of bookkeeping explained therein. Baker v. Selden is one of the foundations for Section 102(b).
>
> So if everything is so clear, what happened? Bollywood met Hollywood and were married by ignorance, a lethal combination. Bikram Choudhury, a Calcutta native transplanted to LaLa Land, became a yoga teacher to the stars, through his Bikram "hot" yoga style, consisting of 26 yoga positions (asanas), and two breathing exercises, performed at a room temperature of about 105 degrees. We will assume arguendo he was the first to select these particular 26 positions. Importantly, he was quite insistent that they be performed strictly in order to achieve advertised physical and emotional benefits. Whether they did or not is irrelevant to me.
>
> A book, "Bikram's Beginning Yoga Class" was written, and perhaps published before 1978, although that's unclear, at least to me, because the literary work registration (TX 179-160) states it was created in 1978 and first published on January 1, 1979 (most unlikely); the application was submitted on January 17, 1979. The claim of authorship was for "entire text."
>
> Sometime in this new century, Bikram concluded, somehow, that he not only had a copyright in his selection of the 26 positions, but that this selection gave him the exclusive right to stop others from performing them in that order. That's baloney, as Baker v. Selden shows. And his registration was, as in Baker, on a literary work form and for "text," not choreography or any form of performing arts work (PA). That didn't stop him though from suing and threatening to sue, and making what were, in my opinion wildly extravagant and erroneous claims about the extent of this copyright.
>
> On October 24, 2002, he filed a supplementary registration to the 1979 one, TX 5-624-003, listing amplified information of "compilation of exercises." There was correspondence over this that I am dying to see and will as soon as possible. If relevant, I'll revise this posting. But, no matter for right now; the supplemental registration was also for a literary work (it amplified a textual work, after all), and was a compilation claim. It still was not a choreography claim. Yet, Bikram asserted in litigation that "the teaching or offering of the sequence" constituted infringement. That is, as I said, baloney.

This claim is highly contested in the context of cultural commoditization.[29] 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.[30]

B. Literal Copying is the Primary Basis for Infringement Allegations Brought by Pornographers

Fairly extensive research suggests that the vast majority of copyright infringement cases that have been brought since 1979[31] in which the plaintiff's work was an article of commercial pornography, and there have been many,[32] have been premised on allegations of literal copying. No indication has been found that there has been a single 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 authorized derivative work.[33] 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

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> The claim was made in a declaratory judgment action brought by the Open Source Yoga Unity, a non-profit group. Their website has copies of many of the relevant legal documents. The case has now been settled, but not after an April 1, 2005 opinion by Judge Phyllis Hamilton of the Central District of California, denying Open Source's motion for summary judgment. 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 what is controversial, indeed, outrageously wrong, was Judge Hamilton's conclusion that "should Choudhury establish at trial that his copyright in the Bikram yoga style is valid, under Section 106(4) he retains the exclusive right to authorize the public performance of his sequence."
>
> Not true. Section 102(b) dictates otherwise, as does the very limited scope of the compilation. The only thing hot about Bikram's claim is the air in stating it.

Id.

[29] *See, e.g.*, Paul Vitello, *Hindu Group Stirs a Debate Over Yoga's Soul*, NEW YORK TIMES, Nov. 27, 2010, *available at* http://www.nytimes.com/2010/11/28/nyregion/28yoga.html?sq=hindu&st=cse&scp=1&pagewanted=all.

[30] Lakes, *supra* note 19. *See generally* Studies prepared for the Subcommittee on Patents Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eight-Sixth Congress, Second Session pursuant to S. Res. 240, *available at* http://www.copyright.gov/history/studies/study28.pdf.

[31] This was the year in which the Mitch Brothers case, *infra* note 68, was decided.

[32] *See infra* notes 184–186.

[33] In *International Media Films v. Lucas Entertainment* the plaintiffs alleged facts that might if proven have resulted in a finding of infringement based on the distribution of an unauthorized derivative work, but were unable to show the held the restored copyright in the plaintiff work. 703 F. Supp. 2d 456 (2010) (disputed chain of title in restored copyright). In *Lucasfilm Ltd. v. Media Market Group, Ltd.*, the plaintiff work was a non pornographic work, *Star Wars*, while the defendant work was a pornographic parody, *Star Ballz*. 182 F. Supp. 2d 897 (2002).

manner. The scope of copyright in a work of mainstream pornography appears to be judicially untested.[34] Literal copying has either been found infringing,[35] or held to be fair use.[36]

Some observers perceive a distinction between (for example) artistic audiovisual works in which there is "unsimulated" (by which they mean actual) sex performed, and works of pornography, in which there is little imaginative concern about plot, dialog, scenery, or any other variable that is not directly related to the depicted sexual exploits.[37] This reflects an entertainment industry perspective, which may or may not be widely held, that views audiovisual pornography as a less creative or perhaps even non-creative commodity.[38] Pornography is sometimes characterized as something that is "used," unlike in some qualitative way mainstream literary or audiovisual works that contain sex scenes.[39] Jim Mitchell reportedly quipped that the only "art" in pornography was

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

[35] *See, e.g.*, Blackman v. Hustler Magazine, Inc., 800 F.2d 1160 (1986); Flava Works, Inc. v. Wyche, 2010 U.S. Dist. LEXIS 64165 (N.D. Ill. June 28, 2010); Io Group, Inc. v. Veoh Networks, Inc., 2007 U.S. Dist. LEXIS 31639 (N.D. Cal. Apr. 13, 2007); Nova Prods. v. Kisma Video, Inc., 2004 U.S. Dist. LEXIS 24171 (S.D.N.Y. Nov. 30, 2004); Sefton v. Webbworld, Inc., 2003 U.S. Dist. LEXIS 6431 (N.D. Tex. Apr. 16, 2003); Sefton v. Jew, 204 F.R.D. 104 (2000); Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (1997). *Cf.* United States v. Gottesman, 724 F.2d 1517 (1984); Brush Creek Media, Inc. v. Boujaklian, 2002 U.S. Dist. LEXIS 15321 (N.D. Cal. Aug. 19, 2002).

[36] *E.g.*, Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (D.C.Cal. 1985). Cf. The Pillsbury Company v. Milky Way Productions, Inc. et al., 215 U.S.P.Q. 124 (N.D.Ga.1981) (plaintiff claimed copyright in wrapper for cinnamon rolls; defendant made pornographic parody).

[37] *Unsimulated sex in film*, WIKIPEDIA, http://en.wikipedia.org/wiki/Unsimulated_sex_in_film (last visited Nov. 15, 2010).

[38] *See also* Schwartz, *supra* note 34 ("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.'").

[39] *See, e.g.*, Erick Janssen, *why people use porn*, PBS.ORG, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/why.html ("Porn as we know it is used predominantly by men. That is not to say that women do not use it, but simply that men are the main consumers of this 'pleasure technology.'"); *Why Millions of Women Are Using Porn and Erotica: Lisa Ling Reports*, OPRAH.COM (Nov. 17, 2009), *available at* http://www.oprah.com/showinfo/Why-Millions-of-Women-Are-Using-Porn-and-Erotica-Lisa-Ling-Reports; Iriving Kristol, *Pornography, Obscenity and the Case for Censorship*, *in* SEX, MORALITY AND THE LAW 176 (Lori Gruen & George E. Panichas eds., 1997) (". . . [T]hough [pornography and obscenity] have different dictionary definitions and are frequently distinguishable as "artistic" genres, they are nevertheless in the end identical in effect. Pornography is not objectionable simply because it arouses sexual desire or lust or prurience in the mind of the spectator; this is a silly Victorian notion… Pornography differs from erotic art in that its whole purpose is to treat human beings obscenely, to deprive human beings of their specifically human dimension. That is what obscenity is all about.").

his brother Artie, a fellow pornographer with the given name of Arthur.[40] 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."[41] 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."[42]

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

1. *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.[43] Sex toys such as vibrators, dildos, butt plugs, nipple clamps, and cock rings can certainly simultaneously evince artistic as well as utilitarian aspects, though in one dispute a court found dildos lacking conceptual separability because they were cast from molds of the gonads of pornography performers, and therefore uncopyrightable.[44] But in and of themselves sex toys would not generally constitute pornography, depending of course upon the nature of the particularized attendant creative flourishes.

Pornography is difficult to qualitatively define beyond: "unambiguous depictions of sexual activity."[45] When the Supreme Court decided *Miller v.*

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[40] Michael Carlson, *Spiking Deep Throat: Gerard Damiano And Jim Mitchell's Guardian Obituaries*, IRRESISTIBLE TARGETS (Mar. 6, 2009), *available at* http://irresistibletargets.blogspot.com/2009/03/buried-deep-throat-gerard-damiano-and.html. *See also* Corliss, *supra* note 2 ("There's a lot of porn out there. But nobody's calling it art. Or even, technically, film. (The industry has been virtually all-video for a couple of decades.) Porn is a commodity, with no more pretension to art than the most mindless kiddie show. For the weary businessman it's just a combination Viagra and Ambien.")).

[41] Freakonomics, *Copyrighting Porn: A Guest Post*, N.Y. TIMES, THE OPINION PAGES (May 5, 2010, 12:00 PM), http://freakonomics.blogs.nytimes.com/2010/05/05/copyrighting-porn-a-guest-post/.

[42] *See* Corliss, *supra* note 2.

[43] *See* Copyright Act § 113. *See generally* COMMITTEE NO. 304, PICTORIAL, GRAPHIC, SCULPTURAL AND CHOREOGRAPHIC WORKS, *available at* http://www.abanet.org/intelprop/annualreport06/content/96-97/COMMITTEE%20NO%20304.pdf (last visited Jan. 24, 2011).

[44] ConWest Resources, Inc. v. Playtime Novelties, Inc., 2006 WL 3346226 (N.D. Cal.).

[45] *See* Janssen, *supra* note 39 ("Although lawyers, feminists, priests, and scientists all have tried to describe it, a satisfactory definition of porn does not exist. Some distinguish between erotica

California in 1973, Chief Justice Burger characterized the dispute as "one of a group of 'obscenity-pornography' cases being reviewed by the Court,"[46] implying that the terms obscenity and pornography were interchangeable.[47] This is no longer true, if it ever was. In *American Booksellers Association v. Hudnut*, the definition of pornography contained in a civil rights ordinance adopted by the City of Indianapolis was:

> . . . [T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
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> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
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> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) Women are presented as being penetrated by objects or animals; or

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and porn, with porn being more violent, portraying unequal power in sexual relations, or showing activities that are judged to be immoral. The Webster dictionary defines pornography more instrumentally, through one of its presumed functions, as "the depiction of erotic behavior intended to cause sexual excitement.").

[46] 413 U.S. 15, 16 (1973).

[47] He also used the term "hardcore pornography" as if it had a generally accepted meaning. *See, e.g.*, *id.* at 27 ("Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."); *id.* at 28 ("If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends."); *id.* at 29 ("But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."); *id.* at 35 ("But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter."); *id.* at 36 ("Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which Mr. Justice Brennan finds constitutionally permissible, has all the elements of 'censorship' for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation." . . . "One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine."). In his dissent Justice Douglas slyly noted, "Some condemn only 'hardcore pornography'; but even then a true definition is lacking. It has indeed been said of that definition, 'I could never succeed in (defining it) intelligibly,' but 'I know it when I see it.'" *Id.* at 39.

> (5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.
>
> . . . [T]he use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.[48]

This definition of pornography was held to be unconstitutional when it was proposed as the basis for redress for civil rights violations through administrative and judicial means.[49] 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 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.[50] This "considerable difference" was entirely intentional, part of a conscious effort to promote recognition of the harms of pornography outside of the confines of the *Miller* test.[51] After *Hudnut* it became less common for courts or legal commentators to use the terms "pornography" and "obscenity" interchangeably. The current practice is to divide

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[48] *American Booksellers*, 771 F.2d at 324.

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

[50] *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.").

[51] *See, e.g.*, *Pornography: An Exchange, Catherine A. MacKinnon, reply by Ronald Dworkin*, N.Y. REV. OF BOOKS, Mar. 3, 1994, *available at* http://www.nybooks.com/articles/archives/1994/mar/03/pornography-an-exchange/ ("In 1983, Andrea Dworkin and I advanced our equality approach to pornography through our ordinance allowing civil suits for sex discrimination by those who can prove harm through pornography. Since then, every argument we 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. Equality was the "compelling state interest" urged in support of the Indianapolis ordinance. . . . We are talking about acts of discrimination: sex-based coercion, force, assault, and trafficking in sexual subordination.").

pornography into two categories: that which is obscene, and that which is not.[52] 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 at issue.[53] Because this is so subjective, the meaning of "obscene" can vary widely from person to person.[54] This would be problematic if criminal obscenity charges were commonly brought, but they are not.[55]

C. Sex Can Be Legally Bought and Sold If It Is Fixed in a Tangible Medium of Expression

Though commercial sex may constitute expressive conduct, prostitution is either regulated as commerce, or it is criminalized. When commoditized sex is

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[52] *See, e.g.*, *Obscenity and Pornography: Behavioral Aspects—Obscenity And Pornography Defined*, *available at* http://law.jrank.org/pages/1609/Obscenity-Pornography-Behavioral-Aspects-Obscenity-pornography-defined.html (last visited Jan. 24, 2011).

[53] Miller v. California, 413 U.S. 15 (1973); Reno v. American Civil Liberties Union, No. 96-511, 1997 WL 74395, *available at* http://www.law.cornell.edu/supct/html/96-511.ZS.html. *See generally, e.g.*, Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 700 (2007); LaVonda N. Reed-Huff, *Political Advertisements in the Era of Fleeting Indecent Images and Utterances*, 84 ST. JOHN'S L. REV. 199, 243 (Winter 2010); Dana Neaçsu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 634–35 (2002-03) ("Under *Miller*, a book was deemed obscene if was wholly without redeeming value and not if it stirred impure thoughts. *Miller*'s guidelines for identifying obscenity are: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. It is worth noting that this three-prong test under which both the average person and the law must find the respective work obscene and without other merit has barely evolved since the first prosecution of obscenity in 1821. Moreover, little has changed in the conservative role obscenity discourse has consistently promoted in both the courts and legislative bodies." (citations omitted)); Robert D. Richards & Clay Calvert, *Prosecuting Obscenity Cases: An Interview with Mary Beth Buchanan*, 9 FIRST AMEND. L. REV. 56 (2010).

[54] The most frequently quoted Supreme Court opinion on obscenity is Justice Stewart concurring in *Jacobellis v. Ohio*, 378 US 184 (1964):

> It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.

Id. at 197 (citations omitted) (emphasis added).

[55] *See infra* note ___; *see also supra* notes 4, 53.

fixed in a tangible medium of expression, however, it becomes protected speech—commoditized sex that is legal, socially acceptable and copyrighted.

Prostitution is illegal in most, though not all, U.S. jurisdictions.[56] In regions where it is illegal it is zealously prosecuted in some contexts, but virtually ignored in others.[57] Selling sex is far more likely to result in an arrest or criminal conviction than buying sex.[58] 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.[59]

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.[60]

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[56] *See* Daniel J. Franklin, *Prostitution and Sex Workers*, 8 GEO. J. GENDER & L. 355, 356-57 (2007) (listing state prostitution statutes).

[57] 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 . . . . 'We've abandoned the people and the neighborhoods,' [says] Police Chief David Kunkle. The Dallas Police Department's own study indicated that '[r]andom gunfire, alleged prostitution, and other nuisance complaints get low priority and often no follow-up . . . .'" (internal citation omitted) (quoting Tanya Eiserer, *Looking South: Dallas at the Tipping Point: Area's Crime Problem Scaring off Developers*, DALLAS MORNING NEWS, Dec. 14, 2004, at 22A)); Moira C. Heiges, *From the Inside Out: Reforming State and Local Prostitution Enforcement to More Effectively Combat Sex Trafficking in the U.S. and Abroad* (University of Minnesota School of Law, Dec. 1, 2009, Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1472125 ("Unfortunately, the current enforcement models for sex trafficking and prostitution crimes embody opposing sets of priorities. Rather than focusing on reducing the market for sex trafficking, police, prosecutors and courts have traditionally viewed pimps and prostitution purchasers as trivial or derivative offenders, while targeting prostituting persons for arrest and prosecution."); Shay-Ann M. Heiser Singh, *The Predator Accountability Act: Empowering Women in Prostitution to Pursue Their Own Justice*, 56 DEPAUL L. REV. 1035, 1062 (2007) (noting the widespread enforcement bias against prostituted women).

[58] Nancy Kallitechnis, *Why Does the U.S. Jail Child Rape Victims?*, J. FEMINIST INSIGHT (Aug. 2, 2009) (citing the story of Nicole from the documentary "Very Young Girls"); Bob Herbert, *The Wrong Target*, N.Y. TIMES, Feb. 19, 2008, at A25, *available at* http://www.nytimes.com/2008/02/19/opinion/19herbert.html ("If a 35-year-old pimp puts a 16-year-old girl on the street and a 30-year-old john pays to have sex with her, how is it reasonable that the girl is most often the point in that triangle that is targeted by law enforcement?"); Steven D. Levitt & Sudhir Alladi Venkatesh, *An Empirical Analysis of Street-Level Prostitution* (2007) (unpublished manuscript), *available at* http://economics.uchicago.edu/pdf/Prostitution%205.pdf

[59] Stephanie Chen, *'John schools' try to change attitudes about paid sex*, CNN (Aug. 28, 2009), *available at* http://articles.cnn.com/2009-08-27/justice/tennessee.john.school_1_prostitutes-victimless-crime-john-schools?_s=PM:CRIME ("In most communities, prostitution has been a one-sided battle focused on the women who offer sex. Their customers, when they are arrested, are usually cited for a misdemeanor and fined. By comparison, prostitutes are often charged with more severe sentences and jailed for months, depending on the offense."); Elaine Pearson, *Half-hearted protection: what does victim protection really mean for victims of trafficking in Europe?*, 10 GENDER & DEV. 56 (2002); Sergio Herzog, *Lenient Social and Legal Response to Trafficking in Women: An Empirical Analysis of Public Perceptions in Israel*, 24 J. CONTEMP. CRIM. & JUST. 314 (2008), *available at* http://ccj.sagepub.com/content/24/3/314.

[60] *See* Bartow, *supra* note 4, at 108,

State governments have largely followed suit because in *California v. Freeman*,[61] 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.[62]

As I explained,

> According to law professor Tim Wu, after slowing down during the Bush I and Clinton administrations, the number of adult obscenity prosecutions declined even further during the Bush II years. Wu noted: "George W. Bush is perhaps the most religiously conservative U.S. president in history. Yet his administration, despite its rhetoric, is looser on mainstream porn than Jimmy Carter or John F. Kennedy was."A recent New York Times article, entitled "Federal Effort on Web Obscenity Shows Few Results," reported that the Justice Department provided a grant to a conservative religious group called "Morality in Media," which pays people to review "sexual Web sites and other Internet traffic to see whether they qualify as obscene material whose purveyors should be prosecuted by the Justice Department." The article noted that "[t]he number of prosecutions resulting from those referrals is zero." It further reported: "In the seven years of the Bush administration, the department has prosecuted about 24 obscenity cases, several centered on film producers who failed to keep proper records showing that their models were not minors."It did not provide identifying information for the referenced "24 obscenity cases," and research suggests that even that small number may be substantially inflated. Indeed, one observer recently noted that contemporary pornographers may be more likely to go to jail for spamming than for the content of the pornographic works they distribute. In a recent issue of the ABA Journal, one self-credited pornography specialist complained that he had to handle copyright infringement cases to pay the bills because so little First Amendment work related to pornography was available.

Bartow, *supra* note 4, at 108. *See also* Jason Krause, *The End of the Net Porn Wars*, ABA J. http://www.abajournal.com/magazine/article/the_end_of_the_net_porn_wars/ ("A handful of prosecutions have been launched around the nation, including convictions in Arizona against a pornographic spam e-mail operation. 'There have been cases, but they are few and far between,' says Peters."). *Cf.* Josh Gerstein, *Porn prosecution fuels debate*, POLITICO.COM, July 31, 2009, *available at* http://www.politico.com/news/stories/0709/25622.html; Spencer S. Hsu, *U.S. District judge drops porn charges against video producer John A. Stagliano*, WASH. POST, July 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071605750.html ("A federal judge dismissed the first obscenity prosecution brought in the nation's capital in a quarter-century on technical grounds Friday, tossing out charges against John A. Stagliano and two companies associated with the adult video producer based in Van Nuys, Calif."); Mike Scarcella, *Porn Producer Fighting Rare Obscenity Case*, LAW.COM, July 13, 2010, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202463445383.

[61] 488 U.S. 1311 (1989).

[62] Justice O'Connor, On Application For Stay, noted:

> California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition, because, in my view, this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan v. Long*, 463 U. S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983), that its analysis of the pandering provision of

The impact of this SCOTUS 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. Consider the recent holding in *State v. Theriault*,[63] in which the Supreme Court of New Hampshire overturned a defendant's conviction for prostitution that was based on his offering paying a couple for having sexual intercourse while he videotaped them. The defendant was unable to successfully appeal a prostitution conviction under the same statute based on simply "offer[ing] to pay a couple to engage in sexual intercourse with each other and explain[ing] that he would need to watch them."[64] The First Amendment offered no cognizable protection for mere voyeurism. But 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.[65] The invocation of a camera was the difference between legal and illegal conduct, pornography and prostitution, even though in both cases the couple would be paid for having sex while he was present.[66]

While it may be hard to imagine companies like General Motors, Google, Marriott or Fox News openly operating brothels, because of their engagement in the pornography industry, commercial sex that directly profits them is bought and sold.[67] Pornography and prostitution are treated so disparately by the legal

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> the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien v. Skinner*, 414 U. S. 524, 531, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under § 266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction."

Id. at 1311.

[63] 158 N.H. 123 (2008).

[64] State v. Theriault, 157 N.H. 215, 216, 949 A.2d 678, 679 (2008).

[65] *Theriault*, 158 N.H. 123.

[66] 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. In the immortal words of one trick, "Yes, the woman in pornography is a prostitute. They're prostituting right before the cameras. They're getting money from a film company rather than individuals." It is also to deny the plain fact that pornographers are pimps, third-party sex profiteers, buying and selling human beings to johns, who are consuming them as and for sex. In some instances, women are directed to perform sex acts by a john from a computer terminal in real time. So what is it, prostitution or pornography? That the sexually used are transported on paper or celluloid or digitally may make the transaction seem more distanced, but it is no less real a commercial act of sex for any of the people involved. As a report of the UN Secretary-General on victims of crime, discussing exploitation of prostitution and trafficking in women, put it in 1985, "it is hard to make distinctions (if any should be made) between prostitution and other sexual services, including those of the pornographic media." Sex from one person is exchanged for money from another, the media being the go-between, the trafficker.").

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

system because 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.

II. THE COPYRIGHT ACT AUTHORIZES AND FACILITATES NON-CONTENT-NEUTRAL REGULATION OF EXPRESSIVE SPEECH

Copyright law is more pornography friendly than the First Amendment is. The First Amendment will only protect pornography if it is not obscene or illegal for other reasons, *i.e.*, if it contains depictions of children. Copyright laws offer copyright protections to pornography no matter what material it contains.[68] 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 laws actually incentivize the creation and distribution of pornography, and enable the employment of government resources to prevent and punish infringing uses by governmental 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. 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 law.[69] 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.

The requisite level of originality required to trigger copyright protection, both doctrinally and in practice, is low.[70] 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

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[68] *See, e.g.*, Mitchell Brothers Film Group v. Cinema Adult Theater, 604 F.2d 852, 852 (1979) (". . . protection of all writings, without regard to their content, is a constitutionally permissible means of promoting science and useful arts under Congress' copyright power . . .").

[69] 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, (2003-2004), *available at* http://www.wmitchell.edu/lawreview/Volume30/Issue5/3Okediji.pdf.

[70] *E.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991). *See also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884); *cf.* Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

fair use.[71] 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 her permission and pay her for the privilege; thus requiring 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 laws establish a framework for injunctions that chill and censor speech, and damages awards that punish speakers, but First Amendment grounded objections to copyright based censorship have not found much traction in the courts.[72] In *Harper & Row Publishers v. Nation Enterprises*,[73] 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. Attempts to communicate unprotectable 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.

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.[74] 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,[75] but fair use unambiguously carves out limited and highly contextual speech rights with respect to contested words or images,[76] and even those may only be available after expensive and protracted litigation. The late Justice William Rehnquist

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[71] Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164 (1994) (For purposes of determining whether parody of copyrighted work is "fair use," inquiry focuses on whether new work merely supersedes object of original creation or whether and to what extent it is "transformative" and alters original work with new expression, meaning or message. 17 U.S.C.A. §§ 101, 107—"and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

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

[73] 471 U.S. 539 (1985).

[74] *See generally* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2001), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2165&context=bclr&sei-redir=1#search="Copyright+as+a+Model+for+Free+Speech+Law:+What+Copyright+has+in+Common+with+Anti-Pornography+Laws,+Campaign+Finance+Reform,+and+Telecommunications+Regulation".

[75] *See, e.g.*, Campbell w v. Acuff Rose (92-1292), 510 U.S. 569 (1994), *available at* http://www.law.cornell.edu/supct/html/92-1292.ZS.html.

[76] *Id.* at 589 ("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, see *Harper & Row*, *supra*, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original.").

noted in his dissent in a flag burning case in 1974: "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."[77] A 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 verbatim quotes from the memoirs of a public figure.[78]

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.[79] Others may be treated as uncopyrightable because they contain infringing material.[80]

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.[81] Lousy songs, awful novels, and ugly paintings get just as much copyright protection as fine melodies, gripping sagas, and beautiful pictures. This gives copyright a thin veneer of content neutrality in the First Amendment sense that does not survive sustained analytical scrutiny.[82] Both obscenity laws and copyright laws are content based restrictions on speech.[83] Copyright laws facilitate speech regulation by the

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[77] Spence v. Washington, 418 U.S. 405, 417 (1974).

[78] Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 548 (1985), *available at* http://www.law.cornell.edu/copyright/cases/471_US_539.htm ("The Nation has admitted to lifting verbatim quotes of the author's original language totaling between 300 and 400 words and constituting some 13% of The Nation article. In using generous verbatim excerpts of Mr. Ford's unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, The Nation effectively arrogated to itself the right of first publication, an important marketable subsidiary right. For the reasons set forth below, we find that this use of the copyrighted manuscript, even stripped to the verbatim quotes conceded by The Nation to be copyrightable expression, was not a fair use within the meaning of the Copyright Act.").

[79] *See, e.g.*, *Feist Publ'ns*, 499 U.S. 340; Brandir Intern, Inc. v. Cascade Pacific Lumber, Co., 834 F.2d 1142 (1987); John Muller & Company, Inc. v. New York Arrows Soccer Team, Inc., 231 U.S.P.Q. 319 (1986), *available at* http://openjurist.org/802/f2d/989/john-muller-company-inc-v-new-york-arrows-soccer-team-inc (last visited Jan. 24, 2011).

[80] *See, e.g.*, Anderson v. Stallone, 11 U.S.P.Q.2d 1161 (1989); Gracen v. Bradford Exchange, 698 F.2d 300 (1983).

[81] *See, e.g.*, *A. Copyright Basics FAQ*, COPYRIGHT AND FAIR USE, STANFORD UNIVERSITY LIBRARIES, *available at* http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-a.html ("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.").

[82] Baker, *supra* note 83, at 897.

[83] *See, e.g.*, C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002), *available at* http://law.vanderbilt.edu/publications/vanderbilt-law-review/archive/volume-55-number-3-april-2002/download.aspx?id=2919; NEIL W. NETANEL, INTRODUCTION, COPYRIGHT'S PARADOX (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099457. *Cf.* Tushnet, *supra* note 74.

government that takes the form of refereeing business transactions and adjudicating commercial disputes. In consequence, First Amendment considerations are often minimized.[84] 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.[85] But restrict free speech it can.[86] And unlike obscenity prosecutions, 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 social deviancy that pornographers condemn and seek to eradicate.

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[84] *See, e.g.*, Harper & Row Publishers v. Nation Enter., 471 U.S. 539 (1985).

[85] *E.g.*, Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) ("The CTEA's extension of existing and future copyrights does not violate the First Amendment. That Amendment and the Copyright Clause were adopted close in time. This proximity indicates the Framers' view that copyright's limited monopolies are compatible with free speech principles. In addition, copyright law contains built-in First Amendment accommodations. See *Harper & Row*, 471 U. S., at 560. First, 17 U. S. C. § 102(b), which makes only expression, not ideas, eligible for copyright protection, strikes a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author's expression. *Harper & Row*, 471 U. S., at 556. Second, the "fair use" defense codified at § 107 allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself for limited purposes. "Fair use" thereby affords considerable latitude for scholarship and comment, id., at 560, and even for parody, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U. S. 569."). *Cf.* U.S. v. Stevens, 130 S. Ct. 1577, 1586, available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=08-769#opinion1 ("When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U.S., at 763, 102 S. Ct. 3348. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. *Id.*, at 756-757, 762, 102 S.Ct. 3348. But our decision did not rest on this "balance of competing interests" alone. *Id.*, at 764, 102 S.Ct. 3348. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.*, at 759, 761, 102 S.Ct. 3348. As we noted, "'[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " *Id.*, at 761-762, 102 S.Ct. 3348 (quoting *Giboney*, *supra*, at 498, 69 S.Ct. 684). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. See *Osborne v. Ohio*, 495 U.S. 103, 110, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (describing *Ferber* as finding "persuasive" the argument that the advertising and sale of child pornography was "an integral part" of its unlawful production (internal quotation marks omitted)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-250, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (noting that distribution and sale "were intrinsically related to the sexual abuse of children," giving the speech at issue "a proximate link to the crime from which it came" (internal quotation marks omitted))").

[86] *E.g.*, Rashmi Rangnath, *U.S. Chamber of Commerce Uses the DMCA to Silence Critics*, PUBLIC KNOWLEDGE (Oct. 26, 2009), *available at* http://www.publicknowledge.org/node/2721; Rob Beshizza, *DMCA Used To Try And Silence Movie Reviewer*, WIRED (Jan. 14, 2008), http://www.wired.com/gadgetlab/2008/01/dmca-used-to-tr/.

A copyright holder's control over a work is not unqualified. Portions of otherwise copyrighted creative works are non-commoditizable through copyright for a host of policy reasons.[87] A copyright holder cannot monopolize facts or ideas, as this would disadvantage competitors and unduly discourage the creation of new works without sufficient compensatory benefits to society.[88] 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.[89]

Ambiguous conflations of facts, ideas, and putatively protectable expression may float outside the confines of copyright control through the merger and *scenes a faire* doctrines.[90] But there are no guarantees. Some words and images can be controlled through copyright law, but others cannot.[91] How much power a copyright holder wields isn't known until a judge or jury rules. The scope of copyright protection is uncertain. Unauthorized uses are adjudicated individually and similar appropriations could drive differential outcomes. In an infringement suit, a court makes highly content-specific determinations about which elements of a plaintiff work fit in the protected category and which do not, which unauthorized uses are fair and which are not. When something facially different from protected expression such as a paraphrase is still too similar, and can therefore be enjoined.[92] Paraphrasing could constitute an infringement, while literal copying might be fair use. Uncertainty reigns.

Simply sending a "take down" notice under the Digital Millennium Copyright Act (DMCA) is a powerful non-content-neutral tool developed and backed by the federal government a copyright holder can use to pressure an online content provider to remove expressive speech from an online venue.[93] The incentives to comply with a takedown notice are powerful, and

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[87] *See, e.g.*, *Chapter 9. Fair Use*, COPYRIGHT AND FAIR USE, STANFORD UNIVERSITY LIBRARIES, *available at* http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/index.html (last visited Jan. 24, 2011); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990), *available at* http://docs.law.gwu.edu/facweb/claw/LevalFrUStd.htm.

[88] L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT ch. 6 (Craig Joyce ed., 2009); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997); Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45 (2007); Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61 (1998); Eric Faden, *A Fair(y) Use Tale*, STANFORD LAW SCHOOL: THE CENTER FOR INTERNET AND SOCIETY, *available at* http://cyberlaw.stanford.edu/documentary-film-program/film/a-fair-y-use-tale (last visited Jan. 24, 2011).

[89] Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection for Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338 (1992). *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (2001).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 11–13 (1998), *available at* http://www.copyright.gov/legislation/dmca.pdf] pgs. 11-13.

counterincentives are virtually nonexistent.[94] 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 ISP potentially liable for the illegal actions of third parties. The incentives all fall in the direction of take down 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.[95]

The Copyright Act 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 violated the First Amendment. It would simply reduce the government provided incentives for the production and distribution of harmful pornography.

III. HARMFUL PORNOGRAPHY IS "NON-PROGRESSIVE" AND "NON-USEFUL"

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 one 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. But even advertisements for mundane fast food chain hamburgers use sexualized imagery of women's bodies, *e.g.*:[96]

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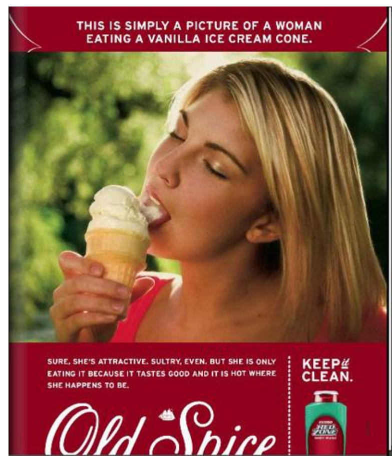
[94] Kurt Opsahl, *YouTube Wins Summary Judgment in Viacom DMCA Lawsuit*, ELECTRONIC FRONTIER FOUNDATION, http://www.eff.org/deeplinks/2010/06/youtube-wins-summary-judgment-viacom-dmca ("The DMCA safe harbors give service providers like YouTube a strong incentive to remove content upon receipt of a takedown 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.").

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

[96] 2009 Sports Illustrated Swimsuit Edition, http://sportsillustrated.cnn.com/2009_swimsuit/ (last visited Mar. 22, 2010).

An advertisement for men's cologne might make unsubtle references to oral sex performed by a woman on a man.[97]



And an advertisement for a mainstream skin moisturizer might make use of visual pornography tropes, see, for example:[98]

[97] CARMINE SARRACINO & KEVIN M. SCOTT, THE PORNING OF AMERICA: THE RISE OF PORN CULTURE, WHAT IT MEANS 120 (2008).
[98] *Id.* at 118.

The cultural effects of pornography are felt by everyone.[99] 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, and/or financial coercion.[100] A poor economic climate has driven

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[99] Ryan Singel, *Internet Porn: Worse Than Crack?*, WIRED (Nov. 19, 2004), ; Ana J. Bridges, *Pornography's Effects on Interpersonal Relationships* (unpublished research paper, Dept. of Psychology, University of Arkansas), *available at* http://www.socialcostsofpornography.org/ Bridges_Pornographys_Effect_on_Interpersonal_Relationships.pdf. *Cf.* David Lee, *What is the influence of pornography on rape?*, PREVENTION (Mar. 19, 2010), http://calcasa.org/prevention/what-is-the-influence-of-pornography-on-rape/ (two research papers reach opposite conclusions about effect of pornography on rate of sexual assaults).

[100] Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010) ("These liberal notions miss their mark in the trafficking context by failing to appreciate the nuances of context--for example, how significant economic, gender, and racial inequalities severely compromise the exercise of choice in many prostitution contexts. As sociologist Laura Agustín notes, many migrant prostitutes do not--contrary to the view of some Western sex-worker advocates-- adopt the view that sex work is art, therapy, or like any other job. While formalizing the industry might enable workers to advocate on their own behalf, many migrants do not self-identify as sex professionals but rather view sex work as a temporary financial measure." (internal citations omitted)); Melissa Farley, *Unequal*, COALITION AGAINST TRAFFICKING IN WOMEN (Aug. 30, 2005), http://action.web.ca/home/catw/readingroom.shtml?x=81265&AA_EX_Sessi on=165358db2079e1d96488cf409fb60da9 ("Prostitution is a choice based on a lack of survival options. Sex discrimination, poverty, and racism are the forces that drive girls into prostitution.") Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 136 (1993) ("[P]rostitution . . . isn't about choice. Instead, prostitution is about the absence of meaningful choices; about having alternative routes to survival cut off or being in a situation where you don't have options to begin with. Nothing demonstrates this more clearly than the fact that most women who enter the 'profession' do so as children, at age sixteen or younger. Or the fact that the majority of women in prostitution in this country - most studies estimate 60-70%—have histories of sexual abuse in childhood . . . . Add to this the reality that the population targeted by pimps and traffickers is teenagers. It becomes clear that the majority of prostitutes are socialized into 'sex work' in childhood and adolescence when consent is meaningless and choice an illusion.") Dave Masko, *Prostitution Up in Eugene Area Due to Recession's Woes, Says a University Study*,

more people into prostitution and pornography because alternative avenues of employment have declined, and most of them are women.[101]

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.[102] Despite a few high profile exceptions, most johns are ignored or even protected by social norms that favor the punishing and shaming of prostitutes.[103]

As explained above, 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 18 or over, and protected under the auspices of dominant First Amendment jurisprudence.[104] Pornographers are much less likely than pimps to be arrested for arranging monetized sex acts, and are subject to far less governmental supervision or scrutiny than anyone involved in the production of mainstream movies or television programs. 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. Their real names may be kept on record so that government actors can insure they are legally adults,[105] and their faces and bodies may remain in Internet circulation in perpetuity.

While prostitution is badly policed by the government, in ways that disproportionately harm women, pornography is barely regulated at all. Cans of tuna are adorned with "dolphin safe" labels because tuna consumers care about the well being of dolphins.[106]

EXAMINER.COM, http://www.examiner.com/outdoor-living-in-eugene/prostitution-up-eugene-area-due-to-recession-s-woes-says-a-university-study.

[101] *Police believe four women found dead off of Long Island are victims of a serial killer*, WHEC.COM (Jan. 30, 2011), *available at* http://www.whec.com/news/stories/s1949615.shtml; Kristi Jourdan, *Ex-prostitutes walk tough road to economic freedom amid recession*, LAS VEGAS REVIEW-JOURNAL (Jan. 24, 2010), *available at* http://www.lvrj.com/news/ex-prostitutes-walk-tough-road-to-economic-freedom-amid-recession-82543682.html.

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

[103] *See supra* note 102 and accompanying text.

[104] *See infra* notes 61–62 and accompanying text (discussing the *Freeman* case).

[105] 18 U.S.C. § 2257; *see generally* Ann Bartow, *Why Hollywood Does Not Require "Saving" From the Recordkeeping Requirements Imposed by 18 U.S.C. Section 2257*, 118 YALE L.J. POCKET PART 43 (2008), http://thepocketpart.org/2008/09/16/bartow.html.

[106] DOLPHIN SAFE TUNA CONSUMERS, EARTH ISLAND INSTITUTE, http://www.earthisland.org/dolphinSafeTuna/consumer/ (last visited Feb. 10, 2011).

General release movies often roll notices that that no animals were harmed during the making of the film. In fairly 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's 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. And 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 non-simulated violence.[107]

The U.S. Department of State's June 2007 "Trafficking in Persons" Report[108] noted that trafficked women and children are the primary victims of commercial sexual exploitation. The Report emphasized the commercial sexual exploitation that human trafficking makes possible, decrying the forced prostitution that trafficked women and children are forced into. 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. 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 that are unlikely to open brothels. They will sell only

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[107] Maria de Cesare, *R_{XXX}: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667 (2006); Christina Jordan, *The XXX-Files: Cal/OSHA's Regulatory Response to HIV in the Adult Film Industry*, 12 CARDOZO J.L. & GENDER 421 (2005).

[108] U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 2007, *available at* http://www.state.gov/g/tip/rls/tiprpt/2007/.

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.[109] 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 bestiality.[110] The aggressive, vitriolic, and highly personal backlash against this study by libertarian organizations like the Electronic Frontier Foundation (EFF) is undoubtedly responsible for the paucity of interest in pornography research.[111] Sociologist Diana Russell has additionally argued that researchers avoid or downplay research that negatively characterizes pornography for professional reasons, as being pro-pornography today is a more lucrative career strategy than doing research that exposes the harms of pornography.[112] The claim that there is need for more scholarly analysis of pornography is something that Linda Williams, an academic in the field of film studies, has echoed.[113]

Given the pornography industry's production of relentlessly sexist, degrading, and racist[114] photos, films and web sites, one might expect politically liberal people to be receptive to critiques of pornography, but one would be very wrong.[115] Rather than open-minded intellectual curiosity, criticisms of

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[109] *See, e.g.*, *The Price of Pleasure: Pornography, Sexuality & Relationships* (Media Education Foundation, 2008).

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

[111] *See* Peter H. Lewis, *The Internet Battles a Much-disputed Study on Selling Pornography Online*, N.Y. TIMES, July 17, 1995, *available at* http://query.nytimes.com/gst/fullpage.html?res=990CE7D61730F934A25754C0A963958260&sec=&spon=&pagewanted=all; EFF "Censorship—Martin Rimm/CMU/Time & Related Anti-porn Hysteria" Archive, http://w2.eff.org/Censorship/Rimm_CMU_Time/ (last visited Mar. 19, 2008); Posting of David Farber to Interesting-People, http://www.interesting-people.org/archives/interesting-people/199510/msg00056.html (Oct. 20, 1995, 16:39).

[112] Diana E. H. Russell, *The Experts Cop Out*, *in* MAKING VIOLENCE SEXY 151 (Diana E. H. Russell ed., Teachers College Press 1993).

[113] MARIA ST. JOHN ET AL., PORN STUDIES (Linda Williams ed., 2004).

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

[115] *See, e.g.*, Gail Dines, *How Some Men React When They Think You Want to Take Away Their Porn: Penn, Porn and Me*, COUNTERPUNCH (June 23, 2008), *available at* http://www.counterpunch.org/dines06232008.html. *But see The Price of Pleasure—Noam Chomsky on Pornography*, *available at* http://www.youtube.com/watch?v=SNlRoaFTHuE (also available on

pornography are met with accusations of prudery, censorious, and alignment with the political right wing.[116] The liberal perspective seems to be that feminists should not attack pornography because social arch-conservatives attack pornography, and they cannot possibly have the correct view of this (or any) issue.[117] 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.[118] 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.[119] Principled expressions of concern about the harms of pornography from either the left or right are rare indeed.

Prostitution is also tolerated and normalized within mainstream American society, but because it is generally illegal, the intersections between law and the people involved with the industry are different, even though some women who

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DVD); Danny Scoccia, *Can Liberals Support a Ban on Violent Pornography?*, 106 ETHICS 776 (July 1996).

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

[117] *See, e.g.*, Nina Hartley, *Thus I Refute Chyng Sun: Feminists for Porn*, COUNTERPUNCH (Feb. 2, 2005), *available at* http://www.counterpunch.org/hartley02022005.html.

> And it is that very power that makes Professor Sun's generalizations and oversimplifications so dangerous. Though she begins her jeremiad with the obligatory disclaimer about opposing censorship, she and others of her persuasion cannot believe for a moment that their opinions are offered in a political vacuum.
>
> For many years, right -wing ideologues have co-opted the language of feminism in their on-going, nefarious attempts to erase all forms of sexual choice. Prof. Sun plays into the hands of these enemies of women. Does she not know that making common cause with those whose most treasured ambition is the reversal of Roe v. Wade will always be suicidal? How is Prof. Sun different from Phyllis Schlafly? From Anita Bryant? From Beverly LaHaye? From Judith Reisman? From Lou Sheldon or Jerry Falwell? They all want to eliminate my choice in the disposition my body. 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. Make no mistake, Professor. When they've got rid of me, they're coming for you next.

Id.

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

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

perform in pornography also sell sex directly to consumers,[120] and many johns are probably also pornography users, and vice versa. 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[121] and former Dean of the Villanova School of Law Mark Sargent[122]) are publicly shamed, but the impact of this may be temporary. Spitzer resigned as Governor of New York, but is now enjoying a high profile media career.[123] 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.[124]

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[120] Roger, *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.").

[121] *Emperors Club: All About Eliot Spitzer's Alleged Prostitution Ring*, THE HUFFINGTON POST (Mar. 10, 2008), *available at* http://www.huffingtonpost.com/2008/03/10/emperors-club-all-about-e_n_90768.html.

[122] Gina Passarella, *Questions Arise After Law School Dean's Resignation in Wake of Prostitution Investigation*, LAW.COM (July 7, 2009), *available at* http://www.law.com/jsp/article.jsp?id=1202432042292&src=EMC-Email&et=editorial&bu=Law.com&pt=LAWCOM%20Newswire&cn=NW_20090707&kw=Questions%20Arise%20After%20Law%20School%20Dean%27s%20Resignation%20in%20Wake%20of%20Prostitution%20Investigation&slreturn=1&hbxlogin=1; Jeff Blumenthal, *Villanova dean resigned over prostitution*, PHILADELPHIA BUS. J. (July 7, 2009), *available at* http://www.bizjournals.com/philadelphia/blogs/law/2009/07/villanova_dean_resigned_over_prostitution.html?surround=etf.

[123] Brian Montopoli, *Elliot Spitzer Gets Primetime CNN Show*, CBS NEWS.COM (June 23, 2010), *available at* http://www.cbsnews.com/8301-503544_162-20008567-503544.html; Jan Hoffman, *Spitzer's Long Road to Redemption*, N.Y. TIMES (Apr. 7, 2010), *available at* http://www.nytimes.com/2010/04/08/fashion/08Spitzer.html?_r=1&adxnnl=1&ref=style&adxnnlx=1298045180-PTPxe9qf1azDCzdD5bLdQQ.

[124] Kathleen Brady Shea, *Ex-dean helped police, report says*, PHILLY.COM (July 03, 2009), *available at* http://articles.philly.com/2009-07-03/news/25288787_1_sargent-prostitution-ring-customer ("For his part, Clark said that authorities did everything they could to ensure that the testimony would not be necessary. He said that after speaking with his attorney, Thomas H. Ramsay, he concluded that he could not 'afford to roll the dice at age 62' and risk greater punishment, so he accepted a plea bargain. He said police repeatedly referred to him as the "brothel operator," while treating Sargent 'with deference.'

'If you watch the taped interview, the police are almost apologetic with this guy,' Clark said of Sargent. 'They told him, "You just happened to be in the wrong place at the wrong time," and they agreed to contact him at his office, not his home.'

Clark's codefendants - Cara Martin, 32, and Lacy Welsh, 20 - also have been prosecuted in the case.

Welsh pleaded guilty to promoting prostitution and conspiracy, and is awaiting sentencing. Martin, who has a history of arrests on prostitution and other charges in Pennsylvania, New Jersey, and Delaware, pleaded guilty to promoting prostitution and received an 8-to-23-month jail term."); Jeff Blumenthal, *Villanova dean resigned over prostitution*, PHILADELPHIA BUS. J. (July 7, 2009), *available at* http://www.bizjournals.com/philadelphia/blogs/law/2009/07/villanova_dean_resigned_over_prostitution.html.

Women culturally identified as prostitutes are also publicly shamed,[125] 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.[126] Due to the illegality of their livelihood, they cannot expect protection from police officers, and instead are often exploited by them.[127]

But there is little reason to believe that wholesale legalization of prostitution would be to 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.[128] 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[129] still suffer from high rates of violence and substance abuse.[130] 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.[131] Women infected with HIV cannot work legally as prostitutes but

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[125] Katie Escherich, *Ashley Dupré: 'I've Made So Many Mistakes': Eliot Spitzer's Former Escort Opens Up About Childhood, Challenges, Hopes for the Future*, ABC NEWS (Nov. 21, 2008), *available at* http://abcnews.go.com/2020/story?id=6302149&page=1.

[126] Malika Saada Saar, *U.S. should stop criminalizing sex trafficking victims*, CNN (Feb. 7, 2011), *available at* http://www.cnn.com/2011/OPINION/02/05/saar.ending.girl.slavery/index.html; Gene Johnson, *New murder charge filed in Seattle in Green River killings; Ridgway won't face death penalty*, YAHOO! NEWS (Feb. 7, 2011), *at* http://ca.news.yahoo.com/murder-charge-filed-seattle-green-river-killings-ridgway-20110207-113816-166.html ("Ridgway, a commercial truck painter, is one of the nation's most prolific serial killers, having been convicted of 48 murders and having confessed to or been suspected of dozens more. He preyed upon women and girls at the margins of society — runaways, prostitutes and drug addicts strangled in a spree that terrorized Seattle and its south suburbs in the 1980s. Several victims were dumped in or posed along the Green River.").

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

[128] *See infra* Part III.B.4.

[129] *100 Countries and Their Prostitution Policies*, PROCON.ORG, http://prostitution.procon.org/view.resource.php?resourceID=000772 (last updated Aug. 4, 2010).

[130] *E.g.*, Kimberly Schupp, *Another Craigslist killer? Bodies of 4 women ID'ed*, WISTV.COM (Jan. 25, 2011), *available at* http://www.wistv.com/Global/story.asp?S=13903767; M.L. Burnette et al., *Prevalence and Health Correlates of Prostitution Among Patients Entering Treatment for Substance Use Disorders*, 65 ARCHIVES GEN. PSYCHIATRY 337 (Mar. 2008), *available at* http://healthpolicy.stanford.edu/publications/prevalence_and_health_correlates_of_prostitution_among_patients_entering_treatment_for_substance_use_disorders/.

[131] *See* Kevin Bales, *Because She Looks Like a Child*, *in* GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003) (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 JEFFRIES, THE INDUSTRIAL VAGINA 152, 173 (2009) (Chapters 7: "Supplying the Demand: The Traffic in Women, and Chapter 8: The State as Pimp: Legalizing Prostitution); Farley, et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf (Includes Germany and Canada; "Findings contradict common myths about prostitution: . . . that most of those in

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 simply go to other "providers," those without any power or options at all.

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prostitution freely consent to it, that most people are in prostitution because of drug addiction. . . , and that legalizing or decriminalizing prostitution would decrease its harm."); Gary Feinberg, Prostitution in the Netherlands: Transforming the World's Oldest Profession into the World's Newest Industry, 19 CRIME & JUSTICE INT'L (Sept/Oct. 2003), *available at* http://www.cjimagazine.com/archives/cji7c3f.html?id=688; Georgios Papanicolaou, *The sex industry, human trafficking and the global prohibition regime: a cautionary tale from Greece*, 11 TRENDS IN ORGANIZED CRIME 379 (2008).

For an overview of U.S. efforts to combat human trafficking, see ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2009 (July 2010), *available at* http://www.justice.gov/ag/annualreports/tr2009/agreporthumantrafficking2009.pdf ("In FY 2009, DHS pursued an active and aggressive domestic and overseas human trafficking investigations program. ICE investigative personnel address all aspects of human trafficking, including human trafficking for sexual exploitation or labor, forced labor, and related offenses such as child sex tourism. ICE actively participated in DOJ's BJA-funded human trafficking task forces and other TIP working groups globally and domestically to enhance its investigative reach. ICE also focused on the investigation of the importation of goods produced overseas by forced labor, with a focus on forced child labor. ICE also investigated American citizens and legal permanent residents who traveled to other countries to engage in commercial sexual exploitation of minors. Through the authorities granted by the PROTECT Act,31 C3 investigators and ICE field agents aggressively investigated child sex tourism cases and brought the offenders to justice in U.S. federal courts. ICE OIA's global network of 63 Attaché offices in 44 countries conducted international investigations to ensure the arrest of child sexual predators and human traffickers.").

For a general critique of U.S. efforts to address human trafficking, see Jennifer M. Chacon, *Misery And Myopia: Understanding The Failures Of U.S. Efforts To Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3020–21 (2006) ("Because the TVPA was not passed on a blank slate, the limitations of the preexisting laws aimed at coerced labor, including sex work, and migrant exploitation ought to have been systematically evaluated as part of the process of enacting the TVPA. Had such an evaluation taken place, several systemic problems would have been clear. First, migrants caught in exploitative labor situations were further isolated and endangered by their presumptive criminality. Second, the prosecution of those who exploited migrants frequently took priority over protecting the victims of exploitation. Third, more prosecutorial energy and attention was lavished on stamping out prostitution than on eliminating coercive labor practices both in and out of the sex industry. Fourth, 'sex traffickers' were depicted as men who were 'foreign' (or racially 'other') who sought to exploit innocent victims. Finally, immigration control efforts that focused on interdiction rather than on internal enforcement and outreach further isolated the victims of coercive labor arrangements. As the preceding discussion demonstrates, all of these were features of the legal landscape prior to the passage of the TVPA. Dishearteningly, all of them persist."). *But see* Cynthia L. Wolken, *Feminist Legal Theory and Human Trafficking in the United States: Towards a New Framework*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 407, 436 (2006) (lamenting an excessive and exclusive focus of human trafficking resources on "pretty white sex slaves"); Rebecca L. Wharton, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. OF WOMEN & L. 753 (2010) (complaining that though they may constitute only half of all trafficking victims, "victims of sex trafficking get so much more attention than all other victims of human trafficking").

Pornography and prostitution are cruelly symbiotic. One drives demand for the other and there is little practical difference between prostitution and performing in pornography. Either a director/pornographer or a client/john is in control of the sex. 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. Non-pornographic audiovisual works are generally created and fixed subject to the cost and logistical constraints imposed by industry norms, regulations and legislation that establish minimum levels of health and safety considerations accorded performers and stunt people.[132] Simply leaving them subject to the base line negligence avoidance incentives and injury compensation frameworks provided by tort law was deemed inadequate.[133] Pornography performers should receive the same level of concern and protection, as they are no less worthy and no less human.

B. Toward a Copyright Based Focus on 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 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.[134]

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.[135] Then in *Mitchell Brothers Film Group v. Cinema Adult*

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[132] *See, e.g.*, Karen Idelson, *High stakes in flying game: Tech Tussle: Aerial stunt pros stand up for safety*, VARIETY (Mar. 9, 2011), *available at* http://www.variety.com/article/VR1118033594; Nikki Finke, *Feds Fine 'Spider-Man-Broadway' Production Company For Cast Injuries*, DEADLINE HOLLYWOOD (Mar. 4, 2011), *available at* http://www.deadline.com/2011/03/feds-fine-spider-man-broadway-production-company-for-cast-injuries/; Ann Oldenburg, *Still willing to take the fall*, USA TODAY (June 6, 2003), *available at* http://www.usatoday.com/life/movies/news/2003-06-05-stunt_x.htm.

[133] *See, e.g.*, Contract Services Administration Trust Fund, *Safety Bulletins: Recommended by Industry-Wide Labor-Management Safety Committee for the Motion Picture and Television Industry*, http://www.csatf.org/bulletintro.shtml; Michael McCann, *Stunt Injuries and Fatalities Increasing*, *at* http://www.uic.edu/sph/glakes/harts1/HARTS_library/stunts.txt (providing this and other articles on stunt safety). *But see* Joan Whitley, *OSHA not reviewing death of stagehand*, LAS VEGAS REV.-J. (Jan. 27, 2011), *available at* http://www.lvrj.com/news/osha-not-reviewing-death-of-stagehand-114707049.html.

[134] *See* Bartow, *supra* note 4, at 133–35.

[135] U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, ORGANIZED CRIME INVOLVEMENT IN PORNOGRAPHY pt.4, ch. 4 (1986), *available at* http://www.porn-report.com/404-organized-crime-and-pornography.htm; *Mitchell brothers*, .DOCSTOC, *at* http://www.docstoc.com/docs/6324551/Mitchell_Brothers (last visited Mar. 30, 2011).

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.[136] 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.

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.'"[137] The court linked this to a right to reach an audience or readership that is economically facilitated by copyright protections.

The *Mitchell Brothers* court expressed enthusiastic support for increasing incentives for the production and distribution of pornography with little apparent 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 interfaces,[138] 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 "the leading treatise on copyright."[139] Although *Mitchell Brothers* was the only case on point at that time, the *Jartech* court observed that "Nimmer . . . considers Mitchell Brothers to represent the prevailing view on this issue,"[140] and rotely[141] followed the prescriptions of the copyright treatise.[142]

In 2004 in *Nova Products, Inc. v. Kisma Video, Inc*.[143] 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

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[136] 604 F.2d 852, 854 (5th Cir. 1979) (noting that the now-superseded Copyright Act of 1909 was the applicable statute).

[137] *Id.* at 858 n.8 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[138] *See, e.g.*, Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc. (9th Cir. 1992); Capcom U.S.A., Inc. v. Data East Corp., No. C 93-3259 WHO, 1994 WL 1751482 (N.D. Cal. Mar. 16, 1994); Midway Mfg. Co. v. Artic Int'l, Inc., 547 F. Supp. 999 (N.D. Ill. 1982).

[139] 666 F.2d 403 (9th Cir. 1982).

[140] *Id.* at 406.

[141] ASK LANGUAGE LOG: ROTELY, LANGUAGE LOG (Oct. 18, 2007), http://itre.cis.upenn.edu/~myl/languagelog/archives/005035.html

[142] *See generally* Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581 (2004) (offering a critique of courts' over-reliance on the Nimmer treatise), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=654661.

[143] No. 02 Civ. 3850(HB), 2004 WL 2754685 (S.D.N.Y. Dec. 1, 2004).

> writings of an author," did not bespeak of an obscenity exception to copyright protection.[144]

Courts are not in complete accord on this issue. 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.[145] 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 powers to come to the aid of plaintiffs and should them," and he refused to commit the resources of the United States Marshal's Service "to support the operation of plaintiff's pornography business."[146] This holding reflected the reasoning upon which assumptions that obscene works were not eligible for copyright protections that were in place from the time the first U.S. copyright law took effect in 1790 up 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.[147] 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, and 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.[148]

Non-progressive, non-usefulworks should not receive copyright protection and the Copyright Act could be modified to make this explicit. I propose defining a "non-progressive, non-useful" writing as: a pornographic work in which the level of originality or creativity is low, but the likelihood that harms

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[144] *Id.* at *3.

[145] *See* Devils Films, Inc. v. Nectar Video, 29 F. Supp. 2d 174 (S.D.N.Y. 1998).

[146] *Id.* at 175.

[147] 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), *available at* http://ssrn.com/abstract=304180 or doi:10.2139/ssrn.304180; Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421 (2009-2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499565; Lawrence B. Solum, *Congress's Power to Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1 (2002); Dan T. Coenen & Paul J. Heald, *Means/Ends Analysis in Copyright Law:* Eldred v. Ashcroft *in One Act*, 36 LOY. L.A. L. REV. 99 (2002); Edward C. Walterscheid, *Originalism and the IP Clause: A Commentary on Professor Oliar's "New Reading,"* 58 UCLA L. REV. *DISCOURSE* 113 (2010), *available at* http://uclalawreview.org/?p=1428.

[148] Thanks to Jessica Litman for this observation and framing of the issue.

were inflicted on living beings during the production of the work, and/or risk of harms resulting from distribution and consumption of the work, is high. I provide specific categories of works that may be presumptively non-progressive and non-useful below. 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" limitation upon Congressional copyright powers, it signaled a high level of deference to Congress in the copyright context.[149] If this sort of change to the Copyright Act was analyzed as an exercise of power under the Copyright Clause, it could withstand constitutional challenges.[150]

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 harm is inflicted when the rate of distribution increases. If stripping certain pornographic works of copyright protections causes 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.

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 the legal academy. 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

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[149] *Eldred*, 537 U.S. at 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. *Sony*, 464 U. S., at 429. The CTEA reflects judgments of a kind Congress typically makes, judgments the Court cannot dismiss as outside the Legislature's domain.").

[150] *Cf.* Golan v. Holder, 609 F. 3d 1076 (2010), *cert. granted* Mar. 7 2011, *available at* http://scholar.google.com/scholar_case?case=1636353906906143958&hl=en&as_sdt=2&as_vis=1 &oi=scholarr ("In sum, Congress acted within its authority under the Copyright Clause in enacting Section 514. *See id.* at 1187. Further, Section 514 does not violate plaintiffs' freedom of speech under the First Amendment because it advances an important governmental interest, and it is not substantially broader than necessary to advance that interest.").

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 non-simulated acts that are coerced or comprise 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 nothing important is ever 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 a whole lot 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.[151]

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. 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.[152]

Some observers argue that there is a moral panic about the sexualization of children that manifests itself through hyper-aggressive prosecution of anyone associated with producing, distributing, or consuming child pornography.[153]

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[151] *See* SARRACINO & SCOTT, *supra* note 97, at 20–29.

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

[153] Bob Chatelle, *Kiddie Porn Panic*, THE POLITICAL ISSUES COMMITTEE (The Political Issues Committee of the National Writers Union (UAW Local 1981)), *available at* http://w2.eff.org/Censorship/Academic_edu/CAF/civil-liberty/kiddie-porn; Jan Schuijer & Benjamin Rossen, *The Trade in Child Pornography*, 4 INST. PSYCHOLOGICAL THERAPIES J. NO. 2 (1992), http://www.ipt-forensics.com/journal/volume4/j4_2_1.htm; Jesse P. Basbaum, *Inequitable*

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" and "profoundly unacceptable, and also disgusting and criminal" is deeply problematic.[154] 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 U.S. is twelve years old.[155] In sharp contrast to children depicted in pornography, children who work as prostitutes are often treated as criminals,[156] while the johns that patronize them are prosecuted much less frequently.[157] Sometimes the johns are perceived by law enforcement actors as being victims of the seductive wiles of the child prostitutes. That commoditized sex between children and adults is less damaging if it is not recorded by a camera defies credulity. There may not be a lasting public record of the event, but this 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

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Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts, 61 HASTINGS L.J. 1281 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457197; Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, STANFORD L. & POLICY REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689507; FBI, Innocence Lost National Initiative, http://www2.fbi.gov/innolost/innolost.htm; Declan McCullagh, *FBI Posts Fake Hyperlinks to Snare Child Porn Suspects*, http://news.cnet.com/8301-13578_3-9899151-38.html (discussing *U.S. v. Vosburgh*, 602 F.3d 512 (3d Cir., 2010)).

[154] MacKinnon, *supra* note 66, at 998 ("To distinguish between children and adults—on the assumption or with the effect of suggesting that child pornography is a serious problem while pornography of adult women is not or is less so—lacks foundation in the real world as well. 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. To purport to address child sexual exploitation while doing nothing effective for adult women is to suppose that an age line is enforceable on, or respected by, an industry that is organized to exploit the powerless, and to accept the false notion that women become equal at age 18."). *See generally* Gail Dines, *Childified Women: How the Mainstream Porn Industry Sells Child Pornography to Men*, *in* SHARNA OLFMAN, THE SEXUALIZATION OF CHILDREN (2008).

[155] Washington State Office of the Attorney General, *Human Trafficking*, http://www.atg.wa.gov/HumanTrafficking/SexTrafficking.aspx (last visited Mar. 30, 2011); U.S. Department of Justice, Child Exploitation and Obscenity Section (CEOS), *Child Prostitution*, http://www.justice.gov/criminal/ceos/prostitution.html (last visited Mar. 30, 2011).

[156] 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 CONSTITUTIONAL L. Q. 433 (2010), *available at* http://digitalcommons.pace.edu/lawfaculty/596/.

[157] Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739861.

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.[158] But at least as a matter of rhetorical consistency, 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.[159] 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.[160] Yet if the

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[158] *See, e.g.*, Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUMBIA L. REV. 209 (2001).

[159] Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUSTICE STATISTICS BULL. (U.S. Dep't of Justice), December 2007, *at* 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)). *See also* Caroline Heldman, No Jail Time for Lawrence Taylor, Ms. Magazine blog (Jan. 24, 2011), http://msmagazine.com/blog/blog/2011/01/24/no-jail-time-for-lawrence-taylor/ ("The city of New York is considered a hub for sex trafficking, but since trafficking was added to the penal code in 2008 only 25 arrests have been made (through September 2010) and only five traffickers have been sentenced."); ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2007 (May 2008), *available at* http://www.justice.gov/archive/ag/annualreports/tr2007/agreporthumantrafficing2007.pdf ("The Criminal Section of DOJ's Civil Rights Division, in collaboration with U.S. Attorney's Offices nationwide, has principal responsibility for prosecuting human trafficking crimes, except for cases involving sex trafficking of minors. Within DOJ's Criminal Division, the Child Exploitation and Obscenity Section (CEOS) takes the leading role in the prosecution of cases of sex trafficking of minors and child sex tourism. In FY 2007, there were 15 child sex tourism indictments and 23 convictions in cases investigated by ICE.").

[160] *See id.*

> Hall of Fame football linebacker Lawrence Taylor will not spend a day in jail for paying to have sex with a 16-year-old runaway on May 6, 2010. The girl was escorted by her trafficker to Taylor's hotel room in suburban Ramapo, New York, where Taylor paid $300 to have sex with her.
>
> In March of last year, the girl's family had informed the authorities that she was missing. About 293,000 children in the United States are at risk of becoming victims of sex trafficking, and many are runaways who are picked up by traffickers. The victim in this situation was recruited by 36-year-old parolee Rasheed Davis, who allegedly promised her a place to stay and a way to make money. Then he forced her into prostitution. On the night of the Taylor incident, she refused to go to Taylor's hotel, so Davis allegedly kicked her, punched her and drove her there against her will. Her poor physical condition–a black eye and other facial injuries–apparently did not concern Taylor or deter him from having sex with her.
>
> Taylor was originally charged with third-degree rape, a felony offense that carries up to four years in prison, but he pled guilty to two misdemeanors charges, soliciting a prostitute and sexual misconduct (having sex with a person too young to consent). He

event is photographed, recorded on video or filmed, the child is far less likely to be arrested, and has an improved likelihood of being viewed and treated as a victim. Conterminously, people caught viewing or possessing child pornography are often harshly punished well beyond what might have befallen them had they had sexual contact with the children themselves. The wrongs perpetrated against child prostitutes are in many respects the same as those inflicted upon children in pornography. All that is missing is fixation in a tangible medium of expression, and the copyright protected commoditization this facilitates. That having sex with children is treated as less illegal and viewed as more socially acceptable than viewing images of other people having sex with children is baffling and unjustifiable.

2. Crush Pornography

A federal statute formerly in effect provided that "Whoever 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."[161] 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, as the faces of the women inflicting torture on animals in "crush porn" may not be shown, and neither the location of filming nor the date of the activity may be 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 anti-cruelty laws be invoked, and then only for the torture itself, not for the production and sale of same.

The Third Circuit held that this statute was an unconstitutional infringement on the First Amendment right to free speech.[162] The court noted that 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

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> was given six years probation and will have to register as a sex offender. Ignorance of age is not a defense against statutory rape in New York, but apparently it mattered in this case. Taylor told the court that the victim said she was 19, and this, along with his cooperation with authorities, earned him just a slap on the wrist."

Id.

[161] 18 U.S.C.S. § 48.

[162] United States v. Stevens, No. 08-769, Case No. 05-2497 (July 18, 2008), http://www.supremecourt.gov/opinions/09pdf/08-769.pdf

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 in *United States v. Stevens* was affirmed by the Supreme Court.[163] 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," depictions of animal cruelty should not be added to that list.

That the First Amendment precludes censoring speech that is cruelly harmful or deadly to nonhuman animals doesn't 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,[164] surely withholding government provided copyright benefits from audiovisual recordings of activities such as killing animals for sexual gratification is appropriate.

3. *"Revenge Porn"*

"Revenge Porn" is pornography in which at least one of the subjects was unaware that the 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. One object of its creation and distribution is to encourage and facilitate the humiliation and harassment of the victim subject. If you enter the words "revenge porn" into an Internet search engine, both the popularity and the profitability of the genre become immediately apparent.

Victims of revenge pornography rarely have effective options in terms of legal recourse. Consider the Barnes case. A unanimous three-judge panel in the Ninth Circuit held in *Barnes v. Yahoo!, Inc.* that a claim for promissory estoppel by an Internet harassment victim was not necessarily precluded by Section 230 of the Communications Decency Act of 1996 (CDA). The plaintiff's lawsuit alleged that her former boyfriend created a Yahoo! account through which the plaintiff herself appeared to be soliciting men for rough, anonymous sex, contained nude photos of Barnes and divulged the addresses, IRL and electronic, and telephone number of place of employment. The ex-boyfriend posed as Barnes in Yahoo! chat rooms and actively encouraged the belief that Barnes desired sexual contact. In response, men began "peppering her office with

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[163] *Id.*

[164] *Apologetic Vick gets 23-month sentence on dogfighting charges* (Dec. 11, 2007), http://sports.espn.go.com/nfl/news/story?id=3148549

emails, phone calls, and personal visits, all in the expectation of sex." This not only jeopardized her job, but also put Plaintiff at risk for sexual assault by men who could claim the forced acts were consensual based on the Yahoo! facilitated communications in which a faux Barnes was "asking for it."

In 2005, a trial court issued a decision dismissing all of plaintiff's claims, holding that Yahoo! was immune from liability under Section 230 of the CDA even though plaintiff alleged that Yahoo! "undertook to remove from its website material harmful to the plaintiff but failed to do so." Yahoo! is alleged to have tried to head off a negative news report about the situation by promising to take down the profiles that were causing men to show up at the Plaintiff's place of employment and demanding to have sex with her. Yahoo! apparently got the good PR bump for making this representation but did not actually do anything it promised.[165] From the Ninth Circuit opinion at page 5316:

> In accordance with Yahoo policy, Barnes mailed Yahoo a copy of her photo ID and a signed statement denying her involvement with the profiles and requesting their removal. One month later, Yahoo had not responded but the undesired advances from unknown men continued; Barnes again asked Yahoo by mail to remove the profiles. Nothing happened. The following month, Barnes sent Yahoo two more mailings. During the same period, a local news program was preparing to broadcast a report on the incident. A day before the initial air date of the broadcast, Yahoo broke its silence; its Director of Communications, a Ms. Osako, called Barnes and asked her to fax directly the previous statements she had mailed. Ms. Osako told Barnes that she would "personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it." Barnes claims to have relied on this statement and took no further action regarding the profiles and the trouble they had caused. Approximately two months passed without word from Yahoo, at which point Barnes filed this lawsuit against Yahoo in Oregon state court. Shortly thereafter, the profiles disappeared from Yahoo's website, apparently never to return.

If Yahoo! made a promise to someone that it would remove content, it might seem that that promise should be as enforceable as any other contractual promise (or under a theory of promissory estoppel)—completely independent of the fact that the promise related to third-party speech for which Yahoo! was immunized under the CDA. The Ninth Circuit's ruling left open that possibility. One reaction by free speech advocates was that the case would likely cause companies to issue directives to their employees not to promise to remove

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[165] *See* Plaintiff's Complaint at paragraph 7, http://www.citmedialaw.org/sites/citmedialaw.org/files/2005-06-23-Yahoo%27s%20Notice%20of%20Removal.pdf.

material or even to inquire into whether the material should be removed. But every company that is already familiar with Section 230 almost certainly does this already. Yahoo! felt free not only *not* to take action, but to lie and say that it would take action for PR purposes, and *then* not take action. The trial court said this was covered by Section 230 immunity. The plaintiff thought help was coming and so probably didn't take protective actions she otherwise might have. She was worse off than she would have been if Yahoo! had just told her to go and pound sand when she first asked for help, and the Ninth Circuit decided that Yahoo! should have to answer for this in court. This doesn't mean Yahoo! will be held liable necessarily, just that Barnes gets a chance to prove that what Yahoo! did was wrong as a matter of law.

Yahoo!'s position is that it can do anything it wants, including lie with impunity as well as immunity, courtesy of Section 230. The big guns of the public interest world have lined up behind Yahoo!, because, of course, if Yahoo! isn't free to do anything or nothing when women are viciously and serially harassed through its portals, both the Internet and First Amendment are doomed. Or at least that is the instrumental claim. What Yahoo! is truly concerned about is avoiding the labor costs it would incur if it had to respond to requests for help from victimized women like Barnes. Yahoo! fears the expense because it knows there are so many of them. Lawyers favoring strong ISP immunity have asserted that if Yahoo! isn't allowed to facilitate and profit from this type of acute sexual harassment in a completely unfettered and unaccountable manner, it will be the death of both the Internet and the First Amendment, with the implicit assumption that the Barnes bitch totally deserved it.[166]

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[166] Posting of Sam Bayard, Ninth Circuit Amends *Barnes v. Yahoo!* Decision, Addresses Concerns Raised by Yahoo! and Amici to Citizens Medial Law Project, http://www.citmedialaw.org/blog/2009/ninth-circuit-amends-barnes-v-yahoo-decision-addresses-concerns-raised-yahoo-and-amici (June 24, 2009); Cecilia L. Barnes v. Yahoo! Inc., No. 05-36189, Motion for Leave to file as Amici Curiae (May 21, 2009), http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-05-21-Brief%20of%20Amici%20Curiae%20in%20Support%20of%20Yahoo%20Petition%20for%20Rehearing.pdf; Posting of Paul Alan Levy, Can a Section 230 Immunity Defense Be Raised on a Motion to Dismiss? to Consumer Law and Policy Blog, http://pubcit.typepad.com/clpblog/2009/05/can-a-section-230-immunity-defense-be-raised-on-a-motion-to-dismiss.html (May 8, 2009); Posting of Eric Goldman, Ninth Circuit Mucks Up 47 USC 230 Jurisprudence . . . AGAIN!?—Barnes v. Yahoo to Eric Goldman, http://blog.ericgoldman.org/archives/2009/05/ninth_circuit_m.htm (May 13, 2009); Posting by Thomas O'Toole, Nice Win for Online Publishers in Ninth Circuit Today to E-Commerce and Tech Law Blog, http://pblog.bna.com/techlaw/2009/05/nice-win-for-online-publishers-in-ninth-circuit-today.html (May 7, 2009); Posting of DMCA/CDA to Mass Law Blog, http://www.masslawblog.com/2009/05/file-under-hell-hath-no-fury-and-if-youre-protected-by-cda-230-dont-waive-your-protection/ (May 8, 2009, 11:26 pm) (blames Barnes for making a bad choice in men); Wendy Davis, *Yahoo Could Be Liable For lewd and libelous Profile*, ONLINE MEDIA DAILY, May 11, 2009, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=105741; Posting of Jeff Neuburger, CDA Section 230: The Law That Judges Love to Hate Takes a Hit to New Media and Technology Law Blog, http://newmedialaw.proskauer.com/2009/05/articles/online-content/cda-section

People who simply like witnessing the infliction of pain and humiliation of women benefit from the broad application of Section 230. The online harassment of Barnes and other women is also independently profitable if it draws clicks and eyeballs from interested observers, which translates into advertising revenues ISPs want to continue to enjoy. The harassing posts about Barnes triggered key word based pornography ads, and the men interested in violent sex with Barnes were also interested in degrading pornography.

The large ISPs have so much money, influence, and support from well-resourced libertarians, the possibility that Section 230 will be amended to require ISPs to do anything helpful for women like Barnes, including simply not lie to them about providing assistance, is slim. The only hope Barnes, and other women in similar situations have is the courts. That's why the *Barnes* case has drawn so much heat and light. I expect Barnes will lose if the case proceeds, because women's lives are never as important as money, such as the profits an ISP like Yahoo! reaps when it can feature even illegal content like child pornography without fear of legal reprisals or responsibility.[167] But at least copyright law could be reconfigured so that it did 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 take down 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 disambiguating copyright protections and revenge at least has expressive value.[168] And victims could perhaps take a tiny bit of solace from the inability of their tormentors to fully commoditize revenge pornography with government assistance.

-230-the-law-that-judges-love-to-hate-takes-a-hit/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+NewMediaAndTechnologyLaw+%28New+Media+and+Technology+Law%29 (May 7, 2009) (calls Section 230 the law that judges love to hate); Howard J. Bashman, How Appealing Blog, http://howappealing.law.com/050709.html#033875.

[167] *E.g.*, Doe v. Mark Bates and Yahoo!, Inc., No. 5:05-CV-91-DF-CMC, Order, http://www.citmedialaw.org/sites/citmedialaw.org/files/DoeVBates12_27_06.pdf (Dec. 27, 2006).

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

4. *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.[169] 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. Consider the case of Nadya Suleman, as contextualized by a feminist commentator:

> [Nadya Suleman] is the woman who gave birth to eight babies at once and had a lot of plastic surgery to try and resemble Angelina Jolie. Many people were outraged at her reproductive choice. She is in bad financial shape and some skeevy porn industry dude keeps trying to get her into porn. What is the demand behind this pornography? Why does this experienced porn producer think the porn will sell?
>
> The answer is pretty damn obvious: people hate her, and feel that porn humiliation is a punishment that they would pay to see. It has nothing to do with being attracted to her or wanting nice pictures of sex-between calling her crazy and irresponsible there is a steady flow of insults calling her ugly on most news or blogs about Suleman. She is poor and a man is offering her lots of money to do pornography, offering more each time she turns him down instead of respecting her saying no. Now he is trying to buy her mortgage and shoot porn in her house, as a new way to try and coerce her into doing pornography. Instead of being more proof that pornography isn't about the prostitutes having fun, it is a casual conversation in the national media. It is about her having to make a choice between having a place to live and having sex she really doesn't want to have (if she did, I doubt that money would be needed at all, much less higher and higher monetary offers). Let's say a substantial number of people find her attractive and would like to have sexy fun with Suleman, despite the widespread ridicule of her appearance-the desperation for money would kind of get in the way of thinking that she is having any fun at all. She would be paid to fake it . . . .[170]

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[169] *See, e.g.*, Gail Dines & Robert Jensen, *The anti-feminist politics behind the pornography that "empowers" women*, http://uts.cc.utexas.edu/~rjensen/freelance/abbywinters.htm.

[170] Posting of Skeptifem, *what porn is about* (Jan. 3, 2011, 2:57 AM), http://skeptifem.blogspot.com/2011/01/what-porn-is-about.html; See also posting of Melissa McEwan, *The Porn King with a Heart of Gold* (Dec. 31, 2010),

Physical abuse is common in pornography, and so is endangerment; performers' bodies are injured, and they are exposed to dangerous diseases.[171] Pornographers have mostly successfully avoided health and safety regulation,[172] and routinely put performers in situations that require them to eat the vomit, urine, ejaculate and feces of strangers; to endure penetration of their body orifices by large objects that tear and damage tissue and organs, and to engage in unprotected sex that results in rampant disease transmission.[173] The rate of sexually disease infection among pornography performers is very high.[174] 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 our sex and reproductive lives has been a very important and

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http://shakespearessister.blogspot.com/2010/12/porn-king-with-heart-of-gold.html; *Porn Company 'Vivid' Offers to Help "Octomom" with Mortgage*, KTLA.COM (Dec. 31, 2010), http://www.ktla.com/news/landing/ktla-octomom-eviction,0,4426841.story; Shaya Tayefe Mohajer, *'Octomom' eviction on hold as landlord meets with porn producer*, WASH. POST (Dec. 31, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004737.html; *Octomom's Calif. Home May Be Sold to Porn King*, CBSNEWS.COM (Dec. 30, 2010), http://www.cbsnews.com/stories/2010/12/30/entertainment/main7198788.shtmlhttp://news.yahoo.com/s/ap/us_octomom_eviction.

[171] Stop Porn Culture, http://stoppornculture.org/watch/. *But see* Shira Tarrant, *Porn: Pleasure or Profit? Ms. Interviews Gail Dines, Part II* MS. BLOG (July 7, 2010), http://msmagazine.com/blog/blog/2010/07/07/porn-pleasure-or-profit-ms-interviews-gail-dines-part-ii/.

[172] *Clinic blasts calls for added oversight of porn industry*, L.A. TIMES (Oct. 13, 2010), http://latimesblogs.latimes.com/lanow/2010/10/following-the-announcement-this-week-that-an-adult-film-performer-tested-positive-for-hiv-a-san-fernando-valley-clinic-relea.html.

[173] Gabriel Mephibosheth, *California Wants Improved Occupational Health in Porn Industry*, CULTURE NEWS (June 11, 2009), http://culturecampaign.blogspot.com/2009/06/calif-wants-improved-occupational.html; Tristan Taormino, *Danger on the Set: A porn star's early retirement has industry insiders talking STDs*, THE VILLAGE VOICE (Sept. 4, 2007), http://www.villagevoice.com/2007-09-04/columns/danger-on-the-set/.

[174] Ian Lovett, *Condom Rule Sought for Sex-Film Sets*, N.Y. TIMES (Feb. 10, 2011), http://www.nytimes.com/2011/02/10/health/policy/10porn.html ("Sexually transmitted infections, however, remain rampant among pornographic film performers. Sexually transmitted disease is diagnosed in a quarter of all performers each year, according to the Los Angeles County Department of Public Health. Rates of chlamydia and gonorrhea infection are seven times higher than those in the general population."); Kimi Yoshino & Rong-Gong Lin II, *At least 16 previously unpublicized HIV cases in porn film performers, public health official say* , L.A. TIMES BLOG, http://latimesblogs.latimes.com/lanow/2009/06/at-least-16-previously-unpublicized-hiv-cases-in-porn-film-performers-public-health-officials-say.html; Patrick Range McDonald, *Rubbers Revolutionary: AIDS Healthcare Foundation's Michael Weinstein: Activist wants to save porn actors from STDs. It's been lonely*, L.A. WEEKLY (Jan. 28, 2010), http://www.laweekly.com/2010-01-28/news/rubbers-revolutionary-aids-healthcare-foundation-s-michael-weinstein/; *HIV-Positive Porn Actor Calls for Condom Use in Adult Films*, CNSNEWS.COM (Dec. 8, 2010), http://cnsnews.com/news/article/hiv-positive-porn-actor-calls-condom-use; Joyce Lee, *Positive HIV Test Halts Production at 5 Porn Companies, More Shutdowns Expected*, CBS NEWS.COM (Oct. 14, 2010), http://www.cbsnews.com/8301-31749_162-20019547-10391698.html; Molly Hennessy-Fiske & Rong-Gong Lin II, *Porn film performer tests positive for HIV: At least two production companies shut down and more people are being tested*, L.A. TIMES (Oct. 13, 2010), *available at* http://articles.latimes.com/2010/oct/13/local/la-me-porn-hiv-20101013

extremely laudable goal of activist liberals and civil libertarians for decades.[175] But withholding copyright protections from harmful pornography is an appropriate intervention that simply reduces governmental involvement in incentivizing the production and distribution of these works.

IV. THE PRACTICAL ASPECTS OF WITHHOLDING COPYRIGHT PROTECTIONS FOR NON-PROGRESSIVE, NON-USEFUL PORNOGRAPHIC WORKS

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.[176] Under Section 408(c)(1) of the Copyright Act, "The 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. . ." While it is true that the statute specifies that "This 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. 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.[177] 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.

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.[178]

Harmfulness would also be available to defendants as a defense to allegations of copyright infringement. If a party accused of copyright

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[175] When then U.S. Surgeon General Jocelyn Elders recommended promoting masturbation to children as a safe and risk free sexual outlet, she was fired. Even "liberals" like Bill Clinton refuse to engage in healthy public conversations about sex. Douglas Jehl, *Surgeon General Forced to Resign by White House*, N.Y. TIMES, Dec. 10, 1994, *available at* http://query.nytimes.com/gst/fullpage.html?res=9902E3DD123AF933A25751C1A962958260&&scp=2&sq=joycelyn%20elders%20clinton&st=cse ("The White House today surrendered to Republican pressure by forcing the resignation of Surgeon General Joycelyn Elders, whose outspoken views about drugs and sexuality had made her the target of a conservative campaign to oust her from office. . . . . The dismissal of Dr. Elders came as some news organizations were preparing to report that at a United Nations conference on AIDS earlier this month, she had condoned the idea of teaching schoolchildren to masturbate as a way of avoiding the spread of the AIDS virus.").

[176] Chapter 4: Copyright Notice, Deposit, and Registration § 408 ("Copyright Registration in General"), *available at* http://www.copyright.gov/title17/92chap4.html#408.

[177] This may require some finessing with respect the Unites States' obligations vis a vis the WTO. Kenneth Crews suggested one possible solution would be to allow all porn to be copyrighted, but to deny remedies to harmful pornography.

[178] This is somewhat amusingly ironic.

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, since they would have nothing to fear from copyright 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. Surely it is 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 but excludes others. For example, computer programs are protectable as literary works, but cooking recipes are not protectable at all; photographs are copyrightable, but hairstyles are not.[179] The exclusive rights a copyright secures differ across categories of works.[180] Even within the statutorily prescribed categories, some works get different protections than others.[181]

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. 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.

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 even a 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 legal academics to describe the emerging field of

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

[180] *See generally* Copyright Act, 17 U.S.C. § 106 ch. 1.

[181] *See, e.g.*, *id.* §§ 104A & 106A.

Cyberspace Law as The Law of Porn,[182] 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[183] Once bandwidth increased enough so that movies could be widely sold or gifted online by so called pirates, pornographic works were among those distributed.[184]According to one observer, "The 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."[185] How significant an impact making copyright protections unavailable for some portion of pornographic works is hard to predict. At present, pornographers take robust advantage of copyright law as it is currently constituted.[186] In 2009 one group of about fifty pornography companies brought infringement suits against 75,000 people alleged to have made infringing downloads of copyrighted pornographic works.[187] Another pornographer recently filed suit against over seven thousand.[188] Using the implicit threat of exposing defendants' pornography proclivities through copyright litigation may be one effective way pornographers are reaping quick and lucrative settlements.[189] 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 Abhorent Racial Epithets" or something similar. Removing the threat of copyright based

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[182] I first heard this from Robert Hamilton in around 1997, 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. http://www.jonesday.com/rwhamilton/.

[183] *See, e.g.*, Playboy Enterprises v. Netscape Communications, 354 F. 3d 1020 (9th Cir. 2004).

[184] *See, e.g.*, Jon Swartz, *Free port on 'tube sites' puts a big dent in industry*, USA TODAY, Mar. 3, 2010, http://www.usatoday.com/tech/news/2010-03-02-porn02_ST_N.htm?csp=Tech.

[185] Carly Perez, *Professor Points Out Inequality, Racism in Porn*, FOGHORN ONLINE, Nov. 13, 2008, http://foghorn.usfca.edu/2008/11/professor-points-out-inequality-racism-in-porn/ (citing Robert Jensen, The Perfect Storm of Inequality: Sexism, Racism, and Economic Exploitation in Contemporary Pornography", Interfaith Summer Institute for Justice, Peace, and Social Movements, Simon Fraser University, Vancouver, BC, Aug. 11-12, 2008).

[186] Swartz, *supra* note 184; Greg Sandoval, *Porn maker sues 7,098 alleged film pirates*, CNET.COM, Nov. 2, 2010, *available at* http://news.cnet.com/8301-31001_3-20021438-261.html; enigmax, *Porn Studios Set To Target 65,000 Movie Uploaders*, TORRENTFREAK, Dec. 9, 2009, *available at* http://torrentfreak.com/porn-studios-set-to-target-65000-movie-uploaders-090912/.

[187] enigmax, *supra* note 186.

[188] Sandoval, *supra* note 186; Greg Sandoval, *Porn studios' copyright lawyer: 'I will sue' (Q&A)*, CNET.COM, Oct. 5, 2010, *available at* http://news.cnet.com/8301-31001_3-20018566-261.html.

[189] In the U.K. there are privacy laws that might apply but the same is not true in the U.S. *See, e.g.*, David Cairns, *ACS: Law faces lawsuit after 'porn pirates' leak: List of named individuals suspected of infringing copyright published online*, THE FIRSTPOST, Sept. 28, 2010, *available at* http://www.thefirstpost.co.uk/69316,news-comment,technology,acs-law-faces-lawsuit-after-porn-pirates-leak-sky-internet-porn
-details-leaked#ixzz1Bz8Ru72b.

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 ones 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 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.[190] 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. COMPARISONS WITH 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; it probably originated in Lowell v. Lewis, an 1817 patent case in which the concepts of moral utility and non-useful inventions were raised.[191] This became far less common by the 1970s in part because courts became wary of denying patents based on non-statutory moral concerns raised by unelected government functionaries.[192] 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 as 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 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. This is a

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[190] *See, e.g.*, Schwartz, *supra* note 34.

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

[192] *Id.*

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.[193] 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.[194] 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 "consists of or comprises immoral, deceptive or scandalous matter." The body of law that has developed from judicial interpretations of this statutory limitation over time is admittedly incoherent.[195] 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 illustrative examples, the following marks were found to be too immoral and scandalous to warrant federal registration on the principal registry:

"Cocaine" as the trademark for a soft drink;[196]

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[193] *See, e.g.*, Astrid Burhöi, *Moral exclusions in European biotechnology patent law* (Ekonomi HÖGskolan, Lunds Universites), *available at* http://biblioteket.ehl.lu.se/olle/papers/0002294.pdf (last visited Feb. 16, 2011); OLIVER MILLS, BIOTECHNOLOGICAL INVENTIONS: MORAL RESTRAINTS AND PATENT LAW (2005).

[194] Margo A. Bagley, *Patent First, Ask Questions Later, Morality And Biotechnology In Patent Law*, 45 WM. & MARY L. REV. 469 (2003), http://scholarship.law.wm.edu/wmlr/vol45/iss2/3/.

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

[196] *See* In re James T. Kirby, Serial No. 77006212 (Not Precedential). Mr. Kirby's company is Redux Beverages, which started marketing the soft drink in 2006.

"Pussy" for an energy drink;[197]

"Bullshit" for a wide variety of beverages;[198] the terms BONG HITS 4 JESUS[199] and DE PUTA MADRE ("whore mother") for clothing,[200]

"Dick Heads" for a restaurant,[201]

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[197] http://www.feministlawprofessors.com/2009/06/too-scandalous-to-be-a-registered-trademark-pussy-natural-energy/

[198] In re Red Bull GmbH, Serial No. 75788830, *available at* http://www.uspto.gov/web/offices/com/sol/foia/ttab/2aissues/2006/75788830.pdf.

[199] Bong Hits 4 Jesus, No. 77305946 (Oct. 22, 2008), *available at* http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=77305946.

[200] In re Mexico 69 SRL, No. 78361172 (Aug. 7, 2006), *available at* http://www.uspto.gov/web/offices/com/sol/foia/ttab/2aissues/2006/78361172.pdf.

[201] *In re Wilcher Corp.*, 40 USPQ2d at 1931.

and "You cum like a girl" for clothing.[202]

Marks that survived Section 2(a) challenges include Big Pecker's for a restaurant,

Redskins for a football team,

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[202] http://www.feministlawprofessors.com/2006/09/i-dont-own-a-tee-shirt-or-any-other-garments-that-say-you-cum-like-a-girl/

Bad Frog for beer,

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.[203]

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[203] In re Mavety Media Group Ltd., No. 93-1464 (Aug. 23, 1994), *available at* http://ftp.resource.org/courts.gov/c/F3/33/33.F3d.1367.93-1464.html.

Despite the stunning lack of discernible consistency in the rulings under Section 2(a) on what constitutes a mark that is scandalous and immoral,[204] this

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[204] See T.M.E.P. § 1203.01, Immoral or Scandalous Matter, at http://www.bitlaw.com/source/tmep/1203_01.html, noting:

1203.01 Immoral or Scandalous Matter

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.

Although the words "immoral" and "scandalous" may have somewhat different connotations, case law has included immoral matter in the same category as scandalous matter. See In re McGinley, 660 F.2d 481, 484 n.6, 211 USPQ 668, 672 n.6 (C.C.P.A. 1981), aff'g 206 USPQ 753 (TTAB 1979) ("Because of our holding, infra, that appellant's mark is 'scandalous,' it is unnecessary to consider whether appellant's mark is 'immoral.' We note the dearth of reported trademark decisions in which the term 'immoral' has been directly applied.")

The prohibition against the registration of marks that consist of or comprise immoral or scandalous matter was originally enacted as §5(a) of the Trademark Act of 1905, and was reenacted as part of §2(a) of the Act of 1946. There is little legislative history concerning the intent of Congress with regard to the provision; therefore, the term "scandalous" is interpreted by looking to "its ordinary and common meaning." In re Riverbank Canning Co., 95 F.2d 327, 328, 37 USPQ 268, 269 (C.C.P.A. 1938). This may be established by referring to court decisions, decisions of the Trademark Trial and Appeal Board and dictionary definitions. In re McGinley, 660 F.2d at 485, 211 USPQ at 673.

In affirming a refusal to register a mark as scandalous under §2(a), the Court of Customs and Patent Appeals noted dictionary entries that defined "scandalous" as, inter alia, shocking to the sense of propriety, offensive to the conscience or moral feelings or calling out for condemnation. In re McGinley, 660 F.2d at 486, 211 USPQ at 673 (mark comprising a photograph of a nude, reclining man and woman, kissing and embracing, for a "newsletter devoted to social and interpersonal relationship topics" and for "social club services," held scandalous). The statutory language "scandalous" has also been considered to encompass matter that is "vulgar," defined as "lacking in taste, indelicate, morally crude." In re Runsdorf, 171 USPQ 443, 444 (TTAB 1971). See also In re Tinseltown, Inc., 212 USPQ 863, 864 (TTAB 1981) (BULLSHIT, which the Board termed "profane," held scandalous for "accessories of a personal nature, ... attachŽ cases, hand bags, purses, belts, and wallets").

The meaning imparted by a mark must be determined in the context of the current attitudes of the day. See In re Mavety Media Group Ltd., 33 F.3d 1367, 31 USPQ2d 1923 (Fed. Cir. 1994) (evidence found insufficient to establish that BLACK TAIL used on adult entertainment magazines comprises scandalous matter; court noted that there were both vulgar and non-vulgar definitions of

"tail," and that the record was devoid of evidence demonstrating which of these definitions a substantial composite of the general public would choose in the context of the relevant marketplace); In re Old Glory Condom Corp., 26 USPQ2d 1216 (TTAB 1993) (OLD GLORY CONDOM CORP and design comprising the representation of a condom decorated with stars and stripes in a manner to suggest the American flag held not to be scandalous); In re Thomas Laboratories, Inc., 189 USPQ 50, 52 (TTAB 1975) ("[I]t is imperative that fullest consideration be given to the moral values and conduct which contemporary society has deemed to be appropriate and acceptable.")

The determination of whether a mark is scandalous must be made in the context of the relevant marketplace for the goods or services identified in the application, and must be ascertained from the standpoint of not necessarily a majority, but a "substantial composite of the general public." In re McGinley, 660 F.2d at 485, 211 USPQ at 673 ("[T]he Lanham Act does not require, under the rubric of 'scandalous,' any inquiry into the specific goods or services not shown in the application itself."); In re Wilcher Corp., 40 USPQ2d 1929 (TTAB 1996) (mark for restaurant and bar services consisting of words DICK HEADS positioned directly underneath caricature of a human head composed primarily of graphic and readily recognizable representation of male genitalia held scandalous, as it would be considered offensive by a substantial portion of the public); Greyhound Corp. v. Both Worlds Inc., 6 USPQ2d 1635, 1639 (TTAB 1988) (graphic design of a dog defecating, as applied to polo shirts and T-shirts, held scandalous, given the broad potential audience that may view applicant's mark in sales establishments and "virtually all public places"); In re Hepperle, 175 USPQ 512 (TTAB 1972) (while the words might be a reference to marijuana, ACAPULCO GOLD found not scandalous when used as a mark for suntan lotion); .

Therefore, to support a refusal on the ground that a proposed mark is immoral or scandalous, the examining attorney must provide evidence that a substantial portion of the general public would consider the mark to be scandalous in the context of contemporary attitudes and the relevant marketplace. In re Mavety Media, 33 F.3d at 1371-1372, 31 USPQ2d at 1925. This evidence could include dictionary definitions, newspaper articles and magazine articles.

Dictionary definitions alone may be sufficient to establish that a proposed mark comprises scandalous matter, where multiple dictionaries, including at least one standard dictionary, all indicate that a word is vulgar, and the applicant's use of the word is limited to the vulgar meaning of the word. In re Boulevard Entertainment, Inc.,334 F.3d 1336, 67 USPQ2d 1475 (Fed. Cir. 2003) (1-800-JACK-OFF and JACK OFF held scandalous, where all dictionary definitions of "jack-off" were considered vulgar).

It has been noted that the threshold is lower for what can be described as "scandalous" than for "obscene." Refusal to register immoral or scandalous matter has been found not to abridge First Amendment rights, because no conduct is proscribed and no tangible form of expression is suppressed. Also, the term "scandalous" has been held sufficiently precise to satisfy due process requirements under the Fifth Amendment. In re McGinley, 660 F.2d at 484-85, 211 USPQ at 672.

The prohibition in §2(a) of the Act against the registration of scandalous matter pertains only to marks that are scandalous. The authority of the Act does not extend to goods that may be scandalous. See In re Madsen, 180 USPQ 334, 335 (TTAB 1973) (WEEK-END SEX for magazines held not scandalous, the Board observing that whether the magazine contents may be pornographic was not an issue before the Board).

The examining attorney may look to the specimen(s) or other aspects of the record to determine how the mark will be seen in the marketplace. See In re McGinley, 660 F.2d at 482 n.3, 211 USPQ at 670 n.3 (containing excerpts from appellant's newsletters pertaining to their subject matter); In re Hershey, 6 USPQ2d 1470, 1472 (TTAB 1988) (BIG PECKER BRAND for T-shirts found not scandalous, the Board considering the labels that were submitted as specimens in determining the question of how the mark might be perceived. "[T]he inclusion of the bird design would make it less likely that purchasers would attribute any vulgar connotation to the word mark and we note that it is proper to look to the specimens of record to determine connotation or meaning of a mark.")

provision has never been held to violate the First Amendment.[205] Marks that cannot be federally registered can still be 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.

VI. CONCLUSION

The First Amendment may secure citizens with the right to produce and distribute at least some harmful works of pornography. Certainly that is the current state of free speech jurisprudence. But there is no legal requirement that the government encourage the creation of harmful pornographic works. With the current practice of indiscriminately according pornographic works copyright protection, the government 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 is a legitimate policy choice that Congress can and should make immediately.

To ensure consistency in examination with respect to immoral or scandalous matter, when an examining attorney believes, for whatever reason, that a mark may be considered to comprise such matter, the examining attorney must consult with his or her supervisor.

[205] 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 Two of the Lanham Act. *See* Sonya Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601 (2010). *See also* Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law after* Lawrence v. Texas, 2 MARQ. INTELL. PROP. LAW REV. (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870321.