University of Baltimore Law Forum

Volume 39
Number 1 *Fall 2008*

Article 8

2008

Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography

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ARTICLE

COPYRIGHT LAW AND PORNOGRAPHY: RECONSIDERING INCENTIVES TO CREATE AND DISTRIBUTE PORNOGRAPHY

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As it moved into the mainstream in the 1970s and early 1980s, pornography obtained copyright protections through judicial fiat, rather than as a result of legislative action. This essay explains how pornography came to be eligible for copyright protections, discusses the social and legal effects of this change, and raises questions about the propriety of according pornography the full benefits of copyright law without taking into account the harms that pornography production can inflict on subordinated or coerced "performers."

I. PORNOGRAPHY AS ENTERTAINMENT PRODUCT

Libertarian organizations with a financial interest in doing so like to pretend that pornography is under relentless attack by the government,[1] but this is clearly not the case. For going on two decades, the consistent response of the U.S. government has been to ignore pornography production, as long as the performers were eighteen years old or over. In *California v. Freeman*,[2] the Supreme Court effectively curtailed states' ability to regulate the production of pornography. By the 1990s, mainstream non-child pornography prosecutions on obscenity grounds by the federal government effectively stopped, and they remain rare.[3]

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[1] *See, e.g.*, Mark Cromer, *Porn's Compassionate Conservatism,* THE NATION, Feb. 26, 2001, at 25; Peter Eisler, *Military's Porn Ban Questioned,* USA TODAY, Nov. 5, 2007, http://www.usatoday.com/news/washington/2007-11-04-Militaryporn_N.htm; Electronic Frontier Foundation, EFF *"Censorship – Martin Rimm/CMU/Time & Related Anti-Porn Hysteria" Archive*, http://w2.eff.org/ Censorship/Rimm_CMU_Time/; Letter from Laura W. Murphy, Director ACLU and Marvin J. Johnson, Legislative Counsel, to Reps. Smith and Scott on H.R. 4632, the "Child Obscenity and Pornography Prevention Act of 2002" (May 8, 2002) (on file with author), *available at* http://www.aclu.org/privacy/speech/14793leg20020508.html.

[2] 488 U.S. 1311 (1989).

[3] *See generally* Andy Sullivan, *FBI Reluctance Stalls Bush Anti-Pornography Push,* REUTERS, Sept. 19, 2007, http://www.reuters.com/article/domesticNews/idUSN1845908320070919?feedType=RSS&feedName=domesticNews. *But see* Andrew Koppelman, *Does Obscenity Cause Moral Harm?,* 105 COLUM. L. REV. 1635 (2005) (arguing that

Law professor Tim Wu recently observed that "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."[4] A recent New York Times article entitled *Federal Effort on Web Obscenity Shows Few Results*[5] reported on a Justice Department grant to a conservative religious group called "Morality in Media" that pays people to review "sexual websites 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." Another observer recently noted that contemporary pornographers are far more likely to go to jail for spamming than for the content of the pornographic works they distribute.[6] 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.[7]

Anti-pornography rhetoric is instrumentally deployed to promote an illusion of entrepreneurial morality. But there has never been a focused attempt to remove pornography from the internet, or even to regulate it in any meaningful way. The Communications Decency Act of 1996 contained ridiculously overbroad content restricting provisions that anyone of reasonable intelligence would have expected the courts to find unconstitutional, and indeed they did.[8] At the end of the sound

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obscenity law is unworkable and unable to effectively address any moral harm related to obscene content); Elizabeth M. Glazer, *When Obscenity Discriminates,* NW. U. L. REV. (forthcoming); Press Release, U.S. Department of Justice, Federal Grand Jury in Salt Lake City Charges Cleveland Men with Obscenity Violations, June 28, 2007, http://www.usdoj.gov/opa/pr/2007/June/ 07_crm_471.html; Grant Cross, *WebWeb-Based Business Charged with Distributing Obscenity,* PCWORLD, June 15, 2007, *available at* http://pcworld.about.com/od/ internetlegalissues/WebWeb-based-business-charged-wit.htm.

[4] Tim Wu, *American Lawbreaking: How Laws Die,* SLATE, Oct. 15, 2007, *available at* http://www.slate.com/id/2175730/entry/2175743 (last visited Sept. 23, 2008).

[5] Neil A. Lewis, *Federal Effort on WebWeb Obscenity Shows Few Results,* N.Y. TIMES, Aug. 10, 2007, at A13.

[6] Thomas Claburn, *Two Men Get Five Years for Sending Pornographic Spam,* INFORMATION WEEK, Oct. 15, 2007, *available at* http://www.informationweek.com/ news/showArticle.jhtml?articleID=202402908.

[7] Jason Krause, *The End of the Net Porn Wars,* A.B.A. J., Feb. 2008, at 55.

[8] *See* Reno v. ACLU, 521 U.S. 844 (1997). *See generally Communications Decency Act,* ELECTRONIC PRIVACY INFORMATION CENTER, Feb. 2, 2002, http://epic.org/free_speech/cda/ (last visited Sept. 23, 2008); *EFF,* ACLU, et al. v. Dept. of Justice (ACLU v. Reno), Electronic Frontier Foundation, http://w2.eff.org/legal/cases/EFF_ACLU_v_DoJ/ (last visited Sept. 23, 2008); *Supreme Court Rules CDA Unconstitutional,* CNN, June 26, 1997, http://www.cnn.com/US/9706/26/cda.overturned.hfr/index.html (last visited Sept. 26, 2008). *See* Mukasey v. ACLU, et al., No. 08-565, 2009 WL 129119 (Jan. 21, 2009); *see also The end*

and fury surrounding this Trojan statute, the internet was a far safer place for pornography than it had ever been before, thanks to surviving Section 230, which gives broad immunity against prosecution to internet service providers,[9] encouraging the unrestricted online distribution of content regardless of whether it was defamatory or obscene, or otherwise harmful or injurious.

Because it is socially acceptable and relatively risk free, large mainstream corporations have entered the market, and earn enormous revenue from the production and distribution of pornography. The New York Times reported in 2000 that "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."[10] News Corp, the holding company for Fox News among other media properties, derives an enormous revenue stream from the pornography broadcast by its subsidiary, Direct TV.[11] Search engines such as Yahoo! and Google derive ad revenues through their copious advertising of pornography. Pornography producers broadcast hardcore movies on TV screens across America through hotel chains like Marriott and Hilton and satellite and cable operators Comcast, DirecTV, and AOL Time Warner.[12] A Frontline documentary about pornography that aired on BS 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

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of the COPA saga, BALKINIZATION, Jan. 21, 2009, http://balkin.blogspot.com/2009/01/end-of-copa-saga.html (last visited Jan. 25, 2009).

[9] "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2000). Effectively, this section immunizes ISPs and other service providers from torts committed by users over their systems, unless the provider fails to take action after actual notice or is itself involved in the process of creation or development of the content.

[10] Timothy Egan, *Erotica, Inc. — A Special Report; Technology Sent Wall Street Into Market For Pornography*, N.Y. TIMES, Oct. 23, 2000, at A1.

[11] *See Murdoch gets heat for mogul's porn channels*, WORLD NET DAILY, May 10, 2007, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=55616 (last visited Jan. 25, 2009); *Critics chide Warren, 'pastor' of Murdoch, over porn channels*, CHRISTIAN CENTURY, May 29, 2007, http://findarticles.com/p/articles/ mi_m1058/is_/ai_n19328530 (last visited Jan. 25, 2009); *Rupert Murdoch's growing porn empire*, THE NEW AMERICAN, March 20, 2006, http://www.highbeam.com/doc/1G1-143720355.html.

[12] Paul Keegan, *Prime-Time Porn Borrowing Tactics From the Old Hollywood Studios*, BUSINESS MAGAZINE 2.0, June 1, 2003, http://money.cnn.com/magazines/business2/business2_archive/2003/06/01/343376/index.htm.

> 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 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.[13]

Like pornography generally, entities that focus primarily or even exclusively on producing pornography have sought, and in many cases found, widespread social acceptance. Playboy Inc., for example, markets its brand as one of wholesome, patriotic entertainment in contexts like the television show The Girls Next Door.[14] An associated online store, The Bunny Shop, offers clothing, jewelry, and work out videos. The Playboy Corporation adorns household goods and children's toys with its bunny logo,[15] and unobservant (or possibly dishonest) commentators tout the mildness and relative innocence of the naked photos in the company's magazine.[16] On a superficial level, Playboy appears to function much as any other entertainment conglomerate, such as Disney.

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. 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 is obfuscated.[17] Playboy also owns hardcore pornography cable channels such as The Hot Network, Vivid TV, and The Hot Zone.[18] The movies on these channels are advertised with descriptions like, "a comical adventure with 10 of the nastiest sex scenes ever filmed!"[19] It is through the production and distribution of

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[13] *Frontline: American Porn* (PBS television broadcast, Feb. 7, 2002).

[14] *The Girls Next Door* (E! television broadcast).

[15] *See* Posting of Ann Bartow to Marketing the Playboy Brand to Children, http://feministlawprofs.law.sc.edu/?p=493 (Apr. 29, 2006, 14:21 EST) (last visited Sept. 23, 2008); *see also* Posting of Ann Bartow to Excerpt from an Email from a Friend Who is Teaching in a Foreign Country, http://feministlawprofs.law.sc.edu/ ?p=1597 (Mar. 14, 2007, 8:16 EST) (last visited Sept. 23, 2008).

[16] Forbes.com, How Big is Porn?, http://www.forbes.com/2001/05/25/0524 porn.html (last visited Sept. 23, 2008) (providing that Playboy calls itself a "men's magazine" and lost money last year); *see also* Posting of Ren Reynolds to Legs Wide Shut, http://terranova.blogs.com/terra_nova/2007/07/legs-wide-shut.html (July 24, 2007) (last visited Sept. 23, 2008).

[17] Bernard Weinraub, *Reviving an Aging Playboy Is a Father-Daughter Project,* N.Y. TIMES, Feb. 4, 2002, at C7.

[18] Keegan, *supra* note 11; *see also* Playboy Enters. Inc., Annual Report (Form 8-K/A), at P-1 (Apr. 15, 2002).

[19] Keegan, *supra* note 11.

hardcore pornography that Playboy generates the majority of its revenue.[20]

The patina of respectability and integration of pornography and mainstream corporate revenue streams ensures pornography a visible, stable, and lasting presence on the Internet and in society.[21] Pornographic works are monetarily valuable works that are in most contexts treated like other entertainment products.

II. PORNOGRAPHY AND COPYRIGHT LAW

For much of this nation's history, the government has been unwilling to give its imprimatur to creative or innovative works that were deemed contrary to public morality.[22] For example, the patentability of sex toys was once contestable, as the Patent and Trademark Office refused to issue patents for products or processes deemed immoral. Eventually, however, courts adopted the view that it did not make sense to have unelected patent examiners make decisions about the morality of inventions that could always be regulated or banned by acts of legislatures if they posed dangers to society.[23]

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[20] *See generally* Annual Report, *supra* note 17.

[21] *See generally* GAIL DINES ET AL., PORNOGRAPHY, THE PRODUCTION AND CONSUMPTION OF INEQUALITY 37-38 (Routledge 1998).

[22] This is still the case to some extent under trademark law; *see* 15 U.S.C. § 1052(a) (2006) (No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it consists of or comprises immoral, deceptive, or scandalous matter.).

[23] *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 155-58 (rev. 4th ed. 2007) (stating that until Congress declares certain inventions unpatentable, there is no basis to find inventions unpatentable for lack of utility because they have the capacity to fool members of the public); Thomas A. Magnani, *The Patentability of Human-Animal Chimeras*, 14 BERKELEY TECH. L.J. 443, 452-53 (1999) ("Since 1977, at least one court appears to have rejected the moral utility doctrine outright. In *Whistler Corp. v. Autotronics, Inc.*, a district court upheld a patent on a radar detector, rejecting claims that the device lacked moral utility because its sole purpose was to circumvent attempts to enforce the speed limit. In so doing, the court noted: 'the matter is one for the legislatures of the states, or for the Congress, to decide. Stated another way, only two states have seen fit to prohibit such devices. Unless and until detectors are banned outright, or Congress acts to withdraw patent protection for them, radar detector patentees are entitled to the protection of the patent laws.' Given the attitude of the district courts towards the moral utility requirement, one might assume that the requirement is now defunct. There are at least two reasons to believe it may be making a comeback, however. First, in a recent decision, *Tol-o-Matic, Inc. v. Proma Produkt-Und Marketing Gesellschaft,* the Federal Circuit declared that a patent on a rodless piston-cylinder was not invalid for lack of utility. In discussing the standard of utility under which the invention should be judged, the court noted that 35 U.S.C. § 101 'has been interpreted to exclude inventions deemed immoral.' The court continued by quoting the *Lowell* opinion extensively. The willingness of the Federal Circuit to embrace such a controversial doctrine in a seemingly unnecessary situation (certainly the cylinder could not be thought of as immoral in any way) suggests that the court may be attempting to lay the groundwork for invoking the doctrine in the future. Second, the moral utility requirement

The legality of sex toys can be uncertain in some jurisdictions, however, and the U.S. Supreme Court has effectively declared laws restricting or banning them outright to be constitutional.[24] In contrast, pornography has been construed as speech, and is therefore less readily controllable by government actors than dildos or vibrators are, as a matter of First Amendment principles. This leads to an odd situation in restrictive jurisdictions in which movies explicitly depicting vibrators being used in sex acts are legal but the vibrators themselves are not.

Until 1979, copyright protection was effectively unavailable for pornography, though it was unambiguously available for other photographic and audiovisual works.[25] In 1979, in *Mitchell Brothers Film Group v. Cinema Adult Theater*,[26] the Fifth Circuit held that obscenity was not a defense to copyright infringement because nothing in the Copyright Act[27] precluded the copyrighting of obscene materials. The court 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 opinion waxes rhapsodically about the importance of "freedom to explore into the gray areas, to the cutting edge, and even beyond" without governmentally imposed restraints. It mentions nothing about the

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should not be dismissed out of hand because it has been widely utilized in other countries, particularly in Europe"); Thomas W. McEnerney, Recent Development, *Fraudulent Material is Entitled to Copyright Protection in Action for Injunctive Relief and Damages*, 44 HOUS. L. REV. 901, 933 (2007) ("Similarly, the U.S. Court of Appeals for the Federal Circuit has largely confined the 'moral utility' doctrine, which at one time prevented the patenting of immoral or fraudulent inventions, to oblivion, *see* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1366-67 (Fed. Cir. 1999), though it may retain some vitality with respect to a small class of inventions the practice of which would violate fundamental public policy"). *See generally* RACHEL P. MAINES, THE TECHNOLOGY OF ORGASM (The Johns Hopkins Univ. Press 1999); Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 469-70 (2003); Thomas F. Cotter, Article, *Misuse*, 74 COLUM. L. REV. 1351, 1354 (1974).

[24] Williams v. Morgan, 478 F.3d 1316, 1322-24 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 77 (U.S. 2007) (N. 06-1501); *see also* Posting of Rachel to Supreme Court Refuses to Hear Sex Toy Case, Sales Effectively Banned in Alabama, http://womenshealthnews.wordpress.com/2007/10/03/supreme-court-refuses-to-hear-sex-toy-case/ (Oct. 3, 2007, 9:10 EST) (last visited Sept. 24, 2008).

[25] *See generally* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

[26] 604 F.2d 852, 863 (5th Cir. 1979) (holding that "obscenity is not an appropriate defense in an infringement action"), *cert. denied*, 445 U.S. 917 (U.S. Mar. 3, 1980) (No. 79-1088).

[27] Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C §§ 101-122 (2005)).

destructive impact that this "exploration" could potentially have upon actual human beings.

The *Mitchell Brothers* court also asserted that the First Amendment and copyrights are "mutually supportive," writing that "[t]he 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.' "[28] The court linked this to a right to reach an audience or readership that is economically facilitated by copyright protections.[29]

What is fairly remarkable about the case is the court's enthusiastic support for increasing incentives for the production and distribution of pornography by declaring obscene works eligible for copyright protection, with little apparent concern for any negative consequences. Proper copyright jurisprudence usually requires weighing and balancing competing interests and concerns.[30] In the years after the *Mitchell Brothers* decision, courts agonized over whether copyright protections legitimately extended to works such as computer game interfaces, where any harm from an overly expansive construction of copyright was likely to be strictly economic in nature.[31] Yet the *Mitchell Brothers* court could not seem to recognize that there was any potential cost to society by affording copyright protection to pornographic works without reservation.

Three years later in *Jartech, Inc. v. Clancy*,[32] the Ninth Circuit adopted the *Mitchell Brothers* reasoning unquestioningly, relying on an endorsement by Nimmer on Copyright, which it referred to as "the leading treatise on copyright."[33] 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

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[28] *Mitchell Bros.*, 604 F.2d at 857; *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555 (1985) ("The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing.").

[29] *Mitchell Bros.*, 604 F.2d at 857 n.8.

[30] *Cf.* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 894 (2002).

[31] *E.g.*, Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992); Midway Mfg. Co. v. Artic Int'l, Inc., 547 F. Supp. 999 (N.D. Ill. 1982), Capcom U.S.A., Inc. v. Data E. Corp., 1994 WL 1751482 (N.D. Cal. 1994).

[32] 666 F.2d 403 (9th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982).

[33] *Id.* at 406.

view on this issue"[34] and apparently outsourced its analytical thinking about the topic to a copyright treatise.[35]

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. He concluded "[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 invoke the doctrine of clean hands and leave the parties where it finds them," refusing to commit the resources of the United States Marshal's Service "to support the operation of plaintiff's pornography business."[36]

However, in 2004, another federal judge in the same district reached a contrary conclusion in a similar case, *Nova Products, Inc. v. Kisma Video, Inc.*[37] Judge Baer decided to follow *Mitchell Brothers*, writing:

> In its well-reasoned and scholarly opinion, the Fifth Circuit reviewed the history of the copyright legislation and found that all-inclusive language of the Copyright Act of 1909, 17 U.S.C. § 34 (1970) (repealed), which encompassed "all the writings of an author," did not bespeak of an obscenity exception to copyright protection.[38]

Congress has never addressed this issue in legislative hearings, nor in any amendment to the Copyright Act. Copyright law scholars have not had much to say about pornography specifically either, even though many high profile copyright cases involve pornographic content, including very early cases about Internet content distribution such as *Playboy v. Frena*[39] and *Playboy v. Webbworld*,[40] much more recent cases about search engine liability such as *Perfect 10 v. Google* and *Perfect 10 v. Amazon.com*,[41] and various contemporary allegations of online reproduction rights infringement.[42] Copyright suits by pornographers are likely to increase, as reportedly, "the ease of posting porn online is causing a panic among some adult film producers, who

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[34] *Id.*

[35] *See* Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581 (2004) (Providing a critique of over-reliance on the Nimmer treatise by courts).

[36] Devils Films, Inc. v. Nectar Video Corp., 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998).

[37] 2004 U.S. Dist. LEXIS 24171 (S.D.N.Y. Dec. 1, 2004).

[38] *Id.* at *10.

[39] 839 F. Supp. 1552 (M.D. Fla. 1993).

[40] 991 F. Supp. 543 (N.D. Tex. 1997).

[41] 487 F.3d 701 (9th Cir. 2007).

[42] *E.g.*, Io Group, Inc. v. Veoh Networks, No. C06-03926 HRL, 2007 U.S. Dist. LEXIS 31639 (N.D. Cal. Apr. 13, 2007).

spend big budgets on big stars, only to have those posted and viewed for free, or only to see viewers turn to free, amateur porn instead."[43]

Because the Intellectual Property Clause of the U.S. Constitution[44] authorizes copyright protections only to the extent that it promotes the progress of science and the useful arts, one might expect the copyrightability of pornography to be more controversial than it has been so far, given the incentives that copyrights provide and the government resources that are required to sustain the copyright legal regime. That policy makers and legal scholars choose to ignore these issues gives pornography a privileged position with respect to more interrogated categories of creative, copyrightable and highly commercialized works such as mainstream music and non-pornographic movies.

Though copyright protection was effectively unavailable for pornographic movies until 1979, as explained above, people created and distributed pornographic works anyway, and presumably did so profitably. One consequence of initial judicial determinations that even obscene works were entitled to copyright protection may well have been to spark the production of more of them. Another likely effect was to provide incentives for even broader distribution of pornographic works, because copyright protections offer mechanisms to profit from doing so. Paralleling the music industry in some ways, commercial pornography producers currently police free porn Web 2.0 sites such as YouPorn, XTube, and PornoTube and others for unauthorized uses of pornographic content they produced, and pursue piracy actions against accused infringers.[45] Facilitating the enforcement of copyright-based limitations on distribution of pornography may have created incentives for increasing production of pornography, and that may have increased the harms associated with pornography production. But no court addressing the copyrightability of pornography addressed this possibility.

III. COPYRIGHT LAW, MORALITY AND HARM

The subject of morality is raised in the context of copyright law in several ways. For example, there are many accounts of musicians whose culture and creative works have been unscrupulously

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[43] Sunny Freeman, The Tyee, *Porn 2.0: What Happens When Free Porn Meets Social Networking*, July 10, 2007, http://www.alternet.org/sex/56414/?page=entire (last visited Sept. 23, 2008).

[44] U.S. CONST. art. I, § 8, cl. 8.

[45] *See* Freeman, *supra* note 42.

appropriated, and copyright law has been a handy tool for this sort of chicanery and theft.[46] This is part of a broader literature about how intellectual property laws intersect with, and facilitate the exploitation of cultural heritage, often to the detriment of its human creators.[47]

The morality of making non-permissive uses of copyrighted works is also a subject of pitched debate. The unauthorized downloading of music has been framed as theft and piracy by copyright holders,[48] but is considered legitimate sharing by others.[49] The morality of borrowing pieces of existing works to use in the creation of new ones is also hotly contested, often framed as a debate about the appropriate scope of fair use.[50]

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[46] *See* Olufunmilayo Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277, 281 (No. 2, Winter 2006); Olufunmilayo Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights* (Northwestern Public Law Research Paper No. 07-13, Apr. 2007), *available at* http://ssrn.com/abstract_id=981423; Olufunmilayo Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 569-71 (2006); Olufunmilayo Arewa, *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property* (Case Legal Studies Research Paper No. 04-19, Mar. 2006), *available at* http://ssrn.com/ abstract_id=596921; Olufunmilayo Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks (TRIPS Symposium)*, MARQ. INTELL. PROP. L. REV. 156, 177-78 (2006); Kevin J. Greene, *Stealing the Blues: Does Intellectual Property Appropriation Belong in the Debate over African-American Reparations?* (Thomas Jefferson School of Law Public Law Research Paper No. 05-03, Dec. 2004), *available at* http://ssrn.com/abstract_id=655424.

[47] *E.g.*, Greene, *supra* note 45.

[48] Ethics Newsline, *Is Illegal Downloading Theft, Plain and Simple?*, Feb. 25, 2008, http://globalethics.org/newsline/2008/02/25/is-illegal-downloading-theft-plain -and-simple/ (last visited Sept. 23, 2008); Gary Shapiro, *Lasting Impression – Downloading is Illegal*, Sept. 26, 2002, http://news.zdnet.com/2100-9595_22-959632.html (last visited Sept. 23, 2008); Rick Lockridge, *Downloading Music from the Internet: Theft or Democracy?*, Mar. 3, 1999, http://cgi.cnn.com/TECH/ computing/9903/03/webweb.music.pirates/ (last visited Sept. 23, 2008).

[49] Lori Enos, *Music Downloads Not Theft, Americans Say*, Oct. 2, 2000, http://www.ecommercetimes.com/story/4442.html?welcome=1204652433 (last visited Sept. 23, 2008); Mary Madden & Amanda Lenhart, *Music Downloading, File-Sharing and Copyright*, July 2003, http://www.pewinternet.org/report_disp lay.asp?r=96 (last visted Sept. 26, 2008).

[50] Ann Bartow, *Copyright and Creative Copying*, 1 U. OTTAWA L. & TECH. J. 75, 80 (2004); Thomas F. Cotter, *Fair Use and Copyright Overenforcement* (Minnesota Legal Studies Research Paper No. 06-69, 2006), *available at* http://ssrn.com/abstract_id=951839 (last visited Sept. 23, 2008); Michael J. Madison, *Fair Use and Social Practices* (University of Pittsburgh Legal Studies Research Paper No. 2007-02, 2006), *available at* http://ssrn.com/abstract_id=998478 (last visited Sept. 23, 2008); Joseph P. Lui, *Copyright and Breathing Space* (Boston College Legal Studies Research Paper No. 139, Sept. 6, 2007), *available at* http://ssrn.com/abstract_id=1012596 (last visited Sept. 23, 2008).

Copyright law is additionally concerned with "moral rights," which mainly refer to the rights of attribution and integrity.[51] The attribution right is intended to insure that the author of a work receives appropriate recognition. The right of integrity is supposed to make certain that the author's artistic vision is unaltered. The entire focus of a moral rights regime is on treating the author in a principled way, to recognize and honor the enriching contributions that creative works make to society.

The morality of the acts that content creators engage in during the production of artistic works, however, has never been a consideration of statutory copyright law. In holding that obscenity was copyrightrightable, the *Mitchell Brothers* court wrote: "Because the private suit of the plaintiff in a copyright infringement action furthers the congressional goal of promoting creativity, the courts should not concern themselves with the moral worth of the plaintiff."[52]

The morality of expanding the economic incentives associated with pornography by making pornographic works eligible for copyright protections has never been publicly debated. Yet if copyrightability has increased the production of pornography, and therefore the harms associated with said production, it should be the focus of a debate. Compared to music and non-pornographic audiovisual works, the scant attention pornography has received from copyright law scholars is surprising, given the size of the industry. Yet it mirrors the larger zone of repressive silence surrounding the effects of pornography on society generally.

Few are willing to contemplate the possibility that significant harms can be linked to pornography production. Cans of tuna are adorned with "dolphin safe" labels because tuna consumers care about the well being of dolphins.[53] General release movies often roll notices that no animals were harmed during the making of the film.[54] 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

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[51] Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications,* 95 WM. & MARY J. ONLINE L. 2, art. 2, ¶ 21 (1995-1996), *available at* http://www.wm.edu/law/publications/jol/95_96/lemley.html (last visited Sept. 23, 2008).

[52] Mitchell Bros. Film Group v. Cinema Adult Theater et al., 604 F.2d 852, 862 (5th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980).

[53] Earth Island Institute, *Dolphin Safe Tuna,* http://www.earthisland.org/dolphin SafeTuna/consumer/ (last visited Sept. 23, 2008).

[54] American Humane, *No Animals Were Harmed, available at* http://www.ame ricanhumane.org/site/PageServer?pagename=pa_film (last visited Sept. 23, 2008).

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, "[n]ow with more brutally slaughtered dolphins than ever!"[55] It may be that pornography consumers erroneously (or preferentially) believe that all pornography performances are voluntary and consensual.[56] It seems more likely that they do not care whether they are or not. It is additionally possible that some derive enhanced erotic pleasure from the possibility that the performers are being subject to coercion and force.

In 2001 Martin Amis published a description of the pornography industry he called "A Rough Trade."[57] In the publication, Amis described the violence, degradation, and disease dangers associated with pornography production. He wrote:

> In the yard of the house on Dolorosa Drive, during a break in filming, Chloe, Artie and Lola stood there naked, discussing a new rollercoaster ride called Desperado. They were all smoking. I came across many a good little smoker in pornoland. What with the risks they run already, who cares about smoking? Then it was butts out and back to work. And I do mean work. Porno is a proletarian form. And porno people are a hard-grafting, ill-paid fraternity who, by and large, look out for each other and help each other through. They pay their rent, with the deaths of feelings.

Copyright law is only one piece of the legal regime that regulated pornography, but compared with the First Amendment, its effects have been virtually ignored. Because the Intellectual Property Clause of the U.S. Constitution[58] authorizes copyright law only to the extent that it promotes the progress of science and the useful arts, one might expect the copyrightability of pornography to be more controversial than it has been so far, given the incentives that copyrights provide and the government resources that are required to sustain the copyright legal regime.

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[55] I owe credit for this rhetorical framing to a pseudonymous feminist blogger whose blog archives are no longer available for reading or linking.

[56] *See generally* Shelley Lubben, *The Truth Behind the Fantasy of Porn, available at* http://www.blazinggrace.org/thetruth.htm (last visited Sept. 23, 2008); Shelley Lubben, *Pornstars Speak Out, available at* http://www.shelleylubben.com/articles/pornstars speakout.pdf (last visited Sept. 23, 2008).

[57] Martin Amis, *A Rough Trade (Part 2)* (Mar. 17, 2001), http://www.martinamis webweb.com/commentary%5Ffiles/rough%5Ftrade%5F2.pdf (last visited Sept. 23, 2008).

[58] U.S. CONST. art. 1, § 8, cl. 8.