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CYBERSEX: PROTECTING SEXUAL CONTENT IN THE DIGITAL AGE

NICOLE CHANEY

ABSTRACT

Advertisers employ bare-skinned models and sex appeal to seduce American consumers with every magazine, billboard, and television advertisement. The ubiquity of sexual gratification has reached a tangible quality in American culture, but sex is still somehow taboo in our legal system. Despite the vast market for online adult entertainment, obscenity laws have been used to strike down claims for adult content copyright owners. These content owners are producing creative sexual expression for the public benefit, but they are being denied the same economic incentives granted to their mainstream counterparts. Ironically, Playboy Co. is an outlier in the adult entertainment industry as it has continually enjoyed enforcement of its adult content copyrights. Multiple judges have argued that explicit adult content is obscene, and therefore, is neither protected by copyright or the First Amendment. This comment argues that there is, in actuality, a hetero-patriarchal judicial bias to blame for the lack of protection in adult content copyright. Further, it argues that these content evaluations violate the core copyright policy of encouraging creative work for the public benefit. Finally, it recommends that the Copyright Act should be amended to reflect the virtual omnipotence of the internet and the growing demand for digital sexual content by rewarding adult content providers through enforcement of valid explicit content copyrights.

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NICOLE CHANEY

INTRODUCTION 816

I. BACKGROUND 818

 A. Learning Copy-Right From Wrong 818

 B. The Miller Test As Obscenely Passé 820

 C. Copyright Policy and Explicit Dis-Content 821

 D. Sexual Interest and Industry Players 823

 1. The American Playboy 823

 2. Outside the Bunnies’ Domain 825

 E. C Words – COICA, Copyright, and Censorship 826

II. ANALYSIS 827

 A. Copyright And Freedom of Expression: The Feeling is Mutual 829

 B. Playmates: Not Everyone’s Type 829

 C. Protecting the Innocent or Imposing Uniformity? 830

 D. Play for Non-Boys: Hetero-Patriarchy and Judicial Bias 832

 E. Sex Sells: Meeting the Market Demand for Variety 834

III. PROPOSAL 835

 A. Massive Joinder, Massive Headache 835

 B. Prophylactic Measures 836

 1. Getting Defensive: Putting Infringers On Notice 837

 2. Making Copyright Sexy 838

IV. CONCLUSION 840

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INTRODUCTION

Sex has evolved to signify a variety of different things in American culture.¹ Its manifestations have moved past mere reproduction to generate perpetual controversy in government regulation of sex with regard to public health, safety and morals.²

One such manifestation is the realm of adult entertainment, which has elicited debate among a broad spectrum of social groups.³ Evidence suggests that the social acceptance of adult entertainment media is just another obstacle to inter-gender equality.⁴ Further, evidence suggests that any negative connotations about adult content do not harm its consumer appeal.⁵

As a vast majority of adult content is marketed solely on the internet and internet usage increases exponentially, adult content producers have had an

* © Nicole L. Chaney, J.D. Candidate, May 2013, The John Marshall Law School; B.A. American Culture and B.A. English Language & Literature, May 2008, University of Michigan. Throughout my academic career, I have always been most inspired by my studies in gender, sexuality, and feminist theory. In writing this comment, I hope that this passion compliments my interests in intellectual property law. I would like to thank Garrett, Gibson, and Momma B, whose love has continually kept me motivated. I would like to give a special thanks to my editor, Thomas Bacon, for his patience, guidance, and support throughout the candidacy process. Finally, thank you to my colleagues at The John Marshall Review of Intellectual Property Law for all of their editorial assistance.

¹ See generally Lisa Duggan, *From Instincts to Politics: Writing the History of Sexuality in the U.S.*, in THE JOURNAL OF SEX RESEARCH, 95, 99–102 (1990) (discussing the changing landscape of sex in America).

² *Mugler v. Kansas*, 123 U.S. 623, 660–61 (1887) (defining the limits of the government to intervene in public matters without due process of law); see also U.S. CONST. amend. XIV, § 1 (securing guarantee of due process rights for American citizens).

³ See Duggan, *supra* note 1, at 100 (noting “the current wave of panic over pornography”); Eleanor Heartney, *Pornography*, 50 ART J. 16, 16–19 (1991) (stating that “[t]he pornography issue brings to the fore a basic American uneasiness with sexuality, with nonconformity, the existence of marginal groups and behaviors, with so called “deviant” philosophies.”).

⁴ Duggan, *supra* note 1, at 100–06 (tracing the repression of female sexuality and discussing various “moral panics” or “sex panics” including miscegenation, HIV/AIDS, military lesbianism and lesbianism in general, and changing perceptions about sexual violence against women); see generally GLORIA STEINEM, *I was a Playboy Bunny*, in OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 32–75 (Henry Holt & Co., LLC, Second Own Books ed. 1995).

⁵ *Surprising Internet Usage Statistics*, NEB. INFO. TECH. COMM’N, http://nitc.nebraska.gov/news/0303/EC_Internetusagestatistics.htm (last visited June 5, 2011).

The No. 1 search term used at search engine sites is the word “sex” . . . Users searched for “sex” more than other terms such as “games,” “travel,” “music,” “jokes,” “cars,” “weather,” “health” and “jobs” combined. The study also found that “pornography/porno” was the fourth-most searched for subject. . . . Other studies show statistical evidence that more than half of all internet searches are “adult-oriented,” and that there are between two and eight million internet pornography subscribers paying an approximate net total of \$800 million in 2002.

increased incentive to protect original adult content.⁶ The rise of peer-to-peer file sharing (“P2P”) has made data exchange convenient, fast, and free for many users.⁷ Numerous programs simply require the user to click a file to download it onto his or her computer.⁸ However, an overwhelming influx of illegal downloads has threatened the exclusive rights granted to copyright owners.⁹ The P2P dilemma has been particularly difficult for the adult entertainment industry as incidents of infringement have increased dramatically.¹⁰

Adult content producers have responded by waging legal battles against online “pirates.”¹¹ However, these battles have reached a stalemate due to unenforceable standards against internet infringers.¹² Courts have enforced greater copyright protection to non-sexual media in similar suits.¹³ Even more striking is the divergence in enforcement within the adult content industry, as the infamous Playboy Co. consistently prevails on the majority of its copyright suits and other adult content providers struggle for judicial recognition as copyright owners.¹⁴

⁶ S. REP. NO. 105–190, at 112 (1998) (“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”); *see also* Report or Affidavit of Mark F. Mauceri at ¶ 4, *Flynt v. Flynt Media Corp.*, No. 09-CV-00048, 2009 WL 2057732 (C.D. Cal. May 4, 2009) [hereinafter *Mauceri Affidavit*] (suggesting that internet is the dominant form of dissemination in the field, that the paying audience was stable prior to the internet, and that the audience was willing to pay for the product before the internet).

⁷ *Mauceri Affidavit*, *supra* note 6, at ¶ 4 (discussing market prior to internet); *see* Joseph Menn, *Porn Producer Vivid Sues Video Site: PornoTube and its Parent Firm are Accused of Profiting from Piracy*, L.A. TIMES (Dec. 11, 2007), <http://articles.latimes.com/2007/dec/11/business/ft-vivid11>.

⁸ *See A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1012 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005).

⁹ *A & M Records*, 239 F.3d at 1013; *Metro-Goldwyn-Mayer Studios*, 545 U.S. at 913.

¹⁰ *See A & M Records*, 239 F.3d at 1013; *Metro-Goldwyn*, 545 U.S. at 913; *see also* Anand Bhatt, *Why Digital Rights Management is Doomed to Failure*, ADULT VIDEO NETWORK (May 1, 2003), <http://business.avn.com/articles/video/DRM-Versus-P2P-Point-Counterpoint-38967.html>.

¹¹ Menn, *supra* note 7, stating that:

We’ve decided to take a stand and say ‘no more,’ Vivid co-Chairman Steven Hirsch said He said Internet piracy might be reducing his company’s profit 35 [percent]. Since copyright infringement suits have been unsuccessful, some adult content owners have even taken this battle into their own hands by hiring organizations like Takedown Piracy who have been credited with removing over 2.3 million infringements since April 2009.

Id. *See* Nate Glass, *Take Down Piracy Celebrates 2.3 Million Infringements Removed*, ADULT VIDEO NETWORK (Apr. 8, 2011, 1:27 PM), <http://business.avn.com/articles/technology/Takedown-Piracy-Celebrates-2-3-Million-Infringements-Removed-431906.html>.

¹² *Hard Drive Prod., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011); *On the Cheap, LLC v. Does 1-5011*, No. C10-4472, 2011 WL 4018258, at *1 (N.D. Cal. Sept. 6, 2011).

¹³ *Hard Drive Prod.*, 809 F. Supp. 2d at 1165; *contra* *Call of the Wild Movie, LLC, v. Smith*, 274 F.R.D. at 345–46 (permitting joinder of defendants who had downloaded a film without explicit sexual conduct); *contra* *Voltage Pictures, LLC, v. Does 1-5,000*, 818 F. Supp. 2d 28, 45 (D.D.C. 2011).

¹⁴ *Playboy Enters., Inc. v. Starware Publ’g Corp.*, 900 F. Supp. 433, 438 (S.D. Fla. 1995) (granting summary judgment in favor of Playboy’s copyright infringement claim against a CD-ROM manufacturer who copied images onto discs without authorization); *Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1177–78 (N.D. Tex. 1997) (granting summary judgment and awarding \$5,000 for each infringed copyright image where defendants were jointly and severally liable to plaintiff for direct and contributory infringement); *Playboy Enters., Inc. v. Eddie Davidson*,

Part I of this article will illuminate First Amendment concerns, copyright protections and policies, and the reach of these legal principles into applicable adult media case law. Part II will discuss how courts have used Playboy Co. imagery as a standard to define the boundaries of protectable sexual content copyright, which contradicts the core policies of intellectual property law. Part III will suggest that the online infringement battle will remain unresolved in the adult content industry until legislators eliminate these sexually preferential judicial biases.

I. BACKGROUND

Intellectual property laws grew out of a need to create legislation reflecting modern concerns regarding inventions, artistic endeavors, and other creative works.¹⁵ As such, the field requires constant reevaluation of cultural, commercial, and legal values.¹⁶ Intellectual property rights stem from two separate clauses in the Constitution,¹⁷ and arising claims are subject to federal jurisdiction.¹⁸ This section will provide important context for the argument by describing basic copyright principles and policies, the underpinnings of the obscenity debate, and the evolution of the adult entertainment industry from its origin through the digital age.

A. Learning Copy-Right From Wrong

Authors of copyrightable material are entitled to protections under the Federal Copyright Act of 1976.¹⁹ Prior to the Congressional adoption of the act, copyright was protected by state common law or federal statutory law.²⁰ However, since these laws are subject to federal preemption by the Act, they have offered only a limited basis of

No. 1:97-CV-2787, 1999 WL 246739, at *1 (N.D. Ohio Apr. 12, 1999) (entering default judgment in favor of Playboy in the amount of \$120,000 in statutory damages where defendant displayed copyrighted images in its website for end-users to download without publisher authorization).

¹⁵ See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 6:4 (4th ed. 2011) (discussing commonality among patents, trademarks, and copyrights).

¹⁶ *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (citing public benefit as main purpose of copyright law and reward to copyright owner as secondary purpose); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (discussing economic philosophy in copyright policy by encouraging innovation and creativity through personal gain to advance public welfare in science and the useful arts); *Washingtonian Pub. Co., v. Pearson*, 306 U.S. 30, 36 (1939) (discussing legislative intent in protecting copyright to encourage production of creative works); see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250–51 (1903) (identifying previously unrecognized copyright of pictorial illustrations as copyrightable subject matter).

¹⁷ U.S. CONST. art. I, § 8, cl. 8. (granting Congress power “[t]o 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.”); see U.S. CONST. art. I, § 8, cl. 3.

¹⁸ 28 U.S.C. § 1338 (2006).

¹⁹ 17 U.S.C. §§ 101–810 (2006).

²⁰ 1-1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01 (2011) [hereinafter NIMMER] (explaining how the Copyright Act of 1976 impacted preexisting laws).

protection.²¹ The Copyright Act of 1976, however, grants copyright owners federally protected exclusive ownership rights including the reproduction right.²²

Congressional power to create the Copyright Act stems from a constitutional clause commonly referred to as the Copyright Clause.²³ Accordingly, the underlying foundational purpose of the act is to expand availability of creative works to the public while encouraging creative works through financial incentive.²⁴ As such, this intellectual property right inures to the commercial gain of copyright owners;²⁵ however, its essential function is to promote creativity as a benefit for the general public.²⁶ According to the Supreme Court, rewarding copyright owners is secondary to the copyright policy of promoting innovation for overall public benefit.²⁷

In order for a work to qualify for copyright registration, it must be original and “fixed in any tangible medium of expression.”²⁸ Copyright protection functions as an incentive by protecting authors from wrongful appropriation of valuable work, and rewards them by bestowing a “bundle” of exclusive rights in the copyrighted work.²⁹

In providing such substantial rights for creative works, copyright protection is subject only to a mild content-based analysis.³⁰ Content has been a hotly contested

²¹ *Id.* (discussing preemption of statutory copyright law).

²² 17 U.S.C. § 106.

²³ *See* U.S. CONST. art. I, § 8, cl. 8.

²⁴ *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) (discussing economic philosophy in rewarding copyright creators).

²⁵ *See* 17 U.S.C. § 504.

²⁶ 1-1 NIMMER, *supra* note 20, § 1.03. *See also Paramount Pictures*, 334 U.S. at 158 (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”). Still, traditional copyright legislation “was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.” *Washingtonian Pub. Co., Inc., v. Pearson*, 306 U.S. 30, 36 (1939); *Mazer*, 347 U.S. at 219 (1954) stating that:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Id.

²⁷ *Paramount Pictures*, 334 U.S. at 158 (stating that copyright law, like the patent statutes, makes reward to the owner a secondary consideration).

²⁸ 17 U.S.C. § 102.

²⁹ *See* 1-1 NIMMER, *supra* note 20, § 1.03.

³⁰ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (discussing fair use statutory factor that looks to nature of work).

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value, it would be bold to say that they have not an aesthetic and educational value, and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes

topic in the field of copyright because of potential First Amendment conflicts and the potential chilling effect on speech.³¹ This content-based analysis has often isolated adult film entertainment from the rest of the entertainment world because conservative legal scholars do not believe that copyright protection should extend to sexually explicit adult media.³²

Copyright case law demonstrates that, on the one hand, some courts are willing to extend copyright protection to sexually explicit adult media.³³ On the other hand, while many courts have expressed hesitance in offering copyright protection for obscene material,³⁴ the impact is disproportionately administered onto certain sexually explicit adult media.³⁵

B. The Miller Test As Obscenely Passé

The underlying policies of the First Amendment and Copyright law have collided with regard to questions of obscenity. Obscene material is not protected by the First Amendment resulting in additional obstacles for the adult entertainment industry.³⁶ Obscenity has been the turning point in the adult content copyright analysis as legislators express concerns about protecting the public from unwanted exposure to obscene material.³⁷

for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.

Id.

³¹ *E.g.*, *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 801 (9th Cir. 2003) (recognizing the value in an artistic work even though it may be offensive to some people's sensibilities).

³² *Devils Films, Inc., v. Nectar Video*, 29 F. Supp. 2d 174, 176–77 (S.D.N.Y. 1998) (identifying pornographic films as obscene and refusing to enforce copyright protection on this basis); *Hard Drive Prod., Inc., v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011).

³³ *MCGIP, LLC., v. Does 1-18*, No. C. 11 1495, 2011 WL 2181620, at *2 (N.D. Cal. June 2, 2011). Some sexuality explicit films have valid copyright registration and courts have permitted copyright infringement suits to proceed against unnamed defendants without evaluating the copyrighted works' content. *Id.*; see *Boy Racer v. Does 2-71*, No. 5:11 Civ. 02833, 2011 WL 2784574, at *1 (N.D. Cal. July 13, 2011); *First Time Videos, LLC., v. Does 1-500*, 276 F.R.D. 241, 244 (N.D. Ill. 2011); see also, *Int'l Media Films, Inc. v. Lucas Entm't, Inc.*, 703 F. Supp. 2d 456, 466–67 (S.D.N.Y. 2010) (holding that trademark owner failed to demonstrate a valid copyright in its claim against an adult film company who had created a pornographic adaptation of the work in the public domain).

³⁴ *Devils Films*, 29 F. Supp. 2d at 177.

³⁵ *Id.* at 175 (categorizing more than 200 titles as obscene based on categorical identifications of "Straight Anal," "Lesbian," and "Transsexual"); *contra Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 437 (S.D. Fla. 1995) (analyzing only infringement claims and not mentioning sexual nature of content; referring to copyrighted work as "images" or "photography" and not "pornography"); *Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1171–78 (N.D. Tex. 1997) (analyzing copyright infringement without assessing nature of sexual content; referring to copyrighted work as "images" or "photography" and not "pornography").

³⁶ See *Miller v. Cal.*, 413 U.S. 15, 23–24 (1973) (holding that obscene material not subject to First Amendment protections and expressly permitting the regulation of works depicting sexual conduct); see also *Devils Films*, 29 F. Supp. 2d at 177 (holding that copyrighted work with obscene content did not warrant grant of injunction); *Hard Drive*, 809 F. Supp. 2d 1150, 1165 (refusing to join unnamed infringers of copyrighted adult film); *On the Cheap, LLC v. Does 1-5011*, No. C10-4472, 2011 WL 4018258, at *1 (N.D. Cal. Sept. 6, 2011) (dismissing 5009 unnamed infringers and denying copyright owners to conduct early discovery to determine the identities of the unnamed defendants).

³⁷ *Miller*, 413 U.S. at 18–19.

The Supreme Court addressed this issue at length in the 1973 landmark obscenity case, *Miller v. California*.³⁸ The case involved a violation of a criminal obscenity statute in California where the defendant had distributed unsolicited brochures advertising sexually explicit books and films.³⁹ The court examined prior obscenity law and distinguished it by setting up a three-part test for identifying obscene material.⁴⁰ The test looks to “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest[;] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [w]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁴¹ This historic precedent, now known as the *Miller* test, has failed to provide a consistent standard and many courts are still struggling to apply it. The standard has resulted in subjective and arbitrary findings of obscenity, and an unsettled future for enforcement of adult content copyright.

C. Copyright Policy and Explicit Dis-Content

In 1979, the Fifth Circuit refused to bar plaintiffs from relief in a copyright infringement suit where the defendant had alleged the original work was obscene.⁴² While still good law, the decision was distinguished by the Second Circuit in 1998 when the court denied an injunction for adult film copyright on the basis that the material was obscene.⁴³ The Second Circuit argued that copyright protection should not extend to obscene material because “[o]nce a court has determined that copyrighted material is obscene, there seems no reason to require it to expend its resources on behalf of a plaintiff who it could as readily be trying for a violation of the federal criminal law.”⁴⁴

While circuits have been split on the issue,⁴⁵ most judges have remained hesitant about regulating substantive content. Many believe that barring protection of original works contradicts the copyright policy of fostering creative growth.⁴⁶ An

³⁸ *Id.*

³⁹ *Id.* at 17–18.

⁴⁰ *Id.* at 24.

⁴¹ *Id.* at 23–24.

⁴² *Mitchell Bros. Film Grp., v. Cinema Adult Theatre*, 604 F.2d 852, 866 (5th Cir. 1979).

⁴³ *Devils Films, Inc., v. Nectar Video*, 29 F. Supp. 2d 174, 176–77 (S.D.N.Y. 1998) (“the strong public policy against the distribution of obscene material compels the conclusion that the Court should not exercise its equitable powers to benefit the plaintiff.”).

⁴⁴ *Id.* at 175 (explaining that where the plaintiff was violating 18 U.S.C. section 1466, “which makes it a felony to engage in the business of selling or transferring obscene material shipped in interstate commerce.”).

⁴⁵ *Compare Mitchell Bros. Film*, 604 F.2d at 866 (discussing perspective against copyright content restrictions) *with Devils Films*, 29 F. Supp. 2d at 176–77 (opposing copyright protection where works are obscene).

⁴⁶ *See Mitchell Bros. Film*, 604 F.2d at 855 (“From the first copyright act in 1790, Congress has seldom added restrictions on copyright based on the subject matter of the work, and in each instance has later removed the content restriction.”); *id.* (explaining that “Congress has been hostile to content-based restrictions on copyrightability,” and that “the legislative history of the 1976 Act reveals that Congress intends to continue the policy of the 1909 Act of avoiding content restrictions on copyrightability”).

evaluation of sexual adult media copyright has resulted in debate about the balancing of protection for obscene material, copyright policy, and First Amendment interests.⁴⁷

In *Mitchell Bros. Film Group v. Cinema Adult Theater*, the copyright owner owned a valid copyright in a pornographic film.⁴⁸ The infringement occurred when the theater displayed the film without a license or the owner's consent.⁴⁹ The infringer attempted to evade liability by claiming that the copyright owner was barred from relief because the material was obscene.⁵⁰ The court held that his defense was an illegitimate basis for denying the copyright owner's rights and contradicted copyright policy in so doing.⁵¹

In *Mitchell*, the film at issue, *Behind the Green Door*, was a full-length sex film depicting a young white woman who is kidnapped and forced to perform sex acts on multiple partners at the same time in front of an audience.⁵² In evaluating whether this work was copyrightable, the court stated that there was little evidence to suggest that obscenity should be a part of the copyright analysis.⁵³ It stated that by reading obscenity into copyright, it could have a chilling effect on speech.⁵⁴ The court further stated that every content-based restriction on copyright to that point had been removed.⁵⁵ It ultimately refused to reach the question about whether this film was considered obscene, but not before it discussed the "practical difficulties" of applying the *Miller* test because of the fact that "what is obscene in one local community may be non-obscene protected speech in another."⁵⁶ The scope of this decision, however, was severely narrowed three decades later within similar facts.

In the contrasting case of *Devils Films v. Nectar Video*, the district court narrowed this holding.⁵⁷ While refusing to comment on whether obscenity and copyright are compatible, the court determined that the content at issue was obscene and left the parties where they stood.⁵⁸ At issue in this case were more than 200

⁴⁷ See generally *Miller v. Cal.*, 413 U.S. 15, 23–24 (1973) (holding that obscene speech is not protected by the First Amendment). The foregoing debate is colored by the fifth circuit's recognition of *Miller* where the Supreme Court held that "[s]ince what is obscene in one local community may be non-obscene protected speech in another, and the copyright statute does not in other respects vary in its applicability from locality to locality." *Id.* The fifth circuit court argued that Congressional obscenity exception to copyright would spur substantial First Amendment concerns; *Mitchell Bros. Film*, 604 F.2d at 866.

⁴⁸ *Mitchell Bros. Film*, 604 F.2d at 854.

⁴⁹ 17 U.S.C. § 106 (2006).

⁵⁰ *Mitchell Bros. Film*, 604 F.2d at 854 (explaining that the defendants relied on the doctrine of unclean hands to duck the owner's request for equitable relief).

⁵¹ *Id.* The claimant's "alleged wrongful conduct ha[d] not changed the equitable relationship between [the parties] and ha[d] not injured the defendants in any way." *Id.* at 863. The court held that "infringers' attempt to immunize" themselves was "antithetical to the purpose of [copyright] laws." *Id.* at 865.

⁵² LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* 243 (Univ. of California Press, 1999).

⁵³ *Mitchell Bros. Film*, 604 F.2d at 854.

⁵⁴ See *id.*

⁵⁵ *Id.* at 855.

⁵⁶ *Id.* at 858.

⁵⁷ *Devils Films, Inc., v. Nectar Video*, 29 F. Supp. 2d 174, 176–77 (S.D.N.Y. 1998).

⁵⁸ *Id.* at 175.

major commercial titles.⁵⁹ Rather than determining whether the specific content was obscene, the court viewed only three of the videotapes, and based on the categorizations of “straight anal,” “lesbian,” and “transsexual,” the court determined that the films were obscene.⁶⁰ Without delving into the nature of the works, the court went on to state that the videotapes were “hardcore pornography bereft of any plot and with very little dialogue.”⁶¹

In *Devils Films*, the infringer sold the owner’s explicit pornographic films without license or consent,⁶² but the court struck down the copyright owner’s claim.⁶³ The court found that the “strong public policy against the distribution of obscene material” outweighed the copyright owner’s right to protection.⁶⁴ Despite valid copyright, public demand, and unauthorized use of the owner’s creative work, the court refused to protect the works because of the nature of the content at issue.

D. Sexual Interest and Industry Players

Despite the IP protections in place, many adult entertainment providers have been unsuccessful at asserting IP rights.⁶⁵ At best, obscenity has a strained correlation with intellectual property, but still dominates courts’ rationales in rejecting adult film copyright infringement claims.⁶⁶ At the very least, it is apparent that courts resist protecting a particular type of sexualized content.⁶⁷

1. The American Playboy

Hailed as an “American cultural icon,”⁶⁸ Playboy Co. started out as a “[s]o-called lad magazine” focusing only on “soft porn.”⁶⁹ The adult content provider now sells over 3.4 million copies of its magazine each month in the United States alone.⁷⁰ The popular Playboy Clubs of the 1960s left little room for the equitable inclusion of female sexuality,⁷¹ despite claims to the contrary.⁷² The core audience was traveling

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 175–76. The owner sought preliminary injunction, so the court did not have to determine with precision whether obscenity was a valid defense to infringement. As a result, *Mitchell Bros. Film* is still good law, but it is distinguished by this decision.

⁶⁴ *Id.* at 176–177.

⁶⁵ *See id.*; *see also* IO Grp., Inc., v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1155 (N.D. Cal. 2008).

⁶⁶ *Devils Films*, 29 F. Supp. 2d at 175.

⁶⁷ *Id.* at 175–77.

⁶⁸ Michael J. McCarthy, *Playboy to Revive Club, and Bunnies, in Vegas*, WALL ST. J. (Oct. 6, 2004).

⁶⁹ *Id.*

⁷⁰ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993).

⁷¹ McCarthy, *supra* note 68; *see* STEINEM, *supra* note 4, at 32–75.

⁷² Larry Dubois, *Playboy Interview: Hugh Hefner*, PLAYBOY, <http://www.playboy.com/magazine/hugh-hefner-interview> last visited June 5, 2012). Hefner states

businessmen,⁷³ and the Club was “a socially sanctioned meeting place” until its female market increased and the “clubs fell out of favor.”⁷⁴ The Playboy Co. market, consistent since the magazine’s birth in December 1953,⁷⁵ still caters to “its core companywide demographic [of] young men ages 18 to 34.”⁷⁶ Its first issue featured the infamous Marilyn Monroe, and the magazine has since gained a reputation for showcasing beautiful blonde bombshells.⁷⁷

Evidence of Playboy Co.’s gender ideology is strongly indicated by the company’s stylistic choices.⁷⁸ The magazine’s founder, Hugh Hefner, stated in an interview that, “[f]emale virginity has been prized in our society simply because an unused possession is valued more highly than a used one. It’s part of our Judaeo-Christian heritage that women are either ‘good girls’ or ‘bad girls’ – on the basis of their sexual behavior.”⁷⁹ He continued, “The extent to which our Bunnies have become known around the world suggests that we were right; the word Bunny has even entered the language as a synonym for a pretty girl.”⁸⁰

The Playboy magazine has enjoyed remarkable success due to its stylistic choices and accessible nature at a time when nude photographs were not available from a multitude of sources.⁸¹ Playboy Co.’s business empire reached \$200,000,000 in profit.⁸² The corporation has obtained copyright protection for its works and has since litigated a number of times to protect its works against infringement.⁸³ Playboy Co. has prevailed on these claims without being subjected to an obscenity analysis.⁸⁴ Lastly, the Supreme Court has recognized that Playboy Co.’s programming is constitutionally protected by the First Amendment and that adults have a constitutional right to view it.⁸⁵

that women would be the real beneficiaries of his work. *Id.*; *contra* STEINEM, *supra* note 4 at 32–75 (exposing the nature of the business in the original Playboy Clubs as exploiting the “bunnies”).

⁷³ McCarthy, *supra* note 68.

⁷⁴ *Id.*

⁷⁵ Dubois, *supra* note 72.

⁷⁶ McCarthy, *supra* note 68.

⁷⁷ Dubois, *supra* note 72.

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (citing statistic that Playboy sells over 3.4 million issues of its magazine each month in the United States).

⁸² Dubois, *supra* note 72.

⁸³ *Playboy Enters., Inc. v. Starware Publ’g Corp.*, 900 F. Supp. 433, 438 (S.D. Fla. 1995) (granting summary judgment in favor of Playboy’s copyright infringement claim); *Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1177–78 (N.D. Tex. 1997) (granting summary judgment and awarding \$5000 for each infringed Playboy copyright image); *Playboy Enters., Inc. v. Eddie Davidson*, No. 1:97-CV-2787, 1999 WL 246739, at *1 (N.D. Ohio Apr. 12, 1999) (entering default judgment in favor of Playboy where defendant displayed copyrighted images on its website without publisher authorization).

⁸⁴ *Starware Publ’g.*, 900 F. Supp. at 433–38 (analyzing only infringement claims and not mentioning sexual nature of content; referring to copyrighted work as “images” or “photographs” and not “pornography”); *Webbworld*, 968 F. Supp. at 1171–78 (analyzing copyright infringement without assessing nature of sexual content; referring to copyrighted work as “images” or “photography” and not “pornography”); *Playboy Enters., Inc. v. Dumas and Dumas Inc.*, 840 F. Supp. 256, 256–60 (S.D.N.Y. 1993) (identifying plaintiff only as “magazine publisher” without identifying the subject matter of the magazine).

⁸⁵ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811 (2000).

2. Outside the Bunnies' Domain

While Playboy Co. still rules the print world, other players have exploited the internet's ability to communicate on a massive scale by widely disseminating adult media online. As internet usage has increased, so has consumer demand for sexually explicit content online.⁸⁶ Evidence demonstrates that consumers view the internet as the most desirable way to retrieve adult content.⁸⁷ Adult content producers have filled this demand by fashioning commercial websites where such content may be retrieved.⁸⁸ Even Playboy Co. began to "[tiptoe] into the adult-film market" to recoup financial losses that they attributed to increased availability of "hard-core" content.⁸⁹

In order to protect original content, adult content providers looked to copyright protection.⁹⁰ With the expansion of internet media and the growth of P2P technology,⁹¹ Playboy Co. entered the market and enjoyed the same level of copyright protection that they already had.⁹² The rest of adult content providers, in contrast, have experienced a significant burden in exercising the exclusive rights laid out in the Copyright Act.⁹³ Where adult content producers have not gained the level of

As this case has been litigated, it is not alleged to be obscene; adults have a constitutional right to view it; the Government disclaims any interest in preventing children from seeing it or hearing it with the consent of their parents; and Playboy has concomitant rights under the First Amendment to transmit it. These points are undisputed.

Id.

⁸⁶ See *Surprising Internet Usage Statistics*, *supra* note 5 (estimating that pornography would almost double its revenue in five years time and citing data regarding the prevalence of the words "sex" and "pornography" in internet searches).

⁸⁷ Mauceri Affidavit, *supra* note 6, at ¶4 ("Leading up to just before the Internet became a dominant force in the dissemination of pornography, the paying audience was considered captive, and remained highly profitable year after year.").

⁸⁸ See *Reno v. ACLU*, 521 U.S. 844, 856–57 (1997) ("There is evidence to suggest that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.").

⁸⁹ McCarthy, *supra* note 68. Playboy's financial losses required them to change their content so that they could compete in the market. *Id.* "Revenue from the entertainment division, which includes the Playboy TV cable channel, more than doubled over the past decade to \$203 million [in 2007]. Revenue from licensed products grew to \$43 million [in 2007] from \$7 million in 1998." *Id.* See also Russell Adams, *Playboy's Chief to Step Down*, WALL ST. J. (Dec. 9, 2008) (stating that Playboy's licensed products includes its "vast collection of mugs, calendars, cocktail shakers and other logo merchandise Meanwhile, publishing revenue has declined 32% over the 10 years and now accounts for less than a third of total revenue, compared with 44% a decade ago.").

⁹⁰ See *e.g.*, *Hard Drive Prod., Inc., v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011); *On the Cheap, LLC v. Does 1-5011*, No. C 10-4472, 2011 WL 4018258, at *1 (N.D. Cal. Sept. 6, 2011); *MCGIP, LLC v. Does 1-18*, No. C. 11-1495, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011); *Boy Racer v. Does 2-71*, No. 5:11 Civ. 02833, 2011 WL 2784574, at *1 (N.D. Cal. July 13, 2011); *First Time Videos, LLC., v. Does 1-500*, 276 F.R.D. 241, 244 (N.D. Ill. 2011).

⁹¹ *Reno*, 521 U.S. at 885 (citing expansion of internet media and evidence of accessibility of explicit content online).

⁹² *Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 433–48 (S.D. Fla. 1995); *Playboy Enters., Inc. v. Webworld, Inc.*, 968 F. Supp. 1171, 1171–78 (N.D. Tex. 1997).

⁹³ *Devils Films, Inc., v. Nectar Video*, 29 F. Supp. 2d 174, 177 (S.D.N.Y. 1998) (holding that copyrighted work was obscene and did not warrant grant of injunction where content could be categorized based on sodomy or homosexual interest; *Hard Drive Prod.*, 809 F. Supp. 2d at 1165 (refusing to join unnamed infringers of copyrighted amateur adult film); *On the Cheap, LLC.*, 2011

notoriety and mainstream recognition as Playboy Co., they have also been largely unsuccessful in litigating against online infringers.⁹⁴

The unwillingness to incorporate explicit adult content into mainstream legal protections, however, is inconsistent with American cultural demands.⁹⁵ Although courts have rejected the basis of a national community standard regarding sexual content,⁹⁶ expansion of the internet warrants a reevaluation of this precedent.⁹⁷

E. C Words – COICA, Copyright, and Censorship

Congress has attempted to solve the problem of internet piracy through measures in the Digital Millennium Copyright Act (“DMCA”),⁹⁸ and more recently in The Combating Online Infringement and Counterfeit Act (“COICA”).⁹⁹ COICA was designed to provide a cause of action for copyright owners that have been injured by online piracy.¹⁰⁰ The proposed legislation would have permitted injured parties to seek relief by filing an application with the Attorney General.¹⁰¹ Upon application, the court would essentially shut down the allegedly infringing website.¹⁰² While this legislation would have provided much needed assistance for copyright owners,¹⁰³ it posed unjustifiable secondary risks for unintended parties like legitimate online

WL 4018258, at *2 (dismissing 5009 unnamed infringers and denying copyright owners to conduct early discovery to determine the identities of the unnamed defendants).

⁹⁴ *Devils Films*, 29 F. Supp. 2d at 176–77; *Hard Drive*, 809 F. Supp. 2d at 1165; *On the Cheap*, 2011 WL 4018258, at *2.

⁹⁵ See *Miller v. Cal.*, 413 U.S. 15, 23–24 (1973) (rejecting the notion of a national community standard in determining whether material is obscene).

⁹⁶ *Id.*

⁹⁷ Cf. *Surprising Internet Usage Statistics*, *supra* note 5 (citing estimates of growth in U.S. pornography revenue from \$230 million in 2001 to \$400 million in 2006 and predicting that “revenues from online music, games and audio-visual entertainment will far outweigh revenue from online porn”).

⁹⁸ Pub. L. No. 105-304, 112 Stat. § 2860 (1998) (codified as amended at 17 U.S.C. §§ 101–810 (1994)). DMCA added civil and criminal penalties for circumventing of technological measures that copyright owners used to protect their work and tampering with copyright management prohibitions. *Id.*

⁹⁹ S. 3804, 111th Cong. (2009). COICA never became law. *Id.*; see also Ashley S. Pawlisz, *The Bill of Unintended Consequences: The Combating Online Infringement and Counterfeit Act*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 283, 283–84 (2011) (discussing the difficulty in finding a remedy for online piracy and aggressive nature of COICA); see also Stephen Yagielowicz, *North American Laumakers Grapple with Anti-Piracy Initiatives*, XBIZ NEWS (Nov. 1, 2011), http://www.xbiz.com/news/news_piece.php?id=140281&mi=all&q=protect+ip+act (discussing the PROTECT IP Act (“PIPA”) and The Stop Online Piracy Act (“SOPA”) in the context of First Amendment concerns).

¹⁰⁰ S. 3804, 111th Cong. (2010); Pawlisz, *supra* note 99, at 283.

¹⁰¹ See *supra* note 100.

¹⁰² *Id.*

¹⁰³ S. REP. NO. 105-190, at 112 (1998); Pawlisz, *supra* note 99, at 283.

content providers.¹⁰⁴ It also had negative implications for the First Amendment rights of American citizens.¹⁰⁵ Accordingly, the bill never became law.¹⁰⁶

COICA and similar acts attempt to avoid infringement by removing copyrighted content from websites.¹⁰⁷ These acts result in the use of increased government power in regulating online content, resulting in burdens on internet content providers and users.¹⁰⁸ Further, these approaches have been designed to protect mainstream content.¹⁰⁹ Legislative history suggests that the benefits would not even extend to explicit adult content (with the exception of Playboy Co.), but may actually be harmful given the industry's censored past.¹¹⁰

These measures demonstrate legislative efforts to address the internet piracy issue on a scale that applies to all copyright owners.¹¹¹ However, before sexually explicit adult content will reap the protections of the legislation, it must first eliminate the imbalance of copyright protection within the industry.

II. ANALYSIS

American interest in sex predates its own social acceptance.¹¹² Conversations about sex have slowly grown more tolerant of its recreational appeal. Still, sex has been an important part of the nation's history and traditions – and American jurisprudence generally reflects these standards.¹¹³ The legal world has long struggled to regulate adult content due to its posture with regard to moral

¹⁰⁴ Pawlisz, *supra* note 99, at 283 (“While the goal of the bill is to prevent copyright infringement, non-infringing content could also be greatly affected by the mechanisms this bill employs, and the potential for abuse is cause for concern); *see also* Yagielowicz, *supra* note 99.

¹⁰⁵ Pawlisz, *supra* note 99, at 305 (“Due to concerns that COICA is over-broad, a number of opponents of the Bill have also argued that the number of jobs lost or businesses negatively impacted by attempts to block domain names under COICA will outweigh the number of jobs or revenue lost by piracy.”); Yagielowicz, *supra* note 99.

¹⁰⁶ S. REP. NO. 111-373, pt. 1, (2010). The last action was on December 17, 2010 when the Senate filed a report on the bill.

¹⁰⁷ Richard Esguerra, *Censorship of the Internet Takes Center Stage in “Online Infringement” Bill*, ELEC. FRONTIER FOUND. (Sept. 21, 2010), <https://www.eff.org/deeplinks/2010/09/censorship-internet-takes-center-stage-online>; Gary Shapiro, *Listen to the Job Creators: Oppose PIPA and SOPA*, HUFF POST TECH (Oct. 31, 2011), http://www.huffingtonpost.com/gary-shapiro/oppose-pipa-and-sopa_b_1063468.html.

¹⁰⁸ Pawlisz, *supra* note 99, at 284; Esguerra, *supra* note 107; Shapiro, *supra* note 107.

¹⁰⁹ Shapiro, *supra* note 107.

¹¹⁰ Stephen Yagielowicz, *Will SOPA Stop Internet Piracy?*, XBIZ NEWS (Nov. 18, 2011), http://www.xbiz.com/news/news_piece.php?id=141186&mi=all&q=censorship (discussing potential ramifications of the Stop Online Piracy Act, an act similar to COICA).

¹¹¹ *Id.*

¹¹² Expert report and Affidavit of Bruce McLaughlin, High Five Investments, LLC, v. Floyd County, No. 4:06-CV-00190, 2006 WL 3921135, at *3. (N.D. Ga. 2007) [hereinafter McLaughlin Affidavit] (“Interest in sexually explicit materials dates back centuries, at least to the ancient Mediterranean.”).

¹¹³ *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (recognizing that American adults have a right to indecent sexual content); *Redrup v. N.Y.*, 386 U.S. 767, 770 (1967) (finding for the first time that sexually explicit speech was constitutionally protected).

behavior,¹¹⁴ public health and safety,¹¹⁵ and freedom of expression.¹¹⁶ The adult entertainment industry has consensually entered the average American home, demonstrating the value in preserving its industry's viability.¹¹⁷ Still, it has met opponents in diverse social interest groups.¹¹⁸

Adult content,¹¹⁹ like the mainstream entertainment industry, has taken on changing forms as technology has progressed.¹²⁰ As a result, courts have constantly had to reevaluate standards of intellectual property protection for these industries in light of advancing technology.¹²¹ The advent of the internet and digitalized media exemplify the court's most recent struggle to balance American expression with intellectual property policies.¹²²

Part A of this analysis will address the interplay between copyright and First Amendment policies. Part B will address the broad copyright protection given to Playboy Co. demonstrating that adult content is, in fact, valuable expression. Part C will demonstrate that the availability of explicit adult content online requires an expanded definition of the "community standards" prong of the *Miller* test. Lastly, Part D will suggest that judicial bias in favor of Playboy-esque content violates copyright and First Amendment Policy.

¹¹⁴ *Kingsley Intern. Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 685 (1959) (analyzing licensing restrictions of motion pictures that "portray acts of sexual immorality").

¹¹⁵ *N.Y. v. Ferber*, 458 U.S. 747, 774 (1982) (identifying a valid state interest in proscribing pornographic material depicting minors).

¹¹⁶ *City of Erie v. Pap's A.M.*, 529 U.S. 277, 329 (2000) (regulating adult entertainment establishment on the basis of secondary effects in the surrounding neighborhood. Lawmaker stated, "We're not talking about nudity. We're not talking about the theatre or art We're talking about what is indecent and immoral We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion.").

¹¹⁷ *Sable Commc'ns*, 492 U.S. at 126 (recognizing that American adults have a right to indecent sexual content); *Redrup*, 386 U.S. at 770 (finding for the first time that sexually explicit speech was constitutionally protected.).

¹¹⁸ See *Miller v. Cal.*, 413 U.S. 15, 23–24 (1973). As early as 1973, the court recognized that the "sexual revolution" may have reduced irrational American "prudery" in a valuable way, but still did not justify the need for access to hard-core material. *Id.* at 36; see generally Duggan, *supra* note 1, at 100. Feminist theorists such as Andrea Dworkin and Catharine MacKinnon have spoken out about the repercussions of pornography. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 8 (1985) (critiquing pornography as incompatible with female equality).

¹¹⁹ *McLaughlin Affidavit*, *supra* note 112, at 3 (defining adult entertainment establishments to include: "all sexually-oriented private clubs, adult bookstores, adult theaters and saunas/massage parlors"). This definition serves to distinguish adult entertainment from mainstream entertainment.

¹²⁰ *Sable Commc'ns*, 492 U.S. at 124 (interpreting sexually oriented telephone messaging service); *Reno v. ACLU*, 521 U.S. 844, 844 (1997) (analyzing obscene and indecent internet content).

¹²¹ See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (interpreting copyright content based on artistic expression which had not previously been considered); see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

¹²² *E.g.*, *Reno*, 521 U.S. at 844.

A. Copyright And Freedom of Expression: The Feeling is Mutual

In the *Miller* court's proscription of obscene material, it recognized that the First Amendment's competing purpose was "bringing about political and social changes desired by the people."¹²³ A more recent decision recognizes that American adults have a constitutionally protected right to indecent sexual expression as long as it is not "obscene" under the *Miller* test.¹²⁴ The court limited the government's regulation of sexual expression to a showing of strict scrutiny because content-based restrictions of First Amendment expression are generally disfavored.¹²⁵

Where the First Amendment serves to foster political and social change as desired by the American people,¹²⁶ copyright law is purposed to expand the availability of creative works.¹²⁷ As such, there is a logical mutualistic relationship between First Amendment expression and copyright protection in furtherance of valuable expression.¹²⁸ With regard to the adult content industry, an increased demand for adult content evidences a corresponding increase in societal acceptance and perceived value of such content. It logically follows that copyright law should function to expand the availability of adult content where it meets copyright requirements.

B. Playmates: Not Everyone's Type

If adult content copyrights are rendered ineffective, the incentive to provide quality sexual expression will decrease.¹²⁹ This issue threatens the incentive to create thereby reducing the production of works for public benefit.¹³⁰ While legislators have expressed concerns about obscenity in protecting adult content,¹³¹ contemporary community standards no longer warrant such a narrow interpretation of sexual content. Even concerns about "hard-core sexual conduct" do not outweigh the need to protect valid copyright.¹³²

¹²³ *Id.* (discussing hesitance to limit expression and citing previous precedent that, "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). Chief Justice Burger distinguished this notion by saying that "[T]he public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." *Miller v. Cal.*, 413 U.S. 15, 34-35 (1973).

¹²⁴ *Sable Commc'ns*, 492 U.S. at 125-26.

¹²⁵ *Id.* at 126-27. In order for the government to regulate such expression, it must be able to prove that its legitimate state interest withstands strict scrutiny. *Id.* To persevere against such a high standard, "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* at 127.

¹²⁶ *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹²⁷ Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 16-17 (2001) (discussing progress as change best understood when divided into groups based on subject matter).

¹²⁸ *Id.*

¹²⁹ 1 MCCARTHY, *supra* note 15, § 6:3.

¹³⁰ *Id.*

¹³¹ *Devils Films, Inc., v. Nectar Video*, 29 F. Supp. 2d 174, 175 (S.D.N.Y. 1998).

¹³² *Miller v. Cal.*, 413 U.S. 15, 36 (1973).

Copyright on its own requires a very minimal showing of creativity.¹³³ Playboy demonstrates that explicit sexual content can meet the creativity threshold and warrant copyright protection.¹³⁴ Websites with similar content (female nudity, sexualized plotlines, and/or simulated sex acts) warrant the same level of copyright protection because their arrangements are similarly creative.¹³⁵ Diversity in these markets is a force that drives competition and propels content providers' incentive to create for American audiences consonant with copyright policy.

A main identifier in Playboy content is conscious effort at not exposing the female genitalia.¹³⁶ The vagina, although an undeniably present feature of the female body, is an orifice that is considered inherently crude.¹³⁷ The sight of the vagina has even been aligned with fetishism and repressed fear of castration.¹³⁸ Since Playboy consciously chooses not to focus on the vagina, it avoids triggering these fears. However, obscenity law is consistently interpreted through a Playboy-sheltered lens, posing serious difficulties for creative protection in the rest of the adult content industry where there is a demand for varieties of content Playboy does not provide.¹³⁹

C. Protecting the Innocent or Imposing Uniformity?

The Supreme Court has recognized a change in the composition of American sexuality.¹⁴⁰ In *Reno v. ACLU*, the Supreme Court struck down Congressional attempts to regulate internet content through a statute criminalizing "obscene and indecent" internet messages.¹⁴¹ *Reno* recognized that "indecent" is too limited.

¹³³ Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 345 (1991).

¹³⁴ Playboy Enters., Inc. v. Starware Publ'g Corp., 900 F. Supp. 433, 438 (S.D. Fla. 1995); Playboy Enters., Inc. v. Webworld, Inc., 968 F. Supp. 1171, 1177–78 (N.D. Tex. 1997) (granting summary judgment and awarding \$5000 for each of Playboy's infringed copyright images); Playboy Enters., Inc. v. Dumas and Dumas Inc., 840 F. Supp. 256, 256–60 (S.D.N.Y. 1993); Playboy Enters., Inc. v. Eddie Davidson, No. 1:97-CV-2787, 1999 WL 246739, at *1 (N.D. Ohio Apr. 12, 1999) (entering default judgment in favor of Playboy in the amount of \$800,000 in statutory damages where defendant displayed copyrighted images without publisher authorization).

¹³⁵ Mitchell Bros. Film Grp., v. Cinema Adult Theatre, 604 F.2d 852, 866 (5th Cir. 1979); Hard Drive Prod., Inc., v. Does 1-188, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011); MCGIP, LLC., v. Does 1-18, No. C. 11 1495, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011); Boy Racer v. Does 2-71, No. 5:11 Civ. 02833, 2011 WL 2784574, at *1 (N.D. Cal. July 13, 2011); First Time Videos, LLC., v. Does 1-500, 276 F.R.D. 241, 244 (N.D. Ill. 2011).

¹³⁶ Affidavit of Andrew F. Trentacosta, Playboy Enterprises, Inc., v. Terri Welles, Inc., No. 98-CV-0413, 1999 WL 34982066, at ¶ 4–5 (S.D. Cal. Nov. 15, 1999) [hereinafter Trentacosta Affidavit] (discussing Playboy content as less "gynecologically explicit" and less "sexually provocative or aggressive" than other adult content providers; stating also that Playboy's content includes "erotic photographs of beautiful women, nude and semi-nude" in "tasteful erotic poses").

¹³⁷ Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1136 (2005).

¹³⁸ *Id.*

¹³⁹ Greg Burns, *Sex a Tough Sell in this Recession; From Playboy to Legal Brothels in Nevada, Business Takes a Hit*, CHI. TRIB. (Aug. 10, 2009) ("A gasping economy has aggravated the biggest problem in the Internet sex biz: the piracy of copyrighted content from pay sites.").

¹⁴⁰ Miller v. Cal., 413 U.S. 15, 23–24 (1973) (recognizing a change in American sexual values); see *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)

¹⁴¹ *Reno v. ACLU*, 521 U.S. 844, 844 (1997).

Further, as recognized in *Reno*, the regulation was not necessary to achieve the government interests because existing statutes already criminalized obscenity and child pornography.¹⁴² Further, the court recognized the repercussions of limiting valuable sexual expression.¹⁴³

In its analysis, the court recognized an important state interest in protecting its citizens from unwanted exposure to obscene material,¹⁴⁴ but it also expressed hesitance in regulating “any form of expression.”¹⁴⁵ The court limited the scope of regulation solely to works depicting or describing sexual conduct, and required the proscribed conduct to be expressly defined in the statute.¹⁴⁶ The ultimate determination about whether conduct is “patently offensive” or “appeals to the prurient interest” now depends upon contemporary community standards.¹⁴⁷

The *Miller* court rejected the notion that such community standards could be divined on a national level, stating that “[p]eople in different States vary in their tastes and attitudes, and [such] diversity is not to be strangled by the absolutism of imposed uniformity.”¹⁴⁸ Despite opposing “imposed uniformity of community standards” regarding obscene content, courts’ findings have peculiarly narrowed the scope of legally protected adult content to monolithic sexuality.

More recently, government officials have spoken out against “hardcore” pornography,¹⁴⁹ citing harm to women as one of the evils in permitting “obscene” online adult content.¹⁵⁰ Absent in the argument, however, is the fact that the supporting academic reports suggest that the most negative social messages informing female sexuality comes from mainstream media including television commercials, magazines, music videos and social media, as well as cosmetics and interpersonal relationships.¹⁵¹ In fact, the report expressly admits that “[i]t does not

[The statute] criminalize[d] the “knowing” transmission of “obscene or indecent” messages to any recipient under 18 years of age. Section 223(d) prohibits the “knowin[g]” sending or displaying to a person under 18 of any message “that, in context, depicts or describes, in patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”

Id. at 844.

¹⁴² *Id.* at 877–78; *see also* 18 U.S.C. § 1465 (criminalizing obscenity); *see also* 18 U.S.C. § 2251 (criminalizing child pornography).

¹⁴³ *Reno*, 521 U.S. at 885.

¹⁴⁴ *Miller v. Cal.*, 413 U.S. 15, 19 (1973).

¹⁴⁵ *Id.* at 24 (discussing First Amendment concerns).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 30–34 (discussing contemporary community standards).

¹⁴⁸ *Id.*

¹⁴⁹ Jamshid Ghazi Askar, *Orrin Hatch, Morality in Media want President Obama to Resume Prosecution of Pornographers*, DESERET NEWS (May 3, 2011), <http://www.deseretnews.com/article/700132174/Orrin-Hatch-Morality-in-Media-want-President-Obama-to-resume-prosecution-of-pornographers.html>.

¹⁵⁰ *Id.*

¹⁵¹ AM. PSYCHOLOGICAL ASS’N, TASK FORCE ON THE SEXUALIZATION OF GIRLS, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS 4–14 (2008). According to the report, these forms of sexualization “undermine confidence and comfort with one’s own body, leading to a host of negative emotional consequences, such as shame, anxiety, and even self-disgust . . . [evidenced in studies] of self-objectification (mostly using college-aged samples) and from experimental and correlational studies of exposure to media emphasizing a narrow ideal of women’s sexual attractiveness.” *Id.* at 22. The study also found an increased correlation between internalized gender stigma and self-objectification and greater exposure to the aforementioned media sources. *Id.*

review evidence concerning the prevalence and effects of sexually suggestive or sexually explicit material per se” and “covers extreme forms of sexualization (e.g., prostitution, pornography, trafficking, child sexual abuse) only briefly.”¹⁵²

Both of these judicial attempts are couched in a patriarchal social structure dictating the importance of protection for helpless women and children.¹⁵³ Given the foregoing evidence, it is difficult to justify the courts’ determinations as anything but judicial activism aimed at policing American sexuality.¹⁵⁴ This holds especially true since the government willingly extends protection to Playboy Co.’s content where female virginity is regarded as a coveted male possession, and nude models are referred to as sexy animals, or “bunnies,” instead of as women.

Despite recent judicial decisions, the *Miller* test is still the crucial case for identifying obscenity.¹⁵⁵ In applying this test to modern explicit sexual content, it is impossible to regionally define “community standards” because so much of the content is distributed on the internet. Since the internet allows material to be distributed to a wider demographic,¹⁵⁶ the argument that community standards cannot be defined on a national level has become somewhat obsolete. When defined at a local level, community standards are too inconsistent a standard to use in evaluating internet content because it is broadly available to audiences all over the country (and world, for that matter). Instead, the court should look to market demands and adopt an approach more consonant with copyright policy.¹⁵⁷

D. Play for Non-Boys: Hetero-Patriarchy and Judicial Bias

There are really only two cases that address the tension between obscenity and copyright - *Mitchell Brothers Film Group v. Cinema Adult Theatre* and *Devils Films, Inc. v. Nectar Video*.¹⁵⁸ Outside of these two cases, courts have essentially avoided addressing the issue because they have been able to dispose of the claims through other means.¹⁵⁹ These two cases represent opposite ends of the obscenity spectrum. At the one end, the *Mitchell* court rejects copyright content restrictions, but at the

at 25. The study emphasized the importance of sexual identity, but demonstrated that girls and young women internalized a sexual double-standard and judged women’s values based on physical attractiveness. *Id.* at 26–27.

¹⁵² *Id.* at 4.

¹⁵³ Ashlle Warnick, *IFEMINISM*, 101 MICH. L. REV. 1602, 1611 (2003) (discussing the anti-pornography movement as a form of patriarchy). “[T]rusting the patriarchal system that oppressed women in the past to now protect women from that same patriarchy seems incongruent.” *Id.*

¹⁵⁴ See generally Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 150–54 (1995) (discussing the tendency of the American judicial system to conflate sexuality and gender into “hetero-patriarchal categories and hierarchies”).

¹⁵⁵ *Miller v. Cal.*, 413 U.S. 15 (1973).

¹⁵⁶ *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (citing expansion of internet media and evidence of accessibility of explicit content online).

¹⁵⁷ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (suggesting that market demands are an important inquiry in copyright).

¹⁵⁸ *Mitchell Bros. Film Grp., v. Cinema Adult Theatre*, 604 F.2d 852, 863 (5th Cir. 1979); *Devils Films, Inc., v. Nectar Video*, 29 F. Supp. 2d 174, 176–77 (S.D.N.Y. 1998).

¹⁵⁹ *E.g.*, *Hard Drive Prod., Inc., v. Does 1-188, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011)* (refusing to join unnamed infringers of copyrighted adult film).

other end is the *Devils Films, Inc.* court's willingness to expand obscenity proscription and refuse to honor copyright owner's rights for at least "straight anal," "lesbian," and "transsexual" works.¹⁶⁰

Case law demonstrates that the most debilitating aspect for adult content providers is the explicit nature of their content. Where Playboy Co. has litigated its copyright infringement claims, it has been paid deference and respect in the courts.¹⁶¹ Playboy Co. has enjoyed success in the vast majority of its copyright infringement claims.¹⁶² The court's loyalty to the Playboy Co. brand demonstrates a judicial bias toward sexual hegemony by favoring its "high-brow" sexual content.¹⁶³ As a result, providers and consumers will be disserved if their sexual preferences do not comply with this standard because they will be unable to access the adult content that they seek.¹⁶⁴ These types of evaluations are contrary to the goals of copyright law and have been strongly disfavored throughout history.¹⁶⁵ By only protecting the

¹⁶⁰ *Devils Films*, 29 F. Supp. 2d at 175.

¹⁶¹ *Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 433–38 (S.D. Fla. 1995); *Playboy Enters., Inc. v. Webworld, Inc.*, 968 F. Supp. 1171, 1171–78 (N.D. Tex. 1997) (analyzing copyright infringement without assessing nature of sexual content; referring to copyrighted work as "images" or "photography" and not "pornography"); *Playboy Enters., Inc. v. Dumas and Dumas Inc.*, 840 F. Supp. 256, 256–60 (S.D.N.Y. 1993) (identifying plaintiff as "magazine publisher").

¹⁶² *Starware Publ'g*, 900 F. Supp. at 438; *Webworld*, 968 F. Supp. at 1177–78; *Playboy Enters., Inc. v. Eddie Davidson*, No. 1:97-CV-2787, 1999 WL 246739, at *1 (N.D. Ohio Apr. 12, 1999) (entering default judgment in favor of Playboy in the amount of \$800,000 in statutory damages where defendant displayed copyrighted images in its website for end-users to download without publisher authorization).

¹⁶³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (discussing the copyright anti-discrimination principle); McCarthy, *supra* note 68. Playboy started out as "[s]o-called lad magazine" focusing only on "soft porn." *Id.*; see also Trentacosta Affidavit, *supra* note 136 at ¶ 4–5 (discussing Playboy content as less "gynecologically explicit" and less "sexually provocative or aggressive" than other adult content providers).

[Playboy] created the concept of a certain standard of quality, erotic photographs of beautiful women, nude and semi-nude, referred to as Playmates and Playmates of the Year. A "Playmate" pictorial is a set of photographs of models who are photographed in a particular way, according to certain professional quality standards . . . high quality photographic product for which its magazine has come to be known . . . very carefully selects tasteful erotic poses for the models . . . Consumers who buy Playboy Magazine have come to expect the high quality photography and non-explicit content guaranteed in a Playmate pictorial.

Id.

¹⁶⁴ See 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 2,000 Cities in Forty Countries*, 83 GEO.L.J. 1849, 1891 (citing soft-core category, i.e., hetero-sexual, female nudity, without penetration, as accounting for 13.7 percent of demand according to Carnegie Mellon study in 1995); see e.g., *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 176–77 (S.D.N.Y. 1998) (rejecting protection for more than 200 titles in categories of "straight anal," "lesbian," and "transsexual" adult content); *Hard Drive Prod., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011); (rejecting protection of "amateur" adult content); see also NIMMER, *supra* note 20, § 1.03 ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."); see also *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (stating that traditional copyright legislation "was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.").

¹⁶⁵ *Bleistein*, 188 U.S. at 251–52; The court has long expressed hesitance in permitting judicial evaluations of copyright content, stating that:

content demanded by the Playboy Co. audience, the judicial system is unfairly limiting public benefit from sexually creative works.

E. Sex Sells: Meeting the Market Demand for Variety

Legally permissible adult content then becomes consonant with the demands of the Playboy Co. audience: the white, heterosexual, male population.¹⁶⁶ The result is copyright protection is upheld only for this “high-brow” adult content.¹⁶⁷ In stark contrast lie the adult content providers who produce work for the rest of the industry’s consumers.¹⁶⁸ Obscenity begins to encompass any explicit sexual conduct that suits the tastes of those Americans who prefer “more gynecologically explicit” or “genital-focused” adult content,¹⁶⁹ or content created for non-heterosexual viewers (i.e., homosexual and transsexual individuals).¹⁷⁰ Also curious is the exclusion of protected content for female audiences, including lesbian and heterosexual women, who are often the objects of protected content in Playboy Co.’s works.

The non-Playboy market makes up 86.3 percent of the entire industry,¹⁷¹ yet the content falls outside the scope of legal protection.¹⁷² Even if some of the demand qualifies as obscene and is not subject to First Amendment protection, the demand demonstrates an inconsistency in the current administration of the law. The “community standard” has been applied without considering American demands for sexual content, subsequently violating copyright policy and demonstrating a remarkable contradiction to principle against “imposed” standards expressed in *Miller*. Moreover, explicit adult content continues to be illegally downloaded and distributed on a mass scale,¹⁷³ highlighting the gravity of infringements as adult content producers experience increased financial loss.¹⁷⁴

[C]opyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,-it would be bold to say that they have not an aesthetic and educational value,-and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.

Id.

¹⁶⁶ McCarthy, *supra* note 68.

¹⁶⁷ *Bleistein*, 188 U.S. at 239.

¹⁶⁸ See, e.g., *Devils Films*, 29 F. Supp. 2d at 175 (providing more than 200 titles in categories of “straight anal,” “lesbian,” and “transsexual” adult content); *Hard Drive Prod., Inc., v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011) (providing “amateur” adult content).

¹⁶⁹ Trentacosta Affidavit, *supra* note 136, at ¶ 4–5.

¹⁷⁰ *Devils Films*, 29 F. Supp. 2d at 175.

¹⁷¹ Rimm, *supra* note 164, at 1891 (citing soft-core category, i.e., hetero-sexual, female nudity, without penetration, as accounting for only 13.7 percent of demand according to Carnegie Mellon study in 1995).

¹⁷² *Devils Films*, 29 F. Supp. 2d at 176–77.

¹⁷³ Bhatt, *supra* note 10. Stating that:

We monitored KaZaA Media Desktop traffic from our Chicago home base to see what kind of content is being downloaded or pirated and how frequently certain files are obtained for free instead of being purchased. We first set up a computer for the sole purpose of housing content and being online with KaZaA Media Desktop running 24 hours a day for 14 consecutive days. We focused on housing

III. PROPOSAL

The best possible solution to this dilemma is to create language in the Copyright Act that addresses the issue directly. One of the major difficulties thus far has been a lack of clear standards in adjudicating these disputes. This section will discuss why past attempts have failed to eradicate infringement and offer tangible steps toward resolution.

A. Massive Joinder, Massive Headache

Congress has attempted to address internet copyright complications by enacting the DMCA;¹⁷⁵ however, the act provides safe harbor for qualifying service providers,¹⁷⁶ leaving adult content providers with limited recourse against those who provide a way for individuals to search for illegally accessible copyrighted works.¹⁷⁷

In contrast, P2P networks are decentralized and do not qualify for the safe harbor provisions,¹⁷⁸ but there are problems with litigating against these individuals as well. Copyright owners are unable to obtain adequate information about individual infringers, i.e. end-users, because the only known identification available is through internet protocol addresses.¹⁷⁹ Further, since these systems are decentralized and file-sharing occurs between individuals (“peer-to-peer”),¹⁸⁰

five separate categories of proprietary hardcore content, all saved as .mpg or .avi movie files The average number of users online and downloading at a given time was over 4 million, sharing just over 850,000 files.

Id.

¹⁷⁴ *Id.* (demonstrating the extent of copyright violation by estimating that “[a]t a given price of \$100 per scene, the financial loss is averaged at \$2,300 per day.”).

¹⁷⁵ Pub. L. No. 105-304, 112 Stat. § 2860 (1998) (codified as amended at 17 U.S.C. §§ 101–810 (1994)).

¹⁷⁶ 17 U.S.C. § 512 (2006).

¹⁷⁷ Mick Haig Prod., v. Does 1-670, No. 3:10-CV-1900-N, 2011 WL 5104095, at *1 (N.D. Tex. Sept. 9, 2011); DigiProtect USA Corp. v. Does, No 10 CIV. 8760, 2011 WL 4444666, at *1 (S.D.N.Y. Sept. 26, 2011); Io Grp. Inc. v. GLBT Ltd., No C-10-1282, 2011 WL 4974337, at *1 (N.D. Cal. Oct. 19, 2011); Perfect 10, Inc. v. Megaupload Ltd., 11-CV-0191, 2011 WL 3203117, at *1 (S.D. Cal. July 27, 2011).

¹⁷⁸ *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010).

To the extent [that] activities go beyond what can fairly be characterized as meeting the . . . collateral scope of “storage” and allied functions, and present the elements of infringements under existing principles of copyright law, they are not facially protected by § 512(c). Such activities simply fall beyond the bounds of the safe harbor and liability for conducting them must be judged according to the general law of copyright infringement. That follows from the language of § 512(c)(1) that “A service provider shall not be liable . . . for infringement of copyright by reason of the storage . . .” However, such instances have no bearing on the coverage of the safe harbor in all other respects.

Id.

¹⁷⁹ *See Voltage Pictures, LLC., v. Does 1-5,000*, 818 F. Supp. 2d 28, 30–21 (D.D.C. 2011).

¹⁸⁰ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005) (“[B]illions of files are shared across peer-to-peer networks each month . . . although decentralized networks do not reveal which files are copied and when.”).

moderators evade liability because there is not enough evidence to sustain the claim of direct infringement against the individual.¹⁸¹

Mass joinder of defendants has occurred in a limited number of cases.¹⁸² The concept of joining defendants in a class does not really comport with traditional American jurisprudence,¹⁸³ but merely offers a short-term remedy in the absence of functional alternatives. Further, this kind of joinder poses substantial prejudice to the accused parties.¹⁸⁴

The best remedy will provide recovery for injured copyright owners, deter infringers, and provide lasting legal protection of the works. However, this challenge is present among all copyright owners, not only those in the adult content industry. Even though mainstream content providers have enjoyed some success in obtaining relief for online infringement, there are still complications in efficiently litigating against infringers, and the legal system is working tirelessly to combat these issues because of its impact on the economy. While the big issue is in the process of being resolved, it is imperative for adult content providers to achieve the same level of legal recognition as other copyright owners so that when the resolution is finally available, they will be able to enjoy the benefits of it, rather than it just being applied for Playboy-esque content.

B. Prophylactic Measures

The DMCA has attempted to offer some relief to copyright owners, but in addition to being ineffectual, it has also been criticized for having a chilling effect on free speech and expression.¹⁸⁵ Part of the problem is that the DMCA was enacted in the early stages of the internet boom, and it was too premature to address the serious and complex issue of digital infringement. It fails to provide reasonably obtainable relief for both massive infringement and individual infringements. Further, it fails to accommodate the end-users who seriously value and rely upon the internet as a resource.

There are really two different types of infringers: website moderators and end-users.¹⁸⁶ Infringing moderators create websites that redirect users to unauthorized content or permit users to stream content,¹⁸⁷ or create programs that allow users to

¹⁸¹ *Cammarata v. Bright Imperial Ltd.*, No. BC 410599, 2009 WL 8394916, at *1 (Sup. Ct. Cal. July 27, 2009).

¹⁸² *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332 (D.D.C. 2011); *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 11 (D.D.C. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 161 n.7 (D. Mass. 2008); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 568 (S.D.N.Y. 2004).

¹⁸³ *See Hard Drive Prod., Inc., v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011); *On the Cheap, LLC v. Does 1-5011*, No. C10-4472, 2011 WL 4018258, at *1 (N.D. Cal. Sept. 6, 2011).

¹⁸⁴ *On the Cheap*, WL 4018258, at *1.

¹⁸⁵ Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 173 (2010).

¹⁸⁶ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005).

¹⁸⁷ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000) (entering judgment); *see also Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1174-78 (N.D. Tex. 1997) (finding copyright infringement where "images in issue were stored in defendants' "web server" computers and available for downloading by subscribers").

share unauthorized content with one another.¹⁸⁸ Infringing end-users access websites where they can view unauthorized content,¹⁸⁹ upload (“seed”) and/or download (“leech”) unauthorized content through file-sharing systems.¹⁹⁰

The difference in levels of infringement necessitates varying degrees in remedy. It is not equitable to hold one individual accountable for downloading one work one time when another individual uploaded the same work on fifty separate occasions. As a result, an applicable cause of action should address these issues.

1. Getting Defensive: Putting Infringers On Notice

Adult content producers have begun to take this issue into their own hands by hiring companies to issue cease-and-desist letters for infringing websites.¹⁹¹ The work has proven effective in terms of forcing infringers to comply with the law.¹⁹² It has also helped to avoid litigation related costs.¹⁹³ Unfortunately, there is still economic injury.¹⁹⁴ Further, this approach has placed the burden entirely onto the copyright owner,¹⁹⁵ and has failed to provide a legal remedy for legal wrong.¹⁹⁶ The content at issue is valuable sexual expression, and is deserving of the court’s cooperation in mitigating financial loss and preserving exclusive rights of copyright ownership.¹⁹⁷

In order to institute an alternative cause of action against these infringers, copyright owners should begin by sending a “cease-and-desist” letter to violating party or parties to demonstrate good faith in identifying actual infringements. This letter puts the infringer on notice that his or her conduct is considered an unauthorized copyright infringement, and it shifts the burden to investigate the infringement onto the accused infringer. If the copyrighted work is not removed, the copyright owner should then be entitled to equitable relief to prevent further injury from the infringement.¹⁹⁸ The violating party should also be required to pay damages to the plaintiff in varying degrees for moderators and end-users.

Where a moderator hosts a copyrighted work on a website in the absence of a license from the copyright owner, the infringing party should have to pay restitution

¹⁸⁸ *Metro-Goldwyn*, 545 U.S. at 913. (“Billions of files are shared across peer-to-peer networks each month . . . although decentralized networks do not reveal which files are copied and when.”).

¹⁸⁹ *Reimerdes*, 111 F. Supp. at 346; see *Webbworld*, 968 F. Supp. at 1174.

¹⁹⁰ *Metro-Goldwyn*, 545 U.S. at 913.

¹⁹¹ Glass, *supra* note 11.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Kathee Brewer, Down the Tubes, ADULT VIDEO NETWORK (Feb. 2, 2008, 10:57 AM), <http://business.avn.com/articles/technology/Down-the-Tubes-28340.html> (“Revenue shrinkage has reached epidemic proportions among traditional San Fernando Valley adult-entertainment companies; for some, video revenue has plunged by as much as 50 percent from its peak.”).

¹⁹⁵ MJ McMahon, *Evan Horowitz, Co-founder, XPays*, ADULT VIDEO NETWORK (Jan. 4, 2007), <http://business.avn.com/executive-suite/Evan-Horowitz-Co-founder-XPays-66404.html>.

¹⁹⁶ 1A C.J.S. ACTIONS § 60 (2011) (requiring a legal wrong to warrant the grant of a legal remedy).

¹⁹⁷ 1 MCCARTHY, *supra* note 15, § 6:3.

¹⁹⁸ 17 U.S.C. § 502 (2006) (citing temporary and final injunction as possible remedy for copyright infringement).

to the copyright owner.¹⁹⁹ In contrast, an end-user should have to pay punitive damages: e.g., an amount reaching not more than three times the market price of the infringed work. These actions would be subject to affirmative defense of fair use.²⁰⁰ Further, damages could be overturned upon the accused infringer's demonstration of a valid copy of the work or a subscription to the copyright owner's content.

Since the infringing party will have adequate notice of their infringement and is given time to investigate the infringement, it cannot be construed as chilling speech. Additionally, unlike the DMCA, this cause of action would be subject to both fair use and validity defenses. Although there still may be procedural issues, it equalizes the burden on the original copyright creator and the public. This remedy ultimately comports with Copyright and First Amendment policies by rewarding creators and simultaneously promoting valuable expression for the public benefit.

2. Making Copyright Sexy

While authorities have attempted to remedy massive online copyright infringement, the issue has grown and remained largely unresolved. In the adult content industry, as previously demonstrated, there is a divergence in levels of protection between certain types of content. The adult content industry necessitates legislative attention in equalizing protection among American preferences in sexual media. The ultimate remedy will eradicate biases in judicial enforcement of sexual mores, sexually repressive behaviors, and patriarchal structures in governing sex.²⁰¹ It is important for policy makers and legislators to be acutely sensitive to the existence of biases in the legal system.²⁰² When biases are identified, they need to be evaluated in light of the interests they protect or threaten.²⁰³

The relationship between Copyright and the First Amendment cannot be denied. These two constitutional principles operate together to propel progress in American society.²⁰⁴ As such, one should not be used to inhibit the other.²⁰⁵ Copyright has its

¹⁹⁹ See *Playboy Enters., Inc. v. Webworld, Inc.*, 968 F. Supp. 1171, 1176 (N.D. Tex. 1997); *Playboy Enters., Inc. v. Eddie Davidson*, No. 1:97-CV-2787, 1999 WL 246739, at *1 (N.D. Ohio Apr. 12, 1999).

²⁰⁰ See *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 591 (1994).

²⁰¹ See Rimm, *supra* note 164, at 1891 (discussing expansive demands in the adult content industry); Warnick, *supra* note 153, at 1611 (discussing the anti-pornography movement as a form of patriarchy); Valdes, *supra* note 154, at 150–54 (discussing the tendency of the American judicial system to conflate sexuality and gender into “hetero-patriarchal categories and hierarchies”).

²⁰² Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 16–17 (2001).

²⁰³ Valdes, *supra* note 154, at 150–54.

²⁰⁴ Compare U.S. CONST. art. I, § 8, cl. 8 (granting Congress with power “[t]o 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;”) with *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

²⁰⁵ *Mitchell Bros. Film Grp., v. Cinema Adult Theatre*, 604 F.2d 852, 854–55 (5th Cir. 1979).

own set of principles that govern content-based analyses and should not be limited by the restrictive proscription of explicit adult content.²⁰⁶

There are important alterations to be made which will effectuate equitable copyright protection among the Playboy-esque content providers as well as the more “explicit” content providers. The superior method of achieving this end is to create language in the Copyright Act that addresses the issue directly. The Copyright Act should be amended to reflect the fact that the internet is a permanent change to the expressive media in our society as previously recommended. In order to address the inequities in the adult content industry specifically, the Act should clarify the proper reach of obscenity in evaluating copyright content.

The Supreme Court has attempted to recognize the value of American sexual expression,²⁰⁷ and Congress has separately recognized the importance in ensuring intellectual property protection in a digital world.²⁰⁸ However, neither has expressly addressed sexually expressive content in copyright law.

It is important to address sexually expressive content specifically because past practice demonstrates that legislative attempts to protect mainstream content will not be interpreted to include sexually expressive content.²⁰⁹ Or, in the event that it is interpreted to include sexually expressive content, precedent demonstrates judicial hesitance to protect anything beyond Playboy-esque content.²¹⁰ Therefore, these attempts fail to provide functional copyright protection for explicit adult content providers who already struggle with issues of censorship and basic inequality in accessing the courts.²¹¹ By explicitly recognizing adult content as legitimately copyrightable subject matter, it will more clearly identify the judicial biases that have applied an outmoded sexual standard in copyright law and illuminate policy conflicts in applications of the laws.

²⁰⁶ *See id.* (explaining that “Congress has seldom added restrictions on copyright based on the subject matter of the work, and in each instance has later removed the content restriction.”).

²⁰⁷ *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (recognizing that American adults have a right to indecent sexual content); *see also* Expert Report and Affidavit of Bruce McLaughlin, *High Five Investments, LLC, v. Floyd County*, No. 4:06-CV-00190, 2006 WL 3921135, at *3. (N.D. Ga. 2007) (“Interest in sexually explicit materials dates back centuries, at least to the ancient Mediterranean. However, for many years, selling sexually oriented materials was a ‘hazardous profession.’”); *Redrup v. N.Y.*, 386 U.S. 767, 770 (1967) (finding for the first time that sexually explicit speech was constitutionally protected).

²⁰⁸ S. REP. NO. 105–190, at 112 (1998); 17 U.S.C. §§ 101–810 (1994).

²⁰⁹ *Contrast Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010); *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332 (D.D.C. 2011); *with Boy Racer v. Does 2-71*, No. 5:11 Civ. 02833, 2011 WL 2784574, at *1 (N.D. Cal. July 13, 2011).

²¹⁰ *Contrast Playboy Enters., Inc. v. Starware Publ’g Corp.*, 900 F. Supp. 433, 438 (S.D. Fla. 1995) (granting summary judgment in favor of Playboy’s copyright infringement claim against a CD-ROM manufacturer who copied images onto discs without authorization); *Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1177–78 (N.D. Tex. 1997) (granting summary judgment and awarding \$5000 for each infringed copyright image); *Playboy Enters., Inc. v. Eddie Davidson*, No. 1:97-CV-2787, 1999 WL 246739, at *1 (N.D. Ohio Apr. 12, 1999) (entering default judgment in favor of Playboy); *with Hard Drive Prod., Inc., v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011).

²¹¹ *Yagielowicz, supra* note 99 (discussing the COICA, SOPA, PIPA, and their opponents fear of impending censorship); *Esguerra, supra* note 107 (citing the potential risks of COICA to free speech).

IV. CONCLUSION

The foregoing argument sets forth the bases for copyright protection of adult content under the 1976 Copyright Act,²¹² and it grounds itself in copyright policy.²¹³ It is important to offer protection for the creators of adult content to satisfy the public demand and prevent creative sexual content from becoming homogenized.²¹⁴ The 1976 Act, while recognizing various forms of media,²¹⁵ could not have anticipated the advent of the internet as a medium of Copyrighted works.²¹⁶

The capacity to infringe on this scale did not become a problem until recently, and adjudications have been inconsistent across the board.²¹⁷ While seeking to protect the legal rights of accused infringers, the balance has begun to veer towards inequity. Moreover, adjudicators have exhibited sexually repressive biases by ruling against adult content copyrights which contradicts the very core of copyright policy. In the age of cybersex and digital sexual gratification, the public demands variety in the adult content market. And this demand is for instant, digital accessibility. Luckily, adult media is valuable expression and copyright policy does not discriminate based on taste. The problem is that until explicit language clarifies applications of Copyright law regarding sexual adult media and provides remedies for online providers, judicial bias will keep copyright from being truly sexy..

²¹² 17 U.S.C. §§ 101–810 (2006).

²¹³ NIMMER, *supra* note 20, § 1.03; *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

²¹⁴ *Washingtonian Pub. Co., Inc., v. Pearson*, 306 U.S. 30, 36 (1939).

²¹⁵ 17 U.S.C. § 102.