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Pornography, Coercion, and Copyright Law 2.0

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Pornography, Coercion, and Copyright Law 2.0

*Ann Bartow**

ABSTRACT

The lack of regulation of the production of pornography in the United States leaves pornography performers exposed to substantial risks. Producers of pornography typically respond to attempts to regulate pornography as infringements upon free speech. At the same time, large corporations involved in the production and sale of pornography rely on copyright law's complex regulatory framework to protect their pornographic content from copying and unauthorized distribution. Web 2.0 also facilitates the production and distribution of pornography by individuals. These user-generators produce their own pornography, often looking to monetize their productions themselves via advertising revenues and subscription models. Much like their corporate counterparts, these user-generators may increasingly rely on copyright law to protect their creations in the future.

* Professor of Law, University of South Carolina School of Law. This article is dedicated to Casey Bartow-McKenney. Many thanks to Keith Aoki, Ed Baker, Vanessa Byars, Bridget Crawford, Steve Hetcher, Catharine MacKinnon, Ellen Podgor, Cheryl Preston, Sharon Sandeen, Gerald Torres, Rebecca Tushnet, Dr. Violet Socks, Diane Zimmerman, and everyone else who gave me helpful input with this article, even if they did not always agree with my views.

While legal scholars have addressed the copyright law's role in incentivizing the creation and consumption of creative content in general, its effect on the creation and consumption of pornography has largely been ignored. Since pornography performers are at risk of abuse by the creators of pornography—particularly those that are filmed or photographed unknowingly or those who have sexual images of themselves distributed against their wishes it is important consider what approaches there may be to reduce that risk, including the possibility of altering the copyright framework with respect to pornography.

Copyright laws do not provide ownership interests or control mechanisms to the subjects of pornographic material, and instead permits the creators to benefit at the expense of the subjects when their participation has not been consensual. Providing this type of control—namely by requiring the creator to show that the subjects' participation was voluntary as a condition of providing copyright protection—would help reduce the risks faced by pornography performers. Promulgating a moral approach to structuring copyright protections is already one goal that is animating calls for reform of the current system. Copyright law should link the ability to register and enforce copyrights on pornographic works to the creators' compliance with a regulatory scheme designed to promote the safety and well-being of pornographic performers by confirming their consent.

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[A]t some point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed.¹

Pornography is a dominant industrial force that has driven the evolution of the Internet. “The law of cyberspace is largely the law of

1. California v. Freeman, 488 U.S. 1311, 1313 (1989) (O'Connor, J.).

pornography.”² Statutes and court cases regarding content-based restrictions, copyrights, domain names, anonymity, and privacy have been rooted to some extent in purveyors, consumers, or putative opponents of pornography. Despite the rhetoric, there has never been a clear, focused attempt to preclude or remove pornography from the Internet, though both free speech activists and pornographers seem to find it useful to pretend that access to pornography is chronically imperiled.³ Internet censoring and filtering initiatives have been largely focused on preventing unauthorized downloads of copyrighted music and copyrighted mainstream audiovisual works, rather than on interfering with online pornography-related transactions.⁴

Estimates about the size of the pornography market vary wildly, but it is clear that commercially distributed pornography enriches many players in the entertainment and communications industries, from large corporations to individuals broadcasting out of their homes via simple web cams.⁵ Regardless of how it is made, the production and distribution of pornography is essentially unregulated, as long as all of the performers are eighteen years of age or older.⁶ In the emerging Internet environment sometimes described as Web 2.0, the ease with which pornography can be manufactured, disseminated, and consumed creates high demand levels which incentivize abuse and coercion in pornography production. Unless the performers are minors, however, the government appears to take little interest in ensuring their safety and well-being.⁷

2. I made this point previously in Ann Bartow, *Open Access, Law, Knowledge, Copyrights, Dominance and Subordination*, 10 LEWIS & CLARK L. REV. 869, 880 (2006).

3. The Communications Decency Act focused on content much broader than pornography, sought to keep content away from minors rather than all citizens, and was so poorly drafted that it is hard to believe any of the lawyers in Congress who voted for it actually believed it to be even remotely constitutional. It led, with suspicious haste and effectiveness, to statutory immunity for ISPs and censorware laws that made software companies very rich. See Communications Decency Act, 47 U.S.C. § 223 (Supp. II 1994) (partially repealed by *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)) (current version at 47 U.S.C. § 223 (2000)).

4. See generally Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER, SOC. POLY & L. 551 (2006) (discussing how copyright laws have been written and enforced to favor male groups and noting that copyright law traditionally has not focused on pornography); Ann Bartow, *Some Peer-to-Peer, Democratically and Voluntarily Produced Thoughts*, 5 J. TELECOMM. & HIGH TECH. L. 449 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)).

5. See, e.g., Dan Ackman, *How Big Is Porn?*, FORBES.COM, May 25, 2001, <http://www.forbes.com/2001/05/25/0524porn.html>.

6. See discussion of 18 U.S.C.S. § 2257 (LEXIS through Pub. L. No. 110-226), *infra* Part VI.

7. Amy Adler argues that child pornography laws as currently constituted are not effective at protecting children from sexual abuse and may actually exacerbate the

User-generated pornography is a widespread phenomenon on Web 2.0.⁸ Lacking a corporate presence or conventional for-profit structure, user-generated pornography is, like many attributes of the Internet, extremely difficult and problematic to monitor a priori. Some of the user-generating up-loaders, however, may assert proprietary intellectual property claims over their pornographic content. The protections of copyright law could be made contingent upon confirmation by the performers that the content was produced legally and without coercion. In this article, I suggest conditioning copyright registration and enforcement upon showings by producers not simply that performers are eighteen years or older, but also that their performances were consensual and recorded with the understanding that they would be widely distributed.

If this approach is implemented, part of the definition of consensuality would include an opportunity for performers to repudiate any contract that had been signed with respect to the performance and distribution of the content. In this way, people who appeared or performed in pornography as a result of coercion, who were under the influence of drugs or alcohol, or who simply changed their minds about appearing in pornography, would have an opportunity to exert some modest level of control over financial exploitation of their own images, which they currently lack. No one would be permitted to register a copyright, or bring any sort of enforcement action, without demonstrating that participants in the copyrighted work performed voluntarily and consented to the work's distribution.

I will use the following definition of pornography in this article: visual images of human beings engaged in sex acts, or in extremely sexualized poses. I know that this definition is imperfect and that I could easily spend the next thirty-eight pages critiquing it and considering other options. I am, after all, a lawyer. But it will do for now. The definition's two most important aspects are the exclusive focus on visual images and on living people. None of the concerns about the production of pornography raised in this article apply to written erotica or to computer-generated images or artist-generated drawings or graphics that do not rely on human models or performers.

Just like advertising, art, music, and other media forms, I believe that pornography surely has an impact upon those who view it.

problem. See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210 (2001).

8. For a general discussion of Web 2.0, see Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY, Sept. 30, 2005, <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html>.

I write this article as a feminist who believes that most mainstream pornography is bad for women in myriad ways. We live in an era in which young women are publicly lamenting the fact that pornography has ruined sex because men they meet evidence pornography-influenced behaviors, such as asking if they can ejaculate on a woman's face on a first date,⁹ referring to her genitals as "meat curtains," forcing their penises down a woman's throat, calling her "bitch," and saying "choke on it," mimicking behaviors seen in pornography.¹⁰ Attempts have been made to document (in more than anecdotal ways) and quantify the impact of derogatory pornography on sexually active women in the past and similar efforts are ongoing.¹¹ One commentator noted:

In mainstream pornography, women are graphically portrayed as greedily accepting and being penetrated simultaneously by triple penises, which are inserted into their vaginas, anuses and of course not forgetting their mouths! Women, according to the pornography industry, are sexually insatiable and penetration is the ultimate sexual gratification for women: the more orifices filled, the better.¹²

This observation is validated by numerous unsolicited e-mails received by this author.

An illustrative example was sent by a company called Gag Factor videos, intended to advertise its available pornography wares. The text of this e-mail was as follows:

9. Posting of Moe to Jezebel, <http://jezebel.com/gossip/how-porn-ruined-sex/how-about-you-dont-ask-to-come-on-my-face-on-the-first-date-333148.php> (Dec. 12, 2007, 16:30 EST); see Posting of Jessica to Feministing, <http://feministing.com/archives/008377.html> (Jan. 10, 2008, 09:16 EST), and accompanying comments; see also David Amsden, *Not Tonight, Honey. I'm Logging On*, N.Y. MAG., Oct. 13, 2003, available at http://nymag.com/nymetro/news/trends/n_9349/.

10. Posting of The Ghost of Violet to Reclusive Leftist, <http://www.reclusivelleftist.com/?p=783> (Jan. 14, 2008, 21:48 EST).

11. See, e.g., A Drug Called Pornography, <http://www.harmfuleffectsofpornography.com/> (last visited Mar. 17, 2008) (providing a description of Jonathan Schneider's documentary, *A Drug Called Pornography: Understanding the Harmful Effects of Pornography*, which documents the harmful effects of mass availability and consumption of pornography on Western culture); Vodpod: Analyzing the Pornographic Text: Charting and Mapping Pornography Through Content Analysis (The National Feminist Antipornography Conference, Wheelock College, Mar. 24, 2007), available at <http://mnvalleynow.vodpod.com/video/253520-robert-wosnitzer-ana-bridges-michelle-chang-panel-at-feminist-antiporn-conf> (detailing that Robert Wosnitzer, Ana Bridges, and Michelle Chang presented their research project analyzing violence and aggression in fifty pornographic films selected randomly from a pool of 275 widely distributed ones; they counted over 3,000 acts of verbal and physical aggression in these fifty films, and in almost every instance the recipient of the aggression—who was female ninety-four percent of the time—responded with neutrality or pleasure).

12. Jennifer Drew, *Sexual Healing?*, THE F-WORD, Jan. 1, 2007, http://www.thefword.org.uk/features/2007/10/sexual_healing_1.

ONE OF THE BIGGEST WHORES EVER! Bridgette Kerkove will probably go down in the annals of porn history as one of the most filthy, disgusting cumpigs to ever have lived. She'll stuff as many cocks in her mouth, ass, and cunt as is physically possible—and then some!¹³

Pornography like this may very well lead to sexual expectations by pornography-watching men that are detrimental to women who prefer not to behave as such pornographers “artistically” depict them.¹⁴ There are many studies of the effects of pornography that suggest its consumption is harmful.¹⁵ My focus here, however, is on the production of pornography, and how copyright law might be used to improve the situations of people who perform in pornography under coercion or duress, or who have their images distributed without their consent. I leave for another day my detailed observations and recommendations concerning the effects of pornography upon its consumers, and the people who have sex with them.

There are a multitude of law review articles debating copyright law reforms across a variety of media.¹⁶ Many legal scholars have

13. Myths of Porn, <http://www.oneangrygirl.net/myth2.html> (last visited Mar. 17, 2008).

14. For a discussion of the possibility of government regulation of “harm advocacy,” see S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159 (2000).

15. See, e.g., *Study Proves “Pornography is Harmful”*, LIFESITENEWS.COM, Mar. 12, 2002, <http://www.lifesitenews.com/ldn/2002/mar/02031203.html> (“A new study has found that viewing pornography is harmful to the viewer and society. In meta-analysis . . . researchers have found that using pornographic materials leads to several behavioral, psychological and social problems.”); see also PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING (David E. Guinn & Julie DiCaro eds., 2005) [hereinafter INTERNATIONAL SEX TRAFFICKING]; Tori DeAngelis, *Web Pornography’s Effect on Children*, MONITOR ON PSYCHOL., Nov. 10, 2007, available at <http://www.apa.org/monitor/nov07/webporn.html>; *Female Performers, Pornography, and the Sex Industry: Take a Closer Look!*, AGAINST PORNOGRAPHY, 2007, <https://againstpornography.org/takeacloserlook.html>; Ryan Singel, *Internet Porn: Worse Than Crack?*, WIRED.COM, NOV. 19, 2004, <http://www.wired.com/print/science/discoveries/news/2004/11/65772>; *Social and Behavioral Science Research on the Impact of Pornography*, AGAINST PORNOGRAPHY, 2007, <https://againstpornography.org/socialsciencestudies.html>; Anti-Pornography Activist Blog <http://antipornographyactivist.blogspot.com> (last visited Apr. 8, 2008); Captive Daughters, CD Salon <http://www.captivedaughters.org/cdsalon.htm> (last visited Apr. 8, 2008); MySpace.com, Stop Porn Culture Profile, <http://www.myspace.com/stoppornculture> (last visited Apr. 8, 2008); ProtectKids.com, Harms of Porn and Resources, <http://www.protectkids.com/effects/> (last visited Apr. 8, 2008); Psychological Aspects of Human Sexuality, Should Pornography Be Banned as a Threat to Women?, http://www.csun.edu/%7Epsy453?porno_y.htm (follow “Yes” or “No” hyperlink) (last visited Apr. 8, 2008); Reviews & Summaries of Studies: Pornography/Erotica, <http://libertus.net/censor/studies2.html> (last visited Apr. 8, 2008); WordPress.com, Blogs About: Evidence of Porns Harms, <http://wordpress.com/tag/evidence-of-porns-harms/> (last visited Apr. 8, 2008).

16. See, e.g., Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551 (2007) (criticizing the Copyright Act of 1976 for being too long, complex, and outdated, and offering suggestions for its reform in the digital age); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004) (arguing that the United

focused specifically on the intersection of copyright laws and music, movies, dance, computer software, or architectural works, but little scholarly examination of the connection between copyright and pornography has been made.¹⁷ I think this is at least in part because law professors are afraid that if they are critical of any aspect of pornography, they will be accused of being prudes, censors, or “in bed with the religious right.”¹⁸ Intellectual property law scholars have had many interesting things to say about the commoditization of information that could be productively applied to pornography. Some have even focused on human rights issues.¹⁹ I hope that this article

States’ transition from a formalized process of copyright to an unconditional process has had harmful effects and suggesting the reintroduction of formalities in the copyright system); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537 (2007) (arguing that the Copyright Act of 1976 needs to be reformed to reflect the economic, technological, and social changes that have occurred since its passage, focusing particularly on the gap between copyright law and copyright norms in today’s society); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761 (2006) (proposing a series of copyright reforms that would scale back existing copyright laws, particularly when it comes to digitized archiving, and would “pave the way for digital library projects like Project Gutenberg, the Internet Archive, and Google Print”).

17. *But see* Note, *Can Intellectual Property Law Regulate Behavior? A “Modest Proposal” for Weakening Unclean Hands*, 113 HARV. L. REV. 1503 (2000) (examining how current intellectual property laws raise concern about compliance with public policies and analyzing certain aspects of pornography within the copyright context); The Patry Copyright Blog, <http://williampatry.blogspot.com/2005/08/should-obscene-works-be-protected.html> (Aug. 31, 2005, 13:19 EST) (discussing whether obscene works, including pornography, should receive copyright protection).

18. *See* Mass Media: Pornography—the Campaign, <http://www.cultsock.ndirect.co.uk/MUHome/cshtml/media/porno3.html> (last visited Mar. 18, 2008); Christopher M. Finan, *Catherine A. MacKinnon: The Rise of a Feminist Censor, 1983-1993*, <http://www.mediacoalition.org/reports/mackinnon.html>; *see also* John Dentinger, *Is Censorship a Civil Right?*, <http://www.zetetics.com/gadfly/censor1.htm>.

19. *See, e.g.*, Graeme W. Austin & Amy G. Zavidow, Essay, *Copyright Law Reform Through a Human Rights Lens*, in INTELL. PROP. & HUM. RTS. (Paul Torremans ed., forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077187 (arguing that “creators’ human rights should inform analysis of proposals for reforming domestic copyright law”); Margaret Chon, *Intellectual Property “From Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007) (proposing an approach to intellectual property linked to distributive justice and discussing the application of a substantive equality principle to educational exceptions to copyright in a global framework); Rochelle C. Dreyfuss, *Patents and Human Rights: Where Is the Paradox?*, MOLENGRAFICA SERIES (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929498 (arguing that intellectual property rights should not be characterized as human rights and pointing out the negative consequences that result from doing so); Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT’L L.J. 1 (2008) (providing a comprehensive analysis of the intellectual property case law of the European Court of Human Rights); Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW & CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005) (examining the concept of intellectual property rights as human rights, particularly with

reduces existing fear of the topic, at least a little, and opens up the terrain for future conversations.

I. THE CORPORATIZATION OF PORNOGRAPHY

Pornography has become corporatized in two important ways. First, entities that focus primarily or even exclusively on producing pornography are accorded mainstream acceptance and respectability. Playboy Inc., for example, markets its brand as one of wholesome, patriotic entertainment in contexts like the television show *The Girls Next Door*, appearing on the E! Entertainment Television, Inc. network.²⁰ An associated online store, The Bunny Shop, offers clothing, jewelry, and workout videos.²¹ Similarly, Playboy's eponymous magazine may be fairly tame in comparison to many competing "lad's mags."²² However, the Playboy corporation also produces and distributes large quantities of hardcore pornography chock full of violent and degrading acts, but they do so under subsidiary trademarks, because, according to Playboy CEO Christy Hefner, "the racier fare 'is a complementary and separate business from the Playboy business'—one in which the Playboy logo and brand" are obfuscated.²³ Playboy also owns hardcore pornography cable channels such as The Hot Network, Vivid TV, and The Hot Zone.²⁴ The movies on these channels are advertised with descriptions like: "a comical adventure with 10 of the nastiest sex scenes ever filmed!"²⁵ It

respect to cultural integrity and self-determination); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007) (discussing the human rights attributes of intellectual property); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979193 (examining intellectual property rights within a human rights framework).

20. See *The Girls Next Door*, <http://www.tv.com/the-girls-next-door/show/39406/summary.html> (last visited Mar. 17, 2008) (providing a description of the show).

21. The Bunny Shop Catalog, <http://www.shopthebunny.com> (search for "girls next door").

22. See, e.g., HUSTLER; BUTTMAN; JUGGS; PENTHOUSE; SCREW.

23. Bernard Weinraub, *Reviving an Aging Playboy Is a Father-Daughter Project*, N.Y. TIMES, Feb. 4, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9E05E2DF133DF937A35751C0A9649C8B63&sec=&spon=&pagewanted=all>.

24. Paul Keegan, *Prime-Time Borrowing Tactics from the Old Hollywood Studios, Vivid Entertainment Has Ditched the Plain Brown Wrapper and Is Taking the Multibillion-Dollar Sex-film Industry Mainstream*, BUSINESS 2.0, June 1, 2003, available at http://money.cnn.com/magazines/business2/business2_archive/2003/06/01/343376/index.htm; R. Thomas Umstead, *Playboy Buys Out Pair of Rival Nets*, MULTICHANNEL NEWS, July 9, 2001, available at <http://www.multichannel.com/article/CA91592.html>.

25. Keegan, *supra* note 24.

is through the production and distribution of hardcore pornography that Playboy generates the majority of its revenue.²⁶

The second corporatizing phenomenon is that large mainstream corporations have begun earning enormous revenue streams from the production and distribution of pornography. *The New York Times* reported in 2000: "The General Motors Corporation, the world's largest company, now sells more graphic sex films every year than does Larry Flynt, owner of the Hustler empire."²⁷ Search engines such as Yahoo! and Google derive ad revenues through their copious advertising of pornography. Pornography producers broadcast "hard-core movies to TV screens across America through hotel chains like Marriott and Hilton and satellite and cable operators Comcast, DirecTV, and AOL Time Warner."²⁸ As a review of a Frontline documentary about pornography that aired on PBS noted:

The corporate giant AT&T is reaping huge financial benefits through ownership of its cable network AT&T Broadband, which shows explicit porn on channels such as the Hot Network. General Motors, which owns Direct-TV, receives big profits every time an adult movie is purchased by viewers across America. Now, it seems, there are infinitely more ways to sell a dirty picture, and pornography has become associated with some big American brand names. Hotel chains are part of the association, too. As an amenity in large hotel chains, pay-per-view adult films are made available by one of two major distribution companies—Lodgenet or On-Command Video. Even internet [sic] companies such as Yahoo!, a search engine used in millions of American households, make money by selling ads and links to porn websites. Both sides of the business equation are satisfied: the mainstream companies receive large profits and the porn industry gets the stamp of approval by legitimate businesses.²⁹

This corporatization of pornography insures pornography a visible, stable, and lasting presence on Web 2.0.³⁰

As I argued in a previous article,³¹ social conservatives like to pretend they energetically oppose pornography, while libertarian liberals like to pretend that pornography is under relentless attack by

26. See *infra* notes 38-39.

27. Timothy Egan, *Erotica Inc.—A Special Report; Technology Sent Wall Street into Market for Pornography*, N.Y. TIMES, Oct. 23, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=9B01EEDA1631F930A15753C1A9669C8B63&sec=&spon=&pagewanted=print>.

28. Keegan, *supra* note 24.

29. Radical Left, http://www.radicalleft.net/blog/_archives/2007/6/12/3012544.html (June 12, 2007, 14:40 CEST) (discussing *Frontline: American Porn* (PBS television broadcast Feb. 7, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/view/>).

30. See, e.g., Gail Dines, *Dirty Business: Playboy Magazine and the Mainstreaming of Pornography*, in GAIL DINES, ROBERT JENSEN & ANN RUSSO, *PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY* 37 (Routledge 1998) (providing a detailed description of the political economy of pornography).

31. Bartow, *supra* note 2, at 880-81.

the government. Neither is true, but the respective heuristics are so useful to partisans that no one wants to pay attention to what is actually occurring,³² which is that pornography has become socially normalized so effectively that the industry and its output are arguably less subject to scrutiny and criticism than McDonald's commercials.³³ The Playboy corporation adorns household goods³⁴ and children's toys³⁵ with its bunny logo, and observers often talk about how mild and innocent the naked photos in the company's magazine are,³⁶ willfully ignoring³⁷ the fact that one of Playboy's main sources of revenue³⁸ is from the production and distribution of hardcore pornography.³⁹ Playboy functions much as any other entertainment conglomerate, such as Disney.⁴⁰

Even pornography sold via late night infomercials is treated as acceptably mainstream by corporate actors. In 2002, pornographer Joe Francis signed a deal to expand his *Girls Gone Wild* pornography

32. See Garance Franke-Ruta, Op-Ed., *Age of Innocence Revisited: A Lot of Those Girls "Gone Wild" Are Disturbingly Young*, WALL ST. J., May 4, 2007, available at <http://opinionjournal.com/taste/?id=110010027> (arguing that soft-core porn has become socially acceptable and that U.S. society has come to accept pornography, including its "barely legal" category).

33. See *Food Tastes Better with McDonald's Logo, Kids Say*, FORBES.COM, Aug. 6, 2007, <http://www.forbes.com/forbeslife/health/feeds/hscout/2007/08/06/hscout607093.html> (describing a study showing that children's food preferences are significantly influenced by advertising and criticizing McDonald's for spending vast amounts of money to advertise "foods of poor nutritional quality to children").

34. Posting of Ann Bartow to Feminist Law Professors, <http://feministlawprofs.law.sc.edu/?p=1597> (Mar. 14, 2007, 08:16 EST).

35. Posting of Ann Bartow to Feminist Law Professors, <http://feministlawprofs.law.sc.edu/?p=493> (Apr. 29, 2006, 14:21 EST).

36. See Posting of Ren Reynolds to Terra Nova, http://terranova.blogs.com/terra_nova/2007/07/legs-wide-shut.html (July 24, 2007) (stating that *Playboy* is not about sex and is "acceptably naughty").

37. See, e.g., Ackman, *supra* note 5 (referring to *Playboy* as a men's magazine and failing to mention the company's other sources of revenue).

38. See *Playboy Company Fatter While Magazine Falts*, THE WINDSOR STAR (Windsor, Ont.), Aug. 8, 2007, available at <http://www.canada.com/windsorstar/news/business/story.html?id=f8c5904a-e45c-4f32-8869-53edbd44869a> (noting that Playboy Enterprises offered new adult content via video-on-demand and posted a profit of \$1.9 million, despite a 5.9% decrease in magazine sales).

39. See William Spain, *Playboy Goes for More Hardcore with New Acquisition*, MARKETWATCH, June 22, 2006, available at <http://www.marketwatch.com/News/Story/Story.aspx?guid=%7BA451B8E7-39A5-4120-83C9-DCD554D61B27%7D&siteid=google> (noting that Playboy has aggressively expanded into television and the Internet in the past ten years, and stating that its acquisition of Club Jenna would allow Playboy to produce and distribute its own hardcore adult entertainment).

40. See Walt Disney Co., Annual Report (Form 10-K), at 1-8 (Dec. 19, 2005) (describing the various aspects and subsidiaries of the Walt Disney Company, including operations in the markets of filmed entertainment, theme parks and resorts, and consumer products).

franchise in conjunction with the Mandalay production company run by Peter Guber.⁴¹ “Francis also signed a *Girls Gone Wild* feature film deal with MGM” at the initiative of Chris McGurk, then the vice chairman and chief operating officer of MGM.⁴²

The New York Times recently published what can fairly be described as a love letter to “arguably the country’s most successful fetish porn company, Kink.com.”⁴³ The author described the company’s employees as educated and professional, writing:

It has long been noted that the San Fernando Valley is increasingly populated by strait-laced corporate managers and not by the oily, medallion-wearing men we once assumed. But succeeding on the Web, or simply surviving its escalating demands, has required more sophisticated entrepreneurial types. With the Internet pushing porn discreetly into the homes of conventional consumers, making it more a part of everyday life and less seedy-seeming, the industry has been better able than ever to attract that sort of employee. That is, as pornography becomes a more mainstream product, it becomes an equally mainstream career. If anything, Kink may be an exaggerated example of just how ordinary pornographers will get, despite the wince-inducing grisliness of its content, which even by porn-industry standards is morbidly eccentric.⁴⁴

Pornography is treated like any other creative content. Mainstream media entities do not appear to fear consumer criticism, much less censorship efforts, for distributing and profiting from pornography.

Money talks, and it also silences, and the wealth stream that pornography now generates for large corporations arguably disincline politicians to regulate it in any specialized way.⁴⁵ Quite the contrary, in fact, as pornographic content is increasingly treated like any other form of creative output. Among other many far-reaching consequences of the corporatization of pornography, pornographers now unabashedly assert intellectual property rights in pornography. Companies such as Playboy, Penthouse, Hustler, *Girls Gone Wild*, and Perfect 10 use the legal system aggressively to protect copyrights in pornographic content.⁴⁶ Ironically, given his public fetishization of the

41. Garance Franke-Ruta, *Porn Again: How the New Pornographers Are Exploiting Young Women, and Why Liberals Should Care*, CAMPUS PROGRESS, May 15, 2007, <http://campusprogress.org/features/1559/porn-again>.

42. *Id.*

43. Jon Mooallem, *A Disciplined Business*, N.Y. TIMES MAG., Apr. 29, 2007, available at <http://www.nytimes.com/2007/04/29/magazine/29kink.t.html?ref=magazine>.

44. *Id.*

45. See *supra* notes 27-29 and accompanying text.

46. See Eddie Adams, *Four Arrested for Pirated Porn DVDs in Malaysia*, AVN MEDIA NETWORK, Nov. 13, 2007, <http://www.avn.com/index.cfm?objectID=39F7612B-E219-B60C-9460388D51EF71FD> (noting that the majority of the “pirated DVDs found in Malaysia’s major cities originated in the United States and Europe”). See generally *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Perfect 10 v. Google, Inc.*, 416 F.

First Amendment,⁴⁷ Larry Flynt once even sued Jerry Falwell and the Moral Majority for copyright infringement when Falwell mailed copies of an attack on Falwell published by *Hustler* to his followers as part of a fund-raising effort.⁴⁸

Large corporations such as General Motors can be expected to utilize the legal system for copyright issues related to pornography-driven subsidiaries just as they do for other business ventures. Companies that are primarily devoted to pornography will continue to enforce their copyrights through the courts as well. For this reason, making enforceable copyrights contingent upon compliance with rules to protect performers, as is recommended below, could be effective with respect to corporatized pornography, as most corporations will prefer not to foreclose copyright enforcement options. Withholding copyright enforceability could be a meaningful sanction that would incentivize compliance with a proof-of-consent-based regulatory regime.

For some genres of pornography, however, the importance of copyright protections is less clear, as it can be somewhat difficult to discern how the copyright holder gets paid, or whether he or she is likely to assert proprietary rights formally through the legal system. Consider this excerpt of an account of the production and distribution of one instance of “gonzo” pornography:⁴⁹

On the video it is clear that Lori is not happy. Entner berates her until she calls him an asshole. At one point, he directs Lori to bark like a dog, and later, with Donnie in her mouth, to squeal like a pig. Lori, afraid she would end up doing all this for free, grudgingly agrees. Donnie chuckles and trades high fives with Sanchez.

Supp. 2d 828 (C.D. Cal. 2006); *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

47. See Posting of Jackson Katz to The Huffington Post, http://www.huffingtonpost.com/jackson-katz/dennis-kucinich-endorses_b_77226.html (Dec. 17, 2007, 21:50 EST) (arguing that Larry Flynt, through the publication of *Hustler* magazine, promotes sexism, racism, and misogyny, and suggesting that Flynt has used the First Amendment as protection for his commodification and exploitation of women’s bodies).

48. See *Hustler Mag. v. Falwell*, 485 U.S. 46 (1988).

49. See Martin Amis, *A Rough Trade*, *GUARDIAN* (London), Mar. 17, 2001, available at <http://www.guardian.co.uk/Archive/Article/0,4273,4153718,00.html> (stating that gonzo pornography “shows you people fucking without concerning itself with why they’re fucking,” and noting that gonzo pornography is extremely dirty, “way out there,” and becoming violent); see also Nikko Snyder, *Strange Bedfellows: Can Feminism and Porn Coexist*, *BITCH MAG.*, available at <http://www.alternet.org/reproductivejustice/81655/?page=entire> (“‘Gonzo’ technically refers to a style of porn that places the camera directly into the scene, but in recent years the term has become shorthand for films that depict women being choked, insulted, spit on, and worse.”).

She was encouraged, however, by the thought that in a couple of days she would receive her share of the \$1200 she and Donnie had just earned and this crisis would be behind her. The sad truth is that in the world of reality porn the only sure thing is that you are going to get fucked. Poor Lori found this out the hard way. In a matter of hours, her images were available to anybody with Internet access and a credit card.

For Internet porn worshipers, Wednesdays are the Sabbath. That is the day Bangbus.com posts the new videos for the week. When co-workers and patrons from Lori's restaurant job downloaded her Bangbus episode, they instantly recognized her.

Not only was her image the Bangbus feature of the week, but, by the next day, people had already started to trade her video file, much as music lovers do with MP3s, on peer-to-peer file sharing networks such as Kazaa and WinMX. Once it was posted to one of these networks, Lori's video file was renamed with her true identity and workplace. After that, it was only a matter of time before her brother in upstate New York, an avid WinMx user and Bangbus fan, would come across his little sister's fifteen minutes of shame.

What's more, Ox Ideas wrote out a check to Donnie for the entire \$1200. Unbeknownst to Lori, Donnie was himself in serious debt. So it isn't surprising that he would take advantage of the situation and exploit his former lover. He had already pimped her out and now it was time to collect. He cashed the check and vanished.⁵⁰

If Bangbus uses a subscription model, and the pornographic content it releases undergoes waves of unrestricted secondary distribution after its initial release, traditional copyright protections may not be important to the enterprise. Even if copyright laws were reconfigured to give Lori some legal rights with respect to the distribution of her image, it is not clear how she would go about enforcing them, as the "notice and takedown" approach facilitated by the DMCA⁵¹ is unlikely to be effective if distribution patterns are rapid, viral, informal, and chaotic. However, if in the scenario described above she had a copyright-law-provided ability to repudiate her contract with Bangbus because she changed her mind about having her performance commercially exploited after it was recorded under conditions different than what she was lead to expect, she might have had some ability to alter the debilitating course of events. The corporatization of pornography that has so effectively embedded it in the culture can be seen as a positive development in the sense that the behavior of

50. Kris Conesa, *The Ride to Perdition: Miami-based Bangbus.com Is a Leading Purveyor of Internet Porn, but at What Cost to Naïve Models?*, MIAMI NEW TIMES, Oct. 14, 2004, available at <http://www.miaminewtimes.com/2004-10-14/news/the-ride-to-perdition/full>.

51. See 17 U.S.C. § 512(c)(3) (2000) (describing the notice and takedown procedure required by the Digital Millennium Copyright Act of 1998, under which a copyright owner must submit a written communication, including a list of specified elements, to the designated agent of a service provider).

corporations might be easier to track and regulate than the actions of independent pornpreneurs.

II. USER-GENERATED PORNOGRAPHY

Like pornography itself, the concept of user-generated pornographic content can be difficult to define clearly; for the purposes of this article, it is pornography that is not distributed within traditional frameworks of mainstream commerce with “for-profit” motivations. Pornography can be commercially exploited via purchased or rented videotapes and DVDs, streaming video that uses either pay-per-view or subscription models and utilizes either television-related or Internet-based distribution technologies. It is certainly possible that noncommercial distribution utilizes some of the same “real space” channels. However, for the purposes of this article, user-generated pornography is that which is non-commercially (where no revenues are collected, a.k.a. “gifted”) or quasi-commercially (using an advertising model or quid pro quo exchange paradigm) distributed over the Internet. “Users” are assumed to both upload and download pornography, uploading their own creations and downloading the content made available by other users. Some user-created content may make unauthorized uses of copyrighted pornographic materials. Other user-generated works may be wholly original. One would expect the user-generated content to be creatively inspired by commercially produced and distributed pornography. Yet, how copyright doctrines, such as “substantial similarity,” might be applied to discern infringement of pornographic works where sex acts are replicated, but little in the way of plot or dialogue is appropriated, is uncertain.⁵² Courts have never addressed questions about the scope of protectable copyrighted expression in pornographic audiovisual works.

User-generated pornography is present on the Internet in substantial quantities. A recent article in *The Economist* posited that online sex was migrating from commercial pornography sites to online games and social networking sites.⁵³ Both online game-based pornography and that which is distributed via MySpace.com, Facebook, and the like⁵⁴ are apt to be predominantly user generated,

52. See generally Ann Bartow, *Copyrights and Creative Copying*, 1 U. OTTAWA L. & TECH. J. 75 (2004) (examining the scope of the substantial similarity doctrine in copyright law).

53. *Devices and Desires: Is Lascivious Online Content, Traditionally on Top, Losing its Lustre?*, ECONOMIST, Apr. 21, 2007, available at 2007 WLNR 7660541.

54. *Social Network Lets Members Pick Top Nudes*, WFTV.COM, Mar. 13, 2008, <http://www.wftv.com/technology/15584474/detail.html>.

given the policing that corporate pornographers do of these venues for infringing uses of pornography in which they hold the copyrights.⁵⁵ The unauthorized posting of clips of commercially distributed pornography is likely to draw notice and takedown requests from the copyright holder.⁵⁶ Only independently created, original user-generated pornography would survive the scrutiny of corporate pornography vendors.

There are undoubtedly a wide variety of reasons that amateur pornographers upload, post, and exchange pornography of their own making non-commercially. In some cases, the act may be an exercise of pure self-expression.⁵⁷ In others, it is fairly transparently an effort to disgrace or damage the subject of the pornography.⁵⁸ “Revenge” pornography appears to be a widespread phenomenon, very popular with pornography viewers attracted by the eroticization of acts of targeted personal humiliation.

In still other situations, uploading user-generated pornography is part of a quid pro quo accord.⁵⁹ One relatively formalized exchange that attracted some press attention demonstrated a close nexus between pornography and violence, and an extensive overlap in the

55. See *infra* note 163 and accompanying text.

56. See generally U.S. COPYRIGHT OFFICE, SUMMARY ON THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (1998), available at <http://www.copyright.gov/legislation/dmca.pdf> (discussing the notice and takedown process).

57. See KATRIEN JACOBS, NETPORN: DIY WEB CULTURE AND SEXUAL POLITICS 11-41 (2007).

58. See, e.g., Greg Smith, *Norwich Man Guilty of Letting Friend Tape Sex Act*, NORWICH BULL., Jan. 17, 2008, available at <http://www.norwichbulletin.com/news/x1435952185> (describing a case in which man who allowed his friend to tape him having sex with his girlfriend was convicted of being an accessory to voyeurism); Edmund Tadros, *Jealous Man Emails Lover's Nude Photos*, SYDNEY MORNING HERALD, Feb. 28, 2008, available at <http://www.smh.com.au/articles/2008/02/28/1203788481669.html>; *Revenge Pics of Your Ex*, <http://www.free-revenge-ideas.com/Revenge-Pics-Of-Your-Ex.html> (last visited Mar. 18, 2008) (describing the site as a place to send photos and stories of your ex and displaying both pornographic and non-pornographic “revenge” pictures); *Submit Ex Girlfriend Pictures for Revenge!*, <http://exgirlfriend-pictures.com/index.php> (last visited Mar. 18, 2008) (displaying pornographic pictures purported to be of former girlfriends and wives and encouraging visitors to upload compromising pictures of their ex-girlfriends to the site); *Watchersweb*, <http://www.watchersweb.com/> (last visited Mar. 18, 2008) (claiming to be a pornographic site containing, among other things, amateur and voyeur sex pictures of wives and girlfriends); *How to Publish Your Own Sex Tape—3 Easy Rules*, <http://valleywag.com/358993> (“If you’re sharing with your sweetie, change your passwords—email, your secret blog, your swinger profile—before you get anywhere near a breakup. The XXX ex video is an all-too-popular genre. Always keep in mind: Porn is forever. Your performance will probably outlast your relationship. If your screencaps become a 4chan meme, there’ll be nothing you can do. It’s okay if you and your costar don’t want to share with anyone else. In an age of overexposure, isn’t keeping something private the dirtiest thing you can do?”).

59. See JACOBS, *supra* note 57, at 45-78.

audience for both violent and pornographic imagery.⁶⁰ Described as a “snuff-for-porn arrangement with American troops,”⁶¹ the pact permitted American soldiers stationed in Iraq and Afghanistan to earn access to a pornographic website by providing photographs of dead bodies they have taken, many of them horribly mutilated or blown to pieces. A newspaper reporter described the bargain as follows:

If you want to see the true face of war, go to the amateur porn Web site NowThatsFuckedUp.com. For almost a year, American soldiers stationed in Iraq and Afghanistan have been taking photographs of dead bodies, many of them horribly mutilated or blown to pieces, and sending them to Web site administrator Chris Wilson. In return for permission to post these images, Wilson gives the soldiers free access to his site. American soldiers have been using the pictures of disfigured Iraqi corpses as currency to buy pornography. . . .⁶²

Wilson, a 27-year-old Web entrepreneur living in Florida, created the site a year ago, asked fans to contribute pictures of their wives and girlfriends, and posted footage and photographs bearing titles such as “wife working cock” and “ass fucking my wife on the stairs.” The site was a big hit with soldiers stationed overseas; about a third of his customers, Wilson estimates, or more than fifty thousand people, work in the military. Wilson says soldiers began e-mailing him, thanking him for keeping up their morale and “bringing a little piece of the States to them.” But other soldiers complained that they had problems buying memberships to his service. “They wanted to join the site, the amateur wife and girlfriend site,” he says. “But they couldn’t, because the addresses associated with their credit cards were Quackistan or something; they were in such a high-risk country that the credit card companies wouldn’t approve the purchase.”

That was when Wilson hit upon the idea of offering free memberships to soldiers. All they had to do was send a picture of life in Iraq or Afghanistan, and they’d get all the free porn they wanted.⁶³

Wilson was arrested on obscenity charges by state officials, though some observers believe this was an effort by the government to stem the flow of graphic photographs of dead Iraqis uploaded by soldiers, rather than a reaction to the sexual content on the site.⁶⁴ However,

60. See *id.* at 122-25; Joanna Bourke, *Torture as Pornography*, GUARDIAN (London), May 7, 2004, available at <http://www.guardian.co.uk/women/story/0,3604,1211261,00.html> (discussing pictures showing American troops degrading and humiliating Iraqi detainees, and likening this to sadomasochistic pornography, stating “[t]his festival of violence is highly pornographic”).

61. Chris Thompson, *War Pornography*, EAST BAY EXPRESS (Emeryville, Cal.), Sept. 21, 2005, available at http://www.eastbayexpress.com/gyrobase/war_pornography/Content?oid=289854&showFullText=true.

62. *Id.*

63. *Id.*

64. Brief for First Amendment Lawyers Ass’n, Free Speech Coalition and the American Civil Liberties Union of Florida as Amicus Curiae Supporting Petitioner, *Wilson v. Judd*, 917 So. 2d 876 (Fla. Dist. Ct. App. 2005) (unpublished table decision) (2D-05-6073), available at http://www.aclufl.org/issues/free_speech/WilsonAmicusBrief.pdf; Jeffrey

none of those commentators appear to have made any comprehensive review of the pornography on the site to evaluate the legitimacy of the obscenity charges. It is possible that the “obscenities” supporting the charges were related to violence rather than sexual activity. Wilson eventually pled guilty to some of the criminal charges and took down the site as a condition of his probation.⁶⁵

Other forms of user-generated pornography involve taking images from one context and placing them in another. Consider the example of Allison Stokke.⁶⁶ Allison Stokke is a high school pole-vaulter whose images in her tracksuit have been widely distributed over the Internet in highly sexualized contexts. Her track uniform can fairly be described as body conscious, but it is one that her high school apparently requires that she wear to show her team affiliation, as with every other female member of the track team. The boys’ uniforms are markedly (And inexplicably? No, not really.) less skimpy and revealing. In any event, Stokke is an attractive young woman with decided athletic talent, and in consequence drew attention that resulted in her image becoming masturbatory blog fodder, without her consent. As one feminist blogger explained it:

The other day WaPo reported that some knob sports blogger, an excrescence who by definition exalts the basest impulses of his species, had posted a photograph of an obscure record-breaking high school pole vaulter. The photo showed the woman at a meet, adjusting her ponytail. The knob sports blogger titled the blog entry “Pole vaulting is sexy, barely legal.” He is a *dude*, so naturally he felt inclined to add “Hubba hubba and other grunting sounds” to his jokey ‘analysis’ of her athleticism.

Because it is the prime directive of dudes to circlejerk all over the internet, downloading images of the pole vaulter soon became pretty much the only purpose

C. Billman, *The Most Depraved Site on the Internet*, ORLANDO WKLY., Oct. 6, 2005, available at <http://www.orlandoweekly.com/features/story.asp?id=8363>; *Free Speech Groups Demand Release of Florida Man Jailed Over a Web Site*, AMERICAN CIVIL LIBERTIES UNION, Dec. 22, 2005, <http://www.aclu.org/freespeech/internet/23266prs20051222.html>; David Kushner, *Casualty of Porn: Is Chris Wilson Facing Jail Over Amateur Smut or Dead Iraqis*, ROLLING STONE, Dec. 5, 2005, available at http://www.rollingstone.com/news/story/8878187/casualty_of_porn; Michael Winkler, *Iraq Pictures Spark a War Over Free Speech*, AGE (Austl.), Nov. 28, 2005, available at <http://www.theage.com.au/news/business/iraq-pictures-spark-a-war-over-free-speech/2005/11/27/1133026332300.html?page=fullpage#contentSwap2>; George Zornick, *The Porn of War*, NATION, Sept. 22, 2005, http://www.thenation.com/doc/20051010/the_porn_of_war; Posting of gonz3000 to Miami Independent Media Center, <http://miami.indymedia.org/news/2006/01/3336.php> (Jan. 6, 2006, 10:27 EST); Posting of Bill Rufty to Polk Politics, <http://politics.theledger.com/default.asp?item=590728> (May 4, 2007, 08:47 EST).

65. Bob Whitby, *Happytown*, ORLANDO WKLY., Jan. 19, 2006, available at <http://orlandoweekly.com/columns/story.asp?id=10382>.

66. See Posting of Twisty Faster to I Blame the Patriarchy, <http://blog.iblamethepatriarchy.com/2007/06/02/i-puke-on-dude-nation/> (June 2, 2007).

to which they put their computers. Eighteen-year-old Allison Stokke, whose crime was pole vaulting while female, had achieved internet pornaliciousness.

Which freaked Stokke out.⁶⁷

Stokke's photographs would not constitute pornography by most definitions; certainly not the one offered at the beginning of this article.⁶⁸ In addition to raising questions about why Stokke's school requires female athletes to compete in uniforms that are far more body conscious than those provided for male athletes competing in the very same events, the episode presents a classic case of what is sometimes called "pornification."

Young female athletes are not the only ones subject to this sort of involuntary sexualizing treatment. Male, teenaged members of one school swim team were reportedly chagrined to learn that their photographs were being displayed on pornographic websites.⁶⁹ Under current laws (or lack thereof), only the copyright holders of the pictures have any clear legal right to object to take action over this use of the photos, and they have no obligation to consider the feelings of their subjects when they contemplate whether to do so. Web 2.0 facilitates the internet-pornification of anyone who finds herself in front of a camera, voluntarily or not, and privacy and defamation laws do not offer much in the way of protection or recourse.⁷⁰

This point was brought home to this author in a very personal way quite recently. A student informed me that nude photographs of her, taken without her knowledge (probably by a cellular phone) while she was changing into a swimsuit in a university locker room, are in Internet circulation. The cost and logistics of bringing an invasion of privacy claim to address this issue are prohibitive. The legal system, as she experiences it, offers her nothing.

67. Posting of Twisty Faster to I Blame the Patriarchy, *supra* note 66 (internal citations omitted).

68. As stated in the introduction, pornography is defined in this article as visual images of human beings engaged in sex acts, or in extremely sexualized poses

69. *Teen Swimmers' Photos Put on Gay Sites*, ABC NEWS, Jan. 20, 2008, <http://abcnews.go.com/US/wireStory?id=4162095>.

70. See generally, e.g., *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1194 (9th Cir. 1989) (holding that *Hustler's* features mentioning Dworkin's name in a derogatory fashion were "privileged opinion," and thus did not constitute libel or defamation because they could not be "reasonably understood as statements of fact"); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP RUMOR, AND PRIVACY ON THE INTERNET* (Yale Univ. Press 2007), available at <http://docs.law.gwu.edu/facweb/dsolove/Future-of-Reputation/> (discussing the conflict between free speech and privacy on the Internet, examining how people's private lives are being exposed online without legal recourse, and suggesting ways for the law to address these problems).

III. THE VULNERABILITY OF PORNOGRAPHY PERFORMERS AGED EIGHTEEN AND OVER

The fact that the government has essentially stopped prosecuting pornography on the basis of “obscenity”⁷¹ is arguably good news for adult pornography performers who appear in pornography voluntarily and enthusiastically, assuming such a class of people exists. However, the government’s disinterest increases the vulnerability of people who are coerced into performing in pornography, the majority of whom are likely to be female. The U.S. Department of State’s June 2007 “Trafficking in Persons” Report⁷² notes that trafficked women and children are the primary victims of commercial sexual exploitation stating:

Annually, according to U.S. Government-sponsored research completed in 2006, approximately 800,000 people are trafficked across national borders, which does not include millions trafficked within their own countries. Approximately 80 percent of transnational victims are women and girls and up to 50 percent are minors. *The majority of transnational victims are females trafficked into commercial sexual exploitation.* These numbers do not include millions of female and male victims around the world who are trafficked within their own national borders—the majority for forced or bonded labor.⁷³

The Report emphasizes the commercial sexual exploitation, including coerced pornography, that human trafficking makes possible in passages that report:

Demand for cheap labor and for prostituted women, girls, and boys is the primary “pull” factor. Customers for the products of forced labor are often completely ignorant of their involvement with slavery. Sex buyers are far more complicit in the victimization of sex trafficking victims, and thus are logical targets for education on the link between prostitution and human trafficking. Sex tourism and child pornography have become worldwide industries, facilitated by

71. See *infra* notes 88-96 and accompanying text; see also *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003) (aiming to protect children from obscenities in public libraries by holding that the Children’s Internet Protection Act, which conditioned federal subsidies for public libraries on their use of Internet filters that would block obscene or pornographic images and prevent minors from accessing material harmful to them, did not violate the First Amendment’s free speech clause and did not impose an unconstitutional condition on public libraries); *Feature on Reno v. ACLU I—The Battle Over the CDA*, AMERICAN CIVIL LIBERTIES UNION, June 26, 1997, <http://www.aclu.org/privacy/speech/15464res19970626.html> (discussing the ACLU’s success in defending the First Amendment’s future on the Internet by having the federal Communications Decency Act declared an unconstitutional restriction on free speech). *But see United States v. Extreme Assocs., Inc.*, Criminal No. 03-0203, 2007 WL 2225844 (W.D. Pa. July 31, 2007) (describing how defendants, who are in the business of producing and distributing pornographic films, were charged with nine counts of violating the federal obscenity statutes for distributing obscene material through the mail and via the Internet).

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

73. *Id.* at 8 (emphasis added).

technologies such as the Internet, which vastly expand the choices available to pedophiles and permit instant and nearly undetectable transactions.⁷⁴

Note that the only reference to pornography in this passage is to “child pornography.” The Report references child pornography twenty-nine times, but the forced participation of women aged eighteen or over in pornography is not mentioned at all.

There is plenty of evidence that women who are “prostituted” (to use the terminology of the report) are also “force filmed,” so that videos of their rapes can be distributed commercially.⁷⁵ Why this category of sexual exploitation does not merit mention by the State Department’s Report is quite disturbing. Surely Secretary of State Condoleeza Rice does not believe that women held captive and forced into prostitution are contemporaneously appearing in pornography voluntarily.⁷⁶ However, pornography is a very lucrative product for mainstream corporations that are unlikely to open brothels, and it is not surprising that the Bush Administration would decline to inquire about or publicize connections between sex trafficking and coercive pornography production.

The lack of widespread concern for people appearing in violent pornography is stunning. Cans of tuna are adorned with “dolphin safe” labels because tuna consumers care about the well-being of

74. *Id.* at 35.

75. *See, e.g.*, MONICA O’CONNOR & GRAINNE HEALY, THE LINKS BETWEEN PROSTITUTION AND SEX TRAFFICKING: A BRIEFING HANDBOOK (2006), available at <http://action.web.ca/home/catw/attach/handbook.pdf> (noting that sex tourists frequently make pornography of their abuse and that pornography is flourishing as part of a multi-million dollar industry of sexual exploitation); *cf.* The Campaign to Rescue and Restore Victims of Human Trafficking, http://www.acf.hhs.gov/trafficking/about/fact_sex.html (last visited Mar. 19, 2008) (noting that victims of sex trafficking are forced into various forms of commercial sexual exploitation, including pornography). *See generally* INTERNATIONAL SEX TRAFFICKING, *supra* note 15.

76. *Cf. Teens Accused of Pimping Girls*, CNN.COM, Jan. 16, 2008, <http://www.cnn.com/2008/CRIME/01/16/teen.pimps.ap/index.html> (describing how a gang in Forth Worth, Texas forced young girls to become part of a prostitution ring). If girls can be coerced into prostitution, these acts can be filmed and marked as porn. *See, e.g.*, David E. Guinn, *Pornography, Prostitution and International Sex Trafficking: Mapping the Terrain*, INT’L HUM. RTS. L. INST. (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885389 (describing the relationship between sex trafficking, prostitution, and pornography); Pamela Foohey, *Trafficking, Prostitution, Pornography: A Play in Three Acts*, RECORD, Oct. 11, 2007, available at <http://media.www.hlrecord.org/media/storage/paper609/news/2007/10/11/News/Trafficking.Prostitution.Pornography.A.Play.In.Three.Acts-3030440.shtml> (describing the progression through and similarity between sex trafficking, prostitution, and pornography, and providing Linda Boreman’s—better known as Linda Lovelace—story of coerced prostitution and pornography). *See generally* INTERNATIONAL SEX TRAFFICKING *supra* note 15.

dolphins.⁷⁷ General release movies often roll notices stating that no animals were harmed during the making of the film.⁷⁸ In fairly stark contrast, pornographic works are often advertised in ways that highlight actual violence that was done to performers during production, such as “bloody first times,” “blondes getting slammed,” “big mutant dicks rip small chicks,” and “men fucking that teen virgin bitch’s ass so hard she couldn’t sit for days.”⁷⁹ Apparently this is an effective way to sell pornography to average pornography consumers. One wonders how the same audience would respond to cans of tuna bearing labels that said: “Now with more brutally slaughtered dolphins than ever!”⁸⁰ It may be that pornography consumers erroneously (or preferentially) believe that all pornography performances are voluntary and consensual.⁸¹ 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.

Even those with decidedly pro-pornography sensibilities are sometimes aghast at the violence that is “consensually” inflicted upon pornography performers. One journalist known for pro-pornography sentiments observed:

Borden was shown making a video in which the scenario is a young woman who is kidnapped, raped and murdered. It’s not the subject that raises questions about the tape’s legality, or even the fact that sexual violence is depicted for the viewer’s erotic delectation. Repellent as it is, that still seems to me protected free speech. What raised questions is that the actress is really beaten in the course of the making of the film, consensually, but still beaten. It was too much for the show’s producers, who left in the middle of taping the shoot (and you can hardly blame them). But even here, a distinction needs to be made. If Borden and Black—and the actors playing the assailants—could be prosecuted for anything it would be for

77. See Dolphin Safe Tuna, <http://www.earthisland.org/dolphinSafeTuna/consumer/> (last visited Mar. 19, 2008).

78. See American Humane: Ensuring Animal Safety on Movie and TV Sets, http://www.americanhumane.org/site/PageServer?pagename=pa_film (last visited Mar. 19, 2008).

79. See Posting of Samantha to Alas!, a Blog, <http://www.amptoons.com/blog/archives/2006/08/31/no-porn-doesnt-prevent-rape/> (Sept. 6, 2006, 14:25 EST) (providing numerous examples of the language used in pornography advertisements).

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

81. See generally Shelley Lubben, *The Truth Behind the Fantasy of Porn*, BLAZING GRACE, <http://www.blazinggrace.org/thetruth.htm> (explaining, in the words of a former porn actress, that porn stars generally do not like making porn, and are often manipulated, coerced, and threatened into performing certain acts, but that the porn industry wants consumers to think they do); Porn Stars Speak Out, <http://www.shelleylubben.com/articles/pornstarspeakout.pdf> (last visited Mar. 19, 2008) (providing quotes from various porn stars documenting the health risks and brutal injuries involved in the industry and the frequency with which porn stars are required to do things they do not want to do).

assault, not obscenity. And they should be. We're not talking about S/M here. We're talking about a beating that, consensual or not, is a crime.⁸²

This reporter readily assumes the recipient of the violence is being beaten "consensually." Yet, he never explains why he believes this to be the case. Perhaps he simply refuses to consider alternative possibilities.

One of the few large-scale academic studies of pornography on the Internet, now over a dozen years old, ascertained that women are disproportionately used in violating ways, such as bestiality.⁸³ The aggressive, vitriolic, and highly personal backlash against this study by organizations like the Electronic Frontier Foundation (EFF) is undoubtedly responsible for the paucity of interest in pornography research.⁸⁴ Sociologist Diana Russell has additionally argued that researchers avoid or downplay research that negatively characterizes pornography for professional reasons,⁸⁵ as being pro-pornography today is apparently a more lucrative career strategy than doing research that exposes the harms of pornography. By way of example, consider Pennsylvania State University's Center for the First Amendment,⁸⁶ which seems to exist primarily to generate positive academic press for the pornography industry.⁸⁷

For nearly two decades, the consistent response of the U.S. government has been to ignore pornography production as long as the performers were aged eighteen or over. In 1989, in *California v. Freeman*, the Supreme Court effectively curtailed states' ability to

82. Charles Taylor, "American Porn": A "Frontline" Report on One of the Biggest Business in the U.S. Is an Expose that Offers Its Audience a Chance To Cover Up, To Divorce Itself from Its Own Sexual Tastes, SALON, Feb. 11, 2002, <http://dir.salon.com/story/sex/feature/2002/02/11/frontline/index1.html>.

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

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

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

86. Pennsylvania Center for the First Amendment, <http://comm.psu.edu/first/> (last visited Mar. 19, 2008).

87. Posting of Ann Bartow to Feminist Law Professors, <http://feministlawprofs.law.sc.edu/?p=3054> (Feb. 23, 2008, 11:09 EST).

regulate the production of pornography.⁸⁸ By the 1990s, mainstream non-child pornography prosecutions on obscenity grounds by the federal government effectively stopped, and they remain rare today.⁸⁹

According to law professor Tim Wu, after slowing down during the Bush I and Clinton administrations, the number of adult obscenity prosecutions declined even further during the Bush II years. Wu noted: "George W. Bush is perhaps the most religiously conservative U.S. president in history. Yet his administration, despite its rhetoric, is looser on mainstream porn than Jimmy Carter or John F. Kennedy was."⁹⁰ A recent *New York Times* article, entitled "Federal Effort on Web Obscenity Shows Few Results,"⁹¹ reported that the Justice Department provided a grant to a conservative religious group called "Morality in Media," which pays people to review "sexual Web sites and other Internet traffic to see whether they qualify as obscene material whose purveyors should be prosecuted by the Justice Department."⁹² The article noted that "[t]he number of prosecutions resulting from those referrals is zero."⁹³ It further reported: "In the seven years of the Bush administration, the department has prosecuted about 24 obscenity cases, several centered on film producers who failed to keep proper records showing that their models were not minors."⁹⁴ It did not provide identifying information for the referenced "24 obscenity cases," and research suggests that even that small number may be substantially inflated. Indeed, one observer recently noted that contemporary pornographers may be more likely

88. 488 U.S. 1311 (1989).

89. Cf. Andy Sullivan, *FBI Reluctance Stalls Bush Anti-pornography Push*, REUTERS, Sept. 19, 2007, available at <http://www.reuters.com/article/domesticNews/idUSN1845908320070919?feedType=RSS&feedName=domesticNews&sp=true> (reporting that porn industry insiders agree that the adult pornography business has not been affected by the increased prosecution of child pornography and noting that "[a]dult-obscenity investigations have taken a back seat to more pressing issues such as terrorism"). But see Grant Gross, *Web-based Business Charged with Disturbing Obscenity*, ABOUT.COM, June 15, 2007, <http://pcworld.about.com/od/internetlegalissues/Web-based-business-charged-wit.htm>; Press Release, U.S. Dep't of Justice, Federal Grand Jury in Salt Lake City Charges Cleveland Men with Obscenity Violations (June 28, 2007), available at http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html. For an argument that obscenity law is unworkable and unable to address any moral harm related to obscene content effectively, see Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635 (2005).

90. Tim Wu, *American Lawbreaking: How Laws Die*, SLATE, Oct. 18, 2007, <http://www.slate.com/id/2175730/entry/2175743/>.

91. Neil A. Lewis, *Federal Effort on Web Obscenity Shows Few Results*, N.Y. TIMES, Aug. 10, 2007, at A13.

92. *Id.*

93. *Id.*

94. *Id.*

to go to jail for spamming than for the content of the pornographic works they distribute.⁹⁵ 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.⁹⁶

If all pornography production were consensual and non-exploitive, the abandonment of obscenity prosecutions might be cause for celebration.⁹⁷ However, the pornography terrain is much too complicated to view the government's *laissez faire* approach to pornography as an unqualified human liberty achievement. When asked in an interview whether there is pornography in distribution that she wouldn't watch, pornographer Nina Hartley⁹⁸ responded:

Absolutely. Absolutely. There's most of it I wouldn't watch. Most of it is execrable—because why? Because our culture is so complicit about sexuality we do not grant it the grace and honor I think it deserves. We don't, we don't let it be a subject of art, we let it be a subject of commerce because we have, we are very of two minds about it. And so I do believe that the culture gets the adult material it deserves, and so we are a conflicted society that creates a massive amount of material that most of it is very poor quality.⁹⁹

If Hartley is correct that most pornography is, as she terms it, "execrable," why this is so, how pornography might be improved, and what role the copyright laws might play in incentivizing better pornography (however that is defined) are questions that need to be considered. Pornographer Tristan Taormino recently remarked with

95. See Thomas Claburn, *Two Men Get Five Years for Sending Pornographic Spam: Spammers Kilbride and Schaffer Will Also Forfeit More than \$1.1 Million in Illegal Proceeds from Their Spam Operation*, INFORMATIONWEEK, Oct. 15, 2007, available at <http://www.informationweek.com/news/showArticle.jhtml?articleID=202402908>.

96. Jason Krause, *The End of the Net Porn Wars: Despite Big Talk, Federal Efforts Against Adult Obscenity Online Have Withered*, AM. BAR ASS'N J., Feb 2008, available at http://www.abajournal.com/magazine/the_end_of_the_net_porn_wars/.

97. See Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1970 (1995) (encouraging expanded access to online sexual discussion and depiction, especially among young people, and arguing that the Internet should be used to initiate an honest discussion and depiction of sexuality). That of course assumes no harm from pornography consumption. Substantive research disputes this. See Porn Statistics and Research, <http://feminazi.wordpress.com/2007/12/29/porn-statistics-and-research/> (Dec. 29, 2007, 16:26) (discussing several studies describing the harmful effects of pornography on its consumers).

98. The Official Nina Hartley Website, <http://www.nina.com/> (last visited Mar. 19, 2008).

99. *Justice Talking: Pornography & the First Amendment* (National Public Radio broadcast Dec. 17, 2007) (transcript available at http://www.justicetalking.org/transcripts/071217_Porno_transcript.pdf).

respect to gonzo pornography,¹⁰⁰ “It’s essentially become an antiporn feminist’s worst nightmare come true.”¹⁰¹ She elaborated:

“I’ve always made the joke that if you’re going to go to all the trouble of sticking my head in a toilet—a dominant image in some gonzo porn—at least I better get a really good orgasm out of it. But we’re seeing this pent-up aggression and hostility towards women; [there’s] rough sex, but it’s not clear that they’re consenting to it, and it’s clear that they’re not getting off on it, because we never get to see their pleasure.”¹⁰²

Again, market forces appear to drive pornography production in some very unsavory directions.

Academic media critic Robert Jensen has observed that, given the pornography industry’s creation of “a steady stream of relentlessly sexist and racist films and web sites that undermine attempts to build a healthy sexual culture, while filling the pornographers’ pockets with substantial profits,” one might expect politically liberal people to be receptive to critiques of pornography, but one would be very wrong.¹⁰³ Rather than open-minded intellectual curiosity, in his experience, criticisms of pornography have been met with accusations that he is anti-sex, censorious, and aligned with the political right wing.¹⁰⁴ The libertarian, liberal perspective seems to be that feminists should not attack pornography because social arch-conservatives attack pornography, and they cannot possibly have the correct view of this issue. Yet, if the harms of pornography to the people involved with producing it are substantial, pornography should be criticized. Even if the critique is highly persuasive, it seems unlikely that feminists are going to find much common ground with arch-conservatives on the issues of why pornography is harmful or how to mitigate those harms, much less embrace any sort of unified agenda in the future. The warped and constricted views of human sexuality held by right-wing fundamentalists may actually drive up demand for pornography, and preternaturally unhealthy varieties of pornography at that.

Right-wing religious fundamentalist cultural warriors do not evidence any particular driving passion to regulate pornography. Pornography’s widespread existence seems very useful to them culturally as a mechanism to illustrate the depravity of liberals. In my view, right-wing religious fundamentalists rarely exhibit concern about the domination and degradation of women that infuses

100. See *supra* note 49.

101. Snyder, *supra* note 49 (quoting Tristan Taormino).

102. *Id.* (quoting Tristan Taormino).

103. Robert Jensen, *A Call for an Open Discussion of Mass-Marketed Pornography*, ALTERNET, Feb. 10, 2007, <http://www.alternet.org/story/47677/>.

104. *Id.*

pornography. Their agenda actually appears to be very different: they want to shame and control all people by regulating sex and interpersonal relationships, and they want to persecute homosexuals, restrict access to contraceptives, ban abortions, and take away instruments of sexual pleasure, such as vibrators. I do not know a single feminist who wants to do these things.¹⁰⁵ This feminist's position against pornography is grounded in opposition to the abuse of women that occurs as a consequence of pornography production.

IV. RECORD KEEPING VERSUS ANONYMOUS SPEECH

Pornography in which any performer is under eighteen years of age is child pornography, and it is illegal.¹⁰⁶ Prior to 1977, the law was silent as to the "age of consent" for performing in pornography, but in 1977, the statutory age was set at sixteen. It was only then that the term "child pornography" had a consistent statutory meaning.¹⁰⁷ This was raised to age eighteen in 1984.¹⁰⁸

To facilitate law enforcement activities aimed at protecting children from sexual exploitation and other abuse,¹⁰⁹ Congress passed a record keeping requirement, which states:

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which—

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct—

105. I realize there are people who define themselves as feminist who oppose abortion. There is plenty of room within feminism for women who would never have abortions themselves, and who would like to see abortions reduced by increasing sex ed and access to contraceptives, more generous welfare benefits for poor mothers, a better safety net for children born with serious health problems, etc. It is a desire to "ban" abortion unambiguously that I do think gets one ejected from the sisterhood.

106. 18 U.S.C. § 2256 (2000); Child Pornography Fact Sheet, http://www.cybertipline.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (last visited Mar. 19, 2008).

107. Franke-Ruta, *supra* note 32.

108. *Id.*

109. See 18 U.S.C. § 2251 (2000).

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.¹¹⁰

Thus, 18 U.S.C. § 2257 requires producers of *commercially distributed*¹¹¹ pornography to verify the age of every performer, keep records about the performers' identities, and make those records available to the government upon request. Noncommercially distributed pornography does not trigger these requirements.

While the names of the performers do not need to be affixed to the pornography, "a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located" does.¹¹² A sample compliance statement reads as follows:

18 U.S.C. § 2257 Compliance Statement:

All models appearing on this website were at least 18 years of age on the date of principal photography.

The records required pursuant to 18 U.S.C. § 2257 pertaining to this website and all materials depicted hereon, including the dates of production of all such materials, are on file with the Custodian of Records M.L. Levine at MLL, Inc. 2404 Wilshire Bl. # 10 D Los Angeles, CA. 90057.

Videotape 2257 notice:

All models appearing in this production were at least 18 years of age on the date of principal photography. The records required pursuant to 18 U.S.C. § 2257 pertaining to this production and all materials associated herewith are on file with the Custodian of Records M.L. Levine at MLL, Inc. 2404 Wilshire Bl. #10 D Los Angeles, CA. 90057.¹¹³

110. 18 U.S.C.S. § 2257 (LEXIS through Pub. L. No. 110-226).

111. Cf. EFF: Bloggers FAQ—Adult Material, <http://w2.eff.org/bloggers/lg/faq-adult.php> (last visited Mar. 19, 2008) (noting that while the regulations imply that the record-keeping requirements only apply to commercial operations, the Department of Justice has "left wiggle-room, and it is still unclear if they intend to go after noncommercial websites").

112. 18 U.S.C. § 2257(e)(1).

113. See The Official Nina Hartley Website, *supra* note 98.

In these statements, the names of the performers are not listed; only the address of the required records is revealed, and that is all that is required. Section 2257's applicability only to "commercially distributed" pornography exempts non-revenue-seeking user-generated pornography, an exception that may be laudable for freedom of speech purposes, but is deeply problematic for the purpose of protecting children, to the extent this is an efficacious approach to doing so.

The records that pornographers are required to keep on file is roughly commensurate with the information required to obtain a copyright registration, the forms for which ask for names, contact information, and even authors' dates of birth,¹¹⁴ except that 18 U.S.C. § 2257 requires identifying information about *performers*, while copyright registration demands identifying information about authors and copyright holders. Copyright registration is of course voluntary, but is very useful, especially for works that are going to be commercially distributed.¹¹⁵

When considered through the prism of labor and employment laws,¹¹⁶ immigration laws,¹¹⁷ and tax laws,¹¹⁸ the idea that a contractor would have to ascertain and keep records about the people who perform in an audiovisual work hardly seems surprising or untoward. Given the goal of impeding the production and distribution of child pornography, it hardly seems onerous or unreasonable, despite

114. See 17 U.S.C. § 409 (2000) ("The application for copyright registration shall be made on a form prescribed by the Registrar of Copyrights and shall include (1) the name and address of the copyright claimant."); see, e.g., U.S. COPYRIGHT OFFICE, FORM TX (2006), available at <http://www.copyright.gov/forms/formtxi.pdf> (providing an example of a copyright application form for literary works that asks for the applicant's name, date of birth, and contact information). See generally U.S. Copyright Office, Copyright Registration, <http://www.copyright.gov/register/> (last visited Mar. 19, 2008) (providing links to copyright applications for registering various kinds of works).

115. See Copyright Office Basics, Copyright Registration, <http://www.copyright.gov/circs/circ1.html#cr> (last visited Mar. 19, 2008) (discussing the advantages that registration offers copyright owners).

116. See WAGE AND HOUR DIVISION, U.S. DEP'T LABOR, FACT SHEET #21: RECORDKEEPING REQUIREMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2007), available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs21.pdf>; U.S. DEP'T LABOR, OSHA RECORDKEEPING HANDBOOK (2005), available at <http://www.osha.gov/recordkeeping/handbook/index.html>; U.S. Department of Labor, Recordkeeping, <http://www.dol.gov/compliance/topics/recordkeeping.htm> (last visited Mar. 19, 2008); U.S. Department of Labor, Youth & Labor, Recordkeeping, <https://www.youth2work.gov/dol/topic/youthlabor/Recordkeeping.htm> (last visited Mar. 19, 2008).

117. U.S. Department of Labor, The Immigration and Nationality Act, Recordkeeping, <http://www.dol.gov/compliance/laws/comp-ina.htm#recordkeeping> (last visited Mar. 19, 2008).

118. Internal Revenue Service, Recordkeeping, <http://www.irs.gov/businesses/small/article/0,,id=98575,00.html> (last visited Mar. 19, 2008).

the strident protestations of one pornography trade group to the contrary.¹¹⁹ As law professor Christine Hurt noted:

Legitimate, legal businesses keep records. Every employer I ever had made a copy of my driver license and my social security card. The DOJ can call any legitimate business in the country and ask for proof of the age of its employees, and those employers can comply. Why? Because we have laws, such as child labor laws and tax laws where this information comes in handy. I guess the adult entertainment industry is uninterested in tax laws. How do they file W-2s if they have no actual name of performers? If you want the adult entertainment industry to be legal, then act like one.¹²⁰

Contrary claims sometimes rely on deception. For example, an article from *Wired.com* inflammatorily entitled “Online Porn Dodges Major Bullet” raised the specter of stalking facilitation as follows:

Adult performers fear their real names, addresses and ages will end up in the hands of countless webmasters who must now keep these records. “We deal with stalkers now,” said Bill Rust, webmaster of Arikaames.com, a soft-core site featuring his wife. “We’ve had people who join the site and try to track her down, send cakes and candies to her parents’ house.” Rust said he stopped providing the site’s content to hundreds of affiliates because he wasn’t willing to give out his wife’s personal information to comply with the new rules.¹²¹

In non-polemic reality, the law does not require Rust to “give out his wife’s personal information.” It requires only that the address at which information about her name and date of birth are stored for possible inspection by government actors. Utilizing a storage address other than his wife’s home would effectively keep her address confidential.

The other trope raised about 18 U.S.C. § 2257 concerns the cost of compliance. In the same *Wired.com* article, a pornographers’ attorney is quoted for the proposition that the government “doesn’t realize ‘there are such things as 19-year-old (live web) cam girls sitting in a trailer with \$200 in their bank accounts, going online solely to support their child. To require them to buy terabytes worth of storage puts down an impossible barrier between them and internet access.’”¹²² Yet why a poor teenager living in a trailer and doing pornography solely to support her child would need to “buy terabytes worth of storage” to keep track of her own name and birth date, and how much (or little) that might actually cost, is unsurprisingly not

119. See Free Speech Coalition, <http://www.freespeechcoalition.com/FSCView.asp?action=preview&coid=137> (last visited Mar. 19, 2008).

120. Posting of Christine Hurt to Concurring Opinions, http://www.concurringopinions.com/archives/2006/02/recordkeeping_i.html (Feb. 13, 2006, 13:28 EST).

121. Randy Dotinga, *Online Porn Dodges Major Bullet*, WIRED.COM, June 24, 2005, <http://www.wired.com/politics/law/news/2005/06/67991>.

122. *Id.*

estimated or explained. The lawyer's purported concern for poor young women might be heartwarming if it seemed sincere, but instead the comments appear to be cynically instrumental.

The only pornographer who has been criminally prosecuted for 18 U.S.C. § 2257 violations to date is cultural pollutant Joe Francis,¹²³ who controls the multimillion dollar *Girls Gone Wild* franchise, and was arrested after he repeatedly served underage girls alcohol and then filmed them engaging in sexually explicit acts.¹²⁴ Notably, an article in *The Nation* polemically and deceptively painted this as some sort of unhinged obscenity prosecution by a right wing Christian who "tried unsuccessfully to force nude art-class models to wear bikinis."¹²⁵ The provisions of 18 U.S.C. § 2257 seem simple enough to comply with, and Francis certainly had every ability to do so. He merely seemed to find the prospect of filming under-aged women after plying them with alcohol irresistible.

The government has virtually ceased obscenity prosecutions with respect to pornography featuring adult performers.¹²⁶ Even though many "respectable," federal government-friendly corporations are deriving large amounts of money from the distribution of pornography,¹²⁷ pornographers have asserted that this law is an effort to drive adult entertainment sites out of business under the ruse of fighting illegal child pornography.¹²⁸ Like Joe Francis, perhaps they too would like to use performers under the age of eighteen. Barring this proclivity, the claim that the government is attempting to interfere with the economically beneficial relationships between pornographers and large corporations such as AT&T, Yahoo!, General Motors, Comcast, Marriott, and Hilton seems absurd. Nevertheless, it

123. I am indebted to Garance Franke-Ruta for this description of Francis. See Franke-Ruta, *supra* note 41.

124. Press Release, U.S. Dep't of Justice, "Girls Gone Wild" Founder Joseph Francis Pleads Guilty in Sexual Exploitation Case (Sept. 26, 2006), available at http://www.usdoj.gov/opa/pr/2006/September/06_crm_644.html; see also Katherine A. Fallow & Scott B. Wilkens, *Government Gone Wild: Regulations for 'Explicit' Materials Move into the Mainstream*, LAW.COM, Feb. 20, 2007, http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1626%5CFallow_Wilkens_Law.com_2.20.07.pdf; *Judge Drops Most Charges Against 'Girls Gone Wild' Producer Joe Francis*, FOXNEWS.COM, Jan. 5, 2007, <http://www.foxnews.com/story/0,2933,241910,00.html>; Posting of Regina Lynn to Sex Drive Daily, http://blog.wired.com/sex/2007/02/first_18_usc_22.html (Feb. 19, 2007, 01:17).

125. See Max Blumenthal, *The Porn Plot Against Prosecutors*, NATION, Mar. 20, 2007, available at <http://www.thenation.com/doc/20070402/blumenthal>.

126. See *supra* notes 89-96 and accompanying text.

127. See *supra* notes 27-29 and accompanying text.

128. David Kesmodel, *Web Sites Proof-of-Age Rules for Porn Performers*, WALL ST. J., Feb. 13, 2006, at B1.

has been advanced by the libertarian advocacy group EFF,¹²⁹ which helped pornographers successfully challenge this law on freedom of speech grounds, in *Connection Distributing Co. v. Keisler*.¹³⁰

The *Connection Distributing* plaintiffs were described by the Sixth Circuit as people who wanted to publish sexually explicit photographs in “swingers” magazines, but neither wanted to create and maintain records required by 18 U.S.C. § 2257, nor to provide the publisher of the magazines with information that identified the people in the photographs.¹³¹ The government asserted that the recordkeeping requirements were aimed at conduct rather than speech—the pertinent conduct being child abuse.¹³² The court concluded that 18 U.S.C. § 2257 was overbroad because it impermissibly impacted what the court framed as a right to speak anonymously and imposed an unconstitutional burden on pornography in which only adults appeared.¹³³

There seems to be an underlying assumption by the courts that the people uploading amateur pornography are the same folks who are appearing in it. This is not necessarily the case. However, neither the government nor the courts appear to contemplate the possibility that some of the adults appearing in the relevant pornography might be appearing on the magazine’s pages involuntarily because they were coerced to pose or perform, were unaware of or opposed to having their sexually explicit photographs taken, or were opposed to having the photographs published and widely distributed.¹³⁴ Judicial approaches privilege the rights of the people in physical possession of the photographs over the safety and well-being of the people who appear in them, whether they are minors or adults, and who unwillingly become permanent public spectacles.

129. See EFF: Bloggers FAQ—Adult Material, *supra* note 111; Posting of Kurt Opsahl to Deeplinks Blog, <http://www.eff.org/deeplinks/2005/06/why-doj-2257-regulations-arent-just-porn-problem> (June 24, 2005) (indicating that EFF is advancing the claim that 18 U.S.C. § 2257 infringes on freedom of speech).

130. 505 F.3d 545 (6th Cir. 2007) (remanding the case to the district court with instructions to find 18 U.S.C. § 2257 unconstitutionally broad and enter summary judgment for the plaintiffs), *vacated, reh’g en banc granted* No. 06-3822, 2008 U.S. App. LEXIS 9032 (6th Cir. Apr. 10, 2008).

131. *Id.* at 550.

132. *Id.* at 556.

133. *Id.* at 566.

134. See, e.g., *id.* (failing to consider whether individuals appearing in “swingers” magazines did so voluntarily).

V. COPYRIGHT LAW AND PORNOGRAPHY

For much of this nation's history, the government was unwilling to give its imprimatur to creative or innovation works that were deemed contrary to public morality.¹³⁵ 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.¹³⁶ 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.¹³⁷

135. This is still the case to some extent under trademark law. See Lanham Act, 15 U.S.C. § 1052 (2000), and associative jurisprudence.

136. See, e.g., *Lowell v. Lewis*, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (No. 8568) (noting that "mischievous or immoral" inventions, including those intended "to promote debauchery," could not satisfy patent law's utility requirement and were therefore not patentable).

137. See generally RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION* (Johns Hopkins Univ. Press 1999) (providing a history of the patentability of sex toys); Margo Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 488-93 (2003) (discussing modern patent law, including the disappearance of the judicially created "moral utility requirement"); Thomas F. Cotter, *Misuse*, 44 HOUS. L. REV. 901 (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."); Thomas A. Magnani, *The Patentability of Human-Animal Chimeras*, 14 BERKELEY TECH. L.J. 443 (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 should not be dismissed out of hand because it has been widely utilized in other countries, particularly in Europe." (citations omitted)); Thomas W. McEnerney, *Fraudulent Material Is Entitled to*

The legality of sex toys can be uncertain in some jurisdictions, however, and courts have declared laws restricting or banning them outright to be constitutional.¹³⁸ In contrast, pornography has been construed as speech, and is therefore less readily controllable by government actors than are dildos or vibrators, as a matter of First Amendment principles.

Until 1979, copyright protection was effectively unavailable for pornography, though it was unambiguously available for other photographic and audiovisual works.¹³⁹ Then, in *Mitchell Brothers Film Group v. Cinema Adult Theater*, the Fifth Circuit held that obscenity was not a defense to copyright infringement because nothing in the Copyright Act of 1909 precluded the copyrighting of obscene materials.¹⁴⁰ The Fifth Circuit specifically used the term “obscenity” rather than “pornography,” and concluded that holding obscene materials copyrightable furthered the pro-creativity purposes of the Copyright Act and of congressional copyright power generally.¹⁴¹ The opinion waxes rhapsodic about the importance of “freedom to explore into the gray areas, to the cutting edge, and even beyond” without governmentally imposed restraints.¹⁴² It mentions nothing about the destructive impact that this “exploration” could potentially have upon actual human beings.

The *Mitchell Brothers* court also asserted that the First Amendment and copyright are “mutually supportive,” writing: “The financial incentive provided by copyright encourages the development and exchange of ideas which furthers the first amendment’s purpose of promoting the ‘exposition of ideas.’”¹⁴³ The court linked this to a

Copyright Protection in Action for Injunctive Relief and Damages, 74 COLUM. L. REV. 1351, 1354 n.27 (1974) (discussing fraud as a defense in copyright infringement actions).

138. See, e.g., *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007) (holding that a state’s interest in preserving and promoting public morality provided a rational basis for an Alabama statute that prohibited the commercial distribution of certain sexual devices designed “primarily for the stimulation of human genital organs”); Women’s Health News, <http://womenshealthnews.wordpress.com/2007/10/03/supreme-court-refuses-to-hear-sex-toy-case/> (Oct. 3, 2007, 09:10 CST) (reporting that the U.S. Supreme Court declined to hear the *Williams* case).

139. See generally Christine H. Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004) (examining the treatment of photography and other technology in copyright law).

140. 604 F.2d 852, 854 (5th Cir. 1979) (noting that the now-superseded Copyright Act of 1909 was the applicable statute).

141. *Id.* at 856-57.

142. *Id.* at 856.

143. *Id.* at 858 n.8 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). This analysis is similar to that adopted by the U.S. Supreme Court majority in *Harper & Row, Publishers, Inc. v. Nation Enterprises*. See 471 U.S. 539 (1985).

right to reach an audience or readership that is economically facilitated by copyright protections.¹⁴⁴

What is fairly remarkable about the *Mitchell Brothers* 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.¹⁴⁵ 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.¹⁴⁶ 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*,¹⁴⁷ the Ninth Circuit adopted the *Mitchell Brothers* court's reasoning unquestioningly, relying on an endorsement by *Nimmer on Copyright*, which it referred to as "the leading treatise on copyright."¹⁴⁸ Although *Mitchell Brothers* was the only case on point at that time, the *Jartech* court observed that "Nimmer . . . considers Mitchell Brothers to represent the prevailing view on this issue,"¹⁴⁹ and apparently outsourced its analytical thinking about the topic to a copyright treatise.¹⁵⁰

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.¹⁵¹ Judge Martin concluded that, "[g]iven the clearly criminal nature of plaintiff's operations, it is self-evident that the Court should not use its equitable powers to come to the aid of plaintiffs and should

144. *Mitchell Bros. Film Group*, 604 F.2d at 858 n.8.

145. Cf. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002) (examining First Amendment issues in copyright law to determine the permissible and appropriate extent of copyright).

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

147. 666 F.2d 403 (9th Cir. 1982).

148. *Id.* at 406.

149. *Id.*

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

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

invoke the doctrine of clean hands and leave the parties where it finds them,” and he refused to commit the resources of the United States Marshal’s Service “to support the operation of plaintiff’s pornography business.”¹⁵²

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.*¹⁵³ Judge Baer decided to follow *Mitchell Brothers*, writing:

In its well-reasoned and scholarly opinion, the Fifth Circuit [in *Mitchell Brothers*] reviewed the history of the copyright legislation and found that all-inclusive language of the Copyright Act of 1909, 17 U.S.C. § 34 (1970) (repealed), which encompassed “all the writings of an author,” did not bespeak of an obscenity exception to copyright protection.¹⁵⁴

Like the Fifth Circuit, Judge Baer completely declined to consider any of the moral or social reasons that obscene works were not extended copyright protections from the time the first U.S. copyright law took effect in 1790¹⁵⁵ up until almost two hundred years later when the *Mitchell Brothers* case was decided.

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*¹⁵⁶ and *Playboy v. Webworld*,¹⁵⁷ much more recent cases about search engine liability, such as *Perfect 10 v. Google*¹⁵⁸ and *Perfect 10 v. Amazon.com*,¹⁵⁹ and various contemporary allegations of online reproduction rights infringement.¹⁶⁰ 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 spend big budgets on big

152. *Id.* at 175.

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

154. *Id.* at *3.

155. Copyright Act of 1790, ch. 15, 1 Stat. 124.

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

157. *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997).

158. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

159. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

160. *See, e.g., Io Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926 HRL, 2007 WL 1113800 (N.D. Cal. Apr. 13, 2007) (providing a recent allegation of online reproduction rights infringement).

stars, only to have those posted and viewed for free, or only to see viewers turn to free, amateur porn instead.”¹⁶¹

Because the Intellectual Property Clause of the U.S. Constitution authorizes copyright protections only to the extent that it promotes the progress of science and the useful arts,¹⁶² 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 both policy makers and legal scholars choose to ignore these issues gives pornography a privileged position with respect to more interrogated categories of created works, such as mainstream music and non-pornographic movies.

Though copyright protection was effectively unavailable for pornographic movies until 1979, 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 incentivize 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, for unauthorized uses of pornographic content they produced, and pursue piracy actions against accused infringers.¹⁶³ 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. However, no court addressing the copyrightability of pornography addressed this possibility.

VI. COPYRIGHT LAW 2.0: CONDITIONING REGISTRATION AND ENFORCEMENT ON PROOF OF CONSENT

Until pornography took to the Internet in the 1990s, “adult content” providers did not often sue for infringement, possibly in part because they feared that neither judges nor juries would be inclined to treat them favorably, though there is little, or perhaps mixed, evidence that adult content has received a lesser level of copyright

161. Sunny Freeman, *Porn 2.0: What Happens When Free Porn Meets Social Networking*, ALTERNET, July 10, 2007, <http://www.alternet.org/sex/56414/?page=entire>.

162. U.S. CONST. art. I, § 8, cl. 8.

163. Freeman, *supra* note 161.

protections than creative works that do not have sexual themes. Some pornographers may have preferred to avoid participation in the legal system altogether.

Recently, however, that has changed. Not only has Internet distribution facilitated extensive dissemination of pornography, but, in conjunction with the corporatization of pornography, it has also normalized pornographic content to the extent that copyright holders in digital works of pornography seek and obtain expansive copyright protections. The expansion of pornography markets is problematic because the production of pornography can inflict emotional or physical damages on living humans, and is also deeply linked to sex trafficking and slavery.¹⁶⁴ The increased reliance on copyright protections by pornographers, however, potentially opens a window that brings light and air to production practices, and through which at least some coercive production practices can be monitored.

As noted above, copyrights in photographs are owned by the photographers, not their subjects.¹⁶⁵ Legal control of the work is bestowed by statute upon the person holding the camera, or her employer. Copyright law is intentionally structured to prevent performers in any kind of audiovisual work from obtaining ownership interests in the copyrights of completed works in which they appear. Copyright's work for hire doctrine vests ownership in employers and independent contractors who meet certain criteria that would likely apply to most pornography.¹⁶⁶ Even if it did not, as a practical matter, any pornography performer trying to maintain some semblance of personal privacy would be unlikely to make a defensible claim to joint authorship of a pornographic work in open court. Whether people are willing subjects of pornographic works, or whether they have consented to commercial distribution of their images or performances, is not something with which copyright law is currently concerned. Absent an enforceable contract to the contrary, only the author has control over a copyrightable work.

164. See, e.g., Melissa Farley, *Sex for Sale: Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006); Posting of Ann Bartow to Feminist Law Professors, <http://feministlawprofs.law.sc.edu/?p=1833> (May 24, 2007, 11:48 EST) (discussing *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007)); Posting of Ann Bartow to Feminist Law Professors, <http://feministlawprofs.law.sc.edu/?p=2536> (Nov. 7, 2007, 14:13 EST).

165. See *supra* Part V; see also *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (holding that copyrights to photographs are owned by the photographer if the photographer exercised sufficient control over the subject of the photograph, such that the photograph embodies an "original intellectual conception" of the author).

166. U.S. COPYRIGHT OFFICE, CIRCULAR 9, WORKS MADE FOR HIRE UNDER THE 1976 COPYRIGHT ACT (2004), available at <http://www.copyright.gov/circs/circ09.pdf>.

The morality of acts of content creators has never been a consideration of statutory copyright law. As far as judges go, 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."¹⁶⁷ Those constructs, which we call "moral rights" in the context of copyright law, are concerned mainly with the rights of attribution and integrity.¹⁶⁸ The attribution right is intended to ensure 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 is on treating the author in a principled way, but never on whether the author has behaved morally in the production or distribution of a creative work.

One of many unknowns in the realm of Internet pornography is how often people upload pictures and videos of themselves, as compared to content that features the images of other people.¹⁶⁹ Copyright law, as currently written, is concerned only with the rights of the copyright holder, who is generally the author of the work, or someone who has licensed or purchased rights from the author. People who upload images of themselves, in which they personally hold copyrights, have some control, rooted in copyright law, over the use of these works. And it is hard to understand how individuals who affirmatively upload pictures of themselves engaging in sex acts can be particularly concerned with personal privacy. The change

167. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 862 (5th Cir. 1979).

168. Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. 2, available at http://www.wm.edu/law/publications/jol/95_96/lemley.html.

169. For example:

Police faced a difficult if not impossible task Thursday as they tried to stop the spread of pornographic video and photos of two high school girls, images that were transmitted by cell phone to dozens of the girls' classmates and then to the wider world. District Attorney James B. Martin said at least 40 Parkland High School students believed to have received the images would not face prosecution as long as they show their phones to police by Tuesday to ensure the images have been erased. But students at the school said the distribution was far more widespread. "Most people got it and kept passing it along for fun to everyone in their phonebook," said Jon Gabriel, 16, a junior who said he received and deleted the images. A state trooper was sent to the school Thursday and will return for two more days to ensure that images were erased from the cell phones of students whose parents got letters from prosecutors. The letter explained what had happened, set a deadline for erasing the images and asked the parents to sign consent forms. Martin said students who fail to comply by the deadline could be prosecuted in juvenile court for possession of child pornography.

Pornographic Photos, Video of 2 High School Girls Spread by Cell Phone, FOXNEWS.COM, Jan. 25, 2008, <http://www.foxnews.com/story/0,2933,325508,00.html>

suggested here would give power to the people depicted in pornography created by others in a way that could somewhat increase their autonomy and preserve their personal privacy. Using a copyright law framework that conditioned enforceability upon performer consent, they would be empowered to leverage copyright protections to curtail commercial distribution of works they appeared in as a consequence of coercion.

As with record keeping aimed at reducing child pornography, copyright-contingent record keeping intends to reduce coercion of pornography performers.¹⁷⁰ The constitutionality of this approach would likely be contested by the same interest groups, primarily pornographers and the libertarian organizations they support financially, who object to 18 U.S.C. § 2257. However, it is important to recognize that, ordinarily, a speaker cannot effectively enforce her copyrights anonymously. Both the acts of registering a copyright and bringing an infringement suit require identification of the copyright holder.¹⁷¹ It is the non-copyright-holding performer whose ability to retain anonymity is potentially compromised, though no more so than is currently required by the demands of 18 U.S.C. § 2257.

Using copyright to address coercion and consensuality issues would enhance the effective privacy of involuntary “performers.” Pornography is not just representation; it is a record of an actual event. In many cases, it is a record of a crime being committed. Rapes and other violent bodily offenses are videotaped and marketed as voluntary pornography,¹⁷² and many performers may appear on camera as a consequence of some form of deception or coercion. Even

170. This may slightly burden anonymous speech to the extent that having to identify the people who appear in pornography to assure their well-being is legitimately considered burdensome.

171. See *supra* note 114 and accompanying text.

172. For example:

The U.S. Capitol police officer accused in a child sex and porn case took the stand Wednesday, as did his alleged victim. Sgt. Michael Malloy, 35, was charged in connection with videotaped sexual encounters of a minor. Because the victim is 16 years old, her initials were used instead of her name in court. The girl testified that when she was 14 and shortly after her 15th birthday she had sex with Malloy and another man in the basement of Malloy's Charles County home. She said that on at least one occasion, the sexual activity was videotaped.

Girl Testifies in Capitol Police Officer Child Porn Trial, NBC4.COM, Sept. 19, 2007, <http://www.nbc4.com/news/14153675/detail.html>; see also Posting of Ann Bartow to Feminist Law Professors, <http://feministlawprofs.law.sc.edu/?p=1409> (Jan. 17, 2007, 19:12 EST) (“A man kidnapped his wife, raped and tortured her and then hung her from a tree to film a two-hour bondage porn video, authorities said Tuesday. The 30-year-old man was charged with aggravated assault and battery, sexual battery, kidnapping and false imprisonment. He was being held in the Brevard County Jail Tuesday on a \$3 million bond.”).

when the sexual acts were performed voluntarily, the performers may not have known that they were being recorded or may have believed that any audiovisual works that were produced would remain private. There is an active harm that is done to performers when pornographers distribute and exploit their sexually explicit images without expressed consent.¹⁷³ Precluding pornographers from asserting copyrights in works for which the consensuality of the performers cannot be demonstrated may reduce incidents of this type of wrong. It might require some negotiation to impose this in a way that does not interfere with our compliance with international copyright treaties,¹⁷⁴ but surely it is important enough that other treaty signatories may be persuaded that the issue is necessary.

VII. CONCLUSION

The production of pornography using living human beings is essentially unregulated. In consequence, pornography performers are exposed to substantial risks, ranging from violence and disease to not being paid for their work. Any attempts to regulate pornography on site or via employment law precepts are vociferously opposed as infringements upon free speech.

Large corporations reap significant profits from the production and sale of pornography and increasingly have turned to the copyright infrastructure to “protect” pornographic content. In part, this is a response to copying and unauthorized distribution by the “user generators” of Web 2.0. Some user-generators are producing their own pornography, and many of these “amateurs” are attempting to monetize these productions themselves. They can also be expected to use copyright law as a tool to facilitate these efforts.

The morality and social utility of using the copyright laws to incentivize the creation and consumption of pornography remains largely uninterrogated by legal scholars. The vulnerability to abuse of pornography performers compels consideration of multiple approaches to reduce risk, including altering the copyright framework.

Copyright law could be reconfigured to alter incentives related to current pornography creation and distribution patterns. The ability to register and enforce copyrights on pornographic works could be linked to compliance with a regulatory scheme intended to promote the safety and well-being of everyone connected with the works’

173. See MacKinnon, *supra* note 83.

174. See *e.g.*, Berne Convention for the Protection of Literary and Artistic Works, Jul. 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (Mar. 1, 1989).

production and commercial exploitation. It is true that works for which copyright protection is not functionally available may be more broadly disseminated than copyrighted works, and I am not under any illusion that denying copyright protection would substantially curtail coercion in the production of pornography, but at least some of the time doing so might make it less profitable.

In an essay entitled "Iraq's War Porn," David Swanson wrote:

Here is a U.S. soldier posing with two Iraqi boys. They are all giving a thumbs-up signal, and one of the boys is holding a sign he is surely incapable of understanding that says: "Lcpl Boudreaux killed my dad then he knocked up my sister!" With some images from this war, we cannot know if, or to what extent, they were posed. This one, however, is clearly a performance and we are the audience. We are supposed to laugh.

And, in a sense, the sign in this photo is certainly true. At least some U.S. soldiers have evidently become so accustomed to killing and torturing that it dominates their thinking. What dominates your thinking, what concerns you, often comes out in humor. It is quite likely that the soldier in this photo has not murdered or raped anyone, but perhaps he has seen such things done by others. Given the nature of our war in Iraq, though, it is entirely possible that he has committed such acts.

Think about the images from Abu Ghraib. Here's one to remind you, one you may not have seen before.

The question we should ask ourselves is not just why our soldiers tortured this man, but why someone took a photo of it. How had such acts become behavior to take pride in, to record as keepsakes? And are a few bad apples really capable of creating such conditions?

A photograph presupposes an audience, someone to enjoy or appreciate it. Here's an image of a young female prisoner in Abu Ghraib raising her shirt as she was certainly forced to do.

Someone expects us to enjoy that as pornography. Instead, it offers a glimpse of a world of unfathomable humiliation and abuse, the very same world that produced the image above of the bleeding man.¹⁷⁵

U.S. copyright law currently gives nothing in the way of ownership or control to the subjects of these photographs even when they are created with violence and coercion. To the contrary, it provides a mechanism through which the photographers can profit at their expense. This is true whether the creative works are pornographic or not, but arguably worse when the images are coerced and degrading.

175. David Swanson, *Iraq's War Porn*, ALTERNET, June 15, 2006, <http://www.alternet.org/waroniraq/37572/?page=entire>. The photographs discussed in the excerpt are available at Iraq War 2003-2005, <http://www.afterdowningstreet.org/node/10633> (last visited Mar. 19, 2008); Abu Ghraib—2, <http://www.afterdowningstreet.org/node/10492> (last visited Mar. 19, 2008); and Abu Ghraib—19, <http://www.afterdowningstreet.org/node/10509> (last visited Mar. 19, 2008).

Making copyright enforcement of pornography conditional upon a showing that performers' participation was voluntary would embed some concern for pornography's victims into Copyright Law 2.0.

As the quantity of user-generated pornography on the Internet increases, some portion is likely to be assimilated into corporate business models. Building mechanisms for combating coercion into the pornographic components of Web 2.0 is an appropriate activity for Congress to undertake, and a necessary precursor to healthy online expressions of sexuality by user-generators.