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How Many Wrongs Make a Copyright?

Rebecca Tushnet¹

Abstract: Derek Bambauer’s provocative paper argues that, because the remedies available to people who suffer unconsented distribution of intimate images of themselves are insufficient, we should amend copyright law to fill the gap. Bambauer’s proposal requires significant changes to every part of copyright—what copyright seeks to encourage, who counts as an author/owner, what counts as an exclusive right, what qualifies as infringement, what suffices as a defense, and what remedies are available. These differences are not mere details. Among other things, incentivizing intimacy is not the same thing as incentivizing creativity. Bambauer’s argument that copyright is normatively empty and already full of inconsistencies and exceptions does not justify such profound changes. Bambauer’s true target is § 230 of the Communications Decency Act, which protects online intermediaries from liability stemming from users’ violations of others’ privacy. Copyright claims aren’t subject to § 230, so his proposal hopes to force intermediaries to do more in revenge porn cases. But the case for requiring more from intermediaries to protect privacy should be made on its own merits, not by distorting copyright law.

Derek Bambauer’s provocative paper starts with a normative proposition: the remedies available to people who suffer unconsented distribution of intimate images of themselves, often known as revenge porn, are insufficient. Bambauer is especially critical of the secondary liability regime for privacy torts. At (First Amendment-inflected) common law, it is hard to hold distributors liable for such harm, and Congress has made it impossible online by enacting § 230 of the Communications Decency Act, which provides total immunity to a service provider uninvolved in developing tortious content.² Copyright’s remedies, Bambauer observes, are much broader. And the lack of ability to control distribution is a disincentive for at least some people to create intimate pictures, even though the creation of intimate pictures might otherwise have social utility. Because copyright is justified as a means of incentivizing creation, but mostly because its remedies are good ones, we should therefore call the harm done by unconsented distribution of intimate images “copyright harm.”

Bambauer is not the first to notice that copyright’s remedies are far broader than those associated with other rights to control information. Some victims of unconsented distribution of intimate images have already turned to copyright claims—mostly celebrities to date, but we can imagine more ordinary folks doing so as well.³ Likewise, trademark owners have made copyright claims when trademark’s remedies have proved insufficient for their desires.⁴ So have victims of

¹ Thanks to James Grimmelman for helpful discussions and Rob McCabe for research assistance.

² Bambauer draft at 5.

³ Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC’Y U.S.A. 209 (2013).

⁴ See, e.g., Sarah B. Deutsch, Re: Request for Public Comment on Designation of Agent to Receive Notification of Claimed Infringement, United States Copyright Office 2 (Nov. 28, 2011), available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/verizon.pdf> (noting DMCA notices sent on trademark grounds); Jennifer M. Urban and Laura Quilter, Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, 22 Santa Clara Computer & High Tech. L.J. 621, 668-70, 678 (2006) (discussing noncopyright claims framed as copyright claims for purposes of benefiting

negative reviews, circumventing defamation's strict limits on liability.⁵ Of course, those limits—like trademark's limits—are there for a reason, and so too with the privacy torts generally thought most apposite to the harm done by unconsented distribution of intimate images.

So how should we think about Bambauer's proposal? As Part I of this response details, the proposal requires significant changes to every part of copyright—what copyright seeks to encourage, who counts as an author/owner, what counts as an exclusive right, what qualifies as infringement, what suffices as a defense, and what remedies are available.

Part II argues that these differences are not merely definitional. They go to the effects of the law as well as its goals. Incentivizing intimacy is not the same thing as incentivizing creativity. The motivations that induce people to create and share intimate images are unlikely to be affected by a change in copyright law that both creators and abusive disseminators are extremely unlikely to understand. Copyright works, when it works, as incentive for economically motivated creators; it handles the non-economically motivated poorly, and it has no real mechanism for communicating its rules to the laypeople engaged in the bulk of the behavior Bambauer wishes to change. Misunderstood penalties will neither incent nor deter as hoped.

Bambauer nonetheless argues that the harm he targets is close enough to copyright harm that the right he wants to grant can fairly be called a copyright right, because copyright—particularly copyright's concept of authorship—is normatively empty and can be filled any way we want to fill it. He points to the inconsistencies and special pleading that abound in the current statute, and argues that adding a sexting epicycle to the current scheme wouldn't make a difference worth protesting. I disagree, because of the profound misfit between every aspect of copyright and the interests at issue here.

Bambauer's true target is the secondary liability rules for privacy violations, particularly § 230 of the Communications Decency Act. He argues that intermediaries should be subject to legal constraints for enabling the unconsented dissemination of intimate media, and that the intermediary liability he envisions would be constitutional if based out of Title 17. I believe that avoiding privacy law's secondary liability regime by calling the proposed cause of action

from DMCA takedown procedures); Fax from Creative Crystal Co. to Google, Inc. (Aug. 22, 2003), <http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=842> (last visited Oct. 15, 2005) (requesting takedown of sites which use Creative Crystal's registered trademarks "in metatags and keywords up to 39 times on one page"). *Euro-Excellence, Inc. v. Kraft Can., Inc.*, [2007] 3 S.C.R. 20 (Can.) (rejecting trademark owner's attempt to use copyright to evade limits on trademark rights); Rebecca Tushnet, *INTA: Pharma Panel and Keyword Panel*, REBECCA TUSHNET'S 43(B)LOG (May 8, 2012), <http://tushnet.blogspot.com/2012/05/inta-pharma-panel-and-keyword-panel.html> (discussing trademark counsel's advice to claim copyright in logos and other marks in order to expand rights).

⁵ See, e.g., *Rosemont Enters. v. Random House, Inc.*, 336 F.2d 303 (2d Cir. 1966) (magnate tried to suppress biography by buying copyrights of quoted articles); Eric Goldman, *Ripoff Report Ordered to Stop Publishing User-Submitted Report*—*Giordano v. Romeo*, TECHNOLOGY & MARKETING LAW BLOG (Jan. 4, 2011), http://blog.ericgoldman.org/archives/2011/01/ripoff_report_o.htm (business sued critic for defamation and acquired copyright in critical post, then sent copyright takedown); Eric Goldman, *You Shouldn't Need a Copyright Lawyer to Pick a Dentist*--*Lee v. Makhneich (Forbes Cross-Post)*, TECHNOLOGY & MARKETING LAW BLOG (April 23, 2013), http://blog.ericgoldman.org/archives/2013/04/you_shouldnt_ne.htm (explaining how some professionals have attempted to use copyright to remove negative online reviews).

“copyright” is a mistake. If the secondary liability rules are wrong and there should be a notice and takedown scheme for revenge porn—something I’m open to agreeing with—then they should be changed, not evaded. If the secondary liability rules are right, they should not be evaded. And the collateral damage from evasion should not be excused by claiming that copyright is already bollixed.

Ultimately, I can’t agree that we ought to be realists when it comes to escaping § 230 and formalists when it comes to evaluating the constitutionality of something labeled “copyright.” Bambauer argues both that the label “copyright” matters, because copyright is about something in particular and because violations of its exclusive rights deserve particular remedies, and also that the label is just a move in a language game. Inconsistency is no great vice, but it’s no virtue either. The case for a new intellectual property (or more properly, privacy or dignity) right for people depicted in intimate photos and videos could most persuasively be made on its own merits.

I. Why Call It Copyright?

Copyright, though it has many complex and reticulated niches, has a general structure. Pamela Samuelson has recently undertaken a valuable taxonomic project on copyrightable subject matter, articulating criteria based on the history of and policies underlying copyright law for what should and shouldn’t be brought into the copyright regime (e.g., gardens, yoga, DNA sequences).⁶ While some of her criteria aren’t very relevant to Bambauer’s proposal, because he deals with photos and video that are already copyrightable subject matter and instead proposes to change authorship and rights definitions,⁷ several others provide useful guidance. She suggests that, when considering an expansion of copyright law, we should consider the fit between copyright’s economic justification and the economic/incentive structure of the subject matter sought to be protected, specifically whether legal protection will spur investment into the production of multiple copies for the purpose of sale.⁸ We should also consider the fit between the subject matter and the legal structure of copyright:

This includes the appropriateness of the exclusive rights, the duration of rights, infringement standards, and copyright remedies, as well as copyright doctrines, such as the idea/expression distinction, the scenes a faire and merger, fair use and first sale, classroom and other performance limitations, and the procedures by which copyright infringement is judged. Often proponents of an expansion in copyright subject matter focus on a subset of the features of copyright’s legal regime, while ignoring respects in which a mismatch exists. While special rules can sometimes be developed to adjust the fit

⁶ Pamela Samuelson, *Are Gardens, Synthetic DNA, Yoga Sequences, and Fashions Copyrightable?* (unpublished draft, on file with author)

⁷ For example, the question of how long the subject matter at issue has existed and whether changed circumstances justify an expansion of copyright is less relevant to Bambauer’s proposal than to DNA sequences, as is whether the works communicate expressive content. *Id.* at 22.

⁸ *Id.* at 21. Relatedly, she suggests evaluating the similarity of creators and creative outputs in the proposed subject matter to the creators and creative outputs of conventional copyrightable works: “[T]he greater the mismatch in these respects, the more likely it is that an extension of copyright to new subject matters will cause distortions or result in misapplications that will undermine the integrity of the copyright regime.” *Id.* at 22.

in copyright law, the legal regime fit should be an important criterion in judging whether subject matter expansion is a sound idea.⁹

In line with Samuelson's framework, the following subsections explore what Bambauer proposes to change—which turns out to be pretty much every aspect of copyright. The overall effect is that the right he wants to create can't be called "copyright" under any current meaning of the term.

A. What is the incentive-based justification for the right?

The subject matter of copyright has traditionally been limited by the concept of encouraging creation of *expression*, not just creation more generally. The threat of underproduction of an intangible value is addressed many different ways in law. Patent, design patent, trade secret, trademark dilution, and the right of publicity all, at least according to their proponents, seek to encourage production by giving owners a right to exclude.¹⁰

As noted by Bambauer and others, the right of privacy can also be seen to protect incentives generated by exclusive control. The question is—control over what? The answer usually allows us to identify the category of legal right at issue. When we want the creator to have control over innovation, the relevant law is patent or trade secret. When we want the creator to have control over marketing value, the relevant law is trademark dilution or the right of publicity. Bambauer proposes to shift the locus of control over intimate expression from the right of privacy to copyright, but identifying "incentives" for "production" in general doesn't justify putting anything into the copyright category in particular.

Privacy, and the related ability to control the presentation of one's self, support the development of that self.¹¹ Privacy provides a space for experimentation, self-discovery, and intimacy, all of which are goods worth having. Intimate media, Bambauer argues, can further these missions of self-discovery and intimate communication, and therefore incentivizing the creation of intimate media fits within copyright's incentive paradigm.¹² Tangible indicia of intimacy and self-discovery, however, are valuable to self-development not because they are tangible, and not because they contain creative expression—those are just incidental phenomena related to the fact that modern Americans live digital, mediated lives—but rather because they support this private, desiring, intimate self. As a result, the incentives Bambauer wishes to provide are not directed at generating expression fixed in a tangible medium, the traditional—and constitutionally

⁹ Id. at 21-22.

¹⁰ See, e.g., *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511, 524 (1871) (design patent); *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1324 (Fed. Cir. 2012) (patent); Restatement (Third) Unfair Competition § 39 cmt. a (1995) (trade secret); 1 J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 2.2 (1987) (right of publicity); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & Econ. 265, 308-09 (1987) (trademark dilution).

¹¹ See, e.g., Julie E. Cohen, *What Privacy Is For*, 126 Harv. L. Rev. 1904, 1906 (2013) ("Privacy is shorthand for breathing room to engage in the processes of boundary management that enable and constitute self-development."); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 532 (2006) ("The risk of disclosure can prevent people from engaging in activities that further their own self-development.").

¹² I therefore find it curious that Bambauer argues that privacy theory doesn't recognize the benefits of intimate media. Bambauer at 55. His description seems to me to fit very well into a discourse about the benefits of privacy, which include intimate interactions.

required—subject matter of copyright.¹³ Privacy’s intimacy-promoting goals would be equally well-served by (1) protecting nonexpressive/factual intimate communications, including communications too basic or standard to be deemed protectable by copyright under conventional copyright doctrine, and by (2) protecting unfixed communications such as realtime telephone conversations, video chats, or even face-to-face gossip.

The examples Bambauer uses also show that the targeted harm is not about expression, but rather about the social meaning of exposure (especially for women):

A female Yale Law School student targeted by defamatory attacks, including about her intimate life, on the AutoAdmit Web site did not obtain a single summer job offer during on-campus recruiting with law firms.... A student teacher was denied a degree in education after inadvertently revealing a MySpace photo that showed her drinking an alcoholic beverage while wearing a pirate costume. A Georgia high school teacher was forced to resign after a parent gained access to her Facebook profile and found a photo of her holding a pint of beer and glass of wine during a trip to Europe. In Florida, a high school English teacher was also pressed into quitting her job after her principal found photos of her modeling swimsuits, under a different name, online. Finally, Citibank terminated a female employee simply because she was judged to be both attractive and given to wearing clothes that accentuated her appeal.¹⁴

Notice that all these examples involve gender role enforcement (including concerns about women’s public consumption of alcohol), but *not* intimate media. That Bambauer rightly identifies them as part of the same problem as nonconsensual distribution of intimate media indicates that the harm is something different than what his proposed solution targets.¹⁵ “Revenge porn employs the darker part of the human emotional spectrum: shame, humiliation, fear, and disgust,”¹⁶ and it is that source of harm that privacy/dignity-based torts target. By contrast, copyright usually refuses to recognize harm to the copyright owner’s dignity as a source of actionable harm: Anne Rice may feel personally assaulted by bad reviews or parodies,¹⁷ but that’s just too bad for her unless the attack rises to the level of defamation or intentional infliction of emotional distress.

Bambauer’s proposal would give copyright new missions: incentivize the creation of intimacy and prevent harms from exposure, mainly harms suffered by women. These might well be valid goals, but not ones that fit copyright’s contours.

¹³ See U.S. Const., art 1, §8, cl. 8 (allowing Congress to protect “[w]ritings” of “[a]uthors,” both terms with arguable limiting force); 17 U.S.C. §102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression ...”); *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.... [O]riginality requires independent creation plus a modicum of creativity ...”).

¹⁴ Bambauer, at 14-15 (footnotes omitted).

¹⁵ Cf. Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 705 (1982) (sexualized advertising does the same kind of harm as pornography).

¹⁶ Bambauer at 17 (footnote omitted).

¹⁷ Sarah Lyall, *The People Have Spoken, and Rice Takes Offense*, N.Y. TIMES, Oct. 11, 2004, available at http://www.nytimes.com/2004/10/11/books/11rice.html?_r=0.

B. Who counts as the author/owner of the right?

Bambauer’s proposed right is not a conventional authorship right. Instead of the *author* of the fixed work—the person or persons who contributed sufficient copyrightable creativity and exercised sufficient control over the final work—being the copyright owner, the *subject* would own a “copyright” interest under Bambauer’s model. Each subject would enjoy a right to prevent distribution of intimate media, even as against the person who would otherwise be deemed the copyright owner.¹⁸ This new right would apparently cover all “intimate media,” but the proposed definition doesn’t include any requirement that the media have been created with an intent to limit distribution. Thus, it would appear to work a profound change in the default ownership rules for pornography as well as for any other photos and video containing sexually explicit elements, something one might imagine both the adult entertainment and the mainstream film/TV industry might wish to weigh in on before enactment.¹⁹

Also unlike a regular copyright right, the intimate media right would be waivable (in writing), but not alienable.²⁰ Copyrights can presently be licensed nonexclusively based on oral agreements or by implication from the parties’ conduct.²¹ Bambauer’s rule for intimate media would require a written agreement even for a nonexclusive license.²² Likewise, because one problem that arises in intimate media is that one member of a couple shares a sex tape featuring both of them, waiver by one participant would not waive others’ rights, again in contrast to existing law, including the existing moral rights provisions in the Copyright Act;²³ presently, joint authors can grant nonexclusive licenses without the consent of other joint authors.²⁴

C. What qualifies as infringement?

¹⁸ Bambauer at 30 (proposal would “curtail the distribution and display rights enjoyed by the copyright owner of intimate media”). It is also unclear whether this new interest would affect the copyright term, which for works not created as works for hire is life of the author plus 70 years. Logically, we could treat the new copyright owner the way we treat joint authors—the term of a joint work is the life of the longest-surviving author plus 70 years.

¹⁹ Bambauer proposes that this right will be waivable in writing, but that’s not sufficient for the modern film industry, which universally seeks work-for-hire status so that the funding/producing entity is deemed the author of the work from the outset. Among other things, a mere copyright transfer from the performer is terminable after 35 years. See 17 U.S.C. § 203. Perhaps Bambauer means that waiver should not be considered a “transfer” and therefore not terminable; if so, his proposal has yet another point of divergence from current copyright law. (No court would allow the use of the term “waiver” to defeat §203 termination rights in other circumstances; §203 was designed to be unwaivable. Cf. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 (2d Cir. 2002) (finding that an after-the-fact agreement that a work was a work for hire is an unenforceable “agreement to the contrary” that can’t prevent termination given Congress’s intent to protect authors).) Or perhaps Bambauer would allow the creation of works for hire outside the scope of this new right, which for nonemployees would require (1) a written agreement, and (2) that the work fall within the enumerated statutory categories of works that can be works for hire. See 17 U.S.C. § 101. In the case of standalone photographs, this might prove a bit tricky, since it’s hard to jam photos into any of those categories, but for films and photos intended for inclusion in magazines and the like it could probably be done with relative ease.

²⁰ Bambauer at 30.

²¹ See, e.g., *Effects Assocs. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

²² Bambauer at 26.

²³ Bambauer at 31. See 17 U.S.C. § 106A (granting limited moral rights of attribution and integrity to certain works of visual art); id. §106A(b) (providing that joint authors are co-owners of these moral rights).

²⁴ Bambauer at 13 (“Even if a participant were deemed a joint author of the intimate media [under existing law], she would be powerless to prevent her co-author from giving permission for the work’s use, regardless of her wishes.”).

Bambauer proposes that the owner of the intimate media right would have the right to prevent distribution of the work.²⁵ This right would apparently *not* be the right to authorize distribution without the consent of the person who would ordinarily be considered the copyright owner, but a purely prohibitory right. So, if the subject wasn't also the camera person, she wouldn't by herself be able to authorize distribution. By contrast, existing copyright rights are rights to authorize, not just rights to prohibit; as noted in the previous section, joint authors can grant licenses without other authors' consent. It is not clear whether this negative right would have the same duration as a copyright (currently life plus seventy years).

In addition, the intimate media right would go beyond the current §106 right to control public performance and display and create a new right to control private performance and display.²⁶ The right would thus cover instances in which a recipient called his friends over to look at the image on his phone, which again sounds more like a privacy right than a copyright.

D. What are the defenses to infringement?

Bambauer proposes to eliminate the existing defenses to copyright infringement for intimate media, including most notably fair use, though presumably the exceptions for educational institutions, nonprofit performances, etc. would also all have to go.

Because the “intimate media” definition would cover all sexual photos and visuals, even if they were created for distribution, this could have significant effects on fair use cases, which often involve sexuality.²⁷ Consider the recent and already influential case *Prince v. Cariou*,²⁸ in which appropriation artist Richard Prince took photos of Rastafarians and combined them with images of naked women taken from soft-core magazines:

²⁵ Bambauer at 30. Bambauer also proposes that only actual images should be covered. Bambauer, at 29. I'm not sure this definition would be likely to survive the drafting process—why not also cover avatars? The interest in them, especially as they improve in verisimilitude, is likely to be similar, and the right of publicity has similarly expanded to cover virtual representations. *See, e.g., Hart v. Electronic Arts*, 717 F.3d 141 (3rd Cir. 2013).

²⁶ Bambauer at 30.

²⁷ *See* Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L., 273, 278-79 (2007).

²⁸ 714 F.3d 694 (2d Cir. 2013).



29

The photographer mostly lost his infringement claim because the use was transformative, bringing new messages and new meanings to the original photos. But under Bambauer's new rule, the models portrayed in the soft-core magazines would have a valid infringement claim (against Prince and against me) because they didn't consent to Prince's use.

Bambauer offers a slightly different scenario:

Consider an artist who uses a photograph of his naked partner in his artwork—perhaps he is mashing up Soviet-era propaganda images with nude photos. That display of the intimate photo is highly transformative, pushing the analysis towards finding the use fair. But, this is irrelevant to his partner, who may not want the photo displayed, regardless of its artsy surroundings. The possibility of being involuntarily featured may dissuade her from posing for the photo at all.³⁰

The use of the hypothetical partner, instead of the image ripped from a magazine (as occurred in *Cariou*), leaves the impression that the problem is only relational (making it appropriate for a privacy tort), so that we needn't worry about fair use. But fair use's transformiveness doctrine specifically favors precisely the kinds of uses that make copyright owners, and sometimes the subjects of their works, feel bad—critical, mocking, even cruel uses.³¹ These fair uses may decrease the incentive to produce works compared to a world in which criticism wasn't allowed, but copyright has deliberately chosen not to provide that kind of incentive to authors and owners.³²

²⁹ Richard Prince, *Djuana Barnes*.

³⁰ Bambauer at 39 (footnotes omitted).

³¹ See, e.g., *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113-14 (2d Cir. 1998).

³² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994) (“[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.

Bambauer proposes to substitute a newsworthiness defense for fair use.³³ That would still seem to spell trouble for Richard Prince (though maybe not for me), as the specific images of the women in the pictures are unlikely to be newsworthy, though I can imagine some courts contorting themselves to find newsworthiness based on the women's prior consent to appear in a soft-core magazine.

But newsworthiness isn't a copyright defense.³⁴ If fair use is a poor fit for the interests that the proposal addresses, they might not be copyright interests. As Bambauer notes, there are existing causes of action that have newsworthiness defenses and don't have fair use defenses. They're privacy torts, whose precedent Bambauer suggests courts could incorporate in defining the boundaries of the new defense.³⁵ But if privacy and newsworthiness go so well together, what's wrong with using the existing privacy torts? Bambauer's answer is that the trouble lies with existing remedies, to which I now turn.

E. What are the remedies for infringement?

1. Statutory damages

Statutory damages, enforced by private parties, are one key reason to choose copyright instead of some other law, according to Bambauer.³⁶ But, though Bambauer says “[d]amages would follow copyright's established system,”³⁷ he proposes to change that system. Bambauer notes that getting a lawyer to take a revenge porn case is difficult, and so is getting a lawyer to take an ordinary copyright case.³⁸ Some revenge porn cases won't involve works that were timely registered (registered before the infringement began or within a few months of publication),³⁹ and timely registration is a prerequisite for an award of statutory damages and attorney's fees, even assuming that the individual infringer had enough cash to pay an award.⁴⁰ Bambauer

Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,’ the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’” (citations omitted).

³³ Bambauer at 38.

³⁴ *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 557 (1985).

³⁵ Bambauer at 38.

³⁶ Bambauer at 25.

³⁷ Bambauer at 33.

³⁸ *Cf.* Mickey H. Osterreicher & Alicia Wagner Calzada, Comments of the National Press Photographers Association, Nat'l Press Photographers Ass'n, at 7 (Oct. 27, 2011), http://blogs.nppa.org/advocacy/files/2012/01/final_Copyright-Small-Claims-Comments-01-17-12-1.pdf (describing photo infringement as rampant online and stating that “most will never be prosecuted because it is economically unfeasible for the creators to commence an action in federal court”).

³⁹ I'm not so sure about this—the works involved in revenge porn cases may well count as unpublished, as long as the creator didn't publish them herself. Distribution to a limited group with no purpose of further distribution is probably not publication. Thus, registration before filing suit might well qualify the victim for statutory damages, assuming she's the copyright owner. *See* Deborah R. Gerhardt, *Copyright Publication: An Empirical Study*, 87 *Notre Dame L. Rev.* 135, 147 (2011). And juries probably would consider the awfulness of the disseminator's harassing and demeaning motive in setting a statutory damage award, even though that's not generally a factor in copyright statutory damage awards (again, because revenge porn doesn't implicate ordinary copyright interests).

⁴⁰ Bambauer at 21.

would solve this problem by removing the timely registration requirement for statutory damages.⁴¹

But there is no reason that a standalone, sui generis law against revenge porn couldn't also allow for private remedies, including statutory damages. No reason, that is, other than § 230, which would block the imposition of statutory damages on *intermediaries*, even ones who refused to honor takedown requests after a plaintiff succeeded in winning a claim against an unauthorized sharer of intimate media.⁴² The sharers themselves, however, could likely be made individually liable for statutory damages under a specifically drafted law targeting revenge porn as a privacy tort—this could supplement or replace potential criminal liability.⁴³ At the very least, it would be fruitful to explore the justifications for and potential arguments against a sui generis right, as Pam Samuelson and Jerome Reichman among others have done with respect to other interests that don't fit well with current intellectual property regimes.⁴⁴

Statutory damages still might not be enough to convince an attorney to sue a victim's horrible ex-boyfriend, unless he also happens to have \$150,000 in the bank. Only big firms tend to seek statutory damages against petty infringers like music uploaders Jammie Thomas and Joel Tenenbaum.⁴⁵ There is not much chance these statutory damages awards will ever be paid, and the recording industry couldn't have thought they would be; its lawyers got paid to send a message.

The only predictable, law-abiding deep pockets in this area belong to intermediaries, which is why Bambauer also suggests changing the law governing them.

2. Intermediary liability

Bambauer proposes altering 17 U.S.C. § 512, which currently provides a notice and takedown scheme for alleged copyright infringement. He suggests that § 512 should be altered with respect to intimate media specifically, and that this would be simple to implement because internet service providers are already familiar with this provision (known as DMCA notice and takedown).⁴⁶ The new system would be similar to the existing DMCA, but with different information provision and redaction requirements. It's not clear whether Bambauer supports the

⁴¹ Bambauer at 35.

⁴² See *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (allowing intermediary to refuse original poster's request to take down content and still keep §230 protection).

⁴³ See Danielle Keats Citron, '*Revenge Porn*' should be a crime, CNN OPINION (Aug. 30, 2013), http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html?hpt=hp_t4; Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper*, Sept. 18, 2013, *available at* http://www.endrevengeporn.org/uploads/1/3/2/8/13286642/franks_ncp_working_paper_9.18.pdf (proposing draft criminalization bill).

⁴⁴ See, e.g., J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51, 113-37 (1997) (discussing justifications for and arguments against sui generis protection for data); Pamela Samuelson, Randall Davis, Mitchell D. Kapor, & J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2310-12 (1994) (arguing for sui generis protection for computer programs).

⁴⁵ See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 454 (2009) (noting that in practice statutory damages are mainly sought by large firms).

⁴⁶ Bambauer at 27; *see id.* at 36-37 (describing new system).

existing DMCA rule that a counter-notification entitles the intermediary to restore access to the accused work unless the claimant files suit.⁴⁷

Nor is it clear that Bambauer would allow existing defenses for intermediaries. Compliance with the DMCA provides relief from any money damages that would otherwise be available to a plaintiff, but, even for non-DMCA compliant services, the ordinary rules of secondary liability would still require the plaintiff to establish that the intermediary was contributorily or vicariously liable for the infringing content before any remedy could be available against the intermediary.⁴⁸ A blogger who allows comments may not have a DMCA agent on file with the Copyright Office and would therefore be ineligible for DMCA protection, but the blogger is still not automatically liable for infringement when a commenter posts infringing material. Thus, in some circumstances, an intermediary could choose noncompliance with notice and takedown and still evade liability under existing law.⁴⁹

I'm unsure that the problems of intimate media distribution are amenable to the DMCA solution. One major source of trouble in the sexting realm has been photos shared through secure messaging services (SMS). Those systems aren't set up to make notice and takedown effective, and standard phone networks that carry SMS don't meet the underlying standards for secondary copyright liability (though, again, perhaps Bambauer is also willing to change those).⁵⁰ Traditional websites would be covered by this new right, but to the extent that intimate media circulate in different ways from the average DMCA target does, that's a further indication that what we have isn't a copyright problem.

F. Summary: A right granted by Title 17, not a copyright

Bambauer proposes a right with a different justification from copyright, owned by someone other than the ordinary copyright owner, infringed by different acts, with different defenses, and with different remedies. When you're making this many changes, it might be time to admit that the proposal does not involve copyright, but rather a sui generis right placed in Title 17 for another purpose. That purpose, as the next part explores, is to avoid CDA § 230. This makes his

⁴⁷ He speaks of the subject's written consent as a defense, and of the intermediary's immunity after complying with a takedown notice as a reason not to worry about the intermediary's difficulty in verifying written consent, Bambauer at 37, but that just means the intermediary will always take down content whenever a notice is proper in form, in order to secure that immunity. Should a counter-notification that claims to have written consent be sufficient to lead to a "put-back"? The copyright analogy would suggest that the answer is yes, since the intermediary is in no position to judge the facts.

⁴⁸ See, e.g., Hotfile decision (finding Hotfile ineligible for DMCA safe harbor, but not necessarily liable on contributory infringement theory).

⁴⁹ There are other ways to evade liability, of course: not all websites are amenable to U.S. jurisdiction. See Lorelei Laird, Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To, ABA Journal, Nov 1, 2013 4:30 AM CDT,

http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/ ("It's an inexpensive way to get photos taken down—if it works. But website operators overseas or those who believe they're judgment-proof can and do ignore the [DMCA] notices. . . . And as [Professor Eric] Goldman notes, foreign websites don't care about DMCA takedown notices. Indeed, several sites have reportedly moved to overseas hosts to avoid legal consequences in the U.S.").

⁵⁰ See *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1072-73 (9th Cir. 2013) (owners of multimedia messaging networks couldn't be held liable for copyright infringement by users; plaintiff couldn't successfully allege contributory or vicarious liability).

proposal notably distinct from other not-quite-copyright interventions into the statute such as microchip design protection or vessel hull design protection.

II. Why *Not* Call It Copyright?

Why are all these changes required to make revenge porn fit a copyright model? In this part, I suggest that renaming the problem of revenge porn is unlikely to help us solve it. The incentive theory does not justify creating a new intimate media right in Title 17, because copyright doctrine's levers for affecting human motivations don't fit the behaviors at issue, though privacy law's might. Copyright law's present messiness is an insufficient justification for making so many alterations to copyright's foundations, and the constitutional issues raised by the new right will still exist no matter its statutory surrounding. Finally, calling a new right a "copyright" has risks of its own, given Bambauer's desire to evade § 230.

A. Not All Incentives Are the Same⁵¹

This mismatch between copyright's incentive paradigm and the benefits of intimate communication isn't just theoretical or definitional. It can't be fixed by deciding that we want "copyright" to incentivize more than just expression. Bambauer writes that "the classic justification for copyright" is that "the threat of uncontrolled copying deters potential creators."⁵² The extent to which copyright incentivizes expression in the first place—as opposed to distribution—is hotly contested.⁵³ And Bambauer's description of copyright cuts off the specifically economic rationale of the copyright story: the threat of uncontrolled copying deters potential creators who need or want to get paid for creating works.⁵⁴ As the Supreme Court explained:

The *economic* philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve *rewards commensurate with the services rendered*.⁵⁵

⁵¹ Bambauer proposes a right to suppress dissemination. This is not necessarily economic in nature, just as there are some personhood-based accounts of copyright rights that value the right to withhold works. *See, e.g.*, Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 551 (1985). But it is ultimately enforced by the prospect of damages against ISPs who refuse to honor takedown notices. This is its primary difference from current law, which is why I speak of economic incentives.

⁵² Bambauer, manuscript at 12.

⁵³ *See, e.g.*, Jonathan M. Barnett, Copyright Without Creators (Univ. of S. Cal. Gould Sch. of Law Legal Studies Research Paper Series, Paper No. 13-7) (arguing that copyright makes the most sense conceived of as an incentive for intermediaries to invest in monetization of authors' creations), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245038. Copyright might well use distribution purely instrumentally as a tool to compensate and incentivize authors, see Wendy J. Gordon, *Dissemination Must Serve Authors: How the U.S. Supreme Court Erred*, 10 REV. ECON. RES. ON COPYRIGHT ISSUES 1 (2013), but my point is that copyright is generally thought of as an incentive for creation because copyright protects works once publicly disseminated, usually for profit.

⁵⁴ *See, e.g.*, Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression.").

⁵⁵ Mazer v. Stein, 347 U.S. 201, 219 (1954) (emphasis added).

This is why copyright provides primarily economic rights, with only extremely limited moral rights for certain limited-edition visual works,⁵⁶ and why sometimes copyright provides only compulsory licenses—a right to get paid—instead of a right to control.⁵⁷ The right to get paid is deemed sufficient to induce creation of the kinds of works copyright seeks to incentivize.⁵⁸

Bambauer later gives a more complete account of the conventional justification, noting that “[a]uthors face the time and expense of creating works initially, and must price this sunk cost into their per-copy fee (average cost)... Copyright law is one way out of this dilemma [in which consumers would prefer to get a copy from a lower-cost copier who didn’t invest in creation]: it forces consumers to pay the author, at average cost, to bribe the author to produce the work initially.”⁵⁹ But, as Bambauer immediately acknowledges,⁶⁰ the “time and expense” faced by the ordinary author creating with the hope of remuneration isn’t the same as the intimate risks Bambauer identifies that might stop a potential creator of intimate media in her tracks. With intimate media, creators aren’t looking to be “bribed” to surrender their photos. Nor are copyists generally looking to sell the photos once acquired.

Even creators of works who intend them to be distributed are only patchily affected by copyright’s incentives,⁶¹ and the failure to fit is even greater with intimate works not intended for public distribution. Bambauer’s example of the disparate use of intimate media by LGBT individuals is an excellent illustration of the issue:⁶² it is hard to imagine that sexual identity is correlated with anything copyright might incentivize, or with knowledge of the difference between the DMCA and § 230 of the CDA. Rather (on the assumption that current law offers no protection), LGBT individuals may simply be bearing more risks in their relationships, as they do in many other ways, *regardless* of the state of intellectual property and privacy law.

But set that all aside for the moment. To get an incentive effect from an extension of legal protection, people would have to know the law and believe that they can effectively make use of it if their trust is betrayed.⁶³ Both of these assumptions are hard to credit. At the start, there’s the optimism bias Bambauer discusses:⁶⁴ just as most people who get married are sure that they won’t be among the large percentage of couples who divorce, most people who send intimate media are sure they won’t be victims of a perfidious partner. As one victim recounted, “He said

⁵⁶ 17 U.S.C. §106A.

⁵⁷ 17 U.S.C. §114.

⁵⁸ Cf. WILLIAM W. FISHER III, PROMISES TO KEEP, TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2007) (proposing to replace most of copyright with compulsory licenses to better fulfill its incentive function in the digital age).

⁵⁹ Bambauer at 18.

⁶⁰ *Id.* (“This simple economic story falls apart completely for intimate media. People create these videos and images for non-pecuniary reasons: to express affection and lust, to remain connected to an existing partner, to court a new one.”).

⁶¹ See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513-546 (2009) (discussing nonmonetary incentives for creation); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (same).

⁶² Bambauer, manuscript at 9.

⁶³ See, e.g., Bambauer at 21 (“[T]he minority of people who sext are well aware of the risks of doing so. Their numbers would probably grow if those risks dropped.”) (footnote omitted).

⁶⁴ Bambauer at 16.

if I didn't want to send them to him, that meant that I didn't trust him, which meant that I didn't love him."⁶⁵ As she told the *New York Times*, even after her experience of having her pictures posted online—which included being stalked by a stranger—her own friends continued to send nude pictures of themselves to their boyfriends. “You don't want to really think that five years down the line, your boyfriend at the time could be your not-boyfriend and do something really bad to you.”⁶⁶

In addition to the optimism bias, people simply don't think about the law when they create intimate media, which means that increased legal protection wouldn't spur more creation. In order for Bambauer's incentives to work, creators of intimate media would have to believe that the change in the legal regime had been absorbed by recipients with enough certainty that the recipients would be noticeably more likely to hesitate—while in the mood to get revenge—before sharing. It is hard to imagine a rational calculation in this form: “yes, I don't trust him all the way, and he might show the pictures to all his friends, but I'd be able to sue him and his ISP for damages if he did, so that gives me the extra confidence I need to send the pictures.”⁶⁷

In practice, these calculations aren't done consciously, but rather with the aid of background heuristics, expectations, and assumptions. But those assumptions aren't likely to be correct. Misunderstandings about law, particularly intellectual property law, are widespread.⁶⁸ To the extent that people already believe that their intimate media are legally protected, of course, they will not be deterred from creating media now, though they may later be harmed by a relationship betrayal, and they need no additional incentive for *creation*.⁶⁹ To the extent that they don't

⁶⁵ See, e.g., Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES, Sept. 23, 2013 (quoting victim).

⁶⁶ *Id.*

⁶⁷ Cf. Bambauer at 13 (“Romantic partners *who understand this legal peculiarity* may be deterred from producing intimate media, surrendering a benefit to themselves and, by extension, to society.”) (emphasis added). Bambauer is skeptical both that no one is deterred from producing intimate media by this risk and also that the risk is part of the fun for any significant number of producers. Bambauer at 22. I'm more unsure; sex has a funny relationship to risk. Carlos Danger/Anthony Weiner, one of Bambauer's cautionary tales, is a good example: his right to control his media output was irrelevant to what he did, and we might speculate that compulsion ruled. I don't contest that believing that one had perfect control over dissemination could increase creation overall. Snapchat is popular for a reason. But creation stories are often a lot more complicated than a pure dose-response relationship.

⁶⁸ See, e.g., Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 237-39 (1991) (describing copyright myths believed by nonlawyers); Cecilia Ogbu, *I Put Up a Website About My Favorite Show and All I Got Was This Lousy Cease-and-Desist Letter: The Intersection of Fan Sites, Internet Culture, and Copyright Owners*, 12 S. CAL. INTERDISC. L.J. 279, 284-85 (2003) (noting widespread misunderstanding of copyright law); Carolyn Elefant, *Judicial Candidates Brawl over Campaign Slogans*, LEGAL BLOG WATCH (Sept. 5 2008, 03:17 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2008/09/judicial-candid.html (candidate for judicial office confuses trademark claim with copyright claim). See generally PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998) (cataloging ways in which lay understandings of law diverge from formal law).

⁶⁹ Bambauer argues that a residual right of a recipient to possess intimate media, even after the end of a relationship, is not problematic because that's a manageable risk for creators: (1) it's well-known that former lovers can hang on to memorabilia, and (2) risk-averse creators can use time-limited media such as Snapchat. Bambauer at 31. As to the former point, Bambauer's argument for providing a new right was that it would provide an additional incentive to create intimate media. The problem he identifies isn't *lack of knowledge* of the risk of dissemination, but rather *knowledge* and the associated rational response to that risk: limiting production. The same incentive logic would seem to apply to the common knowledge that memorabilia often outlast a relationship. As to the latter point, if technological self-help is sufficient to deal with residual risk, why isn't it enough to reassure the risk-sensitive

understand their rights, the issue is largely one of education, and even a change in the law won't change that lack of understanding. The knowledge gap affects both the creators (in need of incentives) and the unauthorized disseminators (in need of disincentives).

Consider in this context the teenagers who've been arrested for disseminating child pornography because they shared intimate media, sometimes consensually.⁷⁰ Whether the problem lies in their understanding of the law, or their practical capacity to conform their conduct to the law, an additional civil remedy seems unlikely to deter what criminal law and the prospect of lifetime sex offender registration hasn't.⁷¹ Nor are most producers of explicit intimate media likely to be complying with 18 U.S.C. § 2257(a), which provides that *any person* who produces visual depictions of "actual sexually explicit conduct" must "create and maintain individually identifiable records pertaining to every performer portrayed."⁷² Many producers and disseminators of intimate media could have bigger problems than copyright, if the law ever came knocking.⁷³ If we're really worried about people declining to create intimate media because they accurately understand the state of the law, we might want to look at the criminal code first. In truth, as Bambauer says, "the deterrence story is simply that: a story. It does no real work in changing behavior."⁷⁴ (He says that about the creators of intimate media, but it is at least as true of the distributors.)

people now? After all, Snapchat is most risk-limiting with respect to short-term or new relationships. The person who creates intimate media with or for someone she's been seeing for five years is less likely to use Snapchat precisely because she trusts her partner.

⁷⁰ See, e.g., John A. Humbach, 'Sexting' and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010); Beth Defalco, *Girl, 14, Arrested over Nude Pics of Herself*, THE DENVER POST (Mar. 27, 2009), http://www.denverpost.com/search/ci_12006602; Caroline Zielinski, *Teens Arrested over Explicit Photos*, THE AGE VICTORIA (July 3, 2013), <http://www.theage.com.au/victoria/teens-arrested-over-explicit-photos-20130703-2pb65.html>.

⁷¹ It's also notable that many people of sexting age probably have downloaded music and/or movies without permission from copyright owners. *Technology, not Ethics, Worry Teens about Illegal Downloading*, Study Says, INTERNET RETAILER (May 21, 2004), <http://www.internetretailer.com/2004/05/21/technology-not-ethics-worry-teens-about-illegal-downloading-s> (finding that over 50% of teens have illegally downloaded music). If people of sexting age don't fear statutory damages enough to avoid unauthorized downloads, how likely is it that they'll fear statutory damages enough to decide against sharing a sexy photo?

⁷² Not all intimate media would qualify: only "images of intercourse, masturbation, or a 'lascivious display' of genitals, as opposed to nudity or other sexually suggestive poses" are covered by the law. *Free Speech Coalition, Inc. v. Holder*, --- F.Supp.2d ---, 2013 WL 3761077, at *20 (E.D. Pa. 2013). Still, the intimate media Bambauer discusses would apparently include many works also covered by § 2257. A producer subject to § 2257 must "affix[] to every copy of any [visual depiction covered by § 2257] . . . a statement describing where the records required by [§ 2257] with respect to all performers depicted in that copy of the matter may be located." *Id.* at (e)(1). Producers must maintain copies of their performers' identification documents and make those records available for inspection by the Attorney General. *Id.* at (b)(3) and (c). Producers may be exposed to criminal liability if they "fail to create or maintain the records as required" or knowingly violate other provisions of the law, including knowingly transferring any visual depiction subject to § 2257 that does not contain the required label. 18 U.S.C. § 2257(f)(1)-(5).

⁷³ *Cf. Connection Distrib. Co. v. Holder*, 557 F.3d 321, 336-39 (6th Cir. 2009) (declining to decide whether § 2257 was overbroad as applied to media created, but not distributed, by couples for their own enjoyment; government disclaimed intent to enforce law against materials that were never distributed). It's unclear whether the government's promise would extend to the kinds of intimate media sharing Bambauer discusses, though a determined prosecutor could likely proceed in some of the scenarios Bambauer describes.

⁷⁴ Bambauer at 16.

Relatedly, most people never consult lawyers, and most legal wrongs go unredressed in court.⁷⁵ Victims may have difficulty finding a lawyer with expertise in the subject. They may be ashamed of being betrayed, and fear greater exposure if they sue—this is known as the “Streisand effect” from an early case in which photos of Barbra Streisand’s house spread more widely as she attempted to suppress them. Many of the victims whose cases Bambauer discusses would already have been able to send DMCA takedown notices. In any case in which they were both the subject and the photographer/videographer (that is, any case involving a “selfie”), they would already be authors under current law. Both Bambauer and I agree that the fact that those victims are also considered “authors” is unrelated to the harm they suffer from unconsented distribution. Nonetheless, it’s notable that lawyers don’t seem to be bringing droves of copyright infringement lawsuits on behalf of selfie victims.

Even for existing author-victims, of course, Bambauer’s proposed reforms could increase the chance of receiving damages from a potentially deep-pocketed intermediary, so perhaps lawyers would more aggressively seek out clients (though if there’s widespread compliance with the amended DMCA, then we’re back to the scenario in which there’s not much money in any given case). My aim in this section is simply to show that the identification of behaviors we wish to incentivize does not mean that copyright is an appropriate tool, even if copyright is also about incentives.

B. Tu Quoque: Is this any worse than what we already have?

Bambauer’s basic response to the distinctions between what we now call copyright and what he wants to add to Title 17 is to point to the inconsistencies in current copyright law:

[C]opyright is nothing if not a congeries of industry-specific tweaks. Copyrights in sound recordings do not include a right of public performance—except via digital audio transmission. Architectural works under copyright have no protection against photographs or pictures that reproduce a building instantiating the work, so long as that building is publicly visible. The first sale doctrine lets lawful purchasers rent movie DVDs, but not software DVDs. A small cafe may show television programming on a set behind the bar [without paying a license fee], but a giant restaurant in Times Square may not—unless it complies with restrictions on the size and number of televisions and speakers. Copyright is unprincipled: it is all about special pleading. Distortion of an elegant copyright system is not a risk, because it is already distorted.⁷⁶

Indeed, U.S. copyright law has a number of medium- and industry-specific provisions that mostly can be explained by lobbying and special pleading. Copyright isn’t pure, so, the argument goes, introducing another impurity is not a problem.

⁷⁵ Cf. PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 61-76 (1993) (survey results show that a significant number of medical malpractice victims never file tort claims). See generally ROBERT ELLICKSON, ORDER WITHOUT LAW (discussing general reluctance of many people to litigate disputes even when law is clear); EWICK & SILBEY, *supra* note [] (discussing nonlawyers’ use and understanding of law in ordinary life and unwillingness to use legal system except in rare circumstances);

⁷⁶ Bambauer at 45 (footnotes omitted); see also *id.* at 25-26 (noting existence of overlapping claims in the current system).

At some point, however, impurity converts to a new substance, which is what Bambauer’s proposal does. None of the provisions Bambauer discusses were introduced merely to circumvent limits on some other right,⁷⁷ which is why none of them required wholesale changes in *every* aspect of copyright—the addition of a digital public performance right for sound recordings, for example, didn’t require a change in authorship rules, liability standards, or fair use defenses. Nor did the extension of protection to architectural works (required by our accession to the Berne Convention).⁷⁸

Relatedly, all of these are industry-specific tweaks, directed at the economic needs and market configurations that were current at the moment the legislature acted. They aren’t content-based. By contrast, the intimate media right isn’t about the business deals and compromises made by any industry. It’s about protecting a privacy interest. If an intimate media right is a copyright, I have difficulty seeing the barriers to giving a victim of defamation a copyright, or even doing the same for any subject of a work, defamatory or not.⁷⁹ Authorship may be a highly flexible concept, but that doesn’t make it entirely meaningless.

I’m a fan of categorical thinking. It can make sense to group “games” together even if we can say that chess doesn’t share any significant characteristics with bouncing a ball, as long as each game has family resemblances to other games in the group.⁸⁰ Still, there is a difference between a concept with a wide range of reasonable meanings and a concept that has been completely emptied out.⁸¹ To my mind, calling an intimate media right “copyright” would tilt too far to the latter.

C. Constitutionality of the New System

Bambauer is aware that he’s suggesting some radical revisions. Among the consequences is the potential vulnerability of his new right to a First Amendment challenge, even though copyright laws are generally unproblematic under current doctrine. Bambauer suggests that his proposal would be constitutionally suspect if called a privacy right, but that the relaxed scrutiny given to

⁷⁷ The closest analogy is probably the Vessel Hull Design Protection Act (VHDPA), which created an extremely limited right to prevent copying of otherwise unprotectable boat hulls. *See* Vessel Hull Design Protection Act, Pub. L. 105-304, §§ 501-02, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 1301-32). This provision, which is essentially and well-deservedly unused, does not strike me as a model to be emulated. In practical terms, proponents of expanding the law to protect fashion designs have faced controversy that has so far blocked change, even though the VHDPA was written precisely so that it could later be expanded to cover other subject matter. *See* 17 U.S.C. § 1301(b)(1); Kal Raustiala & Christopher Sprigman, *The Privacy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1754 (2006). Regardless of the merits of fashion design rights, the history of this provision indicates that putting a new right in the Copyright Act doesn’t go unnoticed, and that the label “copyright” doesn’t refute the legal and policy arguments deployed against expansion.

⁷⁸ *See* 17 U.S.C. § 102; *see also* H.R. Rep. No. 101-735, 1990 U.S.C.C.A.N. 6935, 6936-37.

⁷⁹ *See* Susan Corbett, *The Case for Joint Ownership of Copyright in Photographs of Identifiable Persons*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343357 (forthcoming Media & Arts L. Rev. Dec. 2013) (advocating that all photographic subjects should have copyrights in photos of them).

⁸⁰ *See* GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §66 (G.E.M. Anscombe trans., 3d ed. 1958).

⁸¹ *Cf.* Don Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CAL. L. REV. 609, 629 (1987) (arguing that, even if there are plausible arguments over constitutional meaning, it would be a misreading of the Constitution to read it “as the story of a small boy growing up in Kansas”).

copyright laws would protect this new right if it were called copyright. However, no judge is that bald-faced about formalism, as Bambauer recognizes.⁸² The Supreme Court has specifically identified fair use as a key constitutional limit on copyright,⁸³ and his proposal removes fair use as a defense.

Because the “traditional contours” of copyright would be altered in every particular by the new intimate media right, some other kind of First Amendment scrutiny would have to apply. Bambauer suggests that his proposed newsworthiness defense would suffice to allow the new right to survive First Amendment scrutiny, based on precedent from privacy cases.⁸⁴ Here, the snake swallows its own tail, formalism (copyright is a First Amendment-free zone) converting to functionalism (newsworthiness is an appropriate defense) just at the point at which Bambauer acknowledges that labels can’t be dispositive.

Bambauer offers the following dichotomy: “copyright is left with an uncomfortable dilemma: either the line of cases finding newsworthiness to be adequate free speech protection in other contexts is misguided, or fair use must be analyzed formalistically.”⁸⁵ There’s another alternative, which is that copyright is doing different things than other laws, requiring different First Amendment limits. One could equally assert that fair use in *every* copyright case, including *Prince v. Cariou* as it was actually litigated, could constitutionally be replaced by newsworthiness, or by the constitutionally required limits on defamation. One could also argue that the requirements of falsity and malice for defamation could be replaced with fair use’s consideration of transformativeness and market harm. Those switches don’t make sense, however, because the justifications for the rights, and correspondingly the interests involved on both sides, differ.

Current precedents from the privacy torts could make newsworthiness a sufficient First Amendment limit on the new intimate media right, certainly as applied to individual uploaders.⁸⁶ But a key question, unanswered by Bambauer’s analysis, is how newsworthiness would interact with new forms of dissemination. Newsworthiness case law developed in the context of traditional publishers’ deliberate selections of what to publish. Imposing liability on ISPs for non-newsworthy images disseminated by their users is not obviously constitutional, certainly not when it comes to vicarious liability, which doesn’t require knowledge.⁸⁷ In general, the Supreme

⁸² Bambauer at 49.

⁸³ *Eldred v. Ashcroft*, 537 U.S. 186, 219-20, 222 (stating that copyright is, absent alterations to its “traditional contours,” constitutionally unproblematic) (2003).

⁸⁴ Bambauer at 49-50.

⁸⁵ Bambauer at 52.

⁸⁶ A case he cites with favor, *Toffoloni v. LFP Publ’g Gp.*, 572 F.3d 1201 (11th Cir. 2009), *see* Bambauer at 51, has very weak reasoning. Upholding a privacy claim against the publication of nude photos, though not against the publication of text about the photos, the *Toffoloni* court declined to give any weight to the veridical effects of the photos. This is not to say that other courts won’t follow that reasoning. Courts are often willing to treat images as worthless, unless they’re treating them as ineffable. *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 707, 708 & n. 112 (2012). For these purposes, I simply wish to note that what Bambauer presents as a descriptive claim—the case law suggests that his proposed new right is constitutional—ends up having strong normative implications as well: suppressing images is no great loss.

⁸⁷ *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309 (2008) (arguing that the First Amendment puts constitutional limits on intermediary liability even in copyright).

Court has been wary of liability for speech distributors in the absence of fault.⁸⁸ Even if this new right might be constitutional as applied to perfidious individuals, then, the key part of the remedy—its extension to intermediaries, which defeats § 230’s immunity—might not be.

D. Me Too: Other candidates for “copyright” extension

Bambauer notes that we’ve increased copyright enforcement and remedies in order to go after massive online copying, without particular evidence that this helped copyright owners.⁸⁹ Thus, he concludes, we need not be sure that his proposed reform would work before we enact it. I don’t find that analogy persuasive. It seems to me to be an argument about industry capture, not about good policy. However, the comparison does strengthen my fear that any rights given to subjects of intimate media will be demanded on fairness and economic incentive grounds by other groups much better positioned to make incentive-based claims as rational economic actors seeking only profit maximization. Given the expansions in the scope of copyright rights and remedies required to make Bambauer’s new right effective, the likely demands for parity between existing copyright rights and new intimate media rights strike me as undesirable side effects of putting his proposed new right in Title 17.

I find particularly puzzling Bambauer’s contention that using copyright would solve the problem of § 230:

[U]sing IP law effectively addresses issues with intimate media within the existing statutory framework for Internet intermediaries. Other approaches, such as privacy-based ones, would need to alter the contours of the immunity for interactive computer services from third-party liability created by Section 230 Some of these proposals would not merely alter Section 230, they would eviscerate it. This is undesirable. Section 230 has been critical to the development of a thriving Internet ecosystem based largely on content supplied by users.⁹⁰

But Bambauer’s proposal isn’t operating in secret. It’s perfectly obvious that his new right is designed to evade § 230. He even touts that as a virtue. Yet other claimants are equally capable of deploying formalist concepts to serve realist ends. Any attempt to enact this proposal would give everyone whose ox is gored by § 230 an opportunity to show up and argue that their interests should be considered “copyright” interests too, at least for purposes of avoiding § 230, since we’re already doing a lot of tailoring of “copyright” to deal with intimate media. I can see no functional or political difference between amending Title 17 to evade § 230 and amending §

⁸⁸ *E.g.*, *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2, 76 n.5 (1994) (the First Amendment requires that a distributor must know the victim’s age to support a conviction for distributing child pornography; producers are in a unique position to verify age, and distributors are not); *Smith v. California*, 361 U.S. 147 (1959) (liability for distributing obscenity requires scienter). Section 2257 of Title 18, mentioned above, also avoids constitutional problems by specifically limiting the obligations of non-producer disseminators—they can only be liable for knowingly selling or transferring materials without the requisite labels indicating that the producer kept the appropriate age and identity records. In addition, they have “no duty to determine the accuracy of the contents of the statement or the records required to be kept.” 18 U.S.C. § 2257(f)(4).

⁸⁹ Bambauer at 23.

⁹⁰ Bambauer at 26.

230 itself. Either intermediaries depend on § 230 and we should leave it alone, or we should be willing to tweak it to impose a new duty on them because revenge porn is so bad.

Beyond § 230, many other claimants would have an interest in getting the benefits of this new right's divergence from existing copyright rights. For example, proponents of publicity rights could ask why other, nonsexual portrayals wouldn't justify similar veto rights (subject to a newsworthiness defense).⁹¹ Additionally, Jessica Silbey's empirical work reveals a strong desire for more rights to control reputation among creators; many of them would welcome a new moral right of withdrawal.⁹² Copyright owners of all stripes would also love to have a new right to control, and therefore monetize, private performance and display. If this is a copyright, after all, then other copyright owners have similarly (and more plausibly incentive-based) claims for control.

Likewise, many copyright owners would be thrilled to get rid of the timely registration requirement for statutory damages. Most small copyright owners—precisely the group unlikely to timely register—have the same difficulties as victims of revenge porn in finding legal representation, and thus an equally compelling argument for extension of this new remedy to them.⁹³ And copyright owners *hate* the burdens placed on them by the DMCA's notice and takedown requirements, which they perceive as forcing them into an endless game of whack-a-mole.⁹⁴ If we're creating a new notice and takedown scheme with different contours, surely their desires should be taken into account as well.

III. Conclusion

Bambauer's paper challenges us to navigate the is and the ought: whatever copyright *ought* to be, he argues, is less important for people interested in protecting victims of nonconsensual exposure than what it *is*, which cannot be known at a conceptual level but can only be observed from the actual messy contours of copyright and therefore can be changed in order to serve any reasonable purpose. But categories, however imperfect, exist for reasons—reasons that even realists generally acknowledge. Contradictions and inconsistencies are inevitable, but that doesn't mean they're all of equal worth. Bambauer's claim that copyright can be whatever we want as long as we mention incentives seems to me not to be useful, in Felix Cohen's formulation: "a definition

⁹¹ See Corbett, *supra* note [].

⁹² JESSICA SILBEY, *HARVESTING INTELLECTUAL PROPERTY: IP INTERVENTIONS AND THE ROLES OF INTELLECTUAL PROPERTIES IN CREATIVE AND INNOVATIVE WORK* (Stanford University Press, forthcoming 2013), Ch. 4 (arguing that creators withhold works from certain markets because they fear loss of control).

⁹³ See, e.g., Osterreicher & Calzada, *supra* note [], at 7.

⁹⁴ For a very small but representatively vituperative set of criticisms, see Broadcast Music Inc., Comments of Broadcast Music, Inc. on Department of Commerce Copyright Green Paper, at 13-14, available at http://www.ntia.doc.gov/files/ntia/bmi_comments.pdf; Global Intellectual Property Center, Chamber of Commerce, GIPC Comments To DOC on Digital Copyright Issues, at 6-7, available at http://www.ntia.doc.gov/files/ntia/global_intellectual_property_center_comments.pdf; Independent Film & Television Alliance, Comments of IFTA, at 5-6, available at http://www.ntia.doc.gov/files/ntia/independent_film_and_television_association_comments.pdf; National Music Publishers' Association et al., Comments of National Music Publishers' Ass'n et al., at 14-15, available at http://www.ntia.doc.gov/files/ntia/national_music_publishers_association_et_al_comments.pdf; Recording Industry Ass'n of America, Inc., Comments of the Recording Industry Association of America, Inc., at 4, available at http://www.ntia.doc.gov/files/ntia/recording_industry_association_of_america_comments.pdf.

is useful if it insures against risks of confusion more serious than any that the definition itself contains.”⁹⁵ A more productive debate would consider a right against revenge porn, and the relationship between individual and intermediary liability for revenge porn, on its own merits.

⁹⁵ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 CLOUM. L. REV. 809, 836 (1935).