

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

by Ann Bartow<sup>1</sup>

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

**I. Pornography As Entertainment Product**

Libertarian organizations with a financial interest in doing so like to pretend that pornography is under relentless attack by the government,<sup>2</sup> but this is clearly not the case. For going on two decades, the consistent response of the U.S. government has been to ignore pornography production, as long as the performers were age 18 or over. In 1989 in *California v. Freeman*,<sup>3</sup> the Supreme Court effectively curtailed states’ ability to regulate the production of pornography. By the 1990s, mainstream non-child pornography prosecutions on obscenity grounds by the federal government effectively stopped, and they remain rare.<sup>4</sup>

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<sup>2</sup> See e.g. [http://w2.eff.org/Censorship/Rimm\\_CMU\\_Time/](http://w2.eff.org/Censorship/Rimm_CMU_Time/); <http://www.aclu.org/privacy/speech/14793leg20020508.html>; [http://www.usatoday.com/news/washington/2007-11-04-Militaryporn\\_N.htm](http://www.usatoday.com/news/washington/2007-11-04-Militaryporn_N.htm); <http://feministlawprofs.law.sc.edu/?p=3054>; <http://www.freespeechcoalition.com/http://feministlawprofs.law.sc.edu/?p=2345>

<sup>3</sup> 488 U.S. 1311 (1989).

<sup>4</sup> Cf:

<http://www.reuters.com/article/domesticNews/idUSN1845908320070919?feedType=RSS&feedName=domesticNews>

Law professor Tim Wu recently observed: “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.”<sup>5</sup> A recent NYT article entitled “Federal Effort on Web Obscenity Shows Few Results”<sup>6</sup> reported on a Justice Department grant to a conservative religious group called “Morality in Media” that pays people to review “sexual Web sites and other Internet traffic to see whether they qualify as obscene material whose purveyors should be prosecuted by the Justice Department.” The article noted that “[t]he number of prosecutions resulting from those referrals is zero.” Another observer recently noted that contemporary pornographers are far more likely to go to jail for spamming than for the content of the pornographic works they distribute.<sup>7</sup> 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.<sup>8</sup>

Anti-pornography rhetoric is instrumentally deployed to promote an illusion of entrepreneurial morality. But there has never been a focused attempt to remove pornography from the Internet, or even to regulate it in any meaningful way. The Communications Decency Act of 1996 contained ridiculously overbroad content

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But see: [http://www.usdoj.gov/opa/pr/2007/June/07\\_crm\\_471.html](http://www.usdoj.gov/opa/pr/2007/June/07_crm_471.html) ;

<http://pcworld.about.com/od/internetlegalissues/Web-based-business-charged-wit.htm> ;

For an arguments that obscenity law is unworkable and unable to effectively address any moral harm related to obscene content, see Andrew Koppelman, Does Obscenity Cause Moral Harm? 105 Colum. L. Rev. 1635 (2005); and Elizabeth Glazer, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1016215](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016215)

<sup>5</sup> <http://www.slate.com/id/2175730/>

<sup>6</sup> <http://www.nytimes.com/2007/08/10/us/10obscene.html>

<sup>7</sup> <http://www.informationweek.com/news/showArticle.jhtml?articleID=202402908> 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. By [Thomas Claburn](#) [InformationWeek](#), October 15, 2007 03:35 PM

<sup>8</sup> Feb 2008 issue.

restricting provisions that anyone of reasonable intelligence would have expected the courts to find unconstitutional, and indeed they did.<sup>9</sup> At the end of the sound and fury surrounding this Trojan statute, the Internet was a far safer place for pornography than it had ever been before, thanks to surviving Section 230, which gives broad immunity to against prosecution to Internet service providers,<sup>10</sup> encouraging the unrestricted online distribution of content regardless of whether it was defamatory or obscene, or otherwise harmful or injurious.

Because it is socially acceptable and relatively risk free, large, mainstream corporations have entered the market, and earn enormous revenue streams from the production and distribution of pornography. The New York Times reported in 2000: “[T]he 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.”<sup>11</sup> 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.<sup>12</sup> 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

<sup>9</sup> <http://www.cnn.com/US/9706/26/cda.overturned.hfr/index.html>

[http://w2.eff.org/legal/cases/EFF\\_ACLU\\_v\\_DoJ/](http://w2.eff.org/legal/cases/EFF_ACLU_v_DoJ/); [http://epic.org/free\\_speech/cda/](http://epic.org/free_speech/cda/)

<sup>10</sup> <http://www.law.cornell.edu/uscode/47/230.html> Section 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider". Effectively, this section immunizes ISPs and other service providers from torts committed by users over their systems, unless the provider fails to take action after actual notice or is itself involved in the process of creation or development of the content

<sup>11</sup> Timothy Egan, Erotica, Inc. – A Special Report; Technology Sent Wall Street Into Market For Pornography, NYT October 23, 2000 at A1.

<sup>12</sup> [http://money.cnn.com/magazines/business2/business2\\_archive/2003/06/01/343376/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2003/06/01/343376/index.htm)

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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 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.<sup>13</sup>

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

The Playboy corporation also produces and distributes large quantities of hardcore pornography chock full of violent and degrading acts, but they do so under subsidiary trademarks, because according to Playboy CEO Christy Hefner, "the racier fare "is a complementary and separate business from the Playboy business," one in which the

<sup>13</sup> [http://www.h-net.org/~filmhis/reviews/32\\_1/film/american\\_porn.htm](http://www.h-net.org/~filmhis/reviews/32_1/film/american_porn.htm)

<http://www.pbs.org/wgbh/pages/frontline/shows/porn/view/>

<sup>14</sup> <http://www.tv.com/the-girls-next-door/show/39406/summary.html> ;

<sup>15</sup> <http://feministfire.wordpress.com/2007/10/24/whsmith-and-playboy/> ,

<http://feministlawprofs.law.sc.edu/?p=493> ; <http://feministlawprofs.law.sc.edu/?p=1597>

<sup>16</sup> <http://www.forbes.com/2001/05/25/0524porn.html> (note incorrect assumption by author that Playboy's only source of revenue is the magazine.) [http://terranova.blogs.com/terra\\_nova/2007/07/legs-wide-shut.html](http://terranova.blogs.com/terra_nova/2007/07/legs-wide-shut.html) ;

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Playboy logo and brand is obfuscated.<sup>17</sup> Playboy also owns hardcore pornography cable channels such as The Hot Network, Vivid TV, and The Hot Zone.<sup>18</sup> The movies on these channels are advertised with descriptions like: “a comical adventure with 10 of the nastiest sex scenes ever filmed!”<sup>19</sup> It is through the production and distribution of hardcore pornography that Playboy generates the majority of its revenue.<sup>20</sup>

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

## II. **Pornography and Copyright Law**

For much of this nation’s history, the government was unwilling to give its imprimatur to creative or innovation works that were deemed contrary to public morality.<sup>22</sup> For example, the patentability of sex toys was once contestable, as the Patent and Trademark Office refused to issue patents for products or processes deemed immoral. Eventually, however, courts adopted the view that it did not make sense to have unelected

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<http://query.nytimes.com/gst/fullpage.html?res=9E05E2DF133DF937A35751C0A9649C8B63&sec=&spo n=&pagewanted=all>

<sup>18</sup> [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art\\_aid=12204;](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=12204;)  
[http://money.cnn.com/magazines/business2/business2\\_archive/2003/06/01/343376/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2003/06/01/343376/index.htm) ;  
[http://www.secfinfo.com/dsVsj\\_3N1.htm](http://www.secfinfo.com/dsVsj_3N1.htm)

<sup>19</sup> [http://money.cnn.com/magazines/business2/business2\\_archive/2003/06/01/343376/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2003/06/01/343376/index.htm)

<sup>20</sup> *infra* \_\_\_\_\_

<sup>21</sup> For a detailed description of the political economy of pornography, see e.g. “Dirty Business” by Gail Dines, in Dines, Jensen and Russo, *Pornography, The Production and Consumption of Inequality* (Routledge 1998).

<sup>22</sup> This is still the case to some extent under trademark law; see Section § 1052 of the Lanham Act and associative jurisprudence.

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.<sup>23</sup>

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

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<sup>23</sup> See generally: 74 Columbia L. Rev 1351, 1354 n.27, Markel note , The Technology of Orgasm: "Hysteria," the Vibrator, and Women's Sexual Satisfaction (Johns Hopkins Studies in the History of Technology) by Rachel P. Maines ; Margo Bagley, Patent Forst, Ask Questions Later, papers.ssrn.com/sol3/papers.cfm?abstract\_id=448940 Merges, Mennell & Lemley, Intellectual Property in the New Technological Age (Revised Fourth Edition) at page 155-58; Thomas 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. Magnini, "1. Patenting Lifeforms: a) Chimeras: 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. <sup>24</sup> 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.")

<sup>24</sup> <http://www.ca11.uscourts.gov/opinions/ops/200611892.pdf> ; <http://womenshealthnews.wordpress.com/2007/10/03/supreme-court-refuses-to-hear-sex-toy-case/>

Until 1979, copyright protection was effectively unavailable for pornography, though it was unambiguously available for other photographic and audiovisual works.<sup>25</sup> Then in *Mitchell Bros. Film Group v. Cinema Adult Theater*<sup>26</sup> the Fifth Circuit held that obscenity was not a defense to copyright infringement because nothing in the Copyright Act<sup>27</sup> precluded the copyrighting of obscene materials. The court specifically used the term obscenity rather than pornography, and concluded that holding obscene materials copyrightable furthered the pro-creativity purposes of the Copyright Act and of congressional copyright power generally. The opinion waxes rhapsodic about the importance of “freedom to explore into the gray areas, to the cutting edge, and even beyond” without governmentally imposed restraints. It mentions nothing about the destructive impact that this “exploration” could potentially have upon actual human beings.

The *Mitchell* 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.’”<sup>28</sup> The court linked this to a right to reach an audience or readership that is economically facilitated by copyright protections.<sup>29</sup>

What is fairly remarkable about the case is the court’s enthusiastic support for increasing incentives for the production and distribution of pornography by declaring

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<sup>25</sup> See generally [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=923411](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923411)

<sup>26</sup> 604 F.2d 852 (5th Cir.), *cert. denied*, 445 U.S. 917 (1979).

<sup>27</sup> The Copyright Act of 1909 was the applicable statute.

<sup>28</sup> 604 F.2d 852 (5th Cir.), *cert. denied*, 445 U.S. 917 (1979) at 858. This analysis is similar to that adopted by the Supreme Court majority in *Harper & Row v. The Nation*, [http://www.oyez.org/cases/1980-1989/1984/1984\\_83\\_1632/](http://www.oyez.org/cases/1980-1989/1984/1984_83_1632/)

<sup>29</sup> *Id.*

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.<sup>30</sup> After the *Mitchell* 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.<sup>31</sup> Yet the *Mitchell* 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*,<sup>32</sup> the Ninth Circuit adopted the *Mitchell Brothers* reasoning unquestioningly, relying on an endorsement by Nimmer on Copyright, which it referred to as “the leading treatise on copyright.”<sup>33</sup> 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”<sup>34</sup> and apparently outsourced its analytical thinking about the topic to a copyright treatise.<sup>35</sup>

Courts are not in complete accord on this issue. In 1998, Judge Martin of the Southern District of New York refused to grant a copyright infringement grounded preliminary injunction or pretrial impoundment and seizure order for movies he believed to be obscene. He concluded: “Given 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

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<sup>30</sup> Cf [http://www.law.upenn.edu/cf/faculty/ebaker/workingpapers/55VandLRev891\\_2002.pdf](http://www.law.upenn.edu/cf/faculty/ebaker/workingpapers/55VandLRev891_2002.pdf)

<sup>31</sup> E.g. *Midway Manufacturing Co. v. Artic International, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982); *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* (Ninth Circuit Court of Appeals 1992); *Capcom U.S.A. Inc. v. Data East Corp.* 1994 WL 1751482 (N.D. Cal. 1994);

<sup>32</sup> 666 F.2d 403 (9th Cir.), *cert. denied*, 459 U.S. 826 (1982)

<sup>33</sup> 666 F.2d 403 (9th Cir.), *cert. denied*, 459 U.S. 826 (1982) at 406.

<sup>34</sup> *Id.*

<sup>35</sup> For a critique of over-reliance on the Nimmer treatise by courts, see [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=654661](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=654661)



plaintiffs and should invoke the doctrine of clean hands and leave the parties where it finds them,” refusing to commit the resources of the United States Marshal’s Service “to support the operation of plaintiff’s pornography business.”<sup>36</sup>

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.*<sup>37</sup> Judge Baer decided to follow *Mitchell Brothers*, writing:

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

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*<sup>38</sup> and *Playboy v. Webworld*,<sup>39</sup> much more recent cases about search engine liability such as *Perfect 10 v. Google* and *Perfect 10 v. Amazon.com*,<sup>40</sup> and various contemporary allegations of online reproduction rights infringement.<sup>41</sup> Copyright suits by pornographers are likely to increase, as reportedly, “the ease of posting porn online is causing a panic among some adult film producers, who

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<sup>36</sup> *Devils Films, Inc. v. Nectar Video Corp.*, 29 F. Supp.2d 174, 175 (S.D.N.Y. 1998).

<sup>37</sup> 2004 U.S. Dist. LEXIS 24171 (S.D.N.Y. Dec. 1, 2004),

<sup>38</sup> 839 F.Supp. 1552 (1993).

<sup>39</sup> 991 F. Supp. 543 (1997).

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[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DE8297F56287C0BC882572DC007DACC6/\\$file/0655405.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/DE8297F56287C0BC882572DC007DACC6/$file/0655405.pdf?openelement)

<sup>41</sup> E.g. *Io Group, Inc. v. Veoh Networks*, 2007 U.S. Dist. LEXIS 31639 (2007).

spend big budgets on big stars, only to have those posted and viewed for free, or only to see viewers turn to free, amateur porn instead.”<sup>42</sup>

Because the Intellectual Property Clause of the U.S. Constitution<sup>43</sup> authorizes copyright protections only to the extent that it promotes the progress of science and the useful arts, one might expect the copyrightability of pornography to be more controversial than it has been so far, given the incentives that copyrights provide and the government resources that are required to sustain the copyright legal regime. That 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, as explained above, people created and distributed pornographic works anyway, and presumably did so profitably. One consequence of initial judicial determinations that even obscene works were entitled to copyright protection may well have been to spark the production of more of them. Another likely effect was to 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 and others for unauthorized uses of pornographic content they produced, and pursue piracy actions against accused infringers.<sup>44</sup> Facilitating the enforcement of copyright based limitations on distribution of pornography may have created incentives for increasing production of pornography,

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<sup>42</sup> <http://www.alternet.org/sex/56414/?page=entire>

<sup>43</sup> [http://press-pubs.uchicago.edu/founders/tocs/a1\\_8\\_8.html](http://press-pubs.uchicago.edu/founders/tocs/a1_8_8.html)

<sup>44</sup> <http://www.alternet.org/sex/56414/?page=entire>

and that may have increased the harms associated with pornography production. But no court addressing the copyrightability of pornography addressed this possibility.

### III. **Copyright Law, Morality and Harm**

The subject of morality is raised in the context of copyright law in several ways. For example, there are many accounts of musicians whose culture and creative works have been unscrupulously appropriated, and copyright law has been a handy tool for this sort of chicanery and theft.<sup>45</sup> This is part of a broader literature about how intellectual property laws intersect with, and facilitate the exploitation of, cultural heritage, often to the detriment of human creators.<sup>46</sup>

The morality of making non-permissive uses of copyrighted works is also a subject of pitched debate. The unauthorized downloading of music has been framed as theft and piracy by copyright holders,<sup>47</sup> legitimate sharing by others.<sup>48</sup> The morality of borrowing pieces of existing works to use in the creation of new ones is also hotly contested, often framed as a debate about the appropriate scope of fair use.<sup>49</sup>

Copyright law is additionally concerned with “moral rights,” which mainly refer to the rights of attribution and integrity.<sup>50</sup> The attribution right is intended to insure that

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<sup>45</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=655424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=655424)  
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<sup>46</sup> e. g. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=655424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=655424)

<sup>47</sup> <http://cgi.cnn.com/TECH/computing/9903/03/web.music.pirates/> , [http://news.zdnet.com/2100-9595\\_22-959632.html](http://news.zdnet.com/2100-9595_22-959632.html) <http://globaethics.org/newsline/2008/02/25/is-illegal-downloading-theft-plain-and-simple/>

<sup>48</sup> <http://www.ecommercetimes.com/story/4442.html?welcome=1204652433> ;  
[http://www.pewinternet.org/report\\_display.asp?r=96](http://www.pewinternet.org/report_display.asp?r=96)

<sup>49</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=951839](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951839)  
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<sup>50</sup> [http://www.wm.edu/law/publications/jol/95\\_96/lemley.html](http://www.wm.edu/law/publications/jol/95_96/lemley.html)

the author of a work receives appropriate recognition. The right of integrity is supposed to make certain that the author’s artistic vision is unaltered. The entire focus of a moral rights regime is on treating the author in a principled way, to recognize and honor the enriching contributions that creative works make to society.

The morality of the acts that content creators engage in during the production of artistic works, however, has never been a consideration of statutory copyright law. When it held that obscenity was copyrightable, 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.”<sup>51</sup>

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

Few are willing to contemplate the possibility that significant harms can be linked to pornography production. Cans of tuna are adorned with “dolphin safe” labels because tuna consumers care about the well being of dolphins.<sup>52</sup> General release movies often roll

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**Comment:** This transition is rather abrupt.

<sup>51</sup> 604 F.2d 852 (5th Cir.), *cert. denied*, 445 U.S. 917 (1979) at 863.

<sup>52</sup> <http://www.earthisland.org/dolphinSafeTuna/consumer/>

notices that that no animals were harmed during the making of the film.<sup>53</sup> In fairly stark contrast, pornographic works are often advertised in ways that highlight actual violence that was done to performers during production, such as “bloody first times,” “blondes getting slammed,” “big mutant dicks rip small chicks” and “men fucking that teen virgin bitch’s ass so hard she couldn’t sit for days.” Apparently this is an effective way to sell pornography to average pornography consumers. One wonders how the same audience would respond to cans of tuna bearing labels that said, “Now with more brutally slaughtered dolphins than ever!”<sup>54</sup> It may be that pornography consumers erroneously (or preferentially) believe that all pornography performances are voluntary and consensual.<sup>55</sup> It seems more likely that they do not care whether they are or not. It is additionally possible that some derive enhanced erotic pleasure from the possibility that the performers are being subject to coercion and force.

In 2001 Martin Amis published a description of the pornography industry he called “A Rough Trade.”<sup>56</sup> In it he described the violence, degradation, and disease dangers associated with pornography production. He wrote:

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

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<sup>53</sup> [http://www.americanhumane.org/site/PageServer?pagename=pa\\_film](http://www.americanhumane.org/site/PageServer?pagename=pa_film)

<sup>54</sup> I owe credit for this rhetorical framing to a pseudonymous feminist blogger whose blog archives are no longer available for reading or linking.

<sup>55</sup> See generally <http://www.blazinggrace.org/thetruth.htm>  
<http://www.shelleylubben.com/articles/pornstarsspeakout.pdf>

<sup>56</sup> <http://www.guardian.co.uk/Archive/Article/0,4273,4153718,00.html>

Copyright law is only one piece of the legal regime that regulated pornography, but compared with the First Amendment, its effects have been virtually ignored. Because the IP Clause of the U.S. Constitution<sup>57</sup> authorizes copyright law only to the extent that it promotes the progress of science and the useful arts, one might expect the copyrightability of pornography to be more controversial than it has been so far, given the incentives that copyrights provide and the government resources that are required to sustain the copyright legal regime. 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. This makes little sense, morally or otherwise.

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<sup>57</sup> [http://press-pubs.uchicago.edu/founders/tocs/a1\\_8\\_8.html](http://press-pubs.uchicago.edu/founders/tocs/a1_8_8.html)