

Copyright Law and the Commoditization of Sex

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Can the government constitutionally decline to provide copyright protections for creative works of pornography that cause harm? Yes, it can, and it should. Some pornographic works cannot reasonably be construed as promoting “progress” or “useful arts”¹ either because people are harmed during their production, or as a consequence of their distribution and consumption. Some pornographers rely heavily on the copyright laws to reduce and obtain compensation for unauthorized copying, particularly online. Withholding copyright protections would sharply reduce the economic value of these works without unconstitutionally preventing their authorship or precluding their publication or circulation. Government actors would have to make difficult assessments about which pornographic works belonged in the “non-progressive” and “non-useful” category, and their decisions wouldn’t always be consistent or even coherent. Nevertheless, depriving a work of the copyright protections it would otherwise automatically be vested with does not rise to the level of government censorship, because the consequences of a wrong decision are simply a reduction in the economic incentives provided by the government. Denying copyright protection to problematic works does not constitute censorship, and when the harms associated with non-useful works are severe enough, doing so is justifiable and important.

This Article proceeds in four parts:

1. **Copyright law has a structural role in the commoditization of sex.** When a generally illegal act of buying and selling sex is fixed in a tangible medium of expression, it becomes an act of free speech that is protected by the First Amendment and an article of intellectual property that is protected by copyright laws. Pornographers use copyright laws to facilitate profitable commercial exploitation of their works quite aggressively, effectively commoditizing sex, which is then traded in by mainstream corporations.
2. **Copyright is not a content neutral construct.** Copyright laws facilitate the suppression of speech that is copyrighted, speech that is substantially similar to speech that is copyrighted, and speech that is an unauthorized derivative work of speech that is copyrighted. Injunctions premised on allegations of copyright infringement are acts of content based censorship by the government. Fair use is a right (or privilege, or affirmative defense) that seeks to reduce the silencing powers of copyright enforcement by facilitating unauthorized uses of otherwise protected works. Whether an unauthorized is fair is a legal determination that is completely non-content neutral, driven entirely by context.
3. **Some pornographic works may cause harms during production, or as a consequence of distribution, or both.** These works are non-progressive and non-useful, and therefore beyond the purview of the Intellectual Property Clause

¹ Article I, Section 8 of the U.S. Constitution states: The Congress shall have power . . . :

(Clause 8) To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

of the U.S. Constitution. They include child pornography, crush pornography, “revenge” pornography, and pornography in which the performers are physically abused or endangered.

4. **Withholding copyright protection from non-progressive and non-useful pornographic works would appropriately reduce the government’s role in creating economic incentives for their creation and distribution.** Amending the Copyright Act to reduce the ways in which the economic value of harmful pornography can be exploited is a legitimate policy choice that Congress can and should make. The government should not continue to provide copyright incentives for the production and distribution of harmful works. Trademark law is instructive on this point in both positive and negative ways. The Lanham Act’s prohibition of the federal registration of scandalous and immoral marks provides an example of government promulgated content based restrictions that do not offend the Constitution. Admittedly, however, the unpredictable, inconsistent manner in which the prohibition is enforced is problematic and worrisome.