

COPYRIGHT LAW AND THE COMMODITIZATION OF SEX

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- Should Congress reduce or eliminate copyright protections for pornographic works in which the level of creativity is low and the probability of relational harms is high? Yes.

Some Observations About Pornography and Prostitution

- Significantly linked to sex trafficking
- Even when “voluntary” heavily linked to economic coercion
- Dangerous: High levels of violence, substance abuse, disease transmission and suicide in “sex industry”
- Most performers are prostitutes and vice versa

Pornography and Prostitution, continued ...

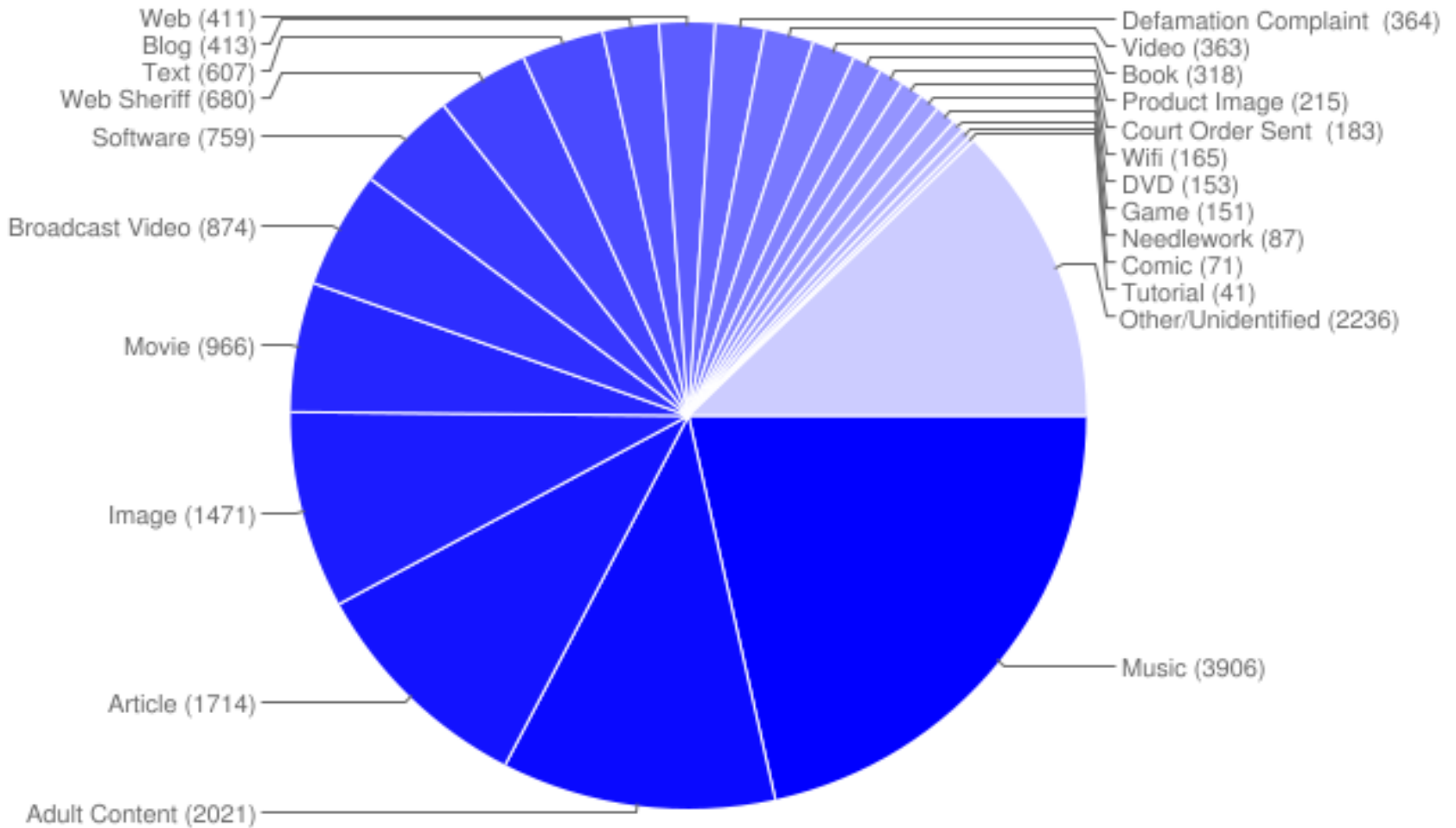
- One is legal in the U.S., the other is not: When a generally illegal act of buying and selling sex is fixed in a tangible medium of expression, it becomes an act of free speech that is protected by the First Amendment and an article of intellectual property that is protected by copyright laws.

Copyright Law Performs a Structural Role in the Commoditization of Sex

- Some corporations that are significant players in the porn industry engage in substantial amounts of copyright litigation, e.g. Fox News, Playboy; see also “Righthaven” and its ilk
- Others have more complicated relationships with copyright law, e.g. Google and Yahoo.
- Still others have little or no porn related copyright interactions, e.g. Marriott and the Hilton.

Pornographers Aggressively Suing Unauthorized Downloaders

Complaint Subjects to Google (2010)



Some pornographic works may cause harms during production, and/or as a consequence of distribution and consumption.

- Because these works are non-progressive and non-useful, and they are beyond the purview of the Intellectual Property Clause of the U.S. Constitution.

“Non-Progressive” and “Non-Useful” Pornography

- A. Child Pornography
- B. Crush Pornography
- C. “Revenge” Porn
- D. Works in Which Performers Have Been Coerced, Physically Abused or Endangered

Can the government constitutionally decline to provide full copyright protections for creative works that cause harm?

- Yes. The “metes and bounds” of copyright protections are changed frequently (when the Copyright Act is amended, and by judicial decisions) and is always uncertain in scope.

- Reducing economic incentives by lowering or eliminating copyright protection for specific categories of works does not “burden” speech impermissibly: Speakers can still speak; distribution channels are still open.

The Copyright Act Authorizes and Facilitates Non-Content-Neutral Regulation of Expressive Speech

- Controlling speech for fun and profit is the whole point of the entire copyright regime!
- Every injunction premised upon “substantial similarity” or “unauthorized derivative work” is a content based restriction on speech.

Copyright is not a content neutral construct, part II...

- Not all speech is eligible for copyright protection now; facts, ideas that are “merged,” works that make unauthorized use of the copyrighted materials of others, etc.
- Too much copyright a bigger obstacle to free speech than none.
- According to current SCOTUS jurisprudence, see e.g. Eldred, “bad” copyright policy is not unconstitutional.

Fair Use

- Example of Copyright Act provision that reduces incentives for creating new works by diminishing economic value of works
- Social value of fair use statutorily deemed more important than strong copyrights
- Fair use determinations not content neutral, very content and context specific

Section 2(a) of the Lanham Act

- 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.

Logistics

- Pornography becomes new category of work in the Copyright Act
- Copyright Office makes (appealable) call about whether to register (harmful?)
- Copyright protection can be stripped by a court if harm raised by defendant as defense to infringement claim
- Presumes benefits of reducing production outweigh costs of increased distribution

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.