

William & Mary Journal of Race, Gender, and Social Justice

Volume 24 (2017-2018)
Issue 2 *William & Mary Journal of Women and
the Law*

Article 3

January 2018

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Kayla Louis, *Pornography and Gender Inequality—Using Copyright Law as a Step Forward*, 24 Wm. & Mary J. Women & L. 267 (2018), <https://scholarship.law.wm.edu/wmjowl/vol24/iss2/3>

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PORNOGRAPHY AND GENDER INEQUALITY—USING COPYRIGHT LAW AS A STEP FORWARD

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INTRODUCTION

The pornography industry generates billions of dollars of revenue annually. The industry relies heavily on protection from copyright law in order to distribute its materials without them being freely taken by others.¹ In other words, copyright law currently operates as an economic incentive to pornographers.²

Unfortunately, this lucrative industry has negative effects on gender equality. Pornography promotes harmful gender roles for both women and men.³ Women are portrayed as merely sexual objects who enjoy any type of penetration imaginable, even if it is rape. They are objectified and dehumanized. Men are shown as animalistic, performance-based, and without morals. As a whole, pornography can lead to behavioral, psychological, and social problems.⁴ Beyond the social harms to both men and women, the performers themselves suffer physical harms.⁵ As a form of prostitution, filmed pornography contributes to the demand for trafficking, and many women are coerced into the industry.⁶

* JD, Rutgers Law School, May 2017.

1. *See infra* Part II.

2. *See id.*

3. *See infra* Section I.A.

4. *See id.*

5. *See infra* Section I.B.

6. *See id.*

The government's denial of copyright protection to speech based on content would potentially violate the First Amendment.⁷ However, the Supreme Court has made clear that not all content deserves free speech protections. Rather, "obscene" materials, as described in *Miller v. California*,⁸ are not protected under the First Amendment.⁹

This Article argues that pornography is an actual problem that warrants denial of copyright protection as a method to disincentivize pornographers. Part I sets forth the harms that pornography causes to men and women, including both social harms to the general public and physical harms to the actors in pornography. In particular, Part I shows that pornography has debilitating and backward effects on gender equality as it enforces harmful gender roles.

Part II explains that the current success of pornography is due to the protection it is granted in copyright law. The very purpose of federal copyright protection was to serve as an incentive to bring ideas into the free-speech marketplace. However, as long as pornography is granted copyright protection, copyright law also operates as a catalyst to pornography's negative effects.

Part III describes the law's current basis for granting copyright protection to pornography, noting that obscenity is not currently a defense to copyrightability. Intending to propose an amendment to the Copyright Act that would exclude obscene materials, this Part recognizes that a denial of copyright protection may violate the First Amendment. Therefore, First Amendment obscenity law, as set forth by the Supreme Court in *Miller*, is analyzed so that a proposed amendment may be consistent with the First Amendment. This would resolve the potential impasse between an obscenity exception to copyright law and free speech concerns.

For that reason, Part IV posits that a solution to the problem—that copyright operates as an incentive to pornography—would be for Congress to amend the Copyright Act. This amendment, which is intended to apply to only filmed works, rather than still pictures,¹⁰ would create an exclusion for obscene materials that is consistent with the First Amendment's definition of obscenity. In particular, this Part suggests that Congress should craft an amendment that codifies a workable, objective version of the *Miller* test. If the *Miller*

7. See *infra* Section III.B.

8. *Miller v. California*, 413 U.S. 15, 23–24 (1973).

9. See *infra* Section III.C.

10. There are two reasons why this proposal is intended to only target filmed pornography. First, it is difficult to show that the harms that result from filmed pornography also result from pornographic still photos. See *infra* Sections I.A, I.B (harms of pornography). Second, it is extremely difficult to craft a test that could apply to photographs, as opposed to filmed works.

test is reworked into an objective framework, it would be easily applied by courts and could be used to deny copyright protection to some pornographic works. I suggest that this new objective test consider the percentage of the work that is composed of explicit sexual activity. This new test would not violate the First Amendment as long as this objective test is within the intent of the *Miller* test. This is a way that copyright law could be used as a step forward for gender equality since less protection for pornography results in less economic incentives to produce it.

I. PORNOGRAPHY'S NEGATIVE EFFECTS ON GENDER EQUALITY

Men and women are bombarded with pornography. As one scientist attempting to research the effects of pornography stated: “We started our research seeking men in their 20s who had never consumed pornography. . . . We couldn’t find any.”¹¹ Unfortunately, the influx of pornography into American culture has not been harmless. Pornography promotes dangerous gender roles: men are to control women; women are to be subordinate to men and accept the abuse.¹² In pornography, this is all done in a way that makes the inequality look glamorous. Behind the scenes, however, real women are being prostituted and coerced into the pornography industry, and their health is risked by a lack of protective measures. While gay pornography presents its own unique set of social and physical harms to the actors, this Article will focus on the harmful effects of pornography in which women are made the subjects of the sexual acts by men. Additionally, this Article considers pornography only in the context of filmed works, rather than photographed or animated images.

A. *Social Harms to Men and Women*

Pornography is harmful to gender equality since it normalizes the degradation and subordination of women to men.¹³ It places women in an inferior status based on their gender.¹⁴ Catharine MacKinnon argues that pornography is, therefore, a form of “sex discrimination because its victims . . . are selected . . . on the basis

11. Jonathan Liew, *All men watch porn, scientists find*, TELEGRAPH (Dec. 2, 2009, 1:22 PM), <http://www.telegraph.co.uk/women/sex/6709646/All-men-watch-porn-scientists-find.html> [<http://perma.cc/KQ2N-N8VR>] (quoting Professor Simon Lajeunesse).

12. See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 58 (1985).

13. See *id.* at 17.

14. *Id.* at 27.

of their gender.”¹⁵ Since pornography is widely consumed by men,¹⁶ the concern is that men treat women based on their view of women, and that view can be shaped by pornography.¹⁷

One way in which pornography is harmful to women’s equality is that it promotes the view that women’s bodies are nothing more than a commodity to be used.¹⁸ This view is harmful to both men and women. It teaches men who watch pornography how to treat women, namely, to use and abuse them.¹⁹ It teaches women that their role is “to tolerate that abuse.”²⁰ In the fantasy world of pornography, inequality is sexualized by making rape, battery, and abuse all look sexy.²¹ In a study conducted of 304 top-selling pornographic scenes, 88.2% of the scenes contained physical aggression and 48.7% of the scenes contained verbal aggression.²² It is routine for a woman to be gagged until the point she is tearing and choking, and to be ejaculated, urinated, and defecated on.²³ All this humiliation is made to look normal and acceptable under the guise of pornography.²⁴

15. *Id.* In other words, but for their sex, the victim would not be treated in the way they are in pornography. *Id.*

16. While the number of women who view pornography is growing, men are still much more likely to look at porn than women. COVENANT EYES, PORNOGRAPHY STATISTICS 9 (2015); *Pornography Use Is a Growing Trend Among Women*, NET NANNY (May 21, 2014), <https://www.netnanny.com/blog/pornography-use-is-a-growing-trend-among-women> [<https://perma.cc/Q3BU-WNAJ>].

17. One example of the way that pornography has shaped the sexual culture is the prominence of anal sex, which was first introduced in pornography in the mid-90s. Jakob Pastötter, *Pornography and Power*, DRJUDITHREISMAN.COM (Sept. 5, 2010), http://www.drjudithreisman.com/archives/2010/09/pornography_and.html [<http://perma.cc/D4A3-X68S>] (transcript of a presentation given by Professor Pastötter). In a study conducted in the 1940s, Alfred Kinsey concluded “not even gay men practiced anal sex frequently.” *Id.* However, only 15 years after it was introduced into pornography, anal sex was practiced by 40% of men ages 25 to 44, and 35% of women in that same age group. BRENDA ZURITA, CONCERNED WOMEN FOR AM., SEXUALLY TRANSMITTED DISEASES: THE COST OF FREE LOVE 9, http://www.cwfa.org/wp-content/uploads/2013/11/CWA_STDs-The-Cost-of-Free-Love_2011.pdf [<https://perma.cc/KSS8-NZZU>]. *But see* Liew, *supra* note 11 (stating pornography did not change men’s perceptions of women, but men instead “discarded material[s] they found offensive or distasteful.”).

18. *See* MacKinnon, *supra* note 12, at 19.

19. MELISSA FARLEY, PORNOGRAPHY, PROSTITUTION, & TRAFFICKING: MAKING THE CONNECTIONS 3 (2015), <http://prostitutionresearch.com/wp-content/uploads/2015/07/Pornography-prostitution-trafficking.pdf> [<http://perma.cc/YM2A-VHS7>]; *see also* MacKinnon, *supra* note 12, at 18 (“Men treat women as who they see women as being. Pornography constructs who that is.”).

20. FARLEY, *supra* note 19.

21. MacKinnon, *supra* note 12, at 16–18.

22. Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1065 (2010).

23. *See* JANICE SHAW CROUSE & BRENDA ZURITA, BEVERLY LAHAYE INST., 10 HARMS OF PORNOGRAPHY, http://concernedwomen.org/images/content/CWA_10-Harms-of-Pornography.pdf [<https://perma.cc/D6F4-VQ3K>].

24. *See id.*

Not only are the women in pornography dehumanized, but the men are as well. Men are portrayed as animalistic and without any morals.²⁵ Pornography constructs the image that in order to be a “man,” they must be able to perform in the way that porn stars do.²⁶ Additionally, pornography tells men that they are supposed to dominate women and should be able to control women in order to fulfill their wishes.²⁷ The danger with this construction is that while “[p]ornography’s world of equality is a harmonious and balanced place,” in the real world, “[i]t [only] eroticizes hierarchy, [and] it sexualizes inequality.”²⁸

Another reason that pornography is harmful to women is that the content that men view in pornography can be translated into aggression or coercion in men’s real relationships. A European survey of 4,564 youths determined that “[b]oys’ [use] of sexual coercion and abuse [in their personal relationships] was significantly associated with regular viewing of online pornography.”²⁹ Furthermore, in another study, men who were shown a sexually violent film “obtained higher scores on scales measuring [the] acceptance of both interpersonal violence and the rape myth when compared with males who viewed either a physically violent or a neutral film.”³⁰ Other studies have shown that men’s “frequent pornography use [can be associated with] sexually aggressive behaviors, particularly . . . for men at high risk for sexual aggression.”³¹ Other material effects of pornography on men and women can include divorce. Studies

25. S. Hite, *The Uncelebrated Beauty of Men’s Sexuality*, INDEPENDENT (May 14, 2009), <https://independent.org/2009/05/the-uncelebrated-beauty-of-mens-sexuality> [<https://perma.cc/J3JG-JS7P>].

26. *See id.*

27. MacKinnon, *supra* note 12, at 17–18.

28. *Id.*

29. Nicky Stanley et al., *Pornography, Sexual Coercion and Abuse and Sexting in Young People’s Intimate Relationships: A European Study*, J. INTERPERSONAL VIOLENCE 1, 1–2 (2016). This study, which was conducted on “young people aged 14 to 17 in five European countries,” additionally determined that “boys who regularly watched online pornography were significantly more likely to hold negative gender attitudes.” *Id.*

30. Mary Anne Layden, *Pornography and Violence: A New Look at the Research*, in THE SOCIAL COSTS OF PORNOGRAPHY 60 (James R. Stoner, Jr. & Donna M. Hughes eds., 2010). Layden defines the term “rape myth” as: “a set of beliefs that women are responsible for rape, like to be raped, want to be raped, and suffer few negative outcomes because of it.” *Id.* at 59. *See also* Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 341, 341 (2008) (finding that in a study of 341 child molesters, “pornography [use] added significantly to the prediction of recidivism.”). *But see* David Lee, *What is the influence of pornography on rape?*, CALCASA (Mar. 19, 2010), <http://www.calcasa.org/2010/03/what-is-the-influence-of-pornography-on-rape> [<https://perma.cc/8LP9-HRGT>] (presenting two research papers that reach opposite conclusions on whether pornography has any influence on rape).

31. Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?*, 11 ANN. REV. SEX RES. 26, 26 (2000).

indicated that roughly fifty percent of divorces result at least in part by pornography use of one spouse.³²

B. Physical Harms to the Performers

“To viewers, pornography can appear a fantasy world of pleasure” for all of its participants.³³ But “[t]o those who create and participate in making [the] pornography, however, their experiences are often flooded with drugs, disease, slavery, trafficking, rape and abuse.”³⁴ While men who participate in gay pornography are often abused in the same way as women are in heterosexual pornography,³⁵ this section of the Article will focus primarily on the harms to the women who act in pornographic films. Pornography is harmful to the women performers for three reasons. First, pornography is inherently linked to prostitution and contributes to the demand for international sex trafficking.³⁶ Second, many women who willingly enter the industry are coerced and manipulated into performing acts they did not consent to.³⁷ And finally, a lack of regulation in the production of pornography risks all of the performers to a myriad of sexual diseases.³⁸

The institutions of pornography, prostitution, and trafficking overlap and are often indistinguishable.³⁹ Pornography can be seen as a form of legal prostitution.⁴⁰ “A typical dictionary definition of

32. Dr. Jill Manning reported in 2004, before the United States Senate, that “56 percent of divorce cases involved one party having an obsessive interest in pornographic websites.” Kevin B. Skinner, *Is Porn Really Destroying 500,000 Marriages Annually?*, PSYCHOLOGY TODAY (Dec. 12, 2011), <https://www.psychologytoday.com/blog/inside-porn-addiction/201112/is-porn-really-destroying-500000-marriages-annually> [<https://perma.cc/Q8M9-UG8H>].

33. *The Porn Industry's Dark Secrets*, FIGHT THE NEW DRUG (Aug. 4, 2014), <https://web.archive.org/web/20160910032317/http://fightthenewdrug.org/the-porn-industrys-dark-secrets> [<https://perma.cc/DJ5V-FB8J>].

34. *Id.*

35. See, e.g., Christopher N. Kendall, *The Harms Of Gay Male Pornography: A Sex Equality Perspective*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 153, 161 (David E. Guinn ed., 2007).

36. See *The Porn Industry's Dark Secrets*, *supra* note 33.

37. Mary Rose Somarriba, *The Porn Industry Is Abusive, and These Women Are Telling It Like It Is*, VERILY (Aug. 5, 2015), <https://verilymag.com/2015/08/porn-industry-playboy-mansion-sex-trafficking-belle-knox-rashida-jones-holly-madison> [<https://perma.cc/HD9R-VHRU>].

38. See *infra* Part IV.

39. See, e.g., Esohe Aghatise, *Sex Trafficking, Prostitution & Pornography—Different Aspects of Sexual Violence*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 43, 43 (David E. Guinn ed., 2007) (Pornography and prostitution are “two sides of the same coin.” “Trafficking and prostitution are literally embodied in the use of women . . . for commercial physical and photographic sexual exploitation. Pornography is embodied in the production of material . . . which sexually objectifies the human body, ‘combining sex . . . behaviour with abuse or degradation in a manner that appears to endorse, condone or encourage such behaviour.’”).

40. See Julie Bindel, *The Dangers of False Distinctions Between Pornography,*

a prostitute is a person ‘who engages in sexual intercourse for money.’”⁴¹ “Therefore, by definition, [the women in pornography] are also . . . prostituted women.”⁴² The only distinguishing feature between illegal prostitution and legal pornography is that the sexual intercourse is being recorded by a camera. As argued by Catharine MacKinnon, pornography and prostitution are indistinguishable.⁴³ She posits that even though “the sexually used” in pornography are transported digitally and therefore make the transaction seem more distanced, “it is no less real a commercial act of sex for any of the people involved.”⁴⁴ As one john admitted, “Yes, the woman in pornography is a prostitute. They’re prostituting right before the cameras. They’re getting money from a film company rather than individuals.”⁴⁵

It is not uncommon for a woman who experiences pornography, prostitution, or trafficking to experience all three.⁴⁶ If a prostituted woman is moved from one part of the country to another by her pimp by force, fraud, or coercion,⁴⁷ she is trafficked.⁴⁸ It is also highly likely that the same women will, at some stage, be used by her pimp in pornography.⁴⁹ In fact, in one study conducted by Melissa Farley of 854 prostituted women in nine countries (including the United States), forty-nine percent of the women reported “that pornography was made of them while they were in prostitution.”⁵⁰ The

Prostitution and Trafficking, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 62, 67 (David E. Guinn ed., 2007) (noting that pornography cannot be produced without prostituted women); see also FARLEY, *supra* note 19, at 1 (quoting one survivor of prostitution who explained, “Pornography is prostitution that is legalized as long as someone gets to take pictures.”).

41. Diana E. H. Russell, *The Damaging Effects Of Exposure To Child Pornography*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 179, 180 (David E. Guinn ed., 2007).

42. *Id.*

43. Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT’L L. 993, 994–1001 (2005).

44. *Id.* at 997 (quoting Melissa Farley, “Renting an Organ for Ten Minutes”: What Tricks Tell Us About Prostitution, Pornography, and Trafficking, Conference Proceedings, “Pornography: Driving the Demand in International Sex Trafficking,” International Human Rights Law Institute of DePaul University, Chicago, Illinois, Mar. 14, 2005, at 5).

45. *Id.*

46. Bindel, *supra* note 40, at 62.

47. Notably, “[m]ore than 80% of the time, women in the sex industry are under pimp control.” See FARLEY, *supra* note 19, at 1.

48. Bindel, *supra* note 40, at 62. Human trafficking is a broad and complex issue, encompassing many forms of exploitation and means of achieving that exploitation that go beyond the scope of this Article. For a broader understanding and definition, see Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319.

49. *Id.*

50. Melissa Farley, “Renting an Organ for Ten Minutes:” What Tricks Tell Us about

prostituted women who had pornography made of them “had significantly more severe symptoms of [post-traumatic stress disorder] than did [prostituted] women who did not have pornography made of them.”⁵¹ One organization that helps women leave prostitution reported that 30% of their clients had been used in pornography at some point.⁵²

“As with all prostitution, the women . . . in pornography are, in the main, not there by choice but because of a lack of choices.”⁵³ For women who are under the control of a pimp, “[t]hese women are often [made] to engage in highly sadistic and repugnant sex acts that less oppressed women in the pornography industry are reluctant to perform.”⁵⁴ Furthermore, many of the women who are involved in both pornography and prostitution do not get to *keep* the money earned from pornography, but rather, must surrender it to their pimps.⁵⁵

Not only are the same women who are used in pornography the same women who are often prostituted and trafficked, but the pornography itself drives the demand for prostitution, which in turn drives the demand for trafficking in order to supply the women.⁵⁶ Melissa Farley argues that “[p]ornography is men’s rehearsal for prostitution” since “[p]ornography is cultural propaganda which drives home the notion that women are prostitutes.”⁵⁷ In her same study, forty-seven percent of prostituted women reported that they “were upset by [johns’] attempts to make them do what the [johns] had previously seen in pornography.”⁵⁸ Since men who consume

Prostitution, Pornography, and Trafficking, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 144, 145 (David E. Guinn ed., 2007).

51. *Id.* at 146.

52. See Vednita Carter, *Racism and Porn*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 213, 213 (David E. Guinn ed., 2007) (reporting that out of the 425 women helped by Breaking Free, an organization “that helps women . . . leave systems of prostitution,” 30% of them had been used in pornography); Chyng F. Sun, *The Fallacies of Fantasies*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 233, 239 (David E. Guinn ed., 2007) (reporting “that 40% of [Breaking Free’s] clients ha[d] been involved in pornography . . . often coerced by their pimps.”).

53. MacKinnon, *supra* note 43, at 995. For a list of the factors that contribute to the lack of choice, see *infra* note 60.

54. Russell, *supra* note 41, at 180.

55. *Id.*

56. MacKinnon, *supra* note 43, at 999 (“[T]he pornography industry, in production, creates demand for prostitution, hence for trafficking, because it is itself a form of prostitution and trafficking. As a form of prostitution, pornography creates demand for women and children to be supplied for sexual use to make it, many of whom are trafficked to fill that demand. The pornographers then traffic these same people in turn in various mediated forms.”).

57. Farley, *supra* note 50, at 145.

58. *Id.* See also Ken Franzblau, *Slavefarm, Sex Tours And The Pimp John T.: Using Pornography To Advance Trafficking, Sex Tourism, And Prostitution*, in PORNOGRAPHY:

pornography often want the prostitute to perform the degrading acts they have witnessed in pornography, young prostitutes are frequently trained by being forced to view pornography by their pimps.⁵⁹

The second reason that women in pornography are harmed is that even the women who willingly enter the industry, rather than acting under the control of a pimp, are coerced and manipulated into performing acts to which they did not consent.⁶⁰ While the pornography industry may look glamorous on the outside, “manipulation is often used to lure women into it.”⁶¹ Unfortunately, a common practice experienced by women in pornography is “that formally agreed-upon terms change very frequently on porn sets” when the woman feels as if she does not have the option to decline.⁶² One former pornography actress explained that amateur porn actresses will sign on to a porn scene as it is described to them, for a certain amount of money, but will then be forced to do something else while the cameras roll.⁶³ She also describes instances where “her agent intentionally [withheld] details about a porn shoot until she had [already] committed to it,” such as that the man she would have sex with was 50 years old, and by the time she found out “she felt her hands were tied.”⁶⁴

DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 261, 261–73 (David E. Guinn ed., 2007) (describing the link between pornography and sex tourism because sex tourists use pornography to successfully advertise to men).

59. Janice Shaw Crouse, *Pornography and Sex Trafficking*, TOWNHALL (May 19, 2008, 3:19 PM), <https://townhall.com/columnists/janiceshawcrouse/2008/05/19/pornography-and-sex-trafficking-n994805> [<https://perma.cc/3TBY-XU7B>]; Fight the New Drug, *Porn’s Dirty Little Secret*, TO STOP THE TRAFFICK (Jan. 8, 2014), <https://tostopthetraffick.wordpress.com/2014/01/08/porns-dirty-little-secret> [<https://perma.cc/X4AH-YPKX>]; MacKinnon, *supra* note 43, at 999.

60. Somarriba, *supra* note 37. However, it should be noted that these women are often faced with a lack of choices. MacKinnon, *supra* note 43, at 995. Specifically, “[t]he same factors that compel women into prostitution . . . also compel women into pornography.” Farley, *supra* note 50, at 147 (discussing that those factors include “poverty, racism, childhood physical and sexual abuse, sexual harassment, and abandonment”); FARLEY, *supra* note 19 (arguing that “[t]he same oppressive experiences . . . [which include] [c]hildhood abuse and neglect, a lack of quality education and job training opportunities, culturally mainstreamed misogyny, racism and poverty—all coerce women into [pornography and prostitution]”).

61. Somarriba, *supra* note 37.

62. *Id.*

63. *Id.* See also Fight the New Drug, *supra* note 59 (quoting a former pornography actress, Regan Starr: “Most of the girls start crying because they’re hurting so bad . . . I couldn’t breathe. I was being hit and choked. I was really upset and they didn’t stop. They kept filming. [I asked them to turn the camera off] and they kept going.”).

64. Somarriba, *supra* note 37. In a similar fashion, former performer Shelley Lubben said that she was “intimidated into doing scenes” she had not agreed to beforehand. Jonathon Van Maren, *This Former Porn Star Is Exposing Porn’s Secrets: And It Should Make You Very Uncomfortable*, LIFE SITE NEWS (May 11, 2015), <http://www.crossmap.com/blogs/this-former-porn-star-is-exposing-porns-secrets-and-it-should-make-you-very-uncomfortable-6372> [<https://perma.cc/YUG6-YARD>]. Lubben said that if she objected, the pornographers would threaten not to pay her, to sue her, to send her pornography

Most pornography portrays the woman as smiling and enjoying the brutality that is inflicted on her.⁶⁵ That is often because “[w]ith some editing and off-screen coercion, pornographers can make it look like what’s happening onscreen is being enjoyed[;] [b]ut the uncut version is a different story.”⁶⁶ Another former pornography actress, Jersey Jaxin, explained that many of the performers rely on drugs in order to cope with the way they are being treated.⁶⁷ She claims that seventy-five percent of porn performers are using drugs in order to numb themselves.⁶⁸ These women are forced to continue smiling or risk upsetting the pornographers and being punished for doing a bad job.⁶⁹

Finally, a lack of regulation in the production of pornography risks all of the performers to a myriad of sexual diseases. Most pornography is filmed in California, where condoms are not required to be worn on set, with the exception of Los Angeles County.⁷⁰ An HIV scare in the pornography industry sparked a call for California to mandate the use of condoms in order to protect the performers.⁷¹ “Since August [of 2013], at least four performers have tested positive for HIV,” forcing the Free Speech Coalition, the adult film industry’s trade association, to halt production three separate times.⁷² At least three of the performers contracted the virus from other performers while on set.⁷³ In one case, performer Cameron Bay contracted HIV after filming a scene in which her partner’s penis was bleeding, and the director chose to continue filming, despite the fact that the actor

to her family in order to ruin her reputation, to take away her finances, and physically hurt her. *Id.*

65. Fight the New Drug, *supra* note 59.

66. *Id.*

67. *Id.*

68. *Id.* Jersey Jaxin goes on to explain the physical toll the business takes on the performer’s body: “You’re bruised. You have black eyes. You’re ripped. You’re torn. You have your insides coming out.” *Id.*

69. MacKinnon, *supra* note 43, at 995 n.12 (quoting former pornography actress Linda Boreman: “I never experienced any sexual pleasure, not one orgasm, nothing. I learned how to fake pleasure so I wouldn’t get punished for doing a bad job.”).

70. See California workplace safety board rejects mandatory condoms for porn actors, FOX NEWS (Feb. 19, 2016), <http://www.foxnews.com/health/2016/02/19/california-workplace-safety-board-rejects-mandatory-condoms-for-porn-actors.html> [https://perma.cc/2928-3UD6] (discussing California determination on condoms).

71. See Kathleen Miles, *Yet Another HIV-Positive Porn Performer Leads To Third Shutdown*, HUFFINGTON POST (Jan. 25, 2014), http://www.huffingtonpost.com/2013/12/06/fourth-hiv-porn_n_4401064.html [https://perma.cc/KMJ9-E2AE].

72. *Id.*

73. See Gail Dines, *The HIV Crisis in the Porn Industry*, COUNTERPUNCH (Sept. 27, 2013, 1:11 AM), <https://www.counterpunch.org/2013/09/27/the-hiv-crisis-in-the-porn-industry> [https://perma.cc/Q5ND-NA6U]; see also Sherry Yates Young, *HIV scare in porn industry after 2 actors test positive*, CBS NEWS (Dec. 30, 2014, 4:29 PM), <http://www.cbsnews.com/news/hiv-scare-in-porn-industry-after-2-actors-test-positive> [https://perma.cc/86RL-MKNZ].

wasn't wearing a condom.⁷⁴ However, in February 2016, California's Division of Occupational Safety and Health rejected the proposal that would have "required actors in all pornographic films [in its state] to use condoms."⁷⁵

HIV is not the only disease performers must be afraid of, however. According to a 2012 study, twenty-eight percent of performers tested positive for chlamydia and/or gonorrhea.⁷⁶ One male performer surmised that "[e]very professional in the porn-world has herpes, male or female."⁷⁷ Despite the estimate that at least sixty-six percent of performers have herpes, pornographers don't test for herpes in the way that they test for other sexually transmitted diseases.⁷⁸ One former performer, Shelley Lubben, said that the performers were often sent to fraudulent doctors clinics in order to obtain the clean bill of health they needed to continue filming.⁷⁹ Additionally, many performers alter the results from their tests.⁸⁰

As Ann Bartow has noted, pornography is different from other types of materials that copyright law protects.⁸¹ With other harmful materials, the harm is related to the end use, such as the instructions for building a bomb.⁸² "With pornography, however, simply 'producing' the 'information' can inflict emotional or physical damages on living humans"⁸³

II. PORNOGRAPHY'S RELIANCE ON COPYRIGHT LAW FOR ITS COMMERCIAL SUCCESS

Despite the questionable means by which pornography is often created, the pornography industry enjoys great commercial success.

74. Dines, *supra* note 73.

75. April Dembosky, *Should Porn Stars Use Condoms? California Grapples With Regulation*, NPR (Feb. 18, 2016, 11:03 AM), <http://www.npr.org/sections/health-shots/2016/02/18/467132549/should-porn-stars-use-condoms-california-grapples-with-regulation> [<https://perma.cc/EN43-3D64>]; see *California workplace safety board rejects mandatory condoms for porn actors*, *supra* note 70. Representatives of the pornography industry argued that use of condoms would disinterest its consumers and force the industry to operate underground, further endangering performers. Dembosky, *supra*.

76. Dembosky, *supra* note 75.

77. COVENANT EYES, *supra* note 16, at 6.

78. Van Maren, *supra* note 64.

79. *See id.*

80. *Id.*

81. See Ann Bartow, *Some Peer-to-Peer, Democratically, and Voluntarily-Produced Thoughts*, 5 J. TELECOMM. & HIGH TECH. L. 449, 456 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006)).

82. *Id.*

83. *Id.*

It is estimated that in the U.S. alone, the pornography industry generates around \$10–\$13 billion yearly.⁸⁴ Across the world, the industry's estimated worth is \$97 billion.⁸⁵ Pornography accounts for approximately “30 percent of all data transferred across the Internet.”⁸⁶ Additionally, pornography websites receive more visitors each month than Netflix, Amazon, and Twitter combined.⁸⁷ Even many Fortune 500 companies have not been able to resist the industry because of the money to be made. These companies include Time Warner (through its subsidiary HBO), General Motors (through its subsidiary DirecTV), Verizon, and Marriott, who make substantial portions of their profit by streaming pornography.⁸⁸

Without copyright protection, the pornography industry would not experience its current profits because its works could be freely taken by others.⁸⁹ The Supreme Court described copyright as an “engine of free expression,” and, as Ned Snow noted, “[it] plays a critical role in bringing ideas into the free-speech marketplace.”⁹⁰ Therefore, copyright currently plays a role in bringing pornography into the marketplace. This means that copyright also serves as a catalyst to the social and physical harms that are caused by pornography.

With copyright protection, pornography companies can bring infringement suits against alleged infringers.⁹¹ These infringers may include “Bulletin Board services, usenet groups, and even browser companies [in order] to prevent the unauthorized uploading, hosting, and downloading of images [to] which [the pornographers have]

84. Scott Macaulay, *The Internet Killed the Adult Movie Star?*, FILMMAKER MAG. (June 2, 2007), <http://filmmakermagazine.com/2868-the-internet-killed-the-adult-movie-star/#.Wbrst8iGPIV> [<https://perma.cc/9YPM-6V5V>] (stating the estimate by Paul Fishbein, president of Adult Video News Media Network, of 13 billion dollars); *Porn Industry Feeling Upbeat About 2014*, NBC NEWS (Jan. 14, 2014, 5:54 PM), <http://www.nbcnews.com/business/business-news/porn-industry-feeling-upbeat-about-2014-n9076> [<https://perma.cc/CD97-HNDE>] (estimating 10 to 12 billion dollars in revenue); *Things Are Looking Up in America's Porn Industry*, NBC NEWS (Jan. 20, 2015, 8:17 AM), <https://www.nbcnews.com/business/business-news/things-are-looking-americas-porn-industry-n289431> [<https://perma.cc/T7XP-FMFV>] (estimating 10 to 12 billion dollars in revenue).

85. *Things Are Looking Up in America's Porn Industry*, *supra* note 84.

86. *Porn Sites Get More Visitors Each Month Than Netflix, Amazon And Twitter Combined*, HUFFINGTON POST (May 4, 2013, 10:45 AM), http://www.huffingtonpost.com/2013/05/03/internet-porn-stats_n_3187682.html [<https://perma.cc/WJY4-RTYA>].

87. *Id.*

88. See NAT'L CTR. ON SEXUAL EXPLOITATION, THE 2016 DIRTY DOZEN LIST, http://endsexualexploitation.org/wp-content/uploads/DD_2016_Flyer_FINAL.pdf [<https://perma.cc/U64D-2J3M>]; *Porn Profits: Corporate America's Secret*, ABC NEWS (Jan. 28, 2017), <http://abcnews.go.com/Primetime/story?id=132001&page=1> [<https://perma.cc/HSV7-YQ7K>].

89. See *Golan v. Holder*, 132 S. Ct. 873, 890, 893 (2012).

90. *Id.* at 890; Ned Snow, *Content-Based Copyright Denial*, 90 IND. L.J. 1473, 1474 (2015).

91. Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 3, 50–51 (2012).

copyrights.”⁹² Most recently, pornography producer Malibu Media has begun a large series of litigation against alleged infringers by tracking individuals’ Internet Protocol (IP) addresses.⁹³ The individuals who are targeted for litigation use:

BitTorrent [technology which] is a peer-to-peer file-sharing protocol that allows users to transfer large files over the internet by breaking the complete file (the “Seed”) into small pieces to be downloaded in parts. Other users (“Peers”) download a small “torrent” file that contains an index of the pieces and directions for connecting to the Seed. When Peers connect to the Seed, they download pieces of the file at random, and begin sharing each piece once it has completed downloading. After all the pieces are downloaded, the BitTorrent software reassembles the pieces into a complete file for the Peer to view.⁹⁴

Since “BitTorrent ‘tracks’ the pieces of a file as it is shared, so Peers can identify the IP addresses from which the file was downloaded,”⁹⁵ once Malibu Media has obtained the IP addresses of alleged infringers, it files lawsuits in federal courts across the country against those individual IP addresses⁹⁶ as John Doe defendants.⁹⁷ Once in court,

92. *Id.* at 50.

93. *E.g.*, *Malibu Media, LLC v. Doe*, No. 15 Civ. 4369(AKH), 2015 WL 4092417, at *1 (S.D.N.Y. July 6, 2015).

94. *Id.*

95. *Id.* at *2.

96. *In re Malibu Media Copyright Infringement Litig.*, No. C 15-04170 WHA, 2016 U.S. Dist. LEXIS 31908, at *2 (N.D. Cal. Mar. 10, 2016). (stating that Malibu must file individual claims against each John Doe defendant it wishes to sue). *Id.* at *2–3, *6–8. This is because the Northern District of California recently disapproved of the litigation scheme commonly used by Malibu and other pornographers. *See id.* at *6–8 (quoting *Malibu Media, LLC v. Does 1 through 10*, No. 2:12-cv-3623-ODW(PJWx), 2012 WL 5382304, at *3–4 (C.D. Cal. June 27, 2012), *vacated on other grounds by Malibu Media LLC v. Doe*, No. 2:12-cv-01642-RGK-SSx, 2012 U.S. Dist. LEXIS 95487, at *1 (C.D. Cal. July 10, 2012)). This scheme involved “su[ing] numerous John Does in a single action” with minimal cost—only “a single filing fee, [some] discovery, and stamps.” *Id.* at *7 (quoting *Malibu Media, LLC v. Does 1 through 10*, 2012 WL 5382304, at *3). Then, because nearly every John Doe would settle for “nuisance-value” to avoid the embarrassment of a lawsuit for infringing pornographic works, pornographers would reap hundreds of thousands of dollars in rewards. *Id.* The Northern District of California positively noted the Central District of California’s position that “[b]y requiring Malibu to file separate lawsuits for each of the Doe Defendants, Malibu will have to expend additional resources to obtain a nuisance-value settlement—making this type of litigation less profitable.” *See id.* at *6–8.

97. *See, e.g.*, *Malibu Media, LLC v. Doe*, No. 1:15-cv-01943-AWI-SKO, 2016 WL 1046934, at *1 (E.D. Cal. Mar. 16, 2016); *Malibu Media, LLC v. Doe*, No. JKB-16-0647, 2016 U.S. Dist. LEXIS 34040, at *1 (D.MD. Mar. 14, 2016); *Malibu Media, LLC v. Doe*, No. 16-942 (KM)(MAH), 2016 WL 952340, at *1 (D.N.J. Mar. 14, 2016); *Malibu Media LLC v. Doe*, No. 13 C 6312, 2016 U.S. Dist. LEXIS 14798, *1–2 (N.D. Ill. Feb. 8, 2016); *Malibu Media, LLC v. Doe*, No. 1:15 CV 1342, 2015 U.S. Dist. LEXIS 150388, at *1–2 (N.D. Ohio Nov. 5, 2015).

Malibu can usually successfully subpoena a third party in order to obtain the real names and addresses of the John Doe defendants.⁹⁸

Cases such as these rarely go to trial. The Northern District of California approved of the description of the litigation strategy used by Malibu and other pornographers as “essentially an extortion scheme” in which the “plaintiff has no intention of [actually] bringing [the case] to trial.”⁹⁹ Armed with the threat of a legitimate copyright infringement claim exposing the defendants’ pornography use, pornographers force “quick and lucrative settlements.”¹⁰⁰

Without copyright protection, the billion dollar profits of the pornography industry would plummet. If pornographic works could be freely copied, pornographers would not sell as many copies. Furthermore, without copyright protection, they would be unable to threaten the copiers with copyright infringement lawsuits and force their lucrative settlements.¹⁰¹ Therefore, withdrawing copyright protection from pornographic works would disincentivize the pornographers who produce it.¹⁰²

III. THE LAW’S CURRENT JUSTIFICATIONS FOR PORNOGRAPHY

The Copyright Act gives protection to pornography.¹⁰³ Moreover, obscenity is currently not a defense to copyrightability.¹⁰⁴ Should the

98. See, e.g., *Malibu Media*, 2016 WL 1046934, at *1 (granting pornographer’s “motion for leave to serve a third-party subpoena” to determine the identity of an individual who “alleged[ly] . . . used the BitTorrent [sic] file distribution network to download [copyrighted pornography]”); *Malibu Media*, 2016 U.S. Dist. LEXIS 34040, at *1–3; *Malibu Media*, 2016 WL 952340, at *1.

99. See *In re Malibu Media Copyright Infringement Litig.*, 2016 U.S. Dist. LEXIS 31908, at *7.

100. Bartow, *supra* note 91, at 51.

101. *Id.*

102. It should be noted that my proposal to withdraw copyright protection from obscene works is not intended to solve the problem of revenge pornography. Revenge pornography is pornography where the subject was either unaware that the expression was being fixed in a tangible work (i.e., filmed) or where the subject was aware but did not intend for the distribution of the work. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014); Kaitlan M. Folderauer, *Not All is Fair (Use) in Love and War: Copyright Law and Revenge Porn*, 44 U. BALT. L. REV. 321, 325–27 (2015); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 424–25 (2014). As the name suggests, the purpose of revenge pornography is to humiliate, embarrass, and socially harm the subject; the purpose is not to obtain economic gain for the distributor. See Folderauer, *supra*, at 321–23, 325. For that reason, withdrawing the economic incentives provided by copyright law will not have an effect on the production of revenge pornography. See *id.* at 330–31. For proposals on how to solve the problem of revenge pornography, see, e.g., *id.* at 334–35; Levendowski, *supra*, at 439; Keats Citron & Franks, *supra*, at 386–90.

103. Bartow, *supra* note 91, at 5–6, 11–13, 19–20.

104. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 854 (5th Cir. 1979).

Copyright Act be amended to create an exception to copyrightability for obscene works, such an exception should be consistent with First Amendment obscenity law. This is because a denial of copyright protection could constitute a violation of the First Amendment.¹⁰⁵

A. *The Copyright Act*

The federal government's power to grant copyright protection under the Copyright Act stems from the Progress Clause of the U.S. Constitution.¹⁰⁶ The Progress Clause states in relevant part that "Congress shall have [the] Power . . . [t]o 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"¹⁰⁷

Based on that authority, the Copyright Act grants protection to "original works of authorship fixed in any tangible medium of expression."¹⁰⁸ The threshold required for a work to be considered original is very low, and absent direct copying, pornographic works meet this low threshold.¹⁰⁹ The second requirement, that the work be fixed in a tangible medium of expression, is met by pornographic works since they are filmed.¹¹⁰

Obscenity is not a defense to copyrightability.¹¹¹ This was first stated by the Fifth Circuit in *Mitchell Bros. Film Group v. Cinema Adult Theater*.¹¹² The Fifth Circuit first reasoned that the language of the Copyright Act was "facially all-inclusive" since there is no "hint" in the language of the Act that obscene works should not be given protection.¹¹³ Moreover, the Court reasoned that the legislative history of the 1976 Act revealed that Congress intended to avoid content restrictions on copyrightability.¹¹⁴ This reasoning has since been

105. Cf. Levendowski, *supra* note 102, at 438 (discussing the difficulty in crafting laws regarding revenge porn).

106. See U.S. CONST. art. I, § 8, cl. 8.

107. *Id.*

108. 17 U.S.C. § 102(a) (current through Pub. L. No. 115-61).

109. See *Feist Public'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358–59 (1991) ("[T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. . . . Presumably, the vast majority of compilations will pass this test").

110. § 102(a). Under the Copyright Act, "[w]orks of authorship include . . . motion pictures and other audiovisual works . . ." *Id.* § 102(a)(6).

111. *E.g.*, *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 854 (5th Cir. 1979).

112. *Id.*

113. *Id.*

114. *Id.* at 855. The Fifth Circuit argued that the intent of Congress in creating the 1976 Act was to continue the policy of the 1909 Act which "[did] not include requirements of

adopted by the Ninth Circuit,¹¹⁵ the D.C. Circuit,¹¹⁶ the Seventh Circuit,¹¹⁷ and many district courts.¹¹⁸ However, this is not a settled issue, and some judges “have reached different conclusions on th[e] issue.”¹¹⁹

My proposal will suggest an amendment to the Copyright Act that makes obscenity a defense to copyrightability, thereby overruling the Fifth Circuit in *Mitchell Bros.* However, such an exception to copyrightability must not be overbroad but rather, as discussed below, must be consistent with the First Amendment.

B. *The First Amendment*

The First Amendment becomes important to this discussion because a denial of copyright protection could well constitute an abridgment of the First Amendment. This idea is currently disputed among scholars¹²⁰ and deserves its own paper, rather than the brief analysis here. However, I will briefly outline the arguments and conclude that even if a denial of copyright protection could violate the First Amendment, my proposal is consistent with First Amendment obscenity law. Therefore, regardless of the answer to this question, my proposed amendment would not violate the First Amendment.

Proponents of the view that a denial of copyright protection violates the First Amendment, as recently articulated by Professor

novelty, ingenuity, or *esthetic merit*, and there is no intention to enlarge the standard of copyright protection to require them.” *Id.* (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51).

115. *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 991 (9th Cir. 2009); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982).

116. *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1448 (1982).

117. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755–56 (7th Cir. 2012).

118. *Malibu Media, LLC v. Benson*, No. 13-cv-02394-WYD-MEH, 2014 WL 2859618, at *3–4 (D. Colo. June 20, 2014); *Malibu Media, LLC v. Zumbo*, No. 2:13-cv-729-JES-DNF, 2014 WL 2742830, at *4 (M.D. Fla. June 17, 2014); *Nova Prods., Inc. v. Kisma Video, Inc.*, Nos. 02 Civ. 3850(HB), 02 Civ. 6277(HB), 03 Civ. 3379(HB), 2004 WL 2754685, at *3 (S.D.N.Y. Dec. 1, 2004); *Pillsbury Co. v. Milky Way Prods., Inc.*, No. C78-679A, 1981 WL 1402, at *9 (N.D. Ga. Dec. 24, 1981) (applying the *Mitchell Bros.* reasoning to the fair use defense); *see Malibu Media, LLC v. Does 1–6*, No. 12 C 08903, 291 F.R.D. 191, 198 (N.D. Ill. 2013).

119. *Malibu Media, LLC v. Does 1–28*, No. 12-cv-12598, 2012 WL 7748917, at *10 (E.D. Mich. Oct. 31, 2012) (quoting *Next Phase Distribution, Inc. v. Does 1–27*, 284 F.R.D. 165, 171 (S.D.N.Y. 2012)), *vacated as moot by Malibu Media, LLC v. Doe*, 2013 U.S. Dist. LEXIS 35893, at *1–2 (E.D. Mich. Mar. 15, 2013); *see also Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 176 (S.D.N.Y. 1998) (“Once a court has determined that copyright[able] material is obscene, there seems no reason to require it to expend its resources on behalf of a plaintiff who it could as readily be trying for a violation of the federal criminal law.”).

120. *See Snow*, *supra* note 90.

Ned Snow, reason that copyright denial “would enable Congress to influence content” in the free-speech marketplace, thereby violating the First Amendment.¹²¹ This is because “[a]bsent the money that copyright provides to speakers, much content would simply never be spoken.”¹²² The Supreme Court has recognized that economic compensation is a significant incentive to produce expression.¹²³ Therefore, as Snow argues, “removing copyright introduces a practical likelihood of silencing speakers.”¹²⁴

On the contrary, opponents of this view reason that copyright denial would not deny speakers a market for their expression but would merely deny them a monopoly advantage in the market,¹²⁵ therefore not violating the First Amendment. They believe that at the heart of the First Amendment is the right to speak what a person wishes, not to obtain an economic incentive for that speech.¹²⁶ Some scholars, such as Ann Bartow, have assumed this to be the case when proposing that copyright law should not protect some pornography; Bartow argued that “[t]he government would not be silencing pornographers; [but] would simply be reducing the economic incentives copyright laws provide them”¹²⁷ I, however, will assume that content-based copyright denials have the potential to violate the First Amendment and will therefore discuss obscenity laws under the First Amendment as stated by the Supreme Court in *Miller v. California*.¹²⁸

C. *Miller v. California*

In *Miller*, the Supreme Court held that “obscene material is unprotected by the First Amendment.”¹²⁹ Specifically, it held that “hard

121. *Id.* at 1479–80.

122. *Id.* at 1479.

123. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 457, 468–70 (1995) (holding that the Speech Clause extended to protection to financial incentives to produce speech).

124. Snow, *supra* note 90, at 1480; *see also* *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (“[T]he government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”).

125. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 352–53 (1989).

126. C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 903 (2002) (“Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech.”); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1203 (1970) (“The first amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker”).

127. Bartow, *supra* note 91, at 5, 52.

128. *Miller v. California*, 413 U.S. 15, 36–37 (1973).

129. *Id.* at 23.

core” pornography, as could be defined by states or Congress, does not receive protection.¹³⁰ At issue in *Miller* was the application of California’s criminal obscenity statute when the appellant Miller distributed sexually explicit materials in a mass mailing to individuals who had not solicited the materials.¹³¹

The Supreme Court first reaffirmed its prior holding in *Roth v. United States* that “obscenity is not within the area of constitutionally protected speech or press.”¹³² However, the Court then rejected its previous test for obscenity in the plurality decision of *Memoirs v. Massachusetts*.¹³³ In *Memoirs*, three justices articulated a three-part test for obscenity: “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”¹³⁴

The *Miller* Court took issue with the third element, which requires that the material be utterly without redeeming social value.¹³⁵ The Supreme Court reasoned that since this prong of the test required “the prosecution to prove a negative,” it was “a burden virtually impossible to discharge under our criminal standards of proof.”¹³⁶ Therefore, it should be “abandoned as unworkable.”¹³⁷

For that reason, the new test articulated by the Supreme Court in *Miller* altered the third element, making the test:

(a) [W]hether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . . ; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹³⁸

By way of example, the Supreme Court provided what it deemed were “a few plain examples” of what could be regulated within this

130. *Id.* at 24, 27–29.

131. *Id.* at 17–18. The materials at issue included “brochures [that] advertise[d] four books entitled ‘Intercourse,’ ‘Man-Woman,’ ‘Sex Orgies Illustrated,’ and ‘An Illustrated History of Pornography,’ and a film entitled ‘Marital Intercourse.’” *Id.* at 18. The brochures contained drawings of men and women explicitly engaging in various sexual acts, with genitals often prominently displayed. *Id.*

132. *Roth v. United States*, 354 U.S. 476, 485 (1957); *Miller*, 413 U.S. at 23.

133. *Miller*, 413 U.S. at 23.

134. *Memoirs v. Massachusetts*, 383 U.S. 415, 418 (1966) (plurality opinion).

135. *Miller*, 413 U.S. at 21–23.

136. *Id.* at 22.

137. *Id.* at 23.

138. *Id.* at 24.

new definition of obscenity, specifically, what constitutes “patently offensive” under the second prong.¹³⁹ This could include: “(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated[;] (b) [p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”¹⁴⁰

The Court acknowledged the difficulty in defining such “hard core” pornographic materials that it sought to isolate from protection.¹⁴¹ However, “[i]f the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then ‘hard core’ pornography may be exposed without limit”¹⁴² The Court reiterated that the heart of this test is that “[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”¹⁴³

The most prominent example of a law that was deemed too broad and outside the limits of *Miller*’s obscenity test was the city ordinance at issue in *American Booksellers Ass’n, Inc. v. Hudnut*.¹⁴⁴ The anti-pornography ordinance in this case was drafted by feminists Andrea Dworkin and Catherine MacKinnon for the City of Minneapolis.¹⁴⁵ The ordinance described pornography as:

[T]he graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or

139. *Id.* at 25.

140. *Id.*

141. *Miller*, 413 U.S. at 27–28.

142. *Id.*

143. *Id.* at 26.

144. *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 324–25 (7th Cir. 1985), *aff’d*, *Hudnut v. American Booksellers Ass’n, Inc.* No. 85-1090, 1986 U.S. LEXIS 166, at *1 (Feb. 24, 1986).

145. E.R. Shipp, *A Feminist Offensive Against Exploitation*, N.Y. TIMES (June 10, 1984), <http://www.nytimes.com/1984/06/10/weekinreview/a-feminist-offensive-against-exploitation.html?mcubz=3> [<https://perma.cc/WPG5-F9SQ>].

- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.¹⁴⁶

The ordinance also provided that “the ‘use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.’”¹⁴⁷

This ordinance was deemed unconstitutional by the Seventh Circuit because it was considerably different from the Supreme Court’s definition of obscenity in *Miller*.¹⁴⁸ The court noted that the “ordinance d[id] not refer to the prurient interest, to offensiveness,” or to “whether the work ha[d] literary, artistic, political, or scientific value.”¹⁴⁹ Rather, the ordinance sought to regulate works that influence attitudes about women, regardless of whether the work has any other value.¹⁵⁰ The Seventh Circuit took issue with the fact that this made the ordinance much broader than the Supreme Court’s definition of obscenity.¹⁵¹ Absent obscene material, the government is not free to regulate ideas, no matter how harmful or distasteful.¹⁵² For example, “[t]he ideas of the Klan may be propagated,” “[c]ommunists may speak freely and run for office,” and “[t]he Nazi Party may march through a city with a large Jewish population.”¹⁵³ Regulating speech in this manner because it is distasteful without a finding of obscenity would violate the First Amendment.¹⁵⁴

The lesson to be learned from *Hudnut* is that obscenity laws must not be overbroad but must be consistent with the intent of *Miller* in order to be deemed constitutional.

IV. CONGRESS SHOULD AMEND THE COPYRIGHT ACT TO EXCLUDE OBSCENE MATERIALS USING AN OBJECTIVE TEST

Since the First Amendment does not protect obscene materials, copyright law is not required to protect obscene materials either.

146. *Hudnut*, 771 F.2d at 324.

147. *Id.*

148. *Id.*

149. *Id.* at 324–25.

150. *Id.* at 325.

151. *See id.* at 324–25, 328–29, 331.

152. *See Hudnut*, 771 F.2d at 327–28.

153. *Id.* at 328 (internal citations omitted).

154. *See id.* at 324–25.

Given the harmful effects that pornography causes, this Article posits that obscene materials should indeed not be given copyright protection. This Part first proposes that the Copyright Act should be amended to exclude obscene materials from protection. Second, this Part analyzes the intent of the *Miller* test so the amendment may be crafted in a way that will not violate free speech concerns. Finally, this Part sets forth an objective version of the *Miller* test. The advantage to an objective version of the test is that it may be easily and cleanly applied by courts.¹⁵⁵ The effect will be that many pornographic works will be denied copyright protection, stripping away the incentive to produce it. This proposal is intended to be a test that can be applied to filmed pornography rather than still images.¹⁵⁶

First, an amendment by Congress to exclude obscene material would solve the debate over whether obscenity should serve as a defense to copyrightability.¹⁵⁷ This would effectively overrule the Fifth Circuit's decision in *Mitchell Bros.* and the subsequent followings by the Seventh, Ninth, and D.C. Circuits.¹⁵⁸ An amendment by Congress is preferable here since there seems to be confusion among the courts as to whether the Fifth Circuit should continue to be followed.¹⁵⁹ In 2012, the confusion only intensified with the Northern District of California's decision in *Wong v. Hard Drive Prods., Inc.*¹⁶⁰ In *Wong*, plaintiff Liuxia Wong filed a motion for declaratory judgment based on the theory that she did not infringe on defendant Hard Drive Productions (HDP) copyright because their materials were obscene and therefore not copyrightable.¹⁶¹ She was accused by HDP of downloading copyrighted pornographic images.¹⁶² The Northern District of California accepted Wong and defendant's stipulated judgment but issued only a one-sentence judgment.¹⁶³ This decision seems

155. The obscenity test contained in *Miller* has been criticized for being overly vague, subjective, and difficult to apply. See, e.g., P. Heath Brockwell, Comment, *Grappling with Miller v. California—The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 131, 133, 135–37, 141, 144–45 (1994). An amendment to the Copyright Act that includes a version of the *Miller* test should be in an objective framework to avoid the problems present with the current *Miller* test.

156. See *supra* note 10.

157. See *supra* notes 121–28 and accompanying text.

158. See *supra* notes 112–17 and accompanying text.

159. See *Malibu Media, LLC v. Does 1–28*, No. 12-cv-12598, 2012 WL 7748917, at *10 (E.D. Mich. Oct. 31, 2012); *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 176 (S.D.N.Y. 1998).

160. Stipulated J. at 1, *Wong v. Hard Drive Prods., Inc.*, No. C 12-00469 YGR (N.D. Cal. May 31, 2012).

161. See Pl.'s First Am. Compl. at 1, 13, *Wong v. Hard Drive Prods., Inc.*, 2012 WL 384870 (N.D. Cal. Jan. 31, 2012), No. 5:12-cv-00469-HRL.

162. *Id.* at 2, 4–5, 9–10.

163. Stipulated J. at 1, *Wong v. Hard Drive Prods., Inc.*, No. C 12-00469 YGR (N.D. Cal. May 31, 2012).

to imply that the court accepted Wong's argument that obscene material cannot be copyrightable.

Congress should choose to clarify this ambiguity in favor of denying obscene works copyright protection because of the harms that pornography inflicts on gender equality. Congress should recognize that this amendment to copyright law would serve as a means by which to disincentivize pornographers. As set forth in Section I.A, not only is pornography harmful to society, since it promotes the degradation and subordination of women, but pornography also fuels the demand for prostitution and trafficking since the individual pieces of the sex industry function in conjunction with one another.¹⁶⁴ Stated differently, since the First Amendment does not protect obscene material, it is not necessary for copyright to protect obscene material either. And, given the harmful effects that pornography causes, copyright should indeed not protect such obscene materials.

This amendment must be consistent with the intent of the Supreme Court in *Miller* to the extent that a denial of copyright protection would violate the First Amendment.¹⁶⁵ In *Miller*, the Supreme Court was predominately concerned that "[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."¹⁶⁶ This is evident since the Court specifically altered the third prong of the existing obscenity test from *Memoirs*, which required that "the material [be] utterly without redeeming social value."¹⁶⁷ Instead, the Supreme Court required that the work lack "serious literary, artistic, political, or scientific value."¹⁶⁸ This test was specifically intended to isolate "hard core" pornography from First Amendment protection.¹⁶⁹

Unless the Copyright Act's test for obscenity tracks with and is consistent with *Miller*, it will likely be held unconstitutional, as was the city ordinance in *Hudnut*.¹⁷⁰ The mistake of the ordinance in *Hudnut* was that it was broader than the *Miller* test.¹⁷¹ The Seventh Circuit criticized the ordinance because it made no mention of prurient interest, offensiveness, or literary, artistic, political, or scientific value.¹⁷² For that reason, the intent of each prong of the *Miller* test

164. See *supra* Sections I.A, I.B.

165. See *supra* Section III.B.

166. *Miller v. California*, 413 U.S. 15, 26 (1973).

167. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion).

168. *Miller*, 413 U.S. at 24.

169. *Id.* at 29.

170. See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 324–26, 328 (7th Cir. 1985).

171. See *supra* notes 144–53 and accompanying text.

172. *Hudnut*, 771 F.2d at 324–25.

should be analyzed and incorporated into a test that would pass constitutional muster.

After each factor from *Miller* is analyzed, I will attempt to rework them into an objective framework. The reason for this is to ensure that the test can be easily and consistently applied by judges to various works in order to determine if the work is copyrightable.

The first prong of the *Miller* test requires that the average person would find that the work, taken as a whole, “appeals to the prurient interest.”¹⁷³ The Supreme Court had already defined appeal to the prurient interest as that which “ha[s] a tendency to excite lustful thoughts.”¹⁷⁴ In other words, the work as a whole is sexually arousing to the average person. “Generally, pornography appeals to the prurient interests because it is designed to arouse lustful thoughts in its audience.”¹⁷⁵

The second prong of the *Miller* test requires that the work depict “sexual conduct in a patently offensive way.”¹⁷⁶ The Court noted that examples of such patently offensive conduct could include “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,” or “[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”¹⁷⁷ Again, given the Court’s example, it appears that it intended most hard core pornography to easily meet this prong.

The Court’s third prong of the test is what separates hard core pornographic works from other works that may contain some pruriently appealing, patently offensive material. The third prong of the *Miller* test requires that “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁷⁸ Even though the Supreme Court later stated that this inquiry should be made from the reasonable person standard,¹⁷⁹ the requirement is, nonetheless, extremely subjective. What one person may deem to lack serious artistic value may be seen as innovative by another.

My proposed test for obscenity combines the first two prongs of the test into a definition of pornography. If the work meets this definition of pornography, it will automatically be deemed to have

173. *Miller*, 413 U.S. at 24 (internal citation omitted).

174. *Roth v. United States*, 354 U.S. 476, 487, 487 n.20 (1957).

175. *United States v. McCoy*, 937 F. Supp. 2d 1374, 1379 (M.D. Ga. 2013). This is also consistent with the idea that obscenity law was created to apply only to sexual materials. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792–94 (2011); *United States v. Stevens*, 559 U.S. 460, 479–80 (2010).

176. *Miller*, 413 U.S. at 24.

177. *Id.* at 25.

178. *Id.* at 24.

179. *Pope v. Illinois*, 481 U.S. 497, 499–501 (1987).

prurient appeal and depict sexual acts in a patently offensive way. Once this definition is met, the work will be subject to the scrutiny of a second step which uses an objective factor as a proxy for whether the work lacks serious literary, artistic, political, or scientific value.

The first step of my test seeks to determine if the work is that which the Supreme Court in *Miller* would have thought to constitute hard core pornography. Borrowing from the Court's language in *Miller*, I propose that pornography be defined as a work which contains actual or simulated sexual acts, masturbation, excretory functions, or open exhibition of genitals. "Sexual acts" can further be defined as either vaginal, anal, or oral sex. This definition would not violate the First Amendment because it is directly in line with what the Supreme Court considered to be patently offensive.¹⁸⁰ Furthermore, the requirement that the work appeal to a prurient interest is present here since, as the Supreme Court noted, pornographic works are intended to "hav[e] a tendency to excite lustful thoughts."¹⁸¹ This initial step should be applied broadly and without a subjective analysis; the work either contains pornographic content, or it does not.

Once a work is considered "pornography," it must be subject to a determination if the work as a whole lacks serious literary, artistic, political, or scientific value.¹⁸² An objective way to accomplish this inquiry is to use *time*. The Supreme Court's instruction that the work need be taken as a whole¹⁸³ implies that just because a work

180. It should be noted that the Supreme Court held that the "prurient interest" and "patently offensive" prongs of the test should be applied using a local, community standard rather than a national standard. *Miller*, 413 U.S. at 30–34. This encourages an even greater deal of subjectivity and has been widely criticized for its difficulty to apply, particularly in the Internet Age. This is because it is difficult to define what community standards should apply to obscene materials that were transferred over a large geographic area via the Internet. See generally Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J. L. & TECH. 87, 88, 96–97, 100, 105, 107–13, 125 (1996); Patrick T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 121–22 (1996); J. Todd Metcalf, Note, *Obscenity Prosecutions in Cyberspace: The Miller Test Cannot "Go Where No [Porn] Has Gone Before,"* 74 WASH. U. L. Q. 481, 484–86, 494–95 (1996).

A national standard, rather than a community standard, for what appeals to prurient interest and is patently offensive would also be more appropriate for the Copyright Act since it is a federal statute that should be applied consistently and objectively. *Contra Miller*, 413 U.S. at 27–34. However, even under the Supreme Court's current rule, which requires community standards to be applied, my proposed test does not violate that rule. My definition of "pornography" which combines the first and second prongs of the *Miller* test merely defines the hard core pornographic material that the Supreme Court thought, at the very minimum, met these first two elements, regardless of what community standard is applied. Therefore, under any community standard, material that meets my definition of "pornography" both appeals to prurient interest and is patently offensive.

181. *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

182. See *Miller*, 413 U.S. at 23–24, 27.

183. *Id.* at 23–24.

may contain some of what I deem pornographic material, the work should not automatically be considered obscene. Rather, as a whole, this prong is intended to look for some artistic value in the work that would remove it from the realm of obscenity.

Rather than forcing courts to determine what does and does not constitute artistic value, courts should deem the portions of the work that contain “pornographic” material, as I have defined it, to be obscene, and the portions that do not contain “pornographic” material to have artistic value. This is an easy way to come up with a percentage of the work that has artistic value. Since the work must be taken as a whole,¹⁸⁴ a court should balance the percentage of the work that is obscene against the percentage of the work that has artistic value. Congress should include in its amendment what percentage of obscene material a work must have in order to lack serious artistic value. In this way, timing percentages can serve as a proxy for whether the work lacks serious artistic value.

Time is a better solution than judging artistic merit. Even the Supreme Court has acknowledged the near impossibility of defining terms such as obscenity and hard core pornography.¹⁸⁵ Prior to *Miller*, Justice Stewart declined to further define the term “hard-core pornography” and acknowledged that “perhaps [he] could never succeed in intelligibly doing so.”¹⁸⁶ Rather, Justice Stewart resorted to the following test: “I know it when I see it”¹⁸⁷ The subsequent *Miller* test is no more helpful to judges since it also requires them to subjectively judge artistic merit. Years later, Justice Scalia expressed his view that, while the third prong of the *Miller* test should use a reasonable person standard, making “an *objective* assessment of . . . artistic value” was nevertheless impossible.¹⁸⁸

“I know it when I see it” jurisprudence is not a proper test to determine what works should be given copyright protection. Without a clear standard, filmmakers will have no way of knowing if their works will be given copyright protection until a judge has told them. The result of this lack of certainty would be that filmmakers would be hesitant to invest their economic resources into producing a work if they have no way of knowing if that work will be protected and, as a result, if they will be able to profit from their work. Also, because what one judge may deem to have artistic value could be viewed as wholly obscene by another judge, the decision of whether

184. *Id.*

185. *See id.* at 20–23.

186. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

187. *Id.*

188. *Pope v. Illinois*, 481 U.S. 497, 504–05 (1987) (Scalia, J., concurring) (emphasis added) (“Just as there is no use arguing about taste, there is no use litigating about it.”).

a work is given copyright protection is left completely to the subjective whim of one judge.

On the contrary, my proposed test leaves little ambiguity. Time is a more appropriate test than artistic merit because filmmakers will generally be able to tell if their work is eligible for copyright protection. Furthermore, if a filmmaker is denied protection, they will not have to suffer the frustration of knowing that perhaps a different judge would have seen the artistic value in their work. The important decision of whether a piece of work is granted protection should not be left to the subjective whims of judges. For that reason, a test that uses time percentages would be more effective than artistic merit because it can be consistently applied by courts.

A sufficient way for Congress to determine the minimum percentage of artistic material a work must contain in order to deserve copyright protection would be to conduct studies into pornographic works that it considers to be the hard core pornography described in *Miller*. If, for example, it finds that in pornographic films, movies, and clips, approximately seventy-five percent of the entire work consists of obscene material, it could determine that when a work is seventy-five percent obscene, it lacks serious artistic value. Therefore, Congress would require that, in order to have serious artistic value, a work must be at least twenty-five percent artistic. I will continue to use this number as an example.

Timing is an appropriate proxy for artistic value because the more time of the work that is dedicated to nonobscene material could be an indication that there is more artistic value in it, such as a storyline or character development. Therefore, a film that is 120 minutes long and contains several scenes of sexual acts or open exposure of genitals amounting to thirty minutes of the film will not automatically be considered obscene. Rather, the percentage of the work that contains obscene material must be analyzed. Here, thirty minutes out of 120 minutes are obscene. That means that only twenty-five percent of the work is obscene and seventy-five percent of the work has artistic value. Because seventy-five percent artistic is higher than the twenty-five percent minimum in my example, the percentage of obscene material will not be high enough for the work as a whole to be considered obscene. Therefore, this work will be eligible for copyright protection.

On the contrary, a typical fifteen-minute clip on a pornographic website that contains thirteen minutes of a mixture of oral and anal sex performed on a woman would not have the same result. Thirteen minutes of the work are obscene and two minutes have artistic value. Therefore, eighty-five percent of the work is obscene, and fifteen percent has artistic value. Since fifteen percent artistic does

not meet the twenty-five percent minimum, this work would be considered obscene and not eligible for copyright protection. Thus, my proposal alleviates courts from having to get into the weeds of what should be considered artistic value. Rather, this method may be easily and consistently applied by courts.

Crafting an objective test as a proxy for what lacks serious artistic value is a difficult task. One may argue that if time is used, pornographers will simply add “filler” material in order to meet the copyright requirements. While this is a possibility, the requirement would still force pornographers to introduce more artistic material into their works, bringing it closer to achieving the Supreme Court’s *Miller* test. Furthermore, one may argue that my proposal cannot be efficiently applied by courts since it would require the entire work to be viewed and dissected. While it is true that this could be time-consuming, it is still a test that can, in the end, be cleanly applied. Given the harmful effects of pornography and the great need for a solution, this burden is not overly heavy on the courts.¹⁸⁹

CONCLUSION

Copyright law does not have to protect obscene materials since the First Amendment does not either.¹⁹⁰ Given the harms that pornography causes,¹⁹¹ copyright should not protect such works. The pornography industry relies on copyright protection to generate the billions of dollars of profit every year. Without copyright protection, pornographers would not have the incentive to produce pornographic works because their works could be copied by others, greatly reducing the amount of money they would be able to make. An amendment to the Copyright Act that excludes obscene material would accomplish this, as long as the test for obscenity is consistent with the First Amendment, as is my proposed amendment. Such an amendment would be a step forward for gender equality. This proposal would help the women who are forced and coerced into the sex industry, since pornography drives the demand for prostitution and trafficking.¹⁹² Furthermore, this proposal would be socially beneficial since it would reduce the number of works which portray women as mere sexual objects who are to be abused by and dominated over by men.

189. Additionally, it is certainly possible that portions of a work that I would deem “pornographic” could actually be portrayed in an artistic fashion and be without any harmful effects to gender equality. For that reason, a factor test may be more appropriate so that works not meant to be targeted by this test are not accidentally stripped of copyright protection. Congress should also consider any other objective factors that could serve as a proxy for what lacks artistic value.

190. *Miller*, 413 U.S. at 23–24.

191. See *supra* Sections I.A, I.B.

192. See FARLEY, *supra* note 19, at 1.

