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## Article

## Exposed

**Derek E. Bambauer**<sup>†</sup>

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[Editor’s Note: For further discussion of *Exposed*, see Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346 (2014).]

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*[P]eople will be surprised at the eagerness with which we went about pretending to rouse from its slumber a sexuality which everything—our discourses, our customs, our institutions, our regulations, our knowledges—was busy producing in the light of day and broadcasting to noisy accompaniment.*

—Michel Foucault, *The History of Sexuality*<sup>1</sup>

## INTRODUCTION

The phone call changed Hollie Toups’s life, and not for the better.

On the other end of the line, a friend told her, “I overheard some people talking about a website. Its [sic] pictures, you know, explicit photos that people have posted . . . [and] you’re on there.”<sup>2</sup> A former boyfriend had uploaded naked photos of Toups to a website specializing in revenge porn—the practice of disclosing nude or sexually explicit images and videos, often along with identifying personal information, of former romantic partners without their consent.<sup>3</sup> In Toups’s case, the photos were accompanied by a link to her Facebook profile, along with her name.<sup>4</sup>

Toups had intended the photos solely for her then-boyfriend. When he shared the images without her consent, though, they became widely known. Toups, who is from a small town in Texas, found that “the website was flooded with people that I knew . . . . Those of us on there go to the grocery store

1. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 158 (1978).

2. *Women’s Outrage After Ex-Boyfriends Post Revenge Photos*, ABC NEWS (Jan. 25, 2013, 8:34 AM), <http://abcnews.go.com/blogs/headlines/2013/01/womens-outrage-after-ex-boyfriends-post-nude-photos> (quoting Hollie Toups).

3. See, e.g., Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 681 (2012); *Women Sue Explicit “Revenge Porn” Site After Jilted Lovers Anonymously Posted Revealing Pictures of Them*, DAILY MAIL (Jan. 26, 2013, 6:47 AM), <http://www.dailymail.co.uk/news/article-2268476/Ex-plicit-revenge-porn-site-allowed-jilted-lovers-anonymously-post-revealing-pics-girlfriends-facing-class-action-suit.html>.

4. Jessica Roy, *Victims of Revenge Porn Mount Class Action Suit Against GoDaddy and Texxxan.com*, BETABEAT (Jan. 21, 2013, 10:58 AM), <http://betabeat.com/2013/01/victims-of-revenge-porn-mount-class-action-suit-against-godaddy-and-texxxan-com>.

and everybody recognizes you.”<sup>5</sup> Her experience is increasingly common, both in her desire to share intimate photos with a partner, and in the subsequent unauthorized distribution of those photos. Surveys by researcher Holly Jacobs found that over half (53.3%) of heterosexual respondents had shared a nude photo with someone else, and nearly three-quarters (74.8%) of LGBT (lesbian, gay, bisexual, and transgender) respondents had done so.<sup>6</sup> In one study, 44% of teenage males reported having viewed at least one nude photo of a female classmate.<sup>7</sup> A survey by the National Campaign to Prevent Teen and Unplanned Pregnancy found that 20% of teenagers ages 13–19 had sent or posted nude or semi-nude images or videos of themselves; the rate rose to 33% for young adults ages 20–26.<sup>8</sup>

Unauthorized distribution of intimate images and videos is also frequent. The now-defunct revenge porn site *IsAnyoneUp?* featured images of thousands of people and, at its height of popularity, received 30 million page views per month.<sup>9</sup> The site’s proprietor, Hunter Moore, claimed to have received 10,000 images in the first three months of operation.<sup>10</sup> Jacobs’s

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5. Abby Rogers, *More than 20 Women Are Suing a Texas “Revenge Porn” Site and GoDaddy*, BUS. INSIDER (Jan. 23, 2013, 10:38 AM), <http://www.businessinsider.com/class-action-lawsuit-against-texxxancom-2013-1>.

6. E-mail from Holly Jacobs to Derek Bambauer (June 28, 2013) [hereinafter Jacobs E-mail] (on file with author). The research is from Holly Jacobs, *An Examination of Psychological Meaningfulness, Safety, and Availability as the Underlying Mechanisms Linking Job Features and Personal Characteristics to Work Engagement* (unpublished Ph.D. dissertation) [hereinafter Jacobs Dissertation], available at <http://digitalcommons.fiu.edu/etd/904>. Jacobs’ dissertation examined the element of work engagement in an organizational setting. She assessed the effects that job features and personal characteristics have on work engagement through the psychological conditions of meaningfulness, safety, and availability.

7. Alexandra Marks, *Charges Against “Sexting” Teenagers Highlight Legal Gaps*, CHRISTIAN SCI. MONITOR 2 (Mar. 30, 2009), <http://www.csmonitor.com/Innovation/Responsible-Tech/2009/0330/charges-against-sexting-teenagers-highlight-legal-gaps> (quoting WIRED SAFETY, <https://www.wiredsafety.org> (last visited Mar. 4, 2014)).

8. Julie Baumgardner, *Teen Pregnancy Prevention*, FIRST THINGS FIRST, <http://firstthings.org/teen-pregnancy-prevention-1> (last visited Apr. 20, 2014).

9. Memphis Barker, *“Revenge Porn” Is No Longer a Niche Activity Which Victimises Only Celebrities—The Law Must Intervene*, INDEPENDENT (May 19, 2013), <http://www.independent.co.uk/voices/comment/revenge-porn-is-no-longer-a-niche-activity-which-victimises-only-celebrities--the-law-must-intervene-8622574.html>.

10. Kashmir Hill, *Revenge Porn with a Facebook Twist*, FORBES (July 6, 2011, 4:54 PM), <http://www.forbes.com/sites/kashmirhill/2011/07/06/revenge-porn-with-a-facebook-twist>.

research found that 22.1% of heterosexual respondents, and 23.3% of LGBT ones, had been the victims of unauthorized distribution.<sup>11</sup> People increasingly share intimate media—nude or sexually explicit photos or videos—with their partners. And, those partners increasingly betray that trust by sharing those media without consent.

Legal scholars have just begun to grapple with the issues surrounding production and distribution of intimate photos and videos. Most have turned instinctively to privacy as the doctrine best able to regulate intimate media, focusing principally on the prevention of non-consensual distribution. For example, Mary Anne Franks treats revenge porn as part of on-line sexual harassment.<sup>12</sup> Danielle Citron proposes an amendment to Section 230 of the Communications Decency Act, which immunizes Internet sites for tortious third-party content, that would remove sites designed to facilitate illegal conduct, or used principally for such conduct, from its safe harbor.<sup>13</sup> Similarly, Nancy Kim would alter Section 230 to impose proprietor-style liability on website sponsors whose sites are used for cyberharassment.<sup>14</sup> Anupam Chander looks to a reinvigorated tort of public disclosure of private facts as one solution.<sup>15</sup> Martha Nussbaum views the problem as the on-line, pornographic objectification of women; she suggests that changes in cultural norms (in particular, the culture of masculinity) are the key to ameliorating it.<sup>16</sup> Eric Goldman proposes a privacy-related consent and take-down system for sex tapes.<sup>17</sup> And Ariel

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11. Jacobs Dissertation, *supra* note 6.

12. Franks, *supra* note 3, at 681.

13. Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013, 3:30PM), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html>. Section 230 is codified at 47 U.S.C. § 230 (2006); see *infra* note 24 and accompanying text.

14. Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1034–44.

15. Anupam Chander, *Youthful Indiscretion in an Internet Age*, in THE OFFENSIVE INTERNET 124, 129–33 (Saul Levmore & Martha C. Nussbaum eds., 2010).

16. Martha C. Nussbaum, *Objectification and Internet Misogyny*, in THE OFFENSIVE INTERNET, *supra* note 15, at 68, 84–87.

17. Eric Goldman, *The Sex Tape Problem... and a Possible Legislative Solution?*, TECH. & MKTG. L. BLOG (July 11, 2008, 10:38 AM), [http://blog.ericgoldman.org/archives/2008/07/the\\_sex\\_tape\\_pr.htm](http://blog.ericgoldman.org/archives/2008/07/the_sex_tape_pr.htm) (noting that, while Goldman favors a limited solution, “the most obvious problem is that this would proliferate yet another limited privacy law as a point solution to a spe-

Ronneburger would establish a notice and take-down regime, similar to that of Title II of the Digital Millennium Copyright Act (DMCA), to deal with what she calls “Porn 2.0.”<sup>18</sup>

Surprisingly, though, current privacy law provides few if any effective remedies for people whose intimate media are distributed without authorization. They can sue the person who uploaded the photos (typically a former partner) under a host of theories: disclosure of private facts,<sup>19</sup> false light, breach of implied confidentiality,<sup>20</sup> perhaps defamation,<sup>21</sup> perhaps cyberstalking.<sup>22</sup> These remedies are effective against the person initially disclosing the media. But, these claims cannot reach the true source of the problem: ongoing Internet distribution of intimate media. For most people whose photos or videos have been shared without consent, the principal harm is not the disclosure by a former partner: that relationship is past. Rather, the injury occurs from the ongoing, repeated dissemination of the sensitive content. For Toups, the difficulty was not that an ex had betrayed her; rather, it was that anyone she met might have viewed the images he uploaded.<sup>23</sup> Section 230 of the Communications Decency Act immunizes web hosts and other interactive computer services from most third-party tort liability.<sup>24</sup> It shields even sites that encourage users to upload inti-

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cific problem instead of providing a more comprehensive omnibus privacy regulatory scheme preferred by privacy advocates”).

18. Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 2009 SYRACUSE SCI. & TECH. L. REP. 1, 28–30.

19. See, e.g., Petition for Damages and Class Action Certification, *Toups v. GoDaddy.com*, No. D130018-C (Tex. Dist. Ct. Jan. 18, 2013), 2013 WL 271500 (listing causes of action including invasion of privacy, intrusion upon seclusion, public disclosure of private facts, false light, appropriation of name or likeness, gross negligence, and intentional infliction of emotional distress).

20. Woodrow Hartzog, *How to Fight Revenge Porn*, ATLANTIC (May 10, 2013, 1:42 PM), <http://www.theatlantic.com/technology/archive/2013/05/how-to-fight-revenge-porn/275759>.

21. Cf. Mary Flood, *Web Post on Herpes at Center of Woman’s Lawsuit*, HOUS. CHRON., May 7, 2009, <http://www.chron.com/neighborhood/pasadena-news/article/Web-post-on-herpes-at-center-of-woman-s-lawsuit-1729971.php>.

22. See, e.g., Criminal Complaint, *U.S. v. Savader*, No. 2:13-mj-30236-JU (E.D. Mich. Apr. 17, 2013), <http://www.scribd.com/doc/137623866/US-v-Adam-Savader-Complaint>; Roy, *supra* note 4.

23. See, e.g., Roy, *supra* note 4; Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BETABEAT (May 1, 2013, 1:04 PM), <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case>.

24. 47 U.S.C. § 230 (2006). See generally David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. REV. 373 (2010).

mate media without authorization, or that refuse to remove such content.<sup>25</sup> Legal theories that hold the initial source accountable provide little comfort if they fail to prevent further dissemination.<sup>26</sup> The likely result, as revenge porn gains increasing media attention, is that people will forgo consensual sharing of intimate media out of fear.

Using privacy law to address issues surrounding intimate media reveals only half of the picture—a privacy approach concentrates on the risks of this content and ignores its potential rewards. Strikingly, scholars have failed to assess the potential for intellectual property (IP) law to regulate the production and distribution of intimate media (except by obviating IP protection).<sup>27</sup> Indeed, this author’s suggestion that copyright law might be used in such a fashion provoked noted copyright expert Rebecca Tushnet to respond that “concern for the victims of these reprehensible [revenge porn] sites is understandable, but distorting copyright law is not the right solution.”<sup>28</sup> That response, though, begs the question: what *is* the proper role for copyright law in regulating production of intimate photos and videos?<sup>29</sup> Legal scholarship typically treats intellectual property systems as the default choice to structure how expressive content is produced, distributed, and consumed—why should intimate media be an exception?<sup>30</sup> Intellectual property law is both

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25. See, e.g., *Global Royalties v. XCentric Ventures*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (“It is obvious that a website entitled Ripoff Report encourages the publication of defamatory content . . . . However, there is no authority for the proposition that this makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site.”).

26. This Article discusses privacy law and criminal law approaches in Part IV *infra*, and sets forth reasons why they are less effective than a copyright-based approach.

27. Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 44–46 (2012) (proposing to deny copyright protection to revenge porn, and suggesting, as a second-best alternative, vesting copyright in the victim rather than in the person capturing the image or video). Bartow concedes that her primary approach, which would enable distribution without risk of infringement, is not likely to curb dissemination of revenge porn, but argues for her proposal as an expressive matter. *Id.* at 45–46.

28. Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC’Y 1001, 1030 (2013).

29. “Distort” implies a deviation from a desired baseline. Tushnet’s article does not identify such a baseline, though clearly it is at odds with the framework proposed here. Ironically, the Tushnet article’s approach to copyright’s authorship doctrine is functionalist: “Authorship moves around as needed to meet the needs of the industry.” *Id.* at 1021.

30. See Michael J. Burstein, *Exchanging Information Without Intellectual Property*, 91 TEX. L. REV. 227, 274–80, 282 (2012) (critiquing the “reflexive

likely to be effective in shaping the generation of intimate media, and overlooked as a candidate for that role.<sup>31</sup>

This Article is the first to propose bringing the production of intimate media within the ambit of intellectual property law. It contends that the consensual production and distribution of intimate media is normatively desirable—it brings people, particularly those in intimate relationships, closer together, and allows them to express romantic and sexual feelings in new ways.<sup>32</sup> Intimate media are an important exemplar of non-commercial amateur production of expressive content.<sup>33</sup> However, the risk of non-consensual distribution or display threatens to undercut the generation of intimate media.<sup>34</sup> A romantic partner is likely to be unwilling to produce such images or video if she fears that, should the media be shared without her consent, she will have no ability to use legal means to counteract that distribution.<sup>35</sup> In particular, copyright doctrine can encourage production and dissemination, through legitimate channels, of this type of information by providing potent remedies against improper distribution.

Tailoring copyright law to encourage production of intimate media is both normatively desirable and entirely in keeping with copyright's pattern of media and industry-specific ad-

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strengthening of existing intellectual property regimes to facilitate commercialization”).

31. Litigators employ IP-based claims on occasion when dealing with unauthorized distribution of intimate media. *See, e.g.*, Complaint, *Middleton v. Bollaert*, No. 13-11968-cv (E.D. Mich. May 2, 2013) (asserting claim for copyright infringement), <http://bv.1110.cds.contentcolo.net/uploads/files/Lindsay%20Middleton%20%20Complaint%20-%20Filed%20Version.pdf>. I thank Erica Johnstone for this reference.

32. *See generally* Margo Kaplan, *Sex-Positive Law*, 87 N.Y.U. L. REV. (forthcoming 2014) (arguing legal doctrine should recognize the value of sexual intimacy and pleasure).

33. *See generally* Yochai Benkler, *Coase's Penguin, Or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (describing rise of peer production).

34. *See* Richard Morgan, *Revenge Porn*, DETAILS.COM (2008), <http://www.details.com/sex-relationships/porn-and-perversions/200809/revenge-porn> (quoting CEO of ReputationDefender that “[t]he best advice, of course, is to never, ever create sexual photos, videos, e-mails, text messages, or anything else that someone could keep and share in the future”).

35. *See, e.g.*, Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, HARV. J.L. & TECH. DIG. (May 28, 2013), <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> (describing legal hurdles to forcing websites to remove unauthorized intimate media).

justment.<sup>36</sup> Counterintuitively, creating sufficient incentives to produce requires recognizing the interests of people captured in these videos or photos. The greatest risk to production comes from subjects' fears about improper dissemination. Providing legal protection that enables them to block non-consensual distribution is thus a generative move.<sup>37</sup> This Article proposes creating a new right for people who appear in, and can be reasonably identified by, intimate media: the right to prevent distribution or display of those media without their consent.<sup>38</sup> It justifies that proposal normatively by describing the value of consensual production and distribution, which is threatened by infringement.

More abstractly, approaching intimate media issues from a copyright perspective highlights important doctrinal tensions, particularly regarding the allocation of rights via the definition of authorship and clashes with the First Amendment. On these fronts, the Article's proposal is provocative: it presses against the boundaries of authorship and free speech limits to test how stringent they are. It argues that each concept constrains copyright law less than is commonly believed. That result is useful for intimate media, but may be troublesome for copyright more generally—a problem beyond this Article's scope.

Five further parts comprise this Article. First, it describes the benefits that flow from consensual sharing of intimate media, the harms worked by unauthorized distribution, and the concomitant risks to production. Then, the Article offers its proposal: creation of a new negative right vested in identifiable subjects of intimate media over distribution and display. Next, it uses intimate media to explore doctrinal puzzles in copyright related to authorship and free expression. The Article concludes by arguing that regulation of intimate media offers a valuable case study for addressing the challenges wrought by a

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36. See, e.g., 17 U.S.C. § 115(a) (2012) (creating compulsory license for musical compositions embodied in publicly-distributed phonorecords); *id.* § 106A (creating waivable, but inalienable, rights of attribution and integrity for authors of works of visual art); *id.* § 120 (limiting copyright entitlements for architectural works). See generally JESSICA LITMAN, DIGITAL COPYRIGHT 35–38 (2001).

37. See JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET 2–18 (2008) (describing generativity).

38. Cf. 17 U.S.C. § 106A(a)(3)(A) (enabling authors of works of visual art to prevent their intentional distortion, mutilation, or modification if prejudicial to the author's reputation and, for works of recognized stature, to prevent their destruction).

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technological environment where the costs of producing and distributing information have plummeted to nearly zero.

### I. BENEFITS AND HARMS OF INTIMATE MEDIA

While the harms of revenge porn have increasingly attracted media attention, the benefits of consensual sharing of intimate photos and videos are largely overlooked. This Section describes the benefits that can accrue to partners who willingly share these media with one another as part of sexual or emotional intimacy. These gains justify deploying copyright law as a means of protecting them, and of encouraging production of more intimate media. Then, the Section describes how unauthorized distribution not only threatens to work a forfeiture of these rewards, but also risks causing both utilitarian and deontological harms to the subjects of intimate media. Non-consensual sharing—which would count as copyright infringement under this Article’s proposal—creates real losses to those who appear in explicit photos or videos, and the risk of those harms threatens to deter socially valuable production of expression.

#### A. SEXTING’S VIRTUES

The consensual production and sharing of intimate media offer significant social value, such that these activities warrant expanded copyright protection to foster them. The exchange of intimate media between consenting partners benefits those involved. It enables them to engage in pleasurable sexual activity, which creates both individual and societal benefits.<sup>39</sup> It allows partners to remain intimate even while separated in space or time.<sup>40</sup> The practice can help people to overcome inhibitions and feel better able to express attraction and other sexual feelings.<sup>41</sup> Qualitative research suggests that sharing sexually provocative images can increase confidence, encourage partners to experiment with new behavior, and build anticipation for other

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39. See Kaplan, *supra* note 32.

40. See, e.g., Jessica Leshnoff, *Sexting Not Just for Kids*, AARP (June 2011), [http://www.aarp.org/relationships/love-sex/info-11-2009/sexting\\_not\\_just\\_for\\_kids.html](http://www.aarp.org/relationships/love-sex/info-11-2009/sexting_not_just_for_kids.html) (describing a relationship coach whose client was “a wife who enjoys sexting her husband while he’s traveling on business, telling (and showing) him what he’s missing at home”).

41. *Id.* (quoting psychotherapist Dr. Jonathan Alpert).

sexual activity.<sup>42</sup> This type of intimacy is increasingly common. A 2012 survey of 5,000 single adults in the U.S. by dating site Match.com found that 57% of men and 45% of women had received an intimate image via mobile phone (a “sext”).<sup>43</sup> Thirty-five percent of the women, and 38% of the men, had sent a sext, even though 72% recognized the practice carried some career risk, and 75% thought it could create reputation risk.<sup>44</sup> The practice crosses generational boundaries; it is increasingly common among seniors, for example.<sup>45</sup>

Moreover, use of intimate media may be particularly important for people with minority sexual preferences, or who are uncertain about what their preferences are.<sup>46</sup> The greater anonymity and psychological distance provided by this type of communication can be useful to those concerned about being identified with a particular preference.<sup>47</sup> Production of consensual intimate media allows people to challenge prevailing gender norms and communication patterns, and to take some control over self-representation.<sup>48</sup> Empirical data support the contention that use of intimate media is more prevalent (and thus likely important) among communities with minority sexual preferences. Survey data collected by researcher Holly Jacobs finds that the creation and use of intimate media is much more prevalent for LGBT respondents than it is for heterosexual ones.<sup>49</sup> Jacobs surveyed 691 participants, 488 self-identified as heterosexual, and 103 as LGBT.<sup>50</sup> In response to the question, “Have you ever taken a nude photo/video of yourself and shared it with someone else?,” 53.3% of heterosexual partici-

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42. Yvonne K. Fulbright, *Scintillating Sexting*, PSYCHOL. TODAY (Sept. 14, 2012), <http://www.psychologytoday.com/blog/mate-relate-and-communicate/201209/scintillating-sexting>.

43. *More on Sexting and Texting from SIA 3*, UPTODATE (Feb. 5, 2013), <http://blog.match.com/2013/02/05/more-on-sexting-and-texting-from-sia-3>.

44. *Id.*

45. *Senior Sexting Gaining Steam*, AZCENTRAL.COM (Feb. 8, 2010, 9:45 AM), <http://www.azcentral.com/offbeat/articles/2010/02/08/20100208seniors-sexting.html>.

46. See Amy Adele Hasinoff, *Sexting as Media Production: Rethinking social Media and Sexuality*, 15 NEW MEDIA & SOC'Y 449, 457–58 (2012); Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 702 (1995) (“[G]ay male pornography is a necessary tool in gay men’s struggle to attain sexual integrity.”).

47. Hasinoff, *supra* note 46, at 455–56.

48. *Id.* at 456–57.

49. Jacobs E-mail, *supra* note 6.

50. Jacobs used Amazon’s Mechanical Turk to conduct the survey. *Id.*

pants responded “Yes”—but 74.8% of LGBT ones replied affirmatively, a statistically significant difference.<sup>51</sup> LGBT individuals were also more likely to have allowed someone else to take a nude photo or video of them; 49.5% had done so, compared to 41.2% of heterosexual respondents (though this difference is not statistically significant).<sup>52</sup> Interestingly, despite the higher rate of production of intimate media among LGBT participants, they reported rates of unauthorized sharing (becoming the victims of revenge porn) that were almost indistinguishable from heterosexual respondents: 23.3% LGBT, versus 22.1% heterosexual.<sup>53</sup> While the use of intimate media is increasingly common overall, it appears to be particularly salient for LGBT communities.<sup>54</sup>

Increasingly, mainstream media coverage and relationship advice laud the virtues of sharing intimate media. The *Huffington Post*, for example, mixes standard warnings about sexting with positive treatment from therapists like Esther Perel, who stated, “[s]ex and love online gives you [the ability] to express yourself in ways that you [normally] do not.”<sup>55</sup> And, Perel notes, intimate media can help rebuild as well as maintain relationships: “[couples] can reconnect with the erotic dimension of their sexual relations. . . [it is] a very creative intervention for couples trying to rekindle their relationships.”<sup>56</sup> Nickelodeon’s Parents Connect features an article on how to sext your spouse, including advice such as “Take a naughty picture of yourself with your phone’s camera and SMS it to your hubby. . . get racy and give him a peep at your delicious décolletage.”<sup>57</sup> The web-

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51. *Id.*

52. *Id.*

53. *Id.*

54. See generally Anne Collier, *The Girls Are All Right: Girls Not as Vulnerable to Sexting as Media Says*, CHRISTIAN SCI. MONITOR (May 13, 2013), <http://www.csmonitor.com/The-Culture/Family/Modern-Parenthood/2013/0513/The-girls-are-all-right-Girls-not-as-vulnerable-to-sexting-as-media-says> (quoting Australian researcher Nina Funnell that “taking and sharing nude images is an established courtship practice within many parts of the gay community and that apps such as Grindr have popularized the practice considerably”).

55. Emma Gray, *Adult Sexting: Does It Help or Hurt Relationships?*, HUFFINGTON POST (Apr. 20, 2012, 4:03 PM), [http://www.huffingtonpost.com/2012/04/20/adult-sexting-relationships\\_n\\_1439404.html](http://www.huffingtonpost.com/2012/04/20/adult-sexting-relationships_n_1439404.html).

56. *Id.*

57. *How to Spice Up a Relationship by Sexting Your Spouse*, NICKELODEON PARENTS CONNECT, <http://www.parentsconnect.com/parents/relationships/relationship-tips/spice-up-a-relationship/how-to-spice-up-a-relationship-sexting-spouse.html>. The ParentsConnect website recently closed. See *A ParentsConnect & NickMom Announcement: ParentsConnect Has Closed Its*

site Couples Advice recommends the smartphone app Couple, which is a “private communication endeavor for couples” that lets you use instant messages and shared pictures to create “a sense of intimacy and closeness with your partner, even when they aren’t necessarily physically close.”<sup>58</sup> Cosmopolitan suggests that couples in long-distance relationships “make sure to keep things spicy, over text, the phone, and webcam.”<sup>59</sup> Similarly, the magazine suggests that such couples have a “Skype date and challenge [each other] to a strip poker tournament a deux.”<sup>60</sup> Strip poker is tame compared to Cosmo’s later advice: “Light candles around your computer for a sexy-yet-romantic vibe the next time you have Skype sex.”<sup>61</sup> A final example: AOL’s Relationships site—hardly a trend-setter—hosts a video entitled, “How To Have Intimate Relations Over the Phone.”<sup>62</sup> Put simply, intimate media have gone mainstream. Sharing such videos and photos increasingly is seen as a valued activity for consenting partners. As Bennett Capers writes, “the only people we seem to frown on for sexting are politicians.”<sup>63</sup>

And yet, the typical response to concerns about unauthorized distribution of intimate media is technological abstinence: people simply should not create explicit photos or videos.<sup>64</sup> This

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*Doors*, NICKMOM, <http://www.nickmom.com/parentsconnect> (last visited Apr. 20, 2014). An archived version of the ParentsConnect article is available at the INTERNET ARCHIVE, <http://web.archive.org/web/20130807074011/http://www.parentsconnect.com/parents/relationships/relationship-tips/spice-up-a-relationship/how-to-spice-up-a-relationship-sexting-spouse.html> (last visited Apr. 9, 2014).

58. *The Tech Spark: 5 Apps That Couples Can Use to Energize a Relationship*, COUPLES ADVICE, <http://www.couplesadvice.com/the-tech-spark-5-apps-that-couples-can-use-to-energize-a-relationship> (last visited Apr. 20, 2014).

59. Cameron Cain, *The Super Long Distance Relationship Survival Guide*, COSMOPOLITAN (Mar. 8, 2014), <http://www.cosmopolitan.com/sexlove/relationship-advice/long-distance-sexy-texts#slide-4>. To make the point clear, the accompanying photo shows a woman beginning to undress in front of a laptop. *Id.*

60. Korin Miller, *12 Ways to Keep Things Hot When You’re Apart*, COSMOPOLITAN, at slide 11 (Dec. 5, 2011), <http://www.cosmopolitan.com/sexlove/dating-advice/long-distance-relationship-tips>.

61. *Id.* slide 12.

62. *How to Have Intimate Relations over the Phone*, AOL ON RELATIONSHIPS (Nov. 14, 2011), <http://on.aol.com/video/how-to-have-intimate-relations-over-the-phone-517201183>.

63. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 878 (2013).

64. See, e.g., Hill, *supra* note 10 (noting that Internet law expert Eric Goldman “strongly advises against making sex tapes and taking nude photos as the best protection”); Morgan, *supra* note 34; Kristie Reeter, *Experts Warn*

advice is increasingly unrealistic—a substantial percentage of adults engage in such sharing, and the practice seems to be a majoritarian one in some LGBT communities. As feminist writer Jill Filipovic notes, “[w]ithin romantic relationships, people have always exchanged tangible things that would be highly embarrassing if publicly revealed, whether that’s a sexy note, a suggestive article of clothing or raunchy photo.”<sup>65</sup> Abstinence comes at significant cost: refraining from sharing intimate media with a partner forfeits benefits from experiencing sexual pleasure, feeling greater intimacy, and overcoming barriers such as social stigma or geographic distance. “Just say no” is bad advice, not merely outdated.

Sex, like nearly everything else, is mediated by technology now. People meet partners via Match.com and Facebook; they arrange dates by text message; and they send intimate photos to one another using smartphones. Couples separated by distance may use Skype or FaceTime to achieve sexual intimacy—a practice different only in degree from steamy love letters or phone sex. *New York Times* writer Frank Bruni describes his short-distance relationship (Manhattan-Brooklyn) with his long-time partner, noting that for them, “alone isn’t alone anymore . . . there’s Skyping, e-mailing, texting, sexting: a Kama Sutra of electronic intercourse.”<sup>66</sup> Once consensual use of intimate media makes the opinion page of the *New York Times*, any taboo against or disapprobation of it has jumped the shark.<sup>67</sup> The consensual use of intimate media creates real ben-

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*of Revenge Porn*, ABC17NEWS.COM (Apr. 25, 2013, 11:29 PM), <http://m.abc17news.com/news/abc-17-news-special-report-experts-warn-of-revenge-porn/-/19167438/19897984/-/jujeee/-/index.html> (“Cybercrimes detectives said if you don’t want a private, nude photos [sic] of yourself getting out, do not take one in the first place.”).

65. Jill Filipovic, “*Revenge Porn*” Is About Degrading Women Sexually and Professionally, *GUARDIAN* (Jan. 28, 2013), <http://www.guardian.co.uk/commentisfree/2013/jan/28/revenge-porn-degrades-women>. Filipovic makes the point even more bluntly: “Once you’ve been face-to-genitals with someone, sending them a nude picture doesn’t seem like it should be such a big deal.” *Id.*

66. Frank Bruni, *Of Love and Fungus*, *N.Y. TIMES*, July 21, 2013, <http://www.nytimes.com/2013/07/21/opinion/sunday/bruni-of-love-and-fungus.html>. I thank Barbara Atwood for this reference, despite her horror at it.

67. The idiom “jumped the shark,” popularized by the television show *Happy Days*, refers to a breaking point or an “irreversible decline.” PAUL MCFEDRIES, *THE COMPLETE IDIOT’S GUIDE TO WEIRD WORD ORIGINS* 86 (2008); see also, e.g., Fred Fox, Jr., *In Defense of ‘Happy Days’ ‘Jump the Shark’ Episode*, *L.A. TIMES*, Sept. 3, 2010, <http://articles.latimes.com/2010/sep/03/entertainment/la-et-jump-the-shark-20100903>.

efits for the partners involved, and is another example of the generative powers of ubiquitous networked computing.<sup>68</sup>

#### B. INFRINGEMENT'S INJURIES

The unconsented distribution of intimate media seems intuitively problematic. We understand Hollie Toups's pain immediately. However, there are two additional, less obvious risks flowing from unauthorized sharing. The first is straightforward: partners considering creating intimate media may hesitate, or forgo the activity altogether, if they fear its unchecked spread beyond their intended audience. This is the classic justification for copyright—the threat of uncontrolled copying deters potential creators.<sup>69</sup> There is a second, more complex risk that derives from copyright's allocation of entitlements. By default, copyright law fetishizes the camera's shutter button for intimate media: the person who presses it is likely to be considered the author.<sup>70</sup> Only authors can assert rights over copyrightable works.<sup>71</sup> Yet, this configuration neglects the interests of other people captured in intimate media, who may not only be responsible for much of the original expression that qualifies a work for copyright, but who also suffer disproportionately the risks of unauthorized distribution.<sup>72</sup> Since these participants by default lack status as authors under copyright law, they have few if any tools to quash unauthorized distribu-

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68. Cf. Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2030–31 (2006) (discussing theory of generativity).

69. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 330–31 (1989).

70. See, e.g., Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1552 (2013) (“U.S. copyright law . . . has tended to locate creativity for photographic mediation in the choices made by a photographer while deploying and operating her equipment.”); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 439–48 (2004) (reviewing photography cases and finding that, while courts purport to use pre-shutter analysis of composition, the photographer is nearly always deemed to be author). *But see* Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic, No. 97 Civ. 9248, 1999 WL 816163 (S.D.N.Y. Oct. 13, 1999) (finding the director who composed storyboards and shots, not the cameraman, to be author of underwater footage).

71. 17 U.S.C. § 201(a) (2012).

72. See Michael W. Carroll, *Copyright's Creative Hierarchy in the Performing Arts*, 14 VAND. J. ENT. & TECH. L. 797 (2012); Tushnet, *supra* note 28, at 1030.

tion.<sup>73</sup> Even if a participant were deemed a joint author of the intimate media, she would be powerless to prevent her co-author from giving permission for the work's use, regardless of her wishes.<sup>74</sup> Romantic partners who understand this legal peculiarity may be deterred from producing intimate media, surrendering a benefit to themselves and, by extension, to society. This subsection explores the risks to intimate media's subjects, as a prelude to and justification for an extension of copyright law that protects their interests.

People featured in intimate media, who are not deemed authors by copyright law, face two forms of harm.<sup>75</sup> The first, grounded in utilitarian calculus, is a probabilistic analysis of the potential injuries, and risk of injuries, that non-consensual distribution can generate. The second, based in deontological analysis, is the risk of blurring the distinction between the public and private selves, and the reduced ability to engage safely in intimate activity.

### 1. Negative Utils

Having one's intimate media publicly available presents a litany of risks. Some are mundane: employers increasingly utilize Internet resources, such as social networks and search engines, to gather data on candidates.<sup>76</sup> Turning up explicit photos or video should have no effect on an employer's decision.

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73. 17 U.S.C. § 501(b) (2012) (limiting infringement suits to "the legal or beneficial owner of an exclusive right under a copyright"); *id.* § 512(c)(3)(A)(i) (limiting issuance of notifications of claimed infringement to person authorized to act on behalf of owner of exclusive right).

74. 17 U.S.C. § 101 (2012) (defining "joint work"); *id.* § 201(a) (providing each joint author with equal, undivided interest in entire work); *see* Thomson v. Larson, 147 F.3d 195, 200–02 (2d Cir. 1998) (describing requirements of independently copyrightable contribution by each claimed joint author and mutual intent to become joint authors).

75. *Cf.* Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1133 (2011).

76. *See, e.g.*, Steve Johnson, *Those Party Photos Could Cost You a Job*, CHI. TRIB., Jan. 17, 2012, <http://www.chicagotribune.com/features/tribu/ct-tribu-facebook-job-dangers-20120117,0,1257938.column> (noting surveys show between 18 and 63% of employers use social media checks, but only 7% of candidates realize employers do so); Jacquelyn Smith, *How Social Media Can Help (Or Hurt) You in Your Job Search*, FORBES (Apr. 16, 2013, 4:20 PM), <http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search> (citing CareerBuilder study finding 37% of employers use social networks to assess candidates, and that 34% of those employers had found content causing them not to hire a candidate).

This is intimate conduct, not workplace conduct.<sup>77</sup> There are few if any professions where intimate decisions affect an employee's performance or qualifications. Nonetheless, both empirical and anecdotal evidence suggests that this sort of unrelated information can adversely affect a candidate's prospects.<sup>78</sup> A survey of recruiters found 17% ruled out candidates based on "excessive personal information" on their social media profiles.<sup>79</sup> Reppler's poll of 300 recruiters found that 69% had rejected a candidate based on information from their social networking profile; 11% of those had rejected someone for inappropriate photos.<sup>80</sup> A female Yale Law School student targeted by defamatory attacks, including about her intimate life, on the AutoAdmit website did not obtain a single summer job offer during on-campus recruiting with law firms.<sup>81</sup> These firms are extraordinarily eager to employ female Yale students with strong grades, as she had.<sup>82</sup> And yet not a single one considered her worthy of a summer position.

Similarly, the rise of social networking has provided worrisome examples. A student teacher was denied a degree in education after inadvertently revealing a MySpace photo that showed her drinking an alcoholic beverage while wearing a pirate costume.<sup>83</sup> A Georgia high school teacher was forced to re-

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77. One hopes.

78. See, e.g., Johnson, *supra* note 76; Leslie Kwoh, *Beware: Potential Employers Are Watching You*, WALL ST. J., Oct. 29, 2012, <http://online.wsj.com/article/SB10000872396390443759504577631410093879278.html>; Smith, *supra* note 76; *Employers May Misjudge Job Applicants Based on Facebook Pages*, MYFOXPHILLY.COM (July 8, 2013, 10:59 AM), <http://www.myfoxphilly.com/story/22768666/employers-may-misjudge-job-applicants-based-on-facebook-pages> (quoting North Carolina State University study finding "companies are eliminating some conscientious job applicants based on erroneous assumptions regarding what social media behavior tells us about the applicants").

79. Kwoh, *supra* note 78.

80. Jorgen Sundberg, *How Employers Use Social Media to Screen Applicants*, THE UNDERCOVER RECRUITER, <http://theundercoverrecruiter.com/info-graphic-how-recruiters-use-social-media-screen-applicants> (last visited Apr. 20, 2014).

81. Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST, Mar. 7, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030602705.html>.

82. *Id.*; see Yale Law Sch. Career Dev. Office, *Class of 2012 Employment*, YALE L. SCH., <http://www.law.yale.edu/studentlife/cdoprospectivestudents2012/employstats.htm> (last visited Apr. 20, 2014); Yale Law Sch. Admissions, *Entering Class Profile*, YALE L. SCH., <http://www.law.yale.edu/admissions/profile.htm> (last visited Apr. 20, 2014).

83. *Would-Be Teacher Denied Degree over 'Drunken Pirate' MySpace Photo Sues University*, FOXNEWS.COM (Apr. 29, 2007), <http://www.foxnews.com/>

sign after a parent gained access to her Facebook profile and found a photo of her holding a pint of beer and glass of wine during a trip to Europe.<sup>84</sup> In Florida, a high school English teacher was also pressed into quitting her job after her principal found photos of her modeling swimsuits, under a different name, online.<sup>85</sup> Finally, Citibank terminated a female employee simply because she was judged to be both attractive and given to wearing clothes that accentuated her appeal.<sup>86</sup> Employers should not use irrelevant information, such as explicit photos, in hiring or retention decisions. But firms are risk-averse, and qualified candidates are usually abundant. At least a subset of companies decides: why risk it?

One common response is that these adverse effects work a painful but necessary deterrence. On this account, the embarrassment, potential discrimination, and other difficulties that subjects of intimate media face—while concededly unpleasant—are both a foreseeable consequence of deciding to be featured in the image, and also a warning to others who might do so.<sup>87</sup> This argument founders in the face of two rebuttals. First, this approach forfeits the many benefits of consensual intimate media based on the risk that one party will violate the shared expectations under which that video or image was produced. Intimate media can be used for ends fair and foul. Yet it would seem foolish to propose giving up firearms, digital video recorders, or encryption code simply because those technologies can

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story/2007/04/29/would-be-teacher-denied-degree-over-drunken-pirate-myspace-photo-sues.

84. *Teacher Sacked for Posting Picture of Herself Holding Glass of Wine and Mug of Beer on Facebook*, DAILY MAIL ONLINE (Feb. 7, 2011, 06:45 PM), <http://www.dailymail.co.uk/news/article-1354515/Teacher-sacked-posting-picture-holding-glass-wine-mug-beer-Facebook.html>.

85. *Olivia Sprauer, Teacher, Forced to Resign After Bikini Photos Emerge*, UPI.COM (May 9, 2013, 1:18 PM), <http://www.upi.com/blog/2013/05/09/Olivia-Sprauer-teacher-forced-to-resign-after-bikini-photos-emerge/2531368119876>.

86. See Meghan Casserly, *Debralee Lorenzana: Is the Ex-Citibank Employee Victim or Villain?*, FORBES (June 2, 2010), <http://www.forbes.com/sites/work-in-progress/2010/06/02/debralee-lorenzana-is-the-ex-citibank-employee-victim-or-villain>.

87. Jonathan Krim, *Subway Fracas Escalates into Test of the Internet's Power to Shame*, WASH. POST, July 7, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/06/AR2005070601953.html> (describing famous case of Dog Poop Girl in Korea, whose failure to clean up after her dog was captured on video and made her a pariah). *But see* Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 259–60 (2012) (arguing Dog Poop Girl “did not deserve to bear the full brunt of the world’s contempt for litterers”).

be used to create harm as well as benefits.<sup>88</sup> Rather, we regulate to channel uses in socially appropriate directions.<sup>89</sup>

Second, the rational actor theory of deterrence, where people logically calculate risk versus reward, has crumbled under the weight of research in cognitive psychology and behavioral economics.<sup>90</sup> For example, optimism bias causes us to discount the likelihood of suffering harm that others do, even when we face the same incidence of risk.<sup>91</sup> This is particularly true where we perceive that harm as stemming from volitional conduct—where our judgment plays a role in the outcome.<sup>92</sup> Even if this represents deluded or biased thinking, it is plainly a *persistent* delusion or bias. Sex and wisdom rarely go hand in hand. This means the deterrence story is simply that: a story. It does no real work in changing behavior. Pretending that it does creates real harm to victims with little benefit to potential victims.<sup>93</sup>

In short, non-consensual distribution of intimate media creates tangible, even quantifiable risks and harms for those appearing in it.

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88. See *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down Illinois ban on carrying loaded, accessible firearms); *Cartoon Network LP v. CSC Holdings*, 536 F.3d 121, 139–40 (2d Cir. 2008) (rejecting secondary liability challenge to remote DVR); *Bernstein v. U.S. Dep't of Justice*, 176 F.3d 1132, 1146–47 (9th Cir. 1999) (striking down, on First Amendment grounds, ban on international distribution of encryption software).

89. See 18 U.S.C. § 922(g) (2012) (prohibiting felons, certain mentally ill persons, and people subject to domestic violence restraining orders, among others, from possessing firearms or ammunition shipped in interstate or foreign commerce); *MGM Studios v. Grokster*, 545 U.S. 913, 936–41 (2005) (establishing inducement liability under copyright for actors who distribute dual-use technologies, but promote unlawful use); 15 C.F.R. § 740.17 (2013) (establishing recipient-based system for determining whether export registration and product classification is required).

90. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL* (2010); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2009); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998).

91. See, e.g., Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 463, 468–70 (Daniel Kahneman et al. eds., 1982); Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 *SCI.* 1232, 1232 (1989).

92. Weinstein, *supra* note 91, at 1232.

93. See Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, *CONCURRING OPINIONS* (Feb. 1, 2013), <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.

## 2. The Public, the Private, and the Intimate

In addition to the risks and injuries outlined above, non-consensual distribution of media capturing intimate activity causes harms less tangible, but no less real. These harms arise in at least three forms.

First, tactics such as revenge porn intrude upon a sphere of intimate, highly personal conduct.<sup>94</sup> Some distribution will encroach upon the shared space of a romantic relationship.<sup>95</sup> Maintaining the boundaries of that sphere—boundaries which can be crossed only with the assent of each participant—is critical.<sup>96</sup> Intimate relationships are where we explore sensitive, even secret aspects of ourselves. A key component of that exploration is control over the decision to whom to expose those characteristics.<sup>97</sup> Non-consensual distribution deprives us of that decision, injuring our autonomy. If we have no recourse against trespass, we may be discouraged from fully experiencing intimacy, both sexual and emotional, in all its forms.<sup>98</sup>

Second, non-consensual distribution works an injury because of its purpose as well as its method. Revenge porn employs the darker part of the human emotional spectrum: shame, humiliation, fear, and disgust.<sup>99</sup> It converts a core human pleasure into a source of pain. Some images and videos are accompanied by commentary making this intent plain: the people portrayed in them are described as sluts or whores, as deserving of abuse, as dirty or degraded.<sup>100</sup> The injury is worsened if the attacker is someone with whom the victim shared a previous relationship of trust: the shift from lover to aggressor—from Jekyll to Hyde—is part of the harm.<sup>101</sup> And, we may have

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94. Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 811 (2010).

95. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

96. See Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311 (2013).

97. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1121 (2002).

98. Anderson, *supra* note 96, at 321 (“Bodily intimacy is what distinguishes a picture of one’s face in the newspaper from a picture of one’s genitals in the same newspaper.”).

99. See Filipovic, *supra* note 65 (stating revenge porn is “about hating women, taking enjoyment in seeing them violated, and harming them”).

100. See, e.g., Kelly Bourdet, *Future Sex: Pornographic Trolling Is the Ultimate Trolling*, MOTHERBOARD (Apr. 16, 2012, 12:22 PM), <http://motherboard.vice.com/blog/future-sex-pornographic-trolling-is-the-ultimate-trolling>; Hill, *supra* note 10; Roy, *supra* note 4.

101. See Roy, *supra* note 4.

concerns about viewers of this material as well. Revenge porn caters not to an interest in sex, but to a prurient interest in sex.<sup>102</sup> We may believe that the desire to see non-consensual images of intimate activity is in itself problematic, and should be discouraged.<sup>103</sup>

Third, while rigorous data are not yet available, non-consensual distribution appears to be a gendered problem.<sup>104</sup> It seems to target women disproportionately.<sup>105</sup> This is likely both a cause and an effect of differential societal norms regarding sexual activity (at least, sexual activity outside marriage). A man who is photographed having sex is a stud, or a playboy. A woman who does so is a whore.<sup>106</sup> Thus, non-consensual distribution risks worsening tenacious social mores that treat those who engage in sex differently based upon gender, and it may cause victims to internalize those norms.<sup>107</sup>

The intrusive, purposive, and gendered aspects of non-consensual distribution work real harms upon participants, even if those harms cannot be quantified.

### C. THE FRAGILE PRODUCTION OF INTIMATE MEDIA

Intimate media are a fascinating, and fragile, example of amateur non-commercial production. This mode of producing information is shaped by current IP rules, but in ways that threaten to curtail output rather than to generate it. Unmodi-

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102. See *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957) (quoting ALI Model Penal Code and defining prurient interest as “a shameful or morbid interest in nudity, sex, or excretion”).

103. See, e.g., Bartow, *supra* note 27, at 28, 45–46. This claim is similar to that made on behalf of obscenity statutes, which ban material appealing to the prurient interest and lacking countervailing value. See, e.g., 18 U.S.C. § 1466 (2012). Legislation based on social mores is controversial: the argument that certain consumption preferences are illegitimate has been advanced to oppose gay marriage, pornography, and violent video games. See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011); *Reno v. ACLU*, 521 U.S. 844 (1997). Determining when such arguments are legitimate is beyond the scope of this Article; I simply offer concern about consumers of revenge porn as one species of deontological argument that could support regulation.

104. Filipovic, *supra* note 65; Franks, *supra* note 93; Amanda Hess, *The Real Difference Between Teenage Boys and Girls’ Sexting Habits? Boys Forward More*, XX FACTOR (Mar. 4, 2013, 4:04 PM), [http://www.slate.com/blogs/xx\\_factor/2013/03/04/sexting\\_statistics\\_teen\\_boys\\_and\\_girls\\_sext\\_in\\_equal\\_numbers\\_but\\_boys\\_forward.html](http://www.slate.com/blogs/xx_factor/2013/03/04/sexting_statistics_teen_boys_and_girls_sext_in_equal_numbers_but_boys_forward.html).

105. See Bartow, *supra* note 27, at 25–34, 44–46.

106. *Id.* at 27–34.

107. See Filipovic, *supra* note 65.

fied, then, copyright law is misaligned with the laudable goal of encouraging the consensual production and sharing of intimate media. This subsection explains why, as context for the reform proposal advanced in the next Section.

As a utilitarian matter, copyright law enables creators to recover costs of production.<sup>108</sup> Authors face the time and expense of creating works initially, and must price this sunk cost into their per-copy fee (average cost).<sup>109</sup> Copyists, by contrast, face only the marginal cost of reproducing the work once it is released.<sup>110</sup> Absent norms-based considerations or legal constraint, consumers will do the math and pick the cheaper option: marginal cost is less than average. The copyists capture sales. Potential authors—no fools—can predict this quandary, and will forgo production.<sup>111</sup> Copyright law is one way out of this dilemma: it forces consumers to pay the author, at average cost, to bribe the author to produce the work initially.<sup>112</sup>

This simple economic story falls apart completely for intimate media. People create these videos and images for non-pecuniary reasons: to express affection and lust, to remain connected to an existing partner, to court a new one. When used for their intended purpose, intimate photos and videos are non-commercial; they are generated between partners, for their mutual use and consumption. (Where the people involved consent to sharing the materials with others, intimate media become amateur pornography, if non-commercial, or simply pornography if commercial.<sup>113</sup>) The costs of production, and the possibility of recovering them, are usually both minimal and irrelevant.<sup>114</sup> The intended market for these images is quite limited and perhaps monopsonistic: a single producer offering wares to a single consumer. Demand is highly elastic: substituting a

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108. Landes & Posner, *supra* note 69, at 328–29. There are other normative bases for copyright. See ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

109. Landes & Posner, *supra* note 69, at 326–29.

110. *Id.* at 328–29.

111. *Id.* at 326.

112. Thomas Macaulay called copyright “a tax on readers for the purpose of giving a bounty to writers.” Thomas Macaulay, *Speech Delivered in the House of Commons* (Feb. 5, 1841).

113. See Amanda Hess, *Can Cindy Gallop’s Crowdsourced Porn Take Down Mainstream Pornography?*, XX FACTOR (Aug. 27, 2012, 1:37 PM), [http://www.slate.com/blogs/xx\\_factor/2012/08/27/cindy\\_gallop\\_and\\_crowdsourced\\_porn\\_can\\_real\\_world\\_sex\\_online\\_take\\_down\\_mainstream\\_porn.html](http://www.slate.com/blogs/xx_factor/2012/08/27/cindy_gallop_and_crowdsourced_porn_can_real_world_sex_online_take_down_mainstream_porn.html).

114. See Erez Reuveni, *Copyright, Neuroscience, and Creativity*, 64 ALA. L. REV. 735, 798–800 (2013).

stranger's photo for that of one's partner drastically reduces the benefit received. Intimate media are perhaps the ultimate bespoke good, tailored for a single buyer. Compensation is in kind rather than in cash—the return is in other such media, or intimacy, or a first date.<sup>115</sup> The cost recovery justification for copyright protection is orthogonal to the incentives to create and distribute intimate media. Copyright's standard economic calculus simply doesn't hold here. It uses mechanisms that misalign with the mode of production of intimate media.

And yet, copyright's underlying reasoning is precisely correct: infringement threatens production, and makes creators wary of investing in the generation of intimate media, though not for pecuniary reasons. Non-consensual exchange can harm the producer of the media, its subject, or both. It violates the shared set of expectations and norms that govern production in this context—and, as Larry Lessig reminds us, norms too are a type of law.<sup>116</sup> The holder of the media file (who may be the author) may gain some benefit, perhaps an illicit one, from the unauthorized sharing.<sup>117</sup> But, the other party in the transaction—the subject of the media—loses, with little chance at protecting him or herself. Predicting the risk, that person may decide to forgo production.

As this Article discusses below, copyright tries, somewhat poorly, to accommodate the creative contributions of those besides the primary author—like the subject of intimate media—via contract, via joint authorship, or via no recourse at all.<sup>118</sup> None of these work well for intimate media. Joint authorship's requirements are typically too stringent, and courts are hesitant to recognize such claims after the fact.<sup>119</sup> Contractual bar-

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115. See, e.g., Hess, *supra* note 104.

116. LAWRENCE LESSIG, CODE 2.0, at 11, 26 (2006).

117. See, e.g., Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Oct. 11, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

118. See *infra* Part III.A.

119. Joint authorship requires intent by all joint authors that they become so. 17 U.S.C. § 101 (2012) (defining “joint work” as one “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”); see Shun-ling Chen, *Collaborative Authorship: From Folklore to the Wikiborg*, 2011 U. ILL. J.L. TECH. & POL'Y 131, 136 (“Courts have consistently chosen to narrowly interpret the joint work clause.”). On courts' reluctance, see, for example, *Richlin v. Metro-Goldwyn-Mayer Pictures*, 531 F.3d 962 (9th Cir. 2008); *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998); and *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

gaining works well in professional production settings but is unsuited to informal, amateur production.<sup>120</sup> People rarely employ formal contracts in intimate settings, even when the risks are clear. Famously, half of all marriages in the United States end in divorce.<sup>121</sup> And yet, only an estimated 5–10% of couples enter into prenuptial agreements.<sup>122</sup> People are unduly optimistic about their risk of marital failure.<sup>123</sup> Bargaining over a breakdown in an intimate relationship is simply too unpleasant for many, and partners worry about the signal that asking for a pre-nup sends.<sup>124</sup> Production of intimate media often takes place under circumstances even less amenable to contracting, such as between prospective partners, where the request for formal legal precautions may radically undercut the prospects of completing the transaction.<sup>125</sup> Few people want a date preceded by a license agreement. And finally, an absence of recourse risks undercutting production. Subjects may be deterred from being photographed or filmed if they have no protection against unauthorized sharing. Those whose media have been distributed without consent certainly are deterred—one woman wrote, “I will never, ever, ever send a picture again. . . I don’t care if I’m married to you.”<sup>126</sup>

At present, copyright law will rarely come to the aid of someone featured in intimate media distributed without their consent.<sup>127</sup> If that person is the subject of the media, but not the

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120. See generally Benkler, *supra* note 33, at 439–40.

121. *Births, Marriages, Divorces, and Deaths: Provisional Data for 2009*, 58 NAT’L VITAL STATS. REP. 1, 1 (Aug. 27, 2010) (listing marriage and divorce rates of 7.1 and 3.5 per million population for 2008, and 6.8 and 3.4, respectively, for 2009).

122. Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 1 (Harvard Law Sch., John M. Olin Ctr. for Law & Econ., Discussion Paper No. 436, 2003), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/436.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf).

123. *Id.* at 9–10.

124. *Id.* at 11–12.

125. Cf. *UM Study: Sexting May Be Normal Dating Behavior for Internet Generation*, CBS 62 DETROIT (July 24, 2012, 2:56 PM), <http://detroit.cbslocal.com/2012/07/24/um-study-sexting-may-be-normal-dating-behavior-for-internet-generation>.

126. Elaine Silvestrini, *Legislators Intend to Outlaw “Revenge Porn,”* TAMPA TRIB., Apr. 17, 2013, <http://tbo.com/news/politics/legislators-intend-to-outlaw-revenge-porn-b82475546z1>.

127. But see Amanda M. Levendowski, *Using Copyright to Combat Revenge Porn*, TRI-STATE REGION IP WORKSHOP, Winter 2014, available at <http://ssrn.com/abstract=2374119> (arguing that since 80% of revenge porn images are selfies taken by the subject, copyright can be an effective counterweight).

photographer or videographer of it, he or she is unlikely to be considered the work's author.<sup>128</sup> Copyright vests in the author; non-authors are left to the mercies of other doctrines such as contract or quantum meruit.<sup>129</sup> Even if the subject is also the author, as in the case of “selfie” photos, he or she will have a difficult time finding counsel to take the case, at least on a contingency basis.<sup>130</sup> Lawyers' time is expensive, and actual damages from infringement are quite likely to be minimal—the value of a license to a particular piece of amateur porn is generally miniscule. While statutory damages for infringement are available in theory, an author must register the work within three months of first publication to obtain them.<sup>131</sup> Few people are likely to register intimate media, and fewer still to do so within the requisite statutory period.<sup>132</sup> In short, for copyright to assist people featured in intimate media distributed without their consent, they must be an author of the work, and either be able to pay an attorney's hourly rate or have registered the work within three months of its first appearance on the Internet. Those are unlikely circumstances.<sup>133</sup>

Given this scenario—where copyright protection is necessary to allow intimate media to flourish, but its current configuration does not provide adequate safeguards—reform is need-

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128. See Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1143 (2011).

129. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1237 (9th Cir. 2000) (denying movie contributor's joint authorship claim, but permitting quantum meruit claim to proceed).

130. See *Selfie*, MACMILLAN DICTIONARY BUZZWORDS (July 2, 2013), <http://www.macmillandictionary.com/us/buzzword/entries/selfie.html> (defining “selfie” as “a photograph of you taken by yourself, usually for use in social media”).

131. 17 U.S.C. § 412(2) (2012).

132. It is evidently rare for photographers to register their works at all. Christian J. Fisher, *Addition Through Subtraction: The Resolution of Copyright Registration Uncertainty Through the Repeal of §§ 411(a) and 412*, 14 TUL. J. TECH. & INTELL. PROP. 191, 228 (2011); cf. Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1493 (2011) (“The disputes that have fleshed out the requirements for photographic copyright have arisen over professional images . . .”).

133. A number of high-profile revenge porn lawsuits are being handled pro bono, likely for precisely this reason. See, e.g., Chet Hardin, *The Face of Revenge Porn*, COLORADO SPRINGS INDEP. (Jan. 9, 2013), <http://www.csindy.com/coloradosprings/the-face-of-revenge/Content?oid=2608450>; Nathan Mattise, *Revenge Porn Site Founder Loses \$250K Defamation Suit*, ARS TECHNICA (Mar. 10, 2013, 7:15 PM), <http://arstechnica.com/tech-policy/2013/03/revenge-porn-site-founder-loses-250k-defamation-suit>. While pro bono efforts are admirable, they will not scale to meet the scope of the problem.

ed. This argument rests upon a conclusion for which robust data remain sparse: the threat of unauthorized sharing of intimate media reduces the output of that expression, compared to what output would be under a system of robust copyright protection, such as proposed in this Article. A chilling effect is intuitively plausible, given lurid media coverage of stories on revenge porn, and given revenge porn victims' vows to never again be captured in intimate media.<sup>134</sup> As the data from Match.com shows, the minority of people who sext are well aware of the risks of doing so.<sup>135</sup> Their numbers would probably grow if those risks dropped. The alternatives—that no one is deterred from sharing intimate media due to fears of unauthorized distribution, or that people create these images or photos because they are attracted to the risk—are unlikely. We lack reliable data on intimate media production and distribution beyond crude demographic measures: how often people in various age or gender cohorts sext, for example.<sup>136</sup> This is likely because sharing of intimate media has only recently been viewed as something acceptable rather than taboo.

However, as a policy matter, copyright rarely requires certainty that infringement damages production before acting. For example, the effects of Internet-based file-sharing, such as via peer-to-peer (P2P) networks, on authors' incentives to produce works such as sound recordings and motion pictures are unclear, and indeed highly contested. Felix Oberholzer-Gee and Koleman Strumpf published a 2010 study suggesting that while infringement via P2P networks may account for as much as 20% of the decline in music sales, incentives to produce remain largely unaffected.<sup>137</sup> They note that in the face of widespread on-line infringement, the "publication of new books rose by 66% over 2002-7"; and "[s]ince 2000, the annual release of new music albums has more than doubled, and worldwide feature film production is up by more than 30% since 2003."<sup>138</sup>

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134. See, e.g., Hill, *supra* note 10; Silvestrini, *supra* note 126; Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7>.

135. See *supra* note 43.

136. See, e.g., Melissa Fleschler Peskin et al., *Prevalence and Patterns of Sexting Among Ethnic Minority Urban High School Students*, 16 CYBERPSYCHOLOGY, BEHAVIOR & SOC. NETWORKING 454 (2013).

137. Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, in 10 INNOVATION POLICY AND THE ECONOMY 19 (Josh Lerner & Scott Stern eds., 2010), available at <http://www.nber.org/chapters/c11764.pdf>.

138. *Id.* at 20.

Looking simply at sales of media (rather than authorial incentives), the authors find that the aggregate evidence is mixed: the majority of studies find file-sharing reduces sales; an important minority finds no effect; and two studies even find a positive correlation between file-sharing and sales.<sup>139</sup> Other authors find greater harm from file-sharing. Michael Smith and Rahul Telang review empirical studies of infringement's impact and state that the majority conclude it harms sales.<sup>140</sup> A study by George Baker using Industry Canada data found that a 10% increase in P2P downloading reduces CD sales by roughly 0.4%.<sup>141</sup> Does Internet infringement affect the production of music recordings and motion pictures? The evidence is unclear.

Yet governments did not hesitate to act in the face of uncertainty. Copyright protections in the United States, and worldwide, have steadily ratcheted up during the file-sharing era.<sup>142</sup> Indeed, some U.S. legislation and precedent has been explicitly designed to target on-line infringement. The 1997 No Electronic Theft Act increased statutory damages for infringement and reduced the threshold for criminal copyright liability.<sup>143</sup> The Supreme Court's 2005 decision in *MGM v. Grokster* recognized a new theory of secondary copyright liability targeted at distributed P2P systems such as KaZaa.<sup>144</sup> The PRO IP Act of 2008 augmented criminal penalties for copyright infringement and set up a new Intellectual Property Enforcement Representative (dubbed the "IP czar"<sup>145</sup>) within the executive branch to combat infringement.<sup>146</sup> Recently, the administration of President Barack Obama began seizing domain names of

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139. *Id.* at 35.

140. Michael D. Smith & Rahul Telang, *Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales* (unpublished manuscript) (Aug. 19, 2012), available at <http://ssrn.com/abstract=2132153>.

141. See Barry Sookman, *The Andersen P2P File Sharing Study on the Purchase of Music CDs in Canada*, BARRYSOOKMAN.COM (Aug. 20, 2012), <http://www.barrysookman.com/2012/08/20/the-andersen-p2p-file-sharing-study-on-the-purchase-of-music-cds-in-canada>.

142. Oberholzer-Gee & Strumpf, *supra* note 137, at 20.

143. *No Electronic Theft (NET) Act*, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

144. *MGM Studios v. Grokster*, 545 U.S. 913 (2005).

145. See, e.g., Nate Anderson, *Obama "IP Czar" Wants Felony Charges for Illegal Web Streaming*, ARS TECHNICA (Mar. 15, 2011, 11:07 AM), <http://arstechnica.com/tech-policy/2011/03/obama-ip-czar-wants-felony-charges-for-illegal-web-streaming>.

146. *Prioritizing Resources and Organization for Intellectual Property Act of 2008*, Pub. L. 110-403, §§ 201, 301, 122 Stat. 4256.

websites accused of infringement using ex parte civil forfeiture orders.<sup>147</sup> The wisdom of these efforts is debatable.<sup>148</sup> What is clear is that the U.S. government moved rapidly to augment copyright based on intuition, later backed with some data, that infringement was harming production of copyrighted works. So, too, the negative effects of non-consensual distribution of intimate media need not be proved with perfection before copyright moves to deal with them.

Lastly, alternative proposals for dealing with the non-consensual distribution of intimate media would almost certainly reduce production, an undesirable result.<sup>149</sup> This is because many of these proposals attack production itself, not merely unauthorized distribution. Eric Goldman, for example, advises “individuals who would prefer not to be a revenge porn victim or otherwise have intimate depictions of themselves publicly disclosed, the advice will be simple: don’t take nude photos or videos.”<sup>150</sup> There is a wealth of similar advice in popular media.<sup>151</sup> For scholars and commentators alike, the typical answer to non-consensual distribution is for people to avoid creating intimate media in the first place. Thus, in the absence of a copyright-based approach, and even with the adoption of alternative

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147. Derek E. Bambauer, *Orwell’s Armchair*, 79 U. CHI. L. REV. 863, 885–86 (2012).

148. See, e.g., *id.*; Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731 (2003); Nicolas Suzor & Brian Fitzgerald, *The Legitimacy of Graduated Response Schemes in Copyright Law*, 34 U. NEW S. WALES L.J. 1 (2011).

149. See, e.g., Nicole A. Poltash, Note, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 14, ¶¶ 42–44 (2013) (advocating education programs to reduce sexting and restrictions that prevent minors from using Snapchat).

150. Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, TECH. & MKTG. L. BLOG (Feb. 9, 2013), [http://blog.ericgoldman.org/archives/2013/02/what\\_should\\_we.htm](http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm).

151. See, e.g., Sasha Brown-Worsham, *8 Sexting Rules to Avoid Starring Naked in Someone’s ‘Revenge Porn,’* STIR (Apr. 6, 2012, 1:05 PM), [http://thestir.cafemom.com/love\\_sex/135696/8\\_sexting\\_rules\\_to\\_avoid](http://thestir.cafemom.com/love_sex/135696/8_sexting_rules_to_avoid); Jessica G., *Revenge Porn: Hard to Prosecute, Harder on the Psyche*, JEZEBEL (Oct. 1, 2008, 1:20 PM), <http://jezebel.com/5057511/revenge-porn-hard-to-prosecute-harder-on-the-psyche>; Lauren Holliday, *Keep Your Pixels in Your Pants; Don’t Sext*, CENT. FL. FUTURE (June 15, 2011, 4:06 PM), <http://www.centralfloridafuture.com/keep-your-pixels-in-your-pants-don-t-sext-1.2600443>; Jessica Janner, *Revenge Porn Ruining Reputations with the Click of a Mouse*, KTNV.COM (May 16, 2013), <http://www.ktnv.com/news/local/207747941.html>; Gil Kaufman, *How Can You Avoid Sexting Dangers?*, MTV.COM (Feb. 12, 2010, 2:51 PM), <http://www.mtv.com/news/articles/1631759/how-can-avoid-sexting-dangers.jhtml>.

proposals, we will likely forgo the real and significant benefits that accrue to partners who consensually employ these materials.<sup>152</sup>

## II. STATUTORY PROPOSAL

The Article now offers an IP-based proposal to encourage the consensual production and distribution of intimate media. This Section opens with an explanation of why intellectual property law—specifically, copyright law—is the optimal tool for this issue. Then, it lays out the specifics of the proposed statute, which would add a new section to the Copyright Act.

### A. WHY COPYRIGHT?

Copyright law holds considerable potential to address the promise and problems of intimate media. The task at hand—encouraging production of consensual media, while constraining sharing without permission—is precisely that for which intellectual property rules are designed.<sup>153</sup> The difficulties of checking unauthorized sharing, which inhere in the dramatically reduced costs of creating and distributing information, are the difficulties of IP enforcement in the networked digital era.<sup>154</sup>

Copyright has several further benefits. First, IP law is principally private law: rights and liabilities are worked out by the parties at interest.<sup>155</sup> While the government provides the forum to resolve disputes, it is generally not otherwise a participant. This removes the resource constraint that public law imposes: there are only so many prosecutors, and each can only handle a docket of a certain size.<sup>156</sup> Prosecutorial constraints

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152. Even Eric Goldman, whose advice is to refrain from producing intimate images or videos, acknowledges the trend: “between sexting and sex tapes, far more private pornography is being generated than at any point in human history.” Goldman, *supra* note 17. Goldman suggests that, in time, norms regarding this material will shift. *Id.* Changes in law, though, can usefully drive changes in norms. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 666, 672–75 (1998).

153. Landes & Posner, *supra* note 69, at 330–31.

154. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1349 (2004) (describing copyright owners as “under threat from a flood of cheap, easy copies and a dramatic increase in the number of people who can make those copies”).

155. *But see, e.g.*, 17 U.S.C. § 506 (2012); 18 U.S.C. § 2319 (2012).

156. See Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 516 (2011) (discussing lim-

limit significantly the scale of enforcement under IP's public law regime. The federal government, for example, brings only a relative handful of criminal intellectual property cases each year, and half of those result in no jail time for defendants.<sup>157</sup> Private enforcement is more broadly available to victims of infringement than public enforcement. The availability of statutory damages under copyright helps make private litigation feasible, despite its costs. While public enforcement has countervailing benefits, such as the ability to deter judgment-proof violators through imprisonment, and the stigma that attaches to criminal sanctions, those do not seem worth the cost in absolute enforcement levels.<sup>158</sup>

Second, IP offers useful mechanisms for addressing technical problems implicit in regulating intimate media, particularly with a scheme of overlapping rights. Intellectual property doctrine is perfectly comfortable with the concept of multiple, shared claims in a protected work of information: joint authorship in copyright, joint inventorship in patent,<sup>159</sup> the independent invention defense in trade secret,<sup>160</sup> and parallel use in different markets in trademark law,<sup>161</sup> among others. This Article's solution contemplates a regime with multiple people who have claims to aspects of copyright in intimate media. Copyright has already achieved working systems of overlapping rights in areas such as sound recordings<sup>162</sup> (derivative works of

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its on prosecutorial resources).

157. U.S. DEP'T OF JUSTICE, PRO IP ACT: ANNUAL REPORT FY2012, at 31 (Dec. 2012), <http://www.justice.gov/dag/iptaskforce/proipact/doj-pro-ivrpt2012.pdf> (listing fewer than 200 IP cases, and fewer than 250 defendants sentenced, per year from 2008–2012). To put this number in context, in 2009, 223 defendants were sentenced in IP cases, and more than half (126) received no prison term. BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2009, at 13 (Dec. 2011), available at <http://bjs.gov/content/pub/pdf/fjs09.pdf>. The same year, 25,874 defendants were convicted on federal drug charges, and 78.2% received prison sentences. *Id.*

158. See Manta, *supra* note 156, at 472.

159. 35 U.S.C. § 116(a) (2012) (defining joint inventions).

160. See UNIF. TRADE SECRETS ACT § 1 cmt. (amended 1985), 14 U.L.A. 437 (1990 & Supp. 2005) (defining “[d]iscovery by independent invention” as proper means of obtaining a trade secret).

161. See 15 U.S.C. § 1052(d) (2012) (permitting concurrent use registration); see also U.S. Patent & Trademark Office, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1207.04 (discussing concurrent use).

162. 17 U.S.C. § 114 (2012). See generally *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003) (discussing liability where rap group Beastie Boys licensed composition, but not sound recording).

their underlying musical compositions), joint authorship,<sup>163</sup> and the moral rights accorded by the Visual Artists Rights Act (VARA).<sup>164</sup>

Moreover, copyright law has helped ameliorate problems of substantiating harm to an acceptable quantum of proof through an administrative schedule of copyright damages, intended both to ensure rough compensation to injured owners and to deter infringers who might otherwise escape liability.<sup>165</sup> Here, too, the proposed reform employs statutory damages to the same end. Harms from unauthorized sharing of intimate media are real, but may be difficult to reduce to a specific pecuniary figure with sufficient rigor. Finally, American IP rights are generally alienable, under various levels of formality: copyright entitlements, for example, can be licensed non-exclusively based on mere oral agreement, whereas an assignment of the same rights requires a written agreement signed by the owner.<sup>166</sup> The proposal advanced in this Article permits consensual distribution when validated by a written agreement.<sup>167</sup> This comports with the general skepticism towards inalienable rights in American copyright doctrine.<sup>168</sup>

Third, using IP law effectively addresses issues with intimate media within the existing statutory framework for Internet intermediaries. Other approaches, such as privacy-based ones, would need to alter the contours of the immunity for in-

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163. 17 U.S.C. §§ 101, 201(a) (2012) (defining “joint work” and ownership of copyright by joint authors, respectively).

164. *Id.* § 106A.

165. *Id.* § 504(c); see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446–63 (2009) (discussing relevant damages).

166. 17 U.S.C. § 204(a) (2012); see *Effects Assocs. v. Cohen*, 908 F.2d 555 (9th Cir. 1990) (finding oral agreement did not transfer copyright in light of 17 U.S.C. § 204(a), but holding agreement created non-exclusive license).

167. The waiver provision ensures that consensually created pornography, whether professional or amateur, can continue unabated. Creators need only obtain written consent from participants. Porn producers are already familiar with similar contractual and recordkeeping requirements necessitated by the participants’ rights of publicity and by federal age verification requirements, among other regimes. See 18 U.S.C. § 2256 (2012); see also *Perfect 10 v. CCBill LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007) (“Perfect 10 is the publisher of the eponymous adult entertainment magazine and the owner of the website, perfect10.com. . . . Many of the models in these [pornographic] images have signed releases assigning their rights of publicity to Perfect 10.”).

168. See, e.g., Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1525–26 (2011) (discussing how American authors have greater protection of their moral rights abroad than in the United States).

teractive computer services from third-party liability created by Section 230 of the Communications Decency Act.<sup>169</sup> Section 230 immunizes intermediaries, such as search engines and websites, from most tort and state criminal law liability for content provided by third parties.<sup>170</sup> Some of these proposals would not merely alter Section 230, they would eviscerate it.<sup>171</sup> This is undesirable. Section 230 has been critical to the development of a thriving Internet ecosystem based largely on content supplied by users.<sup>172</sup> Forcing intermediaries to filter their platforms proactively for potentially suspect content would create significant costs and inefficiencies.<sup>173</sup> Helpfully, however, Section 230 explicitly exempts intellectual property law from its ambit.<sup>174</sup> Thus, this Article's reform co-exists easily with Section 230. And, Internet intermediaries are familiar with analogous provisions of Title II of the Digital Millennium Copyright Act (DMCA), which condition immunity on compliance with a notice-and-takedown system for material allegedly infringing copyright.<sup>175</sup> It should be straightforward for Internet firms to implement the proposed notice-and-takedown system for non-consensual distribution of intimate media as well.<sup>176</sup>

Lastly, IP law is accustomed to First Amendment balancing. Scholars have rightly complained that doctrines such as trademark's fair use defense and copyright's durational chang-

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169. 47 U.S.C. § 230 (2012).

170. *Id.*

171. *See, e.g.*, Citron, *supra* note 13; Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 124 (2009).

172. Eric Goldman, *Unregulating Online Harassment*, 57 DENV. U. L. REV. ONLINE 59 (2010) [hereinafter Goldman, *Unregulating*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1558681](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558681); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101 (2007); Eric Goldman, *The Implications of Excluding State Crimes from 47 U.S.C. § 230's Immunity 4* (Santa Clara Univ. Legal Studies Research Paper No. 23, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2287622](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287622).

173. *See* Lemley *supra* note 172, at 102–03 (discussing liability of ISPs engaging in filtering).

174. Circuit courts of appeal are split on whether the exception, at 47 U.S.C. § 230(e)(2) (2012), applies to state intellectual property law, or only federal law. *Compare* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 (9th Cir. 2007) (holding exception applies only to federal IP laws), *with* Universal Comm'n Sys. v. Lycos, Inc., 478 F.3d 413, 423 n.7 (1st Cir. 2007) (stating exception applies to state and federal IP law).

175. 17 U.S.C. § 512(c)(3), (g)(2) (2012). *See generally* Ardia, *supra* note 24.

176. *See* Franks, *supra* note 3, at 657.

es are insufficiently attentive to free speech concerns.<sup>177</sup> Yet, the free speech issue is one to which attention is (and must be) paid in IP law.<sup>178</sup> Thus, IP offers examples of how to accommodate free speech limitations within a doctrinal framework, such as the idea/expression dichotomy and fair use in copyright law,<sup>179</sup> and the newsworthiness exception to the right of publicity.<sup>180</sup> Other information regulation schemes, such as securities laws, tend to ignore First Amendment concerns.<sup>181</sup> This Article builds on copyright's scheme by proposing that a defendant be immunized from liability where the unconsented distribution of the intimate images or video was newsworthy.<sup>182</sup>

In short, IP law holds under-recognized potential to regulate intimate media. The next subsections describe the contours of the proposed statutory reform.

#### B. A NEW COPYRIGHT ENTITLEMENT

The production and distribution of media capturing intimacy is best addressed by adding a new section, 17 U.S.C. § 106B, to the Copyright Act.<sup>183</sup> The purpose of 106B is to create a new form of copyright infringement: distribution or display of intimate media, from which a living person captured in it can be identified, without the written consent of that person. Put

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177. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); William McGeeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267 (2010).

178. See Neil Weinstock Netanel, *First Amendment Constraints on Copyright after Golan v. Holder*, 60 UCLA L. REV. 1082 (2013) [hereinafter Netanel, *First Amendment Constraints*].

179. See *Golan v. Holder*, 132 S. Ct. 873, 890–91 (2012).

180. See, e.g., *Toffoloni v. LFP Publ'g Grp.*, 572 F.3d 1201, 1208 (11th Cir. 2009).

181. These laws may increasingly be subject to First Amendment scrutiny. See *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (reversing misbranding conviction under Food, Drug and Cosmetic Act); see also Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2013).

182. Such distributions will, one suspects, rarely be newsworthy. One possible counterexample concerns the dispute between attorney Dwayne Beck and a pseudonymous plaintiff. Beck sent a photo of his penis to the plaintiff via e-mail, allegedly after propositioning her and rubbing himself against her; she responded with a lawsuit. Distribution of the photo (if Beck could be identified from it) might succeed under a newsworthiness defense. See Debra Cassens Weiss, *Lawyer Wins Court Order to Remove Explicit Photo from Court File*, ABA JOURNAL (Apr. 3, 2011), [http://www.abajournal.com/news/article/lawyer\\_wins\\_court\\_order\\_to\\_remove\\_explicit\\_photo\\_from\\_court\\_file](http://www.abajournal.com/news/article/lawyer_wins_court_order_to_remove_explicit_photo_from_court_file).

183. The full text of the proposed statute is provided in Appendix A, *infra*. The placement of the right after Section 106A suggests that, like 106A, the new right is limited and does not apply to all types of copyrighted works.

another way, the new provision invests in the identifiable subjects of intimate media the right to approve distribution or display of that media. Enforcement of the right would vary with the type of defendant, who would be divided into natural persons and service providers. While available remedies would be identical in both cases, service providers could avail themselves of statutory immunity via compliance with a notice-and-takedown system modeled on the DMCA.<sup>184</sup> Remedies would include injunctive relief and, at the plaintiff's election, either statutory or actual damages. Defendants could escape liability if the distribution were newsworthy, or if they obtained written consent. This subsection next explores the contours of the new right.

### 1. Subject Matter

The new 106B right would apply to a limited subset of photographs and audiovisual works.<sup>185</sup> This subset would be called "intimate media," a defined term of art that would be added to the Copyright Act's built-in dictionary at 17 U.S.C. § 101. Intimate media would comprise photographs and audiovisual works with four additional characteristics.

First, intimate media contain images of one or more living humans. The term "intimate media" would cover accurate, authentic representations of living persons that capture their actual bodies.

Second, the plaintiff is one of the living persons captured in the intimate media.

Third, the plaintiff can reasonably be identified from the media, or from the combination of the intimate media and identifying information presented along with it.<sup>186</sup> To meet this requirement, the plaintiff would have to prove that a reasonable person viewing the media would believe that the plaintiff was

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184. See 17 U.S.C. § 512(e)(3), (g) (2012).

185. Audiovisual work is expressly defined at 17 U.S.C. § 101 (2012). "Photograph" is not a defined term, but is included within copyright's subject matter as a component of pictorial, graphic, and sculptural works, which are also defined in Section 101. See *id.*

186. See, e.g., Meredith Bennett-Smith, *Hollie Toups Leads Women in Revenge Porn Class Action Lawsuit Against Texxxan.com, GoDaddy*, HUFFINGTON POST (Jan. 25, 2013), [http://www.huffingtonpost.com/2013/01/25/hollie-toups-leads-women-suing-revenge-porn-site-texxxan-go-daddy\\_n\\_2546066.html](http://www.huffingtonpost.com/2013/01/25/hollie-toups-leads-women-suing-revenge-porn-site-texxxan-go-daddy_n_2546066.html) (noting that Hollie Toups's ex-boyfriend posted nude photos of her that were accompanied by her real name and Facebook profile); cf. 18 U.S.C. § 2256(9) (2012) (defining "identifiable minor").

captured in it, and could be identified, such as via display of facial features, identifying marks (such as distinctive tattoos or birthmarks), labels, or accompanying text.

Fourth, the media captures “intimate information,” which would be defined in Section 101 as sexually explicit conduct involving the plaintiff,<sup>187</sup> or the plaintiff’s genitals, pubic area,<sup>188</sup> or (if female<sup>189</sup>) exposed nipple or areola.<sup>190</sup>

The new right’s coverage would be limited to photographic or audiovisual works that capture the plaintiff in a state of graphic nudity or sexual conduct, and that permit the plaintiff to be identified.

## 2. Rights Created

Any person identifiably captured in intimate media, where that media meets the subject matter requirements outlined above with respect to that person, would enjoy the right to prevent distribution and display of that media. Thus, Section 106B would expressly alter sections 106(3) and 106(5) of the Copyright Act, which govern the exclusive rights of distribution and public display of a copyrighted work.<sup>191</sup> Those rights are enjoyed initially by the author of a work—typically, in the case of pho-

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187. The proposed statute, *see infra* Appendix A, would define “sexually explicit conduct” as set forth in 18 U.S.C. § 2256(2)(B)(i), (ii).

188. *See* 18 U.S.C. § 1466A(f)(3) (2012) (defining “graphic” as, *inter alia*, meaning “a viewer can observe any part of the genitals or pubic area of any depicted person”).

189. The proposed statute, *infra* Appendix A, plainly provides female subjects with a greater entitlement than male subjects—that is, their permission is required to distribute intimate media that captures their exposed nipples or areolas, while such consent is not needed from males. Some state courts have held conceptually similar statutes unconstitutional. *See, e.g.*, *People v. Santorelli*, 80 N.Y.2d 875 (1992) (striking down indecent exposure statute that applied to display of female, but not male, breasts). While the question is not free from doubt, this Article argues that the proposed reform would survive constitutional scrutiny in federal courts. *See generally* *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464 (1981) (upholding gender-specific California statutory rape law against equal protection challenge); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (upholding the same for private insurance via employer); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (finding state’s denial of unemployment insurance to pregnant women did not discriminate based on gender).

190. This requirement would certainly cover the popular *Girls Gone Wild* video series. *See, e.g.*, *Deferred Prosecution Agreement, United States v. MRA Holdings, LLC*, No. 5:06CR79/RS (N.D. Fla. Sept. 12, 2006), *available at* <http://news.findlaw.com/cnn/docs/pornlaw/dfrprosmra91206.html>. Cultural sacrifices must be made.

191. 17 U.S.C. § 106(3), (5) (2012).

tographs, the photographer, and in case of audiovisual works, either the director or producer (though the right may expand to include other joint authors).<sup>192</sup> Section 106B would curtail the distribution and display rights enjoyed by the copyright owner of intimate media: exercise of those rights would be subject to the consent of each subject of that media who is identifiable and who is captured naked or engaged in sexually explicit conduct.<sup>193</sup>

Moreover, the new 106B would apply to *private* display as well as public. Copyright law distinguishes between public displays, such as showing a movie in a theater or hanging a painting in a museum, and private displays, such as watching a movie with one's family or showing a photograph to a friend. This proposal expands the 106B right beyond the normal 106(5) right, which applies only to public displays.<sup>194</sup> Thus, 106B would also expressly modify Section 109(c), which permits the owners of lawfully made copies to display them publicly.<sup>195</sup> The expansion of control to private display is necessary, given the nature of these photos and images, and the potential chilling effect of infringement. Showing intimate media to family and social acquaintances may work nearly as great a harm as wider distribution. Like copyright's other entitlements, the new 106B right attaches to each copy of the intimate media. Thus, a plaintiff could enforce her right against anyone possessing such a copy, not merely against the copyright owner.

The 106B right would be waivable in writing, but not alienable. This part of 106B is analogous to the rights of attribution and integrity under Section 106A (implementing VARA).<sup>196</sup>

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192. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000).

193. There is precedent for limiting distribution rights based on the production needs of an industry. The Record Rental Amendment of 1984 removed the first sale privilege of renting or leasing phonorecords for purposes of commercial gain, even when the owner has lawfully obtained the phonorecord. Pub. L. No. 98-450, 98 Stat. 1727 (codified at 17 U.S.C. § 109(b) (2012)). The Computer Software Rental Amendments Act of 1990 performed a similar change for computer programs. Pub. L. No. 101-650, 104 Stat. 5089, 5134 (1990) (codified at 17 U.S.C. § 109(b) (2012)).

194. "Public display" is defined at 17 U.S.C. § 101 (2012).

195. See 17 U.S.C. § 109(c) (2012). Such a change is not without precedent. 17 U.S.C. § 109(d) removes the privilege from holders of copies who do not have ownership—those who have acquired it from the copyright owner via rental, lease, or loan, for example—unless they obtain authorization from the copyright holder.

196. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5132 (codified at 17 U.S.C. § 106A (2012)).

Like VARA, the 106B right would be held by the subject(s) of the intimate media, and not by the copyright owner of the work (though, of course, the subjects may also be owners).<sup>197</sup> And, like VARA's provisions, the 106B right could be waived by a subject if that person expressly agreed, in a signed writing, to the waiver.<sup>198</sup> Waivers of 106B rights would work differently from typical copyright licenses, which can be in oral form if the license is non-exclusive.<sup>199</sup> Here, oral waivers would be ineffective. (Oral waivers would present nearly insurmountable problems of proof for plaintiffs.) Unlike VARA, though, the 106B right is exclusive to each subject who meets the requirements outlined above; a waiver by one such subject has no effect on the rights of others.<sup>200</sup> To be operative, the waiver would have to reasonably identify the intimate media that it covered, to avoid the risk of a blanket license. The waiver also could be limited temporally, by medium (for example, still images, but not video), or by recipient.

Finally, 106B would include a statutory waiver: a person who received intimate media from an identifiable person captured in it would not be liable, to that person, for viewing that media him or herself. For example, if Marge sent a nude photo of herself to Homer, Homer would be immune from 106B infringement liability for viewing the photo himself. He could not, however, show the photo or give it to Moe without incurring liability. For intimate media featuring multiple subjects, the waiver would apply if the recipient received it from any of them. This concededly creates some residual risk for the subject of such photos and videos—if, in the future, they no longer wish the recipient to have the media (as when a romantic relationship ends, for example), they have no power under this new provision to compel that outcome. The residual risk seems manageable, though. Relationships that end often involve former partners possessing sensitive material: love letters, romantic gifts, mixtapes, and the like.<sup>201</sup> People are accustomed to this

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197. See 17 U.S.C. § 106A(b) (2012).

198. See *id.* § 106A(e)(1).

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

200. Contrast this approach with 17 U.S.C. § 106A(e)(1) (“[I]n the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.”). See generally *Grauer v. Deutsch*, No. 01CIV.8672(LAK), 2002 WL 31288937, at \*1 (S.D.N.Y. Oct. 11, 2002) (“Congress plainly meant [in VARA] for any one of two or more coauthors to bind the others by waiving attribution rights.”).

201. See *Filipovic*, *supra* note 65.

risk. Lastly, ongoing viewing of the media is limited to the recipient—further display or distribution violates the new right.<sup>202</sup> The statutory waiver that enables the recipient to view the intimate media without obtaining consent creates a small residual risk, but avoids the perils of a “right to be forgotten” for such content.<sup>203</sup>

### 3. Infringement

The new 106B right would be infringed whenever someone distributed or displayed the intimate media in which the identifiable subject (the plaintiff) is featured.<sup>204</sup> For example, forwarding a sexted, nude photo without the written consent of the person featured in it (where the person could be identified) would infringe that person’s 106B right.<sup>205</sup> So would displaying the original photo to anyone other than the original recipient.<sup>206</sup> Formally, a cause of action for infringement of the 106B right would require that the plaintiff establish five elements: (1) the content at issue qualifies as intimate media; (2) she was captured in that intimate media; (3) a reasonable person would believe she could be identified from it or in combination with accompanying information; (4) the media contains intimate information of the plaintiff; and (5) the defendant displayed or distributed it.<sup>207</sup> Distribution would include making the image or video available to others, and would not necessitate proving that anyone else actually obtained access to it.<sup>208</sup>

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202. Another way to view this immunity is to conceive of 106B as redefining “public,” for the purposes of public display, as anyone other than a person who directly receives intimate media from the subject. On this account, 106B would impose liability only for public displays of intimate media, but the scope of public display would widen considerably. *See infra* Appendix A.

203. *See generally* Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012) (criticizing concept); Jane Yakowitz, *More Bad Ideas from the E.U.*, FORBES (Jan. 25, 2012, 3:57PM), <http://www.forbes.com/sites/kashmirhill/2012/01/25/more-bad-ideas-from-the-e-u> (criticizing concept).

204. As discussed below, someone who received the work of intimate media from a subject of it could view that work him/herself, but could not otherwise distribute, display, or perform it. *See infra* Appendix A.

205. *See infra* Appendix A.

206. *See infra* Appendix A.

207. *See infra* Appendix A; *see also supra* Part II.B.1 (defining intimate information).

208. *See infra* Appendix A. Courts are split on whether violation of the Section 106(3) distribution right requires actual distribution, or merely making a copy available. *Compare* Nat’l Car Rental Sys. v. Computer Assocs. Int’l, 991 F.2d 426 (8th Cir. 1993) (infringing distribution right requires actual distribution), *with* Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d

The statute would, however, separate defendants into two camps: natural persons, and service providers.<sup>209</sup> For natural persons, infringing activity would include the usual modes of distribution (uploading videos or images to a Web server, e-mailing them, texting them, etc.) and of display (showing media files to others). For service providers, distribution would include hosting, linking to, or caching intimate media.<sup>210</sup>

Infringement liability would apply only to intimate media created after the effective date of the legislation implementing the new 106B right. There are several rationales for limiting 106B's temporal application. First, the new copyright entitlement is not necessary to generate production of existing intimate media,<sup>211</sup> and there are no (thinly) plausible justifications for retroactivity such as restoration or renewed distribution of extant works.<sup>212</sup> Second, requiring written consent for distribution of existing media creates potentially significant transaction costs: the person holding the image or video may have obtained verbal consent initially, but must now locate anyone identifiable in the media to gain written permission.<sup>213</sup> This second negotiation might be useful in the privacy context, but in the copyright arena, it creates deadweight loss.<sup>214</sup> The normative justifications for the proposed reform simply do not support retroactive application.

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199 (4th Cir. 1997) (making copyrighted works available for distribution suffices to infringe). See generally Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y 1 (2011).

209. "Service provider" would be any entity meeting the DMCA definition at 17 U.S.C. § 512(k)(1)(B) (2012).

210. Hosting, linking to, and caching media would be defined with reference to the DMCA: 17 U.S.C. § 512(c), (d), and (b), respectively.

211. See *Eldred v. Ashcroft*, 537 U.S. 186, 257 (2003) (Breyer, J., dissenting) (criticizing retroactive extension of copyright term because "in respect to works already created—the source of many of the harms previously described—the statute creates no economic incentive at all").

212. *Id.* at 207 (upholding extension on grounds, inter alia, "that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works").

213. Landes & Posner, *supra* note 69, at 332, 355 (discussing transaction cost implications of copyright's allocation of entitlements).

214. Cf. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1613–14 (1982) (discussing solutions, such as compulsory licensing or fair use, to transaction cost problems in markets for copyrighted works).

#### 4. Remedies

The remedies available to a successful plaintiff would be those for copyright infringement generally, but with a safe harbor available to service providers.

A prevailing plaintiff could obtain both damages and injunctive relief. Damages would follow copyright's established system: the plaintiff could elect actual damages, or statutory damages at the customary copyright rate of \$750–30,000 per infringing image or audiovisual work.<sup>215</sup> A plaintiff seeking to minimize litigation costs could opt for a statutory damages award of \$750 per work, avoiding the need for a jury to determine the amount of damages.<sup>216</sup> Enhanced damages (up to a maximum of \$150,000) could be awarded where the plaintiff proved willful infringement.<sup>217</sup> A finding of willful infringement would also generate a rebuttable presumption in favor of awarding costs (including reasonable attorney's fees) to the prevailing plaintiff.<sup>218</sup> This cost-shifting presumption would enhance plaintiffs' ability to obtain counsel, while cabining the award of fees to cases where the infringer knew that their actions infringed, or recklessly disregarded such a risk.<sup>219</sup> Where

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215. 17 U.S.C. § 504(a) (2012). The burden of apportionment on actual damages would mirror that under the Copyright Act, where the plaintiff proves gross revenues, and the defendant must prove offsetting costs. 17 U.S.C. § 504(b). The potentially significant amount of statutory damages creates another rationale for prospective application of § 106B—notice to potential infringers is vital to the constitutionality of the damages scheme. *See Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012); *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 513 (1st Cir. 2011).

216. *See BMG Music v. Gonzalez*, 430 F.3d 888, 892–93 (7th Cir. 2005) (finding no right to jury trial when plaintiff sought only minimum amount of statutory damages).

217. 17 U.S.C. § 504(c)(2). *See generally Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342–44 (1998); *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 69 (1st Cir. 2013).

218. This would alter 17 U.S.C. § 505 (2012), which leaves cost and fee awards to the trial court's discretion. *See generally Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3rd Cir. 1986) (describing factors used in the Third Circuit to evaluate award of fees). Under this proposal, a court would be instructed to make such an award to all prevailing plaintiffs in cases of willful infringement of the new right, unless the court found (supported by specific findings) that the interests of justice necessitated otherwise. The Copyright Act establishes similar presumptions or mandates for award of enhanced damages under certain circumstances. *See, e.g.*, 17 U.S.C. § 504(c)(3)(A), (d) (discussing the presumption and mandate, respectively).

219. I thank Dave Marcus for this suggestion, while noting he preferred to award costs to all prevailing plaintiffs.

the trial court, applying the standard equitable analysis,<sup>220</sup> awarded injunctive relief, it would presumptively include removal of all infringing on-line intimate media under the defendant's control, and destruction of all such infringing physical media under his control.<sup>221</sup>

A service provider defendant would face the same slate of remedies. However, relief would be limited by a statutory immunity.<sup>222</sup> To qualify for immunity, a service provider would have to follow the notice and take-down system established under 106B. The provider would remain immune until it received a take-down notification as defined below for the intimate media in suit. After receiving the take-down notification, the service provider could maintain immunity by disabling access to the infringing media within five business days of receipt.<sup>223</sup> Taking down the content after notification would protect the service provider against a claim for damages by the identifiable subject of the intimate media. And, the service provider would obtain immunity against suit by the uploader or distributor of the images by notifying that person of the take-down, if the service provider had information sufficient to complete the notification.<sup>224</sup> Thus, a service provider would lose the benefit of the safe harbor if it received a take-down notification and failed to disable access to infringing media, or if it failed to notify the uploader/distributor, if possible, after receiving a take-down notification.<sup>225</sup> If the service provider remained within the safe

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220. See generally *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

221. Cf. 17 U.S.C. § 503 (2012) (providing for impoundment and destruction of infringing works).

222. The immunity is a safe harbor, not a defense: the burden of production lies upon the plaintiff initially. Cf. *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013) (discussing how plaintiff Viacom had the burden to show defendant's knowledge or awareness of specific infringements).

223. By default, notification would be directed to the DMCA agent for the service provider, although the provider could designate a separate agent for this purpose, if the information were made available in the same location as the DMCA agent information. See 17 U.S.C. § 512(c)(2) (2012); U.S. COPYRIGHT OFFICE, *Directory of Service Provider Agents for Notification of Claims of Infringement*, [http://www.copyright.gov/onlinesp/list/a\\_agents.html](http://www.copyright.gov/onlinesp/list/a_agents.html) (last visited Feb. 27, 2014).

224. Cf. 17 U.S.C. § 512(g)(2) (discussing liability and exceptions). This statutory immunity will often be unnecessary, since service providers can protect themselves via contract. See, e.g., *Terms of Service*, YOUTUBE § 10 (June 9, 2010), <http://www.youtube.com/t/terms> (providing limitations of liability); see also *id.* § 6(F) ("YouTube reserves the right to remove Content without prior notice.").

225. This scheme mirrors that for service providers under 17 U.S.C. § 512.

harbor's immunity, it would not be liable for monetary damages, and would be liable for injunctive relief only on the same terms as under the DMCA: compelling it to cease providing access to infringing material or activity, to terminate the account of an identified infringer, or to take other action to prevent infringement at a particular on-line location.<sup>226</sup> Similarly, the service provider would receive immunity from liability to the poster or uploader of the material if that provider notified the poster and, on receipt of a counter-notification certifying that the work was distributed with consent or was newsworthy, restored access to that work.

Lastly, the legislation implementing 106B would remove the three-month deadline for registering copyrighted works (after first publication) to qualify for statutory damages under this new right.<sup>227</sup> Congress implemented this deadline, part of the 1976 Copyright Act, as an incentive for authors to register their works (since the 1976 Act removed registration as a prerequisite for obtaining copyright).<sup>228</sup> But timely registration of amateur, non-commercial media such as intimate photos and videos is highly unlikely. And, removing statutory damages as a remedy effectively denies copyright relief to anyone except a plaintiff able to afford counsel at an hourly rate. With statutory damages, a victim of unauthorized distribution may be able to find an attorney willing to press her claim for a share of the recovery. By maintaining statutory damages as a viable option, the new 106B right makes relief practically as well as theoretically available to those injured by the infringement of non-consensual distribution.<sup>229</sup>

## 5. Takedown System

The remedy scheme outlined above creates incentives for service providers to disable access to allegedly infringing material upon receipt of a takedown notification. To transmit a successful takedown notification, the plaintiff would submit the following information in writing (such as by e-mail) to the service provider:

The plaintiff is a person captured in the intimate media at issue;

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226. *See id.* § 512(j).

227. *See* 17 U.S.C. § 412(2) (2012).

228. Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2451 (1976).

229. I thank Brent White for this point.

The plaintiff could reasonably be expected to be identified based on the media, or information accompanying it;

The media contains intimate information;

The plaintiff did not consent to distribution of the media at issue in writing, or if she did consent, this distribution exceeds the express scope of that consent;

The plaintiff's name and contact information, including an e-mail address; or, if proceeding pseudonymously, the plaintiff's unique identifier and court identification information;

The URLs or locations under the service provider's control where the infringing media can be located; and

A statement that the plaintiff signs this takedown notification under penalty of perjury.

The statute would require that service providers redact identifying information from takedown notifications before sharing them outside the provider's organization, including with websites such as Chilling Effects.<sup>230</sup> In addition, it would mandate that providers keep notifications confidential within their organizations, including by minimizing the number of people with access to them.

Submitting identifying information can be risky for some plaintiffs, such as victims of revenge porn who face threats of violence or stalking.<sup>231</sup> The statute would provide that a plaintiff can seek an ex parte judicial order allowing her to proceed pseudonymously, including with an e-mail account created for this purpose. The order could be issued for cause, broadly defined, and would include a unique identifier. Upon issuance, the plaintiff would include a statement about the order in her takedown notification, with the contact information for the court and the unique identifier. The clerk of court would be authorized to respond to requests from service providers to verify the veracity of the order, but not to provide the plaintiff's actual identifying information.

Falsified takedown notifications represent a potential problem with the 106B system. Plaintiffs could conceivably issue notifications for intimate media for which they had authorized distribution, or perhaps for other media to which they objected (for example, anti-pornography activists might target the *Girls*

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230. See *infra* Appendix A. Chilling Effects, for example, permits but does not require submissions to keep identifying information private. See *C&D Entry Form*, CHILLING EFFECTS, <http://www.chillingeffects.org/copyright/submit.cgi?TriggerID=5> (last visited Apr. 20, 2014).

231. See, e.g., Roy, *supra* note 23 (describing cyberstalking of Holly Jacobs).

*Gone Wild* videos).<sup>232</sup> The statute would incorporate measures to deter false notifications. It would provide that anyone who knowingly submits a 106B notification with material, false information would be liable to the service provider for either the provider's actual damages, or statutory damages of \$750 per image or audiovisual work, at the provider's election. A material, false submission would also relieve the provider of any obligation to disable access to the allegedly infringing content. Finally, the person submitting the materially false takedown notice would be liable to the person who uploaded or distributed the media at issue for that person's actual damages created by the notice. The risk of penalties for a falsified takedown might deter people from using the system, but the combination of scienter requirement, materiality requirement, and need to deter strategic behavior suggests that the benefits from this precaution outweigh its harms.<sup>233</sup>

## 6. Defenses

Two defenses to liability would be available (in addition to the immunity for service providers described above). The burden of proof for them would rest upon the defendant.

First, written consent to distribution or display signed by the person appearing in the media would operate as a defense for both types of defendants against claims by that person. Logistically, it might be difficult for service providers to determine whether such consent had been obtained, since they might have no contact with the original distributor of the intimate media, who would presumably have obtained the written consent. However, the immunity under the new takedown system mitigates this concern.

Second, to honor the First Amendment's requirements, the statute would provide a complete defense for newsworthy unconsented distribution or display of intimate media. Defining what is "newsworthy" is a non-trivial hurdle; the statute (or, at least, the legislative history) could incorporate the common law

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232. Cf. John Timmer, *Site Plagiarizes Blog Posts, Then Files DMCA Takedown on Originals*, ARS TECHNICA (Feb. 5, 2013, 5:33 PM), <http://arstechnica.com/science/2013/02/site-plagiarizes-blog-posts-then-files-dmca-takedown-on-originals> (describing falsified DMCA takedown).

233. This is particularly so since the equivalent provision under the DMCA, 17 U.S.C. § 512(f) (2012), has been interpreted to be generous to defendants. See *Rossi v. Motion Picture Ass'n of America*, 391 F.3d 1000, 1003–06 (9th Cir. 2004) (requiring subjective bad faith on part of defendant to impose § 512(f) liability).

precedent developed for the privacy torts.<sup>234</sup> The statute should also establish that newsworthiness varies with subject matter, not subject: the issue must be a matter of public concern, not merely that the subject is a public figure. There is no principled basis to offer celebrities or politicians less protection against revenge porn.<sup>235</sup> As a practical matter, it seems that non-consensual distribution of intimate media will rarely qualify as newsworthy, though politicians who engage in sexting are a difficult edge case.<sup>236</sup> For example, former New York representative Anthony Weiner resigned from Congress when it was revealed that he had sent explicit photos to a half-dozen women who were not his wife.<sup>237</sup> After two years away from politics, Weiner launched a campaign to become mayor of New York City,<sup>238</sup> framing himself as recovered and repentant.<sup>239</sup> Although Weiner enjoyed strong support in early polling, that support collapsed when gossip site The Dirty revealed a new wave of sexts that Weiner had sent over the past year.<sup>240</sup> At least the second set of sexts would seem to qualify for the newsworthi-

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234. This exception is also framed in terms of whether a disclosure is of legitimate concern to the public. RESTATEMENT (SECOND) OF TORTS § 652D (1977). See generally Bambauer, *supra* note 87, at 266 (noting the “exemption [is] much bemoaned by privacy scholars as the exception that swallows the rule”). On the privacy torts, see generally Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010) and Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007 (2010).

235. Celebrities tend to fare poorly with privacy claims in similar circumstances. See, e.g., Evan Brown, *Court Won't Ban Gawker from Posting Hulk Hogan Sex Tape*, INTERNETCASES (Nov. 17, 2012), <http://blog.internetcases.com/2012/11/17/court-wont-ban-gawker-from-posting-hulk-hogan-sex-tape> (denying injunction in suit by Hogan over sex tape filmed, and distributed, without his consent).

236. See, e.g., Eyder Peralta, *Local New Jersey Politician Resigns Amid Sexting Scandal*, NPR (Aug. 3, 2011, 8:21 AM), <http://www.npr.org/blogs/thetwo-way/2011/08/03/138948566/local-new-jersey-politician-resigns-amid-sexting-scandal>; *Weiner Resigns From Congress over Sexting Scandal*, FOX NEWS (June 16, 2011), <http://www.foxnews.com/politics/2011/06/16/house-dems-may-boot-weiner-from-committee>.

237. Raymond Hernandez, *In Chaotic Scene, Weiner Quits Seat in Scandal's Wake*, N.Y. TIMES, June 17, 2011, at A1.

238. See Domenico Montanaro & Alex Moe, *Weiner Defiant as Polls Show Him Fading in New York Mayor's Race*, NBC NEWS (July 29, 2013, 9:34 PM), <http://nbcnews.com/politics/first-read/weiner-defiant-as-polls-show-him-fading-in-new-york-mayors-race-v19758464>.

239. Jonathan Van Meter, *The Post-Scandal Playbook*, N.Y. TIMES MAG., Apr. 14, 2013, at MM24.

240. Jennifer Peltz, *Anthony Weiner Faces Growing Calls to Drop out of NYC Mayoral Bid over New Sexting Scandal*, STAR TRIB., July 24, 2013, <http://startribune.com/politics/216708441.htm>.

ness exception. Weiner continued extramarital sharing of intimate media after leaving politics for that reason, making public vows of redemption, and re-entering politics.<sup>241</sup> Thus, the content of the media is directly relevant not only to a politician's campaign, but to his record and promises specifically addressed to sharing of intimate media with people other than his spouse. If any intimate media are newsworthy, the latest round of Weiner photos would seem to be so.

Fair use would not apply to 106B.<sup>242</sup> Fair use relieves an accused infringer from liability if their activity is socially beneficial. Under Section 107 of the Copyright Act, a court evaluating fair use must consider the purpose and character of the use of the work, the nature of the work, the amount and substantiality of the portion used, and the effects of the use on markets for the work.<sup>243</sup> The newsworthiness defense covers some of the same territory and addresses the First Amendment concerns that fair use relieves.<sup>244</sup> Fair use is also a poor fit with the copyright interests that 106B addresses. In particular, the critical fourth factor in fair use—the effect of the use upon markets for the copyrighted work—does not align at all. A major goal of 106B is to *prevent* unconsented commercialization of intimate media.<sup>245</sup> Infringement, by unauthorized distribution, develops markets—but in a way antithetical to consensual production. And, the purpose and character of the use (fair use's first factor) is also largely irrelevant; the chilling effects for production accrue regardless of purpose. Consider an artist who uses a photograph of his naked partner in his artwork—perhaps he is mashing up Soviet-era propaganda images with nude photos.<sup>246</sup> That display of the intimate photo is highly transformative,

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241. *Id.*

242. *See infra* Part III.B.4. Fair use is codified at 17 U.S.C. § 107 (2012).

243. 17 U.S.C. § 107. *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (discussing fair use in the context of parody).

244. *But see* Netanel, *First Amendment Constraints*, *supra* note 178 (arguing that the fair use doctrine is not currently an effective First Amendment safeguard).

245. *Cf.* Salinger v. Random House, Inc., 811 F.2d 90, 95–100 (2d Cir. 1987) (rejecting fair use defense for biographer's use of author's unpublished letters).

246. *See* David Rosenberg, *Soviet-Era Photography Mashups Make Propaganda Illicit*, SLATE (July 3, 2013, 11:00 AM), [http://www.slate.com/blogs/behold/2013/07/03/roman\\_pyatkovka\\_soviet\\_photo\\_re\\_imagines\\_propaganda\\_photography\\_and\\_illicit.html](http://www.slate.com/blogs/behold/2013/07/03/roman_pyatkovka_soviet_photo_re_imagines_propaganda_photography_and_illicit.html).

pushing the analysis towards finding the use fair.<sup>247</sup> But, this is irrelevant to his partner, who may not want the photo displayed, regardless of its artsy surroundings. The possibility of being involuntarily featured may dissuade her from posing for the photo at all.

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The new 17 U.S.C. § 106B would create a right for identifiable subjects of intimate media to prevent unauthorized distribution or display of those images or videos, backed by statutory damages and injunctive relief, but leavened with immunity for service providers following a takedown procedure and for any defendant obtaining written consent or making newsworthy use of the media.<sup>248</sup>

### III. THE PUZZLES OF INTIMATE MEDIA

Regulating intimate media via copyright law will bolster the production of such works among consenting partners, and will reduce unauthorized distribution and performance by treating them as infringement. In addition to these practical benefits, using copyright to protect intimate media has scholarly advantages as well. Doing so reveals new insights about a key pair of copyright puzzles: defining the author of a copyrighted work, and balancing IP restrictions against First Amendment protections for free speech. This Section explores both areas.

#### A. AUTHORSHIP

*[O]nce an action is recounted False . . . this disjunction occurs, the voice loses its origin, the author enters his own death, writing begins.*<sup>249</sup>

Who is the author of a copyrighted work, and why? If adopted, the statutory proposal discussed above<sup>250</sup> would confer

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247. See *Campbell*, 510 U.S. at 579 (“The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

248. See *infra* Appendix A.

249. ROLAND BARTHES, THE DEATH OF THE AUTHOR (Richard Howard trans., 1967), available at <https://wiki.brown.edu/confluence/download/attachments/74858352/BarthesDeathOfTheAuthor.pdf>.

250. See *supra* Part II; *infra* Appendix A.

a limited set of entitlements upon people captured in certain intimate media. That proposal places this Article squarely in the midst of a long-standing, contentious copyright debate about the nature of authorship.<sup>251</sup> It confers upon the subjects of intimate media a new right of authorship. Both precedent and scholarship have opposed expanding who qualifies as an author, for a variety of reasons, and so this proposal is controversial. Perhaps unexpectedly, though, the production and distribution of intimate media cast new light on these debates, unsettling previous assumptions and revealing overlooked doctrinal support for the proposal.

Defining authorship is critical for copyright law. The Copyright Act, and the Constitution's IP Clause, limit the initial grant of copyright entitlements to authors.<sup>252</sup> While an author may subsequently alienate these rights, she is copyright's prime mover: rights must vest initially in her.<sup>253</sup> Copyright doctrine evinces a strong preference for locating a single author for a work, sending courts on a determined search for its "master mind."<sup>254</sup> A contributor asserting that her creative additions merit status as joint author faces a stringent test.<sup>255</sup> She must prove that her contributions are independently copyrightable, that she and other authors intended to merge their expression into an indivisible whole, and that all intended to share in the status of author.<sup>256</sup> Whether due to the Romantic ideal of the lone genius,<sup>257</sup> to concern over transaction costs,<sup>258</sup> or to faith in

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251. See, e.g., Carroll, *supra* note 72; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors,* 50 EMORY L.J. 193 (2001); Tushnet, *supra* note 28, at 1030; Russ VerSteeg, *Defining "Author" for Purposes of Copyright,* 45 AM. U. L. REV. 1323 (1996).

252. U.S. CONST., art. I, § 8, cl. 8; 17 U.S.C § 201(a) (2012).

253. Cf. ARISTOTLE, PHYSICS, Bk. VIII, at 132 (R.P. Hardie & R.K. Gaye trans., 1994) (C. 350 B.C.E.) ("[T]here is a time when there is a first moved and a first moved, and another time when there is no such thing but only something that is at rest . . .").

254. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884); see, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000); Tushnet, *supra* note 28, at 1018.

255. See 17 U.S.C. § 101 (2012) (defining "joint work").

256. See, e.g., *Thomson v. Larson*, 147 F.3d 195, 199–202 (2d Cir. 1998). *But see* *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (holding contribution does not need to be independently copyrightable).

257. See generally Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1765–71 (2012) (discussing how authors' works are closely connected to their sense of self).

private ordering to solve authorship,<sup>259</sup> the doctrine is biased towards a solo author.

Legal scholarship has long fought over the proper scope of authorship.<sup>260</sup> Recent efforts typically begin by noting the continued primacy of the single author despite shifts towards collaborative efforts.<sup>261</sup> Some scholars, such as Peter Jaszi<sup>262</sup> and Michael Carroll,<sup>263</sup> advocate for doctrinal or statutory shifts that take account of multiple contributors. Others, such as Amy Adler, follow postmodern literary theory to deprecate authorship altogether, and to encourage the recoding, modification, and even destruction of works of art.<sup>264</sup> Yet others, such as Roberta Kwall, argue that the authorial voice is undesirably deprecated in copyright jurisprudence.<sup>265</sup> Finally, Rebecca Tushnet defends the current preference for solo authorship on grounds that “[m]anageability, at this point in our copyright history, may be more beneficial than a regime that claims to protect every instance of creativity.”<sup>266</sup>

Precedent shows courts are chary of awarding rights to multiple claimants in a work, but they demonstrate underappreciated flexibility in which of those claimants is rewarded with the copyright. And, the path to joint authorship, while difficult, is not insurmountable. While intent remains critical, courts seem more generous in finding the requisite intent where the claimed joint authors have made roughly equivalent contributions to a work—or, at least, to its popular appeal. For example, filmmaker Jonathan Morrill shot video of singer Billy

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258. See Tushnet, *supra* note 28, at 1020.

259. See *id.* at 1016–17.

260. See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192–200 (2008) (discussing the history of authorship’s role in U.S. copyright law); Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 566–613 (2010) (describing historical trends in authorship definition).

261. See, e.g., Benkler, *supra* note 33, at 380–81, 445–46; Carroll, *supra* note 72, at 804–10; Tushnet, *supra* note 28, at 1002–03, 1017–18.

262. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 314–20 (1991).

263. Carroll, *supra* note 72, at 810–25.

264. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 271–99 (2009).

265. Roberta Rosenthal Kwall, *Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 16–22 (2001).

266. Tushnet, *supra* note 28, at 1040.

Corgan and his band (at the time), The Marked.<sup>267</sup> Corgan took a copy of the resulting film, “Video Marked,” and used 45 seconds of it in a video for his new (and much better known) band, Smashing Pumpkins.<sup>268</sup> Morrill’s suit for copyright infringement failed because the district court found that Corgan was a joint author.<sup>269</sup> Indeed, the genre of the work—a music video—was critical to this finding: “music was therefore the central component of the completed work . . . without the music itself Video Marked would not exist.”<sup>270</sup> The film’s audience appeal resulted from both the videography and music.<sup>271</sup> Corgan, the subject, and Morrill, the videographer, were each instrumental to the original, creative expression in “Video Marked,” and the court recognized both as authors.<sup>272</sup> Similarly, the Seventh Circuit held that professional baseball players could negotiate, under the work for hire doctrine, for joint copyright ownership in telecasts of their games.<sup>273</sup> And, the same court of appeals lowered the threshold for joint authorship, deciding that one need not contribute independently copyrightable expression to qualify.<sup>274</sup> Courts still evince a strong preference for unitary copyright, but are willing to consider a surprisingly broad range of claimants for authorship.

Authorship should be understood as an entirely utilitarian concept—one that is otherwise normatively empty. Copyright posits a creative link between the author and the work’s creative expression, even if the Romantic notion of the lone artistic genius was a trope at the time of its invention.<sup>275</sup> Yet copyright does not hesitate to invest rights in people or entities with only

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267. *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1121 (C.D. Cal. 2001); see Tushnet, *supra* note 28, at 1023–24.

268. *Smashing Pumpkins*, 157 F. Supp. at 1122.

269. *Id.* at 1123–26.

270. *Id.* at 1124.

271. *Id.* at 1125.

272. *Id.* at 1123–26.

273. *Baltimore Orioles v. Major League Baseball Players Ass’n*, 805 F.2d 663, 673 (7th Cir. 1986).

274. *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (“Gaiman’s contribution may not have been copyrightable by itself, but his contribution had expressive content without which Cogliostro wouldn’t have been a character at all, but merely a drawing . . . Cogliostro was the joint work of Gaiman and McFarlane—their contributions strike us as quite equal—and both are entitled to ownership of the copyright.”).

275. See ADRIAN JOHNS, PIRACY 48 (2009) (describing the “sadly heroic artist subsisting in a garret” as a “sustaining legend[]” of the publishing world in the eighteenth century).

an indirect link at best to creativity. For example, ownership of foreign works restored to copyright subsists either in the author, or in the initial rightsholder as determined by the law of the work's source country.<sup>276</sup> American law is happy to accede if foreign countries confer copyright on non-authors. Or consider a more familiar example: the work for hire doctrine.<sup>277</sup> Under its dictates, employees who create copyrightable works within the scope of their employment have no copyright interest in them.<sup>278</sup> Rather, their employer owns the copyrights from the moment of fixation.<sup>279</sup> This is not a transfer—it is a reconceptualization of authorhood.<sup>280</sup> Similarly, for certain types of specially commissioned works, the person who produces it can agree contractually to treat the party ordering the work as the author.<sup>281</sup> Authorship becomes a matter of private convenience. In both cases, the statute awards copyright to someone other than the person generating the expressive work. It even flips the default: the employee, or commissioned party, must obtain a signed agreement to claim copyright in the first instance.<sup>282</sup> This arrangement makes sense as a practical matter: the work would not exist without the financial support of the employer or patron, and vesting copyright with them avoids the risk of losing the work to termination decades in the future.<sup>283</sup>

But: this is a coldly instrumental approach to authorship, divorced completely from considerations of whose master mind produces the expressive content. Indeed, the copyright owner may have no creative input whatsoever, yet still hold rights to the work. For example, a New York City management company retained three sculptors to produce lobby art for a building in Queens.<sup>284</sup> The company did not care what they produced, so long as it fit inside the building; the sculptors retained “full au-

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276. 17 U.S.C. § 104A(b), (h)(6) (2012) (defining “restored work”); see *Golan v. Holder*, 132 S. Ct. 873, 877–78, 894 (2012) (upholding constitutionality of § 514 of Uruguay Round Agreements Act, which restored these works to copyright).

277. See 17 U.S.C. § 101 (2012) (defining “work made for hire”).

278. See *Cmt. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737–38 (1989).

279. 17 U.S.C. § 201(b) (2012).

280. *Reid*, 490 U.S. at 737.

281. 17 U.S.C. § 101 (requiring that “the parties expressly agree in a written instrument signed by them” to so characterize the work).

282. *Id.* § 201(b).

283. See *Reid*, 490 U.S. at 737; see also 17 U.S.C. § 203 (2012) (providing termination option for authors).

284. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80 (2d Cir. 1995).

thority in design, color and style.”<sup>285</sup> Several years later, the building’s new owner sought to remove the resulting sculpture, and the sculptors launched a lawsuit under VARA to block the action.<sup>286</sup> They lost, according to the Second Circuit, because the sculptors were employees hired to produce art, and thus the sculpture was a work for hire.<sup>287</sup> The copyright owner supplied money, space, and (at the sculptors’ direction) materials; the artists supplied the creative work.<sup>288</sup> And yet they were not authors. From an authorship perspective, the work for hire doctrine is easily justified on utilitarian grounds, but it requires averting one’s gaze from the severed connection between the copyrighted work and its creator.

Intimate media highlight, and can leverage, the conceptual and doctrinal flexibility of authorship: these photos and videos may support claims by a single author, by multiple authors, or by no author. The subject of a photo may be its author, as where the image is a self-shot.<sup>289</sup> Both subject and photographer could be authors, where they deliberately collaborate and each contributes copyrightable expression.<sup>290</sup> Or, a photo might be but a clinical representation of the person and setting, where originality is so minimal as to preclude copyright protection altogether.<sup>291</sup> The challenge for a singular approach to authorship is that photography and video have at least two significant channels for creative input: work in front of the camera (lighting, posing, choice of venue, etc.) and work with the camera (shutter speed, angle, flash, etc.).<sup>292</sup> Amateur, non-commercial intimate media are often created with limited tools:

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285. *Id.* (quoting agreement between company and sculptors).

286. *Id.* at 81.

287. *Id.* at 85–88.

288. *Id.*

289. *See generally* Pamela Rutledge, #Selfies: Narcissism or Self-Exploration?, PSYCHOL. TODAY (Apr. 18, 2013), <http://www.psychologytoday.com/blog/positively-media/201304/selfies-narcissism-or-self-exploration>.

290. *Cf.* *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1121–26 (holding that videographer was a joint author).

291. *See* Subotnik, *supra* note 132, at 1492–95.

292. *See* Farley, *supra* note 70, at 427–29, 434. *See generally* Christopher Peterson, Gregory Crewdson’s \$1 Million Photo Shoot, JPG MAG. (July 28, 2007), <http://jpgmag.com/stories/1194> (describing one photographer’s extensive creative input in photo shoot). There can also be post-capture editing and alteration, but these are likely rare with informal, amateur intimate media. *See generally* Gregory Crewdson, *Post-Production*, APERTURE, <http://www.aperture.org/crewdson> (last visited Apr. 20, 2014) (describing post-capture process of editing).

smartphones, and simple digital cameras. These have comparatively few settings and adjustments—they are the sort of devices for which the term “point-and-shoot” was invented. Thus, the creativity involved in working with the camera may also be limited; put another way, the contribution of the photographer or videographer may be small, either due to technological constraints or simply minimal effort. Similarly, the contribution of the subject can vary. A snapshot may involve little original expression, or the subject may select their costume (or lack of it), pose, and so forth. Choices of venue and lighting may well be joint decisions. It is difficult if not impossible to craft a clean rule for the authorship of intimate media. Often, both the subject and the person holding the camera will have plausible claims.

Joint authorship is no help. It requires shared intent—intent to merge creative contributions, and intent to share authorship. The difficulty is that here, intent is a fiction: it is most likely that the participants do not have *any* relevant intent. Private ordering through contract is another solution that is plausible in theory but infeasible in practice.<sup>293</sup> Here, too, authorship needs to be instrumental. It is capable of being flexible: in places, it adapts to solve difficulties created by each industry’s individual structure of production.<sup>294</sup> Authorship is not a holy icon—it is a chess piece.<sup>295</sup>

Implementing this Article’s proposal will bolster output of intimate media, but perhaps at the cost of fragmentation: others will advocate for special provisions to address their particular concerns, leading to an increasingly particularized and in-

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293. See *supra* Part I.C.

294. Tushnet, *supra* note 28, at 1021 (“Authorship moves around as needed to meet the needs of the industry.”).

295. In some cases, it may even be a ping pong ball. Sound recordings were not listed among the works eligible for special treatment as a work for hire under the second prong of the definition. See Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 375 (2002). Then, in 1999, at the recording industry’s behest, a Senate staffer inserted a provision into an unrelated satellite bill that added sound recordings. *Id.* Musicians erupted in protest. *Id.* at 375–76. A year later, Congress reversed the change and swept the whole thing under the rug by statute. 17 U.S.C. § 101 (2012) (“Paragraph (2) [of work for hire definition] shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.”); LaFrance, *supra*, at 375–76.

coherent copyright system.<sup>296</sup> But copyright is nothing if not a congeries of industry-specific tweaks. Copyrights in sound recordings do not include a right of public performance—except via digital audio transmission.<sup>297</sup> Architectural works under copyright have no protection against photographs or pictures that reproduce a building instantiating the work, so long as that building is publicly visible.<sup>298</sup> The first sale doctrine lets lawful purchasers rent movie DVDs, but not software DVDs.<sup>299</sup> A small cafe may show television programming on a set behind the bar, but a giant restaurant in Times Square may not—unless it complies with restrictions on the size and number of televisions and speakers.<sup>300</sup> Copyright is unprincipled: it is all about special pleading. Distortion of an elegant copyright system is not a risk—because it is already distorted.

Special pleading can have value. There are pragmatic considerations for treating DVDs of motion pictures and software code differently: the risk of widespread infringement is greater with the latter than the former.<sup>301</sup> The absence of a public performance right for sound recording copyrights originated in historical accident, but has come to make economic sense, as the payola scandals demonstrate.<sup>302</sup> The public performance right exceptions for restaurants and bars were found to violate World Trade Organization rules—yet America was content to pay a small penalty each year to protect small businesses.<sup>303</sup>

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296. See Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO STATE L.J. 1361, 1388–1400 (2009) (setting out theoretical framework supporting uniform IP rights across industries as default position); William Fisher III, *The Disaggregation of Intellectual Property*, HARVARD L. BULL. (2004), [http://www.law.harvard.edu/news/bulletin/2004/summer/feature\\_2-1.php](http://www.law.harvard.edu/news/bulletin/2004/summer/feature_2-1.php) (discussing and analyzing how IP law has varied by industry).

297. 17 U.S.C. § 114(a) (2012).

298. *Id.* § 120(a).

299. See *id.* § 109(b)(1)(A).

300. *Id.* § 110(5)(B)(ii).

301. John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 15 n.45, 72 (2004).

302. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 15–18 (1908); see Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622–23 (2001). On payola, see Krystal Conway, Comment, *The Long Road to Desuetude for Payola Laws: Recognizing the Inevitable Commodification of Tastemaking*, 16 SETON HALL J. SPORTS & ENT. L. 343, 347–54 (2006).

303. Panel Report, *United States—Section 110(5) of US Copyright Act*, WT/DS160/R (June 15, 2000), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm); see also *Section 110(5) of US Copyright Act*, U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/enforcement/>

Multiple authorship under the new 106B right may increase transaction costs by potentially requiring authorization from more than one party, but copyright law is no stranger to provisions that ineluctably increase transaction costs. The termination provisions by which an author can reclaim copyright, free from prior licenses or assignments, require multiple negotiations if one wishes to exploit a work for its entire term.<sup>304</sup> VARA mandates a separate contract for waiver of its moral rights provisions.<sup>305</sup> For U.S. works,<sup>306</sup> a plaintiff alleging infringement must register her work with the Library of Congress before bringing suit.<sup>307</sup> She must be sure to register within three months of first publication if she wishes to recover statutory damages from infringers.<sup>308</sup> All of these well-established copyright provisions increase transaction costs, but that is not the measure of their worth. The key, as with the new 106B right, is whether those costs are outweighed by their benefits.<sup>309</sup> For intimate media, the generative benefits of 106B should eclipse its costs. If the concern is that this Article's approach to authorship for intimate media will lead to a future filled with industry-specific, atomized copyright law—that future is already here, and is not necessarily undesirable.

Copyright's search for a single author often resembles Diogenes's search of Athens for an honest man: fruitless and faintly cynical.<sup>310</sup> Enabling copyright law to recognize multiple authors for intimate media improves the accuracy and generativity of the doctrine.

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dispute-settlement-proceedings/united-states-%E2%80%94-section-1105-us-copyright-ac (last visited Apr. 20, 2014).

304. 17 U.S.C. § 203(a)(3) (2012) (enabling author to terminate transfer or license during five-year period beginning thirty-five years from date of execution or publication); see *Scorpio Music S.A. v. Willis*, No. 11cv1557 BTM (RBB), 2012 U.S. Dist. LEXIS 63858, at \*4–13 (S.D. Cal. May 7, 2012) (discussing need for music label to negotiate with each joint author who had transferred copyright interest separately).

305. 17 U.S.C. § 106A(e)(1) (2012).

306. *Id.* § 101 (defining “United States work”).

307. *Id.* § 411(a).

308. *Id.* § 412(2).

309. See, e.g., Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345, 359–61 (2008) (critiquing transaction cost tradeoff for derivative works right); Landes & Posner, *supra* note 69, at 331–32 (discussing transaction costs of copyright law overall).

310. See Leon R. Kass, *Looking for an Honest Man*, NAT'L AFFAIRS, Fall 2009, at 160, 162.

## B. FIRST AMENDMENT

Copyright law both censors and promotes speech.<sup>311</sup> This brings the doctrine inevitably into conflict with the First Amendment's protection for free expression. Intimate media, and this Article's proposal for them, point up unresolved tensions in doctrinal and scholarly treatment of the copyright/First Amendment intersection. Recent Supreme Court precedent is highly permissive towards Congressional regulation of copyrightable works, engaging only in rational review unless the statute touches upon the "traditional contours" of copyright law.<sup>312</sup> Scholars have responded with a mix of criticism towards the Court's approach and confidence that the First Amendment still has a meaningful role in checking copyright. This subsection uses intimate media to explore the uncertain terrain of the First Amendment and copyright's "traditional contours."

Copyright itself can be seen as a form of content-based restriction: it targets specified types of speech, and prohibits (via injunctive relief,<sup>313</sup> potentially harsh statutory damages,<sup>314</sup> and even criminal penalties,<sup>315</sup>) copying, distributing, adapting, or publicly performing or displaying that speech.<sup>316</sup> Read the Federalist Papers aloud on Boston Common and you are a patriot; read Richard Brookhiser's biography of James Madison aloud in the same place and you are an infringer.<sup>317</sup> And yet, so long as Congress respects the (minimal) constitutional bounds on its legislative powers under the IP Clause, judicial review of its policies is extraordinarily deferential given the speech interests

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311. See, e.g., *Golan v. Holder*, 132 S. Ct. 873, 890–91 (2012); David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1398–99 (2009); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 538–45 (2004).

312. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (stating when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary").

313. 17 U.S.C. § 502(a) (2012).

314. *Id.* § 504(c).

315. 18 U.S.C. § 2319 (2012).

316. See *Golan*, 132 S. Ct. at 889 ("[S]ome restriction on expression is the inherent and intended effect of every grant of copyright . . ."). There is a rich scholarly literature on this topic. See, e.g., Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) [hereinafter Netanel, *Locating Copyright*].

317. See RICHARD BROOKHISER, *JAMES MADISON* (2013).

at stake.<sup>318</sup> So long as Congress leaves the idea-expression dichotomy and fair use untouched,<sup>319</sup> other statutory provisions draw mere rational review.<sup>320</sup> The courts defer to legislative judgment as to what set of rights best encourages the creation and dissemination of copyright-eligible information, even if the statutory connection to incentives is quite attenuated. Thus, Congress can lawfully keep copyrighted works from moving into the public domain for an additional twenty years,<sup>321</sup> and can retract works from the public domain to place them under copyright protection.<sup>322</sup> The former might, the Court has held, encourage dissemination of existing works<sup>323</sup> (for it could not encourage production of extant expression).<sup>324</sup> The latter might, via compliance with international obligations, improve protection of American works abroad, thereby augmenting incentives to produce them.<sup>325</sup> Similarly, Congress could strengthen the distribution right for software and sound recordings beyond the protections available for other works.<sup>326</sup> When it thinks it necessary, Congress can even create new rights, such as VARA's moral rights,<sup>327</sup> or the DMCA's right of access for works safeguarded by technological protection measures.<sup>328</sup> In short, Con-

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318. See *Eldred v. Ashcroft*, 537 U.S. 185, 221 (2003); Netanel, *First Amendment Constraints*, *supra* note 178, at 1101; Netanel, *Locating Copyright*, *supra* note 316, at 3 (“[C]ourts have almost never imposed First Amendment limitations on copyright.”).

319. *Golan*, 132 S. Ct. at 890–91.

320. *Id.* at 889 (holding challenged statute “falls comfortably within Congress’s authority under the Copyright Clause” because “Congress rationally could have concluded that adherence to Berne ‘promotes the diffusion of knowledge’”).

321. *Eldred*, 537 U.S. at 186.

322. *Golan*, 132 S. Ct. at 884–87.

323. *Eldred*, 537 U.S. at 206–07.

324. *Id.* at 257 (Breyer, J., dissenting).

325. *Golan*, 132 S. Ct. at 889.

326. See *supra* note 193.

327. 17 U.S.C. § 106A(a) (2012).

328. *Id.* § 1201(a)(1)(A). While § 1201(c)(1) states that the DMCA does not affect the scope of copyright entitlements or fair use, the circuit courts of appeal have split on whether a fair use defense is available against a § 1201(a)(1)(A) claim. See, e.g., *MDY Indus. v. Blizzard Entm’t*, 629 F.3d 928, 952 (9th Cir. 2011) (“Congress created a distinct anti-circumvention right under § 1201(a) without an infringement nexus requirement.”); *Universal City Studios v. Corley*, 273 F.3d 429, 443–44 (2d Cir. 2001). *But see* *Chamberlain Grp. v. Skylink Techs.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004) (requiring a nexus between circumvention and infringement). Either fair use is a defense to circumvention, or the DMCA creates a new right under copyright. See Netanel, *First Amendment Constraints*, *supra* note 178, at 1113–20. Neil Netanel ar-

gressional power to shape copyright is nearly unchecked.<sup>329</sup> Should the legislature decide that intimate media require the addition of the proposed 106B right, the courts are unlikely to second-guess that judgment.

And yet, this Article's proposal highlights tensions with the First Amendment by pressing against the uncertain boundaries of one of copyright's "traditional contours": fair use.<sup>330</sup> Scholars disagree strongly on how sufficient the traditional contours are to accommodate First Amendment interests. Neil Netanel argues that they track Melville Nimmer's influential "definitional balancing" approach, under which courts weigh non-speech interests against speech burdens, and promulgate categories of speech that are protected along with those that may be regulated.<sup>331</sup> For Netanel, the traditional contours create significant, underappreciated limits on Congressional power to regulate speech.<sup>332</sup> In contrast, David Olson argues that the legislation upheld in *Golan* is not only invalid under the First Amendment, since it fails to encourage the creation or dissemination of new knowledge, but does not even satisfy the IP Clause's internal requirement that legislation promote the progress of science.<sup>333</sup> Mark Bartholomew and John Tehranian contend that the challenges of separating idea from expression make that distinction an inadequate protection for free speech.<sup>334</sup> And fair use, they argue, has been applied to expand copyright, not to constrain it.<sup>335</sup> And finally, for Jennifer Rothman, the First Amendment has simply failed as a check on copyright law; scholars and advocates should explore other limiting principles, such as substantive due process and liberty interests.<sup>336</sup>

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gues that fair use must, on First Amendment grounds, operate as a defense.  
*Id.*

329. Netanel, *First Amendment Constraints*, *supra* note 178, at 1084–86.

330. *Golan*, 132 S. Ct. at 890–91.

331. Netanel, *First Amendment Constraints*, *supra* note 178, at 1084–87 (citing Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970)).

332. *Id.* at 1128.

333. David S. Olson, *A Legitimate Interest in Promoting the Progress of Science: Constitutional Constraints on Copyright Laws*, 64 VAND. L. REV. EN BANC 185, 194–98 (2011).

334. Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 12 (2013).

335. *Id.*

336. Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 493–503 (2010).

This Article's proposal tests these competing perspectives. It explores whether the traditional contours—in particular, fair use—are to be evaluated substantively or formalistically. The new 106B right is not subject to fair use.<sup>337</sup> However, it does have a newsworthiness provision that provides robust free speech protection, modeled on similar provisions in other IP doctrines.<sup>338</sup> Formalistically, then, 106B should face heightened scrutiny since it transgresses the prohibition on removing fair use protections. This Article argues, though, that the newsworthiness exception to the 106B rights should suffice substantively to accommodate First Amendment interests. If it does not, then either formalism has overtaken free speech analysis in copyright, or similar protections in other doctrines such as the privacy torts and right of publicity are suspect as well.

While the newsworthiness defense is not co-extensive with fair use, it is also not necessarily inferior to it. A parodic, non-consensual use of a naked photograph of an identifiable person would not be likely to be considered newsworthy, particularly where there was no issue of public concern related to the photo.<sup>339</sup> Parody, by contrast, is a paradigmatic fair use.<sup>340</sup> The unauthorized use of a photograph of two recognizable people in an advertising campaign against same-sex marriage would likely constitute copyright infringement, not fair use;<sup>341</sup> however, the advertiser would probably escape liability under newsworthiness since the use would not count as commercial.<sup>342</sup> The newsworthiness exception in 106B cannot be dismissed as an inadequate subset of fair use. Rather, it seeks to protect free expression via a different mechanism.

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337. See *infra* Appendix A.

338. See *infra* Appendix A.

339. See, e.g., *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978).

340. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Leibovitz v. Paramount Pictures*, 137 F.3d 109, 112 (2d Cir. 1998).

341. Cf. *Ringgold v. Black Entm't Television*, 126 F.3d 70, 71–72 (2d Cir. 1997) (reversing the district court's determination that a fair use defense was warranted in a copyright suit involving use of an artistic poster on a television set); *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992) (finding that no reasonable jury could find permissive fair use because the copied work included “the essence of the photograph”).

342. See *Raymen v. United Senior Ass'n, Inc.*, 409 F. Supp. 2d 15, 22 (D.D.C. 2006) (finding no liability since, under Restatement (Second) of Torts § 652C, there is no violation “when a person's picture is used to illustrate a noncommercial, newsworthy article” (quoting *Martinez v. Democrat-Herald Publ'g Co.*, 669 P.2d 818, 820 (Or. Ct. App. 1983))).

Newsworthiness has been held adequate to the task of safeguarding the First Amendment in other intellectual property doctrines, and in tort law. This suggests that, even under heightened scrutiny, the new 106B right should survive substantive analysis. Consider the human cannonball. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court permitted a performer's claim of infringement of his right of publicity when a local television station filmed his entire fifteen-second performance, during which he was shot out of a cannon into a distant net.<sup>343</sup> The station relied upon First Amendment privilege to defeat Zacchini's claim.<sup>344</sup> Zacchini's performance was not fixed with his authorization (he expressly instructed the television reporter not to record), and thus he could not assert a federal copyright claim.<sup>345</sup> While the Court repeatedly drew analogies to copyright doctrine,<sup>346</sup> it analyzed the scope of the news reporting exception to Zacchini's state law right of publicity claim.<sup>347</sup> The majority opinion recognized the need for First Amendment accommodation via the exception, but nonetheless found that the broadcast exceeded it.<sup>348</sup> Doctrinally, though, newsworthiness sufficed to protect free speech interests. The Court has ruled similarly in other IP contexts, such as anti-sound recording piracy laws<sup>349</sup> and trade secret laws.<sup>350</sup>

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343. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563–66 (1977) (5-4 decision). While the Supreme Court of Ohio treated Zacchini's claim as one sounding in tort, it explained that the core of the injury was to his "personal control over commercial display and exploitation of his personality and the exercise of his talents." *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 459 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977). The right of publicity is thus conceptually similar to intellectual property, and indeed Ohio's statutory version of the right treats it as such. OHIO REV. CODE ANN. §§ 2741.01–99 (LexisNexis 2008 & Supp. 2012).

344. *Zacchini*, 433 U.S. at 565.

345. *Id.* at 563–64; see 17 U.S.C. § 102(a) (2012) (requiring copyrightable subject matter to be "fixed in any tangible medium of expression").

346. *Zacchini*, 433 U.S. at 575–77.

347. *Id.* at 569 ("The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity.").

348. *Id.* at 578–79.

349. *Goldstein v. California*, 412 U.S. 546, 571 (1973) (5-4 decision). Appellate courts have upheld the federal anti-bootlegging statute, 18 U.S.C. § 2319A, which prohibits unauthorized recording of live musical performances, without reaching First Amendment considerations. See, e.g., *United States v. Martignon*, 492 F.3d 140, 153 (2d Cir. 2007) (remanding to the district court to consider the First Amendment argument); *United States v. Moghadam*, 175 F.3d 1269, 1281–82 (11th Cir. 1999) (analyzing the statute under the Copyright Clause and the Commerce Clause).

There is analogous precedent on the topic of intimate media and newsworthiness. Nancy Benoit was a model and professional wrestler who was murdered by her husband, Chris Benoit.<sup>351</sup> Early in her career, Benoit had posed for nude photos, which she believed had been destroyed at her request.<sup>352</sup> They were not. After her death, *Hustler* magazine published the photos, along with a minimal story about Benoit's career and the murder case.<sup>353</sup> Her family sued based on infringement of Benoit's right of publicity under Georgia law.<sup>354</sup> The Eleventh Circuit noted that Georgia had adopted the newsworthiness exception to protect freedom of speech.<sup>355</sup> The court analyzed the interaction between the article (clearly newsworthy) and the photographs (clearly not), to see if the aggregate merited protection.<sup>356</sup> It did not—the court held that “the article was incidental to the photographs,” and hence could not immunize them.<sup>357</sup> Courts have similarly treated the newsworthiness exception as a sufficient First Amendment safeguard in other tort contexts, such as with invasion of privacy via public disclosure of private facts.<sup>358</sup>

While 106B departs from copyright's traditional contours by omitting fair use as a defense, it ought to survive substantive First Amendment scrutiny. If it does not, copyright is left with an uncomfortable dilemma: either the line of cases finding newsworthiness to be adequate free speech protection in other contexts is misguided, or fair use must be analyzed formalistically. In any event, review of 106B's newsworthiness exception is likely to elucidate the values and parameters at play when

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350. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478–79 (1974).

351. See *Toffoloni v. LFP Publ'g Grp.*, 572 F.3d 1201, 1204 (11th Cir. 2009); Philip Caulfield, *Family of Nancy Benoit, Killed by Wrestler Husband Chris Benoit, Battles Hustler in Court*, N.Y. DAILY NEWS (Jan. 26, 2012, 9:00 AM), <http://www.nydailynews.com/news/national/family-nancy-benoit-killed-wrestler-husband-chris-benoit-battles-hustler-court-article-1.1012181>.

352. *Toffoloni*, 572 F.3d at 1204.

353. *Id.* at 1209–10.

354. *Id.* at 1204.

355. *Id.* at 1208.

356. *Id.* at 1209–10.

357. *Id.* at 1209. The court used the phrase “legitimate public concern,” *id.* at 1208 (quoting *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998)), to distinguish newsworthy information from that which merely involved “morbid and sensational prying into private lives for its own sake.” *Id.* at 1211 (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. h (1977) (defining tort of unlawful publication of private facts)).

358. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975); *Supple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 667–68 (Cal. Ct. App. 1984).

courts assess the interplay between the First Amendment and copyright.

#### IV. ALTERNATIVES

There are at least two alternatives to this Article's IP-based approach to the issues surrounding intimate media, each drawing upon a different doctrinal heritage. The first is criminal law; the second is privacy law. This Section briefly analyzes each, and suggests reasons why this Article's proposal is preferable.

##### A. CRIMINAL LAW

Some scholars would prefer to deploy federal criminal law to deal with non-consensual distribution of intimate media.<sup>359</sup> For example, Mary Anne Franks, Danielle Citron, and Jacqueline Lipton look to federal cyberstalking, sexual harassment, and hate crime legislation as models.<sup>360</sup> Citron and Franks advocate new federal legislation that specifically criminalizes revenge porn.<sup>361</sup> These scholars point to a number of benefits of this approach. From a utilitarian perspective, criminal law could achieve greater deterrence.<sup>362</sup> The threat of prison will deter the risk-averse and the judgment-proof.<sup>363</sup> The state's investigative powers dwarf those of a private litigant, making detection and enforcement more certain.<sup>364</sup> The stigma that attaches to criminal sanctions serves important expressive values about how society views the conduct of those who distribute intimate

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359. Section 230 preempts state criminal law, so a federal statute would be needed. 47 U.S.C. § 230(e)(1), (e)(3) (2012). New Jersey's statute is often cited as a model for federal law. N.J. STAT. ANN. § 2C:14-9(b)-(c) (2013); see, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. (forthcoming 2014) (manuscript at 20-22, 25-27), available at <http://ssrn.com/abstract=2368946> (discussing New Jersey's revenge porn statute and proposing a federal criminal statute addressing the problem).

360. Citron, *supra* note 171, at 89-95; Franks, *supra* note 3, at 657-71; Lipton, *supra* note 128, at 1118-22.

361. Citron & Franks, *supra* note 359 (manuscript at 25-27). The authors also propose a model state statute to address the problem. *Id.*

362. See Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <http://www.concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html>; Lipton, *supra* note 128, at 1117-18.

363. Cf. Lipton, *supra* note 128, at 1117, 1131 (emphasizing the benefits of criminal over civil law in this context).

364. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 598-600 (2012).

media without subjects' permission.<sup>365</sup> Finally, and most instrumentally, federal criminal law is exempt from Section 230's safe harbor, meaning that pressure can be brought to bear on Internet intermediaries.<sup>366</sup>

Federal criminal law may help, but there are reasons to be skeptical, and in particular to prefer an IP-based approach. First, deterrence may be greater under a system of private enforcement than public enforcement. While risk-neutral infringers would rationally calculate their expected penalties, in practice people tend to respond more to levels of enforcement (the chance of being caught) rather than the level of sanctions or expected penalty.<sup>367</sup> Enforcement levels—and hence deterrence—are likely to be greater under a private law regime than a public law one.<sup>368</sup> Federal prosecutors face resource constraints—pressures from national security, narcotics, organized crime, and white collar crime investigations are likely to swamp efforts to prosecute revenge porn. Consider again enforcement of criminal statutes for intellectual property: despite well-funded, motivated interest groups supporting more prosecutions, and despite passage of a statute with specific resources devoted to IP enforcement, such cases are still unusual for a U.S. 'Attorney's docket.<sup>369</sup> While private litigants face limits on

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365. See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594–601 (1996) (discussing the expressive role of criminal punishment).

366. 47 U.S.C. § 230(e)(1) (2012).

367. See, e.g., Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 207–08 (2012) (explaining the relationship between various insurance options and drivers' choices); Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 J.L. & ECON. 863, 883–84 (2011) (proposing a relationship between traffic fines, safe driving, and automobile accidents); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copy-right Law*, 21 BERKELEY TECH. L.J. 651, 661–64 (2006) (“Many studies find very little or no deterrent effect at all from increasing the level of enforcement or penalties.”).

368. Private enforcement is common, and successful, in other areas, such as under the False Claims Act. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1244 (2012).

369. U.S. DEP'T OF JUSTICE, *supra* note 157, at 31. Congress passed the PRO IP Act in 2008, Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256, 4256 (2008), when the Department of Justice charged 259 defendants in 197 cases. U.S. DEP'T OF JUSTICE, *supra* note 157, at 31. Only once in the next four years (2010) did the Department charge as many defendants (259, again), and never again did it

their financial resources and willingness to pursue litigation, the availability of statutory damages under this Article's proposal mitigates the former, and it is not clear why victims' willingness to pursue relief would be less under a copyright system than a criminal one.

Moreover, at present the limit on criminal efforts against non-consensual distribution appears to be law enforcement interest rather than inadequate tools. Danielle Citron documents extensively the resistance from police and prosecutors to tackle infringement such as revenge porn, even when there are statutes that clearly criminalize the conduct at issue.<sup>370</sup> Norms predominate: prosecutors are, at present, generally unwilling to pursue cases of non-consensual distribution.<sup>371</sup> Indeed, the revenge porn prosecution of Holly Jacobs's stalker has drawn media attention precisely because it is so unusual.<sup>372</sup> Enacting a new statute will not shift prosecutorial behavior. And if an online civil rights effort changes how U.S. Attorneys approach unauthorized distribution of intimate media, new laws may be superfluous.<sup>373</sup> It seems preferable to rely on distributed private enforcement rather than scarce, and perhaps unwilling, federal prosecutors.

The stigma of criminal sanctions has drawbacks as well as benefits. A criminal statute would impose sanctions upon use and distribution of truthful information. The courts have traditionally scrutinized such laws with particular care.<sup>374</sup> And, the

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bring as many cases. *Id.* As for results: in 2008, 242 defendants were sentenced. In the next four years, that number steadily fell (except for a one defendant increase from 2010 to 2011), reaching 202 defendants in 2012. *Id.* These numbers comprise a small fraction of the Department's caseload; in fiscal year 2012, the Department charged a total of 63,118 criminal cases against 85,621 defendants. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS ANNUAL STATISTICAL REPORT, FISCAL YEAR 2012, at 6 (2012), available at [http://www.justice.gov/usao/reading\\_room/reports/asr2012/12statrpt.pdf](http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf).

370. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (forthcoming 2014) (manuscript at 85–93) (on file with author).

371. See, e.g., Tracy Clark-Flory, *Criminalizing "Revenge Porn,"* SALON.COM (Apr. 6, 2013, 8:00 PM), [http://www.salon.com/2013/04/07/criminalizing\\_revenge\\_porn/](http://www.salon.com/2013/04/07/criminalizing_revenge_porn/); Roy, *supra* note 23. See generally CITRON, *supra* note 370, at 85 ("Prosecutors undercharge or, worse, refuse to charge perpetrators.")

372. See Roy, *supra* note 23 (describing prosecution of Jacobs's ex-boyfriend as "the first time a victim has ever filed a criminal suit against her ex for distributing revenge porn").

373. See CITRON, *supra* note 370 (manuscript at 85–93).

374. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (finding the Stolen Valor Act unconstitutional); *Ashcroft v. ACLU*, 535 U.S. 564, 575–85 (2002) (scrutinizing the Child Online Protection Act); *Reno v. ACLU*,

trend runs towards increasing scrutiny—towards greater skepticism about laws that ban information.<sup>375</sup> Under Chief Justice John Roberts, the Supreme Court has been especially rigorous about evaluating laws that also made strong claims to tangible harms, from bans on crush videos involving the torture of animals,<sup>376</sup> to limits on violent video games due to negative effects on minors,<sup>377</sup> to tort liability for the deliberate infliction of emotional distress upon a deceased veteran's family during his funeral procession,<sup>378</sup> and to limits on government funding based on the need to reduce prostitution as a means of fighting the spread of HIV/AIDS.<sup>379</sup> Even revenge porn, despicable as it is, does not fall within the few categories of unprotected expression that the government may regulate at will.<sup>380</sup> Criminal law prohibiting non-consensual distribution may not survive First Amendment review. An IP-based regime is the safer, and likely more effective, option.

Lastly, federal intellectual property law is also exempt from the CDA 230 safe harbor,<sup>381</sup> criminal law has no comparative advantage here. By contrast, state criminal law is preempted by Section 230.<sup>382</sup> California's new revenge porn statute, for example, can create liability for people who initially distribute intimate media, but it cannot affect intermediaries.<sup>383</sup>

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521 U.S. 844, 870–75 (1997) (finding the Communications Decency Act unconstitutionally vague). *See generally* Village of Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489, 498–99 (1982) (“The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”); Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1010–13 (2012) (discussing the Court's treatment of statutes criminalizing speech).

375. *See* Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 409–10 (2013).

376. *United States v. Stevens*, 559 U.S. 460, 481–82 (2010).

377. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011).

378. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

379. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2332 (2013).

380. *Brown*, 131 S. Ct. at 2734. *But see* Collins, *supra* note 375, at 416–37 (agreeing that the Roberts Court has tightened categories of unprotected speech, but listing forty-three examples of types of speech that appear to be unprotected).

381. 47 U.S.C. § 230(e)(2) (2012).

382. *Id.* § 230(e)(3).

383. CAL. PENAL CODE § 647(j)(4) (2014). The law is relatively weak even for initial distributors. *See* Derek Bambauer, *California's New Revenge Porn*

Overall, while using federal criminal law to combat non-consensual distribution of intimate media may be beneficial, it is likely that this Article's IP-based approach is even more so.

## B. PRIVACY LAW

Privacy law dominates discussions around the production and misuse of intimate media. Intuitively, privacy doctrine has considerable appeal: there is something sordid and voyeuristic about the unauthorized viewing of people captured in intimate, vulnerable moments. However, privacy-based approaches share common failings, one theoretical and two practical.

The theoretical failing of privacy law's framework is that it does not take seriously the benefits of intimate media. Privacy, on this issue, is entirely about preventing harm to victims of unauthorized sharing.<sup>384</sup> That impulse is admirable, but it ignores another valuable consideration: structuring a legal regime to encourage the production and sharing of intimate media among consenting partners. The virtue of this Article's approach is that it addresses both: it creates a generative regime for intimate media, while reducing harm by punishing it as copyright infringement. And, copyright law operates in practice like a privacy regime more often than either privacy or IP scholars might like to admit.<sup>385</sup> Howard Hughes bought the copyright of a critical biography so that he might suppress it.<sup>386</sup> J.D. Salinger used copyright to quash quotations from his papers.<sup>387</sup> Hulk Hogan sued to stifle his sex tape.<sup>388</sup> In some contexts, copyright law can replace privacy law. It should do so

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*Bill: Helpful-ish*, INFO/LAW (Oct. 2, 2013), <http://blogs.law.harvard.edu/info/law/2013/10/02/californias-new-revenge-porn-bill-helpful-ish>.

384. See, e.g., Franks, *supra* note 93 (highlighting the problematic trend of blaming victims of revenge porn privacy invasions); Kim, *supra* note 14, at 1006 (pointing to privacy law as a primary source of remedies for online harassment victims).

385. See, e.g., Eric Goldman, *The Dangerous Meme That Won't Go Away: Using Copyright Assignments to Suppress Unwanted Content—Scott v. WorldStarHipHop*, TECH. & MARKETING L. BLOG (May 14, 2012), [http://blog.ericgoldman.org/archives/2012/05/the\\_meme\\_that\\_w.htm](http://blog.ericgoldman.org/archives/2012/05/the_meme_that_w.htm) (arguing "we need to vigilantly monitor the ecosystem for potential abuses" of copyright as a privacy mechanism).

386. *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 305 (2d Cir. 1966).

387. *Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir. 1987).

388. Brown, *supra* note 235. Hogan relied on the right of privacy in asserting his claim. *Id.*

here, since it addresses both the virtues and demerits of intimate media.

The first practical hurdle for privacy doctrine is the immunity conferred by Section 230 on intermediaries. While the initial revelation of intimate media likely causes some harm, the greater harm comes from the public availability and ongoing sharing of these media.<sup>389</sup> Privacy laws, with the important exception of federal criminal ones,<sup>390</sup> do not apply secondarily to websites, search engines, or other intermediaries.<sup>391</sup> Privacy scholars typically respond by seeking to circumvent Section 230 or by seeking to change it.<sup>392</sup> Circumvention exists, but is rare. While there are cases successfully bypassing immunity based on privacy claims—typically, on the theory developed by the Ninth Circuit that the website has contributed to the development of the content<sup>393</sup>—they are the exceptions that prove the rule.<sup>394</sup> Alteration or repeal of Section 230 is a hardy perennial of privacy scholars and of state legislators.<sup>395</sup> Thus far, efforts to alter the 230 safe harbor have proved politically nonviable, and if successful, would clearly come at some costs to intermediar-

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389. As Mary Anne Franks writes, “the priority of most victims is to have the material removed, not to recover damages.” Franks, *supra* note 362.

390. 47 U.S.C. § 230(e)(1) (2012).

391. *See, e.g.*, Parker v. Google, Inc., 242 F. App’x 833, 838 (3d Cir. 2007) (per curiam) (finding privacy claims against search engines barred under Section 230); Gavra v. Google, Inc., No. 5:12-CV-06547-PSG, 2013 WL 3788241, at \*1 (N.D. Cal. July 17, 2013) (“Congress gave [Google] a pass when it enacted Section 230 of the Communications Decency Act of 1996.”); Goldman, *Unregulating*, *supra* note 172, at 59–61 (explaining Section 230’s immunity for websites that host user generated content such as Facebook).

392. *See, e.g.*, Citron, *supra* note 13 (proposing an amendment to Section 230); Kim, *supra* note 14, at 997 (“[T]he immunity granted to them under section 230 . . . should not mean that Web site sponsors should be free from all liability for harm arising from their businesses.”).

393. Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1165–68 (9th Cir. 2008) (en banc).

394. *See, e.g.*, Jones v. Dirty World Entm’t Recordings, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011) (“The immunity afforded by the CDA is not absolute and may be forfeited if the site owner invites the posting of illegal materials.”); Gauck v. Karamian, 805 F. Supp. 2d 495, 500 n.4 (W.D. Tenn. 2011) (pointing to the defendant’s invocation of Section 230’s immunity provision). *See generally* Ardia, *supra* note 24 (analyzing courts’ treatment of Section 230 since its enactment).

395. *See, e.g.*, Mike Masnick, *State Attorneys General Want to Sue Innovators “For The Children!”*, TECHDIRT (July 24, 2013 1:08 PM), <http://www.techdirt.com/blog/innovation/articles/20130724/12345123927/state-attorneys-general-want-to-sue-innovators-children.shtml> (describing proposed legislation to eliminate Section 230’s protections for Internet intermediaries).

ies and innovation.<sup>396</sup> Section 230 is a barrier, but it is one worth keeping.

The second practical failing is that, even if Section 230 were modified, privacy law may not be able to hold intermediaries liable for non-consensual distribution of intimate media without running afoul of the First Amendment. The First Amendment generally protects expression against government efforts to ban redistribution of it, unless that expression falls outside the category of “speech.”<sup>397</sup> For example, a radio station that broadcasts an illegally wiretapped conversation may not be held liable, even though the person who initially taped the content could be prosecuted, and even when the radio station knew the taping was unlawful.<sup>398</sup> A newspaper that publishes the name of a minor who was raped cannot be subject to damages under a shield law forbidding publication of the identities of victims of sexual offenses.<sup>399</sup> A media outlet that identifies, in contravention of the law, a minor charged with murder cannot be prosecuted.<sup>400</sup> The trend line is clear: those who disclose initially can be held liable, but intermediaries who republish cannot. This is a significant—if not insurmountable—hurdle for privacy law to overcome.

While appealing at first blush, privacy law not only faces doctrinal challenges to achieving its ends, but those ends are

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396. See, e.g., Goldman, *Unregulating*, *supra* note 172 (arguing that any new exceptions to Section 230 would undercut important benefits of the immunity); James Grimmelmann, *Don't Censor Search*, 117 YALE L.J. POCKET PART 48, 48–51 (2007), available at <http://yalelawjournal.org/images/pdfs/582.pdf> (critiquing proposals to make search engines more accountable for harmful web content); Lemley, *supra* note 172 (emphasizing the importance of safe harbors for Internet intermediaries and advocating a more unified rule to ensure protection).

397. The categories of expression that are not speech, and hence are beyond any constitutional check save viewpoint discrimination, are clearly closed at this point. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (“[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”). Revenge porn, or other nonconsensual intimate media, must therefore fit within one of the existing categories (such as obscenity), or its regulation must survive scrutiny. See *id.* at 2733–41.

398. *Bartnicki v. Vopper*, 532 U.S. 514, 517–22, 534–35 (2001).

399. *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471, 496–97 (1975) (“[T]he First and Fourteenth Amendment will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.”).

400. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 98, 105–06 (1979).

insufficient: they fail to take account of the benefits of consensual sharing of intimate media.

### CONCLUSION

Blame smartphones.

Whether Apple, Android, or Windows, smartphones today share two key traits: they have cameras, and they are networked.<sup>401</sup> These characteristics explain the rise of amateur-generated intimate media, and of its non-consensual distribution. The costs of production and distribution of this type of information—as with everything digital—have plummeted. Creating an explicit photo can be done easily, impulsively. And the device that snaps the photo can share it as well. The cost of distributing analog photos was an effective barrier to most non-consensual sharing; it was simply too much work. Even digital cameras required a USB cable, a computer, and a separate Internet connection before media could be distributed via the Internet. But, as sexting proves, the smartphone has made intimate media ubiquitous.

Yet this Article comes to praise this change, not to bury it. Intimate media generate significant, important benefits for partners who use such images and video consensually. Recognizing that value is the key insight into why intellectual property law is best suited to tackle the challenges raised by non-consensual distribution. Creating a right for identifiable subjects of intimate media to block unconsented sharing and display effectively curbs infringement, empowers people, creates incentives for production, and avoids disturbing both the First Amendment and settled Internet law. Ultimately, this Article's reform to copyright law enhances autonomy and generativity—it enables us to meaningfully choose to whom we are exposed.

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401. See generally Heather Kelly, *How Much Better Can Smartphone Cameras Get?*, CNN.COM (July 16, 2013, 1:53PM), <http://www.cnn.com/2013/07/16/tech/gaming-gadgets/smartphone-cameras-future> (summarizing qualities of modern smartphones and emphasizing the importance of camera features).

## Appendix A

## Proposed Text for Model Legislation

**A Bill**

*To protect the consensual creation and sharing of intimate media.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

## Section 1. Short Title; Definitions.

- (a) This Act may be cited as the “Strengthening Healthy and Responsible Exchange of Intimate Media Act,” or the “SHARE IT Media Act.”
- (b) Section 101 of title 17, United States Code, is amended by inserting the following:

A ‘work of intimate media’ is either a photograph (as defined herein under ‘pictorial, graphic, and sculptural works’) or an audiovisual work that:

- 1) Contains an image that captures the body of one or more living humans;
- 2) Captures intimate information; and
- 3) Enables one or more of the living humans captured in it to be reasonably identified, such as by capturing identifiable features or markings, by accurately labeling the human or humans, or by providing other identifying information in or accompanying the work.

‘Intimate information’ is one or more of the following:

- 1) Sexually explicit conduct, as defined in 18 U.S.C. 2256(2)(B)(i) & (ii);
- 2) Depiction of a living human’s genitals or pubic area, as defined by the term “graphic” in 18 U.S.C. 1466A(f)(3); or
- 3) The exposed nipple or areola of a living human female.

Section 2. Rights in Intimate Media.

Title 17 of United States Code is amended by inserting after section 106A the following:

Section 106B. Rights in Intimate Media.

- (a) A living human captured in a work of intimate media, where that work includes intimate information pertaining to that person, shall have the rights
  - 1) To authorize the distribution of that work, or of any copies of it, and
  - 2) To authorize the display or performance of that work, or of any copies of it.
- (b) The rights in subsection (a) are independent of, and in addition to, the rights conferred by Section 106.
- (c) Section 109(c) of this title does not apply to the rights in subsection (a) above.
- (d) The rights conferred by subsection (a) may not be transferred. These rights may be waived if the owner of the rights in subsection (a) expressly agrees to such waiver in a written instrument signed by the owner. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.
- (e) Notwithstanding the provisions of subsection (a), a person shall not be liable for infringement of that provision for the display, distribution, or performance of a work of intimate media if:
  - 1) That person received the work, or a copy of it, from a living human captured in the work whose intimate information is captured in the work, and

- 2) Only that person views the performance or display of the work, or a copy of it.

This subsection shall operate as an affirmative defense to liability for infringement.

- (f) Anyone who violates the rights in subsection (a) is an infringer of the owner of the rights. For purposes of Section 106B, a plaintiff must establish the following elements to establish liability for infringement:
  - 1) The work in suit is a work of intimate media;
  - 2) The plaintiff was captured in that work;
  - 3) That work contains intimate information pertaining to the plaintiff;
  - 4) A reasonable person could identify the plaintiff based on the work, and information accompanying it; and
  - 5) The defendant displayed, distributed, or performed the work.

For purposes of this subsection, 'distribution' includes making the work, or a copy of it, available, and does not require proof that anyone actually obtained access to that work, or a copy of it.

- (g) For purposes of this subsection, an infringer who is a service provider, as defined in 17 U.S.C. 512(k)(1)(B), infringes by distributing the work, or a copy of it, by hosting it (as defined in 17 U.S.C. 512(c)), linking to it (as defined in 17 U.S.C. 512(d)), or caching it (as defined in 17 U.S.C. 512(b)), among other modes of distribution.
- (h) This Section shall apply only to works of intimate media created on or after the effective date of the legislation enacting the SHARE IT Media Act.
- (i) A plaintiff who proves infringement, as defined in subsection (f), shall be entitled to the reme-

dies in Sections 502–505, except as otherwise provided in this Section.

- (j) A plaintiff who proves infringement, as defined in subsection (f), shall be entitled to recovery of costs and reasonable attorney’s fees as defined in Section 505, unless the district court finds, and supports with specific findings, that such an award is not in the interests of justice.
- (k) A plaintiff who proves infringement, as defined in subsection (f), and who obtains an injunction as provided in Section 502(a), shall be entitled to removal and deletion of all digital copies of infringing works under the defendant’s control, and to destruction of all physical copies of infringing works under the defendant’s control, as provided in Section 503(a)(1), unless the district court finds, and supports with specific findings, that such relief is not in the interests of justice.
- (l) The first clause of Section 411 is edited to read as follows:

“Except for an action brought for violation of the rights of the author under sections 106A(a) and 106B(a)”
- (m) It is not an infringement of the rights in subsection (a) to perform, distribute, or display a work of intimate media if
  - 1) Such performance, distribution, or display is newsworthy, or
  - 2) The defendant has obtained express written consent from the plaintiff to the performance, distribution, or display at issue.

A newsworthy performance, distribution, or display must be one where the work of intimate media at issue is a matter of public concern. To evaluate whether the work is a matter of public concern, a district court may consider the Restatement (Se-

cond) of Torts, section 652D (1977), and related precedent.

(n) Section 107 is not a defense to infringement of the rights in subsection (a). In a suit for infringement of the rights in subsection (a), a district court shall not consider Section 107.

(o) Safe harbor -

- 1) A service provider, as defined in 17 U.S.C. 512(k)(1)(B), shall not be liable for monetary relief, or, except as provided herein, for injunctive or other equitable relief, for infringement of the rights in subsection (a) by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider
  - A. does not have actual knowledge that the material or an activity using the material on the system or network infringes the rights in subsection (a), and
  - B. upon notification of claimed infringement as described in paragraph (2) herein, removes or disables access to the material that is claimed to be infringing within five business days of receipt of the notification.
- 2) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
  - A. A statement that the complaining party is a person captured in the allegedly infringing work of intimate media, or is authorized to act on behalf of such person;
  - B. The complaining party can reasonably be identified based on the infringing work or information accompanying it;
  - C. The work of intimate media contains intimate information pertaining to the complaining party;

- D. The complaining party did not consent in writing to the performance, distribution, or display of the allegedly infringing work of intimate media; or, the performance, distribution, or display at issue exceeded the scope of the consent provided;
  - E. The complaining party's name and contact information, including e-mail address; or, if proceeding pseudonymously as provided in subsection (p), the complaining party's unique identifier and court information;
  - F. The uniform resource locators (URLs) or locations under the service provider's control where the infringing media can be located; and
  - G. A statement that the information in the notification is accurate, under penalty of perjury.
- 3) The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (2), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:
- A. The name, address, phone number, and electronic mail address of the agent.
  - B. Other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

- 4) A service provider receiving a notification of claimed infringement under this subsection must maintain the confidentiality of the notification, including by minimizing the number of people who can obtain access to the notification, and by redacting identifying information before sharing it with anyone who is not employed by the service provider or who is not an attorney retained by the service provider.
- 5) The following rule shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this subsection. A court may grant injunctive relief with respect to a service provider only in one or more of the following forms:
  - A. An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.
  - B. An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.
  - C. Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.
- 6) Subject to paragraph (A), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing

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rights in subsection (a), or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

- A. The limitation on liability described above in subsection (o)(6) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (o)(2), unless the service provider
- I. takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;
  - II. upon receipt of a counter notification described in paragraph (B), promptly provides the person who provided the notification under subsection (o)(2) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 5 business days; and
  - III. replaces the removed material and ceases disabling access to it not less than 5, nor more than 7, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (o)(2) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.
- B. To be effective under this subsection, a counter notification must be a written

communication provided to the service provider's designated agent that includes substantially the following:

- I. A physical or electronic signature of the subscriber;
  - II. Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;
  - III. The material that was removed or disabled was newsworthy, as defined in subsection (m)(1); or that the subscriber obtained express written consent to the performance, distribution, or display of the work of intimate media at issue, as defined in subsection (m)(2);
  - IV. The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (o)(2) or an agent of such person; and
  - V. A statement that the information in the notification is accurate, under penalty of perjury.
- 7) Any person who knowingly misrepresents material information in a notification of claimed infringement, as defined in subsection (o)(2), or in a counter notification, as defined in subsection (o)(6)(B), shall be liable as follows:

- A. To a service provider who received such a notification of claimed infringement, or counter notification, for the service provider's actual damages, or for statutory damages of \$750 per allegedly infringing work, at the service provider's election; and
- B. To any person who uploaded, transmitted, or submitted the allegedly infringing work at issue, in the case of knowing misrepresentation of a notification of claimed infringement; or, to any person who submitted the relevant notification of claimed infringement, in the case of knowing misrepresentation of a counter notification; for that person's actual damages.

A service provider who receives a notification of claimed infringement or a counter notification containing material false information shall not be liable for infringement based on that notification or counter notification.