A Response to Ann Bartow’s

*Copyright Law and Pornography*

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In *Copyright Law and Pornography*, Professor Ann Bartow argues that the Copyright Act should be amended to deny protection to a “narrowly defined band of pornographic works”; specifically, those deemed to be harmful to the individuals depicted. Bartow proposes an amendment that would “make pornography a specific category of copyrightable work with the express stipulation that harmful pornographic works are not eligible for registration or protection.” She contends that this could be accomplished by an “increase in the size and mandate of the Copyright Office,” whose employees “would make the initial, appealable decision about whether a pornographic work qualified as non-progressive and non-useful.”

While Bartow asserts that such an amendment would reduce the incentive to manufacture child pornography, crush videos, and so-
called “revenge porn,” her remedy does not offer any standard or definition by which the Copyright Office could be guided in making a determination as to “pornography that is non-progressive and non-useful.” In addition, it assumes, questionably, that the primary motivation for the creation and distribution of these works is monetary, and it ignores the chilling effect that such a change in the law could have on copyright in general. The following discusses, among other problems, both why such an amendment to the Copyright Act would not succeed in curbing the creation of “harmful” categories of pornography and the potential negative impacts of such a broad amendment.

I

REVENGE AND VIOLENT PORNOGRAPHY

Bartow proposes to amend the Copyright Act to deny copyright protection to “non-progressive, non-useful” pornographic works. Under Bartow’s definition, protection would be denied to works where “the level of originality or creativity is low, but the likelihood that harms were inflicted on living beings during the production of the work, or the risk of harms resulting from distribution and consumption of the work, is high”; works are harmful where “the performers are engaged in unsimulated acts that are coerced or compromise their health and safety.” Bartow’s aim seems to be to curb the production of violent pornography by reducing the financial incentives to create it. While her desire to do so is admirable, her proposed method is flawed in a significant number of respects.

First, for Bartow’s proposed amendment to have its intended effect of decreasing the production of harmful pornography, the perpetrators of harmful pornography must necessarily be interested in the financial benefits of copyright protection. However, Bartow never analyzes how limiting copyright protection would actually impact the financial benefits of creating violent pornography. Regardless of whether copyright protection exists, it is likely that the real motivation behind the production and distribution of this type of pornography does not lie in lawsuits for copyright infringement, but rather in the money made from the purchase of copies of this work for private viewing by

5 See id. at 3–5.
6 Id. at 55.
7 Id. at 38.
8 Id. at 39.
individuals. Accordingly, it is unclear what impact, if any, the denial of copyright protection would have upon certain kinds of pornography.

Bartow acknowledges that for at least one form of pornography—so-called “revenge porn,” in which at least one of the subjects is either unaware of sexual acts being filmed or is at least opposed to the work being disseminated digitally—the primary motive is not monetary. Rather, revenge porn focuses more on widely distributing nude photos or videos of an individual that were intended for personal use only. The primary purpose of “revenge porn” is the humiliation of the subject. It seems unlikely that a person interested in posting pornographic images of another for revenge would be at all interested in copyright protection or financial gain, and so Bartow’s proposed amendments to the Copyright Act would not decrease incentives to create this particular type of pornography.

Furthermore, Bartow’s definition creates what is essentially a balancing test between the “originality” of the pornographic work and the “harm” that was caused to those depicted. This balancing test would potentially allow a work that is highly original to receive copyright protection, despite a high likelihood that living beings were harmed in its making. Conversely, a work with low originality and only a moderate likelihood of harm would be denied copyright protection. Thus, such a test may not decrease financial incentives to produce harmful works, but rather may encourage pornographers to learn to create the perfect equilibrium of originality and harm.

Second, Bartow’s amendment would be virtually impossible to apply accurately and consistently. Bartow provides no real mechanism for how her amended Act would function other than to suggest that the size of the Copyright Office would need to be expanded. But how would the Copyright Office determine whether there is a high likelihood that a performer suffered abuse or harm during the filming of a pornographic work when Hollywood can simulate even the most horrific deaths? What would the definition of “harm” be? Would it be purely physical? Bartow admits that the boundaries of the categories of pornography that would be affected by her proposed amendment to the Copyright Law is “vexingly

9 Id. at 44–46.


11 Id.
complicated," but she does not set forth how the Copyright Office could even begin to deal with the complicated issues her amendments would create.

In practice, it seems impossible to envision how the Copyright Office would accurately determine whether an act in a pornographic work is coerced or whether an actor’s health or safety has been compromised. For example, if a performer is being forced to engage in sexual acts on camera, but is also being forced to act as if he or she is enjoying it, then the viewer determining whether to confer copyright protection may not recognize the work as one that is “harmful.” Further, “health or safety” is rather ambiguous and it may be that an actor’s emotional health and safety is in great jeopardy by taking part in what may seem like “normal” pornography. Such a work would be granted copyright protection, even though the harm caused by it could be greater than a visually violent pornographic film. Thus, Bartow’s amendments to the Copyright Act would only affect pornography with discernable harm. Furthermore, what one viewer at the Copyright Office may perceive as harmful might be quite different than another person’s definition. This could lead to great inconsistencies in the way the Copyright Office would enforce Bartow’s amended Copyright Act.

Finally, basing copyright protection of pornography on whether the “performers are engaged in unsimulated acts that are coerced or compromise their health or safety” is not only impossible, but it opens the door to denying the benefits of copyright protection to other non-pornographic works. While Bartow argues that her proposed amendments would only be limited to a “narrowly” defined group of pornographic films, her offered definition of a “non-useful” pornographic work is simply one in which there is a high likelihood that harm was inflicted on living beings during production. Unless one wants to argue that inflicting harm upon someone is somehow more useful and worthy of protection if their clothes are on, Bartow’s proposed amendments would provide a basis to deny the benefits of copyright law to any film in which living beings were harmed.

For example, during the filming of *Twilight Zone: The Movie*, actor Vic Morrow and two young children were killed when a helicopter

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13 *Id.*
14 *Id.* at 39.
15 See *id.* at 38, 48–52.
used for a scene was damaged by pyrotechnic special effects and spiraled out of control, decapitating Morrow and one of the children and crushing the other.\(^\text{16}\) During the production of *The Crow*, actor Brandon Lee was accidentally shot and killed by another actor while filming.\(^\text{17}\) Bartow’s proposal to amend the copyright law to deny protection to works based upon the likelihood that harm was done to an individual during its creation opens the door to either preventing copyright protection for any film in which there is some degree of unsimulated injury incurred by the performers (no matter how “legitimate” the film), or essentially creating a law that will allow a work to reap the benefits of the copyright law so long as any harm involved is not inflicted in a sexual context.

Thus, while Bartow offers a proposal to limit the production of violent pornography, she fails to provide any evidence that the financial motivation for these works is rooted in the copyright law, and fails to discuss how such an amendment would be implemented. Moreover, the real need for such an amendment is not considered in her Article. Amending the Copyright Act and expanding the Copyright Office would presumably require numerous federally-funded expenditures. Bartow, while arguing that her proposed amendment should be enacted immediately, does not offer a convincing example for why the Copyright Act should be amended, such as specific accounts of performers being harmed.

Simply, Bartow’s proposed amendment to the Copyright Act would seemingly involve the creation of a heightened level of “content based” protection, which allows a film to receive the benefits of the copyright law if it is a non-pornographic work in which harm to performers is involved, but would deny copyright protection to pornography in which there may be a depiction of similar or even lesser harms.

II

CRUSH PORNOGRAPHY

Bartow argues that her proposed amendment to the copyright law should also be applied to “crush” videos, in which small animals are killed, usually by being stepped on by women in high heels, in order


to curb the production of such films. Bartow asserts that the government should deny copyright protection to videos depicting animal cruelty, believing that this is one way to limit financial incentives for the creation of crush videos in light of the Supreme Court’s holding in *United States v. Stevens*.19

In *Stevens*, the Court held that a statute subjecting an individual to fines or imprisonment for profiting from the sale of videos depicting cruelty to animals was unconstitutional under the First Amendment.20 The statute invalidated in *Stevens* applied to visual or auditory depictions “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.”21 The statute had been passed for the purpose of criminalizing the sale of crush videos, and in *Stevens*, it had been used to prosecute an individual who had been selling videos of dogfighting.22 The Court held that the statute was overbroad.23

However, in response to the *Stevens* holding, Congress passed the Animal Crush Video Prohibition Act of 2010, which specifically bans the creation and sale of crush videos.24 Bartow is thus incorrect in arguing that “[t]he ability to federalize the prosecution of animal cruelty cases was effectively terminated” by *Stevens*.25 Her proposal to the Copyright Act, as it would apply to crush videos, is therefore unnecessary in light of Congress’s post-*Stevens* legislation.

Further, Bartow’s proposal could potentially impact the production and distribution of “whistleblower” videos that have been created by such groups as the Humane Society of the United States (“HSUS”) and the American Society for the Prevention of Cruelty to Animals. For instance, an undercover investigation by HSUS of the Hallmark slaughterhouse in California revealed instances of abuse that included forcing extremely sick and injured cows to slaughter for their meat to be sold to a company that produced school lunches.26 These videos

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18 Id. at 42–44.
19 Id. (discussing United States v. Stevens, 130 S. Ct. 1577 (2010)).
22 *Stevens*, 130 S. Ct. at 1583.
23 Id. at 1592.
25 See Bartow, supra note 1, at 43.
have led to awareness of extreme animal cruelty in the meat and farming industries, and in some cases, steps toward reform of inhumane practices. However, some states have proposed laws that would make such videos illegal. While the purpose of these videos is obviously not financial gain, Bartow’s proposal could potentially be one more impediment to these investigations if applied broadly to any depiction of animal cruelty. Arguably, we should be creating, not taking away, financial incentives to create such documentaries for the sake of both animal and human health.

III
CHILD PORNOGRAPHY

Bartow acknowledges her proposed amendments to the Copyright Act would be a “very small advance” toward the prevention of child pornography because it is unlikely that anyone would seek copyright protection due to “fear of arrest.” As Bartow points out, and rightly so, there are harsh penalties for even being in possession of child pornography, much less its creation and production. Due to the legal and social consequences, it is highly improbable that a creator of child pornography would go to the Copyright Office to register his work or commence a lawsuit for infringement. The motivation behind Bartow’s proposal seems to be that the penalties for possession of child pornography are sometimes worse than actually engaging in sexual activities with a minor. This issue seems to be something more properly dealt with by revisions to the penal law, and not copyright law, as amendments to the latter would likely not have a profound effect on reducing the creation of child pornography.

CONCLUSION

Bartow’s proposal to amend the Copyright Act to deny protection to harmful pornography, crush pornography, child pornography, and

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29 Bartow, supra note 1, at 42.
30 Id. at 40.
31 Id. at 42.
32 See id.
revenge pornography is likely to have little impact on actually minimizing financial incentives for their production. Rather, the amendments are too vague and could potentially impede copyright protection for a number of other films, and may ultimately encroach on First Amendment rights.