

# IP WITHOUT IP?\*

## A STUDY OF THE ONLINE ADULT ENTERTAINMENT INDUSTRY

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### ABSTRACT

*Existing copyright policy is based largely on the utilitarian theory of incentivizing creative works. This Article looks at content production incentives in the online adult entertainment industry. A recent trend of industry-specific studies tries to better understand the relationship between intellectual property (IP) and creation incentives in practice. This Article makes a contribution to the literature by analyzing a major entertainment content industry where copyright protection has been considerably weakened in recent years. Because copyright infringement is widespread and prohibitively difficult to prevent, producers have been effectively unable to rely on the economic benefits that copyright is intended to provide.*

*Qualitative interviews with industry specialists and content producers support the hypothesis that copyright enforcement is not cost effective. As a*

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\* Internet Pornography without Intellectual Property (conventionally: Intellectual Production without Intellectual Property).

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*result, many producers have developed alternative strategies to recoup their investment costs. Similar to the findings of other scholarly work on low-IP industries, this research finds a shift toward the production of experience goods. It also finds that some incentives to produce traditional content remain. The sustainability of providing convenience and experience goods while continuing content production relies partially on general, but also on industry-specific factors, such as consumer privacy preferences, consumption habits, low production costs, and high demand. While not all of these attributes translate to other industries, determining such factors and their limits brings us toward a better understanding of innovation mechanisms.*

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## INTRODUCTION

*“The Internet is for Porn.”*

- U.S. House Congressional Hearing on the Stop Online Piracy Act<sup>1</sup>

The magnitude and prevalence of adult entertainment as a business is undeniable. For decades, even centuries, the industry has flourished despite considerable social and legal obstacles. It has often been on the forefront of new media adoption,<sup>2</sup> from paperback books<sup>3</sup> to photography,<sup>4</sup> cable television,<sup>5</sup> and home cinema formats.<sup>6</sup> Adult entertainment companies have

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1. *Stop Online Piracy Act: Hearing on H.R. 3261 Before the H. Comm. on the Judiciary*, 112th Cong. 312 (2011), available at <http://judiciary.house.gov/hearings/pdf/transcript12152011.pdf>.

2. See Benjamin Edelman, *Red Light States: Who Buys Online Adult Entertainment?*, 23 J. ECON. PERSP. 209, 210 (2009).

3. See Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 FED. COMM. L.J. 217, 220-21 (1996).

4. See Piet Bakker & Saara Taalas, *The Irresistible Rise of Porn: The Untold Story of a Global Industry*, 1 OBSERVATORIO J. 99, 103 (2007).

5. See Johnson, *supra* note 3, at 221-22.

pioneered innovations like secure online payment systems and high-definition streaming video.<sup>7</sup> Market demand for adult entertainment products is asserted to be the main driver behind the success or failure of new technologies.<sup>8</sup> At the same time, technology has helped proliferate adult content.<sup>9</sup> When the World Wide Web launched in the 1990s, there were about ninety adult magazine publications in the United States.<sup>10</sup> By 1997, there were an estimated nine hundred adult websites on the Internet.<sup>11</sup> Today, there are millions.<sup>12</sup> The largest of these dwarf comparable mainstream media websites, hosting over 100 terabytes of content and clocking over 100 million page views per day.<sup>13</sup> Although no reliable data exist on the exact value of the online market,<sup>14</sup> it is

6. See David Slayden, *Debbie Does Dallas Again and Again: Pornography, Technology, and Market Innovation*, in FEONA ATWOOD, *PORN.COM: MAKING SENSE OF ONLINE PORNOGRAPHY* 54, 57 (Peter Lang ed., 2010); Lucas Mearian, *Porn Industry May Decide Battle Between Blu-Ray, HD-DVD*, *COMPUTERWORLD* (May 2, 2006, 12:00 PM ET), [http://www.computerworld.com/s/article/111087/Porn\\_industry\\_may\\_decide\\_battle\\_between\\_Blu\\_ray\\_HD\\_DVD\\_](http://www.computerworld.com/s/article/111087/Porn_industry_may_decide_battle_between_Blu_ray_HD_DVD_).

7. See Kayte Van Scoy, *Sex Sells, So Learn a Thing or Two from It*, *PC COMPUTING*, Jan. 2000, at 1, 64.

8. PATCHEN BARSS, *THE EROTIC ENGINE: HOW PORNOGRAPHY HAS POWERED MASS COMMUNICATION, FROM GUTENBERG TO GOOGLE* 1-4 (2011) (describing how pornography is linked to the success of communication media); PRONNOVATION: *PORNOGRAPHY AND TECHNOLOGICAL INNOVATION* (Johannes Grenzforthner et al. eds., 2008) (a compilation of pieces arguing that pornography drives emergent technologies); Johnson, *supra* note 3, at 217-26.

9. See Catharine MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 *GEO L.J.* 1959, 1959 (1995).

10. See OGI OGAS & SAI GADDAM, *A BILLION WICKED THOUGHTS: WHAT THE WORLD'S LARGEST EXPERIMENT REVEALS ABOUT HUMAN DESIRE* 6 (2011).

11. See *id.* at 6-7.

12. According to the commonly cited “*Internet Pornography Statistics*” from Top Ten Reviews, the number of adult websites in 2006 was 4.2 million. See Jerry Ropelato, *Internet Pornography Statistics*, *TOP TEN REVIEWS* (2006), <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>. Unfortunately, while this number is difficult to trace, some of their other, traceable numbers turn out to be a circle of sources all citing each other, with no discernable original source of credibility. Ogas and Gaddam posit that in 2011, filtering programs were blocking around 2.5 million adult-rated sites. OGAS & GADDAM, *supra* note 10, at 7. Regardless of exact numbers, “millions” seems a fairly well-educated guess.

13. Xvideos, one of the largest adult websites, is credited 4.4 billion page views per month and is three times larger than CNN or ESPN. The most popular adult video streaming sites are many times larger than Hulu. See Sebastian Anthony, *Just How Big Are Porn Sites?* *EXTREMETECH* (April 4, 2012, 1:12 PM), <http://www.extremetech.com/computing/123929-just-how-big-are-porn-sites>.

14. While the U.S. online adult entertainment industry is generally estimated to be worth billions of dollars, exact numbers are difficult to determine, as most companies are privately held. Furthermore, adult content is difficult to define and many firms engage in a variety of activities that may not fall under the definition of pornography. Estimates from the past decade range from four to ten billion in the United States. See Sam Spencer, *How Big Is the Pornography Industry in the United States?*, *COVENANT EYES: BREAKING FREE BLOG* (June 1, 2012), <http://www.covenanteyes.com/2012/06/01/how-big-is-the-pornography->

not far-fetched to claim that the online adult entertainment industry carries considerable economic weight.

The Internet has created a new world of business for adult entertainment. For the traditional model of producing and selling content, however, it has proven to be a double-edged sword. On the one hand, increased privacy and convenience for consumers have arguably given adult content distributors even greater opportunities to capitalize than their mainstream counterparts in film and music. On the other hand, an Internet-architecture specifically designed for copying and sharing digital files has ushered in an era of unprecedented content piracy. From individual unauthorized use, to file-sharing systems, to content aggregation websites, copyright infringement has become increasingly widespread and difficult to prevent. Content ownership, while protected in theory through the legal system, can often no longer be enforced in a cost-effective way.<sup>15</sup>

For any industry that deals in easily replicated goods, the problem is evident and reflected in the economic theory behind copyright law. Copyright enables content producers to recoup production costs by letting them sell their product exclusively. Economics tells us that without this mechanism, there will be a lack of incentive to produce content, resulting in market failure.<sup>16</sup> What this theory implies for adult entertainment production is supported by recent reports in the news media, which tell the stories of struggling companies and forecast the death of the industry.<sup>17</sup> Undoubtedly, these anecdotes are true and some adult content producers have taken a substantial financial hit due to the difficulties of online copyright enforcement, but is the industry really dying?

industry-in-the-united-states. The most recent data from a poll conducted by one of the industry's main news sources estimates industry revenues exceeding 5 billion dollars. See Dan Miller, *Porn Revenues Exceed \$5 Billion According to Industry Survey*, XBIZ NEWSWIRE (July 25, 2012, 11:45 AM PDT), <http://newswire.xbiz.com/view.php?id=151751>.

15. See *infra* Part III.C.

16. See, e.g., PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.14 (3rd ed. 2010); MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 17-18 (Matthew Bender rev. ed. 2009).

17. See, e.g., Ben Fritz, *Tough Times in the Porn Industry*, L.A. TIMES (Aug. 10, 2009), <http://www.latimes.com/local/la-fi-ct-porn10-2009aug10-story.html#page=1>; David Futrelle, *Sex on the Internet: Sizing Up the Online Smut Economy*, TIME MAGAZINE (Apr. 4, 2012), <http://business.time.com/2012/04/04/sex-on-the-internet-sizing-up-the-online-smut-economy>; Joe Garofoli, *Economic Woes Hit Porn Industry*, THE S.F. CHRONICLE (Mar. 2, 2009, 4:00 AM), <http://www.sfgate.com/entertainment/article/Economic-woes-hit-porn-industry-3170051.php>; Chris Morris, *Is The Porn Industry Imperiled?*, CNBC (Jan. 18, 2012, 5:09 PM ET), [http://www.cnbc.com/id/45989346/Is\\_the\\_Porn\\_Industry\\_Imperiled](http://www.cnbc.com/id/45989346/Is_the_Porn_Industry_Imperiled); Michael Stabile, *End of the Porn Golden Age*, SALON (Mar. 2, 2012, 8:59 PM PST), [http://www.salon.com/2012/03/03/life\\_after\\_the\\_golden\\_age\\_of\\_porn](http://www.salon.com/2012/03/03/life_after_the_golden_age_of_porn); Louis Theroux, *How The Internet Killed Porn*, THE GUARDIAN (June 6, 2012, 15:00 EDT), <http://www.theguardian.com/culture/2012/jun/05/how-internet-killed-porn>; *The Trouble with Pornography: Hard Times*, THE ECONOMIST (Sep. 12, 2009) [hereinafter THE ECONOMIST], <http://www.economist.com/node/14416740>.

To this day, content production persists and a number of companies remain in business.

If there is no effective copyright protection for the traditional content of the industry, why is it still being produced? How can adult entertainment businesses continue to survive in the face of these difficulties? What drives production and how is it financed? And finally, can we learn anything to inform general IP theory and innovation policy? These are questions that fit into a broader stream of literature. A growing body of scholarly work on information production without intellectual property (“IP without IP”) analyzes the relationship between exclusive rights and innovation in practice, trying to better understand the mechanisms that influence production.<sup>18</sup> While it recognizes that markets for information goods may suffer economically under the absence or removal of IP, some insights about the ways that information is produced challenge the basic theory underlying our laws and innovation policies.

This Article addresses two questions.<sup>19</sup> First, it investigates the hypothesis that copyright enforcement in the online adult entertainment industry is prohibitively difficult. Second, it explores whether and how adult content producers are recouping their investments, as well as to what extent the contributing factors are industry-specific. Based on qualitative interviews with content producers and industry specialists, this Article concludes that copyright enforcement, while still engaged,<sup>20</sup> is generally not an effective method of recouping costs. This Article also concludes that there has been a shift in the industry towards new types of goods and services. Rather than focusing only on selling content,<sup>21</sup> the industry is increasingly moving into convenience and experience goods, which are inherently difficult to pirate.<sup>22</sup> The production of traditional content continues, both as a basis for services and experiences, as well as for marketing purposes.<sup>23</sup>

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18. See Rochelle C. Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1437-73 (2010); see also *infra* Part I.

19. This Article recognizes, but does not engage in, the discussion of social issues surrounding adult content. While this discussion is undoubtedly important, it is orthogonal to the research objective of this project, which is to better understand the market mechanisms of the U.S. adult entertainment production industry.

20. Either in specific areas where it is still effective or as part of a more complex strategy. See *infra* Part III.C.

21. This is, to a certain extent, still a successful business model in certain areas and for specific reasons, such as niche markets that cater to very specific consumer preferences. See *infra* Part IV.A.

22. Such as live camera, and more. See *infra* Part IV.

23. This study does not suggest, however, that adult entertainment production functions at an economically optimal level without copyright protection. While some scholars have argued that removing copyright from the industry has no negative effect, see MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* 40-42 (2008), this study does not support the argument that economic market failure is absent simply

By trying to better understand the struggles and survival methods of this innovative market for entertainment goods, this Article attempts to make a significant contribution to the literature on low-IP industries. The unique characteristics<sup>24</sup> and the historical flexibility of the adult entertainment industry make it an interesting market to study generally but also that in this context, its similarities to the entertainment industries are at the heart of our copyright law debates. Given that our current innovation policies are based on abstract theory,<sup>25</sup> looking at this unique yet parallel industry may provide some valuable insights for the discussion.

Part I explains the underlying body of literature and the concept of low-IP industry research. Part II outlines the research methodology. Part III looks at copyright in the online adult entertainment industry, including the copyrightability of adult content, the history and various types of online infringement, and the difficulties involved in copyright enforcement. It concludes that the industry faces considerable barriers to enforcing exclusive content ownership. Part IV explores the qualitative data in more detail, detecting a shift in the industry toward convenience and experience goods and describing current changes in market structure and what they imply for traditional content production. Part V looks at general implications for innovation policy.

#### I. LITERATURE ON LOW-IP INDUSTRIES

Copyright law is commonly based on the utilitarian theory of incentivizing artistic production.<sup>26</sup> Given that this choice of incentive method is intended to strike a balance,<sup>27</sup> it is important to keep an eye on how this balance works out

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because an industry can survive through alternate strategies. Both the quantity and quality of information goods may be unable to meet economic demand without intervention. For more on this, *see infra* Part V.

24. Such as high consumer privacy preferences, comparatively low production costs, short product cycles, fast adaptability, and comparatively high demand. There is also indication that demand is more inelastic than in comparable mainstream entertainment industries.

25. The theory of hypothetical market failure. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). Furthermore, our system of copyrights was designed prior to digital files and the architecture of the Internet.

26. Producing creative works of economic value (i.e. that meet a market demand) is often costly. Because information goods are easily copied once they are made available, copyists will erode the original creator's profits, preventing the creator from recouping investment costs. In anticipation of this, the investments will no longer be made, resulting in underproduction of creative works. Copyright attempts to remedy this economic market failure by granting creators exclusive rights in order to protect their investment. *See* GOLDSTEIN and NIMMER & NIMMER, *supra* note 16; *see also infra* Part V.

27. This system is an economic tradeoff because exclusive rights will also reduce the distribution and accessibility of works in the market. *See* GOLDSTEIN, *supra* note 16, at §

in practice. Doing so may help us refine innovation policy and develop better solutions for supporting and protecting the investments of creators, as well as ensuring that market demand for creative works can be met in the best possible way. To this end, a recent body of literature analyzes the relationship between innovation and intellectual property in real-world scenarios.<sup>28</sup> Instead of the top-down approach based on economic theory, this literature attempts to study the drivers of creation in individual markets, collecting insights from practices across the board and establishing industry specific factors that influence information production. The combined body of this research may ultimately lead to a better understanding of how legal and economic structures shape innovation.

Prior work in this field looks at markets for replicable goods that do not rely on formal IP protection. This is sometimes because IP laws do not adequately cover the goods, or sometimes because the market participants do not make use of such rights for other reasons. These studies first originated in the area of patent law with a focus on the use and function of proprietary rights in university research.<sup>29</sup> Another field of interest has been open source software development, where participation motivations are found to exist without (or in some cases alongside) monetary incentives.<sup>30</sup> More recently, this research has moved into a number of artistically creative industries with low reliance on IP. Scholars have analyzed innovation incentives and IP protection in the fashion,<sup>31</sup> food,<sup>32</sup> and body art<sup>33</sup> industries and investigated how stage

1.14; Landes & Posner, *supra* note 25, at 326; *see also infra* Part V.

28. *See* Dreyfuss, *supra* note 18.

29. Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999); Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, in 16 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION AND ECONOMIC GROWTH 93-122 (Gary Libecap ed., 2005); Fiona Murray et al., *Of Mice and Academics: Examining the Effect of Openness of Innovation* (Nat'l Bureau of Econ. Research, Working paper No. 14819, 2009), available at <http://www.nber.org/papers/w14893>.

30. Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 372-74 (2002); Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 J. INDUS. ECON. 197, 212-23 (2002); Josh Lerner & Jean Tirole, *The Economics of Technology Sharing: Open Source and Beyond*, 19 J. ECON. PERSP. 99, 102-05 (2005); Sonali K. Shah, *Open Beyond Software*, in OPEN SOURCES 2.0: THE CONTINUING EVOLUTION 339, 339-40 (Chris DiBona et al. eds., 2005).

31. Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

32. Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06, 2008).



performers such as magicians<sup>34</sup> and stand-up comedians<sup>35</sup> protect their work. Further studies include examinations of jam band communities,<sup>36</sup> user-generated innovation,<sup>37</sup> and several other areas.<sup>38</sup> Many of these studies find that information goods are produced despite the absence of formal IP protection. This challenges a basic assumption of our current theory and policy. While no one is claiming that the level or type of content production found in these markets is economically optimal, the factors that contribute to sustaining it may at some point help us design policies that better support innovators and improve the balance we currently attempt to achieve through IP laws.<sup>39</sup>

This Article aims to extend this body of literature. Given the difficulties in enforcing copyrights, the adult industry has effectively been operating without, or at least with low reliance, on copyright protection. The conventional theory behind copyright law predicts that content production is not sustainable in this environment. In tune with this prognosis, recent reports in the media have repeatedly predicted the death of the adult industry, supported by the fact that many content producers have found themselves in considerable financial difficulty and previously stable businesses have failed.<sup>40</sup> That the industry cannot continue with business models based entirely on the protection of copyrights seems fairly obvious. Also, even if it can somehow survive this exogenous shock, this is not likely to happen without structural changes. The stories of struggling entities are undoubtedly very real: many have disappeared,

33. Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97 (2003); Aaron Perzanowski, *Tattoos & IP Norms*, 98 Minn. L. Rev. 511 (2013).

34. Jacob Loshin, *Secrets Revealed: Protecting Magicians Intellectual Property Without Law*, in LAW AND MAGIC 123 (Christine A. Corcos ed., 2010).

35. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1787 (2008).

36. Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006).

37. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2007); ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005); Fred Gault & Eric von Hippel, *The Prevalence of User Innovation and Free Innovation Transfers: Implications for Statistical Indicators and Innovation Policy* (MIT Sloan Sch. of Mgmt., Working Paper No. 4722-09, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1337232](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337232).

38. See, e.g., Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717 (2007); David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012); Jacqueline D. Lipton, *To © or Not to ©? Copyright and Innovation in the Digital Typeface Industry*, 43 U.C. DAVIS L. REV. 143 (2009); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

39. See Dreyfuss, *supra* note 18, at 1439 (“The time is thus ripe to consider whether and when intellectual property rights are needed.”).

40. See THE ECONOMIST, *supra* note 17.

and most that remain have seen their business severely impacted by copyright infringement, not to mention the crash of the economy in 2008.<sup>41</sup> However, some insights gathered from prior studies on low-IP markets,<sup>42</sup> as well as some characteristics of this particular industry, indicate that adult content production may be able to survive in some form, despite the difficulties involved in formal copyright protection.

Studying the adult entertainment industry is a particularly important extension to the previous studies of low-IP markets. While the insights gathered from markets with norm systems have been greatly valuable, the main criticism that prior work in this area faces is that it is focused on close-knit communities that are not comparable to larger industries. This is the first contribution to the low-IP literature that analyzes a billion dollar market for entertainment goods<sup>43</sup> with strong parallels to the industries at the center of the copyright debate.

## II. RESEARCH METHODOLOGY

The aim of this study is to explore how the adult entertainment industry in the United States has been affected by online copyright infringement and how it has dealt with enforcement difficulties. Specifically, it looks at producer reliance on copyright protection as a business model and alternative methods that content producers are using to recoup costs.<sup>44</sup> The first hypothesis is that producers are unable to rely on the copyright system in the way that it is intended to function, that is, as an effective method of recouping production and investment costs. Following from those conclusions, the second hypothesis is that content production can be sustained, partially through user-generated content,<sup>45</sup> and partially through alternative financing methods (in particular through selling different types of goods that are less easily copied).

This study primarily comprises a sample of in-depth, qualitative

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41. See Stabile, *supra* note 17.

42. Previous literature on low-IP industries has shown shifts within markets, indicating that changes in IP-regimes can sometimes affect type of production rather than quantity. See *infra* Parts IV.B and V.

43. See *supra* note 14. For more on the lack of research on the adult entertainment industry, see Georgina Voss, 'Treating it as a Normal Business': Researching the Pornography Industry, 15 *SEXUALITIES* 391 (2012).

44. "Producers" were chosen as the subject of study based on the assumption that these actors are most likely to be the copyright holders of adult content, or at least to be making relevant investments in content production.

45. This part of the hypothesis was rejected during the first phase of the study because user-generated content is a less common occurrence in the United States than originally presumed. The reason for this is apparently strict legal requirements surrounding record keeping for content providers and content hosts. Most of the "amateur" content distributed in the United States is in fact professionally produced and only made to look like it is user-generated. See *infra* Part IV.C.

interviews, supplemented by a variety of information sources.<sup>46</sup> The first phase was a series of explorative interviews and conversations with industry specialists, including lawyers, journalists, and people who have worked in or with adult entertainment companies in the United States within the past decade.<sup>47</sup> The second phase was a series of semi-structured, qualitative interviews<sup>48</sup> with content producers.<sup>49</sup> The sample consisted of twenty-one U.S.-based<sup>50</sup> producers.<sup>51</sup> Additionally, information was gathered from

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46. Information was gathered over a period of two years, from September 2010 to September 2012.

47. The subjects were selected using snowball sampling, in which the first participants were selected opportunistically and then asked to recommend further participants. *See* NIGEL KING & CHRISTINE HORROCKS, *INTERVIEWS IN QUALITATIVE RESEARCH* 34 (2012).

48. The qualitative interviews all took place between January and April of 2012. Their duration was between twenty and forty-five minutes. An explorative style was chosen in order to give the interviewees sufficient space to elaborate, offer anecdotes along with their own assessments and interpretations, and bring up additional, unanticipated points. While the interviews were not based on a strict set of pre-defined questions, the covered topics were as follows: the producers were asked how they had experienced the history, development, and impact of copyright infringement in the online adult industry since the mid-2000s; what measures they and others had and were taking in terms of copyright enforcement (e.g. technological measures, take-down notices, litigation); what strategies they and other producers were using to recoup costs; and what they saw in terms of future developments for their own business, as well as for the industry in general. All interviews were conducted face-to-face, with the exception of one phone interview. The direct quotations in the following text are all taken from the content producer interviews in the second phase of the study (unless otherwise marked).

49. Nearly all interviewees were company CEOs, the remaining were people in high operational positions with sufficient knowledge and overview of company strategy to answer the questions with competence (according to the respective companies). Of the company leaders actively sought to interview for the study, only one request remained unmet.

50. While there is production in many other countries, the U.S.-based industry was chosen for its international prominence in the media, as well as because of a high variance in legal constraints across borders, *see, e.g.*, 18 U.S.C. § 2257 (2006) (detailing U.S. recordkeeping requirements). Germany has strict rules governing access to online content. For a German court decision on age verification systems for content distribution *see, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 18, 2007, MEDIEN INTERNET UND RECHT [MIR] 125, 2008 (Ger.). Furthermore, the U.S. industry is comparatively concentrated in terms of location, as many production companies are based in the districts of Los Angeles, California, and its networking opportunities allow for relatively easy and immediate access to a large part of the industry, *see also infra* notes 51 and 56 and accompanying text. The interviews included one UK-based and one Canada-based producer, which, although their answers did not differ significantly, are omitted from the sample based on the reasons of legal differences mentioned above.

51. In order to ensure the most industry-representative sample possible, this included large, medium, and small companies. The interviewees were selected through convenience sampling (for reasons of access and location, *see, e.g.*, BONITA KOLB, *MARKETING RESEARCH, A PRACTICAL APPROACH* 110 ((2008)), from the attendee lists for three heavily attended industry networking conferences in L.A. and Las Vegas (XBIZ LA, InterNEXT Expo, and the AVN B2B tradeshow). Furthermore, the sample included companies producing material for (predominantly) heterosexual and for homosexual audiences because conversations with industry specialists indicated that there may be differences relevant to

industry news sources,<sup>52</sup> the trade association,<sup>53</sup> industry message boards,<sup>54</sup> and legal cases involving copyright infringement of adult material,<sup>55</sup> as well as by attending several business-to-business industry conferences and observing workshops and industry-only panel discussions on piracy and general market developments.<sup>56</sup>

### III. COPYRIGHT IN THE ONLINE ADULT ENTERTAINMENT INDUSTRY

Copyright law protects adult-themed content that is original and fixed in a tangible medium. Because much of today's material is in digital file format, it is easily copied and shared on the Internet. Copyright law, while protecting such works from unauthorized reproduction in theory, has proven difficult to enforce in an online environment. Peer-to-peer file-sharing and user-uploaded video content aggregators have undermined content owners' ability to cost-effectively prevent copyright infringement. This Part outlines the general copyrightability of adult material, chronicles the relevant types of online infringement, and describes why copyrights on adult content are currently difficult to enforce through the legal system.

#### A. *Copyrightability of Adult Content*

Defining adult content is no simple matter.<sup>57</sup> For the purposes of this Article, adult content refers to the depiction of sexual acts or sexual subject

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copyright enforcement. In particular, privacy preferences were alleged to be higher for consumers of homosexual adult material. This was suggested to play a role for copyright enforcement because extracting settlements in file-sharing lawsuits is potentially easier if information about alleged personal sexual preferences in this area is threatened to become public. *See infra* Part III.C.2. The study therefore included multiple producers from both areas, although no notably significant differences were found. *See infra* notes 112 and 129. *But see infra* notes 74 and 89. Note: although most company names are withheld for privacy reasons, the large companies included Larry Flynt Publications (Hustler), Vivid, Pink Visual, Digital Playground (prior to being acquired by Manwin), and Corbin Fisher.

52. Industry trade journals XBIZ NEWSWIRE and AVN.

53. The Free Speech Coalition.

54. The GFY Webmaster Board and the XBIZ.com message boards.

55. Either through individual users (through file-sharing or other means) or by intermediaries (such as video content aggregation sites, file-sharing sites, and file-lockers).

56. XBIZ LA, InterNEXT Expo, AVN Adult Entertainment Expo B2B Show, and the Phoenix Forum. According to sources from the first phase of the study, these are the largest and most comprehensively attended adult industry conferences in the United States.

57. *See, e.g.*, JOSEPH SLADE, *PORNOGRAPHY IN AMERICA: A REFERENCE HANDBOOK* 3-5 (2000); James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1155-56 (1993). The Merriam-Webster definition of pornography is vague: "the depiction of erotic behavior intended to cause sexual excitement." *Pornography Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/pornography> (last visited May 11, 2014).

matter through writing or visuals (such as photography, film, and other media) that is specifically designed to arouse sexual interest.<sup>58</sup>

Adult content that fulfills the conditions of being an original work and fixed in a tangible medium of expression is protected under the U.S. Copyright Act.<sup>59</sup> While some have argued that certain types of adult entertainment should not be granted copyright protection because they do not promote “progress” or “useful arts,”<sup>60</sup> U.S. courts have repeatedly determined that copyright law does not discriminate according to the nature of the content.<sup>61</sup> So long as a work meets the standard of originality set forth in the copyright act, it is granted the same protection as any other type of copyrightable expression. Copyright is even granted to works depicting criminal acts.<sup>62</sup> For example, courts have repeatedly rejected an obscenity defense to copyright infringement,<sup>63</sup> holding that “[t]here is not even a hint in the language [of the Copyright Act] that the obscene nature of a work renders it any less a copyrightable ‘writing’”<sup>64</sup> and that “acceptance of an obscenity defense would fragment copyright enforcement” due to different community standards.<sup>65</sup> The U.S. Copyright Office maintains that it will not ordinarily “examine a work to determine whether it contains material that might be considered obscene or pornographic.”<sup>66</sup> In a recent decision concerning adult material, Judge Posner

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58. A similar definition can be found in *City of Youngstown v. DeLoreto*, 19 Ohio App. 2d 267, 274-75 (1969).

59. See 17 U.S.C. §§ 101-02 (2010).

60. See, e.g., Ann Bartow, *Copyright Law and the Commoditization of Sex*, STAN. L. & POL’Y REV (forthcoming 2014), available at <http://ssrn.com/abstract=1825946>; see also *Liberty Media Holdings v. Swarm Sharing Hash File*, 821 F. Supp. 2d 444, 447 n.2 (D. Mass. 2011) (claiming it is “unsettled in many circuits whether pornography is in fact entitled to protection against copyright infringement”); Amended Complaint at 10-11, *Wong v. Hard Drive Prods., Inc.*, No. 12-CCV-469-YGR, 2012 WL 1252710 (N.D. Cal. Jan. 31, 2012).

61. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903); see also *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982) (rejecting the idea that obscenity is a bar to copyright protection); *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979) (“We conclude that the protection of all writings, without regard to their content, is a constitutionally permissible means of promoting science and the useful arts.”). Furthermore, “it is inappropriate for a court, in the absence of some guidance or authorization from the legislature, to interpose its moral views between an author and his willing audience.” *Mitchell Bros.*, 604 F.2d at 861.

62. The California Supreme Court prominently held in *People v. Freeman*, 46 Cal. 3d 419 (1988), that adult content production is not prohibited per se, placing most of the material discussed in this Article in the legal realm, but there are of course limits set by the law, for instance to producing/distributing “obscene” content.

63. See *Mitchell Bros.*, 604 F.2d 852; *Jartech*, 666 F.2d 403; see also Marc J. Randaza, *Challenging the Copyrightability of Porn*, XBIZ NEWSWIRE (April 19, 2012), <http://www.xbiz.com/articles/legal/147189>.

64. See *Mitchell Bros.*, 604 F.2d at 854.

65. See *Jartech*, 666 F.2d at 406.

66. U.S. COPYRIGHT OFFICE, COMPENDIUM OF OFFICE PRACTICES II, § 108.10 (2014),

held that “even illegality is not a bar to copyrightability,”<sup>67</sup> again confirming that copyright does not discriminate according to community standards, social value, or even criminally sanctioned works.

The question, therefore, of whether or not a specific work “promotes the progress of science and useful arts,” or even whether or not it is legal to produce or distribute, is a separate question from whether or not it is copyrightable. While this is partially due to strong First Amendment rights in the United States, there is another reason within the economic justification of copyright law. Regardless of a country’s emphasis on the right to free speech, the copyright system enables policy makers to set aside the controversy involved in making value judgments. Instead of selecting which works to support based on ambivalent and subjective factors like social or artistic merit, copyright law sets a low “originality” bar<sup>68</sup> and leaves it to the market to assess whether a work is of any value to society. This allows creators to directly capitalize on works that are successful, at no cost to those that are not. Since other areas of law already fully cover the question of legality, raising the copyright bar to include social value judgments seems to be unnecessary given copyright’s role, not to mention a slippery slope.<sup>69</sup> Despite its social stigma, adult-themed content is therefore generally protected by copyright in the United States.

The question as to what specific parts of a work enjoy protection is slightly more complicated. Many types of adult film and photography, while copyrightable as a whole, include elements that may be perceived as generic and thus freely replicable by others. Does copyright cover particularly original positions or acts, perhaps in analogy to decisions on choreography and dance moves?<sup>70</sup> What parts of a standard adult movie plot are protected from being used by other filmmakers without permission? While these are interesting questions, this Article sets them aside due to their lack of practical relevance. To date, all cases of copyright infringement in the adult industry have revolved around “literal copying.”<sup>71</sup> A literal copy is an exact replica of the original work. The issue that content producers therefore face is not that others are creating similar works, but rather that they are reproducing and distributing exact copies of the original without authorization.

Since adult content is legally protected from unauthorized literal copying,

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available at <http://www.copyrightcompendium.com/#108.10>.

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

68. *See, e.g., Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

69. *See Dan W. Schneider, Authority of the Register of Copyrights to Deny Registration of a Claim to Copyright on the Ground of Obscenity*, 51 CHI.-KENT L. REV. 691, 718-21 (1975).

70. *See Bartow, supra* note 60, at 7.

71. *See id.* at 11.

this should allow creators of successful content to recoup their production costs through the ability to sell it exclusively. But what happens when this protection fails? The following Subpart looks at unauthorized uses of adult content online.

### B. *Infringement in the Digital Age*

When adult entertainment businesses first began to distribute content online, they had the advantage of greatly increased privacy and convenience for consumers. Despite its historic prevalence, adult entertainment has traditionally struggled with social acceptance. Making content available online meant that consumers could purchase adult entertainment within the four walls of their homes, without having to be associated with their consumption in public or deal with physical objects such as magazines or video cassettes and DVDs. It also meant circumventing local resistance to retailer locations, while at the same time making content accessible to far more people and even offering it on an international scale. Given the privacy enhancement and new opportunities to meet the massive demand for material, the adult business was arguably in an even better position to capitalize than its mainstream counterparts when content first began to move online.<sup>72</sup>

The downside to the distribution possibilities of the Internet is that they greatly facilitate unauthorized use of content. Digital files are easily copied and shared, allowing for an unprecedented magnitude of copyright infringement. While many industries have grappled with this problem in the online domain, the adult industry was apparently able to thrive for quite some time before running into difficulties. In the beginning, online copyright infringement took the form of individual users capturing content (through scanning, downloading, encoding, or other measures) and making it available to other users on their personal websites. Industry specialists claim that this type of unauthorized use, while widespread, did not generally have a negative impact on business. Some companies were even able to use content “piracy” to their advantage.<sup>73</sup>

When asked to describe what forms copyright infringement has taken and how it has impacted the industry in recent years, only one of the producers emphasized that individual unauthorized use of their content on personal websites was a problem.<sup>74</sup> About half of the producers identified (later-

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72. It should be pointed out, however, that a number of adult companies went out of business during that time. While many were able to successfully capture online markets, some resisted adapting to the change, increasingly finding themselves unable to make ends meet through the old business model of selling physical home video formats in mail catalogues or retail outlets. DVD sales have increasingly declined, especially as broadband speed and video technology have improved.

73. *See infra* Part IV.C.

74. Although some industry specialists and producers noted a comparatively strong sense of “community” among consumers of gay adult material, leading to a culture of collecting and sharing found or purchased material with others or over publicly accessible

developed) peer-to-peer file-sharing technologies as cutting into their sales by allowing for much wider-spread copying of their content.<sup>75</sup> Every interviewee, however, purported that the most relevant source of copyright infringement for the industry in general was the development of user-uploaded video content aggregators, the so-called “tube sites.” These sites are based on a similar model to *YouTube*<sup>76</sup> and allow users to freely share videos. These two distribution methods are described in the following Subparts.

### 1. *Peer-to-Peer File-Sharing*

The architecture of the Internet allows computers to build networks that share digital files. In peer-to-peer file-sharing networks, users can connect to a network via software, which then allows them to search for and transfer data from other users.<sup>77</sup> With increasing broadband access, peer-to-peer file-sharing has become an efficient and popular way to share and distribute digital content. Content is often copied and shared without authorization of the rights holder. In 2008, over 150 million people were using peer-to-peer networks and an estimated thirty-five percent of downloads were adult-related material.<sup>78</sup> The current standard peer-to-peer file-sharing protocol is *BitTorrent*, which is used to transfer large files at increasingly high average speeds.

### 2. *User-Uploaded Content Aggregation Websites*

As mentioned above, while some content producers feel that file-sharing is relevant, they unanimously claim that user-uploaded content aggregators have posed the larger problem to the industry, in particular the adult content tube sites.<sup>79</sup> Companies were allegedly successful in capturing online markets prior to this development and industry specialists and producers place the crux of the copyright infringement problems between 2006-2008 as these sites gained popularity. Tube sites are very widespread today.<sup>80</sup> Just like their originating

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social networks and blogs (like *Tumblr*), regardless of associated rights.

75. In particular as broadband access has become more common and connection speeds have increased. The other half did not believe that file-sharing had a significant impact on sales, either because it expanded the consumer base (attracting new, paying customers at the same time as forfeiting others), or because the file-sharers were believed to have never belonged to the paying customer base.

76. *YouTube* is a prominent video-sharing website that was created in 2005 and acquired by Google, Inc. in 2006.

77. See Felix Oberholzer-Gee & Koleman Strumpf, *File Sharing and Copyright*, in 10 INNOVATION POL’Y AND THE ECON. 24 (Josh Lerner & Scott Stern eds., 2010).

78. See Jerry Ropelato, *P2P Networking—Kids Know! Do Mom & Dad?*, TOP TEN REVIEWS, <http://internet-filter-review.toptenreviews.com/peer-to-peer-file-sharing.html> (last visited May 11, 2014).

79. But also other social networks or content sharing sites, such as *Achan*, *Tumblr*, etc.

80. In May 2014, a Google search for the phrase “porn tube” returned about



platform, *YouTube*, users can view and upload videos directly on the site. In most cases, unregistered users can access and watch the videos, while only registered users can upload content. Registration is commonly anonymous and uploads are unlimited. These sites offer advantages to consumers of adult entertainment over file-sharing networks because no files are downloaded and they allow for easy previewing and switching between videos.<sup>81</sup> Downloading files through peer-to-peer networks is generally more time-consuming, more difficult to browse and preview, and also carries the risk of corrupted files.<sup>82</sup>

Some producers postulated that consumers of adult entertainment may be unique in that their browsing experience is a significant part of the consumption. Unlike a consumer who visits an online music store to purchase a specific album, consumers of adult material will often prefer to look through a less-specific variety of different content. Furthermore, they can be driven by comparatively stronger impatience,<sup>83</sup> preferring to purchase or use immediately. These factors, plus the anonymity and the legality of watching user-uploaded and remotely hosted videos,<sup>84</sup> make the tube sites an attractive choice over peer-to-peer file-sharing for consumers looking for free content.

Because there is little to prevent anonymous users from uploading content without authorization from the rights holder, the tube sites have been recognized as the main source of video copyright infringement for the adult industry. Additional contributing factors are described next.

### 3. *Contributing factors*

File-sharing and content aggregators coincided with a few other circumstances that contributed to the magnitude of online copyright infringement in the adult industry. In what two interviewees described as “the perfect storm,” an increasing erosion of consumer trust (due to the spread of scams), the popularity of the tube sites, and the economic crash all came together to undermine the traditional business model of creating and selling content.

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50,400,000 results.

81. *See also infra* Part III.B.3.

82. As one producer described, “If you’ve ever tried to download anything from *BitTorrent*, it’s like hit and miss. . . . Sometimes it takes a long time. Sometimes it’s fast, but the files are corrupted. . . . So you’ll sit there and be like, ‘oh, I’m getting this thing,’ but unless you have a lot of time on your hands. . . .” Producer interview 1, San Fernando Valley, Jan. 10, 2012.

83. *See also* *Playboy Enters. v. Netscape Commc’ns. Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2001) (discussing impatience and degree of consumer care).

84. As opposed to file-sharing, watching the videos online is not tied to simultaneous reproduction and uploading of the file (uploading copies clearly constitutes a breach of copyright law). While end-user *BitTorrent* litigation in the film, music, and also adult entertainment industries may have a certain deterrence effect on illegal file-sharing, it does not have an effect on the consumption of content via tube sites.

Even if what had been previously felt as inelasticity of demand<sup>85</sup> had held true through the recession, sales were suffering under the newer circumstance of paid material being (less imperfectly) substitutable through free material.<sup>86</sup> Producers presume that for many users, adult entertainment takes on the attributes of a commodity. Content is in high demand but consumers may not make much qualitative differentiation across the market. In other words, when times are tight, any supplier of content will do.<sup>87</sup>

Furthermore, industry specialists claim that new generations of Internet users are becoming generally accustomed to an abundance of free material online. Most producers echoed the sentiment that today's average user does not always purchase content.<sup>88</sup> Compared to the less socially stigmatized mainstream entertainment industries, consumers of adult content may also display less loyalty towards creators, making it harder for producers to "guilt" users into financially supporting the content they consume.<sup>89</sup>

For adult entertainment, free access via file-sharing or tube sites offers the additional benefit of privacy. Online payments are traceable, and users may prefer to create as few records as possible of their consumption.<sup>90</sup> Industry specialists confirm that pirated material has substantial advantages over purchased content both for privacy reasons<sup>91</sup> and, relatedly, due to a past wave

85. The adult industry has been perceived as comparatively recession-resistant. *See, e.g.*, DAN AHRENS, *INVESTING IN VICE: THE RECESSION-PROOF PORTFOLIO OF BOOZE, BETS, BOMBS, AND BUTTS* (2004).

86. *See also* Edelman, *supra* note 2, at 212.

87. As one producer said, "It's kind of like cable television. Most people don't only watch one channel. So if they can't get our content for free, there is plenty of other free content around that they can substitute." Producer interview 2, Los Angeles, Jan. 11, 2012.

88. "The average adult consumer, in my opinion, doesn't want to pay for adult entertainment anymore. Because such a wide variety is available for free." Producer interview 2, Los Angeles, Jan. 11, 2012. *See also infra* Part IV.C. This sentiment is echoed in other industries, where file-sharing persists, despite attempts at legal deterrence. *See* discussion *infra* Part V.

89. Although industry specialists claimed that consumers of gay material displayed comparatively higher loyalty towards their preferred brands and companies. Also, producers and performers have launched a few awareness campaigns similar to those in the music industry, in which stars ask consumers to support them financially and not pirate adult content. *See, e.g.*, Kimi Yoshino, *Adult Film Industry Launches Anti-Piracy Campaign*, L.A. TIMES (May 5, 2010, 4:55 PM), <http://latimesblogs.latimes.com/lanow/2010/05/adult-film-industry-launches-antipiracy-campaign.html>.

90. *See* Edelman, *supra* note 2, at 210.

91. *See* Stephen Yagielowicz & Rhett Pardon, *DMCA: The Porn Industry's Worst Nightmare*, XBIZ NEWSWIRE (Jul. 18, 2012, 4:00 PM PDT), [http://www.xbiz.com/news/news\\_piece\\_print.php?id=151439](http://www.xbiz.com/news/news_piece_print.php?id=151439) ("The biggest challenge for adult content . . . is the reality that pirated material is ironically better than legitimate material. To access legitimate material, a user has to identify himself by subscribing and paying. . . . [P]irated material, by contrast, can be fully anonymous. . . . That disparity exerts enormous pressure on the market, . . . [it] distinguishes adult content from other forms of vulnerable content, where piracy has been at least partially displaced by the provision of

of identity theft and scams. A number of producers spoke of a time several years ago when selling adult content online first became popular and was comparatively unregulated.<sup>92</sup> With the floodgates to the industry opened for new entrants, the online adult business experienced an era of “get-rich-quick schemes” and consumer scams.

Besides annoying pop-up ads, adult websites were engaging in “mousetrapping” consumers on a page,<sup>93</sup> hijacking browsers, and installing malware on users’ computers. Many adult marketing partners used unlawful practices to promote content.<sup>94</sup> Two popular schemes for subscription websites were credit card “banging” (using a customer’s credit card for unauthorized purchases, often only charging a multitude of small amounts) and pre-checked cross sales. Pre-checked cross sales would coerce users to sign up for website memberships at a low price or for a free trial version, but include an automatic subscription in the fine print unless cancelled, and additionally include sign ups to multiple affiliate websites “for free,” many of which renewed the subscriptions automatically for a fee after the trial period. Subscription websites would also lure paying customers with high quality trial content and then have only cheaply licensed, non-exclusive material in the member area (“the same generic stuff that’s everywhere else . . . like, literally the same videos”).<sup>95</sup> Some did not honor customers’ subscription cancellations, continuing to charge their credit cards until a (often prohibitively embarrassing) call was made to the card company. One producer insisted that copyright infringement was far less of a problem than the fact that “the industry destroyed its own business models.”<sup>96</sup>

Many companies, of course, did not engage in these tactics and preferred to invest in more sustainable business models. There were enough “bad players” entering the market over the time period of a few years, however, to erode general consumer trust. Industry specialists feel this played a substantial role in driving people toward copyright infringement. Consuming unauthorized content, while illegal, became a more attractive option for consumers worried about becoming victims of scams, having their personal data stolen, and facing potential embarrassment. Around the same time that the barriers to entry

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high-quality, consumer-friendly legitimate content.”).

92. One example of a recent, game-changing Internet-inspired regulation is the June 2005 enacted extension of the 18 U.S.C. § 2257 recordkeeping requirements to site hosts as “secondary producers,” which is defined as anyone who “insert[s] on a computer site or service a digital image of, or otherwise manag[es] the sexually explicit content of a computer site or service that contains a visual depiction of, sexually explicit conduct.” See 73 C.F.R. pt. 75 (2008).

93. See also Paul M. Barrett, *The New Republic of Porn*, BLOOMBERG BUS. WK., June 21, 2012, <http://www.businessweek.com/articles/2012-06-21/the-new-republic-of-porn>.

94. See also Edelman, *supra* note 2, at 214.

95. Producer interview 13, phone interview, Jan. 5, 2012.

96. Producer interview 19, Las Vegas, Jan. 12, 2012.

changed and the unsustainable scam businesses began to die out,<sup>97</sup> content was becoming available on the tube sites and could now be consumed both legally and anonymously, leading consumers to flock to the free platforms.

The crash of the economy, a general cultural shift in consumer expectations, users' privacy preferences, a lack of loyalty towards creators, and the erosion of trust through scam proliferation all came together to cultivate the unauthorized use and dissemination of digital content. As a result, copyright infringement has become both common and pervasive in the online adult entertainment industry.<sup>98</sup> The following Subpart examines in more detail why it is difficult for content owners to enforce their rights through the legal system.

### C. Enforcement Difficulties

U.S. copyright law grants authors protection against unauthorized reproduction and distribution of copyrighted content under Title 17 of the United States Code. Adult content owners can therefore take legal action against infringers who do not comply with the law. The effectiveness of the methods at their disposal, however, is limited. The following Subparts describe the enforcement possibilities against unauthorized uses of copyrighted material by individuals and intermediaries.

#### 1. Individual Use

Under federal copyright law, infringers face civil<sup>99</sup> or criminal<sup>100</sup> sanctions for the unauthorized reproduction or distribution of copyrighted works. When individuals directly host copyrighted material on their websites without authorization, rights owners can litigate to remove the content and recover damages. As mentioned above, individual infringement of this sort is not perceived to be a large problem. It requires locating infringing material, but once the unauthorized use gains enough traction to be a threat to a content owner, it is likely to become visible and is fairly easy to shut down. Interestingly, when this type of online copyright infringement first began to occur, a number of adult entertainment companies did not attempt to use the

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97. A recent study of the current landscape of malware-infected websites found that religious and ideological websites are now three times more likely to be affected than adult content sites. Symantec Corporation, *2011 Trends, in 17 INTERNET SEC. THREAT REPORT 33* (2012), available at [http://www.symantec.com/content/en/us/enterprise/other\\_resources/b-istr\\_main\\_report\\_2011\\_21239364.en-us.pdf](http://www.symantec.com/content/en/us/enterprise/other_resources/b-istr_main_report_2011_21239364.en-us.pdf).

98. Furthermore, a factor that contributes to the spread of free content (and the ineffectiveness of enforcement, as seen below) is that consumers will sometimes treat adult material more like a commodity than a highly differentiated product, see *infra* Part III.D.

99. 17 U.S.C. § 501(b) (2002).

100. 17 U.S.C. § 506(a) (2008) (noting that criminal prosecution applies to willful infringement of copyright for purposes of commercial advantage or private financial gain).

legal system to prevent the use of their content. While one reason for the smaller producers could have been that the costs of monitoring and enforcing were prohibitively high,<sup>101</sup> some of the larger companies apparently did not fight this type of infringement either, because they saw value in the free distribution of their material.<sup>102</sup>

## 2. Peer-to-Peer Network Users

In early cases of file-sharing, courts affirmed that using peer-to-peer networks to copy and distribute copyrighted content constitutes direct infringement.<sup>103</sup> A number of adult content producers have therefore attempted to use the legal system to collect damages and deter users from sharing content over the networks.<sup>104</sup>

In order to pursue file-sharers, copyright owners must locate their content by searching the network and identifying the Internet Service Providers (ISPs) of infringing users. The ISPs are required to hand over the name and address of the individual account owner if subpoenaed by the copyright owner. This requires a so-called “John Doe” lawsuit to be filed with a court and the subpoena approved by a judge. Once the copyright owner has retrieved the name and address of the account holder from the ISP, the owner can then proceed to file a civil lawsuit against the alleged infringer.

In practice, copyright owners will generally contact the account owner and request a settlement amount. Alleged file-sharers can then theoretically decide whether to pay the requested amount or be taken to court for copyright infringement.<sup>105</sup> Given the large number of file-sharers and the scale of infringement for individual files, copyright owners have begun to bundle multiple users into one court action rather than to seek subpoenas for each individual infringement. Both of these strategies are theoretically permissible.<sup>106</sup> In fact, they can be an economic necessity to keep the cost of litigation within an affordable range. If content owners were not able to collect settlements or bundle allegedly infringing users in these cases, the costs of

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101. In theory, statutory damages are calculated to make litigation cost-effective. However, for the often “mom and pop” style businesses, even acquiring legal counsel can be a prohibitively daunting undertaking, be this due to information deficiencies, credit restrictions, or behavioral biases.

102. *See infra* Part IV.C.

103. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005); *RIAA v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003).

104. *See, e.g., infra* notes 109-110, 114-115 and 120.

105. Court-imposed damages can range from \$750 to \$150,000. *See* 17 U.S.C. § 504(c) (2010). Furthermore, court procedures are tedious and costly, so parties have an incentive to settle out of court. *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 352 (2005).

106. Multiple defendants can be joined in one action. *FED. R. CIV. P.* 20.

enforcing their copyrights would be prohibitively high.<sup>107</sup> However, these two strategies have posed difficulties for adult content owners.

First of all, courts have questioned the legitimacy of asking for settlements given consumers' high valuation of privacy in this particular industry. Many users are willing to settle and pay, not only because the settlement is cheaper than what they would face in court,<sup>108</sup> but also to prevent the knowledge of their adult content consumption from becoming public. In some cases, account owners may pay up even if they are mistakenly targeted,<sup>109</sup> simply to protect their privacy. Some parties have been accused of using shaming tactics to extort settlements from users.<sup>110</sup> It is imaginable that even in cases where litigants do not intentionally extort users and make a conscious effort to target large-scale file-sharers and ask for "reasonable" amounts, it is difficult to determine the boundaries of an efficient settlement system when users' privacy preferences come into play. Once defendants agree to settle for the "wrong reasons,"<sup>111</sup> the system ceases to work as intended. The fact that privacy preferences make a difference is illustrated by a comparatively higher amount of settlement success stories in the area of gay adult content, where users are more likely to value avoiding publicity.<sup>112</sup>

Courts are aware of the privacy issues with adult content settlements and cases have been dismissed. While the dismissals themselves are based on a variety of reasons, industry specialists suspect that the underlying cause is a general lack of support for this settlement model. Courts have denied subpoena requests when plaintiffs bundle file-sharers from different jurisdictions,<sup>113</sup> from

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107. See *infra* note 122.

108. In theory this would be the economically desirable reason within the system.

109. For example, owners of open wireless Internet networks that were used by others may elect to settle even if they have not engaged in any copyright infringement themselves. See, e.g., *Malibu Media, LLC v. Doe*, No. 2:12-cv-3623-ODW(PJWx), 2012 WL 5382304, at \*2 (C.D. Cal. June 27, 2012) ("[T]he potential for abuse is very high. The infringed work is a pornographic film. To save himself from embarrassment, even if he is not the infringer, the subscriber will very likely pay the settlement price.").

110. See *id.*; see also Memorandum in Opposition to Plaintiff's Motion For Order To Show Cause at 2, *AF Holdings, LLC v. Comcast Cable Commc'ns*, No. 12-C-3516, at 2 (N.D. Ill. June 1, 2012) (describing how the ISP refuses to hand over the defendants' information and asks a federal judge to deny the subpoenas because "plaintiffs should not be allowed to profit from unfair litigation tactics whereby they use the offices of the Court as an inexpensive means to gain Doe defendants' personal information and coerce 'settlements' from them.").

111. In other words, defendants may settle not because they face the probability of higher monetary damages if taken to court and found to have infringed, but rather because they face public embarrassment in any case.

112. According to conversations with industry specialists.

113. See, e.g., Nate Anderson, *Judge: Don't Bring Me Any More Anonymous File-Sharing Lawsuits*, ARS TECHNICA (May 23, 2011, 9:45 AM PST), <http://arstechnica.com/tech-policy/2011/05/judge-dont-bring-me-any-more-anonymous-file-sharing-lawsuits/>; Nate Anderson, *Judge Eviscerates P2P Lawyer: "I Accepted You at Your*

different swarms<sup>114</sup> and times,<sup>115</sup> or with potentially different defenses.<sup>116</sup> Requests have also been denied when it is found that identifying an account owner is not enough evidence to determine who actually was sharing the file over the network.<sup>117</sup> A number of “John Doe” suits involving adult material have thus been refuted, indicating difficulties for copyright owners. Aside from the issue of settlement versus extortion, some of the interviewed lawyers alleged that courts are generally unsupportive based on the nature of the content in question. The lawyers also claimed that not only are these cases hard-pressed to get sympathy from courts because of their subject matter, but that the staff is “fed up” with mass end-user lawsuits, which require a lot of internal effort and resources. Weary of the paperwork that the John Doe litigation brings without ever actually reaching a trial,<sup>118</sup> the courts will oftentimes find any reason within their power to dismiss the cases.<sup>119</sup> Furthermore, a number of players have fallen into bad graces with judges through their tactics, earning themselves hefty fines<sup>120</sup> and negative publicity.<sup>121</sup>

As mentioned above, attempting to directly settle with alleged infringers

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*Word*”, ARS TECHNICA (March 9, 2011, 12:30 PM PST), <http://arstechnica.com/tech-policy/2011/03/judge-eviscerates-p2p-lawyer-i-accepted-you-at-your-word/>.

114. See *Pac. Century Int'l Ltd., v. Doe*, No. C-11-02533-(DMR), 2011 WL 2690142, at \*3-4 (N.D. Cal. July 8, 2011) (finding that the particular torrent files may not be similar enough for the plaintiff to join John Does from different swarms into one lawsuit over downloading the “same” copyrighted work).

115. See *On The Cheap, LLC v. Doe*, 280 F.R.D. 500, 502-03 (N.D. Cal. 2011) (dismissing all but one of over five thousand defendants, saying they were improperly joined because they participated in the same swarm, but it is not clear whether they participated at the same time).

116. See, e.g., Rhett Pardon, *N.Y. Magistrate Judge Tosses Four Porn BitTorrent Suits*, XBIZ NEWSWIRE (May 7, 2012, 12:30 PM PDT), <http://newswire.xbiz.com/view.php?id=148101>.

117. See *supra* note 109.

118. As of 2011, none of these cases had reached a trial verdict. M. Alex Johnson, *Porn Piracy Wars Get Personal*, NBCNEWS.COM TECH (July 20, 2011, 8:06 AM ET), [http://technolog-discuss.nbcnews.com/\\_news/2011/07/20/7113220-porn-piracy-wars-get-personal?lite](http://technolog-discuss.nbcnews.com/_news/2011/07/20/7113220-porn-piracy-wars-get-personal?lite).

119. See, e.g., Nate Anderson, *Random Defendant Outlawyers P2P Attorney, Gets Lawsuit Tossed*, ARS TECHNICA (Feb. 26, 2011, 3:23 PM PST), <http://arstechnica.com/tech-policy/2011/02/random-defendant-outlawyers-p2p-attorney-gets-lawsuit-tossed/> (“Judge Milton Shadur was clearly annoyed that the litigation has been taking up his docket space . . . one of the anonymous defendants in the case wrote in with an amateur ‘motion to quash’ Steele’s subpoenas. The judge immediately used that amateur motion as the ground for a total dismissal of the case . . .”); see also *supra* notes 109 and 114-115.

120. See, e.g., *Mick Haig Prods., v. Doe*, No. 3:10-cv-1900-N, 2011 WL 5104095, at \*1 (N.D. Tex. Sept. 9, 2011) (imposing a court sanction of \$10,000 on the attorney).

121. See, e.g., Mike Masnick, *Copyright Troll Claims Sanctions Against Him Are ‘Bulls\*\*t’ And He’s Going To Keep Sending Questionable Subpoenas*, TECHDIRT (July 16, 2012, 11:26 AM), <https://www.techdirt.com/articles/20120716/08573019710/copyright-troll-claims-sanctions-against-him-are-bullst-hes-going-to-keep-sending-questionable-subpoenas.shtml>.

and bundling multiple John Doe lawsuits may currently be the only cost-effective ways to efficiently enforce copyrights against file-sharers with sufficient compensation effect. Filing fees (and other administrative expenses, such as subpoena fees) make litigating the cases against each individual user prohibitively costly.<sup>122</sup> On the other hand, privacy preferences make the system susceptible to abuse in the context of adult content, which draws negative public attention. Recent cases have attracted the involvement of privacy advocacy groups like the Electronic Frontier Foundation<sup>123</sup> and have come under scrutiny in both the tech blog scene and the mainstream news media.<sup>124</sup> Adult content right holders that litigate are now regularly accused of being “copyright trolls”<sup>125</sup> and settlements are scornfully deemed “a good way to make an easy buck.”<sup>126</sup>

In interviews with both producers and industry lawyers, the answers on whether they engaged in lawsuits against file-sharers, or thought that end-user litigation could be an effective part of a business strategy, were divided. At the time of this Article, only eight companies in the U.S.-based adult entertainment production industry are known to have engaged in actions against file-sharers.<sup>127</sup> Of those companies, the three that were interviewed for this study

122. Even when full statutory damages are taken into account. Currently, the average filing fee for U.S. district courts is \$350. Subpoenas cost around \$150. Lawyers cost money as well. Subtracting these costs from the settlement amount, and then taking into account that there is often no money to be collected, the economic problem is apparent. Filing fees can be recovered in the case of a favorable judgment, but John Doe cases are only ever intended to reach the courtroom as a last resort (and most never do). Going through a court procedure would incur many additional costs to everyone, which is why our legal system allows for settlements in the first place.

123. See Robyn Hagan Cain, *Evan Stone Gets ‘EFF’-ed Up in Porn Copyright Trolling Sanctions*, FINDLAW FIFTH CIR. NEWS AND INFO. BLOG (July 15, 2012, 3:02 PM) [http://blogs.findlaw.com/fifth\\_circuit/2012/07/evan-stone-gets-eff-ed-up-in-porn-copyright-trolling-sanctions.html](http://blogs.findlaw.com/fifth_circuit/2012/07/evan-stone-gets-eff-ed-up-in-porn-copyright-trolling-sanctions.html); *Copyright Troll Gives Up in Porn-Downloading Case*, ELECTRONIC FRONTIER FOUNDATION (Feb. 1, 2011) <https://www.eff.org/press/archives/2011/01/31>; *Judge Blocks Copyright Trolls in Porn-Downloading Lawsuits*, ELECTRONIC FRONTIER FOUNDATION (Dec. 16, 2010), <https://www.eff.org/press/archives/2010/12/16>.

124. See Timothy B. Lee, *This Week’s Local News Scare: Porn Trolls Are Coming for You*, ARS TECHNICA (July 30, 2012, 1:55 PM PDT), <http://arstechnica.com/tech-policy/2012/07/this-weeks-local-news-scare-porn-trolls-are-coming-for-you/>; Kurtis Ming, *Call Kurtis: Could ‘Copyright Trolling’ Happen to You?*, CBS SACRAMENTO (June 18, 2012, 10:37 PM), <http://sacramento.cbslocal.com/2012/06/18/call-kurtis-could-copyright-trolling-happen-to-you/>; Mackenzie Warren, *Internet Providers Turn To Attorneys To Protect Content*, NBC MY NEWS 3 (July 25, 2012, 7:00 PM), <http://www.mynews3.com/content/news/story/Internet-providers-turn-to-attorneys-to-protect/g1viHJEjF025YN56WIU33A.csp>.

125. See Lee, *supra* note 124; Warren, *supra* note 124.

126. See Johnson, *supra* note 118 (“The incentive to settle is to keep from being named forever in court records as a porno fiend, which ‘seems to me like it’s a good way to make an easy buck,’ said Julie Samuels, a staff attorney for the Electronic Frontier Foundation.”).

127. As confirmed through correspondence with [fightcopyrighttrolls.com](http://fightcopyrighttrolls.com), which keeps track of file-sharing litigation. Three of these companies were part of this interview study.



were large companies. They said they undertook lawsuits for the compensation effect of settlement money. The producers that had filed end-user lawsuits all stated that it was part of a larger strategy and by no means enough on its own to effectively prevent copyright infringement and recoup costs. Furthermore, while some lawyers encourage their clients to proceed with end-user litigation, others have advised their clients against it.<sup>128</sup>

The other two large companies, which do not litigate, as well as most of the medium and smaller producers, claimed that there was generally too little money to be made, even assuming the full support of the courts.<sup>129</sup> Thus, litigation was not a cost-effective method for the medium and smaller producers. Of the producers that do not litigate, most said that they had never gone, nor did they plan to go after file-sharers as part of their business model. The stated reasons were manifold. Particularly small producers felt that it was too costly. Even if they could afford to hire legal counsel and pay fees for court actions, they felt that the returns were too low and that litigation would never be cost-effective.<sup>130</sup> Yet others said that they did not believe in “suing customers,”<sup>131</sup> claiming that file-sharing had expanded the audience for porn consumption and with it the number of potential paying users. They said that while some consumers would get most or all of their content for free, there

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128. This is interesting given the financial opportunities for legal counsel in copyright enforcement. Lawyers (as rent-seeking agents) have less incentive to push companies away from litigation and towards alternate business models that do not rely on copyright enforcement. Yet in representing the interests of their clients, some feel that that P2P copyright infringement suits are not a good option. See Greg Piccionelli, *Ten Things to Consider Before Engaging a Firm to File a Mass Copyright Infringement Lawsuit*, PICCIONELLI & SARNO (January 2011), [http://www.gregpiccionelli.com/index.php?option=com\\_content&view=article&id=188:10-things-to-consider-before-engaging-a-firm-to-file-a-mass-copyright-infringement-lawsuit&catid=87&Itemid=1258](http://www.gregpiccionelli.com/index.php?option=com_content&view=article&id=188:10-things-to-consider-before-engaging-a-firm-to-file-a-mass-copyright-infringement-lawsuit&catid=87&Itemid=1258).

129. Contrary to what industry specialists had indicated, the gay studios that were interviewed did not differ from the straight adult content studios in their likelihood to pursue file-sharers. It is possible that this result is skewed, given the small sample size of interviewees.

130. As one producer described: “Fighting that is just a nightmare in itself. You spend a lot of money, you spend a lot of energy, you spend a lot of time, and you usually lose. Because that piece of content, once it’s ripped off, it’s ripped off not only once, it’s ripped off, you know, tens of thousands of times, so how are you going to stop all this from happening? You start with one person, it’s already duplicated hundreds of thousands of times from that one person. So it’s a lose-lose battle if you’re trying to stop it for monetary reasons.” Producer interview 4, Los Angeles, Jan. 11, 2012.

Another producer said: “There’s only been a few cases where anyone has ever gotten anything out of these judgments. So you can get all of the judgments and injunctions you want, but these people. . . you’re still dealing with some teenage boy in the Netherlands, who was just [. . .] trading it around. Or some guy in Russia.” Producer interview 6, Los Angeles, Jan. 12, 2012.

131. Producer interview 8, Las Vegas, Jan. 16, 2012.

were also people who would occasionally purchase,<sup>132</sup> and the companies that were cracking down on consumers against the current social norms of file-sharing would not remain in a favorable position to sell anything.<sup>133</sup> Relatedly, some felt that litigating against this technological disruption was not a long-term solution,<sup>134</sup> stating that they preferred to apply their efforts and resources elsewhere.<sup>135</sup> Finally, some simply said that file-sharers could not be convinced to buy content through lawsuit threats since these users were not going to pay for content either way.<sup>136</sup> Rather than try to “go after students who are just going to go get stuff from the tube sites if they can’t download it,” they thought that companies should focus their efforts on targeting their actual customers, “people with disposable income.”<sup>137</sup>

Interestingly, while those companies that litigate tend to be the larger ones, not all larger companies litigate. As mentioned above, producers generally feel that the crux of the copyright infringement problems has been the availability of free content on tube sites. Even if file-sharing were completely eliminated, this free material serves as a substitute commodity, undermining producers’ ability to sell copyrighted content. The individual users who upload stolen content to tube sites are anonymous and prohibitively difficult to track down. Given the general difficulties of suing individual sharers of unauthorized content, the following Subpart looks at possibilities for taking legal action against distributors, facilitators, and user-uploaded content website owners: the intermediaries.

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132. These consumers will either purchase specific content or other convenience and experience goods offered by the company. For further discussion, *see infra* Part IV.

133. “Litigation’s just going to mold it into an even worse thing. Even more aggressive. And put it in the hands of people who are malicious.” Producer interview 4, Los Angeles, Jan. 11, 2012.

134. “There’s no way to prevent it. . . . [O]bviously it’s going to evolve and move forward, but not from litigation.” Producer interview 4, Los Angeles, Jan. 11, 2012.

135. “Watching some other companies take a really proactive approach, or an actively aggressive approach and going after copyright infringement is interesting, too, because they’re spending a lot of money on it. And for very little reward. Because they’ll get judgments, but they’re never collecting the money.” Producer interview 15, Los Angeles, Jan. 12, 2012.

136. “[K]ids, it’s already engrained in them: the music’s free, and video’s free. You don’t pay.” Producer interview 17, Los Angeles, Jan. 12, 2012. *See also infra* Part IV.C. Another interviewee said: “The site can get shut down, the network connection too can get shut down, but it’s just gonna proliferate somewhere else or in another direction.” Producer interview 12, Las Vegas, Jan. 20, 2012.

137. Producer interview 9, Las Vegas, Jan. 16, 2012. Interestingly, at business-to-business industry conferences during panel discussions, views were heavily divided on whether and how to pursue piracy. While most everyone agreed that it has been a problem, the debates over solutions were lively and differentiated, strikingly unlike the copyright enforcement dialog in other entertainment industries.

### 3. Intermediaries

When it comes to the intermediaries in online copyright infringement, the Digital Millennium Copyright Act (DMCA) exempts certain service providers from liability, granting them a “safe harbor” in § 512.<sup>138</sup> The exemption protects them from being held responsible for direct copyright infringement, such as when they themselves make unauthorized copies (for technical reasons), but it also protects them from being held responsible for copyright infringement conducted by their users under certain conditions. In shielding the intermediaries from this secondary liability, the “safe harbor” provision attempts to sustain a balance of interests between rights holders and online service providers.<sup>139</sup> Because of the “safe harbor” provision, attempts by adult entertainment rights holders to hold intermediaries liable for copyright infringement have been largely unsuccessful.<sup>140</sup>

These judgments have followed in the footsteps of their non-adult industry counterparts.<sup>141</sup> As for other intermediaries, *BitTorrent* websites and file lockers have recently come under more pressure from mainstream rights holders, for example, with judgments against the prominent *BitTorrent* website, *The Pirate Bay*,<sup>142</sup> and file locker website *Megaupload*.<sup>143</sup> Some of these intermediaries, which have been accused of facilitating access to entire libraries of stolen content, are being denied legal protection for various reasons that go beyond copyright infringement, including breaches of their terms of service and accusations of hosting criminally prosecutable illegal content.<sup>144</sup> While such

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138. See 17 U.S.C. § 512 (2010).

139. See World Intellectual Property Organization [WIPO] Copyright Treaty preamble, Apr. 12, 1997, S. Treaty Doc. No. 105-17, 1997 WL 447232.

140. See, e.g., *Vivid Entm't LLC v. Data Conversions, Inc.*, No. 2:07-cv-08023 (C.D. Cal. Dec 10, 2007) (*LegalMetric*), voluntarily dismissed. Another example of a prominent case failing to establish liability for intermediaries is *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) (holding that framing and hyperlinking as part of an image search engine constituted a fair use of Perfect 10's images). See also Edelman, *supra* note 2, at 212-13.

141. But see the recent Second Circuit holding in the prominent mainstream case, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012), before which *YouTube* was not seen as responsible for the actions of its users.

142. The four *Pirate Bay* founders were sentenced to jail and fines by the district court (tingsrätt) of Stockholm, Sweden. Nytt Juridisk Arkiv [NJA] [TR] 2009-04-17 B13301-06 (Swed.), translated in *Stockholm District Court Translation*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, available at <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf>.

143. *Megaupload's* owners were arrested and its sites were shut down by the Department of Justice on January 19, 2012. The trial is still pending. Christopher Danzig, *Megaupload Trial May Never Happen Because of Possible FBI Error*, ABOVE THE LAW (Apr. 23, 2012), <http://abovethelaw.com/2012/04/megaupload-trial-may-never-happen-because-the-fbi-apparently-doesnt-understand-extradition-rules>.

144. For instance, child pornography.

outcomes have led to a number of file lockers shutting down,<sup>145</sup> the ultimate effectiveness of these judgments is questionable. In England, when ISPs were directed to block access to *The Pirate Bay*, this was immediately subverted through proxies.<sup>146</sup> A recent study shows that preventing access to such websites has no discernible effect on the amount of file-sharing that occurs.<sup>147</sup> To the extent that there is no deterrence effect, enforcement against these intermediaries may only provide a short-term compensation to the individual litigator.

Nearly all of the adult content producers expressed frustration with the “safe harbor” provision for online service providers,<sup>148</sup> in particular for the tube sites.<sup>149</sup> Because the safe harbor provision states that the service provider is not liable if it “does not have actual knowledge that the material or an activity using the material on the system or network is infringing,” the right holders must locate all unauthorized uses of their material and subsequently alert the intermediary using a takedown procedure.<sup>150</sup> Because not all firms have the necessary time and resources to monitor the sites for their material and send the required notices, some have outsourced this to external companies that specialize in the task. Others are working on technological solutions to automatically identify their content and send notification. Both of these solutions are costly, yet effective to the extent that large amounts of content can be tracked and located.

Once notified, the intermediary must respond “expeditiously” to comply with the takedown notice.<sup>151</sup> In practice, this will usually be a period of around twenty-four to forty-eight hours, which for the adult tube sites means that the content may have already been viewed millions of times.<sup>152</sup> Furthermore, once

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145. Some of these closed down on their own accord following the recent judgments against others; for example, *Filesonic* and *Fileserve*, two prominent cyberlocker services, ceased their operations within three days of *Megaupload's* shut down. See Tom Cheredar, *Following Megaupload Takedown, FileSonic & FileServe Remove Sharing Features*, VENTURE BEAT (Jan. 23, 2012, 11:24 AM), <http://venturebeat.com/2012/01/23/filesonic-fileserve-yank-sharing>.

146. See, e.g., Sebastian Anthony, *The Pirate Bay Evades ISP Blockade with IPv6, Can Do It Eighteen Quintillion More Times*, EXTREMETECH (June 8, 2012, 7:03 AM), <http://www.extremetech.com/internet/130627-the-pirate-bay-evades-isp-blockade-with-ipv6-can-do-it-18-septillion-more-times>.

147. See JOOST POORT & JORNA LEENHEER, *FILESARING 2©12 37* (2012), available at [http://www.ivir.nl/publicaties/poort/Filesaring\\_2012.pdf](http://www.ivir.nl/publicaties/poort/Filesaring_2012.pdf).

148. See 17 U.S.C. § 512 (2010).

149. Some also expressed frustration with other media sharing sites, such as social networks like *4chan* or *Tumblr*.

150. 17 U.S.C. § 512(c)(1)(A)(i); see also Yagielowicz & Pardon, *supra* note 91.

151. 17 U.S.C. § 512(c)(1)(C); see also Debra Weinstein, *Defining Expeditious: Uncharted Territory of the DMCA Safe Harbor Provision*, 26 CARDOZO ARTS & ENT. L. J. 589, 589 (2008).

152. See Anthony, *supra* note 13.

the content has been taken down, it will often quickly reappear. While repeat infringers are required to be banned from posting to the site, the content will simply be uploaded under a different user account,<sup>153</sup> leading to a continuous circle of takedown notices and uploads that producers likened to “cat and mouse games” or “whack-a-mole.”<sup>154</sup>

Based on the suspicion that the tube site operators themselves were uploading stolen content in order to increase traffic to their sites,<sup>155</sup> one of the large producers said that he had taken legal action against some of the intermediaries and gotten favorable settlements. However, according to the DMCA and confirmed by a landmark decision in the case of *Viacom International, Inc. v. YouTube, Inc.*,<sup>156</sup> as long as the site operator has no knowledge of infringing user-uploaded content, it is only required to take down content as notified by the content owner. Tube sites and other user-uploaded content aggregators are therefore able to continue to operate as long as they are not proven to be directly infringing or purposely allowing users to infringe despite knowledge of the action.

Given the financial impact to producers of losing exclusive control over their content, many continue to engage in the takedown procedure and are investing in technological strategies<sup>157</sup> as well as partnership models with the tube sites.<sup>158</sup> Producers and industry specialists expressed acute awareness, however, that these measures will neither eliminate online copyright infringement nor be an effective way to recoup costs within the traditional business model of creating and selling content.

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153. See Yagielowicz & Pardon, *supra* note 91 (“A UGC [User Generated Content] site with a repeat offender (whether a ‘real’ user or spurious staffer) that is required to terminate that user’s account, will only see user John\_123 quickly come back as John\_124 or under some other bogus identifier or ‘nick’ (short for ‘nickname’). The signup process’ relative anonymity prevents any effective due-diligence—even by those UGC sites that may be actually interested in keeping infringing content uploads at bay. . . .”).

154. A producer who uses automated software that checks every two hours for fingerprinted content said, “It’s really eye-opening: . . . Let’s say it’s up for a day . . . in that short window over a hundred million people had already viewed it. In that short window. So even though we get it down, a lot of these tube sites, their whole business is the front page. Whatever is new. Whatever is new is a day or two. So if they take it down a day or two later, it doesn’t matter, they’ll have new stuff up.” Producer interview 1, San Fernando Valley, Jan. 10, 2012.

155. See Yagielowicz & Pardon, *supra* note 91.

156. 676 F.3d 19 (2d. Cir. 2012).

157. Digital watermarks and fingerprinting systems are two examples.

158. For example, the Free Speech Coalition’s Anti-Piracy Action Program (APAP) seeks revenue-sharing models with participating tube sites in exchange for the adoption of technological measures to police for fingerprinted material. See *Anti-Piracy Action Program (APAP)*, FREE SPEECH COALITION, <http://fscapap.com/tube.html> (last visited May 9, 2014).

#### D. Summary

Copyright protects adult content, but infringement has become technologically easy and commonplace online. Fully enforcing exclusive rights is prohibitively difficult. In order to effectively protect their copyrights, producers must sue the individual users that upload pirated content (to tube sites or onto file-sharing networks), send whack-a-mole takedown notices to user-uploaded content sites, or litigate against intermediaries, who often cannot be held liable. The obstacles to these actions and the general difficulty of preventing online copyright infringement undermine producers' ability to retain exclusivity of their material. Furthermore, many producers are competing with free content that serves as a partial substitute, making it more difficult to sell content as a way of recouping the costs they have invested in its production. If content has the attributes of a commodity, enforcing copyright becomes a rather useless exercise. Settlements from peer-to-peer end-user litigation may have a (short-term) compensation effect for those who engage in it and potentially a slight deterrence effect on general file-sharing or the unauthorized use of a specific company's material. However, enforcement remains largely ineffective in helping to salvage the traditional model of selling content because it is undermined by the availability (and substitutability) of free material.<sup>159</sup>

Because of the barriers to, and ineffectiveness of, copyright enforcement, both producers and industry specialists confirm that the industry cannot rely on the copyright system as it was originally intended to function. In the absence of the economic incentives provided by copyright law, simply attempting to prevent copyright infringement within a traditional business model of creating and selling content is deemed a losing strategy. Producers are therefore moving to adopt other methods of recouping investment costs.

Since the function of copyright is so severely undermined in the online adult entertainment industry, it is an interesting space to analyze in the context of markets with low IP protection. Previous literature has found shifts in the type of innovation that is produced.<sup>160</sup> The next Part explores a similar shift in the online adult entertainment industry where new kinds of goods are emerging. Furthermore, while production may have suffered setbacks, either in quantity or quality, the next Part looks at why some incentive to produce traditional content may remain.

#### IV. INDUSTRY SHIFT AND NEW PRODUCTION INCENTIVES

“You know, in this industry, when we started, you made a movie and you

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159. See *infra* Part IV.C on why free material is unlikely to disappear—not only does pirated content remain available on the tube sites, but content producers are also giving part of their content away as a loss leader.

160. See *infra* Part IV.B.

put it out on DVD and that was your income. And anybody that just stuck with that model? They're not around anymore."<sup>161</sup>

The conventional theory behind copyright predicts that the production of goods will be insufficient where copyrights are missing. While such "underproduction" is difficult to measure in practice,<sup>162</sup> the common belief among industry members is that production of adult content has indeed decreased in recent years, not only because of the economic downturn, but also as a result of copyright infringement.<sup>163</sup> As the industry has struggled to maintain content exclusivity, its production levels appear to have suffered. The key question, however, is whether anything else is happening.

Looking at how the industry has steadily weathered previous changes,<sup>164</sup> technological disruptions have generally always been times of struggle as many companies go out of business. But they have also always cleared the way for new market entrants, and the companies that have survived and been successful in the long-term have been flexible enough to quickly and fundamentally adapt their business models in times of change.<sup>165</sup> What is currently perceived, particularly in the news media, as the "death" of the industry<sup>166</sup> might simply be a turnover of old players being replaced by new players with new strategies.

If there is an industry that is most likely to survive whatever hardship is thrown at it, adult entertainment seems a strong contender.<sup>167</sup> Part of the industry's general flexibility may be due to the fact that it has historically been unable to fall back on law enforcement or policy makers when dealing with technological disruption.<sup>168</sup> The socially stigmatized business has little political

161. Producer interview 3, Los Angeles, Jan. 11, 2012.

162. As one of the smaller producers put it, "It's really impossible to quantify how much of an impact it's had on any one company. You know you're making content, you know it's stolen out there, but you don't know how many consumers would have bought it if it hadn't been out there. So you don't know how much you would have earned, or maybe lost, you can't really ever do it, it's just guessing. You just generally feel it has an impact." Producer interview 17, Los Angeles, Jan. 12, 2012.

163. While common lore states that the demand for adult material is comparatively inelastic (i.e. more recession resistant than for other entertainment goods), the economic crisis is likely closely linked to copyright infringement because free content serves as a (imperfect) substitute for paid content, even if it is of lesser quality. *See supra* Part III.C.

164. For example, the development of home video technology or the Internet prior to broadband, *see* BARSS, *supra* note 8; Bakker & Taalas, *supra* note 4; *see also* FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* (2001).

165. For an example of the adaptability of companies like Playboy, *see supra* Part IV.C.

166. *See supra* note 17 and accompanying text.

167. *See, e.g.*, Dan Cameron, *Edge Of Gay: Of Machines and Men*, XBIZ NEWSWIRE (July 20, 2012), <http://www.xbiz.com/articles/151390> ("The business is never settled," Valenti says. "If you think it's settled, you're about to hit an iceberg. This is a tremendously innovative industry, Darwinian sometimes . . .").

168. "[T]he porn industry is a different one. We don't have any cache with lawmakers," said one producer, adding that "the entertainment industries are trying to

clout and adult entertainment companies are comparatively weak in lobbying policy makers to represent their interests.<sup>169</sup> Because using politics to resist change is not an option, some of the long-term successful companies in the business may be especially quick to accept new environments as a given and figure out how to work with them.<sup>170</sup>

The new environment in this particular case is the architecture of the Internet, which allows content to be liberally copied and distributed by unauthorized users. While this has created considerable difficulties in protecting the exclusivity of copyrighted material, some industry specialists and producers claimed that increased access and wide availability has also greatly expanded the consumer base for adult content, including many who are willing to spend money. However, they also feel that what the average consumer is willing to pay for has changed.

While times have been tough, conversations with industry specialists and qualitative interviews with content producers indicate that the industry is restructuring itself to adapt to this new environment. Companies are shifting towards selling what cannot easily be copied or offered for free<sup>171</sup> and looking for ways to recoup costs. Interestingly, it appears that some of the new business models could sustain the production of traditional content<sup>172</sup> as well as increase investment in types of goods that are less easily replicable.

The interviewees all felt that unauthorized content distribution had changed the industry over the last five to eight years.<sup>173</sup> While they confirmed that many adult entertainment production companies were struggling or had gone out of business as a result, most believed that those companies had largely disappeared because they failed to change their business models. The interviewees also stated that in addition to unauthorized content distribution, the traditional business models of the industry were facing an additional problem, namely that many producers were giving away content for free, thus undermining the ability of others to sell theirs. Several noted that consumer expectations had significantly changed, in that people expected to be able to get (at least some) content free of charge, and that they were trying to

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rewrite all the laws and make anyone a criminal just for whistling a tune when they walk down the street. Completely overkill.” Producer interview 6, Los Angeles, Jan. 12, 2012.

169. Although the industry does have a (small) political lobby in the form of the Free Speech Coalition, a non-profit trade association that “opposes the passage and enforcement censorship and obscenity laws.” See FREE SPEECH COALITION, <http://www.freespeechcoalition.com> (last visited May 10, 2014).

170. Or, as more than one producer put it, to “adapt or die.” Producer interviews 5, 7, and 12, Las Vegas, Jan. 18, 20, 2012.

171. See discussion *infra* Part IV for examples.

172. Not at the same level as previously, but at a higher level than assumed by conventional IP theory, see *infra* Part V.

173. The most commonly stated defining change factors were the popularization of the tube sites followed by the economic downturn.



accommodate these new expectations. Especially the large producers reported to be in the process of changing or expanding their main revenue sources. The majority of producers and industry specialists noted a perceived shift in the industry towards selling experience-based goods with an increased focus on services and interactivity. While about three quarters of the respondents reported to have reduced their level of content production, some said they had not. While all but three indicated that they were trying to supplement their revenue sources with activities other than just selling content, none of the interviewed producers expressed the belief that they would discontinue the production of traditional, copyable material.

The following Subparts take a closer look at convenience goods, experience goods, and the incentives to continue producing traditional content.

#### A. *Convenience Goods*

“Ultimately, I think the defense is a good offense. You know, create a good product, have it easily available at a good price point, so people don’t want to go around trying to find it.”<sup>174</sup>

“Whenever there’s a new way for people to consume, we’ll get there. And we’ll get there quick.”<sup>175</sup>

While average consumers may be less likely to pay for content that they can find freely available elsewhere, a group of consumers seems willing to pay for content when it is tied to services. Unlike a music consumer, who may download an album to listen to later on, adult entertainment is often intended for immediate use and consumers are willing to make purchases quickly and compulsively—a consumption pattern that providers can oftentimes exploit. Additionally, browsing well-displayed content is frequently part of the consumption experience. According to industry specialists, consumers value the quality of content curation, preferring to browse content pre-consumption that is specifically tailored to their preferences, and many are willing to pay simply for the convenience of not having to search through free material to find the content that they want. Finally, both privacy and location are of significant importance to consumers. Services that enable content streaming to mobile devices or allow users to store material in the cloud are becoming popular and are potentially profitable. This Subpart describes the curation, access, and storage services increasingly offered by providers in more detail.

Because of the importance of browsing, content providers will invest in the visual aesthetic and usability of their websites<sup>176</sup> and try to cater to visitors’

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174. Producer interview 19, Las Vegas, Jan. 17, 2012.

175. Producer interview 2, Los Angeles, Jan. 11, 2012.

176. Producers do this, for example, by exploiting every technique available for attracting a browsing user’s attention and catering to the wants of frequent visitors. Landing pages are content heavy and well designed; the newest videos are prominently displayed and

preferences by offering services that free websites cannot. While it may be possible to find all of the posted material through unauthorized sources shortly after a release, the producer sites: provide reliability, convenience, and more tailored aesthetics; are able to cater to individual tastes through a more narrow categorization of content; and provide consumers with descriptions, trailers, crowd-sourced ratings, and more. Teasers and links to “more from this performer” or “more from this genre” are apparently of value to the average consumer, who will rarely be looking for a very specific product (such as consumers in other industries who might look for a particular music album or film) and be more prone to browsing in preferred genres prior to a purchase. The browsing process can even be seen as part of the consumption as the points in time of acquiring and consuming content are generally very close together. For these reasons, well-designed sites offer an added service value to the consumer and ultimately allow producers to sell material that is available for free elsewhere. Many websites still offer subscriptions, tying in users with the promise of continuously updated content that is easily found and immediately available.<sup>177</sup> The curation and browsing convenience aspects could be the reason why these subscription models are still successful. Although less lucrative than about five to eight years ago, producers report that subscription models continue to attract paying customers and contribute to their income.<sup>178</sup> When asked why users would pay for their service if they can find the same (or similar) films or photos elsewhere, many guessed that their customers value not having to navigate or sift through free material to find the content that they want.<sup>179</sup> By establishing themselves as service providers, production companies distance themselves from needing to protect their proprietary content rights as the sole means of income.

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usually feature free screenshots and trailers that are expertly produced to interest consumers in purchasing the full film. The purchase itself is made as simple as possible. *See, e.g.,* Hugh Hancock, *Why a Good Porn Site Makes Our Web Show Pages Look Like Amateurish Crap*, GUERRILLA SHOWRUNNER (Feb. 25, 2011), <http://guerillashowrunner.com/2011/02/why-a-good-porn-site-makes-our-web-show-pages-look-like-amateurish-crap>.

177. Subscriptions to websites are usually monthly, but users are sometimes offered shorter or longer-term options; most subscriptions allow full access to all of the material on the website. *See* Edelman, *supra* note 2, at 212-13.

178. A (non-representative) survey by XCritic.com of 400 respondents found that more than half of online consumers still pay to watch porn. *See* Bob Johnson, ‘*Sex Tracker*’ Survey Reveals Users Still Pay To View Porn, XBIZ NEWSWIRE (Mar. 5, 2012, 11:30 AM PST), <http://newswire.xbiz.com/view.php?id=145219>.

179. They also cited brand loyalty as a reason. Part of the reason may also be that consumers sign up for a monthly payment model to access something specific and then neglect to cancel the subscription, which is typically renewed automatically. *See* Edelman, *supra* note 2, at 213 (“In a dataset I received from a top-10 seller of online adult entertainment, . . . 54 percent of customers continued subscriptions beyond their first month of service via the seller’s automatic renewal service. Of the sites Rabbit’s Reviews examined, 47 percent offered short trials (three days or less), which typically automatically become monthly subscriptions at the end of the trial period.”).

As described above, content is often copied and distributed without authorization and some producers will also attempt to license their content non-exclusively at a very low price. Because of this, many websites offer duplicates of the same content available on other websites. This situation is reminiscent of the post-vaudeville era of stand-up comedy, when jokes were generic and freely appropriated,<sup>180</sup> creating an environment in which stand-up comedians competed over performance rather than content.<sup>181</sup> What adult entertainment providers end up essentially competing over is distinctions in service, design, format quality (for example in the form of higher resolutions, faster downloads, or streaming video), content curation, search functions, media integration, selection, and so forth. This would suggest that in these cases there is less investment in the quality of content production—non-exclusively licensed content appears to be among the cheapest produced.<sup>182</sup> However, at the same time, this model incentivizes higher investments in other aspects, namely those of performance. Service distinctions are more radically improved because companies are focused on competing through services rather than content. Furthermore, as discussed in more detail below, some incentive to invest in higher quality on the content level remains intact, particularly for producers that are able to brand their material.<sup>183</sup>

Some producers are increasingly beginning to cater to specific preferences in niche markets as another form of “convenience.” Similar to the way that the music and book industries have been able to expand into less popular areas with online distribution,<sup>184</sup> some producers are now focused on exploiting the long tail of the adult entertainment market.<sup>185</sup> By accommodating narrower and more personal customer requests, producers are able to create and sell traditional content because it is difficult to find a rare or specific thing elsewhere.<sup>186</sup> Even if the products are later copied and circulated without authorization, production costs are sufficiently low and consumers remain

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180. See Oliar & Sprigman, *supra* note 35, at 1847-50.

181. See *id.* at 1853-54.

182. But see *infra* Part V for discussion of quality and “optimally low” production costs.

183. This is because they will try to distinguish their product and tie the material to their services and other offerings, e.g., to strengthen their brand, provide consumers with a reason to visit or revisit a specific website, purchase a subscription or other services, or to draw people to their website for purposes of advertisement revenue. See *infra* Part IV.C.

184. See, e.g., Erik Brynjolfsson, Yu (Jeffrey) Hu, & Michael D. Smith, *The Longer Tail: The Changing Shape of Amazon’s Sales Distribution Curve* (Nat’l Sci. Found., Working Paper, 2010), available at <http://ssrn.com/abstract=1679991>.

185. The “long tail” of a market in this context commonly refers to the demand for many different small quantities of unique goods, rather than large quantities of more popular goods. See *id.*; see also Erik Brynjolfsson, Yu (Jeffrey) Hu, & Michael D. Smith, *From Niches to Riches: The Anatomy of the Long Tail*, 47 SLOAN MGMT. REV. 67, 67-71 (2006).

186. In this regard, niche content has far fewer attributes of a commodity than non-niche content.

willing to pay a high enough price to commission individual, personalized projects. Furthermore, this allows a brand to build a loyal customer base that is willing to pay and return for more. Some niche producers are able to effectively make the case among their consumer community that their specific content will die out without financial support.

Companies are also currently playing with a variety of new video-on-demand models. Available technologies for home viewing over television now include built-in Smart TV platforms,<sup>187</sup> external boxes that can be connected to a Smart TV, and subscription models similar to the popular non-adult film rental service Netflix.<sup>188</sup> For example, adult content providers will offer individual films for purchase or unlimited streaming of on-demand video over authorized platforms for a monthly fee.<sup>189</sup> The fact that instant access to digital film rental or purchase over Smart TV systems appeals to consumers is plausible; similar models for cable television<sup>190</sup> and video-on-demand in hotel rooms have previously enjoyed wide success.<sup>191</sup>

The main reason the producers feel that consumers are willing to pay for this type of service is the convenience and location of video-on-demand content, which gives it an edge over free content offerings. This superiority partly relies on the fact that unauthorized content is currently more complicated to access technically over most Smart TV platforms. However, similar to non-adult entertainment goods, and perhaps even more so, even a small convenience barrier appears to suffice to generate willingness to pay for certain types of online services.<sup>192</sup> Low content production costs for adult material<sup>193</sup> may make free subscription models supported by advertisements and premium content upgrades sustainable.

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187. These platforms give users access to streaming content providers over their home television displays. "Smart TV" generally refers to the merging of Internet services into television sets.

188. The company Netflix, Inc. (founded in 1997) offers streaming media services. While they started with DVD rental, now they are a major provider of on-demand Internet streaming of movies to compatible devices.

189. The older model of sending home video formats like DVDs via physical mail is also still effective, but may be increasingly outdated for younger generations. Consumers seem to value instant access, perhaps even more so than compared to other entertainment industries like non-adult film and music—a consumer may be more impatient than wanting to order a film via snail mail.

190. See, e.g., Lynn D. Wardle, *Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming*, 63 DENV. U. L. REV. 621, 624-26 (1985).

191. See, e.g., Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 26 (2005).

192. See, e.g., L. Richard Ye et. al., *Fee-Based Online Services: Exploring Consumers' Willingness to Pay*, 13 J. INT'L TECH. & INFO. MGMT. 133, 133-41 (2004).

193. See *infra* Part V.

While individual service models may face some obstacles,<sup>194</sup> producers agreed that delivery of content has become an increasingly important aspect of their revenue stream. Their competition with other producers and especially the competition with free content are often over tying content to services. While producing content is still important to them, many producers feel that they compete over “bringing content to the consumer.”

For example, one producer noted that “we’ve tried to adapt by offering an optimal customer experience.”<sup>195</sup>

One area that producers claim has grown significantly in both size and relative importance in recent years is the mobile market. Adult content providers were quick to move into the smartphone space. Now in the current mobile device landscape, tablets are particularly attractive to exploit because of their screen size and portability. Apple, whose products currently make up a significant portion of the market,<sup>196</sup> does not permit adult-themed apps on their smartphones and tablets, but adult companies have optimized their websites to enable easy browsing and purchasing and have found workarounds to Apple’s restrictions by developing web apps that run within the standard browser on devices.<sup>197</sup> A producer claimed to have developed the first-ever wireless application protocol (WAP) site for smartphones.<sup>198</sup> A WAP site is a website that has been designed and optimized for mobile phone viewing. While it may perhaps be disputable which company was the very first, adult websites were undoubtedly among the pioneers of smartphone platform compatibility and mobile-friendly design. Providers have been quick to become proficient in HTML5 and device-friendly video formats and they claim that they will remain on the cutting edge as technology continues to evolve. There is an allegedly thriving market for Android apps, which so far are not subject to the kinds of restrictions that Apple has in place.<sup>199</sup>

Not only are mobile devices convenient as such, but producers can also offer the convenience of cross-platform compatibility. This service can have an

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194. For instance, being banned from certain devices and mainstream channels due to the nature of the content.

195. Producer interview 19, Las Vegas, Jan. 17, 2012.

196. See Agam Shah, *Samsung Grabs Tablet Market Share From Apple*, PC WORLD (May 1, 2014, 10:31 AM), <http://www.pcworld.com/article/2150560/samsung-grabs-tablet-market-share-from-apple.html>.

197. See *Vivid Entertainment Launches ‘Vivid Touch’—First Browser Delivered Web App*, VIVID (Sep. 24, 2012), <http://www.vivid.com/news/2012-09-24/vivid-entertainment-launches-vivid-touch-first-browser-delivered-web-app/>.

198. Producer interview 1, San Fernando Valley, Jan. 10, 2012.

199. While some stores do not permit adult content apps, the Android platform does not restrict third-party app development. App stores like MiKandi are therefore able to offer adult content as well as services for creating, developing, and publishing apps. See Jason Kincaid, *Android’s App Store For Pornography, MiKandi, Adds Support For Paid Applications*, TECHCRUNCH (Nov. 23, 2010), <http://techcrunch.com/2010/11/23/androids-app-store-for-porn-mikandi-adds-support-for-paid-applications/>.

edge over pirated material if users wish to access content from multiple devices. Often, unauthorized files must be converted to or downloaded in different formats in order to move them, which can be a tedious and time-consuming process. Producers are now quick to offer their content in every possible format and are beginning to provide instant wireless access and cross-platform streaming to any device (for example from web to mobile devices, but also to Blu-ray players and game consoles like Playstation). Producers said there is increasing demand for video streaming to devices and that the companies that moved quickly have been able to profit financially.<sup>200</sup> They expect to be able to further capitalize on streaming services as they become more widespread.

New advances into offering streaming from cloud and locker services are interesting because providers will additionally store content for the consumer. This not only has the advantage that it can be accessed from any place and device with an Internet connection, but also that the library is not stored on the user's device. This saves storage space and comes with a significant privacy advantage because it leaves less record of consumption to be discovered, e.g. by other household members or device users. Payment models range from purchase, to subscriptions (allowing limited or unlimited access to content libraries), to rental, to pay-per-minute streaming access. Even if consumers can find the same content by searching through free websites or file-sharing networks, it seems that paid providers are able to capitalize on the convenience and privacy aspects of their services.

"We might not make as much money on DVDs anymore, but now we have all of these other revenue streams, and all added up together, from cable TV to VOD to Internet to all this stuff added up, that creates the revenue that you need in order to make it successful."<sup>201</sup>

Furthermore, capitalizing on convenience is not the only way that producers are attempting to recoup their investment costs. The following Subpart looks at a further exploitable aspect of adult entertainment consumption: experience.

### B. *Experience Goods*

"[T]he industry is adapting—there's a lot more "live" stuff going on, there's also a lot more gaming, interaction."<sup>202</sup>

"You see more companies dabbling in interactivity with the content. So I think that as an industry, we are evolving."<sup>203</sup>

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200. Producer interviews 2 and 5, Los Angeles, Jan. 11, 2012; Producer interview 7, Las Vegas, Jan. 18, 2012; and Producer interview 12, Las Vegas, Jan. 20, 2012.

201. Producer interview 3, Los Angeles, Jan. 11, 2012.

202. Producer interview 4, Los Angeles, Jan. 11, 2012.

203. Producer interview 16, Las Vegas, Jan. 17, 2012.

According to interviewees, the most significant way that adult entertainment is adapting to compete with free content and recoup costs is by focusing on experience goods. From new home viewing technologies to live chat and live camera shows, producers are looking to increase immersion and interactivity. They are also trying to engage consumers through gaming, virtual worlds, and real-life community building. All of these methods aim to create an enhanced and more personalized experience for the consumer, while at the same time being inherently difficult to appropriate and copy.

The loss of a large part of the traditional content market to free material makes producers especially dependent on other sources of income. As an interviewee described one of the challenges:

“There’s not another industry in the world that is media that is for a very specific reason. You can go watch a *YouTube* video for hundreds of thousands of different reasons. To laugh, to cry, to show your friends, to learn to hack, to whatever, it’s everything. But pornography is just to get off. That’s the only reason to watch it. So how do you monetize it [if content is free]?”<sup>204</sup>

A few of the interviewed producers<sup>205</sup> are currently not only working on enhancing the consumption experience, but also on creating new reasons and new contexts for engaging with adult entertainment. Home video technologies with high resolutions and large screens allow for a substantial difference in viewing quality. When faced with the option of searching through masses of lower quality material that is available for free or purchasing formats in high quality, some users will choose the latter based on their investment in home viewing systems. The fact that consumers in this case are not obtaining the high quality formats from unauthorized sources relies partly on technological cost factors<sup>206</sup> and partly on the convenience factors illustrated above.<sup>207</sup> But interestingly, producers also believe it is driven by the fact that the act of purchasing the material is part of the experience. This is one of the reasons that two producers seem to have changed their strategy to actively target couples—a market they claim did not exist over a decade ago. As one producer explained:

“We’re more a couples-oriented company now. You’re not going to want to sit with your girlfriend or your wife in front of a tube site and look at clips. You want an experience, you want something that . . . You sit down, you put in a DVD or a Blu-ray and you want to watch it on your big-screen TV, or in your bedroom, you know, have an ‘evening.’ So even though we’re pirated a lot—we’re the number one company that gets pirated—at the same time people will

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204. Producer interview 19, Las Vegas, Jan. 17, 2012.

205. Specifically two of the large firms (Producer interviews 1 and 2, San Fernando Valley and Los Angeles, Jan. 10 and 11, 2012), but also medium-sized (Producer interview 8, Las Vegas, Jan. 16, 2012).

206. See, e.g., Edelman, *supra* note 2, at 213 (on video resolution quality of *YouTube* versus paid sites, where the quality is more scalable).

207. See *supra* Part IV.A.

go buy the DVD because they want to have that experience.”<sup>208</sup>

Makers of adult entertainment “parodies,”<sup>209</sup> a long-time popular format, continue to produce, despite the fact that these films are an expensive investment compared to less intricate films with lower production costs or short video clips.<sup>210</sup> To a small but present extent, high-end material like full-length feature films is able to capture an aspect of experience. While sales have reportedly declined compared to a few years ago, two interviewees claimed to be witnessing new, capturable trends in consumer interest. They said that not only has their consumer base expanded to include more couples and more women, but also that there are other reasons to purchase their products in the first place, for example that younger generations of adults will treat their material as social entertainment.<sup>211</sup> They ascribe these trends to changing social norms surrounding adult content. These market expansions tie into the experience aspect in that they capture new reasons and motivations to consume that are often linked to willingness to pay, both in order to ensure high quality and also to create a specific environment.<sup>212</sup>

Future developments in home-viewing technology are expected to generate both interest and revenue. Some producers are keeping a close eye on technologies that are expected to be marketable within the next five to ten years. One given example is 3D home-viewing on screens that do not require glasses.<sup>213</sup> Producers believe that moving into 3D formats may be worthwhile because, while unauthorized distribution serves as a partial substitute, the users who invest in high quality home-viewing technology will likely also purchase easily accessible, good quality content. 3D is believed to create a sufficiently different atmosphere in which consumers are willing to invest.<sup>214</sup>

There are other immersive viewing contrivances on the horizon. Producers are playing with concepts of “virtual spaces” and thinking about ways to create

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208. Producer interview 1, San Fernando Valley, Jan. 10, 2012.

209. “Parodies” are adult film versions of popular mainstream films, TV shows, and books, often mixing adult content with general entertainment (humor, drama) and featuring comparatively elaborate props, costumes, and effects.

210. *See infra* Part V.

211. Consumers will allegedly purchase movies to watch with friends and even organize parties and social events around prominent releases.

212. While these also apply to the non-adult entertainment movie industry, which may also be facing hardships due to content piracy, adult entertainment is comparatively much cheaper to produce, *see infra* Part V.

213. This technology is still in development. *See, e.g.*, Adam Mann, *New Tech Could Mean 3D Movies with No Glasses*, WIRED (Aug. 21, 2012, 11:37 AM EDT), <http://www.cnn.com/2012/08/21/tech/innovation/3d-movies-no-glasses/index.html>.

214. This format is more difficult to copy for technical reasons and therefore may have fewer attributes of an information good. *See* Stephanie Pappas, *3-D Movies Are Harder to Pirate, for Now*, LIVESCIENCE (Feb. 9, 2010, 11:07 AM ET), <http://www.livescience.com/6088-3-movies-harder-pirate.html>. This could change at some point, leading to a new DRM-technology war.



enhanced experiences with various kinds of new technologies. For example, some companies have invested in, or recently launched, online “virtual strip clubs” and other digital 3D worlds where users can watch media and interact with both performers and other users using avatars.<sup>215</sup> When Google announced its Project Glass in Spring 2012,<sup>216</sup> adult entertainment companies quickly applied for developers’ versions and began to brainstorm potential uses.<sup>217</sup>

“[I]t’s a good way of creating something that’s harder for people to replicate, because you’re creating an interactive experience.”<sup>218</sup>

Another way to generate a more immersive experience is through increasing “in-film” interactivity by giving consumers more control over what is happening, rather than just providing static viewing of content. Some producers have switched from making full-length movies with subsequent scenes to shooting a variety of individual scenes in one setting, which are then offered to the consumer in a “choose-your-own-adventure”-style model. For example, users may go to a website, watch some initial content for free, and then pay to have the scenes unfold according to their preferred options and pace.<sup>219</sup> While the individual video clips may be taken and distributed without authorization, well-designed, interactive services that offer a smooth experience appear to have an edge over free viewing that is static or requires the effort of piecing together the same “story” of content elsewhere. The “choose-your-own-scene” model is both more engaging and more difficult to replicate for free.<sup>220</sup>

One of the most important and frequently cited current interactivity trends in adult entertainment is the use of live chat and live camera. Many adult

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215. See, e.g., John Sanford, *Wasteland BDSM Virtual World Launches*, XBIZ NEWSWIRE (Nov. 12, 2012, 9:00 AM PST), <http://newswire.xbiz.com/view.php?id=156454>.

216. Google Glass is an augmented reality head-mounted display (HMD) in the form of glasses, currently in prototype stage and being made available to selected developers. See David Pogue, *Google Glass and the Future of Technology*, N.Y. TIMES, (Sept. 13, 2012, 1:38 PM), [http://pogue.blogs.nytimes.com/2012/09/13/google-glass-and-the-future-of-technology/?\\_php=true&\\_type=blogs&\\_r=0](http://pogue.blogs.nytimes.com/2012/09/13/google-glass-and-the-future-of-technology/?_php=true&_type=blogs&_r=0).

217. See Sascha Segan, *Porn on Google’s Project Glass Is Inevitable*, PC MAGAZINE (June 28, 2012, 5:57 PM EST), <http://www.pcmag.com/article2/0,2817,2406481,00.asp>.

218. Producer interview 9, Las Vegas, Jan. 16, 2012.

219. One challenge that these services face is that the industry is unable to use micropayments the way that mainstream services, like iTunes, can. Because adult companies fall into a high-risk category for credit card companies, there is effectively a minimum on accepted amounts that is too high for small, single-dollar purchases. Companies can try to persuade their customers to buy a stash of virtual tokens (e.g. worth \$20) at once and then have them cash in the tokens gradually, mimicking a system of small payments.

220. It is more difficult to replicate for the consumer. In theory, other providers could invest in offering the same service and free ride on other producers’ production by stealing the material. So far, this does not appear to be a problem, both because of the upfront investment in the technology and perhaps also because by using other content, providers could still be held directly liable for copyright infringement. To this extent, copyright would still play a role in protecting production investment costs.

entertainment providers now feature pop-up chat windows in addition to static content on their websites. The chat adds interactivity, attempting to engage website visitors. Forms of pop-up chats vary—some are fully automated “bots,” others feature an actual person on the other end, and some will begin as an automated conversation and transfer to a person later on. But, they all aim to generate interest through activity, interactivity, and increased personal engagement. For example, providers will attempt to motivate customers to enter paid areas of a website through notification of performers who are “currently online.” Personal attention through live chat is one of the strategies that pay sites now use to set themselves apart from free sites.<sup>221</sup>

Most industry specialists and the majority of producers note that the largest and most lucrative business model in the industry today is live camera shows. Performers will establish a direct connection to consumers via webcam, either out of their own homes or from a studio. Live camera platforms, which are becoming popular and widespread, provide a personal experience that is significantly different from consuming recorded content. The increased investment in this type of model is based not only on consumer interest, but also on the extremely relevant fact that this type of good is not easily replicable. The content of a live chat can be recorded and the resulting video material distributed without authorization, but the recording of someone else’s chat is a different type of product.

“You can steal the feed, but you can’t steal the experience.”<sup>222</sup>

In fact, distribution of recorded chat content, whether authorized or unauthorized, may actually serve as marketing for live camera websites. So long as the video is sufficiently branded as to be traceable to a provider, it will potentially generate awareness and attract users. Should a consumer become interested in the live experience, the only way to obtain it is then to pay a fee.<sup>223</sup>

Some reasons that consumers may prefer paid live camera chat over free static video include customizability and personal connection. Live chat and personal camera shows offer a greater level of diversification than one-way video because the experience is customizable to specific requests. Another interesting thing about live camera chat is that it can cater not only to a variety of content preferences but also to more diverse motivations to seek out the entertainment in the first place. For example, one live chat website operator claimed to have a customer who spends hours every week playing chess with one of the performers. He said that in that sense, his “product” has expanded from a very narrow focus toward meeting new demands such as the desire for personal connections.

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221. See also Edelman, *supra* note 2, at 213.

222. Producer interview 7, Las Vegas, Jan. 18, 2012.

223. For more on the strategy of using free video content as marketing, see *infra* Part IV.C.

It is worth noting that many of the mainstream news articles that have predicted the economic downfall of the industry use adult entertainment “stars” as an example.<sup>224</sup> These articles provide anecdotal evidence that the “porn star is dying,” citing lower average wages and recounting stories of established adult performers having more difficulty finding work.<sup>225</sup> But according to industry specialists, this narrative does not take webcam performers into account. Specialists say that many of the performers making money through live camera and chat websites are not interested in being “stars” because it might actually hurt their business. When what they offer is a personal, intimate, exclusive experience, it would decrease the value of the service to the consumer if the experience were too obviously shared with many. In this case, the illusion of exclusivity is part of the purchase.

“There’s the whole porn star thing, but then there’s webcam girls. You know, webcam girls don’t want to be known. ‘Cause then that blows the opportunity of making a lot of money from people who are spending a lot of money. The guys who are spending hundreds of dollars a day to watch them on webcam, they’re not gonna spend it if everyone knows who she is. ‘Cause they want that exclusivity. More like, ‘oh this is my girlfriend’-type feeling, as opposed to being star struck or in awe of the girl. And if you look at how many webcams there are, I think that porn stars are over. It’s like novelty, almost. Like the old-school porn is. I think [old-school porn] can always exist, it’s just more of a novelty than it is a business that’s making a lot of money.”<sup>226</sup>

Another area where producers can create immersive interactivity is gaming. The adult industry has previously faced a number of obstacles in the video game market. Not only have adult companies been unaccustomed to the comparatively large ex-ante investments necessary for quality game production,<sup>227</sup> but they have also been restricted from platforms, mainstream

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224. See Theroux, *supra* note 17; Susannah Breslin, *How Porn Went From Boom To Bust*, FORBES (July 11, 2012, 9:51 PM), <http://www.forbes.com/sites/susannahbreslin/2012/07/11/how-porn-went-from-boom-to-bust>.

225. See Breslin, *supra* note 224. Some of the interviewed industry specialists argued that this is the economy in general, not piracy, and that the market has been flooded with new workers because people need jobs. Additionally, some industry specialists claimed that adult entertainment work is becoming increasingly socially acceptable, with more people taking pride in the profession and also with recent stories of performers (James Dean, Sasha Grey etc.) who have “crossed over” into non-adult entertainment, something that was less likely to happen in previous eras. Should factors such as economic necessity and/or the lottery-style prospect of lucrative or socially rewarding non-adult entertainment careers contribute to an increase in available workforce, this is also likely to drive wages down.

226. Producer interview 4, Los Angeles, Jan. 11, 2012.

227. A study conducted by the market research company M2 Research in 2009 shows average video game development costs of \$10 million for one platform, and \$18-28 million for multiple platforms. Aj Glasser, *Here’s How Much It Cost to Make a Video Game in 2009*, GAMEPRO (Jan. 13, 2010, 12:00 AM PT), <http://www.networkworld.com/article/2241385/applications/here-s-how-much-it-cost-to-make-a-video-game-in-2009.html>.

advertising, and standard distribution channels. With fairly recent technological advances allowing for the possibility of high-quality online games, however, distribution and cost becomes less problematic.<sup>228</sup> Furthermore, with increasing consolidation and structural changes in the industry, firms appear more able and willing to make the necessary long-term development investments. Some of the larger producers have thus been experimenting with games, releasing initial trial versions for free to attract users and then offering paid upgrades or in-game purchases. One producer claimed that early tests have shown that the majority of their users “get hooked” and continue past the trial version, paying for upgrades. Producers try to increase the customizability of the experience with options like allowing players to create their own 3D scenes. While pictures and videos of such scenes may be appropriated and shared without authorization, technically constituting copyright infringement, producers feel that the distribution of customized scenes is not only unproblematic but in fact desirable. The same way that in-game videos of massively multiplayer online role-playing games (MMORPGs) like *World of Warcraft*<sup>229</sup> go “viral,”<sup>230</sup> this generates more attention for the game as a marketing tool. The experience itself cannot be replicated and the copied material is not customizable. Producers are therefore even considering making the user-generated scenes freely available.<sup>231</sup>

Finally, companies are searching for ways to build not only virtual, but also real-life social communities around their products. Producers face the difficult circumstance of consumers’ privacy preferences—word-of-mouth marketing is less practiced and videos are not as widely shared among friends and strangers. Adult entertainment providers also face restrictions from some of the more popular social media platforms, such as Facebook. Music streaming services like Spotify,<sup>232</sup> for example, can more easily tie into social media platforms and piggyback off existing social networks, driving adoption and popularity.

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228. *See id.* The 2009 M2 Research study estimates a less daunting \$30,000-\$300,000 for online games that do not deal with the packaging and marketing materials necessary for reaching offline retailers.

229. *World of Warcraft* (WoW) was released by American video game developer Blizzard Entertainment in 2004 and is one of the world’s most popular MMORPGs (as measured by number of players), peaking at 12 million subscribers in 2010. *See World of Warcraft® Subscriber Base Reaches 12 Million Worldwide*, BLIZZARD ENTERTAINMENT (Oct. 7, 2010), <http://us.blizzard.com/en-us/company/press/pressreleases.html?id=2847881>.

230. *See, e.g.,* Joel Warner, *The Legend of Leeroy Jenkins*, DENVER WESTWORD NEWS (Mar. 8, 2007), <http://www.westword.com/2007-03-08/news/the-legend-of-leeroy-jenkins>.

231. *See, e.g.,* Rhett Pardon, *Pink Visual Launches 3D Sex Simulator MaleSpectrumGames*, XBIZ NEWSWIRE (Sept. 10, 2012, 11:00 AM PDT), <http://newswire.xbiz.com/view.php?id=153755>.

232. *Spotify*, launched in 2008 by a Swedish company of the same name, is a music streaming service that collaborates with and offers material from the major (and many independent) record labels. SPOTIFY, <https://www.spotify.com/us/> (last visited May 29, 2014).

Not all platforms restrict adult content, however—Tumblr allows for curation and community building around specific preferences<sup>233</sup> and many people in the adult industry use Twitter to establish and maintain contact with (and among) customers and fans. Furthermore, there are a number of adult social network alternatives to Facebook that are available and allegedly gaining popularity.<sup>234</sup>

The concept of building social interaction and community appears to work especially well for more specific content preferences, like niche markets. For example, one of the larger U.S. “fetish” producers has for some time now successfully invested in building a participatory, interactive experience around its community. The business models range from offering tours of its facilities and shooting locations to interested members of the general public to allowing people to watch live shows in person or even participate in scenes. This producer is also in the process of creating a social network and live webcam community.

All of these strategies attempt to provide an experience to consumers rather than selling static content. While this is a natural shift given the difficulties of preventing traditional material from being copied, some incentives to continue producing content may still remain intact. This is explored in the following Subpart.

### C. *Traditional Content Production*

“To me, I think there’s more money to be made in offering some of your content for free than in trying to protect it.”<sup>235</sup>

“We can blame piracy, but at the same time we’re dealing with a new generation of potential consumers.”<sup>236</sup>

As adult entertainment producers shift towards selling services and experiences, they are not necessarily giving up on traditional content production. Copyrightable content (video, photos) still serves a function, not only where it can be sold as the basis of convenience or experience, but also as a marketing tool. This is one of the reasons that producers continue to create standard content.

Looking at the history of the online business, giving content away as a loss leader<sup>237</sup> is not a new strategy. Playboy, for example, adopted this approach in

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233. Although one producer lamented that social network sites like *Tumblr* or *4chan* lead to a proliferation of unauthorized content being shared by members amongst themselves.

234. One need only “google” adult-themed variations of the name.

235. Producer interview 4, Los Angeles, Jan. 11, 2012.

236. Producer interview 15, Los Angeles, Jan. 12, 2012.

237. A loss leader is a good that is sold (or given away) below its cost price in order to attract customers to purchase other goods from the provider, who then aims to make a profit on the subsequent purchases.

the 1990s, when it realized that its images were being copied and shared online. Rather than attempt to enforce its rights, it began to harness and exploit the unauthorized distribution of its content for marketing purposes, using it to increase traffic to its website and attract new customers. Recognizing that allowing others to use its images would strengthen its brand and function as free advertisement, the company simply made sure to mark all of its material with its logo, the Playboy bunny. Not stopping there, Playboy went beyond tolerating and began to actively encourage the use of its material, contacting the people who were hosting the images and offering them a business proposition: should they add a link back to the Playboy website, Playboy would pay \$25 (or more) for any subscriber who was directed to them through the link.<sup>238</sup> It even offered the host sites assistance in improving their web pages.<sup>239</sup> So while continuing to produce high-quality images, Playboy actively began to focus on selling consumers subscriptions or pay-per-view offers,<sup>240</sup> in other words, conveniences for which people were still willing to pay.

Today, producers engage in similar tactics. Given the high visibility of content on tube sites,<sup>241</sup> producers are able to distribute video clips to a large audience quickly and cheaply. They can provide this material without having to pay for hosting or bandwidth, which had become a heavier financial burden than content production itself.<sup>242</sup> The tube sites are able to cover their bandwidth costs through advertising revenue, as well as through economies of scale. Many producers now actively place their own content on the tube sites in the form of short, branded video clips. Sometimes this happens as part of a partnership with the site operator. Producers also distribute branded video clips over file-sharing networks: “We seed our own torrents; . . . when you search for a pirated version, you find us, first.”<sup>243</sup>

Many also host free content on their own websites, saying that while this costs them bandwidth, the traffic that it generates (and subsequent purchases and/or sign-ups) is worth the cost.

“People . . . see the value of making a piece of content that can be ripped off easily and giving it away, and then monetizing elsewhere. You know, things

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238. See John Schwartz, *The Pornography Industry vs. Digital Pirates*, N.Y. TIMES (Feb. 8, 2004), <http://www.nytimes.com/2004/02/08/business/the-pornography-industry-vs-digital-pirates.html>.

239. See *id.*

240. See CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 89-90 (1999).

241. See Anthony, *supra* note 13.

242. Said one: “Production costs are a one-time cost, but the main cost is bandwidth.” Producer interview 2, Los Angeles, Jan. 11, 2012. Another said: “One of the advantages of putting promotional content on tube sites is that we’re no longer carrying the cost of feeding bandwidth to the world.” Producer interview 9, Las Vegas, Jan. 16, 2012.

243. Producer interview 1, San Fernando Valley, Jan. 10, 2012.

that can't be stolen.”<sup>244</sup>

“I work with musicians and all day long I tell them ‘give your music away for free.’ Because of the eyeballs. If you get maybe a couple thousand people buying your music, that’s nothing compared to hundreds of thousands of people who will download it if you give it away. And then . . . you get them to buy x, you know, something that you can sell. . . . [A]nd I think that’s way more valuable than a piece of intellectual property and fighting that.”<sup>245</sup>

In order to attract interest in their particular brand, studios continue to produce their own content rather than use or license the content of others. Even if producers have trouble selling their material exclusively due to it being copied and shared, some incentive to create it remains, as long as it can be tied to their brand.<sup>246</sup> The ways in which producers distinguish their products vary. For commodity content, the main goal may be simply to drop a name that sticks in a consumer’s mind, while other producers will try to highlight their specific genre, style, or quality.<sup>247</sup>

As mentioned above,<sup>248</sup> producers do not attribute the difficulty in sustaining the business model of selling content solely to copyright infringement; many of them also spoke of changed consumer expectations and commoditization of content. While these three factors are inextricably linked, the majority of the interviewed producers, both large and small, expressed a sense that the environment in which they are operating today has changed so fundamentally with new generations of Internet users that there is little to be done other than to mitigate the damage and try to adapt.

“It’s really challenging, because there’s a whole generation of people growing up thinking that they don’t have to pay for things.”<sup>249</sup>

“I’ve tried to have this conversation with twenty year olds that I know, that work in our office or their friends, and almost all of them—in this age group that’s under thirty right now—they think of porn as free. They think of porn as something that’s been accessible to them more than half their lives freely on the Internet. They don’t see it as theft in any way. It doesn’t even occur to their brains that one of us is producing the very thing they’re watching. That someone had to pay for the creating.”<sup>250</sup>

“If you look at these guys, if you take a look at a *Tumblr* blog, a lot of them will say something like ‘this is all stuff I found on the public domain of the

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244. Producer interview 7, Las Vegas, Jan. 18, 2012.

245. Producer interview 4, Los Angeles, Jan. 11, 2012.

246. Granted, this relies on another type of IP, but trademark performs a different function in this case. *See also infra* Part V.

247. Also, while only a few companies sign performers exclusively, those that do will also tie the performers to their brand for marketing purposes.

248. *See supra* Part III.C.

249. Producer interview 19, Las Vegas, Jan. 17, 2012.

250. Producer interview 17, Los Angeles, Jan. 12, 2012.

Internet.’ So they believe because they’ve seen it, it’s part of the public domain, so they’re free to re-share it as many times as they want. Or . . . they join the membership site and steal it. And then they, but then they don’t think they’re stealing it, they think they paid to be able to redistribute it.”<sup>251</sup>

Because of this sharply perceived divide between law and social understanding or behavior,<sup>252</sup> producers feel that they need to give away part of their content as a loss leader, not just because it may be appropriated for free anyhow, but also because they are trying to adapt to changed consumer expectations.

“As a whole, the production companies are responding by putting even more of their stuff out there for free to begin with, in the hopes of capturing more eyeballs to come in.”<sup>253</sup>

“The whole thing’s a double-edged sword, I mean, you can lock down your website so it would be impossible for people to redistribute the stuff, but then it’s really going to affect what people’s expectations are. People expect when they come to a website they’re gonna see videos, photos, and if they like the video they can download it and have it. So there’s a hunting and gathering on top of a horny desire that causes people to join these sites. And if you take that away from them, then they’re unfulfilled. And . . . you have to satisfy the people who are legitimately there, and that also means that there are some people who are going to take advantage of that and redistribute it when they shouldn’t.”<sup>254</sup>

Furthermore, while it is debatable to what extent specific material is a commodity, many of the producers indicate that it is substitutable enough that their model of selling content is undermined by other producers giving theirs away.<sup>255</sup>

“The desire to have specific content is being completely set aside by the fact that you can just get other stuff.”<sup>256</sup>

“With adult, we’re facing not just piracy, but also free content.”<sup>257</sup>

Once this cycle has started, it is difficult to switch strategies, because producers who do not use content as a loss leader are rendered at a disadvantage. Some indicated that the current situation resembled a prisoner’s

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251. Producer interview 6, Los Angeles, Jan. 12, 2012.

252. For further discussion of this, *see infra* Part V.

253. Producer interview 6, Los Angeles, Jan. 12, 2012.

254. Producer interview 15, Los Angeles, Jan. 12, 2012.

255. *See also* Edelman, *supra* note 2, at 212 (“Sellers of adult entertainment face a variety of competing free material. For one, almost all sellers make a portion of their material available without charge, often styled as a ‘tour’ or ‘preview’ intended to draw attention to paid offerings. Such free trials act as an imperfect substitute for a paid subscription.”).

256. Producer interview 15, Los Angeles, Jan. 12, 2012.

257. Producer interview 8, Las Vegas, Jan. 16, 2012.



dilemma,<sup>258</sup> in that no company has the incentive to deviate from giving away content, even though the industry might be better off if everyone played by the same rules. However, given the difficulties of copyright enforcement discussed above, it is unlikely that a coordinated strategy, even if possible, would salvage traditional business models.

“It’s already changed, so why try to stop it? You have to learn what the new business model is to make money with that environment. And, you know, yeah, it’s kind of fucked up, but a lot of things are fucked up. And it is a reality, so there’s no way to change it.”<sup>259</sup>

Currently, the majority of producers continue to produce and freely give part of their content away. A few indicated they did so as part of a win-win business model. The others felt that they simply had little choice in the matter, either because their material was likely to be appropriated and distributed through unauthorized sources anyhow or because their consumers expected free material and would substitute elsewhere if they did not make theirs available. In producing and giving away content as a loss leader, companies now try to draw attention to their brand, their websites, their services, and other goods, as illustrated above.<sup>260</sup>

There is another changing circumstance that contributes to companies’ ability to cross-subsidize production and other goods, namely consolidation within the industry. These changes are explored in the following Subpart.

#### D. *Changing Industry Structure*

“We are at that stage in the lifecycle of this industry where there is a lot of change happening, and it will continue to happen. You have early entrants who are now looking to exit, you have business models that have not adapted or changed and are fading away, you have consolidation of entire parts of the industry. These will all drive a dramatically different landscape in the next few years. There are plenty of changes to come.”<sup>261</sup>

“I know a lot of people who have been fucked, but . . . it’s a new industry. You get too settled in to what you’re doing, and you lead yourself off a cliff. . . . [T]hree to four years ago, I saw it crumbling. But the people who are now at the front line really didn’t ever complain about it. They adapted.”<sup>262</sup>

“[They] are consolidating the industry. And it’s probably the smartest thing you can do right now. It’s about to change—it’s about to go through that

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258. A prisoner’s dilemma is a game theoretical situation in which individuals do not cooperate, even when in their best interests to do so, because if they choose to “play nice” and someone does not cooperate, they will lose to the deviator.

259. Producer interview 4, Los Angeles, Jan. 11, 2012.

260. See *supra* Parts IV.A and IV.B.

261. See Cameron, *supra* note 167.

262. Producer interview 8, Las Vegas, Jan. 16, 2012.

metamorphosis. And I think in the end it's going to create better content for the consumer."<sup>263</sup>

While several adult entertainment production companies have gone out of business,<sup>264</sup> there are also new companies that have entered the industry and existing companies that have grown.<sup>265</sup> Two noticeable structural changes among current companies in the market are vertical integration and consolidation. Firms are increasingly incorporating production, marketing, distribution, etc., and becoming larger, more organized structures. Producers are partnering with live camera operators and mobile technology providers and expanding into multiple market segments. Adult entertainment companies are folding into each other, as in, for example, the owner of a large network of tube sites acquiring a growing mass of production companies. While most people today know prominent adult entertainment names such as Playboy or Hustler, fewer people will have heard of a company called Manwin. Yet in recent years, these new players have come to dwarf their more famous predecessors in size and market power.

These fundamental changes in structure come with rising barriers to entry in the industry. Copyright infringement and the proliferation of free content, as well as recent Internet-inspired legal restrictions on content distribution,<sup>266</sup> have raised the bar. Many new business models, for example live camera operations, require upfront investments in technology. According to producers, the times in which individuals could set up a simple website with a minor investment and easily make a living simply selling material are over. Those able to enter the market and succeed are comparatively professional and strategic companies, as well as companies that have the financial means to invest in a variety of different business models as the industry adapts to environmental changes. Consolidation and integration allow firms to cross-subsidize their operations, working with content as a loss leader and investing to make other goods profitable.

As the industry restructures itself to adapt to its low-IP environment, this raises a more general question: how are these changes to be evaluated within the economic framework of innovation policy? This is explored in the following Part.

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263. Producer interview 1, San Fernando Valley, Jan. 10, 2012.

264. Most of the interviewees stated at one point or another that many companies, in particular smaller ones, had gone out of business. However, larger ones have also gone out of business, for example, most recently the well-known "Girls Gone Wild" franchise. See, e.g., Mary Elizabeth Williams, *Did the Internet Kill "Girls Gone Wild"?*, SALON (March 1, 2013, 12:42 PM PST), [http://www.salon.com/2013/03/01/did\\_the\\_internet\\_kill\\_girls\\_gone\\_wild/](http://www.salon.com/2013/03/01/did_the_internet_kill_girls_gone_wild/).

265. For instance, the live camera affiliate networks.

266. See *supra* note 92.

## V. IMPLICATIONS

When asked about their predictions for the future of the industry, all of the industry specialists and producers expressed the belief that the adult entertainment business would continue despite its hardships.

“I don’t think it’s going to kill the porn industry. No way. There’s way too much money to be made right now. I mean, webcams are just ridiculous. So it’s just people who understand [the changed world] that are going to do well. . . . I don’t think piracy is gonna kill this industry.”<sup>267</sup>

Contrary to common lore in the press and the basic intuition behind copyright policy, this Article shows that the adult entertainment industry is surviving. Although copyright has become widely difficult to enforce, and traditional content production has allegedly declined, the business of adult entertainment appears to be sustainable. This is explained by a shift towards selling convenience and experience, both of which are more difficult to copy. Furthermore, traditional content continues to be produced for marketing purposes and in its function as a loss leader. This Article explains both the current coping mechanisms of the industry, as well as indicating how the industry could continue to survive in the face of copyright difficulties.

Given the robustness of the adult entertainment industry in the face of changing markets, it is worth looking at whether there is anything to be learned from innovation policy. Some industry-specific factors may translate to other creative industries on a case-by-case basis<sup>268</sup> and the shift towards convenience and experience goods, which is echoed in previous literature,<sup>269</sup> seems both broadly applicable and fundamentally important to consider in the context of innovation policy. Without necessarily undermining copyright theory, it adds another perspective to consider in the (so far oversimplified) debate over what types of creation we as a society wish to incentivize and how to best support creators and content makers.<sup>270</sup>

To illustrate, take the example of coffee.<sup>271</sup> Coffee can be sold to consumers in different ways. One way is by packaging coffee beans that people purchase as a product. Another way is to provide a service, such as selling

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267. Producer interview 4, Los Angeles, Jan. 11, 2012.

268. For example, the fashion industry has short production cycles, *see, e.g.*, George B. Sproles, *Analyzing Fashion Life Cycles: Principles and Perspectives*, 45 J. MKTG. 116, 116 (1981); the alternative film industry Nollywood has low film production costs, etc. Olufunmilayo Arewa, *The Rise of Nollywood: Creators, Entrepreneurs, and Pirates* 9 (U.C. Irvine School of Law, Research Paper No. 11, 2012).

269. *See supra* Parts II and IV.B and discussion in this Part V below.

270. *See also* KAL RAUSTIALIA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 167-68 (2012) (discussing how our current theory of copyright may be oversimplified).

271. The following example has been modified from B. Joseph Pine II & James H. Gilmore, *Welcome To The Experience Economy*, 76 HARVARD BUS. REV. 97, 97-105 (1998).

prepared cups of coffee. In this case, consumers are paying not just for the product, but also for the convenience of having it prepared and ready for immediate consumption. Yet another way is to construct an experience around the product, such as a Starbucks coffee house, where people will pay not just for the coffee and the convenience, but also for the surrounding atmosphere. The interesting thing about this type of market is that the different goods (products, service goods, experience goods) can cross-subsidize each other. Even if coffee beans are made available for free, consumers will still be willing to pay for the services and experiences.

Applied to the online adult entertainment industry, coffee can be likened to traditional content (photography, film, etc.). In this case, however, content is a non-exclusive, non-rivalrous information good. It can be easily copied once produced, leading to unlimited availability. Since consumers can get content for free, businesses therefore attempt to offer convenience and experience goods for which consumers are willing to pay. At the same time, they continue to produce information goods to which they can tie their brand in an attempt to build their reputation. One relevant difference to physical goods like coffee lies in the fact that distribution of information goods is cheap. In fact, the very mechanisms and platforms that limit producers' ability to sell content also allow for a highly cost-effective marketing model. Free material that is distributed through content aggregator websites can get hundreds of millions of views per day. The bandwidth costs for hosting the content are covered by the content aggregator provider (for instance, through advertising revenue or through cross-deals with content producers).<sup>272</sup> Producers therefore have continuing incentives to provide traditional content, both to feed the convenience and experience goods, and also to strengthen their brand and draw attention to their businesses. This system relies on brand protection through trademark law, so it is not a "system without IP" in the broadest sense. The trademark protection, however, serves a completely different function than the function of copyright, rather than simply being wielded as a substitute as is occasionally seen in industries where there is overlap between trademark and copyright protection.<sup>273</sup>

Our current copyright law is based on a simplified blanket theory, without regard for factors or circumstances that may sustain some of the mechanisms in practice or steer investment incentives in other directions rather than eliminate them.<sup>274</sup> If coffee beans can be easily replicated, producers will have insufficient incentive to invest in coffee production. The market for coffee beans will die. To correct this, limited exclusive rights are created, taking into

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272. See also *supra* Part IV.C.

273. For instance, in the fashion industry, see, e.g., Hemphill & Suk, *supra* note 31, at 1177; Raustiala & Sprigman, *supra* note 31, at 1723.

274. See also Oliar & Sprigman, *supra* note 35, at 1857.

account that this will also limit access and distribution.<sup>275</sup> To be clear, one cannot claim that an exogenous shock which makes coffee beans available to everyone for free will not cause negative market effects, just as one cannot claim that unauthorized piracy and content aggregators have not caused negative economic effects in the adult entertainment industry. Even if a system of cross-subsidizing various types of goods is sustainable, production of the base good may still be at a level below what we as a society desire, both in terms of quality and quantity. Another theoretical concern is whether there are negative effects associated with a shift in investment towards less desirable goods.<sup>276</sup>

The main argument for copyright protection is based on the utilitarian theory of incentivizing artistic production.<sup>277</sup> While stimulating creative innovation is undoubtedly a noble cause and can generally be regarded as socially desirable, it is important to remember that its encouragement through our current copyright system of exclusive rights constitutes a tradeoff. The economic theory behind copyright law assumes that creating artistic works of social value comes with costs. Because information goods are easily copied once they are made available, creators' profits will be eroded by copyists, preventing the former from recouping their investments.<sup>278</sup> In anticipation of this, the necessary efforts will no longer be made, resulting in underproduction. The chosen remedy to this market failure is to grant creators appropriability in order to incentivize their investment. However, granting these exclusive rights reduces the distribution and accessibility of artistic works.<sup>279</sup> Furthermore, there are enforcement costs to a system of such rights to be taken into account, particularly since copyright covers intangible goods that are sometimes difficult to define.<sup>280</sup> Appropriability should therefore only be granted to the extent necessary to sustain a socially desirable level of creation.<sup>281</sup> In other words, the

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275. The tradeoff inherent to copyright is between limiting access to works and creating incentives to invest in their production. *See* Landes & Posner, *supra* note 25, at 326.

276. For instance, towards ephemeral goods rather than those with long-term value, *see id.* at 332.

277. *See, e.g.,* GOLDSTEIN, *supra* note 16, at § 1.14; NIMMER & NIMMER *supra* note 16, at 17-18. The U.S. Constitution enables copyright laws that grant "Authors . . . the exclusive Right to their . . . Writings" in order "to promote the progress of Science . . ." U.S. CONST. art. I, § 8, cl. 8. *But see* Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, 8 ANN. REV. L. & SOC. SCI. 397, 397-414 (2012).

278. *See* Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 435 (1966).

279. Landes & Posner, *supra* note 25, at 326.

280. *See id.* at 331.

281. "To give greater property rights than are needed to obtain the desired quantity and quality of works would impose costs on users without any countervailing benefits to society. To give fewer property rights than are needed to support this investment would give users freer access, but to a less than socially desirable number and quality of works." GOLDSTEIN, *supra* note 16, at § 1.14. *But see* Stan J. Liebowitz, *Is Efficient Copyright a Reasonable*

social benefit of copyright must be weighed against the social costs it imposes. Both sides of the tradeoff are incredibly difficult to measure, so lawmakers and society must rely on the best possible information available when making policy decisions.<sup>282</sup>

Previous industry-specific studies that assess the relationship between intellectual property and creation incentives in individual markets have come to the conclusion that the “market failure” assumed to happen in absence of formal IP protection is not always as strong as predicted by traditional theory.<sup>283</sup> While it may be the case that content production in the adult entertainment industry has not disappeared as simplified copyright thinking would suggest, one should be hesitant to conclude that a blanket removal of copyright protection would strike the right balance for production. Just because an industry can survive without, or with less, copyright protection does not mean that economic market failure is absent. Theory predicts that in absence of copyright protection, the level of content production will be lower than what economics would deem optimal.<sup>284</sup>

Based on this interview study, it is realistic to assume that production of traditional content has to some extent gone down as a result of increased copyright enforcement difficulties. This Article also demonstrates, however, that content production can nevertheless persist, and also that there appears to be increased investment in other areas. The standard basis for copyright does not take into account that there could be incentives to produce and give away traditional content for branding purposes or as a loss leader for other types of goods. As discussed below, this is something that other creative industries are experiencing as well and it is something that theory and policy may need to take into further consideration.

One theoretical concern could be a reduction in content quality rather than quantity. In absence of copyright protection, production may focus on cheaper, ephemeral works with less upfront investment and more immediate gains.<sup>285</sup> This is a legitimate worry for creative industries and it is here that there may be a significant difference between the adult entertainment industry and some of the other entertainment industries in practice. Generally speaking, it appears that this type of inexpensive, ephemeral good is produced regardless of whether or not exclusivity is granted to producers. Whether this is due to a general substitutability of content, or due to specific consumer preferences, if adult entertainment consumers do not place sufficient value on high-investment,

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*Goal?*, 79 GEO. WASH. L. REV. 1692 (2011).

282. See GOLDSTEIN, *supra* note 16, at § 1.14 (claiming that the “quantity and quality of . . . works that are socially desirable” is a value judgment and the effectiveness of copyright policy in achieving it is an empirical question).

283. See *supra* Part II.

284. See Landes & Posner, *supra* note 25, at 332.

285. See *id.* at 332.

high-quality works, production costs will be low to begin with.

Even during the boom of filmmaking in the industry, when producers could have invested high amounts in the film quality of their content, production costs for adult material steadily remained far lower than for the major non-adult entertainment film industry. For example, *Pirates*, the most expensive adult movie ever produced, cost a total of \$1 million,<sup>286</sup> as compared to the approximately \$317 million cost of Hollywood blockbuster *Pirates of the Caribbean: At World's End*.<sup>287</sup> Furthermore, *Pirates* was a full-length spectacle featuring stars, acting, glossy editing, an unusually elaborate plot, and expensive sets and costumes. The majority of adult films are produced far less elaborately at a fraction of the cost. While high-quality production is undeniably of certain value to some consumers, it would be difficult to claim that the average user of adult content prefers a market with a smaller number of full-length, expensive films to one with very many different films that are short, simple, and inexpensive.<sup>288</sup> Consumer preferences are likely part of the reason that most standard content producers have never really invested large sums of money in high-quality plots, creative content, expensive sets, or special effects, focusing instead on short product cycles and high output rates.

Further indication of “socially optimal” low production costs can be found in the phenomenon of “Gonzo pornography”—professionally produced content that is made to look especially cheap. The narrative behind the popularity of such material begins with the decline of prices for computers, webcams, and all of the technology necessary to produce and distribute homemade video material. The success of mainstream platforms like *YouTube* has partially been driven by the fact that the barriers for anyone to create and share content have all but disappeared. Amateur-produced adult content experienced a similar boom for some time because anyone could make and distribute homemade material.<sup>289</sup> In the United States, legal requirements have since created

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286. See Talia Ron & Dana Harris, *'Pirates' Pic Unbuckled*, VARIETY (Sept. 14, 2005, 10:00 PM PT), <http://variety.com/2005/scene/markets-festivals/pirates-pic-unbuckled-1117929120>.

287. See Jenny Aluning, *Top Ten Most Expensive Movies Of All Time*, STARCENTRAL, <http://www.starcentralmagazine.com/the-ultimate-top-10-list/2010/01/17/top-ten-most-expensive-movies-of-all-time> (last visited May 10, 2014).

288. A TIME Magazine article from 2005 claims the average time that hotel in-room adult entertainment movies are watched is twelve minutes. See Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME (Mar. 29, 2005), <http://www.time.com/time/arts/article/0,8599,1043267-1,00.html>.

289. Conventional economic theory would attempt to explain the phenomenon of user-generated content with indirect monetary incentives—producers and actors are willing to invest in creation of material that is freely distributed, because they hope that this will lead to their discovery and subsequent possibilities of making a career in the professional adult industry. However, insights from other literature imply that people may also create out of a desire for non-monetary prestige in the form of peer recognition. See, e.g., Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative*

considerable barriers to this type of production.<sup>290</sup> However, despite the fact that user-generated content has become difficult in the United States, cheaply-made U.S. content has become rampant over the last decade and interestingly, much of the popular material on tube sites is actively portrayed as low-budget productions by amateurs, despite being professionally produced.<sup>291</sup>

Of course, the wide availability of this material cannot immediately be interpreted as popularity in terms of consumer preferences. Some claim that the vast supply of amateur content is no reflection of what adult content users value most, arguing that many settle for a low-quality version out of convenience.<sup>292</sup> However, others claim that amateur films do indeed reflect a prevalent consumer preference.<sup>293</sup> Homemade-style content is felt to be more appealing to many because it seems more authentic and is easier to relate to.<sup>294</sup> In fact, professional adult content producers seem to believe that this is the case because the real or perceived popularity of amateur adult content in the 1990s is what spawned this specific type of professionally produced films. “Gonzo pornography” effectively imitates user-generated content. The style of filming tries to capture the look and feel of a non-professional production, usually omitting scripts, plots, acting, costumes, and expensively groomed stars, and will even use bad lighting, cheap sets, and a shaky camera on purpose, to create the illusion of authenticity.<sup>295</sup> Often, one person will do the directing, filming, and participate in the film all at the same time, enabling the production team to consist of as few as one to three people.

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*Motivation to Shape Copyright Protection* 8-9 (Lewis & Clark Summer Research Grants Program, Working Paper, 2008), available at [http://works.bepress.com/lydia\\_loren/1](http://works.bepress.com/lydia_loren/1) (examining amateur and home photography); see also Benkler, *supra* note 30, at 424-26 (discussing diverse human motivations). Producing and uploading content that is well received may yield social rewards such as appreciative comments from others, or even popularity and fans. Another incentive to invest the necessary time or money could simply be intrinsic joy in creating (and/or exhibiting) adult content, for the same reason that people invest time and money in hobbies: because they derive utility from activities that are fun. A further reason could be the creation of content for one’s own use, the product of which is then basically costless to share with others. See, e.g., ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 45-61 (2005).

290. See, e.g., *supra* note 92.

291. This study focuses on U.S. based production. In other countries with less legal restrictions and/or more illegal activity, “real” amateur adult content continues to be produced and can be accessed over non-U.S. based services and providers.

292. See, e.g., Keunwoo Lee (Cog), *Sexual Desire, Authenticity, and Internet Business Models*, THE ABSTRACT FACTORY BLOG (Jan. 8, 2011, 4:29 PM), <http://abstractfactory.blogspot.com/2011/01/sexual-desire-authenticity-and-internet.html>.

293. See, e.g., Natasha Vargas-Cooper, *Hard Core: The New World of Porn is Revealing Eternal Truths About Men and Women*, THE ATLANTIC (Jan. 4, 2011, 8:00 AM ET), <http://www.theatlantic.com/magazine/archive/2011/01/hard-core/8327>.

294. See *id.*

295. As one producer described: “It’s like a documentary, or reality show. You feel like it’s real.” Producer interview 14, Las Vegas, Jan. 19, 2012.



Needless to say, the costs of producing amateur-style content are extremely low. Assuming that some consumers actually do value this type of content more than expensively produced feature films,<sup>296</sup> this would theoretically mean that the investment costs necessary to keep production at a socially desirable level are low. Even when also accounting for quantity and catering to the other consumers who value more polished content, the overall costs for economically optimal adult content production would still be significantly lower than they are for traditional Hollywood studios. The fundamental current reality for adult entertainment is that its market is facing difficulties in exclusively selling content. This situation will naturally cause a decrease in production investment. However, this decrease may not be as substantial as in the Hollywood industry. Furthermore, the function of content as a loss leader will allow some producers to distinguish themselves from their competitors by offering more expensively produced content and then capturing the consumers that prefer “high quality” material with services and experience goods.<sup>297</sup> Relatedly, the incentive to meet consumer interests remains intact so while there may be a drift towards lower-quality, inexpensively produced material, this can also simply mean a placement of investment elsewhere rather than the loss thereof.

Regarding the shift towards other goods, a final concern derived from theory is that this may focus investment in less desirable directions.<sup>298</sup> Looking at previous literature on markets with low IP protection, many have found investment in types of content that are more difficult to replicate. For example, French chefs develop intricate recipes that require additional know-how or personal assistance to copy,<sup>299</sup> fashion designers will favor creating some kinds of products over others, for example using distinctive materials or a pattern that can be trademarked,<sup>300</sup> and tattoo artists will customize and personalize their artwork.<sup>301</sup> The findings of these prior studies echo the above-mentioned yet seldom discussed implication, namely that the absence of IP protection may affect not the *amount* of investment in artistic production, but rather the *kind* of content produced.

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296. A reason for this could be that this preference has always existed without being as socially acceptable, or without being recognized by producers, or could be due to changing preferences in society. Interestingly, if one assumes preferences to be path dependent, the implications would be that society’s “need” for content production can ultimately be fulfilled by cheaper content.

297. “[Gonzo] is kind of like Walmart—cheap fast and everything’s there. But there’s people that want the Guccis and the Louis Vuittons, and the, you know, the Mercedes and things like that, so I think there’s a market for both.” Producer interview 1, San Fernando Valley, Jan. 10, 2012.

298. See Landes & Posner, *supra* note 25, at 332 (discussing a potential shift towards goods that are less easy to copy).

299. See Fauchart & von Hippel, *supra* note 32, at 192.

300. See Hemphill & Suk, *supra* note 31, at 1177-78.

301. See Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 589 (2013).

Interestingly, this effect need not be a negative one. Dotan Oliar and Christopher Sprigman argue in their article that contrary to popular economic wisdom in IP theory, the shift they observe in stand-up comedy of content versus performance cannot be easily evaluated in terms of what type of investment is more socially desirable.<sup>302</sup> While it is difficult to make the case from a purely economic perspective that necessity drives optimal innovation,<sup>303</sup> and while it would be far-fetched to claim that there is no “market failure” in the traditional sense to be observed in the struggling adult industry, the development towards experience goods may in fact not be quite as forced or suboptimal as assumed. In fact, some would say that one of the reasons adult entertainment drives new media formats so strongly is not only because of general high demand, but also because of demand for novel methods of consuming content.<sup>304</sup> If users continuously and actively seek out newer ways to enhance their overall consumption experience, they will be particularly responsive to new formats. One producer spoke at length about technology adoption and consumption methods in the industry over history, pointing out that in succession, all successful new media developments for adult content ultimately strived toward creating the most “immersive” experience possible. She postulated that the trend towards selling interactivity and experience, while partially spurned by current copyright protection issues, was essentially a natural development that had less to do with hardship-induced necessity and more to do with what technologies were available now.<sup>305</sup>

With regard to other major entertainment industries, the broad change that this Article observes in the adult market is by no means unique. Other industries are also seeing a parallel shift towards experiences and services. For example, while declining sales in the major music recording industry are attributed to file-sharing,<sup>306</sup> there has also been an impact on complimentary

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302. See Oliar & Sprigman, *supra* note 35, at 1857.

303. This is because it effectively limits the available investment options by forcefully removing some of the possibilities, rather than by letting investments be guided by competition and market demand. On the other hand, some would argue that demand is neither static, nor a good measure of social desirability.

304. See, e.g., BARSS, *supra* note 8, at 2 (stating that photography was driven by porn, not because of increased consumer privacy, but because it was an entirely new (and exciting) way to consume and experience adult content).

305. For instance, personal webcams have become far more affordable than a decade ago, and broadband connections are common, allowing for video chat opportunities that were not available previously.

306. See Stan J. Liebowitz, *Economists Examine File-Sharing and Music Sales*, in *INDUSTRIAL ORGANIZATION AND DIGITAL ECONOMY* 145-73 (Gerhard Illing & Martin Peitz eds., 2006); Stan J. Liebowitz, *Research Note: Testing File-Sharing's Impact on Music Album Sales in Cities*, 54 *MGMT. SCI.* 852, 852-59 (2008); George Barker, *Evidence of the Effect of Free Music Downloads on the Purchase of Music CDs in Canada*, 9 *REV. ECON. RES. ON COPYRIGHT ISSUES* 55, (2012). *But see* Oberholzer-Gee & Strumpf, *supra* note 77.

markets for live performances<sup>307</sup> as well as for electronics and communication services.<sup>308</sup> Some also observe complementary effects, wherein consumers will browse free or unauthorized content not as a substitute for purchasing, but rather in order to help them make an informed decision.<sup>309</sup> Amidst these shifts, both the quantity as well as the quality of music<sup>310</sup> may not suffer as much as traditional theory assumes. The major movie industry, despite declining DVD sales,<sup>311</sup> appears to be successfully using the increase in broadband and digital networks to reach a much wider audience through services and to be profiting through broader and more targeted advertising.<sup>312</sup> Independent musicians are trying to give content away as a loss leader to build their fan base and capitalize on live performances<sup>313</sup> and independent filmmakers and authors are using crowd sourcing to fund their upfront investments in content production.<sup>314</sup> Law and economics research is increasingly attempting to understand and evaluate the effects of digitization and the Internet on copyrighted works and producer strategies.

The perceived divide between social norms and law is regarded as a more general issue in online copyright infringement.<sup>315</sup> In 2002, Eric Posner

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307. See Alan Krueger, *The Economics of Real Superstars: The Market for Concerts in the Material World*, 23 J. LABOR ECON. 1, 1-30 (2005); Marie Connolly & Alan Krueger, *Rockonomics: The Economics of Popular Music*, in 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 667-719 (Victor A. Ginsburgh & Charles David Throsby eds., 2006).

308. See Oberholzer-Gee & Strumpf, *supra* note 77, at 19-20, 44-45, who also argue that file-sharing has increased consumer welfare substantially.

309. See, e.g., Birgitte Andersen & Marion Frenz, *Don't Blame the P2P File-Sharers: The Impact of Free Music Downloads on the Purchase of Music CDs in Canada*, 20 J. EVOL. ECON. 715, 715-40 (2010).

310. See Joel Waldfogel, *Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music since Napster*, 55 J.L. & ECON. 715, 715-40 (2012).

311. See, e.g., Alejandro Zentner, *Measuring the Impact of File Sharing on the Movie Industry: An Empirical Analysis Using a Panel of Countries 2*, (Working Paper, Mar. 10, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1792615](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792615).

312. See Michael D. Smith & Rahul Telang, *Piracy or Promotion? The Impact of the Broadband Internet Penetration on DVD Sales*, 22 INFO. ECON. POL'Y 289, 289-98 (2010).

313. See BENKLER, *supra* note 37, at 426; RAUSTIALIA & SPRIGMAN, *supra* note 270, at 179-84.

314. See Inge Ejbye Sorensen, *Crowdsourcing and Outsourcing: The Impact of Online Funding and Distribution on the Documentary Film Industry in the UK*, 34 MEDIA, CULTURE, & SOC'Y 726, 726-43 (2012); Alison Flood, *Kickstarter Becomes Fourth Biggest Publisher of Graphic Novels*, THE GUARDIAN (July 11, 2012, 11:45 EDT), <http://www.guardian.co.uk/books/2012/jul/11/kickstarter-fourth-biggest-publisher-graphic-novels>.

315. See LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 53 (1999); Ben Depoorter, Alain Van Hiel, & Sven Vanneste, *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1256 (2011); Steven A. Hetcher, *The Music Industry's Failed Attempt to Influence File Sharing Norms*, 7 VAND. J. ENT. L. & PRAC. 10 (2005); Christopher Jensen, Note, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531 (2004).

prominently explored the relationship between social norms and legal norms, in particular the factors of internalization, compliance, and risk, arguing for policymakers to take differences and their effects into account.<sup>316</sup> A large divide between social norms and legal norms can cause less compliance, leading some to argue that the legal system should adapt to a perceived social norm of “sharing” on the Internet.<sup>317</sup> Others argue that the law should be structured to inform social norms in the case of online copyright infringement, rather than the other way around.<sup>318</sup> While the appeals to policymakers thus differ, content producers are currently left to their own devices. In absence of changed or enforced laws, creative markets appear to be adapting to social norms, both in the adult entertainment industry and elsewhere.

While the general trend towards services and experiences is the same, what is effective to recoup socially desirable investment in some industries, it may be less so in others. The adult entertainment industry is characterized by attributes like low production costs, commodity-type goods, high demand, and somewhat unique consumer needs and preferences. This industry appears to be in a better position to capitalize on demand-driven traffic, immediacy, and privacy, while other entertainment industries may be in a better position to capitalize on ancillary markets for merchandise,<sup>319</sup> social values,<sup>320</sup> or crowd-sourced funding.<sup>321</sup> Most importantly, it could be that the costs and benefits to having a system of exclusive rights vary strongly across industries, depending on the individual parameters.<sup>322</sup> Even with a fully functioning copyright system, the economic costs of granting protection to traditional adult entertainment content may be lower than for other entertainment goods because content is more substitutable. This means that the monopoly-like effect of exclusive rights is lower. While this is reflected in the investment that producers may make in quality, social welfare may not suffer if consumers

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316. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 3-5 (2002).

317. See Depoorter, Van Hiel & Vanneste, *supra* note 315 (discussing the scattershot efforts of the copyright industry to stem the tides of P2P file-sharing); Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 73 (2003) (discussing same); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 19-20 (2003) (discussing same).

318. See, e.g., Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies For Persuading People To Pay For Recorded Music*, 17 J. INTELL. PROP. L. 59 (2009).

319. For example, the film and music industry does and may be able to increasingly sell merchandise. See Oberholzer-Gee & Strumpf, *supra* note 77, at 46.

320. For instance, some industries may be able to appeal to consumers to financially support creators.

321. For example, some creative works may be able to find funding through platforms like Kickstarter or Indiegogo.

322. See, e.g., Martin Peitz & Patrick Waelbroeck, *Piracy of Digital Products: A Critical Review of the Theoretical Literature*, 18 INFO. ECON. & POL'Y 449 (2006).

value access more than high quality content. This particular evaluation could be different for the shifts that other industries are currently experiencing in absence of efficient copyright protection. It could be that the change in adult entertainment towards more live camera, service-based goods and experience technologies comes at a lesser loss to social welfare than similar shifts in the mainstream film, music, or book publishing industries. A relevant question is what types of investments get lost in new funding models. For example, some criticize crowd-sourced funding for the arts as a shift towards populist projects with lesser long-term value to society or as deterring to projects that carry legal and other risks.<sup>323</sup> Changes in documentary film funding in the United Kingdom have been shown to affect the types of films that people invest in producing.<sup>324</sup> Whether socially desirable investments get lost in new models of content funding that rely less on copyrights is an industry-specific question that requires both empirics and value judgment.

This Article furthers the insights from previous literature on industries with low IP protection.<sup>325</sup> Previous studies indicate that changing copyright regimes may be more likely to influence type of goods rather than quantity, and that these shifts in type need not necessarily be negative.<sup>326</sup> The interviews and collected information in this Article clearly establish a shift towards service and experience goods, reaffirming the suggestion of prior literature. This Article, however, also indicates that creative industries may differ in their innovation policy tradeoffs. Policy makers may want to consider where consumers, given the tradeoff inherent to copyright law, may prefer an increase in access over an increase in product quality. While it is difficult to measure in absolute terms whether this is the case in the adult industry, this Article sheds some first light on what is inevitably a value judgment for policy makers in practice.<sup>327</sup> By looking at a large entertainment industry, and both reaffirming and furthering the findings of prior studies, this Article makes a contribution to the literature on low IP markets.

Even given the conclusions drawn from this Article, it seems overly simplified to argue, as some have suggested,<sup>328</sup> that entertainment industries function just as well without copyright and that the system of exclusive rights can be discarded.<sup>329</sup> The general idea behind intellectual property, that it aims to correct a market failure and compensate creators for their investments,

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323. See EVGENY MOROZOV, TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM 26-28 (2013).

324. See Sorensen, *supra* note 314, at 739-40.

325. See *supra* Part I.

326. See RAUSTIALIA & SPRIGMAN, *supra* note 270, at 179-84; Oliar & Sprigman, *supra* note 35, at 1857.

327. This trade-off remains a value judgment until we have further available information. However, it may remain difficult to quantify these variables in practice.

328. See, e.g., BOLDRIN & LEVINE, *supra* note 23.

329. See *id.* at 7.

cannot simply be cast aside without a better understanding of the involved costs. As the debate about the tradeoffs of, and alternatives to, current innovation policies evolves, more information is required. Providing detailed, industry-specific insights into the types of investments and entertainment goods that are produced or affected by a change in law are therefore valuable. How these insights are applied more generally depends on what types of goods policy makers want to incentivize as well as the goal of the system and the desired tradeoffs: whether the aim is to support creators and help them make a living, or whether it is to ensure widest possible distribution of works and lower social costs without too severely reducing incentives to invest in creation. Copyright law is but one way to correct the theoretical market failure inherent to information good production. Recent policy debates have brought alternatives to the table: politicians and academics are suggesting various ways to ensure that creators get compensated for their work, while at the same time attempt to mitigate the costs to society of granting exclusive rights. Whether evaluating the tradeoffs of an industry-specific approach to innovation policy,<sup>330</sup> or discussing systems of taxation and wealth redistribution outside of a copyright framework,<sup>331</sup> it is useful to analyze the workings of individual industries in order to achieve a better understanding of how to meet the needs of consumers and creators.

#### CONCLUSION

This Article has looked at content production incentives in the online adult entertainment industry, where copyright has been difficult to enforce in recent years. Because of copyright infringement and the proliferation of substitutable, free content, producers have struggled with the previously successful business model of producing and selling material. Through qualitative interviews with industry specialists and content producers, this Article finds that the industry has been effectively unable to rely on the economic benefits that copyright intends to provide. As a result, the industry has shifted towards other strategies to recoup costs, with increased focus on services, experiences, and interactivity. Traditional content continues to be produced, partially as a basis for these new goods, and partially for use as a loss leader. While production is likely to have suffered in terms of quality and quantity compared to previous times, this Article indicates that the market for adult entertainment may be sustainable. This sustainability relies partially on industry-specific factors, such as consumer privacy preferences, consumption habits, low production costs, and

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330. See Raustiala & Sprigman, *supra* note 31, at 1762-64.

331. See, e.g., Netanel, *supra* note 317, at 83 (proposing a noncommercial use levy); *Rethinking Music: A Framing Paper* 18-19 (2011), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking\\_Music\\_Framing\\_Paper.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking_Music_Framing_Paper.pdf) (discussing collective licensing and alternative compensation models).

high demand. It also relies on a shift in business models as well as changes in industry structure. By analyzing the relationship between copyright and innovation in the online adult entertainment industry, this Article attempts to make a valuable contribution to the growing literature on low-IP industries. Studying real-world markets in the context of innovation may grant helpful insights to the policy discussion as we think about revising our laws in the digital age.