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Unveiling copyright law double bind through pragmatist feminism: adult content creators as authors

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ABSTRACT

Adult content creators' copyright is undermined in the profitable, gig economy, porn industry. From an analysis of the terms of use on the ManyVids, Chaturbate, OnlyFans and Pornhub porn platforms, the results show such creators have no bargaining power vis-à-vis online platforms. Although they create pornographic content, the copyrightability of their works is obscured because the recognition of their authorship is often a smokescreen. This is because, under the terms of use, they are forced to perpetually transfer their economic rights to online platforms without royalties in exchange as well as waiving their moral rights. By using Radin's pragmatist feminist methodology, we suspend any critique of the goodness or badness of pornography in order to unveil the double bind that adult content creators working in the gig economy face in the context of UK copyright law.

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Introduction

Adult entertainment statistics reveal that during the COVID-19 pandemic, half of the adult population (49%) in the UK, or 26 million people, visited adult websites (Ofcom 2021, 100). The statistics of Pornhub, the UK's most popular porn platform visited by 'a third of UK online adults (15 million)' (Ofcom 2021, 100), show that porn has become a global industry, with 'over 100 billion videos'[1] views a year. Within the UK, each porn consumer spends on average 10 minutes and 20 seconds watching porn, making it the third highest source of traffic on Pornhub after the USA[2] and Japan.[3]

The COVID-19 pandemic marks a significant paradigm shift in the exponential growth of the porn industry and its new focus on gig economy direct-to-consumer platforms (Berg 2021, 17–18). The gig economy, which is a labour market employing workers on atypical contracts which grant them flexibility, has revolutionized porn commerce (De Stefano 2016). Online platforms now have full control over adult content creators (ACCs). Although these platforms claim to be mere intermediaries, not only are they leaving ACCs with few labour law rights and freedoms but they are

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also limiting their authorship of copyright. Debates within scholarship on whether pornography should be regulated and whether copyright law protection would incentivize the market of pornography are putting ACCs at risk of economic exploitation by online platforms and deflecting attention away from the question of enforcement of ACCs' copyrights.

In this article, we provide an analysis that aims to empower ACCs by investigating their copyright in the gig economy. We adopt Margaret Radin's (1989) pragmatist feminist perspective; first, to disentangle ourselves from the double bind that emerges when considering the question of whether pornography should be protected through copyright law; and second, to justify properly attributing copyright protection to ACCs. We investigate pornography as an industry that supplies the market demand for sexual explicitness with images and videos made through the performance of ACCs, who freely consent to perform under a legal contract.[4] Pornography is a multifaceted reality constituted by heterogeneous types of creative works which deserve copyright protection in most instances. However, due to the remarkable expansion of the porn industry in the gig economy, we limit our focus to audiovisual works – that is, films within the meaning of a pre-recorded video uploaded onto the internet – and to live internet broadcasts. We focus on UK law and specifically analyze the copyright clauses within the terms of use of the Chaturbate, ManyVids, OnlyFans and Pornhub online platforms.[5] In addition to being currently highly popular websites, these four are pertinent examples of how porn work is conducted in the gig economy. Not only are ACCs uploading pre-recorded audiovisual works, but they are also performing and interacting with their customers live via streaming broadcasts. The porn industry now offers services whereby ACCs' performances are the results of their unique personalities and idiosyncrasies; customers specifically request these individualized performances and ACCs may receive tips for them (Van Doorn and Velthuis 2018, 177–178).

This article aims to unveil an existing problem regarding the contentious topic of pornography. The copyrightability of pornography is yet to attract sufficient scholarly attention or adequate legal protection because pornography is mainly perceived as obscene and thus an uncomfortable subject matter of analysis. To us, tackling the elephant in the room constitutes the first step to offering a concrete solution to this crucial, yet underexplored, problem of how to empower ACCs' authorship. Second, identifying the problem enables wider significance to be given to other types of unconventional works perceived as obscene because of their sexual content, such as performances by drag queens and strippers. Because we focus on the gig economy, we also aim to provide relevant insight into the increasing number of other creative works crowding the online space, such as crafting or cookery tutorials. Such works involve original expressions, some of which are in the form of interactive broadcasts where platforms host user-generated content by receiving copyright licences, in most cases free of charge.

The article is divided into three sections. First, we analyze the gig economy of pornography in the context of feminist debates and define the concept of the double bind. We then conduct an original evaluation of the double bind in copyright law through a pragmatist feminist lens. In the final section, we propose strengthening ACCs' copyright ownership through royalties and authorship by retaining their moral rights, arguing that this may be a pragmatic solution towards an end state where the double bind is dissolved.

The vulnerable status of adult content creators

The identification of the problem of porn works requires an examination of the precarious condition of the pornography industry itself. Pornography is a nebulous term, and the question of who should enjoy its intellectual property rights is, due to the gig economy, not a straightforward issue. Further contributing to the problem is the disagreement within feminism regarding whether pornography is harmful or a matter of self-agency. Although this is a fruitful debate, it does not address pornography as deserving of copyright protection and thus fails to consider ACCs as the authors.

Pornography in the gig economy

Pornography is controversial due to its potential harm to society, and because it is legally addressed as prohibited conduct under criminal law (Bronstein 2011, 16). In UK legislation, the term pornography gives the government the power to censor sexually explicit representations of an indecent and/or obscene nature and to condemn crimes of sexual exploitation and abuse, such as child pornography and revenge porn.[6] Although pornography is a legal industry, its association with criminal activities places ACCs' copyright in a grey area.

Since its infancy, pornography has always been an artist's invention, fixated as an object, such as statutes or paintings, or novels (Hunt 1993, 261). However, in the twenty-first century, the rise of the internet, and its new user-friendly technological tools such as smartphones and their respective apps, has also made it a product of the gig economy (Berg 2016). The gig economy is a labour market characterized by atypical working relationships, whereby the contours of traditional employment realities and 'the line between performer and producer' are blurred (Pezzutto 2019, 40); workers are not employed under an indefinite contract, and they do not work for and within the premises of an employer (De Stefano 2016, 473–485). The gig economy has not invented precarious work (Bajwa et al. 2018, 8), but has strengthened it by providing workers a platform to work on a flexible basis (Aloisi 2015, 653, 658). It may also act as the means for workers to earn an extra stream of income. Gig economy workers are more likely to work remotely through their own technological means via the mediation of online intermediaries – mainly platforms controlling websites or apps – through which they interact with end users (Rogers 2016, 494). The gig economy relies on the opportunities provided by the internet to instantaneously match supply and demand for products via platforms (Bajwa et al. 2018, 8). This is enabled through 'crowd work' and 'work on demand via the app' (De Stefano 2016, 473–485). Whereas crowd work allows workers to carry out their jobs on online platforms, work on demand via app sees workers connected to users through the mediation of the platforms, who limit their interference to ensure decent 'standards of service' (De Stefano 2016, 472). ACCs work in the gig economy in both ways: although they upload their work on online platforms, they also directly interact with users and frequently tailor their creations to meet users' specific demands.

Although ACCs are paid by users and bear the financial risk of poor profits, they nonetheless operate under the control of online platforms (Cohen 2017, 185). Therefore, there is a rich scholarship on labour rights within the gig economy concerning whether workers should be given basic labour law protections connected to worker status despite them

not being genuinely self-employed (Adams, Freedman and Prassl 2018, 476–479; Freedland and Adams-Prassl 2017). Gig economy workers cannot fit within the traditional employer–employee labour law relationship because the users/clients as a third party have power over how they should deliver their gigs (Adams, Freedman and Prassl 2018, 489, 493).

Feminists have investigated how the gig economy reinforces 'gender, race and class norms' (Webster and Zhang 2020, 122). Specifically, it blurs the boundaries between 'home/work and personal/professional spheres' (Webster and Zhang 2020, 122), making it particularly desirable for vulnerable workers such as those operating in the shadow economy (Butler 2021). The gig economy formalizes and destigmatizes types of labour outside the reach of the law which have always existed, such as sex work (Butler 2021, 343). These types of workers 'navigate marginalized status, power imbalances, and a need for economic independence and flexibility' which the gig economy and other atypical types of jobs appears to provide them with (Butler 2021, 366).

The atypical work relationship is particularly striking in the context of the porn industry because ACCs' work-related vulnerabilities operate on the intersection between their operating in the gig economy and the sex work nature of jobs in the porn industry. Cruz (2018, 77) argues that workers might enjoy the flexibility connected to self-employment because it means they might stay 'unmanaged' and decide when and whether to work; however, in reality, according to her Marxist perspective, they may still be exploited. This is because in the sex industry, employers cannot provide workers with means of production and yet they extract surplus, meaning a greater profit than that which they pay the workers (Cruz 2018, 77). Employers cannot provide sex workers with means of production aside from technologies facilitating payment (Cruz 2018, 77); sex work is performed especially through the embodied and emotional work of individuals, who are only paid the minimum wage (Albin 2013, 184). ACCs' payments might even be below the minimum wage because although they remain on platforms attracting customers for extended periods of time, they are only paid for the time they interact with clients – clicks, views and downloads of their videos (Cruz 2013, 474; Moore and Hayes 2018). Contrary to actors performing in mainstream productions outside the gig economy, ACCs' income is extremely uncertain and principally comes from multiple sources such as clip sales, webcamming and selling their underwear online (Pezzutto 2019, 42). Each ACC earns differently depending on their ability to attract customers and on their popularity (Van Doorn and Velthuis 2018). Moreover, the platforms control their earnings by retaining fees, but ACCs are paid only if users subscribe to their channels or view, download or purchase their videos.[7]

Within feminist legal theory, there is a binary divide in pornography between defining it as exploitation and defending it in the name of self-agency in sexual matters (Radin 1989). Feminists debate pornography in the arena of censorship law, focusing on the end product of the industry rather than on the intellectual efforts involved in the making of it (Crawford 2007).

The sex wars

Feminist legal theorists have long debated whether pornography should be restricted through censorship laws due to its harm or whether its production should be allowed

as freedom of speech. Within the so-called sex wars, radical feminists condemn the existence of pornography as harmful, whereas sex-positive feminists defend it as sexual agency.

Radical feminists have opposed the industry because it produces three sets of harms. First, heteronormative pornography portrays women as enjoying being sexually subjected to the will of men in a degrading and humiliating manner (MacKinnon 1991, 802). Such pornography conveys the message that women's sexuality is subordinated to men's, who hold power and domination over how women should sexually behave (MacKinnon 1993, 28). Through pornography, women are made 'second-class citizens' because their subordinated status is then enforced not only in the sexual sphere but in all spheres of life where they are left at the mercy of men's power (MacKinnon 1991, 802). Second, the industry encourages sexual behaviour and specific body standards that may be harmful (Jeffreys 2009, 130). Rape and sexual harassment are the practice of what is learnt from the theory of pornography (Morgan 1980, 128). Through exposure to pornography, men learn to expect that women are willing to perform even potentially dangerous sexual acts for them, and women find themselves constantly confronted with dangerous beauty standards (Cameron 2018, 90). For example, operations such as labiaplasty surgery, and uncomfortable beauty practices such as waxing intimate body parts, are carried out to make female reproductive organs adhere to beauty canons created through the porn industry (Cameron 2018, 90). Third, radical feminists show concern about the potential harm the porn industry might cause to the women involved in its production (MacKinnon and Dworkin 1997). The latter also constitutes the crux of our argument; it is necessary to examine porn as a product created through the original work of individuals (women and men equally) who, if left without legal protection, may face abuse.

Sex-positive feminists, in contrast, believe that pornography, as such, should not be restricted. Closer to the liberal philosophical stance (Dworkin 1996, 238), they believe the industry is a manifestation of freedom of expression and, as such, should not be censored (Strossen 1996, 454, 473). As pornography is a legal industry, limiting it through censorship laws would simply push its production towards the black market, leaving its stakeholders with fewer legal protections (Strossen 1993, 1157). Censorship laws are concerned with protecting society from 'potential future harm' rather than preventing 'actual or imminent harm' (Strossen 1996, 455) and, therefore, they may not be an apt solution to challenging the 'institutions and practices' which regulate principally women to an inferior status (Strossen 1993, 1157). Sex-positive feminists rely on the absence of empirical evidence between crimes committed against women and exposure to pornography to defend the industry as providing opportunities for women who have few alternatives to find a job (Barnett 2016, 27; McNair 2014, 165). They find empowerment in women taking advantage of their bodies and sexuality by satisfying men's sexual needs in return for incomes they would struggle to find elsewhere (Crawford 2007, 141–152). It could be argued, however, that sex-positive feminists gloss over the imbalance between the profits of the industry and the economic and legal protections ACCs gain from it.

Although radical feminists might be responsible for reinforcing a moral high ground justifying state surveillance and the shaming and condemning of porn producers and consumers (Galbraith 2017, 112), sex-positive feminists advocate for sexual rights and sexual diversity as a means to gain women's socio-political–economic independence (McNair 2014, 169). Third-wave feminists are now concerned with embracing the intricacy

of fantasies, desires and pleasure (DeGenevieve 2014, 193) through a queer theory perspective according to which pornography should not 'conform to a specific behaviour' (DeGenevieve 2014, 195). Radical feminists' excessive focus on the binary between men and women has excluded the consideration of how sexual minorities might also be oppressed by pornography (Rubin 2011, 112).

Nowadays, radical feminists see porn as 'more dangerous than ever before' (Taylor 2021, 39) as societies have been 'pornified' through the sexualization of women 'into every corner of our consciousness without us noticing' (Barnett 2016, 97). However, although they create and intensify 'sex panic', radical feminists nonetheless lack concrete examples of how society is 'pornified' (Barnett 2016, 97). The new terrain on which the radical feminist position is carried forward is to protect children and teens from exposure to pornographic material that might increase their promiscuity and sexualized behaviour (Taylor 2021, 40). Although protecting the youngest is important given their vulnerability to 'corruption', the focus on children is seen as a strategy to portray porn as a dangerous and evil business and engender anxieties around sex (Taylor 2021, 40; Roberts and Brown 2018, 449). For example, the UK anti-pornography organizations UK Feminista and Object! have focused on hiding heterosexual sexually explicit magazines sold in supermarkets in so-called modesty bags (Roberts and Brown 2018).

As Cossman (2021, 69) highlights, the 1980s 'Sex Wars are with us still' as the 'Sex Wars 2.0'; radical feminists now use their anti-pornography positions to argue against trafficking, and sex-positive feminists focus on sexual identities and consensual sexual practices (Cossman 2021, 69). Feminists no longer uniquely disagree over whether sex work should be legal but they are now also expanding their critique to cover the extent to which the law should tackle sexual speech and harassment when sexuality might be a 'site of danger' (Cossman 2021, 70). Although radical feminists still maintain that the law is the best tool to protect women and condemn instances of violence, sex-positive feminists resent it as it relegates women to the status of victims without agency (Cossman 2021, 82) given that sex can be a site of both danger and pleasure (Cossman 2021, 79). The New Sex Wars see feminists no longer focusing on the binary between exploitation and empowerment, but rather on how to tackle sexual harm without the law shaming people in their sexual practices (Cossman 2021, 86; Freccero 2008, 213).

Suspending the sex wars through pragmatist feminism

Although a thorough analysis of the current feminist debates is beyond the scope of this article, the Sex Wars have been crucial in complicating our understanding of pornography and the regulatory concerns surrounding the industry. However, they do little to suggest methods for empowering those involved in the production of pornography. Feminists can and should be critical of pornography. Our concerns, however, specifically lie with the asymmetries involved in the industry, whereby powerful online platforms rely on intimate labour provided by a workforce that struggles to be recognized by the law. We believe that these concerns are too often obscured in feminist debates about pornography, alongside significant questions around how ACCs in the porn industry deserve to be empowered. Such questions are crucial to draw a stronger and sharper line between ACCs' potential subjection to exploitation and abuse and their freedom to choose to work in the porn industry.

Feminists' commitment to centring women's experiences can benefit from a pragmatist perspective which rejects the idea that unifying global theories can improve our non-ideal world shaped by 'poverty, racism and sexism' (Kaufman-Osborn 1993; Schnably 1993, 349). To achieve theoretical coherence, feminists have reached an impasse because they are striving to achieve an ideal world where sexuality is not commodified but empowering for women. However, they find themselves stuck in what Radin defines as a double bind on how to assess the subordination of women caused by gender oppression (Becker 1993, 305). If we censor pornography, the industry will move into the black market, and its workers will be left with no legal rights and protections. Conversely, if we liberalize it, we will be complicit with the potential harms it causes. Radin defines the double bind as a 'series of two-pronged dilemmas' recurring 'throughout feminist struggles', which are triggered because of 'the dominant social conception of the meaning of gender' (1989, 1704). Therefore, the double bind might only be dissolved 'by changing the framework' which creates it. This would require a Herculean effort to achieve a new 'meaning of male and female' (Radin 1989, 1704). If feminists are to succeed at this, it is crucial they support the empowerment of those oppressed by the double bind. Consequently, pragmatist feminists realize that dealing with the double bind implies confronting a temporary non-ideal reality; they push themselves to question which of the two prongs 'will hinder empowerment the least and further it the most'. In doing so, they acknowledge that their solution is adequate to their context and will need a newer evaluation at another time and place (Radin 1989, 1704).

Pragmatist feminism temporarily sets aside the urge for coherence which separates abstract critique of values from practice (Wells 1995, 1649); for our purposes, 'practice' means the real-life experiences of workers in the porn industry. Without the feminist perspective, pragmatism might assimilate these experiences into existing legal frameworks and act conservatively in its attempt to achieve institutional coherence (Radin 1989, 1710). Radin describes the latter as a system of bad coherence because it reflects the dominant concept of gender without acknowledging that this might be oppressive for some. Similarly, without the pragmatist perspective, feminism might engender a system of bad coherence when addressing women's experience, which is not unitary, through the application of one theoretical framework (Wells 1995, 1660). The problem of women's inferior status cannot be adequately solved through a 'grand theory' without engendering further problems (Brake 2007, 521).

When operating together, however, pragmatism and feminism are strengthened under a more realistic epistemology that is accessible to both women and men as an inclusive and pluralistic method for understanding the world around us (Wells 1995, 1660). We thus adopt a more pragmatic approach which suspends the conventional terms of feminist critiques of pornography, which risk overlooking the needs of ACCs. Pragmatist feminism helps us set aside the feminist dilemma regarding whether pornography should be censored or left unregulated because it is pleasurable and hence empowering (Bird 2020, 194). The sex wars binary approach between exploitation and agency proposes that ACCs, through the sexual representation of their bodies, might be producing valuable forms of social or economic capital (Paasonen et al. 2021, 117, 133). However, radical feminists' denial that ACCs might be sexual subjects while they objectivize themselves for economic purposes hinders their empowerment (Paasonen et al. 2021, 44). It denies ACCs access to 'social, economic, political and psychological resources' when the industry

'hooks on the wider fabric of society' and requires greater acknowledgement to improve society itself (Voss 2015, 29, 134). Our starting point is that pornography is a legal industry wherein ACCs, both women and men, require adequate protection on online platforms. Such protection includes the field of copyright law, to which we now turn.

The double bind on the copyrightability of online pornographic works

Copyrightability of pornographic works

UK copyright law necessitates that works, among other criteria, must 'show appropriate subject matter' and be original for copyright to subsist (Aplin and Davis 2022, 73). Therefore, any discussion regarding the copyrightability of pornographic works in the gig economy should begin with the subject matter. UK copyright law is unique due to its approach to the subject matter of copyright, the so-called closed list approach. Accordingly, UK law lists categories of protected subject matter in an exhaustive manner under the Copyright, Designs and Patents Act 1988 (CDPA). These categories are literary works, dramatic works, musical works, artistic works, films, sound recordings, broadcasts and typographical arrangements of published editions. Failure to bring an intellectual creation within at least one of these categories will result in leaving the creation being outside copyright protection. This approach is the opposite of the open list approach which prevails in civil law countries and in the USA, albeit belonging to common law tradition (Aplin and Davis 2022, 74). Thus, it is crucial to define the categories and identify what categories the pornographic works created by ACCs fall into; only then can such works and their respective authors enjoy copyright protection. Moreover, such classification would serve a greater purpose as definitions not only describe concepts but also limit them by drawing their boundaries. These boundaries favour legal certainty and predictability because different categories are subject to different limitations.

In the gig economy, pornographic works are created by ACCs, who can be either professionals or amateurs, working at their homes without the need to physically go to work. ACCs either upload their content onto the porn platforms or live-stream their performance, whereby they can simultaneously receive instructions from the platform users. The content of these videos and broadcasts does not involve genital interactions with customers as they are transmitted online. In fact, the ACCs also do not necessarily have to have penetrative sex with other people, such as their colleagues, as their intention is to sexually arouse their customers by meeting the customers' demands for sexual gratification and stimulation. Significantly, under section 15 of the UK 2017 Digital Economy Act, pornographic material deals with audiovisual works which are 'produced solely or principally for the purposes of sexual arousal'.

Pornographic works, if uploaded onto a platform in the form of 'recordings of moving images on a medium', are audiovisual works or, as section 5B of the CDPA defines, 'films', irrespective of the duration of the recording. They are thus considered the protected subject matter. However, when ACCs perform for a specific customer by using the live-streaming functions of online platforms, such a performance should be treated as a 'broadcast' under section 6 of the CDPA. Although the definition of a broadcast, in principle, does not include transmissions over the internet, a live-streaming event is broadcast within the meaning of 'a concurrent transmission of a live event' under section 6(1A).

Hence, these interactive performances are the new 'engine of the porn industry', to the point that pre-recorded performances are not prevalent in the gig economy (Patella-Rey 2021, 2). Globally, 5% of porn consumers visit live porn performances daily as they can choose from at least 12,500 ACCs to directly interact with them (Patella-Rey 2021, 2; Lowry 2016). Whereas ACCs can still shoot and upload content, their predominant mode of production is via live webcam performances (Easterbrook-Smith 2022, 6; Van der Nagel 2021, 395). Their broadcast creates a direct synergy between ACCs and customers, making the delivery of porn works simultaneous to their consumption as well as specifically tailored to satisfying the customers' ad hoc requests.

A fruitful discussion would be to enquire whether pornographic works, irrespective of whether they are recorded on a medium or not, could also qualify as dramatic works. More specifically, it is worth discussing whether a porn work could be 'a work of mime' under section 3 of the CDPA. Although the word 'mime' implies gestures, facial expressions and moves in a rather burlesque and humorous manner in conformity with its classical historical meaning, in modern times it also involves performances which contain the technique of expressing actions, with or without words, using only movements that include, for example, ballet performances.[8] The gig economy gives porn a unique characteristic beyond its sex performances: ACCs are selected and followed by their customers in online chatrooms because of their original humorous, fun and outgoing personalities, which are key to their popularity (Warhurst and Nickson 2007, 792). Therefore, porn works could also be perceived as dramatic works. That said, when ACCs produce pornographic films, they will clearly have film copyright; although dramatic works and films are not mutually exclusive,[9] the real difference is that the former must be original to be protected by copyright whereas the latter does not. This classification is crucial to empowering ACCs because, in a potential infringement claim, a causal link (derivation) between the dramatic work and the alleged infringement is sufficient for infringement to occur; whereas there is no infringement unless a film is wholly or partially – literally – copied.[10]

The second criterion for the subsistence of copyright is the originality of pornographic works within the meaning of the *Infopaq v Danske* 'author's own intellectual creation' test.[11] The test implies a higher threshold than the UK traditional standard (i.e. the 'sweat of the brow' test, which only requires 'skill, labour, and judgement' in the creation of works)[12] which prevailed before the *Infopaq v Danske* decision. If the works reflect ACCs' personalities, as evidenced by the making of creative choices, they are original. That said, in the gig economy, pornographic content uploaded or live-streamed by ACCs does not have to be original at all as the CDPA does not stipulate the originality requirement for films or broadcasts. Nonetheless, originality is neither a monolithic nor a straightforward concept. Regarding other jurisdictions or other types of subject matter, originality can still be a requirement for the subsistence of copyright, so further avenues for discussion are opened up by the differences between jurisdictions as well as work categories (Bonadio and Lucchi 2018). For instance, if pornographic films are also considered dramatic works (namely works of mime), they should be original for copyright to subsist.

Bartow (2012, 9) disputes the originality of certain pornographic performances, which may be considered 'banal' under US copyright law because of the widespread use by the population of certain sex positions, such as missionary. Thanks to *Infopaq*

v Danske, the current understanding of originality in the UK signifies a higher threshold than the US standard, 'a modicum of creativity'.[13] Nevertheless, the lack of the originality requirement for broadcasts and films under the CDPA, unlike works of mime, means that they are protected by copyright so long as they are not literal copies of previously created works.[14]

Certainly, an essential aim of porn in the gig economy is to sexually arouse its users in such a manner that they believe the sex and character being acted for them is personal, authentic and unique (Hancock 2013, 1012–1017). This might also mean that the more pedestrian the sex performance is, the more realistic it will appear to be, and the more success can be secured for the workers themselves; ACCs' creative choices reflect not only their personalities but also the audience's choices (Raustiala and Sprigman 2019, 1618). Too many tweaks around porn work risks losing the market gig economy essence and distinctiveness of porn itself – to make porn so similar to real-life sexual encounters that is capable of making users feel emotionally satisfied as if they have experienced authentic sex. Following the idea/expression dichotomy recurrent in copyright law – under which it is not the ideas per se that are protected, but the way they are expressed – sexuality is not an idea but an expression.[15] Each porn work is a unique expression even if it represents a sexual act. Acknowledgement of the contrary would feed widespread hierarchical gendered visions by claiming that it is difficult to convert the sexual use of bodies into something creative which produces social and cultural capital (Paasonen et al. 2021, 133; Smith 2012, 197). This approach would then force ACCs to choose to make their works either original at the expense of their marketability or pedestrian at the expense of their copyrightability (Tushnet 2007). Through a pragmatist feminist analysis which aims to empower ACCs, we maintain that classifying pornographic works as ideas or raw materials because sex is a common activity, and raising the originality threshold too high, might come at the cost of making these works public and easily reusable.

We maintain that any barriers against the copyrightability of pornographic works in the gig economy do not account for their inability to meet the subject matter or originality criteria, but are instead caused by the perceived understanding of pornography as embodied in the public policy exclusion.

The public policy exclusion

Most critiques of the copyrightability of online pornographic works concern the public policy exclusion due to their perceived obscene nature.

Although it cannot be argued that copyright will be refused on the grounds of obscenity, courts were historically ambivalent about affording porn works copyright protection even when all copyright requirements were met; immorality was one of the reasons used for the denial. A seminal example of this is undoubtedly *Glyn v Weston*, where Younger J denied copyright protection to a novel that was a 'sensual adulterous intrigue' and which 'advocated free love' because it was 'grossly immoral'.[16]

Society's understanding of morality has changed since *Glyn v Weston*. However, the notion of public policy exclusion remains a theme in copyright law; even if a work satisfies the requirements of subsistence of copyright, it may not attract protection based on a public policy exclusion, including but not limited to immortality (Sims

2008, 190). Groves (2020, 931) argues that *Glyn v Weston* 'remains the unchallenged leading case on immorality in copyright'.

This observation was later confirmed in the *Hyde Park v Yelland* [17] judgement, concerning the copyrightability of a photograph of Dodi Al-Fayed and Princess Diana published by *The Sun*, whereby Aldous LJ, among other issues, also discussed immorality by stating that 'a court would be entitled to refuse to enforce copyright if the work is: (i) immoral, scandalous or contrary to family life'.[18] The ruling was considered subjective due to the ambiguity around 'what is grossly immoral' and was even considered to display 'an element of hypocrisy' (Yurkowski 2001, 1079).

The public policy exclusion and the obscenity condemnation it creates have been criticized fiercely and found to be paradoxical and unclear (Dworkin 1998; Bently and Sherman 2014, 123; Laddie et al. 2018). Certainly, the rejection of copyright protection due to public policy exclusion does not rely on a legislative basis and is arbitrary (Sims 2008, 193–195).

In a more recent case, however, the jury did not find the hardcore videos of Michael Peacock, a male escort professionally known as 'sleazy Michael', obscene.[19] This outcome may well be a victory of the modern digital age over archaic obscenity rules. However, some scholars question this premature conclusion because the verdict, which is not binding, does not herald the demise of obscenity rules in the UK; on the contrary, it may lead to their replacement with much stricter and more conservative ones (Antoniou 2013, 100–101). Certainly, a relaxation of obscenity laws can only be enacted by Parliament through a more objective understanding of obscenity, of a kind which can be observed in other fields of law.

The Obscene Publications Act 1959, for instance, inhibits copyright protection by defining certain works as obscene, thus condemning their possession,[20] if they might 'deprave and corrupt persons'.[21] Obscene articles include 'any sound record, and any film' published not only through traditional means but also merely by being 'played, projected or transmitted electronically'.[22] Furthermore, the transmission of data through uploading and downloading is classified as publishing.[23] Following the Obscene Publications Act 1959, if the prosecutor succeeds in proving that a porn work depraves and corrupts people, a film may be saved only through the 'public good' defence if it satisfies 'the interests of drama, opera, ballet or any other art, or of literature or learning', and if the person had not examined it nor had 'reasonable cause to suspect that it was obscene'.[24] This defence needs to be balanced through trial evidence on who is likely to be exposed and potentially corrupted by the article.[25] The expression 'deprave and corrupt people' burdens the prosecutor with the requirement to prove that pornography is obscene, meaning 'morally unsound or rotten'.[26] Specifically, the main goal is to ensure not only that the 'wholly innocents' (e.g. children) are not exposed to an obscene work, but especially the 'less innocent' (e.g. those addicted to porn), so as to protect them from further corruption.[27]

A further association of pornography with obscenity as a moral ground for its condemnation is also made within section 63 of the Criminal Justice and Immigration Act 2008, wherein the possession of extreme pornography is criminalized because it is 'grossly offensive, disgusting or otherwise of an obscene character'. Obscenity is condemned either because of its potential to corrupt and deprave people or because it is associated with crimes of extreme pornography. The judges' decision on whether a porn work might be extreme, and thus the consumer who owns it criminally liable, is

based on a subjective judgement; it is linked to how judges react based on their own personal view and morality regarding the sexually explicit representation at stake (Johnson 2010, 148–151). The threshold is based on whether they might find it disgusting to the point that they feel society might need to be protected from deprivation and corruption.[28] Protecting society, and especially vulnerable individuals such as children,[29] from being exposed to sexually explicit materials is a goal worth pursuing. Prosecutors ought to support the condemnation of obscene products to prevent crimes and protect health and morals.[30] The infliction of harm and pain remains criminal and incompatible with consent under UK law.[31] However, the law on obscenity fails to consider whether ACCs are equally protected. Blocking the distribution of obscene pornography might benefit society at large but it does not prevent porn platforms from benefiting from those end porn products eventually put on the market. Crucially, while discussing the enactment of the Criminal Justice and Immigration Act 2008, little concern was put upon whether ACCs might have been harmed in the making of extreme pornography. The legislature's main focus was on banning exposure to disgusting images (Johnson 2010, 148–151).

From a pragmatist feminist perspective, Parliament's focus on banning already produced porn works in the name of obscenity, and therefore denying them protection, leaves ACCs without adequate legal rights and protections. The protection runs the risk of incentivizing production as ACCs are benefiting from the economic gains associated with copyright, but denying such rights is equally harmful to ACCs in the industry. The double bind at stake shows that, either way, ACCs will not be sufficiently protected. It is therefore crucial to ask which solution might hinder ACCs the least and further their empowerment the most. As pornography is a legal industry, criminalizing certain types of its products not because of their definite and demonstrable harmfulness, but on public morality grounds which are elusive and uncertain, might further increase the economic precariousness of ACCs.

Consequently, there is no legal issue regarding the subsistence of copyright on pornographic works that are produced as a film or transmitted online in the gig economy. Neither could we suggest that courts would deny such protection due to the public policy exclusion in the future because they did so in the past. Although judges now show less scepticism to granting pornographic works copyright protection compared to a hundred years ago when *Glyn v Weston* was the leading case law, it is the obscenity condemnation that creates a double bind which has eventually affected the copyright protection that ACCs receive in practice.

It is a truism to argue that the trend in copyright law is extending the scope of copyrighted subject matter, and any public policy exclusion that could prevent porn works from being protected by copyright due to immorality would be an issue of enforceability rather than subsistence anyway. Nevertheless, the understanding of pornography and the legislative association with the legal category of obscenity leaves ACCs in a weak bargaining position against online platforms. Online pornography sold through online platforms is subjected to obscene condemnations, and, because of the power imbalance between the parties, these condemnations affect ACCs more than the platforms. The platforms unilaterally decide through their terms of use to what extent ACCs use their copyrights, and the understanding of pornography associated with condemnable material exacerbates the problem, creating an impasse.

Empowering adult content creators: authorship of online pornographic works

It should not be surprising that favouring the prong that online pornographic works should not be seen – in the absence of definite and demonstrable harms – as obscene will not undo the double bind in copyright law. Merely granting ACCs copyright protection or bolstering existing rights in copyright law also does not solve the problems intrinsic to the commodification of sexuality. However, as scholars who have the goal of empowering ACCs at heart, we also understand the importance of identifying a strategy that can enable us to work with non-ideal transitory conditions (Brake 2007, 522); specifically, human beings are selling content involving the use of their most intimate body parts with inadequate legal protections, yet in an industry that is legal and highly profitable. Pornography is considered a legal matter for obscenity law purposes. This means that, in terms of whether its end product might be obscene or indecent, the industry is legal, but ACCs are not acknowledged as a cohort of workers. Consequently, while ACCs lack basic labour law protection – such as the right to a minimum wage, working time regulations, and health and safety protections – because they are apparently self-employed entrepreneurs, the copyrightability of their works is sometimes challenged because of obscenity condemnations.

Pragmatist feminism could be a strategy to 'hold tentatively' every critique on the copyrightability of pornography and be of practical use in analyzing ACCs' legal protections under copyright law (Wells 1995, 1648). The discussions around whether sex acts before a camera might be obscene foreshadow the fact that porn is a legal business that seeks economic support through copyright law. We suspend the double bind because it is triggered by the sexual and gendered nature of pornography, and it increases the stigma associated with working in the sex industry. Its argument – that sex is a common and widespread activity, which if filmed triggers obscenity condemnation – justifies the absence of a proper pragmatic acknowledgement of the business of the porn industry. The double bind risks acting as a leeway to tolerating the existence of the porn industry without critically examining the agreements between ACCs and platforms.

Through pragmatist feminism, we employ 'disciplined thinking' (Wells 1995, 1665), meaning that we test the prong arising from the double bind uniquely for the sake of ACCs' present needs without identifying solutions for future times where they might live under different conditions. We take the perspective of ACCs who are in a vulnerable condition in negotiating their rights with porn platforms by analyzing the copyright clauses of the terms of use of the platforms through which ACCs sell their works. Thus, the focus should be to establish whether ACCs actually enjoy copyright protection through an adequate recognition of their copyright authorship and ownership status.

As is firmly established in the copyright scholarship, authorship and ownership of copyright works are two different concepts that do not necessarily have to overlap. A differentiation arises when authors transfer their economic rights to third parties, most of the time in exchange for royalties (Karapapa and McDonagh 2019, 61). However, ipso jure, under section 11 (A) of the CDPA, a differentiation also arises when the works are created by an employee in the course of an employment relationship; the owner of the work is not the employee who creates it but the employer. If the author and the copyright owner are different persons, it is the copyright owner who has the ability to transfer

the economic rights and grant licences, and who can sue for any copyright infringement (Karapapa and McDonagh 2019, 65).

Under section 9 of the CDPA, authors of protected works are the persons who create them. As for films, it is the producer and the principal director (as the joint authors), whose contributions are not distinct from each other, irrespective of the level of their contributions. This is because there is a legal presumption that the contributions of the producer and the principal director are inseparable from each other within the meaning of section 10 (1A) of the CDPA. Frequently, pornographic works' financers act as producers and directors simultaneously; they employ 'performers in work-for-hire arrangements' to sell such works through traditional channels, or they hire others 'to perform with them' and distribute such scenes through online on-demand platforms (Berg 2020, 1168). However, in the gig economy, it is more common that online pornographic works are directed and produced by the ACCs, a situation which makes them authors and the first owners of copyright under section 11 of the CDPA. This is because online platforms frequently deny an employment relationship with ACCs under the terms of use.[32] Hence, because ACCs are not their employees, they are the copyright owners.

When ACCs live-stream content to users via online chatrooms, they are then the broadcasters who transmit the content for which they are responsible in line with section 9 of the CDPA. Therefore, they are both authors and copyright owners of their own works. That said, there may be some instances in which ACCs are instructed by their customers to tailor personalized performances for them in these chatrooms. In such a scenario, it may well be argued that customers could be the authors, or co-authors, because they contribute to the creation of the work and, to some extent, direct it with ACCs. However, should this be the case, the state of the art sees the copyright clauses of the terms of use of porn platforms directed at whoever streams pornographic content. Consequently, authorship status would lie with the customers only when they upload sexually explicit material produced by themselves on online platforms. In the gig economy, the roles of the stakeholders are blurred; the identity of directors, ACCs and customers are likely to overlap (Berg 2021, 90) as ACCs do not necessarily have to be professionals. What appears distinct, however, is the decision-making power of the online platforms, whose terms of use are non-negotiable.[33] In the gig economy, platforms hosting the content as internet intermediaries are usually given a licence to use the user-generated content, mostly free of charge (EBU 2021).

The terms of use of porn platforms identify ACCs as copyright authors[34] and, by doing so, acknowledge their copyright ownership status. Hence, most of these online platforms explicitly mention ACCs as owners of copyright in their terms of use.[35] However, the platforms then force ACCs either to perpetually transfer all the economic rights or grant licences by way of non-negotiable standard clauses of their terms of use. This prevents ACCs from properly enjoying their copyright despite what the platforms claim in their terms of use.[36] The terms of use require ACCs to grant the platforms 'unlimited, worldwide, irrevocable and perpetual licences' to use their economic rights, including but not limited to making adaptions and derivations from the works, without bargaining power.[37] ACCs also grant platforms the right to sub-license these rights to third parties.[38] More importantly, ACCs do not receive any royalties in exchange for this transfer,[39] which makes the transmission especially problematic given that they also do not receive wages from the platforms. However, this does not mean that ACCs obtain no

financial gain for their work in any capacity. They are paid by their customers – namely the subscribers using the platforms – by way of tokens or subscription fees. Stardust (2019, 22) argues that this payment can be converted into royalties. However, this payment is dependent on the extent to which ACCs can attract customers and the frequency at which their content is viewed. In fact, the unpredictable nature of the income is true for all types of works communicated to the public in the meaning of section 20 of the CDPA. ACCs' future pay-off is not certain; consequently, it is common for many to keep mainstream jobs to supplement their income, and only a small percentage of them rely uniquely on the revenues of the porn industry (Berg 2016; McKee 2016).

Lastly, the terms of use compel ACCs to waive their moral rights which would normally vest in them even after a potential transfer of copyright,[40] and the privileged status of porn platforms appears to continue even after their agreement with ACCs ends.[41] The waiver of moral rights is problematic because they stem from authorship to the extent that in other jurisdictions they cannot be waived at all because of the justification for copyright under these legal systems. Moral rights are non-pecuniary in nature, and they aim to protect the personality interest of the ACCs (Aplin and Davis 2022, 157). Such a waiver is not alien to UK law, but it gives less control to ACCs over their works and dilutes their personality interests in their works created by their 'free choices', which represent their 'personal stamp'.[42]

In contrast to the ACCs' position, online platforms enjoy the rights the law bestows upon them without taking major business risks.[43] They use ACCs' economic rights permanently and irretrievably by virtue of contractual licences – but without paying them royalties. They are also not held liable to them for any wrongdoings of other platform users or third parties.[44] They act as internet intermediaries, and many legal texts (e.g. E-Commerce Directive articles 12–15) regulate their liability regime for illegal acts, including copyright infringements committed by third parties, in such a manner that the intermediaries are not held liable under certain circumstances. Most of the time, porn platforms benefit from the borderless nature of the internet, which facilitates forum shopping whereby the platforms that occupy a stronger position vis-à-vis the ACCs choose the jurisdiction most favourable to them. This only deepens the imbalance between the platforms and the ACCs. For example, OnlyFans[45], a UK-based platform, states in its terms of use that it has chosen to voluntarily comply with the notice and takedown provisions of the US Digital Millennium Copyright Act of 1998 (DMCA).[46] The notice and takedown provisions of the DMCA recognize the copyright of ACCs by enforcing the liability of the platforms in a very limited capacity; the consideration given to ACCs by law is only superficial. The terms of use of online platforms therefore only pay lip service when acknowledging ACCs' copyright authorship.

Consequently, there is no international standard for intermediary liability and nor is there any international harmony of copyright provisions, and the terms of use restrict the copyright protection given to ACCs to the extent that they hold the copyright but cannot enforce it. Platforms are facilitated in leaving ACCs with inadequate copyright protections precisely by the sex nature of porn works. Under these popular porn platforms, ACCs' economic rights are irrevocably transferred, their moral rights are neglected, and the copyright protection of their works is inconsistent. Even though they are not employees of the platforms, they do not properly own their work. However, the porn industry continues to reap large profits which porn platforms guarantee themselves.

ACCs cannot adequately enjoy their decision-making power over the creation of their pornographic works granted to them by law because they currently have no choice but to accept the harsh conditions unilaterally enforced on them by the platforms if they wish to continue working in the sector. The proper acknowledgement of ACCs' control of their works requires bolstering their bargaining power with the platforms. We maintain the problem is caused by, among other factors, the impasse in the double bind.

Pragmatist feminism leads us to conceal ideal critiques on whether the law should encourage the commodification of sexuality and instead advocate for the recognition of copyright for ACCs. The proper recognition of ACCs' copyright ownership through fair remuneration and allowing them to retain their moral rights is be a practical step towards mitigating their vulnerability while we await an ideal world where sexuality has been freed from gender oppression and harm connected to its commodification.

Conclusion

In the gig economy, pornography is no longer a static object separated from its author but is also frequently a live performance. Although ACCs benefit from the flexibility of working online, they are left with little bargaining power over their rights as outlined on online platforms. However, the precarity of their working conditions and their vulnerability is obscured by feminists' debates on whether porn is harmful and should be censored. Due to pragmatist feminism, it is possible to suspend such critiques and instead consider what ACCs currently need.

By considering how to empower ACCs in the porn industry through copyright law, we encounter an impasse in the double bind created by gender oppression. Even though copyright subsists in porn works, the potential 'obscene' nature of sexually explicit material is sometimes involved in the discussion as to whether it is fair to incentivize the production of pornography through copyright law. If we deny copyright protection, ACCs will be left with fewer rights because the industry is legal and its production will not cease, but if we grant copyright protection, we might be complicit in the harm potentially committed in the production of pornography.

To work towards dissolving such an impasse, we should consider what is being legally granted to ACCs under the terms of use of online platforms. The online porn platforms recognize ACCs' copyright ownership but limit its use to the extent it is no longer functional. Online platforms shield themselves from liability for the content they host as mere intermediaries and they also avoid legal responsibility by picking jurisdictions and laws that best suit them. Pragmatist feminism seeks outcomes that give ACCs stronger bargaining power to ensure their legal rights and freedom are respected. As feminists, we may well believe that pornography is inevitably implicated in producing certain forms of harm, but we are left to live under non-ideal conditions where porn is legal, and where it is debatable that its illegality would benefit ACCs more than it would harm them: the double bind. In this reality, online platforms' power and control over ACCs can be mitigated via a temporary solution: strengthening the ACCs' position through copyright royalties and moral rights, which could benefit the wider presence of original content uploaded through the gig economy.

Notes

1. 'Pornhub Statistics', 2017. https://www.pornhub.com/press. Accessed 1 October 2021.
2. The market share of adult and pornographic websites in the USA reached USD 1.1 billion in 2023, with an annualized growth of 12.6%. See 'Adult and Pornographic Websites in the US, Market Size 2005–2028'. https://www.ibisworld.com/industry-statistics/market-size/adult-pornographic-websites-united-states/. Accessed 22 February 2023.
3. 'Pornhub Insights', 2019. https://www.pornhub.com/insights/2019-year-in-review. Accessed 2 October 2021.
4. We do not engage with child pornography and revenge porn, which are crimes of sexual exploitation and abuse and thus require condemnation. We also do not engage with extreme pornography beyond what is necessary to indicate the subjective nature of obscenity. Although legislators define the aforementioned crimes with the term pornography, such a label is problematic precisely because the production of pornography is legal in the UK, and the association of criminal activity with the word pornography might imply that pornography itself is illegal and that such crimes could be tolerated within its industry. Naming criminal activities that are lewd in nature as pornography, which is legal, would be not only semantically incorrect but also jurisprudentially wrong. Although society's understanding of morality might change over time, these activities should remain strictly illegal and would most likely continue to be immoral.
5. All content was collected and analyzed by the authors with ethical clearance from the University of Reading.
6. Obscene Publication Act 1959, section 4 (1); and Indecent Displays (Control) Act 1981, section 1 (1).
7. ManyVids, Terms for Uploaders, 2.3 and 4.1-4, https://info.manyvids.com/home/terms-uploaders (accessed 11 June 2023); Chaturbate, V. 5-8, https://chaturbate.com/terms/ (accessed 11 June 2023); OnlyFans, Terms of Use for Creators 5-12, https://onlyfans.com/terms (accessed 11 June 2023); and Pornhub, https://www.pornhub.com/information/terms (accessed 11 June 2023).
8. 'Mime', Oxford English Dictionary, https://www.oed.com/view/Entry/118635?rskey=FR4FDe&result=1# (accessed 24 June 2021).
9. *Norowzian v Arks Ltd (No 2)* [2000] FSR 363.
10. *Designers Guild Ltd v Russel Williams (Textiles) Ltd* [2000] 1 WLR 2416.
11. *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [39].
12. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.
13. *Feist Publications, Inc., v. Rural Telephone Service Co.* [1991] 499 U.S. 340.
14. See earlier note 9.
15. *Baigent and Lee v Random House Group Ltd* [2007] FSR 579.
16. *Glyn v Weston Feature Films* [1916] 1 Ch. 261.
17. *Hyde Park v Yelland* [2001] Ch. 143.
18. *Hyde Park v Yelland*, para. 66.
19. *R* v *Peacock* (unreported, Southwark Crown Court, 6 January 2012).
20. Obscene Publications Act, section 2.
21. Obscene Publications Act, section 1. These are the persons 'likely … to read, see or hear the matter contained or embodied in it' (section 2). As for online pornographic works, it is literally everyone.
22. Obscene Publications Act, section 1.
23. *Perrin* [2002] EWCA Crim 747.
24. See earlier note 20 at section 2 (5).
25. See earlier note 21.
26. *Penguin Books Ltd* [1961] Crim LR 176.
27. *Whyte* [1972] 3 All ER 12.
28. *Anderson* [1972] 1 QB 304.
29. Digital Economy Act 2017, section 14.

30. European Convention on Human Rights, article 10 (2).
31. *R v Brown* [1993] UKHL 19.
32. ManyVids, Terms for the Uploaders, 2.6
33. *Uber BV and others v Aslam and others Hilary Term* [2021] UKSC 5 on appeal from [2018] EWCA Civ 2748.
34. ManyVids, Terms for Uploaders 3.3-3.12, https://info.manyvids.com/home/terms-uploaders (accessed 11 June 2023), Chaturbate, V.6-7, VI2-3, https://chaturbate.com/terms/ (accessed 11 June 2023); OnlyFans, Terms of Use for Creators, 10, https://onlyfans.com/terms (accessed 11 June 2023); Pornhub, https://www.pornhub.com/information/terms (accessed 11 June 2023).
35. See note 35.
36. For instance, OnlyFans allow ACCs to retain copyright ownership as what has been transferred is only a non-exclusive licence which does not prevent ACCs from granting non-exclusive licences to others for the same content. This, however, does not suggest that there are no problems with the terms of use. OnlyFans, 10.b.
37. See earlier note 35.
38. Chaturbate, VI2, https://chaturbate.com/terms/ (accessed 11 June 2023); ManyVids, Terms for Uploaders, 3.5, 3.6, https://info.manyvids.com/home/terms-uploaders (accessed 11 June 2023); OnlyFans, Terms of Use for Creators 10.c, https://onlyfans.com/terms (accessed 11 June 2023); Pornhub, https://www.pornhub.com/information/terms (accessed 11 June 2023).
39. See note 39.
40. See earlier note 35.
41. See earlier note 35.
42. See *Football Dataco Ltd v Yahoo! UK Ltd Case*, C-604/10 (2013) FSR 1.
43. Chaturbate, V, VI2, https://chaturbate.com/terms/ (accessed 11 June 2023); ManyVids, Terms for Uploaders 3.5, https://info.manyvids.com/home/terms-uploaders (accessed 11 June 2023); OnlyFans, Terms of Use for Creators 6, 9, 10c, https://onlyfans.com/terms (accessed 11 June 2023).
44. See note 44.
45. OnlyFans, DMCA Takedown Policy.
46. See also *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers* (2004) 2 SCR 427.

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