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Intimate Images and Authors' Rights: Non- Consensual Disclosure and the Copyright Disconnect

Meghan Sali
University of Ottawa, Faculty of Law

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Meghan Sali[*]

INTRODUCTION

This article responds to a brand of legal realpolitik that says using property law to respond to the non-consensual distribution of intimate images (NCDII) is appropriate and even necessary, because its remedial frameworks are well developed and provide the relief that is often most sought after by targets of an assault: the immediate removal of photos from online platforms. While some targets are not considered the "authors" of their intimate images, most of the images that are the subject of NCDII are selfies,[1] taken by the target themselves. In these cases, that person rightfully owns the copyright in those images and would be able to make use of that right in seeking a remedy.

Some forms of unauthorized distribution fit neatly within the copyright framework. This is the case for intimate images and videos that are consensually commercialized by creators who find their works being reproduced without authorization. However, copyright remedies are a much more uneasy fit for private sexual expression, where images are shared among intimate partners or a small circle of trusted confidants, and are ultimately hacked and released, or shared publicly without the consent of the author. At some level, defaulting to copyright law is logical where it provides the remedies that prove challenging for survivors of image-based sexual abuse to secure through other means. Some remedies for NCDII exist under both the criminal and civil law, but none offer the swift takedown procedures that can be found under the U.S. *Digital Millennium Copyright Act* (*DMCA*) — a powerful tool for content removal on copyright infringement grounds. Although the *DMCA* is an American law, Canadians can and do make use of this tool to have images removed from online platforms, particularly when the sites on which the images appear are based in the U.S. or have removal policies specifically designed to respond to *DMCA* notices. While copyright may in some cases afford a practical remedy, relying on copyright to respond to image-based sexual abuse puts victims/survivors[2] in the

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[1] Amanda Levendowski, "Using Copyright to Combat Revenge Porn" (2014) 3:422 NYUJ Intell Prop & Ent L 422 at 426.

[2] I employ the term victim/survivor throughout this article to describe people who are

position of having to argue that the real harm they have suffered is to their intellectual property interests, and not to their dignity, privacy, physical safety, and sexual autonomy.[3] Furthermore, copyright remedies do not respond to the broader societal harms caused by NCDII and, more specifically, to the equality interests of women, girls, LGBTQ2s+ persons, and other historically marginalized individuals and their participation in public life.

In this article I argue that it is incumbent on legislators to develop remedies for NCDII that do not rely on proprietary frameworks to address the harm that results from image-based sexual abuse. The article will proceed in three parts. In Part 1, I will discuss the nature of NCDII and conceptualize the harm. Here I argue that NCDII is an extreme privacy invasion and a form of gender-based violence. I briefly address how Canadian law has failed to provide an effective remedy for the victims/survivors of NCDII — canvassing both criminal and civil approaches to redressing the harm. In Part 2, I examine the justifications for intellectual property law. I argue that early privacy theorists were correct to conceptualize privacy and property as two distinct rights with material differences in the kinds of interests they were designed to protect. I make the case that the modern Anglo-American approach to copyright — dominant in Canada and the U.S. — is weighted towards economic rights and explore how the Supreme Court of Canada's articulation of copyright's purpose balances these economic rights with public interest concerns. In Part 3, I discuss how copyright remedies fail to respond to NCDII harms, including privacy, dignity, and equality. I acknowledge that copyright, when used as a practical tool, provides some remedies that may otherwise prove elusive, but I also highlight the inherent challenges faced by individuals relying on copyright law for those remedies. I conclude with the recommendation that legislators should focus on creating a *sui generis* remedial framework for NCDII that acknowledges the true nature of the harm and provides victims/survivors with effective remedies — including those that are so powerful and attractive within copyright law.

1. NCDII IS AN EXTREME PRIVACY VIOLATION AND A FORM OF GENDER-BASED VIOLENCE

The use of private, sexual images and videos to perpetrate harm against the individual(s) depicted in them is all too common. In 2012 and 2013, the deaths of Amanda Todd and Rehteah Parsons drew national media attention after vicious online harassment and abuse resulting from sexual images and videos made

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negatively affected by image-based sexual abuse. The use of a hybrid term is intended to be inclusive of individuals who identify with either or both labels and "references the potential for positive affirmations of agency and empowerment in the face of violence." See Christopher Parsons et al, *The Predator in Your Pocket: A Multidisciplinary Assessment of the Stalkerware Application Industry* (Citizen Lab, 2019) at 11.

[3] Danielle Citron, "Sexual Privacy" (2019) 128:7 Yale LJ 1870 at 1882 (describing how sexual privacy is foundational to the exercise of human agency and sexual autonomy).

public by their abusers contributed to their deaths by suicide.[4] Following these high profile tragedies, in 2015 the government criminalized NCDII.[5] According to Statistics Canada data, reported incidents of NCDII are on the rise — between 2015 and 2020, individual complaints reported to the police surpassed 8,000, with over 2,200 incidents reported in 2020 alone.[6] It is reasonable to assume that these numbers capture only a fraction of the abusive activity, as study after study shows that incidents of sexual violence are persistently underreported.[7]

Although NCDII often does not involve physical contact, it should be understood as an extreme privacy violation and a form of gender-based violence (GBV). The Government of Canada describes GBV as violence targeted at individuals because of their gender, gender expression, gender identity, or perceived gender.[8] Women and girls are not the only targets of GBV — individuals whose gender identity and expression challenges patriarchal norms, including transgender, non-binary, and gender non-conforming people are also frequently the targets of abuse and harassment because of discriminatory gender norms.[9] Critically, GBV is not limited to physical acts, but "can include any word, action, or attempt to degrade, control, humiliate, intimidate, coerce, deprive, threaten, or harm another person".[10] GBV operates to "seriously [inhibit] women's ability to enjoy rights and freedoms on a basis of equality with men."[11] Situating NCDII within a broad definition of violence that also encompasses non-physical acts provides necessary context, plotting NCDII as

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4 Angela Mulholland, "Amanda Todd's mother saddened by Rehtaeh Parsons suicide", *CTV News* (11 April 2013), online: < www.ctvnews.ca/canada/amanda-todd-s-mother-saddened-by-rehtaeh-parsons-suicide-1.1233416 > .

5 *Criminal Code*, RSC 1985, c C-46, s 621.1(1).

6 Statistics Canada, "Incident-Based Crime Statistics, Annual", Table: 35-10-0177-01 (27 July 2021), online: < https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.257&cubeTimeFrame.startYear=2014&cubeTimeFrame.endYear=2020&referencePeriods=20140101%2C20200101 > .

7 See Cecilia Benoit et al, *Issue Brief: Sexual Violence Against Women in Canada*, commissioned by the Federal-Provincial-Territorial Senior Officials for the Status of Women (2015) at 5, online: < cfc-swc.gc.ca/svawc-vcsfc/issue-brief-en.pdf > ; Alana Prochuk, *Women's Experiences of the Barriers to Reporting Sexual Assault* (Vancouver: West Coast LEAF, 2018) at 12-13, online: < www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf > .

8 Government of Canada, "About Gender-Based Violence" (28 October 2020), online: *Status of Women in Canada* < cfc-swc.gc.ca/violence/knowledge-connaissance/about-apropos-en.html#what > [*About GBV*].

9 Suzie Dunn, *Technology-Facilitated Gender-Based Violence: An Overview* (Ottawa: Centre for International Governance Innovation, 2020) at 3, online: < www.cigionline.org/publications/technology-facilitated-gender-based-violence-overview > .

10 *About GBV*, *supra* note 8.

11 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women* (1992), online: < www.refworld.org/docid/52d920c54.html > [accessed 27 December 2020].

one point on a continuum of violent behaviour, which abusers routinely target at women and girls.[12]

Offline, women and girls are frequently the subjects of sexual violence by their intimate partners.[13] With the rise of digital technology, this form of abuse has migrated online, where perpetrators make use of technology that can broaden the impact of their abusive behaviour. Some of the earliest demographic data on NCDII comes from an oft-cited 2013 self-report study by the Cyber Civil Rights Initiative (CCRI) showing 90 percent of NCDII victims are women.[14] More recent research from Australia suggests that, while gender is one factor influencing who is affected by NCDII, there is an even higher rate of victimization among members of marginalized groups.[15] With this said, women and girls who have their images non-consensually shared online are likely to face harsher societal consequences than men.[16] Even where intimate images are not ultimately distributed, threats to do so lead some individuals to remain in sexual relationships against their wishes, where they may experience other forms of abuse. NCDII is often perpetrated alongside other well-known forms of intimate partner violence, including physical and sexual assault.[17]

Clarity around terminology will help to properly situate the harm. In the context of NCDII, abusers often publicize intimate photos or videos that were exchanged during an intimate relationship after the relationship has ended, as retribution for some perceived offence — leading to the genesis of the term "revenge porn."[18] In recent years, the term has been popularized in public

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[12] A definition of violence that encompasses non-physical acts is not without controversy. Too broad a definition is thought by some to undermine the significance and impact of physical violence. See Oren Nimni, "Defining Violence", *Current Affairs* (17 September 2017), online: < https://www.currentaffairs.org/2017/09/defining-violence > .

[13] World Health Organization, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence* (Geneva: WHO, 2013).

[14] Jessica Roy, "California's New Anti-Revenge Porn Bill Won't Protect Most Victims", *Time* (3 October 2013), online: < nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/#:~:text = A%20survey%20conducted%20by%20the,protect%20a%20minority%20of%20victims > .

[15] Austl, Commonwealth, Australian Institute of Criminology, *Image-based sexual abuse: victims and perpetrators* by Nicola Henry, Asher Flynn & Anastasia Powell, Trends and Issues in Crime & Criminal Justice (2019) at 5.

[16] Alexadra Dodge, *Punishing 'Revenge Porn': Legal Interpretations of and Responses to Non-Consensual Intimate Image Distribution in Canada* (PhD Dissertation, Carleton University, 2019) [unpublished] at 135-37 [Dodge, "Punishing 'Revenge Porn'"].

[17] Dunn, *supra* note 9 at 3-4.

[18] Despite the popularity of this term and the considerable proportion of NCDII that stems from the misuse of intimate images shared within relationships, a significant portion of NCDII does not take place within or following an intimate relationship. Consider, for example, the numerous instances in which devices were hacked and images stolen for release. See e.g. Suzie Dunn & Alessia Petricone-Westwood, "More than 'Revenge Porn': Civil Remedies for the Nonconsensual Distribution of Intimate Images" (Paper

discourse and is often used as a catch-all for different kinds of harms perpetrated using intimate images and videos. However, scholars in the field have criticized the term, both for failing to accurately describe the breadth of activity related to private, sexual images and for obscuring the motives behind the misappropriation of such images. Clare McGlynn and Erika Rackley prefer the broad descriptor "image-based sexual abuse," of which NCDII is one subset.[19] Other examples of image-based sexual abuse include voyeurism and "upskirting," where images of a sexual nature are surreptitiously recorded, and often distributed, without consent; recording sexual assaults; "sextortion," where individuals are coerced into creating images or engaging in sexual acts under threat of exposure; and altering photos so that they appear to be sexual in nature.[20]

Further, scholars have criticized the use of the term "cyberbullying" to describe image-based sexual abuse. In a submission to the Special Rapporteur on Violence Against Women, Valerie Steeves, Jane Bailey and Suzie Dunn argued that the term "technology-facilitated violence against women and girls" (TFVAWG) best conceptualizes the kinds of gendered harms perpetrated using digital technologies. They push back on the use of the word "cyberbullying" to characterize the type of abuse suffered by victims like Reteah Parsons and Amanda Todd, arguing that it tends to trivialize the harm and can open the door to paternalistic advice and victim blaming.[21] It is important to bear these critiques in mind as much of the recent scholarship on this issue uses one or both of the terms "cyberbullying" and "revenge porn."

In this paper, I focus on one category of image-based sexual abuse: NCDII. Narrowing further within the category, I have chosen to examine the legal remedies available in cases where victims are the authors of their images for the purposes of copyright law.[22] Research suggests that the vast majority of images that are the subject of NCDII are selfies — taken by the individual depicted in the photo or video.[23] I focus on these cases in part because they make up the

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delivered at the 38th Annual Civil Litigation Conference, Mont-Tremblant, November 2018).

19 Clare McGlynn & Erika Rackley, "Image-Based Sexual Abuse" (2017) 37:3 Oxford J Leg Stud 534 at 538.

20 *Ibid.*

21 Jane Bailey, Valerie Steeves & Suzanne Dunn, "Submission to The Special Rapporteur on Violence Against Women Re: Regulating Online Violence and Harassment Against Women" (2017) at 3, online (pdf): *Equality Project* <www.equalityproject.ca/wp-content/uploads/2017/12/Bailey-Steeves-Dunn-Submission-27-Sep-2017.pdf>.

22 The definition of authorship for the purposes of copyright protection has undergone significant change in the past decade. Prior to the 2012 *Copyright Modernization Act,* s 10(2) of Canada's *Copyright Act* deemed the author of an image to be the owner of the initial negative or photograph. Before this section of the *Copyright Act* was amended, an individual who created an image of themselves on a device belonging to someone else would not have been the author of the image for the purpose of pursuing copyright remedies. See *Copyright Act,* RSC 1985, c C-42 as it appeared on December 2005.

majority of the reported examples, but also because these are the only instances in which copyright law provides some of the remedies sought by victims/survivors. As such, it is not within the scope of this paper to address what is sometimes called non-consensual pornography, in which the individuals were not the authors of the intimate images shared without their consent. In these circumstances, copyright can provide no remedy. In fact, in cases where the subject of the photo is not its author, copyright law may serve as an impediment to having such images removed from online platforms, leaving a criminal complaint or other civil law remedy as the only avenues open to the person targeted to redress NDCII injury.

(a) A True Accounting of the Harms

In order for the law to respond appropriately to the harm caused by NCDII, lawmakers must understand and properly conceptualize the nature of the harm, beginning with the injuries inflicted on the individual victim/survivor. Much of the collected data and research into the nature and the extent of NCDII harms comes from the U.S. and other higher income countries.[24] Noting this, I have used Canadian sources and data where possible.

According to the CCRI self-report survey, targets of "revenge porn" reported that their personal identifying information was often posted alongside their nude photos or videos.[25] Among other items, the information commonly included one or more of the following: their full name (85%), email address (26%), social media profile information (49%), home address (16%), and phone number (20%).[26] The inclusion of personal identifying information means that individuals who are targeted by image-based sexual abuse also face threats to their physical safety and are increasingly likely to be stalked and assaulted offline.[27] Some targets have reported receiving death and rape threats as a result of their images being shared.[28] Even where the abuse does not extend to offline actions, the psychological impacts are serious and prolonged. Victims/survivors reported experiencing severe fear and anxiety that their photos would be found by friends, family, and employers,[29] often resulting in depression, panic attacks, and extreme emotional distress.[30] Critically, financial loss to the value of

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[23] Levendowski, *supra* note 1 at 426.

[24] Dunn, *supra* note 9 at 1-2.

[25] Cyber Civil Rights Initiative, "End Revenge Porn: A Campaign of the Cyber Civil Rights Initiative" (2013), online (pdf): < www.endrevengeporn.org/main_2013/wp-content/uploads/2014/12/RPStatistics.pdf > .

[26] *Ibid.*

[27] Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49 Wake Forest L Rev 345 at 350.

[28] *Ibid.* at 353.

[29] Levendowski, *supra* note 1 at 424.

[30] Citron & Franks, *supra* note 27 at 351.

(intellectual) property is rarely, if ever, cited as a harm experienced by individual victims/survivors of NCDII. Scholars and researchers in this area have underscored the amplification effect that the internet has on these harms[31] — exponentially expanding the reach of content and resulting in an unrelenting cycle of victimization and fear that photos and videos are never truly gone, even if the individuals depicted have managed to overcome the legal and practical hurdles to having them removed from certain platforms.[32]

Individuals whose private, sexual images are shared without their consent suffer significant reputational harms. In a series of qualitative interviews with researcher Samantha Bates, NCDII victims/survivors discussed the impact that abusers publicizing their images had on their relationships. While some reported that their families were supportive and a source of strength and healing, others experienced extreme discord in their family lives because of their intimate images being made public.[33] Respondents reported feeling judged and blamed by their families, moving out of their homes, and becoming estranged and withdrawn due to internalized shame.[34] Multiple participants reported concern that their photos would be used against them in ongoing custody disputes.[35] Women who were targets of NCDII within an intimate relationship described feeling less trusting in subsequent relationships, with some saying that it led them to avoiding intimate relationships altogether.[36] Those targeted by NCDII also reported lasting impacts to their friendships. Again, some individuals described forming deeper bonds with friends who supported them, but others explained how they shared social circles with their abusers and how having mutual friends that remained connected to both them and their abuser made social interactions "very tense."[37] Finally, nearly all the participants described impacts on their professional lives.[38] As employers increasingly turn to online searches to evaluate applicants, search results that prominently feature sexualized images are no doubt harmful to the careers and employment prospects of victims/survivors.[39]

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31 Dunn, *supra* note 9 at 3.

32 Jessica M Goldstein, "'Revenge porn' was already commonplace. The pandemic has made things even worse." *The Washington Post* (29 October 2020), online: <www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html>.

33 But see Alexa Dodge, "'Try Not to be Embarrassed': A Sex Positive Analysis of Nonconsensual Pornography Case Law" (2021) 29 Fem Leg Stud 23 [Dodge, "Try Not to be Embarrassed"] (examining how sex-negativity is embedded into police and legal responses to NCDII, reinforcing feelings of shame and blame in victims/survivors).

34 Samantha Lynn Bates, *"Stripped": an analysis of revenge porn victims' lives after victimization* (MA Thesis, Simon Fraser University, 2015) at 79-82 [unpublished].

35 *Ibid.* at 84.

36 *Ibid.* at 87.

37 *Ibid.* at 92.

38 *Ibid.* at 112.

39 Citron & Franks, *supra* note 27 at 352.

Targets of abuse often face additional harm when they choose to speak out or report their abuse to authorities, likely contributing to the underreported nature of NCDII. Some have observed anecdotally that police and prosecutors are hesitant to take reports of NCDII seriously.[40] Police responses have been reported to include dismissive remarks that veer into victim blaming,[41] made increasingly likely in the instances that are the focus of this analysis, where the individuals whose intimate photos are publicized created the images themselves. In addition to potential re-victimization by authorities, people who report their abusers or go to the police can be targets of further harassment, both online and offline.[42] When complainants pursue their claims in court, having their names associated with the action can bring more unwanted publicity and is a significant deterrent for victims/survivors.[43] Although some suits can be pursued pseudonymously, courts can be reluctant to allow anonymity for claimants where they feel it will interfere with the open court principle.[44]

Like other kinds of gender-based violence, NCDII is a form of discrimination that scholars argue must be recognized as a threat to the human rights of women and girls.[45] In her 2018 report, UN Special Rapporteur on violence against women, Dubravka Šimonović, addressed the rising trend of online violence against women, noting how "patriarchal patterns that result in gender-based violence offline are reproduced, and sometimes amplified and redefined in [information communications technology], while new forms of violence emerge."[46] Knowing they are more likely to be targeted by gendered violence drives some women to retreat from the internet and reduce their online interactions, limiting the participation of women and girls in society and public discourse.[47] This threat is pronounced for women in leadership roles, including human rights defenders, politicians, parliamentarians and journalists, who are more likely to become targets of hate and harassment online.[48] Online comments in response to non-consensually distributed images reveal that this kind of abuse propagates false narratives about women's sexual availability to men, and reinforces the idea that women's bodies are merely tools for male sexual

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40 *Ibid*. at pp 366-67; Levendowski, *supra* note 1 at 437; Bates, *supra* note 34 at 94 et seq.

41 A Moira Aikenhead, "Non-Consensual Disclosure of Intimate Images as a Crime of Gender-Based Violence" (2018) 30 CJWL 117 at 127; Citron & Franks, supra note 27 at 367.

42 Goldstein, *supra* note 32.

43 Citron & Franks, *supra* note 27 at 352.

44 *A.B. (Litigation Guardian of) v. Bragg Communications Inc*., 2012 SCC 46, 2012 CarswellNS 675, 2012 CarswellNS 676 (S.C.C.).

45 Bailey, Steeves & Dunn, supra note 21 at 2.

46 Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, UNGAOR, 38th Sess, UN Doc A/HRC/38/47 (16 June 2018) at 20.

47 *Ibid*.

48 *Ibid*. at 28.

gratification.[49] NCDII is among the new forms of patriarchal control referred to by Šimonović and contributes to extending the threat of violence under which many women already live, further undermining gender equality.[50]

While women and girls are frequently targeted by this kind of abusive behaviour, it is important to note that individuals from other historically marginalized groups are also common targets. For example, a recent study on the victims and perpetrators of image-based sexual abuse conducted by Nicole Henry, Asher Flynn and Anastasia Powell shows that victimization is higher among LGBTQ2s+ and Indigenous populations.[51] The intersection between overlapping sites of oppression[52] is visible in the data, revealing that this kind of abusive behaviour is rooted not only in misogyny and patriarchy, but also in colonialism, racism, transphobia, and homophobia.

(b) Privacy Interests are Only One Source of NCDII Harms

Generally, when legal scholars have addressed NCDII, they have found that the basis for the harm is rooted in a violation of the targeted individual's privacy interests — and legislative responses have reinforced this conceptualization.[53] For example, making out the criminal offence of NCDII is predicated on finding that the individual targeted by the non-consensual disclosure had a reasonable expectation of privacy in the image(s).[54] Similarly, some of the civil law frameworks that have been invoked to respond to NCDII also focus on the privacy violation, including public disclosure of private facts and breach of confidence.[55]

Although difficult to succinctly describe due to the abundance of different conceptualizations offered by various scholars,[56] privacy is recognized as a

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[49] Dunn, *supra* note 9 at 10.

[50] Aikenhead, *supra* note 41 at 124.

[51] Henry, Flynn & Powell, *supra* note 15 at 9.

[52] See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chicago Legal F 139 (describing how the dominant framework for understanding discrimination sees subordination along a single categorical axis, whereas in reality this approach erases the experience of those who occupy multiple marginalized identities).

[53] Aikenhead, *supra* note 41 at 128.

[54] *Ibid.*

[55] Bailey, Steeves & Dunn, supra note 21 at 10.

[56] Daniel Solove's formative article "Conceptualizing Privacy" canvases a number of different theories of privacy. Among them are: the right to be let alone, which protects a sphere of inviolate personality and allows individuals to preserve peace of mind; limited access to the self, which bears some similarities to the right to be let alone, encompassing the right to maintain one's own affairs without observation by other individuals or government actors; secrecy, which Solove associates with keeping personal facts about oneself concealed; control over personal information, which involves individuals maintaining control over the manner of (non)disclosure of information about

fundamental human right.[57] While some theorists describe the right to control information and to be left alone as a kind of property interest,[58] in their seminal 1980 article, "The Right to Privacy," Samuel Warren and Louis Brandeis advanced the argument that privacy is a cognizable legal interest of its own. Warren and Brandeis draw a distinction between privacy, which they say protects one's thoughts, sentiments, and emotions, and property, which protects against injuries that "are in their nature material rather than spiritual."[59] Tellingly, the genesis of the article, which has since been hailed as the "foundation of privacy law in the United States,"[60] was the (mis)use of a woman's image. On the occasion of his daughter's wedding, Warren is said to have been outraged at the way journalists were dogged in their attempts to obtain images of the event to publish in the gossip columns.[61]

Ample writing on privacy theory has articulated several intersecting interests sheltered under the broad umbrella of privacy, many of which are directly implicated in the context of NCDII. First, privacy affords individuals control over personal information about themselves.[62] The Supreme Court of Canada has acknowledged this as a key element of privacy, specifically in the context of images, describing control over visual information as "a facet of privacy linked to personal autonomy."[63] Consent is the reverse side of the control coin, and many legislative interventions designed to protect privacy seek to give individuals control through requiring consent for the collection, use, and disclosure of information.[64] Abusers who use sexual images of women to harm them do so in the absence of consent (regardless of whether the image was first consensually shared with them) and the non-consensual nature of the action is what forms the basis of the abuse. Within the framework of personhood, privacy is also closely linked to human dignity. Stanley Benn writes about the coercive power of surveillance, arguing that privacy creates a space for self-creation and

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themselves; personhood, in which privacy serves the end of protecting the personality and dignity of individuals; and intimacy, a theory which recognizes privacy as essential to the formation of relationships. See Daniel Solove, "Conceptualizing Privacy" (2005) 90 California L Rev 1087.

57 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

58 Jeremy Waldron, *The Right to Privacy Property*, revised ed (Oxford: Oxford University Press, 1991) at 296.

59 Louis D Brandeis & Samuel Warren, "The Right to Privacy" (1890) 4:5 Harvard L Rev.

60 Solove, *supra* note 56 at 1100.

61 Irwin R Kramer, "The The Birth of Privacy Law: A Century Since Warren and Brandeis" (1990) Catholic University L Rev 39:3 at 709.

62 Solove, *supra* note 56 at 1109.

63 *R. v. Jarvis*, 2019 SCC 10, 2019 CarswellOnt 1921, 2019 CarswellOnt 1922 (S.C.C.), per Rowe J., concurring at para. 135 [*Jarvis*].

64 See e.g. *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 4.2. [*PIPEDA*]; *Privacy Act*, RSC 1985, c P-21, ss 7-8.

exploration "which could be disrupted, distorted, or frustrated even by so limited an intrusion as watching."[65] Here, observation by the public disrupts women's private sexual expression, and women who fear that their sexual expression is likely to be weaponized against them are therefore less likely to engage in this kind of expression, narrowing the space for self-creation and exploration.

Another highly relevant consideration in the context of NCDII is the interrelation between privacy and intimacy. Many scholars have argued that privacy is a precondition to forming intimate relationships of love, friendship, and trust[66] — and that the ability to control information about oneself, and to selectively share information within the context of an intimate relationship, is a core principle that privacy should protect.[67] Images that are used to abuse are often created in the context of intimate relationships, where they were perhaps shared as an act of intimacy building, before being turned against the women who created them. These three values — control, dignity, and intimacy — are essential to understanding why the act of sharing private, sexual images without consent is theoretically rooted in privacy violation. Danielle Citron writes compellingly about the unique nature of sexual privacy, which she situates at the "apex of privacy values," arguing that "we are free only insofar as we can manage the boundaries of our bodies and intimate activities."[68]

Privacy's contextual nature is also highly relevant when considering NCDII. We know that a large majority of the intimate images and videos that are the subject of NCDII were originally authored by the individuals depicted in them, and in many cases these photos were shared consensually with another person in the context of an intimate relationship. Helen Nissenbaum advances a theory of contextual integrity, arguing that that *how* information is shared — including the nature of the relationship in which it is shared — is critical to understanding whether a privacy violation has occurred.[69] Although the photographer/subject may have consented to sharing these images with an intimate partner, the subsequent non-consensual sharing outside of that relationship forms the basis for the harm.

Contextual integrity is recognized in Canadian law, where consent given in one context and for one purpose cannot be assumed to extend to other contexts and purposes. Accordingly, public and private sector privacy legislation has long rejected a binary notion of privacy that says information is either public or

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[65] Stanley Benn, "Privacy, Freedom, and Respect for Persons" in J Ronald Pennock & JW Chapman, eds, *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1 at 26.

[66] *See* Judith DeCew, "Privacy" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Spring 2018 ed, online: ; Julie C Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1996); Tom Gerety, "Redefining Privacy" (1977) 12:2 Harv CL-CLL Rev 233; Danielle Citron, "Why Sexual Privacy Matters for Trust" (2019) 96:6 Wash L Rev 1189.

[67] Solove, *supra* note 56 at 1122.

[68] Citron, *supra* note 3 at 1874.

[69] Helen Nissenbaum, "Privacy as Contextual Integrity" 79:1 Washington L Rev 101.

private, recognizing that contextual circumstances are critical to understanding whether a person has given meaningful consent for the information to be collected, used, and disclosed. For example, Principle 3 of the *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) emphasizes the contextual nature of consent, directing entities collecting and disclosing information to take into account the reasonable expectations of the individual subject in determining whether consent has been obtained.[70] Once given, consent is not a blank cheque. Instead, it must be obtained for a specific purpose, and that purpose needs to be clearly communicated to the data subject.[71] Similarly, the *Privacy Act*, which governs information held by public entities, specifies that information may only be used "for the purpose for which the information was obtained."[72]

The Supreme Court of Canada has further affirmed that an individual's reasonable expectation of privacy is contextual. In the 2019 *R. v. Jarvis* decision, the court found that in order to determine whether an individual had a reasonable expectation of privacy in a surreptitiously recorded video, "a court must consider the entire context in which the observation or recording took place".[73] In this case, a teacher at a high school had secretly recorded his female students with a pen camera and was charged with voyeurism. The court found that the location of the recording — in a high school, which the Court classified as a semi-public setting — was not the only or even the most important factor to consider in determining that the girls had a reasonable expectation of privacy.[74] Looking at other contextual factors, including the subject matter of the recording and the relationship between the person observed and the person recording,[75] the Court found it was reasonable for teenage students to have an expectation of privacy in a school setting.[76] Experts in the field have noted that the criminal offence of voyeurism shares similar features to the prohibition on NCDII, including the necessary finding that the targeted individual had a reasonable expectation of privacy in the images.[77]

Although it is undisputed that privacy is among the core interests at stake when considering the non-consensual sharing of private, sexual images, a privacy-reductionist theory of NCDII harms fails to capture the full extent of the

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70 *PIPEDA*, *supra* note 64 at s 4.3.5.

71 *Ibid.*

72 *Privacy Act, supra* note 64 at s 7(a).

73 *Jarvis*, *supra* note 63 at para 5.

74 On this point, the Supreme Court reversed the ruling of the Ontario Court of Appeal, which found that the students did not have a reasonable expectation of privacy in school due to the fact that it was a semi-public setting. See *R. v. Jarvis*, 2017 ONCA 778, 2017 CarswellOnt 15528 (Ont. C.A.), reversed 2019 SCC 10, 2019 CarswellOnt 1921, 2019 CarswellOnt 1922 (S.C.C.).

75 *Jarvis*, *supra* note 63 at para 29.

76 *Ibid.* at para 90.

77 Aikenhead, *supra* note 41 at 128.

injury. Moira Aikenhead argues that, in addition to privacy violations, the myriad other harms suffered by survivors of this kind of image-based sexual abuse — including sexual violation, threats to physical safety, and to mental wellbeing — strain against the doctrinal limits of privacy law.[78] She also warns that the criminal law response, which relies heavily on the reasonable expectation of privacy concept, fails to account for how women experience privacy differently than men.[79] Kristen Thomasen and Suzie Dunn further expand on this argument, suggesting that "our normative and legal concepts of privacy must evolve to counter the gender-based harms arising from [the] misuse of new technology," particularly in the context of sexualized images of women.[80] The harms of NCDII go beyond violating the privacy of the individual; they also negatively impact an individual's safety and sexual autonomy and inflict broader injury to the equality interests of women and girls.

(c) Existing Remedies Often Fail to Provide Victims with the Relief Sought

Several legal responses have been advanced to combat NCDII. Calls for an effective criminal law response have been increasing in both the U.S. and Canada in recent years,[81] culminating in the Criminal Code provisions enacted by the federal government in 2015. Some scholars have argued that the criminal law succeeds in addressing elements of the wrong for which the civil responses seem inadequate, including addressing the moral blameworthiness and seriousness of the act, and providing an avenue for public denunciation and recognition of the harm to society in addition to the harm to the individual.[82] Proponents of a criminal law response have also highlighted how the permanency of a criminal record serves as a more effective deterrent.[83]

Acknowledging the seriousness of sexual violence and the need for societal condemnation of these acts, feminist scholars have questioned the utility of the criminal law as a response. Constance Backhouse, in an article on feminist remedies for sexual assault, poses the prescient question of whether prisons

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[78] *Ibid.*. at 131.

[79] *Ibid.* at 124.

[80] Kristen Thomasen & Suzie Dunn, "Reasonable Expectations of Privacy in an Era of Drones and Deepfakes: Expanding the Supreme Court of Canada's Decision in R v Jarvis" in Jane Bailey, Asher Flynn & Nicola Henry, eds, *International Handbook on Technology-Facilitated Violence* (Emerald Publishing, forthcoming) at 3.

[81] Tal Kopan, "States criminalize 'revenge porn'", *Politico* (30 October 2013), online: <www.politico.com/story/2013/10/states-criminalize-revenge-porn-099082>; Dani-Elle Dubé, "1 in 25 people are victims of 'revenge porn' new study says", *Global News* (16 December 2016), online: <globalnews.ca/news/3131964/1-in-25-people-are-victims-of-revenge-porn-new-study-says/>.

[82] Jane Bailey & Carissima Mathen, "Technologically-Facilitated Violence Against Women and Girls: If Criminal Law Can Respond, Should It?" (2017) Ottawa Faculty of Law Working Paper No. 2017-44 at 24.

[83] Citron & Franks, *supra* note 27 at 349.

"steeped in cultures of masculinist excess" present any real means of achieving the long-term ends of reducing sexual violence.[84] Elizabeth Burnstein coined the term "carceral feminism" to describe the tendency of some feminists to rely on policing and imprisonment to respond to sexual violence.[85] This phenomenon was described by Aya Gruber as an outgrowth of the domestic violence and rape reform movements of 1960s and 1970s.[86] Focusing on the alliance between anti-trafficking advocates and the carceral state, Burnstein underscores how relying on incarceration as a response to sexual abuse and exploitation misses the systemic nature of the problem, "effectively [locating] all social harm outside of the institutions of corporate capitalism and the state apparatus."[87] The carceral feminist movement has earned condemnation from other spheres of critical feminist thought, with scholars like Mimi Kim arguing that, not only does the criminal justice system perpetrate the violent oppression of marginalized communities, but it also fails to respond to the needs and concerns of those most affected by gendered violence.[88] Critical feminists warn that we must be wary of the ways that victimization of women and children can be weaponized to the ends of imposing harsher criminal sanctions that fall disproportionately on those groups and individuals who are already over-incarcerated and whose social, sexual, and racial identities place them at greater risk.[89]

In the context of NCDII, the criminal law's significant shortcomings are evident. Alexa Dodge points out a number of ways in which the adversarial criminal systems fails to secure the results sought by those who are the targets of NCDII.[90] First, the criminal response to NCDII rarely addresses the continued circulation of images shared without consent.[91] Second, marginalized victims/survivors may be additionally hesitant about turning to the criminal justice system for remedy, given the mistrust of police and of the carceral systems that subject racialized and other historically marginalized individuals and communities to trauma and cruelty.[92] Among youth, where it is generally reported that sharing of intimate images, both consensually and non-consensually, happens at higher rates than among adult populations,[93]

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[84] Constance Backhouse, "A Feminist Remedy for Sexual Assault: A Quest for Answers" in Elizabeth Sheehy, ed, *Sexual Assault in Canada* (Ottawa: OpenEdition Books, 2017) at 17.

[85] Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'" (2007) 18:3 Differences 128.

[86] Aya Gruber, "The Feminist War on Crime" (2007) 92 Iowa L Rev 741 at 748.

[87] Bernstein, *supra* note 85 at 144.

[88] Mimi E Kim, "From carceral feminism to transformative justice: women-of-colour feminism and alternatives to incarceration" (2018) 27:3 J Ethnic Cultural Diversity Soc Work 219 at 226.

[89] Burnstein, *supra* note 85 at 133.

[90] Dodge,"Punishing 'Revenge Porn'", *supra* note 16 at 204.

[91] *Ibid*. at 203.

[92] *Ibid*. at 207.

engaging in criminal justice processes to remedy NCDII is undesirable to those targeted, and fear of criminalizing their peers may prevent young people from reporting abuse when it happens. [94]

There is, however, no consensus among feminist scholars as to how to appropriately reshape the legal response to sexual offences. In their article "Criminalizing Revenge Porn", Citron and Franks acknowledge serious concerns with the criminal law, including overcriminalization and overincarceration, but counter that choosing the appropriate legal framework requires consideration of:

> the seriousness of the harm caused and whether such harm is adequately conceptualized as a harm only to individuals, for which tort remedies are sufficient, or should be conceptualized as a harm to both individuals and society as a whole for which civil penalties are not adequate, thus warranting criminal penalties.[95]

Despite the continued debate about the appropriate role for the criminal law in responding to sexual violence in general and NCDII specifically, among some groups of legal feminists there is commitment to the notion that the criminal law has *some role* to play.[96]

Various private law approaches are also potentially applicable to NCDII, including the torts of harassment, intentional infliction of emotional distress, breach of confidence, and intrusion upon seclusion.[97] Despite the various potential avenues of legal action for survivors of NCDII, critics have identified a number of challenges with bringing a claim under these causes of action. Citron and Franks outline the trilogy of obstacles facing survivors who turn to the civil law for recourse.[98] First, the law often fails to provide the remedy most sought after by survivors: the expeditious removal of photos and images from the internet. Second, few survivors have the resources to bring a claim against their abuser. Third, in the circumstances where a survivor does have the resources to bring a claim and is ultimately successful, many defendants do not have the resources to pay the damages that are likely to be awarded.

In view of these challenges, a recent article by Canadian legal scholars Emily Laidlaw and Hilary Young proposes the development of a "revenge porn tort" tailored to respond to the unique context and specific remedies sought by survivors.[99] Their proposed remedial framework is simple: in order to seek declaratory relief, the only elements that the plaintiff would have to prove is that

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93 Henry, Flynn & Powell, *supra* note 15 at 5.

94 Dodge, "Punishing 'Revenge Porn'", *supra* note 16 at 208.

95 Citron & Franks, *supra* note 27 at 362.

96 Bailey & Mathen, *supra* note 82.

97 *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541, 2016 CarswellOnt 911 (Ont. S.C.J.).

98 Citron & Franks, *supra* note 27 at 358.

99 Hilary Young & Emily Laidlaw, "Creating a Revenge Porn Tort for Canada" (2020) SCLR 147.

the defendant distributed an intimate image in which they are featured.[100] Under this "fast-track tort," once a declaration is obtained, the plaintiff would have access to removal from online platforms and injunction against the defendant(s).[101] This new cause of action is designed to decrease the time and cost associated with a tort-based approach to NCDII.

In the absence of such a response, advocates often recommend using copyright law to address the proliferation of NCDII online. American intellectual property scholar Amanda Levendowski makes a compelling argument that copyright law is a practical remedy that can be used by victims/survivors seeking the removal of their intimate images from websites and online platforms that have reproduced them without authorization.[102] Because NCDII so often involves selfies — where the subject of the video or image is also its author — copyright allows them to assert an intellectual property right over the image and to seek the corresponding remedies, including injunctions and damages. While damages are an extraordinary remedy, and may be challenging to collect for the reasons outlined above, injunctions and takedown orders are relatively easy to secure, and they achieve the end goals of the individuals seeking redress: the removal of the photos and images from where they are hosted online. In light of the serious injury that results from NCDII, we must ask whether it is fair to victims of NCDII to push them towards intellectual property remedies. Put simply, can a proprietary framework properly account for the interests and values at stake?

2. THE INTERESTS AND INCENTIVES THAT UNDERLIE THE GRANTING OF INTELLECTUAL PROPERTY RIGHTS

In the context of a discussion about instrumentalizing copyright remedies to respond to NCDII, the interests and incentives underlying copyright and intellectual property rights more generally are significant and worthy of exploration. Some may reasonably question whether the policy objectives and animating purpose of copyright law are relevant if copyright can be marshalled to achieve the desired result. The response to "why does it matter if it works?" is that it *does not* work, or at least that copyright law does not *do* the work that needs to be done in the context of NCDII. First, although the remedies may be appealing, leaving NCDII victims/survivors with copyright law as the most practical remedy inflicts a psychic injury, suggesting that the law sees intellectual property rights as more significant than dignity, safety, and sexual privacy. In addition to the consequential effects of legislation, what and how we legislate performs a social signalling function, demonstrating what we value and sanction as a society. Second, because copyright law is a primarily economic tool, repurposing it to address image-based sexual abuse has the distasteful side effect

[100] *Ibid.* at 154-55.

[101] *Ibid.* at 156-57.

[102] Levendowski, *supra* note 1.

of "commercializing" images that were originally created in the context of intimacy building and self-exploration.[103] We should resist the march of market logic into intimate spaces where we create and experiment with the boundaries of our bodies and our sexuality. Third, it is uncontroversial to say that a law's purpose informs its application, and that, correspondingly, its purpose is informed by the values it attempts to safeguard or the harms it exists to prevent. As I will discuss in this section, the values and interests at the core of copyright law are not aligned with the privacy, sexual autonomy, and equality issues central to NCDII.

Property law theories are often used to justify the granting of intellectual property rights, and those theories in turn shape the contours of legal protections and play an important role in lawmaking and judicial interpretation. In his famous 1987 book chapter, *Theories of Intellectual Property Law*, William Fisher identifies four main theoretical justifications for the granting of intellectual property rights: utilitarianism, labour theory, personality theory, and social planning theory.[104] Of those theories, Fisher argues that utilitarianism and labour theory have been the most prominent and influential — an argument that is borne out in copyright case law, as examined later in this section.[105] Before diving into how these theoretical justifications have been put to use by lawyers and judges, a brief — and necessarily simplified — explanation of their contents is warranted.

Utilitarianism, as applied to intellectual property, seeks to maximize social welfare through the granting of rights in relation to one's creative, original intellectual creation. Utilitarianism, as envisioned by Jeremy Bentham and John Stuart Mill, aimed to bring about "the greatest amount of good for the greatest number [of people]."[106] Fisher argues that, in the copyright context, the drive to translate the "greatest good" into an objectively verifiable standard generally leads to the adoption of an economic benchmark by which the greatest good can be assessed.[107] Critics decry this approach as reducing social welfare to a crassly economic analysis.[108] Despite this criticism, a utilitarian view of copyright has been popularized among influential thinkers, mostly within the field of law and economics, where, perhaps predictably, scholars embrace the ideas of incentives

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[103] Again, this critique does not extend to images that are knowingly commercialized by their creators from the outset. Copyright law is and should be an effective tool for these authors to prevent the appropriation of credit and profit.

[104] William Fisher, "Theories of Intellectual Property" in Stephen Munzer, ed, *New Essays In the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) at 1-5.

[105] *Ibid.* at 5.

[106] Julia Driver, "The History of Utilitarianism" in Edward N Zalta, ed, The Stanford Encyclopedia of Philosophy, Winter 2014 ed, online: .

[107] Fisher, *supra* note 104 at 9.

[108] *Ibid.*

and trade-offs that serve to maximize wealth creation and minimize transaction costs.[109]

By comparison, advocates of the labour theory of intellectual property maintain that the granting of property rights in relation to one's intellectual efforts is merely the formal recognition of a natural right to the fruits of one's labour. The labour theory of property is attributed to John Locke, who argued that individuals have a property right in their bodies.[110] When individuals mix their labour with something in the material world, Locke contends that they also acquire a property right in that thing.[111] Fisher acknowledges that one persistent critique of the Lockean labour theory is whether it properly applies to intangible goods at all[112] — after all, tangible goods are rivalrous, while intangible goods are not. When one "mixes labour" with a tangible good like a plot of land, and that good is later appropriated, the labourer is deprived of their property. By comparison, when one labours on producing a novel, and the fruits of that labour are appropriated, the original labourer is not deprived of their words — they may be deprived of the ability to economically exploit that novel, but given the nonrivalrous nature of intangibles, they are not deprived of the creation itself. This critique is examined in full by feminist copyright scholar Carys Craig, who warns that a Lockean approach to copyright law misunderstands copyright as the recognition of a relationship between an author and their works, where instead copyright exists to serve a social policy goal and is better characterized as rooted in the relationship between the author and the public.[113]

To a lesser extent, personality theory and social planning theory have had some influence on the Anglo-American copyright framework. Under the personality theory, embraced more fully in continental Europe, authors express their inviolate personality through their works, and, in recognition of this relationship, the law extends a property right over that work.[114] Social planning theory, in contrast, justifies copyright with a view to society's interest in the work. It attempts to resolve the underlying tension between economic benefit and social welfare inherent in the utilitarian approach by drawing on many of the same teleological principles but broadening the scope of social welfare beyond simply wealth maximization to include other factors that lead to a "just society."[115] However, among the social ends sought under this approach is the

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[109] See e.g. Richard A Posner, "Intellectual Property: The Law and Economics Approach" (2005) 19:2 J Econ Perspectives 57; Mark A Lemley, "Faith-Based Intellectual Property" (2015) 5 UCLA L Rev 1328. But see also e.g. Diane Leenheer Zimmerman, "Copyrights as Incentives: Did We Just Imagine That?" (2011) 12 Theor Inq L 29.

[110] Adam Moore & Ken Himma, "Intellectual Property" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Winter 2018 ed, online: .

[111] *Ibid.*

[112] Fisher, *supra* note 104 at 15.

[113] Carys Craig, "Locke, Labour, and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law" (2002) 28:1 Queen's LJ 1 at 4-5 [Craig, "Locke"].

[114] Fisher, *supra* note 104 at 6-7.

encouragement of creative works, which proponents generally aim to achieve through the economic incentives afforded by copyright protection, which may lead one to question whether, in practice, there is a meaningful difference between the social planning and utilitarian theories.

Even with this simplified overview, it is clear that the creation of personal, intimate images is an uneasy fit with the common justifications offered for intellectual property rights. The protection of such images by copyright does not immediately resonate with concerns about incentivizing intellectual creation or rewarding socially-beneficial labour, nor with recognizing personhood through property or advancing some shared vision of human flourishing. While the latter might have greater resonance when we consider, for example, gender equality and the value of self-expression, it is the mix of utilitarianism and labour theory that seem to have the strongest hold on modern copyright law in the Anglo-American tradition. As a result of this potent brew, in Canada and the U.S., copyright law has a decidedly commercial flavour, more closely resembling economic policy than social policy, focussing narrowly on the remunerative aims behind the granting of exclusive rights. Copyright scholars, both maximalist and minimalist, have described this system using terms ripped from the pages of an economics textbook. For example, Siva Vaidhyanathan refers to copyright as "a necessary evil, a limited, artificial monopoly,"[116] whereas William Landes and Richard Posner discuss how understanding the fixed and variable "cost of expression" are essential to properly calibrating copyright law.[117] Even where scholars seek to justify copyright from a public interest perspective more closely aligned with the social planning theory, economic incentives can be found just below the surface. Craig, making the case for reorienting copyright to address the over-reliance on Lockean labour theory, argues that the public purpose behind copyright is to encourage intellectual creativity. She describes a system where "[r]ights are granted to authors in the belief that intellectual works will be underproduced unless there is sufficient opportunity to exploit them for financial return."[118]

These theoretical perspectives on copyright are valuable, as they provide the scaffolding for legislators and judges to build doctrine. However, acknowledging that property is itself a contested concept, and intellectual property perhaps even more so, properly characterizing intellectual property rights requires examining how those theoretical principles are applied in practice — and to what end. This will, in turn, allow us to assess whether copyright law can, in principle or practice, respond to the concerns presented by NCDII.

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[115] *Ibid*. at 7.

[116] Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: NYU Press, 2003) at 24.

[117] William M Landes & Richard A Posner, "The Economic Structure of Intellectual Property Law" (Harvard University Press, 2003) at 37 (ProQuest Ebook Central).

[118] Craig, "Locke", *supra* note 113 at 5.

(a) The Purpose of Copyright Law: a Canadian Analysis

In Canada, copyright is entirely a creature of statute — there is no common law right to property over one's creative intellectual creations.[119] Rather, the *Copyright Act* creates the only causes of action and remedies relating to infringement of "original literary, dramatic, musical and artistic [works]."[120] The Act also limits the scope of copyright and provides a number of exceptions under which copyrighted content can be used, without authorization, for specific purposes.[121] Somewhat curiously, the Act contains no statements on the purpose of copyright doctrine, and so the exercise of providing justification for the scheme has been left entirely to the courts. In the 2002 case *Galerie d'art du Petit Champlain inc. c. Théberge,* the Supreme Court of Canada spoke definitively on the purpose of copyright law in Canada,[122] following years of confusion that saw lower courts take differing perspectives on the intentions underlying the grant of property rights over creative works.

Examining the pre-*Théberge* jurisprudence, it is clear that courts have relied heavily on theoretical frameworks to guide their interpretations. Since copyright is entirely a creature of statute, it is relatively simple to conclude that it does not flow from innate or natural rights to the products of one's intellectual labour, as suggested by the Lockean labour theory of property. It is more difficult to square that statement with case law demonstrating that Locke's theories have significantly influenced judicial interpretation of copyright law in Canada. Craig, considering the Canadian originality threshold, points to a legal tug-of-war in lower court decisions over the appropriate originality standard.[123] In order to benefit from copyright protection, a work must be original, and lower court cases reveal decades of struggle between two schools of thought on the originality threshold — the "sweat of the brow" school and the "creativity" school.[124] Adherents to the sweat of the brow approach held that, for a work to be original, all that is required is an investment of time and labour.[125] In opposition, adherents to the creativity school believe something more is required, a "creative spark" that would justify the granting of property rights over an intellectual creation.[126] Underlying the sweat of the brow school is the inherently Lockean proposition that the investment of labour alone is enough to justify

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[119] *Compo Co. v. Blue Crest Music Inc.*, 1979 CarswellNat 640, 1979 CarswellNat 640F, 105 D.L.R. (3d) 249, [1980] 1 S.C.R. 357 (S.C.C.) at 272-273 [S.C.R.].

[120] *Copyright Act*, RSC 1985, c C-42, s 5(1).

[121] *Ibid.* at ss 29, 29.1.

[122] *Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, 2002 CarswellQue 306, 2002 CarswellQue 307 (S.C.C.) [*Théberge*].

[123] Carys Craig, "Resisting Sweat and Refusing Feist: Rethinking Originality After CCH" (2007) 40:1 UBC L Rev 69 [Craig, "Rethinking Originality"].

[124] *Ibid.* at 71.

[125] *Ibid.*

[126] *Ibid.*

copyright protection, as it prevents others from reaping where they have not sown. Craig outlines how the Federal Court of Appeal swung precipitously between the two extremes on the originality threshold, first embracing the creativity school in the 1997 case of *Tele-Direct (Publications) Inc. v. American Business Information Inc.,*[127] then reversing position in a "dramatic turnabout decision" and endorsing a position firmly within the sweat of the brow school in the early 2002 case *CCH Canadian Ltd. v. Law Society of Upper Canada*.[128] Craig elaborates on the powerful normative pull of Lockean natural rights theory, noting that

> the property right conferred by copyright legislation is understood as a reward for intellectual labour and effort, and that reward is in turn regarded as something 'deserved.' What is deserved becomes an entitlement, a heavily loaded concept that carries with it a normative force ill-suited to copyright law.[129]

This discussion proves relevant because the choice of an appropriate originality threshold turns on the purpose of copyright. If copyright's purpose is simply to reward individuals for intellectual labour, then the "sweat of the brow" standard seems appropriate in that it rewards labourers with an enforceable monopoly over the fruits of their labour, however little creativity was involved. If, however, rewarding creators is not the only purpose of copyright, then perhaps there is an originality threshold that better advances copyright's other objectives.

When in *Théberge* the Supreme Court finally turned its mind to the purpose of copyright, there, too, were remnants of a Lockean influence. Binnie J, writing for the majority, stated that the underlying (and unstated) purpose of the *Copyright Act* is to strike a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[130] In articulating this dual purpose of copyright, the decision exhibited a clear utilitarian streak. Describing the nature of the balance in crassly economic terms, Binnie J says that copyright law creates a system of incentives to spur the creation of new works and that, operating optimally, "it would be as inefficient to overcompensate artists and authors...as it would to undercompensate them."[131] To overcompensate the author, Binnie J says, would be to grant them "excessive control" which "may unduly limit the

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[127] *Tele-Direct (Publications) Inc. v. American Business Information Inc.*, 1997 CarswellNat 2752, 1997 CarswellNat 2111, [1998] 2 F.C. 22, 154 D.L.R. (4th) 328 (Fed. C.A.), leave to appeal refused 1998 CarswellNat 3212 (S.C.C.).

[128] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, 2004 CarswellNat 446, 2004 CarswellNat 447 (S.C.C.) [*CCH*]; Craig, "Rethinking Originality", *supra* note 123 at 75-76.

[129] Craig, "Locke", *supra* note 113 at 15.

[130] *Théberge*, *supra* note 122 at para 30.

[131] *Ibid.* at para 31.

ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole."[132]

Although both the author's economic and moral rights[133] are at issue in *Théberge*, it is clear that economic rights take precedence in the majority's reasons. In fact, in the opening paragraphs of the judgement, the Court explicitly takes note of the primacy of economic rights, saying that "copyright law has traditionally been more concerned with economic than moral rights."[134] Examining the impact of the *Théberge* decision, Daniel Gervais characterizes the supremacy of economic rights as a key takeaway from the case.[135] In adopting an instrumentalist approach to copyright that focuses on economic efficiency, the Court endorses a theory of copyright wherein effective incentives are the means to accomplish its dual purpose. Read together with another key element of the decision — that copyright is inherently limited in nature, and that exceptions to copyright are an integral mechanism through which these limitations are operationalized — we are left with a practical scheme that engages in balancing the author's interest against the public interest, using predominantly economic considerations to guide the weighing process. This approach is consonant with how the Court resolved the conflict between the sweat and creativity schools in *CCH*, ultimately settling on a standard — skill and judgment — which it described as a mid-point between the two competing approaches.[136] McLachlin CJ, writing for the Court, described the standard as a "workable yet fair" approach that balances incentives and costs.[137]

Case law examining the scope of the *Copyright Act*'s fair dealing provisions also provides support for this economically driven perspective on copyright. Under section 29 of the Act, use of copyrighted content without authorization is permitted for a limited number of purposes.[138] In *CCH*, the Supreme Court adopted six factors to assess whether dealing is fair.[139] The sixth factor — the effect of the dealing on the work — looks at the impact of the dealing on the market for the original work. Here, the significant influence of the U.S. fair use

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[132] *Ibid.* at para 32.

[133] Canada's *Copyright Act* recognizes two types of rights in a work: economic and moral. Economic rights give an author the ability to authorize and prevent the reproduction of a work and to benefit financially from its exploitation, thereby providing an incentive to create new works for the benefit of society, as the utilitarian theory goes. By contrast, moral rights are concerned with the author's association with her work and with preserving the work's integrity. Moral rights are inalienable, and more closely associated with the personality-based theory of copyright.

[134] *Théberge*, *supra* note 122 at para 12.

[135] Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2006) 2:2 U Ottawa L & Tech J 315 at 324.

[136] *CCH, supra* note 128 at para 24.

[137] *Ibid.*

[138] *Copyright Act*, *supra* note 120 at s. 29.

[139] *CCH, supra* note 128 at para 53.

doctrine is noteworthy. In the fair use analysis, the economic impact of the use on the market for the original is recognized as the preeminent factor in determining the fairness of use.[140] Although the Court is careful to state that, under Canadian fair dealing, the factor assessing the economic impact of the dealing on the original work is "neither the only factor nor the most important factor," it has in subsequent cases proven to be an important consideration.[141]

The jurisprudence demonstrates the predominance of the instrumentalist, economic approach to copyright law in Canada. Here, the courts have enacted a careful balancing regime between the economic rights of authors and the broader goal of encouraging creative intellectual endeavours and fostering a vibrant public domain. These two aims are achieved in tandem by honouring the incentive system enacted through the *Copyright Act* and providing for a range of circumstances under which the exclusive rights of a copyright owner are limited, allowing for permissionless copying and avoiding the pitfalls of "excessive control."[142]

Returning to the issue of intimate images, it is clear that the framework laid out in the *Copyright Act* and developed by the courts would afford protection to such images as works demonstrating the minimal but sufficient amount of skill and judgement required. Moreover, because most intimate images are selfies, the rights would accrue to the author/subject. However, as creative works that exist and circulate outside of the market and without economic purpose, these kinds of images are arguably peripheral to the copyright system and its public policy goals — with a view to the "nature of the work," the creation of private sexual images are far from "the core of copyright's protective purposes."[143]

3. THE PROPERTIZATION OF INTIMATE IMAGES CANNOT COMPENSATE FOR ABUSE RESULTING IN HARMS TO DIGNITY, PRIVACY, AND SAFETY

In assessing whether an intellectual property law framework can suitably respond when intimate images are used to abuse, understanding the original motivations behind their creation is critical. Creating and exchanging intimate images is common behaviour, and recent research shows this trend is on the rise during the COVID-19 pandemic.[144] Much of the research available looks at the practice of sexting — a term for sharing sexually explicit messages, some of

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[140] *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (N.Y. Sup., 1985).

[141] *York University v. The Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77, 2020 CarswellNat 1294, 2020 CarswellNat 4546 (F.C.A.), affirmed *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 CarswellNat 2815, 2021 CarswellNat 2816 (S.C.C.).

[142] *Théberge*, *supra* note 122 at para 31.

[143] *Campbell v. Acuff-Rose Music Ltd.*, 510 U.S. 569 (1994) at 586.

[144] Justin J Lehmiller et al, "Less Sex, but More Sexual Diversity: Changes in Sexual Behavior during the COVID-19 Coronavirus Pandemic" (2020) Leisure Sciences at 6.

which are text-only, but which often include nude or semi-nude images. Depending on the study, somewhere between 20[145] and 80 percent[146] of people say they have engaged in sexting in committed or casual relationships.

Individuals create intimate photos and videos for a variety of reasons, and there is ample evidence that this kind of sexual expression can create positive outcomes when all parties are interested in the creation and viewing of the images. Some of the most commonly cited motivations for sending sexually explicit photos or videos include flirting, initiating sex, and responding to a request from a partner.[147] Although some differences have been observed between men and women who engage in sharing intimate images, at least one study shows that the most common reason for sending an intimate image — to excite the recipient — was the same for men and women.[148] However, a study by Morgan Johnstonbaugh revealed notable differences on the basis of gender, namely that women were four times more likely than men to share sexual images as a way to feel empowered, and twice as likely as men to say that they sent the image to boost their confidence.[149] In the context of committed relationships, sending intimate images can have an intimacy-building effect, and research reveals that people who sent sexual images to committed partners were significantly more likely to report positive consequences, as compared to those who made the exchange in casual or cheating relationships.[150] Among young people, pleasure and amusement are frequently cited as reasons to create and share intimate images.[151] Additionally, many youth report that sexting is a way they can safely experiment with their sexuality, especially for those teens who are not sexually active or involved in a sexual relationship.[152]

On the other hand, sharing intimate images can be the result of coercion by a partner. Sexting coercion is reported in significant numbers by both men and women and is highly correlated with other forms of intimate partner aggression, as well as negative mental health symptoms.[153] Here, there are also significant

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[145] Michelle Drouin et al, "Let's talk about sexting, baby: Computer-mediated sexual behaviors among young adults" (2013) 29:5 Computers in Human Behavior A25 at 3.1.

[146] Emily C Stasko, *Sexting and Intimate Partner Relationships among Adults* (MSP, Drexel University, 2015) [unpublished] at ix.

[147] Drouin, *supra* note 145 at 3.3.

[148] Brittany Wong, "Why Do Women Send Nudes? Why Do Men? It's Complicated, A New Study Finds", *Huffington Post* (21 August 2019), online: < www.huffingtonpost.ca/entry/sexting-women-and-men-study_l_5d5c504ee4b0f667ed69c8d6 > .

[149] University of Arizona, News Release, "Motivations for sexting can be complicated, UA researcher says" (12 August 2019), online: < www.eurekalert.org/pub_releases/2019-08/uoa-mfs080919.php > .

[150] Michelle Drouin, Manda Coupea & Jeff R Temple, "Is sexting good for your relationship? It depends" (2017) 75 Computers in Human Behavior 749 at 1.1.

[151] Andrea Anastassiou, "Sexting and Young People: A Review of the Qualitative Literature" (2017) 22:8 Qualitative Report 2231 at 2234.

[152] *Ibid.* at 2235.

gendered differences. Research suggests that men are more likely than women to send messages propositioning sexual activity,[154] and that men are twice as likely as women to have sexted with a casual partner than a committed partner.[155] This is significant as it has been persistently observed that women are far more likely than men to face long-term, negative consequences to their relationships and reputations for being viewed as promiscuous.[156]

Even where their exchange is consensual, intimate images can be weaponized to abuse. The relative ease with which digital content can be copied and distributed makes it difficult to know if and when images have been copied and shared. All too commonly, NCDII survivors report that they shared their images consensually with intimate partners who later distributed those images without their permission.[157] Even services like Snapchat — popularized for its "disappearing messages" feature, which made it an attractive platform to share intimate images — were not safe from the copy/paste phenomenon, as there were multiple ways for individuals to circumvent the ephemeral design of the messaging features. For example, users could take screenshots of the image or use a second phone to make a copy.[158] Entire websites with names like "Snapchat Leaked" and "Snapchat Nudes" were created to host non-consensually distributed images that were originally taken by Snapchat users who thought that they were sharing for a limited period of time in a closed ecosystem.[159]

In the context of the creation and sharing of sexual images for private purposes, deploying a property law framework to remedy non-consensual distribution makes little sense. The incentive to create that is the central justification for copyright law is unnecessary and ill-fitting — for the most part, individuals who are taking intimate selfies and sending them to a partner, whether casual or committed, are not driven by a profit motive, and, in all likelihood, they intend for the photos or videos at issue to remain private as between the immediate recipient and the author/subject. Here, the conceptualization of privacy as intimacy is implicated, as those individuals creating and sharing images with the intent that they retain their contextual

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[153] *Ibid.*

[154] Rob Weisskirch, "Why Do People Sext–and Who Is Likely to Do It?" *Scientific American* (29 August 2016), online: < www.scientificamerican.com/article/why-do-people-sext-and-who-is-likely-to-do-it/ > .

[155] Drouin, Coupea & Temple, *supra* note 150 at 754.

[156] Aikenhead, *supra* note 41 at 124.

[157] Bates, *supra* note 34.

[158] Catriona Harvey-Jenner, "If you share other people's Snapchats, you could be breaking the law", *Cosmopolitan* (23 May 2016), online: < www.cosmopolitan.com/uk/entertainment/news/a43531/share-other-peoples-snapchats-breaking-law/ > .

[159] Alexis Kleinman, "Snapchat Nudes Are Being Screenshot And Secretly Posted On Facebook", *Huffington Post* (28 May 2013), online: < www.huffingtonpost.ca/entry/snapchat-nudes_n_3348145?ri18n = true > .

integrity have a reasonable expectation that those images will not be shared with the wider public.

However, it is also important to recognize that sexual content is also created for other purposes, including economic purposes. The rise of OnlyFans — a paid subscription service where creators make and share (often explicit) content directly with their fans — has been welcomed by some who see it as a platform that empowers sex workers and others without some of the exploitative tendencies that are well-documented in the commercial pornography industry.[160] Although this type of intimate commercial content is generally not the source of NCDII, distribution without consent may still be a relevant consideration for people who are in the sex work community, but whose real-world identities are not associated with their work, or who find their paywalled content distributed for free on commercial sites like Pornhub. Independent erotic filmmaker Erika Lust has advocated extensively for the rights of performers in the pornography industry to be paid for the content they create, calling out "tube sites" with lax policies on unverified uploads and stolen porn.[161] In these cases, exercising a proprietary right over intimate content is logical, especially as the context of its creation falls within the boundaries of copyright's purview: the generation of economic benefit through the exercise of exclusive rights over original artistic creations.

Both commercial and non-commercial intimate images are the result of artistic labour. Equally, there is a societal good worthy of protection in encouraging the creation of sexual images intentionally commercialized by their creators, as well as private sexual images shared in trusting relationships. Where the two diverge is in the interests underlying their creation and protection, thereby necessitating a different approach to remedy misuse.

(a) Using Copyright Law to combat NCDII

In some cases, copyright law can provide victims of NCDII with powerful remedies. It has been particularly useful for women in the U.S., where the most desired remedy — removing intimate images from online sources — is within the scope of copyright law. Specifically, under section 512 of Title 17 of the United States Code, online service providers are provided with a limited safe harbour from liability under copyright law.[162] In order to qualify for this safe harbour, service providers must comply with a "notice and takedown" procedure under which copyright owners can send notices to service providers to have copyrighted

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[160] Jacob Bernstein, "How OnlyFans Changed Sex Work Forever", *The New York Times* (9 February 2019), online: <www.nytimes.com/2019/02/09/style/onlyfans-porn-stars.html>.

[161] Erika Lust, "Pay for Your Porn: It's Time For The New Normal" (15 June 2020), online (blog): *Erika Lust* <erikalust.com/lustzine/voices/pay-for-your-porn-the-new-normal>.

[162] United States Copyright Office, *Section 512 of title 17: A report of the Register of Copyrights* (May 2020) at 84.

content removed.[163] Section 512 was enacted in 1998 by the *DMCA*, and it is now the predominant tool relied upon by copyright owners in policing infringement of copyrighted content online — as of 2016, Google alone was fielding 75 million *DMCA* notices every month.[164] Under it, "service providers" include everything from websites run by individuals, to internet service providers (ISPs), to online platforms like Twitter and Facebook.[165] The *DMCA* provides what is truly an extraordinary remedy and one that is only available for copyrighted content. Section 230 of the U.S. *Communications Decency Act* provides online platforms with a broad immunity when they are hosting user-generated content.[166] There is no process analogous to the procedure in place for copyright for the expeditious removal of defamation, harassment, or content that violates other rights. As a result of broad interpretation by U.S. courts, critics argue that Section 230 acts as a bar to litigation against platforms, which, when paired with online anonymity, means that complainants are left without legal recourse.[167] Copyright, on the other hand, is explicitly exempted from the Section 230 framework. Copyright lobby groups, largely funded by the music and movie industries, are some of the most well-resourced powerbrokers in the U.S.,[168] and through their efforts they have secured a mechanism to remedy violations of their intellectual property rights unlike any other provided under U.S. law.

Even though the *DMCA* is U.S. law, its impacts are felt far beyond U.S. borders. This is largely a practical effect as opposed to an intended legal effect, owing to the fact that many of the largest online platforms in the digital ecosystem are U.S. companies and are therefore subject to U.S. law.[169] There are certainly examples of Canadian copyright owners sending *DMCA* notices.[170] If, for example, a Canadian complainant found an intimate image to which she owned the copyright posted on Facebook, that person could send a notice to

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[163] *Ibid*. at 25.

[164] Gina Hall, "How many copyright takedown notices does Google handle each day? About 2 million", *Silicon Valley Business Journal* (7 March 2016), online: <www.bizjournals.com/sanjose/news/2016/03/07/how-many-copyright-takedown-notices-does-google.html>.

[165] US Copyright Office, *supra* note 162 at 23.

[166] 47 USC § 230(c)(1).

[167] Danielle Citron & Mary Anne Franks, "The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform" (2020) U Chicago Legal F 45 at 50-51.

[168] Open Secrets, "Industry Profile: TV/Movies/Music" (2019), online: *Open Secrets* <www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=B02>.

[169] The extraterritorial effect of the DMCA notice-and-takedown regime is well recognized. See e.g. Carys Craig & Bob Tarantino, "'An Hundred Stories in Ten Days': COVID-19 Lessons for Culture, Learning, and Copyright Law" (2021) 57:3 OHLJ 567 at 578-79.

[170] Lumen Database, "DMCA (Copyright) Complaint to Google" sent by the Canadian Broadcasting Corporation (24 November 2016), online: <www.lumendatabase.org/notices/13432006#>.

Facebook under the U.S. notice and takedown procedures and have the photo removed. Even sites operating in Canada that are not explicitly subject to the *DMCA* have been known to create policies to address the likelihood that they might be sent *DMCA* notices. Canadian ecommerce site Shopify[171] and Canadian dating service Ashley Madison[172] both have procedures for processing D*MCA* notices and removing content that has been flagged as infringing copyright, even though Canadian copyright law does not provide a notice and takedown framework.

Canadian copyright law does provide remedies that may be attractive to individuals seeking to have content removed from online platforms, although there is no analogous procedure to the one created by the U.S. *DMCA*. Under the *Copyright Act*, Canadian intermediaries are obligated to comply with a number of requirements to facilitate copyright owners' attempts to enforce their rights. First, in order to qualify for limited immunity for infringement, intermediaries in Canada must comply with a "notice and notice" process, under which they must forward notices of alleged infringement and retain customer data that would allow copyright owners to pursue the primary infringer.[173] Beyond passing along the notice, intermediaries have limited obligations to remove or disable access to content. For search engines, this requirement is limited to situations in which the infringing content has already been removed from its original location[174] or where an injunction has been issued by a court.[175] Content hosts must remove content only after they become aware of a court order declaring it to be infringing.[176] Additionally, individuals can bring an action for copyright infringement in a court of competent jurisdiction, seeking damages and an injunction to remove the infringing work.[177]

In the U.S., copyright may indeed be a practical mechanism through which individuals can seek the removal of intimate photos or videos posted online without their consent. In Canada, there are a number of ways in which it is impractical. First, Canadians' use of the *DMCA* to remove copyrighted content is an option only to the extent that the websites hosting the content are governed by U.S. law or otherwise adopt policies and practices that reflect U.S. law. Even where content is posted on American sites or online services that are subject to the *DMCA*, there are reasons why sending notices may be ineffective. For example, sites designed for the explicit purpose of posting abusive images are

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[171] Shopify, "Terms of Service" (updated 10 December 2020) at 20, online: < www.shopify.com/legal/terms > .

[172] Ashley Madison, "Ashley Madison — Terms and Conditions" (updated 27 February 2020) at 3(H), online: < www.ashleymadison.com/app/public/tandc.p?c = 1 > .

[173] *Copyright Act*, *supra* note 120 at ss 41.25(1)(a)-(b) and 41.26(1)(a)-(b).

[174] *Ibid.* at s 41.27(3).

[175] *Ibid.* at s 41.27(1).

[176] *Ibid.* at s 31.1(5).

[177] *Ibid.* at s 34(1).

unlikely to be persuaded to remove the content by way of a notice, as operators know that the abusive images belong to individuals who cannot afford the cost — whether financial, emotional, reputational, or personal — of a lawsuit.[178] Second, for Canadians attempting to use Canadian law, the notice-and-notice regime may also prove to be a disappointment. As mentioned, there is no obligation for intermediaries to remove or disable access to content upon the receipt of a notice — instead, the obligation is to pass along the notice to the content provider. In the case of NCDII, it is likely that the person posted the photo or video knowing there was no consent. Additionally, research into the issue of NCDII shows that these kinds of images are often posted on websites that have the express purpose of distributing non-consensual intimate images,[179] once again making it unlikely that the content provider would be induced to remove the image based on a notice. Third, pursuing a copyright claim in court is expensive and time consuming. In most cases, the expenses associated with hiring a lawyer and bringing a claim would far exceed the damages that would be awarded for a successful copyright suit.[180] Many complainants are also dissuaded by the knowledge that filing a claim in court may lead to additional attention and publicity surrounding their situation.

(b) Copyright Law does not Adequately Respond to the Nature of the Injury

In addition to the practical reasons why copyright may not be the ideal tool for addressing NCDII, there are also compelling normative arguments against putting those harmed by this kind of image-based sexual abuse in a position where they feel the need to resort to property law remedies. The harm resulting from NCDII, properly framed, is rooted in privacy, dignity, and equality interests, and circulation of intimate images often results in a threat to the physical safety of those targeted. By comparison, copyright doctrine as it has developed in the Anglo-American tradition focuses primarily on providing authors with the opportunity to economically exploit their creations for profit.[181] This fundamental misalignment between the values at stake means that copyright law is incapable of properly responding to NCDII harms. It also leaves individuals who are not the authors of their own intimate images without remedy, altering women's sexual expression by compelling them to take their own images if they want to avoid the perverse result of being the subject of an intimate image that they have little legal control over.

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[178] Citron & Franks, *supra* note 27 at 360.

[179] Aikenhead, *supra* note 41 at 120.

[180] Samuelson-Glushko Internet Policy and Public Interest Clinic, "Copyright Trolls" (accessed 27 December 2020), online (blog): *CIPPIC* <cippic.ca/en/FAQ/Copyright_-Trolls#lose>.

[181] But see Shyamkrishna Balganesh, "Privative Copyright" (2020) 73:1 Vand L Rev 1 (arguing that copyright was historically and should remain concerned with dignitary interests and privacy).

As demonstrated above, copyright can be an effective tool in some circumstances, especially when it comes to the expeditious removal of content online. However, it is also designed to foreground economic considerations. Obliging individuals who are the targets of image-based sexual abuse to seek a remedy in which the harm claimed is to their economic interests further degrades targets and trivializes the injury. The purpose of the copyright balance — to secure a just reward for creators while ensuring that the public interest is also served — leaves little room for privacy, dignity, and personal safety to be considered within the framework of copyright. A key facet of the harm is a violation of sexual autonomy and fundamental human rights, not only on the part of the individual survivor, but also with respect to the broader interests of women and girls in society. Despite the public interest balancing inherent in the copyright framework, the exhaustive statutory scheme does not recognize human rights as implicated by copyright, even though granting a monopoly over expression necessarily invokes freedom of expression concerns and likely engages other fundamental rights.[182] In fact, when courts consider the public interest in copyright balancing, most often this factor tends toward more permissive sharing, as "public interest" is typically synonymous with the dissemination and accessibility of works in copyright jurisprudence. The misalignment between copyright and private sexual images is even more obvious in light of Binnie J's comments about the need for copyright law to avoid granting "excessive control" to the author. In the context of intimate images, there is arguably less room for concern about excessive control; a person should be able to exercise near-complete control[183] over sexual images of themselves, and any compelling fair use argument that advanced through the copyright frame should yield to the privacy and contextual integrity concerns central to the purpose of the work's creation.

Further, cabining NCDII within the copyright paradigm imputes certain values to this kind of sexual expression that are entirely inappropriate in the context of intimate images weaponized against their authors. As we have seen, it is well recognized that the economic monopoly granted to copyright owners is meant to compensate them for their intellectual creation and indeed to incentivize the creation and dissemination of works. In the context of intimate images, the assumption attending copyright protection is that the creator is the beneficiary of an economic incentive to create and disseminate works. Unlike consensual pornography that is publicly shared by the subjects with a view to a profit, sexual expression for non-commercial purposes as an act of intimacy building within a relationship is not intended to be traded in the creative marketplace. Here, the dominant economic rights framework is ill-suited to

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[182] Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the Charter Right to Freedom of Expression in the Context of Copyright" (2016) 41 Queen's LJ 455.

[183] There may be some instances in which an intimate image ought not to be entirely within the control of the author/subject, such as where it is relevant evidence in a criminal trial.

address the harms that occur when these images or videos are decontextualized and distributed without the consent of the individual author/subject.

Copyright's subordinate doctrine, moral rights, is also an unsatisfactory tool for NCDII survivors to seek redress. Generally speaking, moral rights consist of an integrity right that protects against distortion and mutilation of the work[184] and a right of attribution and association, which safeguards an author's choice to have their works attributed (or not) and protects against unauthorized uses of the work that associate it with a product, service, cause, or institution.[185] In both instances, prejudice to the author's honour or reputation must be demonstrated.[186] In *Wiseau Studio et al. v. Richard Harper*, Schabas J described the moral rights infringement framework, saying that the court will consider both the subjective views of the plaintiff and objective evidence, but warned that "moral rights are not, and cannot be, determined solely on the feelings or opinions of the creator of a work."[187] With respect to the integrity branch of moral rights, it is unlikely this avenue would be of practical use to complainants whose images have not been distorted in some way.[188] Perhaps this branch of moral rights could be more easily plead in the context of sexualized deepfakes — where images are deliberately altered and manufactured with the aid of artificial intelligence.[189] However, NCDII images are frequently unaltered, especially considering that the purpose behind the distribution is often to identify the subject, and the harm that flows from their unauthorized distribution tends not to be a result of modifications made to the original.

Attribution appears more promising on its face, but bringing a complaint in this manner may force women to incur further harm. In a case where an NCDII image was shared without the author/subject's name attached, arguing that it is infringing on the basis that it is not associated with the author is self-defeating as claimants are bringing their action precisely *because* they do not want their image publicly associated with them. Attribution also protects an author's right to remain anonymous, and as such it could potentially be used to prevent association by name with the image. However, this provides only a half solution, as disassociating the author from their image does nothing to prevent its further circulation.

If, alternatively, a woman argues the image has resulted in harm to her reputation or honour, this may require framing her complaint in a way that relies on the sex-negative assumption that consensual sexual expression reflects poorly

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[184] *Copyright Act*, *supra* note 120 at s 28.2(1)(a).

[185] *Ibid.* at s 28.2(1)(b).

[186] *Ibid.* at s 28.2(1).

[187] *Wiseau Studio et al. v. Richard Harper*, 2017 ONSC 6535, 2017 CarswellOnt 16881 (Ont. S.C.J.) at para. 203 [*Wiseau*].

[188] Relatively minor distortions or modifications of a work — for example, the addition of a filter — may be enough to implicate moral rights, although it could be argued that reputational harm would not flow from such modifications.

[189] Dunn, *supra* note 9 at 12-13.

on her character.[190] This is particularly so since the plaintiff must establish that the impact on honour or reputation is objectively prejudicial.[191] Further, the purpose of making a moral rights argument as opposed to an economic rights argument, in this context, is to find a method of framing complaints that does not rely on injury to a woman's economic interests. Unfortunately, the close nexus between moral and economic rights makes threading this needle very challenging. As David Vaver describes it, the development of moral rights was in recognition of the entrepreneurial efforts that creative people exerted in order to build a reputation in the community that allowed them to sell their works.[192] He characterizes moral rights as a trademark-like consumer protection mechanism, promoting truth-in-advertising and facilitating functioning creative markets. In this light, even a claim for moral rights infringement undertaken with the explicit aim of avoiding the misalignment between intellectual property rights and NCDII harms ultimately leaves women in the same uncomfortable position, arguing that the real harm is to their economic interests or reputation *as an artist/author* and not their dignity, safety, and privacy.

Finally, it is difficult to see how a claim under either the integrity branch or the attribution/association branch of moral rights would be well suited to address the issue of NCDII, given how rarely this doctrine is invoked in Canada. In light of the dearth of case law and, in particular, the paucity of successful claims by authors claiming a violation of moral rights, it would be additionally burdensome to require that complainants who wished to bring a claim against their abuser devise a novel argument that would meet the standards set out in the Act. Additionally, moral rights claims are often most effective when the author is not the owner of the economic rights. Where the author has claim to both moral and economic rights, the invocation of moral rights can be seen as duplicative or even moot, and moral rights claims are practically more difficult to advance because prejudice must be shown.[193] At its most basic, recourse for the non-consensual sharing of intimate images should be clearly defined and should provide an expeditious avenue for victims to have content disabled and removed. Although on paper moral rights may seem a more appropriate avenue for redress, they continue to present problems, both practical and principled, when it comes to tackling NCDII.

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[190] Dodge, "Try Not to be Embarrassed", *supra* note 33.

[191] *Thomson v. Afterlife Network Inc.*, 2019 FC 545, 2019 CarswellNat 1479, 2019 CarswellNat 2517 (F.C.) at para. 47.

[192] David Vaver, "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?" (1988) 14:4 Monash UL Rev 284 at 287.

[193] *Wiseau*, *supra* note 187 at para 122.

(c) Can a Feminist Reconstruction of Copyright Transform it into an Appropriate Remedy?

Feminist copyright scholars have long argued that copyright and the broader intellectual property system is designed to help certain groups over others and fails to respond to the needs of women. Ann Bartow grounds her critique in the origins of copyright laws, arguing that they "began as implements of censorship" and that they remain tools of control.[194] She further questions the truism at the heart of copyright law, namely that the complex system of restrictions and incentives is actually necessary for the flourishing of creative endeavours.[195] Here, she argues that "copyright laws were written by men to embody a male vision of the ways in which creativity and commerce should intersect."[196] Feminist scholars have equally rejected the romantic conception of authorship that views the author as an original genius, creating something from nothing.[197] Craig argues that this sole genius is inherently a male construction firmly rooted in the Lockean conception of property as arising out of self-ownership.[198] A feminist reconstruction, she posits, would embrace the relational and dialogic nature of creativity and expression, rearranging our understanding of an author's relationship to her work and to others.[199] Finally, many have criticized copyright law for excluding from its protection creative endeavours that have historically been the work of women, including food and clothing.[200]

In the context of NCDII, the question is whether a feminist reconstruction of copyright law can redeem its use as a remedy for non-consensual distribution. In general, the feminist approach to copyright advocates for reducing private copyright owners' power to control in a way "that facilitates a significant amount of unauthorized excerpting, adapting, and sampling by declining to deem it infringing."[201] Putting aside the practical challenges inherent in attempting to radically reshape the copyright landscape — after all,

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[194] Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law" (2006) 14:3 Am UJ Gender Soc Pol'y & L 551 at 555.

[195] *Ibid*. at 556.

[196] *Ibid*. at 557.

[197] Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17:4 Eighteenth-Century Studies 425.

[198] Carys Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law" (2007) 15:2 J Gender Soc Pol'y & L 207 at 254.

[199] *Ibid*. at 244 et seq.

[200] See e.g. Malla Pollack, "Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter" (2006) 12:3 Wm & Mary J Race, Gender, & Soc Justice 603 at 606; Bartow *supra* note 194; Carys Craig, "Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Vision" (2014) 10:10 Osgoode Hall Legal Studies Research Paper Series; Terra L Gearhart-Sema, "Women's Work, Women's Knowing: Intellectual Property and the Recognition of Women's Traditional Knowledge" (2010) 21 Yale JL & Feminism 372.

[201] Bartow, *supra* note 194 at 570.

beneficiaries of maximalist copyright provisions are some of the most powerful and influential corporations on earth, with seemingly unlimited resources to lobby lawmakers for increasingly severe copyright laws — it is doubtful that this approach is consonant with providing the remedies sought by NCDII victims. If a feminist approach to copyright encourages more flexibility and sharing, free from the strictures of authorization by an existing copyright holder,[202] then this open-by-design position is logically incompatible with redressing harm that arises predominantly out of making public what was meant to be private as between certain people or a limited group. Where the aim is to fit the responsible, non-commercial exchange of intimate images within a property law framework, an approach that recognizes and prioritizes the privacy and sexual autonomy of the author/subject is more in line with the near-absolute control conferred to authors as the system currently stands. While limiting the monopoly individual authors enjoy over their works may indeed lead to a net benefit for women and society at large, this reconstruction is incoherent with the right to exercise increased and exclusive control through the expansion of intellectual property.

Despite this, the feminist position on copyright does not necessarily support the imposition of a sweeping imperative of more-or-less protection. Rather, feminist perspectives on copyright make room for consideration of social context, power dynamics, and substantive equality, and recognize copyright for what it is: a political tool that empowers certain people while disempowering others. Indeed, it can be argued that a feminist reconstruction of copyright would support its use to advance gender equality in a pragmatic context, as in the case of NCDII, while recognizing its limits and continuing to train an eye on the potential unintended consequences of extending copyright protections and further empowering private owners without due regard to equality, dignity, and privacy. However, this view can be equally complicated by the observations of Black feminist writer Audre Lourde, who warns that it is the "primary tool of all oppressors to keep the oppressed occupied with the master's concerns".[203] Here, copyright may fairly be seen as the master's tool, incapable of dismantling the master's house.

The tension between control and access in the context of intimate images is seemingly better resolved by approaching copyright from a personality-based perspective that the Anglo-American tradition has been loath to embrace. Under this framework, private property rights are extended to intangible creative works only to the extent that they promote human flourishing. Jeremey Waldron argues that a personhood approach to copyright can advance a variety of interests, including three that seem specifically relevant in the context of NCDII: privacy, individual self-realization, and identity.[204] Extending intellectual property rights

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[202] Jacquilynne Schlesier, "Feminist Copyright is Not a Non Sequitur" (6 October 2016), online (blog): IP Osgoode <www.iposgoode.ca/2016/10/feminist-copyright-is-not-a-non-sequitor/>.

[203] See Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in *Sister Outsider* (Ten Speed Press, 1985) at 110.

on the basis of these interests seems to align with the overarching contextual considerations unique to intimate images. The problem with this approach, however, is that it exchanges our well-established system with defined purposes and clear mechanisms for one that is nebulous, perhaps raising more questions than it answers. Fisher advances this critique, arguing that the conceptions of personhood we are trying to protect by way of a property right are "too abstract and thin to provide answers to many specific questions."[205] Without more clarity on what it means to protect "personhood" through intellectual property, it is likely that such an approach could set up a system where control of all artistic expression is further divorced from the dual purpose of copyright law — a careful balancing of the economic interests of authors with the broader public interest in seeking and receiving information, and safeguarding a robust public domain enabling creative expression to flourish. Additionally, a shift to increased reliance on personhood theory, which is itself inherently rooted in patriarchal notions of the individual author as originator,[206] supports greater protections for author/owners, proving harmful to feminist causes in other contexts, including where the subject of a photograph is not its author/owner.[207]

Consistent with a personhood approach, revising or supplementing Canada's moral rights doctrine could align the exercise of copyright with a set of values that are, at a theoretical level, more appropriate for addressing NCDII harms. Consider the approach taken in France, Germany, and Italy, where, by comparison to the Canadian statutory scheme, inalienable moral rights are much broader, including the right to control disclosure and withdrawal.[208] However, in practice the continental European copyright framework bears striking similarities to the Lockean labour theory and has the effect of further entrenching an author's absolute control over creative works in a way that is incompatible with a feminist reformulation of copyright. Relying on the right to control disclosure and withdrawal means reorienting copyright towards broad control to achieve narrow objectives sought by NCDII survivors. The level of control necessitated by such a reorienting bears little relation to the articulated purposes of copyright, which is at least as concerned with encouraging the dissemination of works as it is with allowing authors to control them. While NCDII survivors deserve a practical and effective remedy for the harms they have suffered, overhauling copyright law or reorienting its policy objectives to

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[204] Waldron, *supra* note 58.

[205] Fisher, *supra* note 104 at 22.

[206] Carys Craig & Anupriya Dhonchak, "A Feminist Theory of Moral Rights" in Ysolde Gendreau, ed, *Research Handbook on Moral Rights* (Edward Elgar Press, Forthcoming 2021).

[207] See e.g. Emily Radajkowski, "Buying Myself Back: When does a model own her own image?", *The Cut* (15 September 2020), online: <www.thecut.com/article/emily-ratajkowski-owning-my-image-essay.html>.

[208] Elizabeth Schéré, "Where is the Morality? Moral Rights in International Intellectual Property and Trade Law" (2018) 41:3 Fordham Intl LJ 773 at 776.

respond to this specific concern is likely to have unintended consequences for copyright doctrine more generally. It should now be clear that a better solution would be to develop a remedy outside of copyright that responds to the unique issues raised in the NCDII context.

CONCLUSION

The harms resulting from NCDII are serious, and in a society shaped by patriarchal ideas about sex and sexuality, they are almost inevitably more severe for women and girls whose sexual privacy is violated when their images are circulated online without their consent. Regardless of who is targeted by this abusive behaviour, it is a failure of law to leave NCDII victims/survivors without effective remedies that provide expeditious takedowns. Copyright law, although unsatisfying from a theoretical (and sometimes practical) perspective, remains one of the only legal tools that can be used by those targeted to remove their images from the Internet. Moreover, logical alternatives such as a *sui generis* tort action have not been implemented despite the mainstreaming of NCDII as a form of image-based sexual abuse and its increasing frequency. However, by pressing individuals towards copyright remedies, the law suggests that the real injury is that their copyright has been infringed, giving them the impression that their intellectual property is valued more than their sexual privacy and autonomy. Instead of revising copyright doctrine to remedy the serious harms caused by NCDII — which could have harmful consequences for copyright policy, particularly viewed from a critical feminist perspective — we should instead seek to recognize that the unique contextual circumstances surrounding intimate images require a tailored solution designed to account for the interests at stake.

The argument is not that NCDII victims/survivors *should not* use copyright law to address the harms flowing from non-consensual disclosure, especially in light of the relative strength and efficiency of intellectual property remedies as compared to other civil and even criminal law avenues. Instead, it is incumbent on lawmakers to legislate a tailor-made legal remedy for NCDII such as the fast-track tort proposed by Young and Laidlaw that provides women and others targeted with a process that is at least as expeditious and powerful as intellectual property law remedies, but that also acknowledges the serious harms to dignity, privacy, and equality that go well beyond the harm resulting from copyright infringement. Further, copyright law fails to address — and, in fact, an overreliance on copyright remedies may serve to exacerbate problems with regard to — images in which the subjects are not the authors. Ultimately, it is likely that a suite of remedies from both the criminal and civil law will be necessary to address the breadth of harms inflicted by individuals who weaponize sexual expression against others. Whatever the result, crafting remedies for NCDII should begin with a deep understanding of this harm and refrain from

pushing victims/survivors towards a framework that further trivializes their suffering.