

Can Victims of Child Sexual Abuse Material Use Copyright as a Method of Full Restitution from Possessors and Distributors?

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collect restitution under several different schemes,¹³ but actually recovering financially from the harm can be difficult because litigation costs are high for the victim, both monetarily and psychologically. Many victim restitution laws still require victims to prove how defendants caused their harm, which can lead to victims reliving their trauma when they bring suit, thereby increasing emotional cost for victims and decreasing their willingness to litigate these claims.¹⁴ Even the most recent restitution scheme, the Amy, Vicky, and Andy Act (“AVAA”), which does not require a nexus of harm, still only delivers nominal damages for possession of images.¹⁵ The minimum a victim can collect from a defendant under the AVAA is \$3,000.¹⁶ Yet Amy’s estimated losses total over \$3,000,000, meaning that she would have to litigate over 1,000 minimum restitution cases to fully recover financially.¹⁷ Amy’s attorney presumably thought that he could litigate fewer cases with higher damage rewards to achieve full restitution for Amy under the Copyright Act of 1976. Additionally, when victims own the copyright of the images or videos in which they appear, they have the ability to send take-down notices as provided in the Digital Millennium Copyright Act (“DMCA”).¹⁸ Under the DMCA, copyright owners are able to send notices to service providers¹⁹ informing them that there is infringing material on their sites, and if a service provider does not take down the infringing material, the copyright owner may sue the service provider for contributory or vicarious copyright infringement.²⁰

There are other incentives for victims to move to own the copyright of the images and recordings depicting their abuse. In other intimate media realms, such as pornography involving adults but created through coercion or abuse, and sexual images publicized without consent (also known as “revenge pornography”), scholars have argued that there is a marked benefit to the victims when they own and feel like they have control over their abuse imagery.²¹ Even if victims cannot fully stop the circulation of their abuse images, the knowledge that they have power over the images, as opposed to their abuser, can be calming and eases some anxiety relating to the continued circulation of the images.²²

13. See, e.g., Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified at 18 U.S.C. § 3664 (2018)); Victims Compensation and Assistance Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 42 U.S.C. § 10691 (2018)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 2259, 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2259 (2018)); Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, 132 Stat. 4383 (2018).

14. Binford et al., *supra* note 3, at 136.

15. 18 U.S.C. § 2259 (2018) [hereinafter AVAA].

16. *Id.*

17. Cassell & Marsh, *supra* note 7 at 188–89.

18. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (codified at 17 U.S.C. § 512) (enacted Oct. 28, 1998).

19. “Service providers” under the DMCA include websites and Internet service providers (ISPs). See 17 U.S.C. § 512(K) (2012).

20. 17 U.S.C. § 512.

21. Binford et al., *supra* note 3, at 154.

22. *Id.*

This method of receiving full restitution should be examined carefully. Although Amy's attorney was seemingly able to register the images with the Copyright Office, it is still unclear if a judge would uphold the registration in court. The Supreme Court has never answered whether copyright protection for material that is illegal in its mere creation would be enforceable. There are complexities within the copyright regime that could make the fight to gain ownership, and then exercise of that ownership, more burdensome than suing hundreds of times under victim's restitution statutes. Such complexities include the hardship of negotiating with abusers for the transfer of the rights, creators' rights to terminate those transfers at later dates, and the costs associated with policing the Internet for the copyright-protected images. Many obvious solutions to these problems involve making small, but meaningful changes to the basic definitions of the Copyright Act. Nevertheless, the issue is extremely complex, especially considering that victims' compensation falls far outside the purpose of the American copyright system. Even so, in some situations, copyright could be a tool for victims to achieve full restitution from those who possess and distribute their abuse images.

This Note argues that because the current restitution regime is inadequate and harrowing for victims, victims of child sexual abuse material should be able to pursue fuller restitution by obtaining ownership of their abuse material and suing those who download, publish, or otherwise infringe the copyright of these images. This Note also suggests three amendments to the Copyright Act to streamline the litigation process and ensure that victims can obtain more beneficial damages awards in the easiest way possible. This Note will first look at the harm that circulation of child sexual abuse material (CSAM), also known as child pornography, inflicts on victims and why restitution is so vital for the healing of victims. Next, this Note will discuss the current laws in place that authorize CSAM victims to seek restitution from their abusers and the challenges victims face when attempting to do so. Section III will explain the basics of copyright law as it relates to victims attempting to utilize the copyright system, including the purpose of copyright law, what can be copyrighted, and what protections copyright owners have. Sections IV and V of this Note will discuss the benefits and detriments of having a content-neutral copyright scheme and how a victim could potentially benefit from using copyright law. Section VI addresses how detrimental negotiating for a copyright could be for a victim, and why an amendment is necessary. In the final section, this Note suggests three amendments to the Copyright Act of 1976 that would effectively make minors depicted in CSAM the authors of the work, prevent abusers from regaining ownership of the CSAM they create, and dispose of the registration prerequisite in works relating to CSAM.

II. THE POSSESSION AND DISTRIBUTION OF CSAM CAUSES VICTIMS HARM

The Supreme Court has long held that the harm suffered by child pornography victims is twofold.²³ The Court in *New York v. Ferber* first held that CSAM (called “child pornography” by the Court) harms victims not just by the abuse involved in the creation of the material, but also in the continued viewing and distribution of the material because the images or recordings are a “permanent record” of the abuse.²⁴ The continued circulation of the material “may haunt [the child] in future years, long after the original misdeed took place,” because the child must live knowing that their abuse material is part of a mass distribution network of child pornography.²⁵ And the Court decided *Ferber* in 1982, when the abuse images were undoubtedly hard copies only—actual photographs that had to be printed and developed.

While the distribution of CSAM has always been a serious problem, the Internet and digital images have made circulation easier and more widespread than ever, and it is growing exponentially.²⁶ In 1998 there were just 3,000 child sexual abuse images on the Internet; in 2014 there were one million; in 2018, 18.4 million; and in 2019, over 45 million.²⁷ Because of the infinite lifespan of images and videos posted online, the harm recognized in *Ferber* caused by circulation is virtually never-ending and victims are powerless to end their abuse. Amy, the victim in the *Paroline* case, began seeing a therapist in the early- to mid-1990s after her initial abuse.²⁸ In the early 2000s, Amy found out that her abuse images were some of the most circulated online, causing her recovery, which her psychologist reported to be going very well, to regress.²⁹ The knowledge that abusers still share and possess her images ruined her mental health.³⁰

There are many ways that CSAM financially harms its victims. Victims will likely spend their entire lives requiring psychological care and nearly all victims “suffer lifelong psychological damage and may never overcome the harm, even after lifelong therapy.”³¹ Victims have reported feelings of shame, disgust, loathing, guilt, paranoia, worthlessness, and powerlessness, culminating in diagnoses of post-traumatic stress disorder, depression, anxiety disorders, and psychoses.³² This psychological damage comes not only from the original abuse, but also from the knowledge that a record of

23. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

24. *Id.*

25. *Id.* at 759, n.10.

26. Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun with Images of Child Sexual Abuse. What Went Wrong?*, N.Y. TIMES (Sept. 28, 2019), <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html> [<https://perma.cc/C3NW-VX6R>].

27. *Id.*

28. Cassell, *supra* note 7, at 187.

29. *Id.*

30. *See id.*

31. Binford et al., *supra* note 3, at 127.

32. *Id.* at 127–28.

their abuse will live on the Internet, likely forever.³³ Many victims feel anxious about being recognized in public and having to interact with someone who may have viewed their abuse.³⁴ Some victims report disguising themselves every time they leave their homes so that they won't be recognized in public.³⁵ Child pornography victims are more likely than most to abuse alcohol later in life, "with the severity of the child abuse correlating with the severity of alcohol abuse."³⁶ Victims also suffer mental anguish because in many instances, CSAM is used to groom other children in order to create new CSAM, so victims are aware that their abuse may be used to harm others.³⁷ To make matters worse, there are few mental health professionals equipped to deal with this type of abuse, making it "difficult for victims to find effective therapeutic support."³⁸

In addition to the difficulties of psychological care, victims suffer lost income due to their inability to maintain regular employment caused by fear of being recognized, and many victims spend their lives in and out of psychiatric care.³⁹ Victims also incur costs related to litigation, namely attorneys' fees, transportation, and childcare.⁴⁰ Victims often have trouble forming meaningful adult relationships, which can further damage their mental and emotional health.⁴¹

Amy, the victim in *Paroline*, calculated her total lifetime losses to be over \$3 million.⁴² Without a proper restitution scheme and a way to fully recover financially from her abuse, she cannot recover emotionally and mentally.

III. CURRENT AND HISTORICAL RESTITUTION SCHEMES FOR VICTIMS AND WHY THEY FAIL TO PROVIDE FULL FINANCIAL RECOVERY

Victims of CSAM suffer immense harm, not just emotionally, but also financially.⁴³ Government prohibition of the creation, distribution, and possession of child pornography helps curb the victimization of children by deterring and punishing abusers. But victimized children are left with large medical and mental health bills that could continue to increase throughout their lives due to sustained trauma.⁴⁴ In addition to the actual costs brought on by this abuse, many victims of CSAM are unable to work full-time because

33. *Id.* at 128.

34. *Id.* at 127.

35. Keller & Dance, *supra* note 25.

36. Binford et al., *supra* note 3, at 127.

37. *Id.*

38. *Id.* at 128.

39. *Id.*

40. 18 U.S.C. § 2259(b)(3) (2012).

41. Binford et al., *supra* note 3 at 127.

42. Cassell, *supra* note 7, at 187.

43. Binford et al., *supra* note 3, at 136.

44. *Id.* at 127, 136.

of their mental health struggles.⁴⁵ The U.S. has several victim's restitution schemes meant to compensate victims for harm suffered at the hands of their abusers.⁴⁶

Despite their good intentions, many restitution schemes fall short when it comes to full recovery for victims. One of the earliest victims' restitution laws, the Victim and Witness Protection Act of 1982, allowed victims to recover financially for physical and psychological care.⁴⁷ While this law was a big step forward in ensuring that victims can afford to pay for physical and mental health care, it required the presiding judge to consider the financial situation of the defendant before assigning any restitution payments.⁴⁸

Only two years later, Congress passed the Victims Compensation and Assistance Act of 1984, which required states to have a general victims' restitution fund that compensates victims with money collected from criminal fines.⁴⁹ However, these funds tend to be only for victims of violent crimes, meaning that victims cannot collect when defendants only possessed or circulated CSAM rather than committing the depicted abuse.⁵⁰ These funds seem to be underutilized, with only 200,000 victims collecting from this fund, despite nearly seven million violent crimes occurring per year.⁵¹ These funds may be underutilized because many victims are ineligible to receive them or perhaps victims are not aware that they are entitled to collect.⁵² Additionally, these funds are only available for U.S. citizens to collect from U.S.-based criminals.⁵³ In the case of CSAM, the harm is global, with material depicting American children circulated globally via the Internet, and the same with CSAM depicting foreign children reaching American soil, but neither of these groups can collect from the fund.⁵⁴ Even more worrisome, many of these state funds require that the victim reimburse the state if they collect any kind of restitution directly from a defendant.⁵⁵

The Violence Against Women Act, another potential recovery mechanism for victims, includes a Mandatory Victims Restitution Statute (MVRS), codified at 18 U.S.C. § 2259, which makes the discretionary portion of the Victim and Witness Protection Act obsolete, as it requires restitution to

45. Cassell, *supra* note 7, at 187.

46. See, e.g., sources cited *supra* note 13.

47. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified at 18 U.S.C. § 3664 (2018)).

48. *Id.*

49. 42 U.S.C. § 10691 (2018).

50. Binford et al., *supra* note 3, at 134.

51. *Crime Victim Compensation: An Overview*, NAT'L ASS'N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=14> (last visited Apr. 18, 2021) [<https://perma.cc/8WYZ-5YJM>].

52. See Douglas Evans, *Compensating Victims of Crime*, JON JAY COLL. CRIM. JUST. 10 (June 2014), http://www.njcn.org/uploads/digital-library/jf_johnjay3.pdf [<https://perma.cc/46VP-K3DZ>] (explaining that some victim's restitution laws require that victims report the crime within a set amount of time and many do not do so and that studies show that many victims of crimes were never notified of their rights to receive compensation).

53. Binford et al., *supra* note 3, at 134.

54. *Id.*

55. *Id.* at 135.

be paid regardless of the defendant's financial situation or ability to pay.⁵⁶ This statute mandates that victims be paid at all levels of the CSAM market, including creation, distribution, and possession, but requires victims to prove that the defendant's actions were a proximate cause of their harm.⁵⁷ Congress amended the MVRS in 2018 after many years of attempting to do away with the causation requirement addressed in *Paroline v. United States*.⁵⁸ This amendment, the AVAA, removes the proximate cause requirement of the original MVRS.⁵⁹ But the statute, like nearly all of the restitution laws, has relatively low minimum compensation compared to most victims' actual financial losses. Thus, some victims are required to litigate hundreds if not thousands of cases to fully recover.⁶⁰ If victims of CSAM are able to utilize the copyright system, they could win full financial restitution at faster rates with fewer cases litigated than traditional restitution channels currently allow.

IV. COPYRIGHT BASICS AND MINIMUM REQUIREMENTS FOR PROTECTION

A. Purpose of Copyright Law

The federal government has authority to issue legal protections to authors of creative works through the Intellectual Property Clause of the United States Constitution.⁶¹ This clause, also called the Progress Clause or the Copyright and Patent Clause, allows Congress to "promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁶² Copyright law enables authors of various types of works to reap the benefits of their creative labor, and it also allows authors to exercise control over their work, empowering them to decide when, where, and how their work is publicly displayed or privately held. Just as an author can choose to allow the public to consume their work, an author can decide to exclude anyone from viewing it, if they so desire. Under current copyright law, the owner of the copyright receives protection for the entire life of the author, and then an additional 70 years after the author's death.⁶³

56. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 2259, 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2259 (2018)).

57. *Id.*

58. Cassell, *supra* note 7, at 187.

59. See Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, 132 Stat. 4383 (2018); Cassell, *supra* note 7, at 191.

60. Cassell, *supra* note 7, at 188.

61. U.S. CONST. art. 1 § 8, cl. 8.

62. *Id.*

63. 17 U.S.C. § 302(a) (2018).

B. Only Original and Fixed Works Are Eligible for Copyright Protection

The Copyright Act lays out the basic requirements necessary for copyright protection. First, “original works of authorship fixed in any tangible medium of expression,” are afforded copyright protection.⁶⁴ Section 102(a) of the Copyright Act provides a few examples of protectable works of authorship, including “pictorial, graphic, and sculptural works,” as well as “motion pictures and other audiovisual works.”⁶⁵ Therefore, under this definition, a photograph or video constituting CSAM would be protectable under copyright law, so long as it meets the originality requirement, because photographs and videos are fixed by definition.

1. To Be Eligible for Copyright Protection, a Work Must Be Original

Not all works of authorship are protectable. While the statute does not define originality or offer a threshold for just how original a work needs to be in order to earn copyright protection, the Supreme Court formed a two-part test for determining originality in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁶⁶ For a work to meet the originality requirement of the Copyright Act, it must be a work that (1) is “independently created by the author (as opposed to copied from other works),” and (2) “possesses some minimal degree of creativity.”⁶⁷ Only the parts of a work that the author created can be protected by copyright. The creativity prong is a little murkier, but the Court in *Feist* stated that even a “slight amount,” of creativity will suffice, and that “a vast majority of works would make the grade quite easily.”⁶⁸ The Court then clarified that the work does not have to be innovative or novel; to satisfy the creativity prong, it only must be more than “so mechanical or routine as to require no creativity whatsoever.”⁶⁹ Works need not be aesthetically pleasing or even what most people would consider good art, because “no matter how crude, humble, or obvious,” a work is original so long as it “possess[es] some creative spark.”⁷⁰ Examples of works that do not meet the modicum of creativity standard are almanacs, phonebooks, and other compilations of facts that are arranged in an obvious way, such as chronologically or alphabetically.⁷¹

64. 17 U.S.C. § 102(a) (2018).

65. *Id.*

66. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

67. *Id.*

68. *Id.* at 346.

69. *Id.* at 379.

70. *Id.* at 345 (quoting 1 M. NIMMER AND D. NIMMER, COPYRIGHT § 1.08(C)(1)(1990)).

71. *See, e.g., id.* at 363.

2. To Be Eligible for Copyright Protection, a Work Must Be Fixed

In addition to the originality requirement of the Copyright Act, there is a fixation requirement.⁷² Most traditional types of expression are fixed by definition. A book is printed on paper. A movie is recorded on film, and a song is copied onto a disc. Photographs and videos meet the fixation requirement once they are taken, whether on film or digitally.⁷³

V. CONTENT NEUTRALITY AND COPYRIGHT OF ILLEGAL OR OBSCENE WORKS

While no abuser has tried to assert copyright ownership of the abuse imagery they created (likely due to obvious implication of criminal liability), CSAM is eligible for copyright protection based on the text of the Copyright Act. CSAM typically consists of photographs and videos that qualify as original works of authorship as defined by the Copyright Act. Despite how disconcerting it is to consider, the likelihood that child pornography would meet the minimal creativity standard is high, partly because the bar for creativity is so low, but also because the technical aspects required to frame up a photograph or video are minimally creative.⁷⁴ The statute alone provides no reason to deny CSAM at least thin copyright protection, the protection against literal reproduction of the work.

Although CSAM meets the basic requirements to gain copyright protection, there is a more important question: should copyright protection be made available for works that are repugnant to moral decency and public policy? Should something as despicable as CSAM earn protection of the federal government in some instances (copyright), but otherwise trigger heavy (and well deserved) criminal penalties in others? The purpose of copyright law is, among other things, to encourage creativity and foster a free flow of information.⁷⁵ Protecting CSAM does neither of those things, so it is an open question whether the aforementioned benefits to victims outweigh compromising copyright law's basic purpose.

The Supreme Court has never heard a case in which someone tried to enforce copyright protection for a per se illegal work, such as child pornography, but it has heard a few cases regarding copyright of other morally questionable works of authorship.⁷⁶ Scholars, too, have written about the benefits and detriments of a content neutral copyright system and the

72. 17 U.S.C. § 102(a) (2018).

73. 17 U.S.C. §§ 101–02(a) (2018).

74. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

75. U.S. CONST. art. 1 § 8, cl. 8.

76. *See generally* *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979); *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

implications of allowing protection for illegal and immoral works.⁷⁷ Although the Copyright Office only needs to consider whether material is an “original work of authorship fixed in any tangible medium of expression,”⁷⁸ for many years, examiners followed instructions to deny applications for registrations of illegal works if the examiner knew the content of the work was illegal.⁷⁹ This changed in 1959, when the Attorney General decided that refusal of registration on the grounds of illegality was no longer mandatory, but instead at the discretion of the examiner.⁸⁰ Until 1979, courts usually held that illegal works were never eligible for copyright protection and denied plaintiffs remedies.⁸¹ The ambiguity of illegal works’ eligibility to gain copyright protection began in 1979 when the Fifth Circuit held otherwise in *Mitchell Bros. Film Grp. v. Cinema Adult Theater*.⁸² In *Mitchell Bros.*, the court held that a pornographic film was copyrightable whether or not it was considered obscene.⁸³

After *Mitchell Bros.*, other circuit courts considered the same question. The Ninth Circuit followed suit in *Jartech, Inc. v. Clancy*, holding that obscene (and therefore illegal) material is copyrightable and the obscenity of the material is not a defense to infringement.⁸⁴ But the Second Circuit declined to follow the Fifth and Ninth Circuits due to “strong public policy” arguments against copyright protection for obscene material.⁸⁵ The Second Circuit explained that its decision intended to stop the distribution of obscene material and to avoid benefitting the plaintiffs—the creators of the material.⁸⁶ Perhaps the court would have ruled differently if the case intended to cease and discourage the distribution of obscene material and punish the creators of that material. Additionally, the Seventh Circuit, while not deciding on the issue, recognized that “the prevailing view is that even illegality is not a bar to copyrightability.”⁸⁷ Based on this precedent, it would seem that child pornography is eligible for copyright protection and that a court would likely enforce the rights of the owner, and in the case of CSAM, an abuser, in an infringement suit. This is likely not an issue in CSAM cases because the creators of any CSAM would incriminate themselves and any network of other creators they may have built by identifying themselves as authors of illegal child pornography. But if a victim registered their copyright like Amy, the victim in *Paroline*, it seems likely that a court would hear and rule on an infringement suit.

77. See, e.g., Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J.L. & TECH. 454 (2014).

78. 17 U.S.C. § 102(a) (2012).

79. Haber, *supra* note 77, at 463–64.

80. *Id.*

81. *Id.* at 465.

82. *Mitchell Bros.*, 604 F.2d at 852.

83. *Id.* at 854, 858.

84. *Jartech, Inc. v. Clancy*, 666 F.2d 403, 408 (9th Cir. 1982).

85. *Devil Films, Inc. v. Nectar Video*, 29 F.Supp. 2d 174, 176–77 (S.D.N.Y. 1998).

86. *Id.*

87. Haber, *supra* note 77, at 466 (citing *FlavaWorks, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012)).

On the other hand, without any kind of content-based restrictions, granting federal protection to illegal works could be seen as the federal government endorsing or rewarding these works.⁸⁸ This issue can be solved by amending the Copyright Act so that immediately upon creation, the ownership rights of CSAM vest in the minor victim or victims depicted rather than the creator, so government never endorses these illegal materials, and the creator can never benefit from the material.

Additionally, one of the main reasons why having a content-neutral copyright system is so important is because we value free speech so highly and denying protection for some works and not others can be a constitutional violation of a creator's First Amendment free speech rights and prevents the free flow of information. Even if the prospect of content-based copyright registration draws concerns by those strongly in favor of free speech, it should not for CSAM cases because the Supreme Court has held that child pornography is not speech.⁸⁹ Still, restricting any material sends the message that our copyright scheme is not content-neutral and undermines the purpose of the Copyright Act.

VI. BENEFITS TO VICTIMS BY UTILIZING COPYRIGHT OWNERSHIP

Despite the queasy feeling that may come from the idea of enforcing copyrights of illegal works, specifically CSAM, the benefits that stem from doing so for victims are great. Victims would have more control of their abuse material and would have a streamlined process for recovering damages that current criminal victims' restitution statutes fail to provide.

A. Rights Protected Under Copyright Law

Once an original work has been fixed, it has copyright protection.⁹⁰ There are six rights included in that protection, each defined in Section 106 of the Copyright Act.⁹¹ Whomever owns a copyright has the exclusive right to do or authorize any of the following: (1) "reproduce" the work; (2) "prepare derivative works" based on the work; (3) "distribute copies" of the work to the public by sale or any other transfer; (4) publicly perform the work; (5) publicly display the work; and (6) "perform the work publicly by means of digital audio transmission."⁹² This Note is primarily concerned with reproduction, distribution, display, and performance rights. The owner of a copyright is the only one that legally can make copies of their work unless they authorize another to do so.⁹³ Reproducing a work includes anything from

88. *Id.* at 484.

89. *New York v. Ferber*, 458 U.S. 747, 779–80 (1982).

90. 17 U.S.C. § 102(a) (2018).

91. 17 U.S.C. § 106 (2018).

92. *Id.*

93. 17 U.S.C. § 106.

making a literal copy on a copy machine to downloading a photo to a computer or other digital storage device.⁹⁴ Distribution means selling but also lending or circulating.⁹⁵ Displaying or performing the work publicly can mean posting it on a website or even showing others physical copies at home, depending on who was invited.⁹⁶

B. Remedies Afforded to Copyright Owners Upon Infringement

Once the owner of a copyright finds that someone infringed their copyright, they can bring suit in federal court.⁹⁷ If a court finds infringement, there are a few remedies that will typically be awarded, namely damages and injunctions.

1. Damages

Damages in copyright law come in two forms, actual and statutory. Copyright owners are entitled to the actual damages suffered from the actions of the infringer, most often lost profits.⁹⁸ However, actual damages may be small and, similarly to victim's restitution law, the harm can be difficult to prove, so there is another choice. If the copyright was already registered at the time the infringement occurred, the copyright owner can receive statutory damages, which can range from no less than \$750 and up to \$30,000 per work infringed, at the discretion of the judge.⁹⁹ The judge will determine the award amount based on several factors, including financial benefit to the defendant as a result of the infringement, the relative innocence or willfulness of the defendant when infringing, and deterrent to other potential infringers.¹⁰⁰ If a fact finder decides that a defendant truly was innocent and had no knowledge that the work was under copyright protection, the damage award may be lowered to \$200 per work infringed.¹⁰¹ On the other hand, if a court finds willful infringement, "the court in its discretion may increase the award . . . to a sum of not more than \$150,000."¹⁰² The Second Circuit created a test to determine willfulness in *Island Software & Computer Serv. v. Microsoft Corp.*¹⁰³ To prove willful infringement the defendant (1) must have been aware of the fact that their activity was infringing, and (2) must have acted in

94. 17 U.S.C. § 101 (2018).

95. 17 U.S.C. § 106(3).

96. 17 U.S.C. § 101. Public display or performance for the purpose of copyright is defined as either showing or performing the work in any place open to the public where a substantial number of persons outside of a normal circle of a family and its acquaintances are gathered; or transmitting or communicating the work to a place that is open to the public or to many people at one time even if they are not in the same place.

97. 17 U.S.C. § 501(b) (2018).

98. 17 U.S.C. § 504.

99. 17 U.S.C. §§ 411(a), 504(c) (2018).

100. *Island Software & Comput. Serv. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005).

101. 17 U.S.C. § 504(c)(2).

102. *Id.*

103. *Island Software & Comput. Serv.*, 413 F.3d at 257.

“reckless disregard for, or willful blindness to, the copyright holder’s rights.”¹⁰⁴

While not guaranteed, the odds of getting greater payments from copyright remedies than from victim’s restitution laws are high because the damage award is calculated per individual image.¹⁰⁵ For example, if someone possessed 50 different images of Amy, under the AVAA,¹⁰⁶ she would get varying amounts of restitution depending on how the judge in each specific case decides. There is a chance that a judge would order a large restitution award, but the guarantee is only \$3,000.¹⁰⁷ If she were to sue the possessor for copyright infringement and opt for statutory damages, then she would be guaranteed a minimum of \$10,000 (50 different images multiplied by the statutory damages minimum of \$200) or more if a judge deemed the infringement to be willful or especially egregious.¹⁰⁸ Based on this difference alone, the benefits of suing under Title 17 to recover would be vast for victims of CSAM, especially victims like Amy, whose abuse imagery is extensive and widespread.

2. Removal Under the Digital Millennium Copyright Act

Similar to an injunction, under the DMCA, a copyright owner can issue take-down notices to websites that display the owner’s copyrighted work.¹⁰⁹ Many content-hosting websites fall under a safe harbor exception in the DMCA, shielding them from contributory infringement claims.¹¹⁰ If a website is a safe harbor and one of its users posts infringing material on the website, only the user can be sued for copyright infringement, and the website gets protection.¹¹¹ To keep its safe harbor status, a website must (1) not actually know or have reason to know that there is infringing material on their site and must act expeditiously to remove the material upon becoming aware or knowledgeable of the infringement; (2) not receive financial benefit that is “directly attributable to the infringing activity” if the site “has the right and ability to control” the activity; and (3) upon receiving a take-down notice, the site must comply with such notice quickly.¹¹² If a content-hosting website does not obey these provisions, a court will likely remove its safe harbor status, and a copyright holder may sue the website for contributory or vicarious infringement.

104. *Id.* at 263.

105. 17 U.S.C. § 504(c).

106. 18 U.S.C. § 2259 (as amended 2018).

107. *Id.*

108. 17 U.S.C. § 504.

109. 17 U.S.C. § 512(c)(3) (2012).

110. 17 U.S.C. § 512(c)(1).

111. *Id.*

112. 17 U.S.C. § 512(c)(1).

C. Technology Exists to Detect Infringement and Send Take-Down Notices to Copyright Infringers, Meaning Victims Could Find and Sue Infringers Through Copyright Attorneys Without Ever Appearing in Court

There are programs that catch both copyright infringement and child pornography, so if an attorney or nonprofit could take charge of policing victim-owned CSAM copyright, the victim would not need any contact with defendants or CSAM.¹¹³ Once the abuse imagery is uploaded into the system, these programs scan the Internet for exact reproductions of the imagery, inform the owner of apparent infringing activity, and send take-down notices to the infringers.¹¹⁴ This creates a possible benefit to victims that stems from their ability to control and affirmatively police their own abuse via the DMCA. There may be some power that comes from literally owning your own abuse material.¹¹⁵

VII. UNDER CURRENT COPYRIGHT LAW, VICTIMS CAN NEGOTIATE WITH THEIR ABUSERS FOR OWNERSHIP OF THE COPYRIGHT IN THEIR ABUSE IMAGES, BUT THIS IS UNCERTAIN AND CAN BE PSYCHOLOGICALLY DAMAGING TO VICTIMS

In *Paroline*, Amy's attorney negotiated with her abuser for copyright of Amy's abuse images.¹¹⁶ There is no evidence that suggests this was an easy process, but Amy ultimately succeeded. Other victims may not have as much luck. Currently, this method of restitution is still new and has not been regularly used, so it may be easier than ever for victims to acquire the copyright ownership in this way. It is possible that many abusers see no value in the copyright, either because they believe it is not enforceable or because registering and enforcing a copyright would publicize their conduct and draw attention to them. Perhaps they would quickly dispose of the ownership for a lesser restitution payment, but it is likely that many abusers would keep the copyright because the victims have very little bargaining power.

Such negotiations could be detrimental to the victims because concessions in negotiation could compromise their potential restitution. The negotiation process could also be emotionally taxing, and litigation costs could be high, leading victims to dismiss the process altogether. Another problem with this solution is the termination right of creators. The original

113. *New Technology Fights Child Porn By Tracking Its "PhotoDNA"*, MICROSOFT, (Dec. 15, 2009) <https://news.microsoft.com/2009/12/15/new-technology-fights-child-porn-by-tracking-its-photodna/#sm.0001mpmupctevct7pjn11vtwrw6xj> [https://perma.cc/D3JA-MCQK].

114. *Id.*

115. Binford et al., *supra* note 3, at 154.

116. *Id.*

owner of the work, the author, has a right to terminate any transfers.¹¹⁷ This means that roughly 35 years after negotiating with an abuser, the abuser has the right to terminate the transfer, taking back ownership of the copyright.¹¹⁸ Because victims' images likely will live on the Internet and continue to be viewed forever, a time limit of 35 years diminishes full restitution for victims.

While negotiating for the copyright of the material could be a valuable tool for victims that have previously been abused, a few amendments to the Copyright Act would allow future victims copyright ownership of their abuse images from the moment the material is created and do away with many of the problems faced in the negotiation process.

VIII. AMENDING THE COPYRIGHT ACT WOULD ALLOW CSAM VICTIMS TO ACHIEVE FULL FINANCIAL RECOVERY FROM THOSE WHO POSSESS THEIR ABUSE IMAGERY

The amendments proposed in this section are not an excuse for Congress to avoid adjusting the minimum awards for victims in CSAM cases. Ultimately, congressional action is the most efficient and unconvoluted way for victims to financially recover fully. Amending the Copyright Act is less direct but could still ultimately lead to stronger victim financial recovery. Full recovery of monetary damages may allow victims to get the best care for the other harm they suffered at the hands of their abusers, and ultimately lead them to begin recovering from the abuse completely. Among the direct benefits to the victims of these crimes, there are policy and administrability benefits to the government as well. Higher damage awards may act as an even greater deterrent to potential abusers leading to fewer abused children, and greater damages awards allow victims to litigate fewer cases to be able to recover fully, which will lighten the burden on the court system.

Restitution is a tricky balancing act of the rights of victims to be free from the financial burden the defendant placed on them and the rights of the defendant to avoid punishment beyond his wrongdoing, which is why nearly every restitution scheme requires victims to prove how the defendant directly caused their harm. There may be issues with overburdening defendants with forcing them to pay copyright infringement damages, but the benefit provided to the victims, the probable deterrence to future abusers, and the fewer overall suits brought by victims limiting the strain on the court system would outweigh the harm to defendants.

Therefore, Congress should amend the Copyright Act with three minor changes to make it easier for CSAM victims to litigate claims of copyright infringement.

117. 17 U.S.C. § 203(a)(3) (2012).

118. *Id.*

A. Amending the Definition of Authorship for Works Relating to 18 U.S.C. §§ 2251 and 2252 So Ownership of Copyright in CSAM Initially Vests in the Minor(s) Depicted

The first suggested change is to amend the definition of authorship in Section 201(a) of the Copyright Act, which says that copyright ownership “vests initially in the author or authors of the work.”¹¹⁹ Instead, it should include a clause at the end, providing that “in works relating to 18 U.S.C. §§ 2251–52,¹²⁰ the author shall be defined as the minor child or children depicted in the work.”

Ownership of a copyright in a work initially vests in the author of the work.¹²¹ For the purpose of copyright law, “author” does not just mean someone who wrote a book, but instead it is a general term referring to the creator of any type of work that is protected by copyright.¹²² The Copyright Act does not define what makes someone an author, but case law illustrates that the author is typically one who physically created the work or the one who had control over the work’s creation, even if they did not literally create the work.¹²³

Although ownership initially vests in the author, the author can transfer their ownership rights to anyone at any time in the duration of the work’s protection, but such transfers must be made in writing.¹²⁴ Any grants of ownership made by the author can be terminated (that is, the ownership will be returned to the author) about 35 years after the initial transfer.¹²⁵ Termination of the grant is not automatic. The author, or the author’s heirs, must file a notice of termination with the Copyright Office and the grantee in order to have the ownership returned, but once that is done, the grant is terminated, and all ownership rights revert to the author or the author’s surviving family.¹²⁶

By ensuring that the copyright ownership of the abuse imagery initially vests in the minor victim(s) depicted rather than the person who took the photograph, the victim is protected from ever having to negotiate with their abuser and having their copyright ownership terminated.

119. 17 U.S.C. § 201(a) (2018).

120. *See generally* 18 U.S.C. §§ 2251–52. These are the relevant child sexual abuse production and distribution statutes. By specifically naming these in the amendment, the amendment only applies to works involving child sexual abuse so as to not upend the copyright system by making *any* child depicted in a work the author of the work.

121. 17 U.S.C. § 201(a).

122. The Copyright Act does not define “author.” It is a general term for the creator of all types of works eligible for copyright protection throughout the statute. *See e.g.*, 17 U.S.C. §§ 101, 103(b), 201 (2012).

123. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

124. 17 U.S.C. §§ 201(d), 204(a) (2018).

125. 17 U.S.C. § 203(a)(3) (2018).

126. 17 U.S.C. § 203(a)(2)–(4), 203(b).

B. Amending the Ability to Terminate Transfers

The second change involves amending Section 203(a), which provides that an author can terminate any grants of ownership rights starting 35 years after the transfer.¹²⁷ Congress could add a provision, Section 203(a)(6),¹²⁸ that reads “in works relating to §§ 2251–52, there shall be no right of termination.” This amendment would not affect victims after the enactment of the first amendment, which would establish the minor as the author. But the additional limitation on terminations of transfers would be important to victims who are required to negotiate with their abusers for the copyright to existing abuse materials, as the new limitation would prevent abusers from reclaiming the copyright in 35 years.

C. Amending the Registration Prerequisite for Statutory Damages and Attorney’s Fees

The third and final amendment is to the damages portion of the Copyright Act, Section 412. Currently, Section 412 provides that no statutory damages or attorney’s fees shall be awarded for “any infringement . . . commenced after first publication of the work and before the effective date of its registration,”¹²⁹ meaning that a copyright must be registered when the infringement happens in order to collect statutory damages. Statutory damages require no proof of how the infringement harmed the owner, and thus are the best choice of damages for CSAM victims. Additionally, registration requires a deposit of two copies of the work with the Library of Congress.¹³⁰ Because of the illegal nature of CSAM, the act of sending the work to the Library of Congress is in violation of federal child pornography laws, making registration difficult.¹³¹

Registration is voluntary and ancillary to copyright protection.¹³² Registration is optional but still important because it requires a deposit of the work with the Library of Congress, allowing the government to keep track of creative works and providing citizens with access to these works.¹³³ Because society generally does not see any creative value in CSAM, the benefit of the deposit created by registration is moot. An amendment to Section 412 providing that “in cases relating to 18 U.S.C. § 2251-52, there shall be no registration prerequisite for an award of statutory damages and attorney’s

127. 17 U.S.C. § 203(a).

128. It is important here to note that 17 U.S.C. § 203(a) already includes subsections (1)–(5), and the proposed amendment would simply be added to the end as subsection (6).

129. 17 U.S.C. § 412 (2012).

130. 17 U.S.C. § 408(b) (2018).

131. 18 U.S.C. § 2252(a)(1) (2018).

132. 17 U.S.C. § 408(a).

133. U.S. COPYRIGHT OFFICE, MANDATORY DEPOSIT OF COPIES OR PHONORECORDS FOR THE LIBRARY OF CONGRESS (2019), <https://www.copyright.gov/circs/circ07d.pdf> [<https://perma.cc/K5SE-T7LJ>].

fees” would allow victims to sue for statutory damages from the creation of the material, not just registration.

There could be many years between the creation of the material and the victim acknowledging the abuse or law enforcement identifying the abuse. In this time, many people could commit copyright infringement on the victim’s abuse imagery, but he or she would not be able to collect damages from those infringers under the current statute. The amendments in this Note would change that.

IX. CONCLUSION

Under current criminal restitution law, it is almost impossible for victims of CSAM to fully recover financially from their abuse due to insufficient restitution. But copyright law, with a handful of statutory fixes, could be a better avenue. By allowing victims of CSAM to register their abuse images and bring suit for copyright infringement against those who possess and distribute those images, victims will be able to fully recover financially from their abuse at faster rates with fewer cases litigated. These changes would not stray far from copyright doctrine while also empowering victims with a new tool to stop the horrors of CSAM.