Computer Law & Security Review 54 (2024) 105990

Contents lists available at ScienceDirect

Computer Law & Security Review: The International Journal of Technology Law and Practice

journal homepage: www.elsevier.com/locate/clsr

Pornography, sexual privacy and copyright

Abhilash Nair *, James Griffin

Law School, University of Exeter, UK

ARTICLE INFO

Keywords:
Internet
Pornography
Sexual privacy
Copyright
Enforcement

ABSTRACT

This article proposes a new paradigm in the consideration of privacy in pornographic works in copyright enforcement actions. It focuses particularly on attempts to threaten individuals with copyright infringement action based on a speculative invoicing model. We approach this issue from the perspective of the right to sexual privacy of alleged infringers, which, as we argue, is particularly pertinent for pornographic works. The courts in England and Wales have broadly recognised the role of individual privacy and embarrassment caused to alleged infringers in the leading cases of *Golden Eye* and subsequently in *Mircom*, but the law remains unclear with no real recognition of, or meaningful mechanisms in place to address, the underlying issues. The article points out that this is due to a fundamental lack of appreciation of sexual privacy at a conceptual level in the context of consumption of pornography in the internet age, and consequent failure to consider this in copyright enforcement proceedings. We argue that the law should achieve a balance between the right holder's interest and the sexual privacy of alleged infringers, and copyright enforcement actions need to be approached with this in mind. This calls for a fundamental reconceptualisation of the right to privacy, and we call upon the courts to recognise and balance the sexual privacy rights of the alleged infringers of copyright in pornographic works with the interests of the right holders in certain copyright enforcement actions to achieve fair and equitable outcomes.

1. Introduction

Copyright forms the main basis of intellectual property protection for pornographic material on the internet, as is the case for other photographs, videos and literary works. Although internet copyright infringement cases have mostly focused on the music industry, there have been many attempts to sue internet users for allegedly infringing copyright in pornographic material in different jurisdictions, including the US, UK and Germany. This usually takes the form of what is commonly referred to as 'speculative invoicing'. Examples include the numerous John Doe letters sent to alleged infringers in the US,[1] cease and desist letters sent to certain internet users in Germany for allegedly watching pornographic material on RedTube,[2] and the letters of claim sent to several individuals in the UK, for instance in the *Golden Eye*[3] case. In all cases, an opportunity was granted to settle the case by paying a rather arbitrary 'compensation' amount to avoid litigation which, as we argue in this article, is aimed at exploiting the embarrassment of the individual to extract payment, thereby infringing on their right to sexual privacy. As put by Justice Arnold: 'the court needs to consider the impact of the letter of claim upon ordinary consumers who may not have access to specialised legal advice, who may be innocent of what is alleged against them and who may be embarrassed and/or distressed by being alleged to have been involved in filesharing involving pornography.'[4]

Copyright grants a legal right which primarily protects the owner's economic interest, as well as the moral rights of the creator.[5] Whilst there are some exceptions and defences to copyright on certain grounds,

* Corresponding author.
E-mail address: abhilashcm@gmail.com (A. Nair).

[1] See, Amy Rosen, 'The Big Lawsuits Keep on Coming: An Analysis of Extortive Pornographic "Trolling Lawsuits" and Preventative Approaches' (2013) 95 *Journal of the Patent and Trademark Office Society* 165.

[2] These letters are known as *Abmahnung,* usually sent by lawyers on behalf of the infringers. See, Sandra Schmitz 'The Redtube copyright infringement affair in Germany: shame on who?' (2015) 29(1) *International Review of Law, Computers & Technology* 33.

[3] *Golden Eye (International) Ltd and others v Telefonica UK Ltd, Consumer Focus intervening* [2012] RPC 28.

[4] *Ibid* [750].

[5] Chapters I–IV CDPA 1988; see Gillian Davies, Nicholas Caddick and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th edition, Sweet & Maxwell 2016); Michael Tappin *et al, Laddie, Prescott and Vittoria* (5th edition, Lexis Nexis Butterworths 2018); James Griffin (ed), *Copyright and Design Law* (Sweet & Maxwell 2020).

https://doi.org/10.1016/j.clsr.2024.105990

Available online 19 August 2024

the right to privacy has not been a core feature of general copyright jurisprudence.[6] We argue that privacy deserves a more prominent place and nuanced understanding with regard to copyright enforcement actions for alleged infringement of pornographic works. Consumption of pornography is essentially a private matter, and as this article will demonstrate, has become intrinsically linked to the sex life of individual users in the internet age – it is not something individuals would wish to share publicly. The threat of a copyright infringement action would in many cases result in the alleged infringer paying the settlement amount regardless of whether they have actually infringed copyright, for fear of the public shaming and embarrassment that would accompany litigation. The impact on their privacy rights is obvious, particularly with respect to one's sexual privacy, as we set out in this article.

Under the UK's current legal system, it is possible to threaten anyone with copyright infringement proceedings in relation to any type of copyright work.[7] Unjustified threats provisions exist in relation to patents, trademarks and designs,[8] but there is no equivalent law for copyright. Further, in the case of a right holder threatening infringement proceedings against an individual for watching pornography, it could leave the individual in a vulnerable position: the current legal position means that the right holder could make the threat of infringement proceedings public.[9] Whilst courts have powers to derogate from the principles of open justice in certain circumstances, for example misuse of private information injunctions, the onus in such cases would be on the defendant to make an application for an injunction to preserve privacy pending trial. The court may order that the identity of the party must not be disclosed if it considers non-disclosure necessary to protect the interests of that party[10] but, as we argue in this article, this comes too late in the process to meaningfully protect the sexual privacy of alleged infringers. In order to adequately balance the rights of both parties, due consideration ought to be given to the potential impact on the sexual privacy of the alleged infringers at the stage of granting third-party disclosure orders, ie, *before* the right holders or their agents have access to the identities of the individuals concerned.

We argue that whilst copyright remains the appropriate regime to protect pornographic material in substantive law, and that a regime for legitimate claims of infringement should continue to exist for pornography just as for other categories of work, there is a need for better protections for the sexual privacy of the alleged infringers. There has been some judiciary-level recognition of the role of privacy in the context of copyright infringement actions relating to pornography. For instance, courts have taken the rather unusual step of re-drafting a letter before action (*Golden Eye*,[11] and subsequently in *Mircom*[12]), but we argue that the law needs to go further. As this article will demonstrate, the deficiency of the current approach can essentially be attributed to a fundamental lack of appreciation of the concept of sexual privacy in the context of consumption of pornography. We argue that copyright enforcement actions for pornographic works merit more initial scrutiny in order to protect the sexual privacy of alleged infringers which, in turn, requires a clearer understanding and recognition of the latter as an individual right in this context.[13] To this end, the article establishes why sexual privacy matters for consumers of internet pornography and makes the case for individual privacy to be assessed through this lens in certain copyright enforcement actions. In order to provide clarity and consistency of approach as well as equitable outcomes, we propose some solutions which will enable the courts to adequately balance the right holders' interests with the sexual privacy of the alleged infringers, which will in turn serve to act as a deterrent for malicious enforcement actions. The article thus proposes a pioneering approach towards the consideration of sexual privacy in copyright infringement actions in pornographic works, providing a new paradigm of privacy in copyright law.

We first consider the history and issues of speculative invoicing in the context of copyright infringement actions relating to internet pornography (Section 2). In Section 3, we set out how copyright enforcement has operated for pornographic works and makes some observations as to the enforceability of obscene works from a copyright perspective. In the discussion that follows in Section 4, we establish why the consumption of lawful pornography should be regarded as a sexual activity, and therefore must form part of right to privacy. Section 5 examines the relationship between copyright law and privacy, introducing Section 6, which proposes a way forward to enable courts to approach copyright infringement actions for pornography in a consistent and equitable manner. The article concludes in Section 7 with a call for a fundamental reconceptualisation of the right to privacy to recognise and balance the right to sexual privacy of the alleged infringers of copyright in pornographic works with the interests of the right holders to ensure fair and smooth administration of justice in this area.

2. Speculative invoicing: exploiting embarrassment

2.1. Speculative invoicing and Norwich Pharmacal orders

'Speculative invoicing' refers to the practice of sending letters to individuals threatening potential court action for alleged copyright infringement, along with an option to settle in exchange for payment of an amount stipulated by the right holders (or their agents). As noted earlier, the practice of speculative invoicing is not unique to the UK. In the US, speculative invoicing existed even before it was imported into the UK and Germany, with the Recording Industry Association of America (RIAA), a key organisation representing musical artists, pursuing a campaign of pre-litigation John Doe letters against a large number of individuals.[14] Letters have been pursued by organisations concerning the download of embarrassing pornographic content.[15] As

[6] See, Jonathan Griffiths and Uma Suthersanen, *Copyright and Free Speech: Comparative and International Analyses* (Oxford University Press 2005).

[7] Subject to the very restricted limits of speculative invoicing outlined in Section 2 below.

[8] See the IP (Unjustified Threats) Act 2017 in the UK.

[9] In *Golden Eye* (*supra* n 3), the applicants proposed not to disclose recipients' names to the public without their consent until proceedings commenced and they became defendants. Arnold J, however, took objection to this as he felt that making the individual's name public could be an implicit threat: '(the recital) while designed to protect the Intended Defendants, is also capable of causing unnecessary distress because it could be read as an implicit threat of publicity once proceedings have been commenced. The reason why that may cause distress is because of the pornographic nature of the films combined with the fact that the Intended Defendant may not in fact have been a person who was engaged in file sharing of those films'. *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) [122].

[10] CPR, SI 1998/3132, r 39(2)(4). The test is based on whether there is a general public interest in identifying the party that restricts his Art 8 right. See, *Home Secretary of State for Home Department v AP (No 2)* [2010] UKSC 26 [7] (Lord Rodger). For a detailed discussion, see Rebecca Moosavian, 'Jigsaws and Curiosities: The Unintended Consequences of Misuse of Private Information Injunctions' (2016) 21(4) *Communications Law* 104.

[11] *Ibid.*

[12] *Mircom & Golden Eye v Virgin Media* [2019] EWHC 1827 (Ch).

[13] This has become more pressing following the ruling in C-597/19 *Mircom International Content Management v Telenet* [2021] ECLI:EU:C:2021:492, where the CJEU noted that the Enforcement Directive did not require intellectual property rights holders to have actually used their rights in order to be able to apply its rules (at [133]). It is up to the national courts to determine the proportionality of enforcement actions.

[14] The RIAA gave up its litigation campaign against file-sharers at the end of 2008. Kerry Sheehan, 'It's the End of the Copyright Alert System (As We Know It)' Electronic Frontier Foundation (6 February 2017), at https://www.eff.org/deeplinks/2017/02/its-end-copyright-alert-system-we-know-it

[15] Matthew Sag and Jake Haskell, 'Defense Against the Dark Arts of Copyright Trolling' (2018) 103 *Iowa Law Review* 571.

Sag and Haskell point out, the pornography distributer Malibu Media accounted for 62 % of the John Doe cases filed in Federal courts in 2015–2016,[16] and it is clear the *modus operandi* of the plaintiffs is to coerce settlement by exploiting the embarrassment of the defendants.[17]

In the UK, the roots of speculative invoicing can be traced to the practice first initiated by the law firm Davenport Lyons,[18] which in March 2007 sent letters to 500 individuals alleging infringement of copyright in computer games, with a settlement offer of around £600 in exchange for taking no further legal action. Davenport Lyons was subsequently retained by copyright holders of pornographic works, following which letters were sent to several individuals pertaining to these titles.[19] The firm had also sent letters to elderly people, which raised criticism. For example, an elderly couple were threatened with legal action for downloading a pornographic film called *Army Fuckers*.[20] The bad publicity that ensued led to Davenport Lyons suspending its practice in speculative invoicing.

The period following this saw the rise of copyright monitoring companies acting on behalf of copyright holders under contractual agreements to pursue claims of copyright infringement, as brought to light in *Media CAT Ltd v Adams*.[21] In this case, Media CAT, through its lawyers, ACS:Law, sent out letters to about 10,000 individuals threatening to sue them for alleged copyright infringement, with the option to pay £495 as settlement. The court ruled against Media CAT and was particularly critical of the nexus between the company and the law firm which were, in the view of the court, abusing the court's processes in obtaining access information identifying individuals. This is because the information gained, which was intended to prevent copyright infringement, was essentially being used for speculative invoicing, leveraging embarrassment to encourage the payment of settlement fees. They were avoiding public scrutiny of the cause of action by means of a 'wholesale letter writing campaign from which revenues are being generated away from the gaze of the court'.[22] It is worth noting that copyright monitoring companies (as with all right holders) initially only have access to the IP addresses of the alleged infringers. In order to obtain the individuals' contact details from the relevant internet service providers (ISPs), they typically make an application to the court for a Norwich Pharmacal order. This is essentially an order against a third party (in this case, ISPs), directing them to disclose documents or information (ie, contact details of alleged infringers).[23] Norwich Pharmacal order applications usually have a high threshold to meet in order to be successful, including that the information cannot be obtained by other means, for example third-party disclosure orders under the Civil Procedure Rules (CPR) r 31.17.[24]

Whilst *Media CAT* brought an end to mass actions by copyright monitoring companies, *Golden Eye*[25] revived the speculative invoicing model in the UK. The main difference this time was that copyright holders themselves (on their own, and also acting as agents for other copyright holders), rather than a monitoring company, brought the action. Letters alleging copyright infringements and requesting sums of money to settle were sent by Golden Eye and Ben Dover Productions for themselves and on behalf of several other right holders. At first instance, Arnold J stipulated that any letters sent to potential infringers should meet certain requirements, such as having reasons for the sums of money asked, clearly setting out that a legal appeal was possible and that the letter itself was not a final determination. Doing so, it was expected, would help to balance the interests of the alleged infringer, such as privacy, with that of the right holder.[26] Arnold J, however, limited granting the Norwich Pharmacal order to Golden Eye and Ben Dover Productions, and not to the other claimants, as he was concerned that the activity was champertous.[27] This would have been a significant step in limiting the ability of right holders to send purely speculative invoices via third parties. However, the judgment was partially reversed by the Court of Appeal, which granted Norwich Pharmacal order to all the claimants. This has effectively meant that speculative invoicing continues to flourish in the UK, such that privacy rights are, to our minds, insufficiently protected.[28]

Norwich Pharmacal order is an equitable remedy, and therefore the courts have discretion whether to grant it. In *Viagogo*,[29] which has subsequently been held in *Mircom*[30] to be consistent with *Golden Eye,* a number of factors additional to those noted above by the High Court in *Golden Eye*, and which could assist courts in exercising this discretion, were identified. These include: '(i) the strength of the possible cause of action contemplated by the applicant, (ii) the strong public interest in allowing an applicant to vindicate his legal rights, (iii) whether the making of the order would deter similar wrongdoing in the future, (iv) whether the information could be obtained from another source, (v) whether the respondent to the application knew or ought to have known that he or she was facilitating arguable wrongdoing, (vi) whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons would suffer any harm as a result, (viii) the privacy rights under Art.8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of the individuals whose identity is to be disclosed, (ix) the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed, and (x) the public interest in maintaining the confidentiality of journalistic sources, as recognised in s.10 of the Contempt of Court Act 1981 and Art.10 ECHR'.[31]

In addition, applicants for Norwich Pharmacal orders are required to give a cross-undertaking in damages to compensate the respondent and/or innocent parties who may have suffered harm, if it is later found that a Norwich Pharmacal order should not have been granted. Thus, it

[16] *Ibid* 578.

[17] *Ibid* 581.

[18] 'Innocent File Sharers Face £500 Penalty' *Metro* (29 October 2008). See for analysis, Andrew Murray, *Information Technology Law* (Oxford University Press 2023) Chapter 12, section 4.

[19] It transpired that it would be illegal to publish or distribute the titles in question in the UK, so a separate question remains whether the courts have given due consideration to this aspect. This is because, following *R v Perrin* [2002] EWCA Crim 747, pornographic material that is lawful for adults to consume could be deemed obscene, with respect to children, and therefore unlawful to publish and distribute, unless measures are in place to prevent children from accessing it.

[20] Tony Levene, 'Porn Bill for couple who can't download' *The Guardian* (29 November 2008), at https://www.theguardian.com/money/2008/nov/28/internet-porn-bill-mistake

[21] *Media CAT Ltd v Adams* [2011] EWPCC 006.

[22] *Ibid* [98]–[102].

[23] The orders are named following the case where they were first granted. Such an order 'to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession'. *Norwich Pharmacal Co and Others Appellants v Customs and Excise Commissioners Respondents* [1974] AC 133 at 174.

[24] CPR r 31.17. The rules state that: '(2) The application must be supported by evidence. (3) The court may make an order under this rule only where– (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.'

[25] *Golden Eye* (*supra* n 9).

[26] *Ibid* [92]–[100].

[27] *Ibid.*

[28] *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWCA Civ 1740 [28].

[29] *Rugby Football Union v Viagogo* [2012] WLR 3333.

[30] *Mircom International Content Management v Virgin Media* [2020] FSR 110.

[31] *Viagogo* (*supra* n 29) [17]. Also note C-597/19 *Mircom* v *Telenet* [2022] ECDR 1 [136]: a request for information in the pre-litigation phase is not *per se* inadmissible, in so far as it is also justified and proportionate.

appears that the current regime for Norwich Pharmacal orders (which, as noted earlier, has a higher threshold than pre-action disclosure or third-party disclosure under the CPR) already has measures in place for the court to consider the impact on individuals' privacy. And yet, these requirements have failed to dissuade the courts from granting Norwich Pharmacal orders for copyright enforcement actions for pornography. In our view, this is because of a lack of adequate understanding of sexual privacy as a right in relation to pornography in the internet age, which in turn means that privacy and associated harms to individuals are not sufficiently understood or considered in the copyright enforcement context, despite the guidelines in *Viagogo*.

In other words, the problem stems from not conceptualising sexual privacy within the framework of the broader right to respect for private life in the context of consumption of lawful pornography online. As a result, the courts do not undertake a balancing of interests in a manner that sufficiently recognises or protects the sexual privacy of the alleged infringers. As argued elsewhere in this paper, pornography is consumed by a large proportion of the population (half of the UK adult population watched pornography in September 2020, according to an Ofcom report);[32] granting Norwich Pharmacal orders without sufficient consideration of the sexual privacy of the alleged infringers carries the risk of coerced settlements in some cases to avoid embarrassment regardless of fault, and constitutes an unacceptable intrusion into their sexual privacy rights.[33] We do not argue that the Norwich Pharmacal requirements be replaced, but that courts should recognise the concept of sexual privacy in this context, and apply the requirements in a manner that balances the sexual privacy of the individuals impacted by such actions. We have proposed some practical measures to implement this in practice so that the law affords sufficient protection for the sexual privacy of individuals in a fair and equitable manner.

2.2. The uncertain individual

Merely accessing a video on a streaming site (as opposed to actively downloading a video file to one's computer) would technically class as an infringement under UK law, which raises further issues in the context of speculative invoicing.[34] In fact, there is precedent for this in Germany, where tens of thousands of individuals received '*Abmahnung*' cease and desist letters for allegedly watching pornographic clips on the streaming platform RedTube, and offering them the opportunity to settle by paying €250 as compensation.[35] Schmitz points out that the recipients of *Abmahnung* tended to pay the settlement without consulting a lawyer, and there is a 'noticeable tendency to pay rather than challenge a claim – even in cases where the recipient is unaware of having committed an infringement'.[36] It should be fairly self-explanatory why the law must be particularly mindful to protect the interests of the individual users against such an exploitative practice.

A large volume of pornography is available on the so-called 'tube sites', such as Pornhub and RedTube.[37] Whilst these sites offered paid premium content, a substantial number of videos are also available to watch for free. There is no requirement (and in some cases, no option) of actively downloading these files to one's computer; instead, the videos are streamed directly on the browser, often without even having to sign up as a member. There is no easy way for the consumers to know whether what they are watching is an infringing copy or not. Whilst individual video files may carry general copyright notices pertaining to that work, such sites do not provide any meaningful notice to the effect that simply viewing the material (as opposed to active downloading or sharing) might breach copyright. In fact, deterring people with copyright notices against watching content available on 'free' porn sites goes against the very business model within which many websites operate.[38] It is therefore unlikely that such notices will ever be used in practice.

From a strict copyright law perspective, as already noted, the mere act of initiating the streaming of a video online without active downloading can technically constitute an infringing act.[39] In addition, videos are often uploaded by right holders themselves (rather than shared by individual users) on large pornographic video-sharing platforms, which, from a copyright perspective, will therefore be legitimate copies. These videos generally tend to be lower-quality formats, intended to entice customers into paying for premium content. This leaves the consumer with less clarity as to the legality (or lack of it) of the videos accessed from large platforms.[40] This can be contrasted with, for example, someone viewing a copy of the latest *James Bond* film on a dubious website, where it is fair to expect the reasonable person to be aware that it might be a pirated version, if for example, the film was newly released for cinema screening.

It can thus be seen that the burden of responsibility for identifying infringing material is effectively placed on the end user, who has no realistic way of ascertaining whether the specific video they are watching is a legal or pirated copy. If someone receives a letter of claim alleging infringement in specific works, there is no certain way for the individual to know whether the material they had watched – if indeed they did – was an infringing copy.[41] If the individual errs on the side of caution, they might decide to pay the settlement amount demanded in the speculative invoice. A number of people would, as mentioned

[32] According to Ofcom, 49 % of the UK adult population visited an adult content site and/or app in September 2020, equating to 26 million unique adult visitors. See, 'Online Nation: 2021 Report' (Ofcom 2021) 100, at https://www.ofcom.org.uk/_data/assets/pdf_file/0013/220414/online-nation-2021-report.pdf

[33] *Infra* Section 3.

[34] Receiving a video stream would amount to an act of copyright infringement as it would be a breach of the reproduction right under CDPA 1988, s 17, and the s 20 communication right. However, there is more than enough evidence that users do not understand that receiving streaming content in this way is an infringing act. *Football Association Premier League Ltd v QC Leisure* [2012] EWHC 108 (Ch); *Football Association Premier League v British Telecommunications Plc* [2017] EWHC 480 [38]. In addition, private copying of copyright works is not a permitted act, following the removal of CDPA 1988, s 28B, and temporary copying would not apply in this context; see CDPA 1988, s 28A. *See R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin). For an example specifically concerning an individual, see Tim Atkinson, Live Streaming: Protecting Your Copyright – A "Knock-Out" for Sky' Nelsons (19 March 2018) at https://www.nelsonslaw.co.uk/protecting-copyright-knock-sky/

[35] See, Schmitz (*supra* n 2).

[36] *Ibid*. See also *Golden Eye* (*supra* n 3), where the High Court specifically noted the potential embarrassment to the recipient of the letter, due to the subject matter of the alleged infringement being pornography.

[37] Over 6.83 million new videos were uploaded to Pornhub, one of the largest pornography platforms, in 2019. Pornhub transferred 6,597 petabytes of data (209 gigabytes per second) in 2019, with an average of 2.8 hours of content uploaded to the site every minute. See, Pornhub Insights, 'The 2019 Year in Review' (11 December 2019), at pornhub.com/insights/2019-year-in-review. These stats pertain only to Pornhub – just one of the many large pornography sites in the world.

[38] This is fundamentally because a large portion of revenues are generated through advertisements on the site, and more traffic to the site means more money for the platform. In addition, free content will lure people into paying for better quality, premium content. See, Abhilash Nair, *Regulation of Internet Pornography: Issues and Challenges* (Routledge 2019) ch 7.

[39] *Supra* n 34.

[40] This could lead to 'accidental infringement' of copyright. Whilst traditional copyright law has always adopted a strict liability approach to infringement, there have been recent calls to introduce a negligence-based doctrine premised on the reasonable person standard. See, Patrick Goold, *IP Accidents* (Cambridge University Press 2022).

[41] As noted above, several individuals who received the '*Abmahnung*' letters in Germany paid the settlement even when they were unaware they had committed an act of infringement. Schmitz (*supra* n 2).

earlier, choose to settle regardless, for fear of the details of their consumption of pornography becoming public. In such a case, it is essentially the threat of the invasion of sexual privacy that prompts the payment, rather than any acknowledgement of guilt. Simply put, the right holders are unjustly enriching themselves by holding individual's sexual privacy at ransom.

3. Pornography, obscenity and copyright

3.1. Scope of 'pornography'

The term 'pornography' notoriously lacks precision in legal definitions in the UK. Indeed, it was not until the enactment of the Criminal Justice and Immigration Act 2008 (CJIA 2008), which criminalised the possession of 'extreme pornography', that a legal definition of pornography was introduced: material 'produced solely or principally for the purpose of sexual arousal'.[42] More recently, the (now repealed) Part 3 of the Digital Economy Act 2017 provided a broader definition in the context of adult pornography, but the new Online Safety Act 2023 has followed the definition embodied in the CJIA 2008.[43] Regardless of these relatively recent developments, pornography remains a somewhat ambiguous concept. It is therefore important to be clear about what material would come under the purview of 'pornographic' for the purpose of our discussion.

We suggest that only material that would be classed as 'pornographic' under s 63(3) of the CJIA 2008, ie, works of 'such a nature that it must be reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal', be included within the scope of this discussion. This will naturally exclude sex scenes that form part of a classified film, or other artistic works which some people might use for sexual gratification. This would also mean that clearly illegal content such as indecent images of children and extreme pornography are not eligible for copyright enforcement, as they are specifically criminalised under UK law, and it would be not be equitable for a court to grant a Norwich Pharmacal order with respect to such works.[44] We also suggest that websites that do not have measures in place to age-verify their users to protect children from accessing it, and are therefore flouting UK obscenity and other relevant laws, also be denied the enforcement of copyright, as we discuss in the section below.[45] In other words, we take the view that only pornography that is both lawful to publish/distribute and for adults to consume should be eligible for copyright enforcement.

Whilst it is acknowledged that this might exclude certain content from the purview of our discussion, it is important to note that speculative invoicing practices are usually focused on pornographic websites. Further, as explained further below,[46] the internet has fundamentally changed the landscape of pornography both in terms of the nature and diversity of content as well as its widespread and often unfettered availability. It now forms a part of the sex lives of many people, rendering it uniquely different to other forms of content and media; consequently, its regulation merits a different approach in terms of the issues raised in this article.[47]

3.2. Pornography and copyright enforcement

The copyright of pornography is generally protected either as a literary work, artistic work or film. It is not the purpose of this article to question the issue of subsistence of copyright in pornographic works.[48] The law in general has traditionally been more concerned about the 'obscene' than the 'pornographic' when controlling its publication and distribution.[49] As the law generally prohibits the publication and circulation of obscene material, it could be asked whether copyright enforcement actions should be permitted for obscene works at all. Whilst this issue sits at the periphery of the core discussion in this article, it still merits consideration.

Substantive copyright law in the UK does not currently contain any specific exceptions for obscene pornographic works. However, courts tend to refuse the enforcement of copyright where it would offend against the policy of the law; for instance if the work is 'immoral, scandalous or contrary to family life', or is 'injurious to public life, public health and safety or the administration of justice'.[50] As such, copyright will not be enforced for clearly illegal content such as indecent images of children (in all its manifestations), or for content that falls under the definition of 'extreme pornography'. Case law, however, offers little definitive guidance in relation to obscene works in the context of copyright. In *Glynn v Western Feature Film Company*,[51] it was held that a sensuous adulterous intrigue would not be capable of obtaining copyright subsistence (though this must now be viewed in light of the mores of the day). There has been a lack of cases since, and the next subsequent case was nearly 80 years after *Glynn*. In *Spycatcher*,[52] it was reiterated that copyright might not subsist in a work that is created in disgraceful circumstances. However, it was mooted that a work might still be able to retain copyright protection, but that copyright which *subsists* would not be capable of *enforcement*.[53]

This latter position is particularly pertinent for internet pornography, although there has been no consideration of this aspect in UK courts from a copyright perspective. The Obscene Publications Act 1959 criminalises the publication and distribution of obscene articles, but not its consumption (except for indecent images of children and extreme pornography, which are specifically criminalised by other statutes). Therefore, courts should in theory refuse to enforce copyright in obscene material if there is, in the first place, unlawful publication or distribution, for instance where such material can readily be accessed by children, and therefore deemed 'obscene'. Following the landmark judgment in *R v Perrin*,[54] making pornographic websites available for

[42] Section 63(2), An image is 'pornographic' if it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal. This definition was later adopted in the Coroners and Justice Act 2009, s 63(3) in the context of prohibited images of children (virtual imagery).

[43] Digital Economy Act 2017, s 15(1) (repealed). The Online Safety Act 2023, s 236(1) defines pornographic content as 'content of such a nature that it is reasonable to assume that it was produced solely or principally for the purpose of sexual arousal'.

[44] *Supra* Section 2.

[45] See, *infra* Section 6.

[46] *Infra* Section 4.1.

[47] See for a critical account on how the internet has transformed pornography, Nair (*supra* n 38).

[48] There is rich literature on the topic of subsistence of copyright in pornographic works. See, eg, Ann Bartow, 'Pornography, Coercion, and Copyright Law 2.0' (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 799; Ann Bartow, 'Copyright Law and Pornography' (2012) 91 *Oregon Law Review* 1. For the position in France, where courts have held that pornography can be protected by copyright, see Kevin Bercimuelle-Chamot, 'Copyright in a film does not depend on its genre: French court also confirms that pornography can be protected' (2017) 12 *Journal of Intellectual Property Law & Practice* 461. For a cross-jurisdictional perspective, see Enrico Bonadio and Nicola Lucchi, 'Copyright and Pornography', in Enrico Bonadio and Nicola Lucchi (eds), *Non-Conventional Copyright: Do New and Non-Traditional Works Deserve Protection?* (Edward Elgar 2018) 418–431.

[49] For example, whilst pornography *per se* is not outside of protected speech in the US, obscenity does not merit First Amendment protection. *Miller v California* 413 US 15 (1973). In the UK, the Obscene Publications Act 1959, s 2 criminalises the publication and distribution of 'obscene articles'.

[50] *Hyde Park v Yelland* [2000] EWCA Civ 37.

[51] *Glynn v Western Feature Film Company* [1916] 1 Ch 261.

[52] *Attorney General v Observer Ltd* [1990] 1 AC 109.

[53] *Ibid* at 262.

[54] *R v Perrin* [2002] EWCA Crim 747.

access and download in the UK without restricting access to children (eg by using age verification) could amount to 'publishing obscene articles' contrary to s 2(1) of the Obscene Publications Act 1959.[55]

Whilst the Audiovisual Media Services Regulations 2020 brought in a legal regime that applies to UK-based pornography providers to age-restrict their customers, no such conditions have traditionally applied to foreign providers. An attempt to extend the mandatory age verification requirement to foreign providers of content was originally envisaged under Part 3 of the Digital Economy Act 2017, but this was subsequently withdrawn and has now been brought back as part of the Online Safety Act 2023, following on the Online Harms White Paper published in 2019.[56] Whilst the Online Safety Act (as and when the relevant parts come into effect) would offer more clarity regarding the obligations of content providers regarding age verification,[57] existing law per *Perrin* already means that pornography providers who do not have age-appropriate restrictions in place are technically breaching s 2 of the Obscene Publications Act 1959 by publishing obscene articles in the UK – no matter which jurisdiction they have uploaded the content from. It would therefore be inequitable for a court to grant a Norwich Pharmacal order to copyright holders of pornographic works who make their content freely available for all, including children, as it would mean allowing the enforcement of a claim stemming from the unlawful publication of a work contrary to s 2 of the Obscene Publications Act.

We have therefore proposed a change to the law that requires courts, through an amendment to s 171 of the CDPA 1988, not to allow the enforcement of copyright where the infringement occurred as a result of unlawful publication of the works in question.[58] This would also bring the enforcement of copyright broadly in line with the compelling interest of the state to protect its children, in addition to deterring unscrupulous right holders who unlawfully publish and distribute pornography from pursuing blanket speculative invoicing claims for the same works.

3.3. A right to pornography?

The jurisprudence of adult pornography and obscenity in the UK has as its primary focus the right to freedom of expression and restrictions thereof, premised on the protection of morals rather than the right to privacy of its consumers.[59] In fact, there is relatively little consideration of the right to privacy in the context of consumption of pornography. This is paradoxical, given that the consumption of pornography is something that falls squarely within one's private sphere and, we argue, forms part of one's sexual privacy; and yet, the legal arguments and considerations surrounding its regulation has almost always focused on notions of morality and speech.

The main exception to this is the relatively new genre referred to, rather inappropriately, as 'revenge pornography', which involves the non-consensual distribution of sexually explicit private images – a form of intimate image abuse.[60] However, a key distinction to be drawn in relation to intimate image abuse is that the core issue that the law is seeking to address is the privacy of and distress caused to those who feature in the images that are shared without permission, rather than the privacy of consumers of pornography.

Another category that has been subject to critique from a privacy perspective is extreme pornography, which carries a simple possession offence in the UK.[61] The extreme pornography offence, whilst referring to standards of obscenity, is largely premised on the harm – cultural[62] and physical – caused to both viewers and participants. Whilst some commentators have argued that there might be scope to challenge the criminalisation of the possession of extreme pornography on the basis of Article 8 of the European Convention on Human Rights (ECHR) – so that the offence targets the publishers and distributors rather than its consumers – this has not happened yet.[63]

In any event, our discussion is confined to pornography that is lawful for adults to consume, rather than content that is specifically categorised as illegal.[64] An individual's right to consume pornography is limited to

[55] The website in this case contained two areas: a 'teaser' area that was open to children; and an age-restricted area that could be accessed only with paid subscription. The court held that the teaser pages could be classed as obscene publication as it could be accessed by children and vulnerable young people: the content could more easily meet the obscenity test with respect to children – a 'tendency to deprave and corrupt' –under the Obscene Publications Act, s 1.

[56] See 'Online Harms White Paper: Consultation Outcome' (15 December 20201), at https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper

[57] Ofcom is the regulator tasked to draft codes and guidance on, *inter alia,* age assurance measures to be adopted by providers. See, https://www.gov.uk/government/publications/online-safety-act-explainer/online-safety-act-explainer

[58] *Infra* Section 6.

[59] The 'deprave and corrupt' test under the Obscene Publications Act, s 1, for example, is emblematic of a restriction on the right to freedom of expression on the basis of protection of morals and in practice has been used to restrict the circulation of adult pornography to children.

[60] The term 'revenge' insinuates that victims are somehow in the wrong to elicit a revengeful act, which contributes to a culture of victim-blaming. Non-consensual sharing of intimate images was first criminalised in England and Wales under the Criminal Justice and Courts Act 2015, but following the passage of the Online Safety Act 2023 the law has been reformed and intimate image abuse is now included in the Sexual Offences Act 2003, s 66B. For an analysis of the relevant Canadian law, see Moira Aikenhead, 'A Reasonable Expectation of Sexual Privacy in the Digital Age' (2018) 41 *Dalhousie Law Journal* 273. For a US perspective, see Theresa Chmara, 'Balancing Privacy and First Amendment Rights in Social Media: The Example of Revenge Porn' (Winter 2015/16) 19 *Copyright and New Media Law* 5. Copyright has been advocated as an appropriate remedy to address revenge pornography by some commentators. But this is a separate issue, and one that deals with unauthorised sharing and publication of private images, rather than consumption of pornography, and in any event pertains to the privacy of the person depicted in the image rather than its consumers. On the former, see Aislinn O'Connell and Ksenia Bakina, 'Using IP Rights to Protect Human Rights: Copyright for 'Revenge Porn' Removal' (2020) 40 *Legal Studies* 442. In the UK, non-consensual distribution of private and sexual images was criminalised by the Criminal Justice and Courts Act 2015, s 33. In a civil law context, the tort of misuse of private information provides protection to claimants, as seen in, eg, *Contostavlos v Mendahaun* [2012] EWHC 850; *AMP v Persons Unknown* [2011] EWHC 3454; and the recent *FGX v Gaunt* [2023] EWHC 419.

[61] See Abhilash Nair and James Griffin, 'The regulation of online extreme pornography: Purposive teleology (in)action' (2013) 21(4) *International Journal of Law and Information Technology* 329; Abhilash Nair, *The Regulation of Internet Pornography: Issues and Challenges* (Routledge 2019) ch 6.

[62] Clare McGlynn and Erika Rackley, 'Criminalising extreme pornography: A lost opportunity' (2009) 4 *Criminal Law Review* 245. See also, Tanya Palmer, 'Rape pornography, cultural harm and criminalisation' (2018) 69(1) *Northern Ireland Legal Quarterly* 37; Alex Dymock, 'A Doubling of the Offence?: "Extreme" Pornography and Cultural Harm', in Avi Boukli and Justin Kotze (eds), *Zemiology* (Palgrave Macmillan 2018) 165–182.

[63] See, Abhilash Nair, 'Caveat viewer: the rationale of the possession offence' (2008) 22(1&2) *International Review of Law, Computers and Technology* 157. See also, Paul Johnson, 'Pornography and the European Convention on Human Rights' (2014) 1 *Porn Studies* 299. The 2011 resolution of the Parliamentary Assembly of the Council of Europe on violent and extreme pornography and subsequent reiteration of this in the 2021 Parliamentary Assembly resolution on gender aspects and human rights implications of pornography which calls for extending the 'provisions criminalising the glorification of criminal acts to cover violent pornography', render it challenging for the Court's jurisprudence to evolve in this regard. See also, Pinto De Albuquerque J's concurring opinion in *Prianishnikov v Russia* Application no 25047/05 (ECHR, 10 September 2019), where he argues for a positive obligation on states to prohibit violent pornography.

[64] Regardless of a simple possession offence, extreme pornography will almost inevitably be classed as 'obscene' and therefore violate the Obscene Publications Act 1959 (or any future laws that proscribe the publication/distribution of obscene or harmful content).

its consumption in private: it does not extend to a right to consume pornography in public.[65] Whilst it is debatable whether unsolicited exposure to pornography causes *harm* to its viewers, it can certainly be *offensive* to many and certainly inappropriate for any children. Feinberg recognised 'profound offence' as a legitimate basis for criminalising conduct in the absence of harm, provided that the conduct in question is carried out in public.[66] But this does not apply to private conduct, as would mostly be the case with the consumption of pornography.

The harm of 'offensiveness' caused by pornography was acknowledged in the Williams Committee report, which noted that knowledge of pornography being consumed in private could also cause offence to some.[67] However, the Committee recognised the need to find a balance between individual liberties and public upset. They took the view that the offence caused to anyone due to another individual consuming pornography is not sufficient to warrant a total prohibition on its sale. By permitting the sale of pornography in licensed shops, pornography is still available to those who choose to look for it, and children and those who do not wish to consume it are automatically excluded. The position thus remains that adults have the right to access lawful pornography and consume it in private.

Our point is that the basis for a right to consumption of pornography which we set out in this article is not new *per se*. Regardless of the jurisprudential perspectives and debates surrounding the rights and wrongs of pornography generally, the right already exists, with certain restrictions, as we elaborate further below. It is, however, now time to revisit this position and examine whether the consumption of pornography impacts on rights going beyond those that have been recognised so far. We argue that the scale, prevalence and nature of consumption of pornography has radically changed since the advent of the internet, which calls for a re-examination of pornography's place in the sex lives of individuals, and consequently its intrinsic link to the right to sexual privacy.

It is certainly not the case that the right to consume pornography (and the wider issue of sexual privacy) should come at the cost of the rights of others. From a copyright perspective, the right to consume pornography in the privacy of one's home does not negate the right to enforce copyright in the work – it is still unlawful to download infringing material in the privacy of one's home, and this applies to pornography too. The problem, therefore, is not about legitimate right holders being able to pursue genuine claims of infringement of their pornographic works. Instead, our concern is with the lack of safeguards in existing copyright law to address malicious and groundless threats of infringement actions against individuals that seek to exploit their vulnerability. In particular, we are concerned that the law has not adequately recognised the concept of sexual privacy in this context, which is problematic, as set out in the section below.

4. Sexual privacy and pornography

Privacy is particularly pertinent to the consumption of pornography in multiple ways. To have the nature of one's consumption of pornography made public can reveal substantial intimate details about the individual. This is particularly so in the internet age: it is a *cliché* to state that the internet is a huge repository of pornography, catering to all tastes and preferences. In pre-internet times, access to pornography was confined to material available in physical formats such as magazines or DVDs, and it would have been very difficult for the state or a right holder to draw inferences on an individual's sexual preferences or proclivities, unless they resorted to physical surveillance. The internet has hugely transformed the nature and diversity of pornographic content, and an unprecedentedly vast variety of genres and subgenres are now available to the viewer.

People have different preferences in terms of the pornography that they enjoy, which may in turn be linked to their sexual preferences and sexual identity. For instance, if someone regularly consumes pornography depicting homosexuality, it may be possible to draw inferences, albeit inconclusively, about that person's sexual orientation or interests.[68] If the individual so wishes, these matters are, and ought to remain, deeply rooted within one's private sphere. The rich diversity of internet pornography offers individuals content that caters to their own sexual fantasies. Making one's 'porn habits' public may be tantamount to revealing one's sexual fantasies, or in legal terms, their (sexual) thoughts – something which falls comfortably within the sphere of individual fundamental rights. In fact, some people may not wish to share these pursuits even with their partners. Whilst the rights or wrongs of this could be debatable from a *moral* perspective, this is not a concern for the law: an individual is entitled to keep certain things private, even between partners.

There is recognition within the common law of breach of confidence that private information of a sexual nature implies a duty of confidence.[69] In *Argyll v Argyll*,[70] the court prevented the defendant, who was the former husband of the plaintiff and proprietor of a newspaper, from publishing details of her private life confided to him during the course of their marriage. Following *Argyll,* there is good authority for the position that information of a sexual nature could form the subject matter of an obligation of confidentiality. As noted by Thomas J, 'the protection of confidential information between husband and wife is not designed to intrude into the marital domain, but to protect it, not to break their confidential relation, but to encourage it'.[71] The law also offers broader protection to confidential information between married partners, which is the essence of the policy of law to render them incompetent to give evidence against each other in certain matters. This does not impose a duty on a married individual to confide all aspects of their private life to their partner; instead, as a natural corollary to this, the protection offered by law should also extend to the right of individuals to keep certain matters to themselves should they choose to do so, even within the institution of marriage.[72]

The liberalist argument is that individuals are entitled to 'the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among larger groups, in a condition of anonymity or reserve'.[73] This, in turn, is crucial to foster individual autonomy and dignity, which are two underlying justifications for privacy. People will not generally want these aspects of their private lives to be shared openly, which would be the case if a copyright infringement action for consuming pornography goes to court. This is regardless of whether an act of infringement has taken place or not: private information about an individual's sexual content preferences will be shared with others and even publicly, even if the person is innocent.

[65] The latter is criminalised under the Indecent Displays (Control) Act 1981, s 1, which is rarely used in practice.

[66] Joel Feinberg, *The Moral Limits of Criminal Law: ii Offense to Others* (Oxford University Press 1985).

[67] Report of the Home Office Committee (Williams Committee) on Obscenity and Film Censorship, Cmnd 7772. See also, Ronald Dworkin, 'Is there a right to pornography' (1981) 1(2) *Oxford Journal of Legal Studies* 177; TRS Allan, 'Right to Pornography' (1983) 3(3) *Oxford Journal of Legal Studies* 376.

[68] This is not to suggest that those who watch gay or lesbian pornography are necessarily of homosexual orientation. Instead, the point we are making is simply that it is possible to make reasonable predictions about one's sexual preferences based on the content they regularly watch.

[69] *Stevens v Avery* [1988] 2 All ER 477.

[70] *Argyll v Argyll* [1965] 1 All ER 611.

[71] *Ibid* at 624.

[72] See, W Wilson, 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53(1) *Modern Law Review* 26.

[73] Alan Westin, *Privacy and Freedom* (The Bodley Head 1967) 7.

It could be argued that there would be no interference with sexual privacy had the individual not consumed the pornography that they are accused of streaming, in which case no true information about their sexual preferences would be shared. However, this is not the case. Litigation may still carry the risk of exposure of consumption of other pornography. This is due to two factors: the scale of internet pornography consumption among the adult population means that there is a possibility that the alleged infringer may have consumed *some* pornography if not the particular work in question; and the prospect of these coming to light in court proceedings would be intimidating for many.[74]

As noted earlier, in most cases there is no realistic way for the user to ascertain whether the video they are streaming is a legal or a pirated copy.[75] A court proceeding would reveal the details of the works that were consumed, putting the individual in a difficult position that might lead them to settle the claim quietly to avoid the potential invasion of their privacy and the embarrassment of a court case, and/or because they do not realise that their identity (thus privacy) could be protected in litigation. Furthermore, even if the alleged infringer had not consumed *any* pornography, we would still argue that there is the potential for breach of their sexual privacy from an enforcement action stemming from a speculative invoicing letter. As we explain below, consuming pornography in the internet age is more akin to a sexual activity than a mere communicative process, and whether someone consumes pornography or not in itself should be regarded as a matter that falls within one's sexual autonomy and privacy. Contesting a speculative invoicing claim in a court would mean a disclosure of aspects of one's sex life, of which consumption of pornography (or lack of) might be part, as the discussion that follows further below will demonstrate.

4.1. Pornography and ECHR

To date, there has been relatively little consideration of the sexual privacy of consumers of pornography within the jurisprudence of the European Court of Human Rights (ECtHR), with the notable exception of the recent decision in *Chocolac v Slovakia*,[76] discussed below. One reason for this could be that, as Johnson points out, the majority of Convention countries do not criminalise the simple possession of adult pornography (with the exception of 'extreme pornography', as noted above), which naturally means there was limited scope for cases focusing on the right to privacy in the context of consumption of pornography.[77] The right to respect for private life in relation to pornography has been relied on in a few unsuccessful attempts to invoke Article 8 before the Strasbourg courts, but these were either related to the public showing of pornography or to the publication and distribution of obscene material, rather than its consumption or simple possession.

For example, in *Reiss v Austria*,[78] it was held that the public showing of obscene material for profit was not something that fell within the applicant's own 'private life'. Johnson points out that *Pay v the United Kingdom*[79] 'demonstrated the potential for interferences with the production and distribution of pornography to be successful under Article 8′, although the application was held to be inadmissible by the Court and therefore no precedent was set.[80] This case involved a probation officer who was dismissed from employment following the discovery of online images featuring the complainant engaged in male domination over submissive women and other BDSM activities. The underlying activities were not unlawful under English law, but the applicant argued that the activities as well as its public performance aspect were part of his sexual expression and orientation, and therefore should form part of his 'private life'. The ECtHR acknowledged that the activities could fall well within the scope of his private life, but did not decide on this aspect. Fundamentally the decision of inadmissibility came down to the proportionality of the applicant's dismissal in light of the sensitive nature of his work with sex offenders and the respect he ought to command from them, combined with the confidence that the public and in particular victims would place on him, which would be jeopardised by making the images available on the internet. Johnson draws the inference that Article 8 will not be applicable if the individual does not ensure that the aspects of their sexual practice remain purely private.[81] As such, it is in theory possible that the ECtHR could find that sexual expressions involving pornography that are confined to one's private sphere could be recognised as falling withing the scope of their individual rights under Article 8.

In *Chocolac*,[82] the ECtHR considered a case involving the possession of pornographic material by a prisoner serving a life sentence in a Slovakian prison. The applicant was subject to disciplinary action by the prison authorities following the seizure of pornographic material (which was essentially pictures cut out and pasted on the inside pages of a magazine), on the basis of violation of the prohibition on the possession of materials that 'endanger morality' under s 40(i) Act No 475/2005 Coll on the Execution of Prison Sentences. Following unsuccessful appeal to the Constitutional Court in Slovakia, the applicant appealed to the ECtHR. He argued that as a heterosexual male serving a life sentence with no conjugal visits permitted as per Slovakian law, pornography was a means for him to satisfy his sexual needs. As he was in a single cell, there was no question of the material being displayed publicly or causing any effect on others. The ECtHR found that the seizure of the material and consequent disciplinary sanction constituted a violation of the applicant's right to privacy.[83]

Chocolac offers some promising directions in situating the private consumption of lawful pornography within the framework of Article 8 of the ECHR. The case involved offline images, but in the context of a regulated environment of a prison. The prisoner's state of deprivation of intimate contact was long-term, if not permanent, and the material was kept in the applicant's private sphere and meant exclusively for his individual and private use within that sphere. Despite the various arguments advanced by the authorities on matters of morality, potential to offend public opinion, and potential for 'aggression' stemming from the consumption of pornography in prison, the Court noted that there was no evidence that the consumption of the material in question would pose any such risk. Whilst the Court made observations to the effect that the rights of the applicant cannot be subject to automatic disenfranchisement simply because it might offend public opinion, considering that 'tolerance and broadmindedness are the acknowledged hallmarks of democratic society',[84] it did not examine the material scope of Article 8 in the context of possession of pornography in any significant detail. The Court noted an absence of an assessment of proportionality of the restriction of Article 8 either at legislative level (resulting in the prohibition on the possession of pornography in prison), or at an individual level whereby a case-by-case assessment could be made. Whilst the Court reiterated its traditional position that contracting states remain at liberty to define what might contravene 'morality' by exercising their margin of appreciation, it found that, in *Chocolac*, this had been exceeded, which meant that there was a violation of Article 8.[85] However, the

[74] As noted at *supra* n 32, almost half of UK adult population consumed online pornography according to the Ofcom report.
[75] *Supra* Section 3 above.
[76] *Chocolac v Slovakia* Application no 81292/17 (ECHR, 7 July 2022).
[77] Johnson (*supra* n 63) 311.
[78] Application no 23953/94 (ECHR, 6 September 1995).
[79] Application no 32792/05 (ECHR, 16 September 2008).
[80] *Supra* n 67, 311.
[81] *Ibid* 312.
[82] *Chocolac v Slovakia* (*supra* n 76).
[83] *Ibid* [56].
[84] *Ibid* [52].
[85] See, Andrej Beles, 'ECtHR: Chocolac v Slovakia' (2022) 6(2) *Bratislava Law Review* 129.

Court missed an opportunity to determine the material scope of Article 8 for the consumption of adult pornography, and so the lacuna on this aspect still remains.

ECtHR jurisprudence has been more direct and helpful when it comes to recognising the sanctity of sexual practices carried out in private.[86] There is a plethora of cases in ECtHR jurisprudence that uphold the right to sex life and sexual orientation, notably in the context of LGBT rights.[87] In *ADT v the United Kingdom*, the Court ruled that the 'mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life'.[88] An issue in this case was whether the existence of video recordings of the activities would exclude them from the scope of private life, but it was decided that as there was no likelihood of the tapes being made available to the public there was no justification for prosecution based on protection of public health or morals, and the activities were declared to be 'private'. However, this case did not pertain to the recording of the activities per se, and instead focused on the activities as such.

In the UK, *Mosley v News Group Newspapers Ltd (No 3),*[89] concerned with the clandestine recording and publication of sexual activities (involving non-conventional sexual activities) of the then President of the *Federation Internationale de l'Automobile*, the Court held that there was no public interest or other justification for the non-consensual recording or the publication of the video footage and it therefore constituted an invasion of Article 8 right of the appellant. Whilst the case pertained to the recording and publication of the individual's sexual activity, it was essentially concerned with the privacy of the individual who featured in the video footage, rather than the privacy of those who consumed the material. This is an important distinction: the law has traditionally favoured and recognised the privacy of individuals who are depicted in the image, which does not seem the case for the consumers of pornography.

Apart from privacy, in a few cases the ECtHR has considered applications involving pornography from the perspective of the right of freedom of expression under Article 10. These are worth mentioning briefly. Again, the ECtHR has been reluctant to narrow the wide margin of appreciation of contracting states to determine the standards for the protection of morals in the domestic context as the basis for restricting freedom of expression, which has proven to be a significant impediment for applications involving pornographic works.[90] This position has not really shifted since the pre-internet-era landmark decision in *Handyside v United Kingdom*[91] and the subsequent decision in *Muller v Switzerland.*[92] Whilst in some instances the Court found the restrictions imposed by the state as violating the rights of the applicants, these involved material that were determined to be works of artistic merit (eg *Adkas v Turkey,*[93] where the material was deemed to represent ideals of 'European literary heritage') or political in nature (eg *Vereinigung Bildender Künstler v Austria*,[94] where the material was deemed to constitute political 'counter-attack' against a party) rather than pornographic works.

Kaos GL v Turkey[95] involved the confiscation of a magazine published by the applicant (an association promoting the rights of the LGBT community) that contained certain articles and images that were published as part of a 'pornography' feature. The ECtHR deemed this to be a disproportionate interference with the exercise of the applicant's right to freedom of expression. It is arguable that *Kaos* was in some way an attempt to narrow the margin of appreciation of states in the context of pornography and freedom of expression. However, the rationale of the Court was premised on the methods adopted by the state, ie confiscating and withholding publication to the whole population (rather than requiring measures to prevent access to specific groups of people, ie minors), which was found to be excessive and disproportionate, rather than casting any doubt on the ability of the state to determine society's moral standards.

The subsequent case of *Pryanishnikov v Russia*[96] also found that there was a violation of the right to the applicant's freedom of expression due to state's disproportionate refusal to grant a film reproduction license, as well as a failure to balance the applicant's Article 10 right with the right to protect public morals and the rights of others.[97] A common theme in these cases is that, as with privacy, there has been no significant change to the Court's traditional stance regarding the state's wide margin of appreciation to determine the standards of 'protection of public morals' in the context of pornography *per se*. In any event, *Kaos* and *Pryanishnikov* pertained to the publication/distribution of pornography rather than its consumption.

In a nutshell, the Strasbourg courts' position in relation to pornographic works (as opposed to works that were determined to be artistic or political representations) is one of largely consistent reluctance to intervene on state restrictions on the production, distribution or possession of pornographic (or obscene works),[98] with some limited exceptions, as seen above in *Chocolac*. Whilst sex life and sexual expression are viewed by the Strasbourg courts as falling within the remit of the right to respect for private life, and have thereby been granted protection, as noted above,[99] there is nothing in the ECtHR jurisprudence that explicitly recognises the consumption of adult

[86] This should then mean that if the consumption of adult pornography is recognised as a sexual practice, the ECHR protections would naturally become applicable.

[87] See eg *Norris v Ireland*, Application no 10581/83 (ECHR, 26 October 1988); *Modinos v Cyprus* Application no 15070/89 (ECHR, 22 April 1993); *Dudgeon v UK* Application no 7525/76 (ECHR, 22 October 1981); *ADT v the United Kingdom* Application no 35765/97 (ECHR, 16 March 1999); *EB v France* Application no 43546/02 (ECHR, 22 January 2008); *X and others v Austria* Application no 29010/07 (ECHR, 19 February 2013).

[88] *ADT* (*ibid*). See also, *Dudgeon* (*ibid*).

[89] *Mosley v News Group Newspapers Ltd (No 3)* [2008] EWHC 1777 (QB). See also the ECtHR decision in *Mosley v the United Kingdom* Application no 48009/08 (ECHR 10 May 2011).

[90] For a critique of the ECtHR's reluctance to accept a uniform concept of morals across contracting states, see Christopher Nowlin, 'The protection of morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002) 24(1) *Human Rights Quarterly* 264.

[91] *Handyside v United Kingdom* Application no 5493/72 (ECHR, 7 December 1976).

[92] *Muller and others v Switzerland* Application no 10737/84 (ECHR, 24 May 1988).

[93] *Akdas v Turkey* Application no 4010 (ECHR, 16 February 2010).

[94] *Vereinigung Bildender Künstler v Austria* Application no 68354/01 (ECHR, 25 January 2007).

[95] *Kaos GL v Turkey* Application no 4982/07 (ECHR, 22 November 2016).

[96] *Pryanishnikov v Russia* Application no 25047/05 (ECHR, 10 September 2019).

[97] See, Dirk Voorhoof, 'European Court of Human Rights: *Pryanishnikov v Russia*' (2019), IRIS Merlin: European Audiovisual Observatory 2019-9/1, at https://merlin.obs.coe.int/article/8670#:~:text=The%20ECtHR%20found%20that%20the,over%201%20500%20erotic%20films. The concurring opinion of Pinto J in *Pryanishnikov*, which argued that the Court's current 'permissive approach' to pornography conflicts with international norms and that contracting states have a positive obligation to prohibit violent and certain forms of pornography, has attracted academic debate. See, Tara Beattie, 'Pryanishnikov v Russia (Application no 25047/05, judgment of 10 September 2019: Setting the foundations for human rights discourse on pornography' (2019) 12(6) *European Human Rights Law Review* 654. See also, Argyro Chatzinikolaou, 'Pryanishnikov v Russia: The production and distribution of erotic and pornographic material under Article 10 of the ECHR' *Strasbourg Observers* (19 November 2019), at https://strasbourgobservers.com/2019/11/19/pryanishnikov-v-russia-the-production-and-distribution-of-erotic-and-pornographic-material-under-article-10-of-the-echr

[98] For a critique on the evolution (or lack of) the ECHR jurisprudence in the context of pornography, see Johnson (*supra* n 63).

[99] For example, *Norris v Ireland; Modinos v Cyprus; Dudgeon v UK; ADT v the United Kingdom* (*supra* n 87).

pornography as a sexual activity and therefore deserving protection under the right to respect for private life. There was an opportunity to consider this in *Chocolac,* but unfortunately this did not occur.

The courts' failure in this regard could be due to a lack of appreciation of the concept of sexual privacy in the context of consumption of pornography, and a failure to treat the latter as part of an individual's sex life. In other words, a more nuanced understanding of consumption of adult pornography could well mean a paradigm shift in the way courts interpret and balance the right to privacy of individual consumers. Therefore, we now turn to the issue of what such a privacy right should look like and why this should be treated as a part of one's sex life, which will in turn be used to develop a construct that will assist courts in forming a greater understanding of the right to sexual privacy in the context of pornography. Recent scholarship on sexual privacy by Danielle Citron in the US provides us with a starting point for situating sexual privacy in the context of consumption of pornography.[100]

4.2. Sexual privacy: a wider approach

The seminal work of Warren and Brandeis, which discussed privacy in the context of intimate details family and domestic lives, laid a solid foundation for a new right to privacy in the US, arguing for the recognition in law of an individual's inviolable right to determine for themselves the extent to which the details of their intimate life is known to others.[101] For Warren and Brandeis, the breach of an individual's privacy results in emotional harm that is more profound than any pecuniary or physical harm that they may suffer. Building on this, Citron's work focuses on the concept of sexual privacy, which she describes as 'the social norms governing how we manage the boundaries around our intimate lives'.[102] According to Citron, sexual privacy is 'foundational for the exercise of human agency and sexual autonomy', and it should mean that individuals can decide 'if and to what extent their intimate information will be revealed, published, or disclosed'.[103] Whilst Citron focuses mainly on intrusion of privacy through non-consensual sharing of private images, voyeurism, upskirting, etc., we would extend her argument, applying it equally to one's right to privacy with respect to the consumption of lawful pornography.

Citron persuasively argues that sexual privacy should be at the top of the hierarchy of privacy rights. Yet, it has not received the recognition it deserves from the law in the context of consumption of pornography. The law has endeavoured to maintain pace with developments in technology and the challenges it poses for individual privacy in other areas. For instance, data protection laws offer strong safeguards for the protection of personal data, with additional safeguards provided for 'special categories of data', including data concerning an individual's sex life and sexual orientation.[104] Therefore, if the information pertaining to one's sexual preferences were to be processed as 'personal data', it would automatically qualify for a number of additional protections under data protection laws.[105] This is, in essence, the concept of 'informational privacy' ie, that individuals should be able to retain control over their personal data even when it is in the hands of third parties, as promulgated by Westin in the context of privacy and developed further within the more modern digital context by Lloyd.[106] Similarly, intimate image abuse also now carries several criminal and civil remedies to protect victims against non-consensual taking and sharing of sexual and private imagery, as noted earlier.[107] So, whilst the law would protect personal information relating to sex life (broadly defined) from a data protection perspective and other technology-facilitated abuse, it is an anomaly that no effective safeguards exist against the exploitation of an individual's privacy in relation to the consumption of lawful pornography in private, which could reveal deeply intimate details of one's sexual preferences and broader sex life.

The nature and diversity of online pornographic content means that it can no longer be equated with pre-internet times. Why the consumption of pornography is no longer just a communications issue, but instead is more akin to sexual activity and therefore merits the protections under established broader privacy laws, merits further discussion.

4.3. Internet pornography: is it just 'speech'?

Traditionally, pornography was seen purely as a 'communications issue', and often as 'low value speech' in previous discourses on regulatory approaches.[108] It still merited protection regardless of the value of speech, due to the nature and breadth of the right to freedom of expression. Internet pornography, however, has rendered the consumption of pornography no longer just a speech issue. As we set out below, it is very much linked to, and intrinsically so, to the sex lives of its consumers in many respects, and therefore has implications for individual right to privacy.

Our legal reconceptualisation has its basis in recent analyses of pornography. Altman contrasts modern-day internet pornography with older forms of 'pornography' that had some level of literary or artistic value – such as *Lady Chatterley's Lover,* which was predominantly a literary work but attracted an obscenity prosecution, or older pornographic films that contained a plot, however superficial, and were available as cassettes, DVDs, etc. Contemporary internet pornography does not tend to have any such value, and is described by Altman as content purely produced for the sexual gratification of the viewer, rather than possessing any literary or artistic value.

We do not entirely agree with his observation on the literary value of internet pornography for two reasons. Firstly, some hardcore pornography online still has a 'plot', albeit weak or superficial. Secondly, and more importantly, the value that Altman attributes to these works, especially in relation to the older pornographic videos, is inherently subjective in nature[109] – and, in any event, determining its value is irrelevant to its status as speech. The only instance where a judgment as to its 'literary, political or scientific value' might be pertinent from the US perspective espoused by Altman is in the context of an 'obscene work'; this is in opposition to broader pornography, as envisaged in the US standard for finding obscenity set out in *Miller v California.*[110] Just as copyright law is not concerned with the literary value of a work (provided that it is not *de minimis*), free speech protections do, and should, apply to lawful pornography regardless of its literary or artistic value.

[100] Danielle K Citron, 'Sexual Privacy' (2019) 128 *Yale Law Journal* 1870.

[101] Danielle K Citron, 'The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life' (2019) 42 *Columbia Journal of Law & the Arts* 383.

[102] *Ibid.* See also, Citron (*supra* n 100).

[103] *Ibid.*

[104] General Data Protection Regulation, Art 9.

[105] This was noted, albeit not considered in any detail, in the case of *Mircom* (*supra* n 12) in the context of the GDPR.

[106] Westin (*supra* n 73); Ian Lloyd and Moira Simpson, *Law on the Electronic Frontier: Hume Papers on Public Policy 2.4* (EUP 1994) ch 2.

[107] *Supra* n 60. See also, Tsachi Keren-Paz, *Egalitarian Digital Privacy: Image-based Abuse and Beyond* (Briston University Press, 2023); Clare McGlynn *et al*, '"It's torture for the soul": The Harms of Image Based Sexual Abuse' (2021) 30 (4) *Social and Legal Studies*, 541; Clare McGlynn and Ruth Houghton, '"Beyond 'Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25(1) *Feminist Legal Studies* 25.

[108] See, Andrew Koppelman, 'Is pornography "speech"?' (2008) 14(1) *Legal Theory* 71.

[109] This subjectivity can indeed be seen in trials and debates on 'obscenity' itself, ie, where content regarded as obscene by some is deemed to be non-obscene and therefore acceptable by others. This is, in fact, one of the biggest challenges for obscenity prosecutions, as demonstrated in *R v Penguin Books* [1961] Crim LR 176 and more recently in *R v Peacock* (unreported, 6 January 2012 Southwark Crown Court), where the jurors reached a different conclusion to the CPS regarding the obscene nature of the content involved.

[110] *Miller v California* 413 US 15 (1973).

Nonetheless, Altman's point regarding the changed landscape of pornography in the internet context is valid, and pertinent for our discussion. As noted earlier, the internet has significantly changed the nature and availability of pornography, and the way people consume it has shifted accordingly. Pornography is no longer a one-off or occasional 'adventure' that one pursued from top-of-the-shelf magazines, or cassettes and discs that were only available to purchase from sex shops. The internet has redefined the prevalence and accessibility of pornography, as well as the nature and diversity of its content.[111] It now permeates people's lives in a much more significant and unprecedented manner, and is more likely to be part of an individual's sex life: the fact that a significant number of adults watch pornography would suggest that this might in fact be the case for many.

As noted earlier, a study in the UK revealed that almost half of the adult population (49 %) in the UK visited an adult content site and/or app in September 2020, equating to 26 million unique adult visitors.[112] With the growing popularity of pornography has come greater interest in the impact of pornography on its viewers – ranging from its effects on the brain to the direct harms it causes to its audience as well as indirectly to others, particularly children. Some studies have found that regular and habitual consumption of pornography leads to shifts in interest in sex, challenges in maintaining healthy sexual relationships, and Gutman-like progression, ie the seeking of more and progressively hardcore content with time.[113] However, the current literature does not draw any firm conclusions of the harm caused to viewers by adult pornography. As Ortiz and Thompson point out, although there is substantial empirical literature on the effects of pornography consumption, 'generalising the findings to simple conclusions' is difficult: the effects are dependent and specific to the individual, and not everyone is affected the same way (with both positive and negative outcomes reported).[114] What is clear from the literature, however, is that pornography does have an impact on the brain, negative or otherwise.

Modern-day internet pornography is so prevalent in the lives of many adults that it has become a significant means by which some people obtain sexual gratification. Consuming pornography should thus be treated as a form of sexual activity, and by implication, part of one's sex life. It may not be the norm for many others, and some commentators raise genuine concerns about the misogyny and portrayal of women in internet pornography.[115] It is acknowledged that these are pressing issues that go to the heart of the pornography industry – especially regarding the welfare and treatment of the women involved in it – and merit appropriate responses. However, it is not the purpose of this paper to examine the rights and wrongs of modern-day pornography, or to examine the psychological or clinical impact of pornography: the fact remains that within the legal systems of most Western democracies adult pornography is widely regarded as a form of expression and as such constitutes protected speech. This means that the law must respect the autonomy of those who choose to consume lawful adult pornography for sexual gratification.

Some may argue that pornography serves no meaningful purpose for one's growth or development, and it may even be detrimental to healthy sexual relationships between partners in some instances. But this is not really a legal argument. Many sexual practices exist outside of pornography within the privacy of one's bedroom, with or without partners, and these are not the law's concern unless it causes harm to others or to self. The sanctity of what happens in one's bedroom is preserved via the right to privacy: the law assumes that autonomous individuals have the liberty to choose what they consider to be right for themselves.

There is currently a lack of conclusive evidence that lawful pornography causes sufficient harm to others to warrant prohibition of its private consumption, but there is now a growing body of evidence that points to some harm to self, although this falls too short of the threshold set in the law, as established in *R v Brown,*[116] to merit prohibition. Many other legitimate activities in life carry a risk of harm to individuals: consumption of alcohol, for instance, is known to be harmful if consumed excessively or regularly, but the law does not prohibit its consumption by adults. Instead, the law prohibits the sale to underage persons, and advocates awareness strategies such as warnings on the cover or label to educate consumers regarding the harms of excessive consumption. This, in turn, maintains individual autonomy to make one's own decisions.

The regulatory approach to the consumption of pornography should be no different, which in the context of this discussion means that its consumption should be restricted to adults and not children, and any possible harms stemming from excessive consumption of pornography should be addressed through appropriate strategies such as education and awareness. There is currently no legal basis to reject lawful pornography as a legitimate sexual activity for adults or prohibit its consumption in private. As long as the law continues to permit adults to consume adult pornography, the law has to provide sufficient safeguards against deliberate and malicious violations of their sexual privacy stemming from its consumption.

An argument could be made that treating the consumption of pornography as a sexual 'activity' rather than a communicative process could be problematic as other forms of speech can be considered 'activities'. For instance, if comic books make readers laugh, should it then be considered an activity and therefore merit more protections than what is afforded to other literary works? In our view, this is a flawed argument. Pornography is unique among all other forms of speech; in the internet age, it performs a function that is so fundamentally linked to people's private lives, the scale and prevalence of which means that there is no realistic comparison that can be made to other forms of speech. In fact, it is much more than just 'speech' by any definition of the word. In any event, it is not its value as 'speech' that qualifies pornography for special treatment from the perspective of individual users' rights, but the interrelationship it has with the individual as a method for sexual gratification/activity, which in turn positions it comfortably within the realm of one's private sex life.

We have moved beyond the notion that pornography should be a *crimen carnis*.[117] Attitudes toward sex have changed over time – the decriminalisation of homosexuality, and societal and legal recognition of

[111] See, Nair (*supra* n 38).

[112] Ofcom (*supra* n 32) 100.

[113] See, Simone Kühn and Juergen Gallinat, 'Brain Structure and Functional Connectivity Associated with Pornography Consumption: The Brain on Porn' (2014) 71(7) *JAMA Psychiatry* 827; Aline Wéry and Joel Billieux, 'Online sexual activities: An exploratory study of problematic and non-problematic usage patterns in a sample of men' (2016) 56 *Computers in Human Behavior* 257; Kathryn Seigfried-Spellar and Marcus Rogers, 'Does deviant pornography use follow a Guttman-like progression?' (2013) 29(5) *Computers in Human Behavior* 1997.

[114] Rebecca Ortiz and Bailey Thompson, 'Content Effects: Pornography and Sexually Explicit Content' in Patrick Rossler (ed), *The International Encyclopaedia of Media Effects* (Wiley-Blackwell 2017) 1–12.

[115] See Fiona Vera-Gray, Clare McGlynn, Ibad Kureshi and Kate Butterby, 'Sexual violence as a sexual script in mainstream online pornography' (2021) 61(5) *The British Journal of Criminology: An International Review of Crime and Society* 1243. See also more generally on pornography, Catherine MacKinnon, 'Pornography as defamation and discrimination' (1991) 71 *Boston University Law Review* 793; Andrea Dworkin, *Pornography: Men Possessing Women* (Women's Press 1981); Susan M Easton, *The Problem of Pornography: Regulation and the Right to Free Speech* (Routledge 1994); Catherine MacKinnon, 'Pornography as Trafficking' (2005) 26(4) *Michigan Journal of International Law* 993. There is also a counter-narrative, including from some feminist scholars, that opposes the premise that pornography simply silences and oppresses women, and instead it can also represent the liberation of women. For an excellent analysis of these opposing views, see Mari Mikkola, *Pornography: A Philosophical Introduction* (Oxford University Press 2019) 197–231.

[116] *R v Brown* [1993] UKHL 19.

[117] Immanuel Kant, *Lectures on Ethics* (Methuen 1930; trans L Infield) 169–171.

alternative sex practices[118] all provide ample examples. Internet pornography has also evolved over time: from traditional websites offering images and short video clips, modern-day internet pornography now facilitates a level of interactivity that was previously inconceivable. Performative information is breaking down of barriers to sex.[119] Essentially, the manner of the development of internet pornography – namely, the interactivity and the fact that it has become a sexual activity for some people – mitigates or renders moot the issues raised by more mainstream theorists. The development of informatic flows and actions of the individual means there is a need to consider online pornography in a different light. It is no longer passive information, but part of an interactive action by an individual, and we argue that it should be recognised by the law as a sexual activity and therefore an inherent part of the sexual privacy of individuals. Given how the current speculative invoicing model for copyright interferes with the sexual privacy of the individuals, it is no longer defensible for the law to allow the *status quo* to continue.

In the next section, we examine the limits of the current copyright law in this context, which will demonstrate the need for the solutions, which are proposed in the subsequent section.

5. Boundaries of privacy and copyright

As already noted, the sexual privacy of consumers of pornography has received only limited consideration within ECtHR jurisprudence. Existing copyright law jurisprudence does not provide any direct guidance to address the specific issues raised in this article. Copyright is an exclusionary right granted by s 1 of the CDPA 1988, which states that copyright is a property right. Numerous checks and balances exist within statute and case law, but none of these specifically addresses the privacy of the alleged infringers in the context of our discussion. Privacy has been primarily the concern of laws outside of copyright although, as with any statute, the CDPA should be interpreted in a way that is compatible with the ECHR rights.[120]

There are in fact only two provisions within the CDPA 1988 that relate to privacy. One of those (s 85) is in Chapter IV, which deals with authors' moral rights provisions.[121] However, this provision has been of limited use. Instead, because of the rise of case law dealing with the privacy rights of individuals in other contexts, in the UK courts the emphasis has been on the direct use of the Human Rights Act 1998 in conjunction with the common law of breach of confidence. The only other provision (s 171) states that the CDPA 1988 should not interfere with public interest concerns. This provision allows for the courts to come to a decision about not upholding copyright in a work due for public interest reasons (as defined by the courts).[122] These cases, however, merely state that there are public interest situations in which copyright should not be enforced and, in any event, does not apply to the privacy of the alleged infringers.[123]

In the context of this discussion it is also worth considering the fair dealing provisions found in Chapter III of the CDPA 1988. These are permitted acts, which essentially grant exemptions for the absolute rights provided by the statute. Cases such as *ProSieben*[124] and *Hubbard v Vosper*,[125] which set out the basics of how to apply fair dealing provisions, merely state that there are public interest situations where copyright should not be enforced and does not apply to the privacy of the alleged infringers that we highlight in this article.[126] In essence, we are left with rules that do not deal with the specific and unique issues relating to the enforcement of copyright from the perspective of the alleged infringers' right to privacy, which are particularly pertinent in relation to pornographic works.

Traditional copyright law in the UK faces a structural problem in attempting to deal with privacy. In the UK, the legal conception of privacy primarily arises from the ECHR, and more recently the Charter of Fundamental Rights (CFR). Balancing conflicting rights within the human rights framework – eg, the right to freedom of expression versus the right to respect for private life – has been a predominant means of resolving disputes in ECtHR jurisprudence. But, despite much anticipation, these have had limited application within the context of privacy and intellectual property rights. The approach of the ECtHR has ultimately led to changes in the ways in which UK courts deal with privacy concerns more generally, most notably by creating a new common law tort of misuse of private information, but in the context of intellectual property rights these have been largely focused on cases concerning celebrities.[127] For instance, the ECtHR provided the leading judgment on privacy rights in *von Hanover*,[128] which concerned the distribution of photographs of Princess Caroline of Monaco. However, a key distinction to bear in mind is that the ECtHR cases essentially dealt with the right to privacy of the individuals featured in the photographs (ie copyrighted works), rather than the *privacy of the alleged infringers* of copyright works, which is our focus. The general principles set out in such cases should in theory be helpful in protecting the right to privacy of the alleged infringers of pornographic works facing threats of litigation, but this has not happened.

However, the limited interaction of human rights with intellectual property law has seen some changes due to recent developments in the CJEU, which now embraces more keenly the CFR within the field of IP. In *Promusicae v Telefonica*,[129] the CJEU identified at [65] the need to balance fundamental rights – ie the right to respect for private life on the one hand, and the rights to protection of property and to an effective remedy on the other. The CJEU has made the same argument regarding the release of private information (IP addresses) of infringing subscribers.[130] As part of a proportionality balancing test, the CJEU required that national courts weigh competing interests when releasing the private details of ISP subscribers.[131] In *Spiegel Online GmbH*,[132] the

[118] *R v Peacock* (*supra* n 109) is a good example of how societal attitudes to sex and sexual practices have changed generally. In this case, the accused was prosecuted on six counts under the Obscene Publications Act, which involved material depicting urination, fisting, whipping, etc. The jury unanimously found him not guilty on all counts, essentially rejecting the CPS argument that the depictions of these activities are obscene.

[119] Foucault identifies the barriers the study of sex itself has caused – again, the rise of current pornographic trends would mitigate much of the critical empiricism that Foucault brought to the table in his work. Michel Foucault, *The Will to Knowledge: The History of Sexuality* Vol 1 (Penguin, 1990; trans R Hurley).

[120] Human Rights Act 1998, s 3. See, *Duchess of Sussex v Associated Newspapers Ltd* [2021] ECDR 13.

[121] CDPA 1988, s 85.

[122] *Ashdown v Telegraph* [2001] 3 WLR 1368.

[123] *Lion Laboratories v Evans* [1985] QB 526.

[124] *Pro Sieben Media AG v Carlton UK* [1999] 1 WLR 605.

[125] *Hubbard v Vosper* [1972] 2 QB 84.

[126] See CDPA 1988, s 171(3) and discussion in Section 2 *supra*.

[127] See, Rebecca Moosavian, 'Charting the journey from confidence to the new methodology' (2012) 34(5) *European Intellectual Property Law Review* 324.

[128] *Von Hannover v Germany* [2004] EMLR 2.

[129] C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271.

[130] C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2012] 2 CMLR 42. This is a preliminary ruling case from the *Högsta domstolen* (Sweden), which questioned when the release of personal information was required. The CJEU stated that legislation 'enables the national court seized of an application for an order for disclosure of personal data, made by a person who is entitled to act, to weigh the conflicting interests involved, on the basis of the facts of each case and taking due account of the requirements of the principle of proportionality'. See [59] and [61].

[131] For more details, see discussion below *infra* Section 6.

[132] C-516/17 *Spiegel Online v Volker Beck* [2019] ECDR 24. The case is part of similar case law in the arena of IP and fundamental rights; see C-476/17 *Pelham GMBH v Hutter* [2019] EU:C:2019:624, [2020] FSR 6 [165]; C-70/10 *Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)* [2011] EU:C:2011:771, [2012] ECDR 4 [43]; C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] EU:C:2012:85 [41]; and C-314/12 *UPC Telekabel Wien* [2014] ECDR 12 [61]).

CJEU stated that balancing within the Information Society Directive 2001 must '… rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union'. It was also mentioned that IP rights should not be treated as inviolable.[133]

Following *Spiegel,* there is broad recognition by the CJEU of the principle that copyright law is not above the rights granted under the CFR. However, despite these developments, the law continues to disappoint when it comes to adequately protecting the privacy of the alleged infringers for pornographic works. This, as we have argued, is due to a fundamental lack of appreciation of sexual privacy in the context of consumption of adult pornography, and it is about time the courts reflected on this in order to provide a better balance between copyright interest and the sexual privacy of individuals.

6. Way forward

It should be clear by now that there is a significant impact on individuals' right to privacy stemming from speculative copyright enforcement actions for pornographic works. We have demonstrated a sound basis for arguing that the current regime, which allows the exploitation of individuals' vulnerabilities through the speculative invoicing model, should be regarded as a breach of their right to sexual privacy. We have also reiterated that copyright remains the appropriate regime for protecting pornographic works in terms of subsistence of the right. However, the current enforcement regime for copyright is heavily imbalanced to the detriment of consumers of pornographic material online. Maintaining the *status quo* in this regard is no longer tenable. Following the CJEU case law in *Spiegel Online GmbH*,[134] there is now recognition of the principle that copyright is not inviolable and does not supersede the fundamental rights granted under the Charter, of which the right to privacy is an important one.

Privacy, of course, is not an absolute right. For instance, the ECHR specifically sets out the circumstances in which the right to privacy can be restricted, including 'for the protection of rights and freedoms of others'.[135] Thus, the right to privacy of the individual will not provide a successful justification for viewing indecent images of children due to the harm to children inherent in its making.[136] Similarly, if an individual has infringed copyright by consuming pornography, their right to privacy does not prevail over the right holder's economic interest in protecting their work. It is not our suggestion that privacy should supersede copyright in enforcement actions; instead, the argument is that a conceptual understanding of sexual privacy in the context of consumption of pornography is fundamental to reaching fair outcomes in applying existing law, which has been missing in the copyright jurisprudence.

The fundamental change we propose, following the discussion above, is that the courts recognise the consumption of pornography in the internet age as inalienably linked to the sexual privacy of individuals. This would naturally mean a radically new perspective, while applying the Norwich Pharmacal principles outlined in *Viagogo* as to how the implications on the right to privacy of the alleged infringers are assessed.[137] As sexual privacy sits at the top of the hierarchy of privacy rights,[138] it is imperative that the consideration and balancing of privacy rights should be approached primarily through the lens of sexual privacy of the affected individuals. In order to provide clarity and consistency of approach, a Practice Direction that clearly requires the consideration of sexual privacy in certain third-party disclosure applications for copyright infringement cases would be constructive. This could require courts to consider the sexual privacy of the alleged infringer vis-a-vis the copyright interest of the right holder for pornographic works.

By limiting this to consideration of pornographic works, copyright law will remain in conformity with the Berne Convention 1886[139] of which the UK is a member, and subsequent international agreements.[140] In accordance with the three-step test of the Berne Convention,[141] the ordinary interests of the copyright holder cannot be prejudiced, and any exceptions need to be kept minimal. The Practice Direction should essentially require that the interest of the copyright holder (or other interested third party) is to be balanced with the sexual privacy of the alleged infringer, where infringement is alleged of a pornographic work. In order that the process is meaningful and efficient, this should be carried out during third-party disclosure order proceedings before claimants are allowed to obtain the identity of the alleged infringers. In doing so, cases such as *Golden Eye*[142] would require a more focused consideration by courts of the potential impact that third-party disclosure orders will have on the sexual privacy of the alleged infringers.

Further, we also propose an amendment to s 171 of the CPDA 1988 to deter copyright enforcement of obscene works that are unlawful to publish in the UK. As noted earlier, the current copyright enforcement regime allows right holders to publish obscene pornography in the UK without measures such as age verification in place to prevent children's access, thereby breaching s 2 of the Obscene Publications Act 1959.[143] It is with this in mind that we propose a provision to disallow the enforcement of copyright with regard to such works. This would insert a specific reference to pornographic works in s 171, as follows:

> 'Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest, [in pornographic works] or otherwise.'

Together, these two actions will enable courts to take a consistent approach in providing a fair balance between the interests of the alleged infringer and the existing right holders. This will not unfairly prejudice the interests of copyright holders more generally. It will, instead, allow genuine right holders to enforce their copyright interest through *bona fide* actions, whilst deterring unscrupulous claimants, whose current *modus operandi* relies on exploiting the sexual privacy of individual users, from pursuing speculative infringement actions.

7. Conclusion

The concept of a right to sexual privacy has not received the recognition it deserves in the context of consumption of pornography. This has led to particularly harsh outcomes for individual consumers of pornographic content in copyright enforcement actions that rely on a speculative invoicing model. As this article has shown, this has resulted in the mere threat of litigation forcing some individuals to settle to avoid

[133] *Spiegel Online* (*supra* n 32) [56].
[134] *Spiegel Online* (*supra* n 132).
[135] ECHR, Art 8(2).
[136] There is near-universal consensus in the literature that the consumption of child sexual abuse material causes harm to children. This principle is at the core of specifically criminalising the production, distribution and possession of child sexual abuse material. For a comprehensive study, see Alisdair Gillespie, *Child Pornography and the Law* (Routledge 2012).
[137] *Supra* Section 2.
[138] Citron (*supra* n 100).
[139] Berne Convention 1886, Art 9(2).
[140] The test is also in TRIPS 1994, Art 13 and WIPO Copyright Treaty 1996, Art 10.
[141] Art 9(2): 'It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in [1] certain special cases, provided [2] that such reproduction does not conflict with a normal exploitation of the work and [3] does not unreasonably prejudice the legitimate interests of the author'. Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as revised in Paris on 24 July 1971 and amended on 28 September 1979. .
[142] *Golden Eye* (*supra* n 3).
[143] *Supra* Section 3.2.

the intrusion into their sexual privacy.

For this reason, copyright infringement actions in pornographic works should be subject to more rigorous checks and balances. This will be achieved by first of all recognising sexual privacy as a protectable right in the context of consumption of pornography that is lawful for adults to consume. This would be particularly pertinent whilst applying the Norwich Pharmacal principles and for other third-party disclosure orders. The proposed Practice Direction will require courts to undertake a balancing exercise in this respect and will provide greater clarity and consistency. The intention is not to prevent the enforcement of copyright altogether in pornographic works or to deter genuine *bona fide* claims: instead, it addresses the practice of speculative legal actions that target the embarrassment and sexual privacy of individuals to extract settlement.

To date, the way courts have interpreted the requirements within Norwich Pharmacal order applications has not recognised or adequately balanced the sexual privacy of the alleged infringers with the copyright interest of the right holders. In spite of cases such as *Golden Eye*,[144] which attempt to address to some degree the broader privacy right of alleged infringers, such attempts have fallen considerably short of the mark. As should be evident from the discussion above, this is predominantly due to the lack of conceptual recognition of sexual privacy within the framework of pornography and copyright jurisprudence.

We conclude that the current position is no longer tenable and have set out the reasons why the law has failed to protect consumers of lawful pornography. Privacy generally, and sexual privacy in particular, deserves more recognition and consideration in relation to copyright enforcement actions for pornographic works. There is a pressing need for courts to explicitly consider the right to sexual privacy with regard to pornographic works, particularly in the context of speculative invoicing claims that seek to obtain the contact details of individuals through third-party disclosure applications as a means of coercing settlement. We have proposed specific reforms that would serve to provide clarity and consistency for courts to consider this. It is imperative that the right of sexual privacy is given due recognition in copyright infringement actions for pornography to ensure that the administration of the copyright balance remains in the hands of the legislature and courts, rather than in the hands of the speculative invoicer.

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data availability

No data was used for the research described in the article.

Acknowledgements

We are very grateful to the anonymous reviewers and Professor Abbe Brown, Professor Simon Cooper and Associate Professor Rebecca Moosavian for all their valuable comments on previous drafts of this article. We remain responsible for any errors or omissions.

[144] *Golden Eye* (*supra* n 3).