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Privative Copyright

Shyamkrishna Balganesh

University of Pennsylvania Carey Law School

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ARTICLES

Privative Copyright

*Shyamkrishna Balganesh**

“Privative” copyright claims are infringement actions brought by authors for the unauthorized public dissemination of works that are private, unpublished, and revelatory of the author’s personal identity. Driven by considerations of authorial autonomy, dignity, and personality rather than monetary value, these claims are almost as old as Anglo-American copyright law itself. Yet modern thinking has attempted to undermine their place within copyright law and sought to move them into the domain of privacy law. This Article challenges the dominant view and argues that privative copyright claims form a legitimate part of the copyright landscape. It shows how privative copyright claims derive from considerations that are genuinely authorial and seek to redress a form of harm that is unique to the nature of the work involved—a harm best described as “disseminative.” Tracing the historic evolution of privative copyright claims in Anglo-American copyright law, it develops a theoretical basis for understanding the workings of these claims and offers a framework for courts to deploy in adjudicating them, which addresses the

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concerns about free speech and censorship that have contributed to the ignominy that privative copyright claims continue to encounter in modern copyright jurisprudence.

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INTRODUCTION

U.S. copyright law is justified today in exclusively utilitarian terms. Drawing from the constitutional directive that copyright exists to “promote the Progress of Science and useful Arts,”¹ courts, scholars, and legislators identify copyright’s primary purpose as the inducement of creativity. According to this theory, which has in recent times assumed an overt economic orientation, copyright’s promise of limited market exclusivity over original expression functions as an ex ante

1. U.S. CONST. art. I, § 8, cl. 8.

incentive for the production of such expression.² By promising authors a set of marketable exclusive rights in their works, copyright is believed to incentivize the production of works of authorship. Copyright's very *raison d'être* is therefore seen to lie in its role as a market-based incentive for creative production.³

Yet in practice, copyright does much more than just induce creativity through the market. Ever since its origins, copyright law has seen a robust set of infringement claims being brought that have no connection whatsoever to the market. These are not just infringement claims that lack a market basis owing to the creator's unique circumstances; they are instead claims that are motivated by decidedly nonmarket considerations. Rather than seeking to curb competition for the production and dissemination of the work, these claims are brought *by authors* and are driven by the desire to prevent *any* distribution of the work because of the noneconomic harm that such dissemination is likely to cause them. These claims are best described as "privative" claims since they involve the author seeking to legitimately suppress the publication of expression that is her own creation.

Paradigmatic of privative copyright claims are actions brought to prevent the public distribution of work consisting of content that its author does not want revealed publicly *and* that, on its face, discloses its author's identity. In these situations, the publication (or distribution) compels the author to publicly accept authorship of the work against her own will. In so doing, it produces a form of dignitary harm that melds considerations of privacy, personality, and autonomy.

The earliest privative copyright claims arose in relation to private letters, which copyright law came to treat as protectable literary works.⁴ Implicit in this early treatment was the recognition that while letters did contain literary expression, the rationale for affording them protection was nevertheless different. These private letters entailed their authors recording private and potentially embarrassing content, all of which could be readily associated with them, and which the

2. For scholarly work either pushing this idea or assuming its centrality to copyright law, see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 13 (2003); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–81 (2009); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1702 (1988); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996); and Christopher S. Yoo, *Copyright and Public Goods Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 643 (2007).

3. Cf. Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996) (arguing that the justification is more rhetorical than real).

4. See discussion *infra* Section III.A (discussing privative copyright claims under early English law).

authors fully intended to keep out of public circulation.⁵ From there, the idea expanded to cover other—similarly private—works. Ironically, despite this expansion, copyright law has never carved out a special place or category for such works within its overall skein, so they continue to be analyzed and theorized using copyright law’s traditional principles and assumptions.

A recent use of copyright law to address the issue of revenge pornography illustrates this expansion in a modern context.⁶ The Plaintiff in the case had taken intimate photographs of herself and shared them with the Defendant, her boyfriend at the time.⁷ When their relationship soured, the Defendant began publicly distributing those photographs—without her consent—in an effort to humiliate her.⁸ The work thus embodied sensitive content and simultaneously risked revealing the identity of its subject and creator. The Plaintiff thereafter promptly registered the work and commenced an action against the Defendant for copyright infringement, which culminated in her obtaining a permanent injunction enjoining the distribution of the images as well as a large damages award.⁹ As should be obvious, copyright’s market rationale played no role in the Plaintiff’s creation of the work nor in her infringement claim. Instead, the claim was driven by distinctively noneconomic considerations. Commentary and coverage examining the case have uniformly agreed with the outcome, but nevertheless doubted the suitability of employing copyright to this end.¹⁰ The rationale for the supposed mismatch originates in the view that copyright law ought to be invoked only when the creative incentive (and its connected market attributes) is at issue, and not otherwise.

5. For an early and insightful treatment of the idea, arguing that copyright should recognize a role for privacy interests, see Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459, 466–67 (1988).

6. See *Doe v. Elam*, No. 2:14-cv-09788-PSG-SS (C.D. Cal., Apr. 4, 2018), ECF No. 139-1 (granting default judgment against Defendant).

7. *Id.* at 2.

8. *Id.*

9. *Id.* at 6–9.

10. For coverage of the case, see Christine Hauser, *\$6.4 Million Judgment in Revenge Porn Case is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html> [<https://perma.cc/S6KZ-UMRH>]; Max Jaeger, *The Ingenious Way Revenge Porn Victims are Fighting Back*, N.Y. POST (Apr. 11, 2018, 9:25 PM), <https://nypost.com/2018/04/11/the-ingenious-way-revenge-porn-victims-are-fighting-back/> [<https://perma.cc/B5ZC-V3KF>]; Sara Ashley O’Brien, *Woman Awarded \$6.45 Million in Revenge Porn Case*, CNN (Apr. 9, 2018, 8:30 AM), <https://money.cnn.com/2018/04/09/technology/revenge-porn-judgment/index.html> [<https://perma.cc/qq4q-ljwc>]. As an example of this skepticism, see Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN (Apr. 26, 2015, 1:32 PM), <https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html> [<https://perma.cc/3NUN-4DP8>] (describing the use of copyright as an “extreme” and “creative” solution, while mischaracterizing the very subject matter of copyright protection).

This perceived mismatch arises from a myopic understanding of copyright law and its normative ideals. Contrary to common wisdom, the use of copyright in revenge pornography cases is but a modern addition to the (implicit) category of privative copyright claims. Protecting the author's dignitary interest and the underlying commitment to authorial autonomy that motivates these claims have remained important normative goals of copyright law despite the multiple doctrinal variations and updates that the law has gone through over the last three centuries. Publication, which had long been seen as copyright's principal analytical device for protection, is routinely conceived of in entirely commercial terms. This exclusive focus on the commercial aspects of publication ignores the complex set of noneconomic factors that motivate an individual's decision of whether, when, and how to embrace the identity and title of "author"—a decision that lies at the root of privative copyright claims.

Affording authors a mechanism of private redress for interferences with their authorial autonomy has always been central to copyright doctrine. And yet, modern American copyright thinking exhibits a marked reluctance to acknowledge this as a legitimate goal for copyright law, preferring instead to relegate all noneconomic interests to the domain of moral rights. Generally speaking, Anglo-American authorial interests are today classified into two broad categories—known as the "dualist" model of copyright.¹¹ On the one hand are the creator's economic interests, believed to be protected entirely by copyright's set of marketable exclusive rights.¹² And on the other are the creator's authorial interests, served by inalienable "moral" rights—rights that are taken to protect the creator's reputational interests as manifested in the work.¹³ Not only are these two categories treated as mutually exclusive, but they are also considered exhaustive of the kinds of interests involved. In other words, the category of moral

11. See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 21–23 (1994) (describing the development of the dualist theory, notable proponents of the theory, and its basis in the French Copyright Act of 1957); Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 74 (2007) (describing the dualist theory and the differences between it and monist approaches). As Rigamonti argues, the distinction is hardly watertight and most jurisdictions exhibit some overlap in practice. Rigamonti, *supra*, at 75–77.

12. Rigamonti, *supra* note 11, at 99.

13. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355 (2006) (describing the moral rights theory of copyright protection as recognizing that authors have "inalienable rights in their works that protect their moral or personal interests"); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (discussing and exemplifying the differences in economic and moral protections in copyright law).

rights is routinely treated as the exclusive (if not principal) basis for protecting the creator's noneconomic interests.

As understood by U.S. law today, moral rights do little to protect the interests involved in privative claims.¹⁴ They protect authors against harmful mutilations of the work and wrongful attributions of authorship. To the extent that they serve the reputational interests of authors, they only ever do so for the author's reputational interests as embodied *in the work*, and never independently.¹⁵ While the interests at issue in privative claims emanate from the distribution and display of the work, those interests are hardly embodied within the work itself. The work is instead the principal means through which the expressive harm is inflicted; yet the harm manifests itself well beyond the four corners of the work.

What justifies the persistence of privative claims within copyright is the reality that the root of these claims is in an important sense authorial, despite implicating other concerns. The work involved in a privative claim very much originates with the creator and assumes a uniquely personal status to its creator owing to its content, which is subjectively personal to the author. The content of the work comes to be indelibly tied up with the identity of its creator in a way that renders it impossible to extricate the two in dealing with the work. Disseminating the work against its creator's wishes therefore amounts to a denial of authorial autonomy, not just as an infraction of authorial control over the work, but additionally in the sense of compelling its creator to accept a set of responsibilities and consequences, as author, against her will. And unlike with moral rights, the interference with the author's autonomy occurs not through any harm *to* the work, but quite distinctively instead *through* the work. Safeguarding the author's right to exclude others from the work is therefore the essence of privative claims.

Appreciating the significance of privative copyright claims necessitates recognizing that in its most basic form, copyright law functions by rendering forms of expressive harm (that is, harm arising from acts of expression) privately actionable. The primary form of expressive harm that copyright ordinarily centers around is

14. Limited moral rights are today codified in the Copyright Act. *See* 17 U.S.C. § 106A (2012). As discussed later, moral rights protection remains more expansive in civil law countries, where aspects of privative claims would find protection under the right of disclosure. *See* discussion *infra* Section II.C.

15. The legislative history accompanying the enactment of the U.S. moral rights law makes this abundantly clear. *See* H.R. REP. No. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925 (noting that protection is limited to "artistic or professional honor or reputation of the individual *as embodied in the work that is protected*" (emphasis added)).

appropriative in nature—from instances of copying. Privative copyright claims have little to do with appropriative harm. The expressive harm at issue emerges instead from the mere dissemination or use of the protected work without the creator’s authorization, regardless of the objective utility or value of such actions. In this respect, it closely resembles other privative causes of action such as defamation, false light, and disparagement. And much like these other causes of action, privative copyright claims implicate free speech and First Amendment concerns directly.¹⁶ Unlike appropriative copyright claims, which implicate free speech concerns tangentially, privative copyright claims are by their very nature speech-impeding since their primary focus is on curbing the dissemination of protected expression, regardless of its market effects. Consequently, balancing these claims against free-speech considerations becomes essential not just to safeguard speech, but also to ensure fuller recognition and legitimacy of privative copyright claims, which are today relegated to the shadows of the copyright system.

This Article develops a theoretical framework to understand and analyze the working of privative copyright claims, which it argues remain an undeniable feature of the copyright landscape. It shows how, contrary to common wisdom, these claims are as old as copyright law itself and reveal the existence of a hitherto unappreciated source of normative pluralism within the copyright system. Drawing on the working of noncopyright privative claims, it then develops a mechanism for courts to differentiate legitimate privative copyright claims from mere attempts at censorship.

Part I unpacks the basis of privative copyright claims. First, Section I.A examines how they seek to redress a particular form of copyright harm known as disseminative harm. Section I.B then analyzes the principal nature of harm that such claims involve, showing how they meld considerations of privacy, personality, and autonomy; it also traces the justificatory logic of such claims to the German philosopher Immanuel Kant. Part II then addresses the distinction between privative copyright claims and privacy claims. Section II.A first examines the principal arguments made in favor of using privacy torts to cover the interests at issue in privative copyright claims and demonstrates their flaws; Section II.B then examines the reasoning of the famous Warren and Brandeis article that formed the basis of the modern law of privacy to show how it misunderstood the working of

16. See Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1359–64 (1975) (analyzing the complexities of defamation law and free speech implications).

privative copyright claims; Section II.C concludes the Part by showing how privative copyright claims might be understood as simulating the working of a lesser-known moral right—the right of disclosure. Part III examines the evolution of privative copyright claims over time—first in early English law, then in early and nineteenth century American law, and finally under modern American copyright law. Finally, Part IV looks at the conflict between privative copyright claims and First Amendment concerns and develops a mechanism for courts to use in balancing the two while adjudicating these claims.

I. THE BASIS FOR THE PRIVATIVE COPYRIGHT CLAIM

The theory of creator incentives dominates U.S. copyright thinking today. A product of neoclassical economic thinking, this theory posits that creators or authors are rational actors who produce original expression based on the law's promise of limited market exclusivity for such expression, once brought into existence.¹⁷ Market exclusivity—produced through a prohibition on copying—is thus presumed to induce creative authorship and is seen as the principal justification for the very existence of copyright.¹⁸

Despite its ubiquity and general acceptance, the incentives account of copyright law is hardly free of problems. To begin with, its universality remains dubious given that it is hardly premised on any empirical validation.¹⁹ Second, long-standing copyright law principles and doctrine have little connection to the incentives account, a rather anomalous situation.²⁰ Despite recurrent calls to reform the system to reflect this putative alignment, copyright law has consistently rejected such modifications. And third, the incentives account readily presumes that the work at issue—the author's original expression that is the subject of protection—is little more than a marketable commodity to that author. In other words, authorship is taken to be copyright's mechanism for rent-seeking.

Ever since its early days, Anglo-American copyright law has recognized a set of claims that have little connection to the logic of the market or creator incentives. In numerous situations, creators of original works of expression seek to have the work taken out of public

17. LANDES & POSNER, *supra* note 2, at 13; Balganes, *supra* note 2, at 1576–81; Yoo, *supra* note 2, at 643.

18. See Yoo, *supra* note 2, at 648.

19. See Diane Leenheer Zimmermann, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 30–34, 42–48 (2011).

20. See Balganes, *supra* note 2, at 1581–89 (identifying the mismatch between copyright doctrine and the theory of creator incentives).

circulation when it is published or distributed without their consent. Their rationale for doing so has little to do with the market and is instead intricately connected to the nature and content of the work at issue, which for subjective reasons the author prefers to keep private. These claims are best described as “privative” copyright claims since they emanate from a distinctively expurgatory motivation—that is, they seek to prevent or redress the public dissemination of the work and are thus privational in structure. Copyright’s standard logic of economic value, market harm, and authorial incentives is far removed from these claims, which it has a hard time accounting for. This Part sets out the working of privative copyright claims and offers a justification for them.

A. Disseminative Harm

An indisputable reality of copyright law ever since its origins has been its structure as a private law claim. While often characterized as a form of “property,” in reality, copyright operates by granting creators (and owners) a private cause of action for certain kinds of unauthorized uses of their creative works.²¹ The core of copyright therefore lies in its active delegation of authority to creators for them to determine whether or when to commence an action for infringement, even when an unauthorized interference occurs. The decision about whether to commence an action for infringement is therefore entirely dependent on the creator-plaintiff’s rational motivations for the action.²² In essence, then, copyright functions as a form of civil redress.

Despite its structure as a form of redress, the precise forms of harm that an action for copyright infringement is directed at remain multifarious. Owing to their focus on creative expression and the unauthorized use of such expression, actions for copyright infringement—as a class—aim to redress a form of harm within the broad category of “expressive harm,” or harm from expression. Here, copyright law is but one of several other types of private actions (some also privative) that are directed at expressive harm, such as defamation, false light, public disclosure of private facts, and false advertising. The specific type of expressive harm that copyright law aims to redress—best described as “copyright harm”—is also capable of being understood in different ways.

21. For a fuller elaboration of this idea and copyright’s normative structure as a private law institution, see Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law*, 125 HARV. L. REV. 1664 (2012).

22. For a general account of the rational motivation to commence a private law enforcement action, see SEAN FARHANG, *THE LITIGATION STATE* 22–23 (2010).

The first, and most common, form of copyright harm emanates from acts of unauthorized copying and is best described as “appropriative harm.” Here, the harm ensues from the wrongful appropriation by the defendant of the plaintiff’s protected expression, which in turn produces either economic or noneconomic harm to the plaintiff. The economic harm is principally substitutionary in nature in that it interferes with the market for the original work and dissipates the creator’s revenue therein,²³ while the noneconomic harm is associated with the idea that the appropriation is interfering with the creator’s ability to speak and is acting as a form of compelled speech.²⁴ Since the right to prevent unauthorized copying is often seen as copyright’s core—or gatekeeper—right, this form of harm is copyright’s most basic form of harm and is commonly (though mistakenly) taken to exhaust the category of copyright harm.

A second form of copyright harm that the U.S. copyright system has recognized since 1990 originates in its limited recognition of moral rights protection in the form of the rights of integrity and attribution.²⁵ A common feature of both rights is that they derive from the need to protect the author’s reputation.²⁶ In essence, therefore, they are directed at reputational harm. Yet the reputational harm is fairly unique in that it is limited to the author’s reputation *as manifested in the work*. The integrity right focuses on protecting against a mutilation or distortion of the work in the recognition that this would impact the authorial reputation directly.²⁷ The attribution right focuses on ensuring that a work is not wrongly attributed to the author, and that the right work is accurately attributed to the author, again with the recognition that attributions contrary to the author’s actions and intent do harm to authorial reputation. And again, the principal focus of the

23. See, e.g., Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 332 (2005) (noting that “value to consumers depends on the extent to which a work has close market substitutes”); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 217–18 (2004) (describing how the value of a copyright decreases as near substitutes enter the market).

24. The leading account here is by Abraham Drassinower. ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? 111–44 (2015). Drassinower’s account is based on a Kantian theory of copyright, under which copyright seeks to protect the work in its capacity as a speech act rather than as an independent object. See *id.* at 112. For a review and critique, see Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 MICH. L. REV. 1047 (2017).

25. See Visual Artist Rights Act of 1990, 17 U.S.C. § 106A (2012).

26. For a normative analysis of moral rights, identifying their purpose as protecting the creator against “reputational externalities,” see Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 104 (1997).

27. See 17 U.S.C. § 106A(a)(3).

attribution is through the work.²⁸ This form of harm is therefore best characterized as “*in situ* reputational harm” and, while noneconomic in character, it is nevertheless circumscribed by the need for the harm to emanate from an action *to* the work at issue and not independently.

It is, however, a third category of often ignored copyright harm that forms the basis of privative copyright claims. This is the harm that inures to the creator from the dissemination of the work without the author’s consent or authorization. Ordinarily, discussions of unauthorized disseminations focus on the unauthorized distribution of unauthorized copies, and the resulting harm from such distribution is taken to be duplicative of the appropriative harm previously described.²⁹ To the limited extent that it is seen as analytically distinct, however, it is taken to be a form of economic harm, ensuing from the substitutionary effect of the unauthorized distribution on the market for the author’s original (that is, authorized) copies of the work. The harm from distribution is therefore usually seen as parasitic on appropriative harm or limited to its economic consequences.

An unauthorized dissemination can, however, do much more damage than just economic harm. In some situations, the dissemination is harmful not for its economic effects, but instead because of its interference with an author’s unique dignitary interest. Understanding how this dignitary interest emerges sheds light on the nature of disseminative harm.

In various situations, individuals produce original expression that they intend to either keep private or limit to very particular recipients. This is often, though not exclusively, in the nature of private communications. And when fixed in a medium of expression, such communications become eligible for copyright protection.³⁰ Given the private nature of such expression, individuals routinely inject into it aspects of their persona and individuality that they would almost

28. The attribution right has both a positive and a negative component. Hansmann & Santilli, *supra* note 26, at 130. The positive component entitles the author to be affirmatively named as the author of a work that she has created, while the negative component entitles the author to *not* be named as the author of a work that she did not author. *Id.* The negative component can therefore obviously be disaggregated from the author’s work itself, strictly speaking, and is therefore not operational through the work in the sense that the positive aspect is. Yet, it too operates through the work—albeit the misattributed work—insofar as it focuses on the connection (or put more precisely, the lack of connection) between author and work and thus may be accurately described as also protecting an interest of the author in the work: the interest not to be misidentified as author of the work.

29. See 17 U.S.C. § 106(3) (2012) (giving copyright owners exclusive rights to distribute copies or authorize others to do so).

30. See § 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”).

certainly refrain from revealing publicly. One might even put the point more strongly: it is indeed the private nature of the expression that induces its personality-infused content. When such expression is made public—after its production—it amounts to a direct infraction of its creator’s personal autonomy. Importantly, though, this infraction is two-layered. At its simplest, it repudiates the creator’s choice to control whether, how, and when the work is to be shared. Yet it also entails more than that, given the nature of the work involved. Publishing the work, or disseminating it publicly, forces the creator to admit to being the author of the work, since elements of the creator’s persona and identity are often apparent on the face of the work.³¹ The publication thus forces authorship on the creator, with all its social, legal, and moral implications.³²

The interest at the root of this scenario is thus a complex combination of elements of privacy, personality, and personal autonomy, best described as a “dignitary interest.” Most importantly though, the form of harm that its violation entails is in turn best described as “disseminative,” since it emanates from the mere circulation of the work without consent, *tout court*. Privative copyright claims attempt to redress disseminative harm.

Central to disseminative harm is the recognition that the work is *personal* to its author in a rather distinctive way, which inflects the nature of the author’s autonomy at issue. The term “personal” may be used to exemplify a variety of different connections to the work, and thus requires some additional elaboration. An overwhelming number of privative copyright claims involve work wherein the individual author has presented herself in a particular way through the expression. Not only is the author’s identity readily apparent from the work, but additional aspects of the author’s individual *persona* are manifested in the original expression. Personal letters, selfies, diaries, intimate photographs, and videos—expressive work that is commonly the subject of privative claims—typify this manifestation, though it may occur in other, less direct ways as well. The work is therefore quite genuinely a work of authorship in that there is a salient causal connection between the creator and the expression at issue,³³ but the particular content imbues that authorship with a subjectively personal dimension. This personal dimension has the effect of altering the nature of the author’s

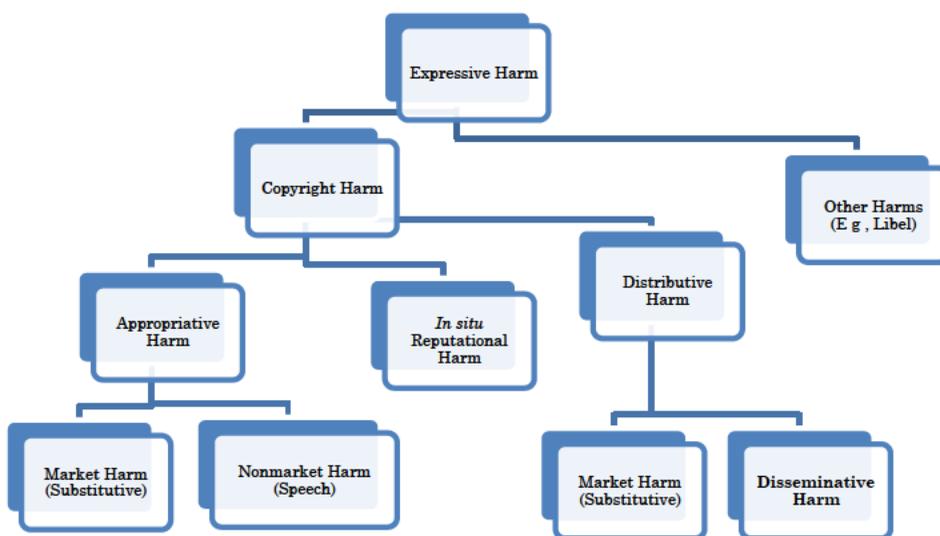
31. IMMANUEL KANT, *On the Wrongfulness of Unauthorized Publication of Books*, in PRACTICAL PHILOSOPHY 27, 29–35 (Mary J. Gregor ed. & trans., Cambridge 1996) (1785) [hereinafter KANT 1785].

32. *See id.*

33. *See* Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 10, 11–27 (2017) (setting forth a theory of “authorial causation”).

autonomy interest in the work qualitatively, changing it from a form of artifact autonomy, where the author’s interest lies merely in the ability to control a fungible external object, to one where the author seeks to control his or her self, akin to bodily integrity. Under these circumstances, an unauthorized dissemination of the work denies authorial control not just in the abstract sense (of the author’s ability to control an object). It instead is akin to a denial of the author’s very sense of self. This is the essence of disseminative harm, and it derives from a strong sense of autonomy—in the Kantian sense—as described later.³⁴

FIGURE 1: A CLASSIFICATION OF COPYRIGHT HARM



Under modern U.S. copyright law, disseminative harm (and thus credible privative copyright claims) can arise for *both* published and unpublished works. Prior to the Copyright Act of 1976, the act of publication formed the dividing line between the availability of statutory copyright protection and common law copyright.³⁵ The very availability of statutory copyright was contingent upon the work being published; conversely, common law copyright was dependent on the

34. See *infra* Section I.B (tracing Kant’s theory of unauthorized dissemination as compelled authorship).

35. See William S. Strauss, *Study No. 29: Protection of Unpublished Works*, in SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION (Comm. Print 1961) (discussing the critical significance of publication in delineating statutory and common law copyright protection).

work remaining unpublished.³⁶ The 1976 Act eliminated this requirement and in its explication of the author's exclusive rights, replaced the idea of publication with public "distribut[ion]."³⁷ Instead of offering a clear definition of distribution, the Act merely defined "publication" in terms of distribution, which it then exemplified through specific forms.³⁸ Simultaneously, it also abrogated almost all common law copyright for works that it covered, such as unpublished works, which became eligible for statutory protection.³⁹ Additionally, authors of works were for the first time also given a new exclusive right—the display right—which allowed them to control the public display of the work, of particular importance to works that could not be disseminated except in their original, such as pictorial works and sculptures.⁴⁰

Consequently, unpublished works came to obtain copyright protection—including under the distribution and display rights—as long as they met the statute's other criteria for protectability. By allowing unpublished works to be the subject of both distribution and display right claims (under § 106(3) and § 106(5) of the statute), copyright law today allows privative claims to be brought for *both* published and unpublished works without exception—though, of course, the nature of the disseminative harm and interest remain significantly stronger for the latter.⁴¹ This is certainly not to suggest that copyright infringement claims for the unauthorized dissemination of unpublished works are always privative claims; just that they can be, a reality that is often ignored.

Discussions of copyright's distribution and display rights focus on the economic harm that arises from unauthorized distribution or display of the work, principally in terms of its market effects. They ignore the simple reality that these rights are just as important for redressing noneconomic disseminative harm. The distribution and display rights, as they stand today and in the myriad forms that they

36. *Id.*

37. 17 U.S.C. § 106(3) (2012).

38. 17 U.S.C. § 101 (2012).

39. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.01 (2018) (discussing the 1976 Act's "virtual abolition" of copyright protection under the common law by federal preemption).

40. *See* 17 U.S.C. § 106(5).

41. *See* 1 NIMMER & NIMMER, *supra* note 39, at § 4.01[A]. This is not to imply that other rights—such as the reproduction right, *see* 17 U.S.C. § 106(1), the public performance right, *see* 17 U.S.C. § 106(4), or the derivative works right, *see* 17 U.S.C. § 106(2)—are never implicated in privative copyright claims. To the contrary, they routinely are, especially given that plaintiffs have little to lose by pleading additional rights. It is just that the distribution right and the public display right most directly implicate the nature of concerns involved in disseminative harm, which relate to the public revelation of expression in a work that its creator seeks to shield from public scrutiny.

have taken over time,⁴² remain perfectly suited to redressing disseminative harm.

The following examples illustrate the basic working of disseminative harms and (prima facie⁴³) privative copyright claims under modern U.S. copyright law:

- *A* maintains a personal diary that he never shows anyone, in which he records his candid observations of the world around him. It falls into the hands of *B*, who seeks to publish it without *A*'s permission. *A* can maintain an infringement action against *B* for violations of his § 106(3) public distribution right (and the reproduction right, under § 106(1)⁴⁴).
- *M*, a musician, produces an early version of a new musical composition that he is wary about. Before he can finalize it, he dies. The composition gets into the hands of a music publisher, *P*, who seeks to publish it. *M*'s heirs can bring an infringement action against *P* for violations of *M*'s public distribution right under § 106(3).
- *X* sends *Y* a private email message, in which he sets out his views on various political subjects. In order to shame *X*, *Y* then forwards on the email to a public listserv group. *X* can maintain an infringement action for violation of his public distribution right under § 106(3).
- *P* sends his doctor, *D*, a close-up photograph of his face for a diagnosis. He takes the photograph with his cell phone camera, and it shows a dark mole on his mouth that he is worried about. *D* treats it and later, without *P*'s consent, posts the picture on his public website as an example of the skin conditions that he has successfully treated. *P* can bring an infringement action against *D* for violation of his public display right under § 106(5).

These examples all have a few things in common. Each infringement action is driven by nonpecuniary considerations. Instead, in each instance, the putative plaintiff seeks to curb the dissemination of the work, since it represents something personal to her. Part of what makes the work personal to the author in each case is the fact that the author's identity is readily discernible from the face of the work. In most of the examples, identity is discernible as an objective matter; however, in one (the musician) it is at best subjectively discernible. As we shall see, privative copyright claims have evolved to encompass this

42. See 2 NIMMER & NIMMER, *supra* note 39, at § 8.11[A].

43. These are only illustrations of a plaintiff's potential prima facie case and do not cover potential defenses that a defendant might be able to raise—whether successfully or not—including fair use, implied license, and first sale. These are discussed later, in the context of understanding how courts should go about adjudicating privative copyright claims. See *infra* Section IV.B.

44. This is a prime illustration of the idea noted above, see discussion *supra* note 41, that privative copyright claims can implicate additional rights that are not themselves central to disseminative harm. In this illustration, publishing the diary involves making copies of it—which is a violation of the reproduction right. Yet if the publisher were to merely make copies and do nothing more, i.e., keep it locked up, it would clearly not produce the disseminative harm, for which distribution is essential. Thus for disseminative harm, the violation of the distribution right takes analytical precedence over violations of the reproduction right, even though as a purely legal matter there is no difference.

subjectivity as well. In each instance, then, the work is not just an artifact for its creator; it is instead a representation of the author's self.

In short, privative claims attempt to redress a form of noneconomic copyright harm that is routinely ignored in modern discussions of copyright law—disseminative harm—and they do so primarily through the distribution right, and on occasion via the display right, even though they often implicate other rights. Disseminative harm is authorial in its roots and emerges from the strong dignitary interest that the creator has in the work. And while the claim is strongest for unpublished works, it by no means is limited to that category, except that the nature of the harm (and the corresponding interest) gets significantly attenuated when the author has voluntarily relinquished control over the work through publication or public distribution.

B. Disseminative Harm as Compelled Authorship

As discussed above, disseminative harm is strongly rooted in the ideas of personality and personal autonomy. Interestingly, a poignant and direct account of disseminative harm can be found in the work of German philosopher Immanuel Kant, considered to be the foremost philosopher to have theorized the nature and role of individual autonomy.

Kant has long been associated with a highly nuanced and deeply influential deontological account of human autonomy.⁴⁵ Kant's moral and ethical philosophy on the topic has since been internalized into an account of legal rights by legal philosophers, which has spawned a voluminous body of scholarship.⁴⁶ Initially, Kant's accounts of property and private wrongs were often used by theorists of intellectual property

45. For some of Kant's most important contributions to moral philosophy, see IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Mary J. Gregor trans., Cambridge 1999) (1787); IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Paul Guyer & Allen W. Wood, eds. & trans., Cambridge 1999) (1781); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Mary J. Gregor & Jens Timmermann eds. & trans., Cambridge 2012) (1785); and IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed. & trans., Cambridge 2017) (1797).

46. See, e.g., B. SHARON BYRD & JOACHIM HRUSCHKA, *KANT AND LAW* (2017); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (2012); Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559 (1987); George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171 (1984); George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385 (1996); Thomas C. Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580 (1987); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1991); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391 (2006).

to construct a nonutilitarian account of such rights.⁴⁷ This approach prevailed until somewhat recently, when a relatively obscure stand-alone essay by Kant directly on the subject of authors' rights came to light.⁴⁸ In this essay, Kant attempts to connect some of his thinking on autonomy and agency to the working of copyright, and yet he does so independently of property and ownership rhetoric.⁴⁹ Instead, he appears to identify a version of disseminative harm as a core concern of authors' rights.

Titled *On the Wrongfulness of Unauthorized Publication of Books*, Kant's essay purports to derive a basis for why copyright law treats the act of unauthorized publication as an actionable private wrong.⁵⁰ Kant's logic originates in the recognition that there is a fundamental difference between the ownership of the physical medium in which the work is expressed and the work itself.⁵¹ To Kant, the work is most fundamentally a *communication*, a "speech act," on the part of the author.⁵² When a publisher prints a book, the publisher is in turn purporting to act on behalf of the author by communicating to her audience.⁵³ In situations when this is authorized, the author is speaking to the public through the publisher.⁵⁴ On the other hand, when publication is unauthorized, the publisher is purporting to speak on behalf of the author without the consent of the author—in turn forcing the author to speak against her own will, acknowledge the existence of the speech, and take responsibility for it.⁵⁵ In this sense, the

47. See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999) (justifying a right to publicity based in autonomy using Kantian philosophy). It is worth noting that in the German legal tradition, scholars appear to have been aware of Kant's essay much earlier and they developed theories of copyright that came to influence the copyright regime in Germany. See Sig Strömholm, *Copyright – National and International Development*, in 14 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: COPYRIGHT AND INDUSTRIAL PROPERTY 3, 10–11 (Friederich-Karl Beier & Gerhard Schrickler eds., 1990) (discussing the role of Otto von Gierke in Germany's copyright debates and noting his reliance on Kant's essay to develop a personality-based, rather than property-based, justification for authors' rights).

48. See KANT 1785, *supra* note 31, at 29–35. For leading attempts to rationalize the essay and employ it in theories of copyright law, see DRASSINOWER, *supra* note 24; Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 L. & PHIL. 1 (2012); and Leslie Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059 (2008).

49. See KANT 1785, *supra* note 31, at 29–30.

50. *Id.* at 27–29.

51. See *id.* at 33.

52. *Id.* at 35.

53. *Id.* at 32.

54. *Id.* at 30.

55. *Id.* at 31–32.

unauthorized publication is therefore a form of “compelled speech,” which is the basis for its wrongfulness in Kant’s view.⁵⁶

Facially, Kant’s account may appear to be of little relevance to privative copyright claims. Privative copyright claims are primarily concerned with unauthorized distributions, whereas Kant’s focus is on reproductions. Additionally, Kant appears to limit himself to a category of works that bear a strong resemblance to speech, namely writings.⁵⁷ All the same, there remains an important continuity between Kant’s derivation and the logic of disseminative harm that becomes apparent as one digs deeper.

At the core of Kant’s reasoning is the idea that publication and authorship are acts of communication, the latter direct and the former intermediated.⁵⁸ The author’s autonomy is violated in an unauthorized publication—not mere reproduction—since the publisher is purporting to communicate on behalf of the author without authorization to do so. Where then does this leave an unauthorized dissemination of the kind at issue in privative copyright claims?

Recall that the paradigmatic privative copyright claim remains a situation where the author of a work chooses to keep it private, or in very limited circulation. Indeed, under common law copyright, the work needed to be unpublished.⁵⁹ Disseminative harm, described earlier, thus emerges principally in situations where a defendant engages in the act of “publication” or a “public display” of the work, without the authorization of its creator. And in so doing, the defendant is effectively compelling the creator of the work to assume responsibility for it *as its author*.

The parallel between Kant’s account and privative claims now starts to become clear. Kant’s idea that forcing the author to speak each time there is an unauthorized republication of the work in the author’s name amounts to a form of compelled speech⁶⁰ might be logically extended one step earlier in the chain of events. Forcing a creator of the expression at issue to speak at all and thereby assume the mantle of author and its attendant moral responsibilities and consequences is nothing less than an act of *compelled authorship*. And, insofar as it

56. See *id.* Kant himself does not use the phrase. The phrase is best known in the work of Abraham Drassinower, who builds a justification for copyright around Kantian thinking. See DRASSINOWER, *supra* note 24, at 111–44 (characterizing his analytical framework as “[a]dopting Kant’s framework”).

57. See KANT 1785, *supra* note 31, at 30.

58. See *id.* (describing publishers as controlling the speech of authors to readers).

59. See Laurence N. Walker, *Publication and the Copyright Law Revision*, 50 CALIF. L. REV. 672, 674–76 (1962) (illustrating the rule that one who publicly presents an unpublished work retains his common law rights in that work).

60. KANT 1785, *supra* note 31, at 31–32.

forces an individual to assume responsibilities against her will, it is no less a denial of that individual's agency and autonomy, which renders it just as wrongful in Kant's deontological scheme and triggers an actionable private right.

While this may seem like an extension of Kant's logic in the essay to the case of disseminative harm, in reality Kant alludes to it later in the same essay. As he concludes his argument, all works of art are exempt from this analysis, because in Kant's view, such works may be freely reproduced by anyone.⁶¹ His rationale for this is the uniqueness of artworks and the fact that once brought into existence, works of art—unlike literary works—assume a thinglike independence. As he puts it:

This, then, is the reason that all works of art of another may be copied for sale to the public whereas books that already have their appointed publisher may not be reprinted: the first are works (*opera*), whereas the second are actions (*operae*): the former can exist on their own, as things, *whereas the latter can have their existence only in a person*. Hence these latter belong exclusively to the person of the author.⁶²

This is an intriguing observation that has received little attention even from scholars who have hitherto analyzed Kant's essay. Kant appears to be suggesting that there is something "person[al]" about one category of works (writing) that is absent in another (art), and yet offers no real basis for this distinction.⁶³ The basis for the distinction appears to be that books have a personal dimension associated with them since they always reveal the identity of their creator, which is rarely (or never) the case for works of art once brought into existence. This explains why book publishing is an act of speaking, since identity and content are indelibly bound up therein; this is not so with art. It traces back to the distinction between artifact autonomy, where the owner's autonomy is entirely in the *res* (thing) at issue, and personal autonomy, where the autonomy (or its denial) directly implicates the individual's own self.

If this reading is correct, it has important implications for privative copyright claims, which almost always involve a personal dimension where the author has invested an identifiable element of her personality into the work. A good part of what triggers the injury associated with disseminative harm is the fact that the author is forced to self-identify as the creator of an expression that was intended to be kept out of circulation. This self-identification emanates from the fact that the work itself reveals the identity of its creator in some way.

61. *Id.* at 34–35.

62. *Id.* (emphasis added).

63. *Id.*

Privative claims therefore revolve primarily around works that entail a personal dimension in the sense that Kant identifies in his derivation—letters, personal papers, diaries, and, in more modern times, “selfies,” for instance.⁶⁴

Kant’s deontological rationale in his 1785 essay thus provides an excellent justification for privative copyright claims and the disseminative harm that they are rooted in. Built around ideas of autonomy, communicative freedom, and private right, it in many ways works better as a justification for disseminative harm than for appropriative harm, the original target of Kant’s derivation. Authorship is a moral responsibility, in addition to entailing legal consequences. When this is foisted on an individual against her will, the denial of autonomy that it entails by purporting to substitute the individual’s agency for that of the disseminator produces the wrong that is privately actionable.

II. DISSEMINATIVE HARM, PRIVACY, AND THE RIGHT OF DISCLOSURE

While the dignitary interest that lies at the root of disseminative harm draws on considerations of privacy and personality, it is both analytically and normatively distinct from both ideas. Over the last several decades, privative copyright claims have come to be criticized rather extensively by scholars and courts on the basis that the interest underlying them is better protected through privacy claims. This approach misunderstands the nature of privative claims in copyright and the centrality of authorial autonomy that underlies them.

This Part examines the criticism of privative copyright claims and refutes it. It begins in Section II.A by examining the principal strands of the argument in favor of privacy (over copyright) as a mechanism of protecting dignitary interests. It then moves, in Section II.B, to unpacking the origins of privacy torts in American law and shows how the famous derivation of privacy logic by Warren and Brandeis consciously misstated several aspects of common law copyright as it existed at the time, and its protection for dignitary interests. Section II.C shows that the real analog of privative copyright claims in Anglo-American copyright law is a lesser-known moral right that is routinely invoked in civil law jurisdictions: the moral right of

64. A caveat is in order here. While the paradigm case of a privative claim involves work that readily identifies its creator, the category has since grown to encompass works where this element is more subjective. The next Part discusses this expansion of the category over time. As will be seen, a good part of the reason for this expansion appears to be courts’ implicit unwillingness to police the idea of authorial personality contained within the work. *See infra* Part III.

disclosure, which also focuses on disseminative harm, but with more limitations.

A. *Privacy Torts, Not Copyright*

Modern copyright scholarship is deeply critical of privative copyright claims; this criticism is premised on the argument that the dignitary interests and harms that underlie such claims are best dealt with through the law of privacy—specifically privacy torts—at the state level.⁶⁵ This view has only grown since the passage of the new copyright statute and the elimination of common law copyright for most subject matter in 1976. Even the few scholars who are sympathetic to privative copyright claims describe them as an “emerging scenario”⁶⁶ and do not go far enough in refuting the dominant view that “copyright is not the direct vehicle for the[] vindication”⁶⁷ of dignitary concerns, since it risks converting authorship into censorship. The dominant view is driven by three primary concerns, none of which withstands close scrutiny: copyright utilitarianism, free speech concerns, and the perception that privacy torts are better suited to address dignitary harms.

65. See, e.g., Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 557–65, 587 (2015) (“[A]ssertions of protection for markets beyond the protected market—be they in relation to privacy and reputational interests or more generally—raise the specter of great cost to society.”); Jeffrey L. Harrison, *Privacy, Copyright, and Letters*, 3 ELON L. REV. 161, 163 (2012) (“In the context of copyright law, privacy is really something to be avoided.”); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130 (1990) (“[C]opyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so.”); Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 16 (2016) (explaining that copyright is not the “direct vehicle” for advancing privacy interests); Alfred Yen, *The Challenge of Following Good Advice About Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 412, 413 (2016) (explaining that allowing a plaintiff to succeed on a copyright claim brought in the interest of personal privacy does not do much to protect the plaintiff’s incentive to create). *But see* Andrew Gilden, *Copyright’s Market Gibberish*, 94 WASH. L. REV. 1020, 1022 (2019) (arguing that copyright routinely protects noneconomic interests, including dignitary harms, but masks this protection in the language of the market); Deirdre Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?*, 20 UCLA J.L. & TECH. 1, 36 (2016) (finding such protection legitimate but suggesting that U.S. law recognize a moral right of disclosure).

66. Margaret Chon, *Copyright’s Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364, 364 (2016). It is worth noting that, overall, Chon appears to be sympathetic to the recognition of privacy and dignitary claims in copyright law. *See id.* at 366 (“Privacy and other functions of copyright should not be categorically excluded as beyond the legitimate purview of copyright’s concerns, and copyright will not be stretched beyond its breaking point by incorporating them.”). For a more recent account that is critical of deploying copyright for general privacy purposes, while nevertheless recognizing the existence of a few domains where such use might be legitimate, see Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, 2019 B.Y.U. L. REV. (forthcoming).

67. McKeown, *supra* note 65, at 16.

1. Copyright Utilitarianism

The principal reason for the extensive skepticism toward privative copyright claims emanates from the belief that copyright's exclusive purpose lies in it serving as a market-based incentive for the production of creative works. Deriving from the seemingly instrumentalist wording of the Constitution and its mandate that copyright legislation strive to "promote . . . Progress,"⁶⁸ this view roots all of the copyright system in the need to provide creators with an inducement to produce original expression through the market.⁶⁹ According to this view, since privative claims derive from a strong dignitary interest and since the creators at issue are unmoved by pecuniary considerations, copyright law ought to pay (little or) no attention to them. Infringement lawsuits brought exclusively to vindicate a dignitary interest—that is, lawsuits with no commercial or economic rationale—ought to be discouraged.⁷⁰

Accepting copyright's utilitarian logic as its principal theoretical justification certainly does not necessitate denying the existence of other nonutilitarian normative values operating within the system. While normatively essentialist accounts of legal doctrines and institutions may present a degree of theoretical elegance in discussions of the system, they routinely fail to capture the practical machinations of legal doctrines and the complex behavioral motivations of the participants involved.⁷¹

What such essentialist accounts also ignore is the simple reality that copyright doctrine—with the exception of one statutory provision⁷²—shows no marked affinity for the utilitarian rationale as its dominant, let alone exclusive, justification. This has in turn allowed the facially neutral language of copyright doctrine to adapt itself to varying normative considerations over time, in precisely the same

68. U.S. CONST. art. I, § 8, cl. 8.

69. See Balganesch, *supra* note 2, at 1576–77 ("Copyright law is thus thought to exist primarily to give authors (that is, creators) an incentive to create and thereafter disseminate their works publicly."); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

70. See McKeown, *supra* note 65, at 16 ("[C]opyright cannot be everything to everybody.").

71. For what is perhaps the best known critique of this essentialism in academic legal theorizing involving law and economics, see Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 458–59 (1974) (noting how the economic analysis of law underemphasizes the complexity of human behavior and is driven by an effort to avoid the "complexity" of the real legal system).

72. See 17 U.S.C. § 107(4) (2012) (requiring courts to examine "the effect of the use upon the potential market for or value of the copyrighted work" as part of the fair use analysis).

manner as the rest of the common law.⁷³ Copyright's infringement analysis is a prime example here, as is the joint works doctrine.⁷⁴ Therefore, while it may well be true as a normative and interpretive matter that today's copyright thinking desires an exclusively utilitarian framing for the institution, this is hardly an essential attribute of the system such that deontological considerations, such as the author's dignitary interest, have no place in it.

In short then, the overt utilitarian turn in copyright law, which some see as emanating from the influence of twentieth century neoclassical economic thinking,⁷⁵ is far from a principled reason to critique the legitimacy of privative copyright claims. To the contrary, normative pluralism has remained a hallmark of the copyright landscape, much like it has for a variety of legal institutions. Courts and scholars may find such pluralism messy and hard to theorize, yet in practice it has served copyright rather well over time. Privative copyright claims, as we shall see, predate copyright's utilitarian turn.

2. Free Speech Concerns

A second argument often raised against the use of copyright law to protect an author's dignitary interests via privative claims is a concern with free speech, or the idea that authorship might be used as a vehicle for censorship. As an illustration of this concern, the recent case of *Garcia v. Google, Inc.*⁷⁶ is often raised to show how the plaintiff's nonpecuniary motives were little more than an attempt to squelch speech. *Garcia* involved a Plaintiff who, without her knowledge, came to be portrayed in a controversial and offensive motion picture, and thereafter sought to have the motion picture taken down from public viewing by arguing that she was the sole author of her individual performance in the work.⁷⁷ The U.S. Court of Appeals for the Ninth Circuit denied her claim, but in so doing noted that her claim was of a dignitary nature, which was inappropriate for copyright law since it

73. For an account of how this might occur, see Shyamkrishna Balganesch & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241 (2015). Jody Kraus has described a similar evolution in common law meaning as the process of "radical semantic evolution." Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 326 (2007).

74. For pluralist accounts of these doctrines, see Shyamkrishna Balganesch, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012); and Shyamkrishna Balganesch, *Unplanned Coauthorship*, 100 VA. L. REV. 1683 (2014).

75. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 306–07 (1996) ("An approach to copyright based on . . . neoclassical and new institutional economic property theory has emerged as the principal theoretical support for copyright expansionism.").

76. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

77. See *id.* at 737–38.

sought to suppress speech.⁷⁸ The court echoed the idea that privacy was not the function of copyright law and noted: “We are sympathetic to her plight. Nonetheless, the claim against Google is grounded in copyright law, not privacy, emotional distress, or tort law, and Garcia seeks to impose speech restrictions under copyright laws meant to foster rather than repress free expression.”⁷⁹

The concern with free speech, seen in the court’s framing and elsewhere, is overstated. In some sense, there was nothing uniquely speech-suppressive in the Plaintiff’s argument in *Garcia*; nor did she seek a remedy different from that sought by any ordinary copyright plaintiff in a takedown action. Indeed, as scholars have pointed out, all requests for injunctive relief in copyright cases involve speech suppression as an analytical matter, and copyright has never had a problem with this reality as a matter of principle.⁸⁰ Instead, courts have over time found ways and means to balance these competing concerns and incorporate them into the calculus for such relief.

It is worth noting that the idea of free speech is a common rhetorical device that courts use to their advantage to justify outcomes, as seen in the *Garcia* opinion. In *Garcia*, the Ninth Circuit used it to deny relief.⁸¹ This is in contrast to the Supreme Court’s decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*,⁸² where speech considerations were treated as overblown since copyright was itself “the engine of free expression.”⁸³ At other times, courts have reiterated that copyright’s multiple safety valves—fair use, the idea/expression dichotomy, and the like—are sufficient to guard against any free speech concerns.⁸⁴ Yet, the Ninth Circuit made no mention of this.

Copyright has various devices protective of free speech that can come into play in privative claims. The most notable of these is fair use. Indeed, a scrutiny of various privative copyright claims indicates that in several such cases, defendants raise the defense of fair use, which courts use as a stand-in for free speech concerns and balance against the plaintiff’s claims.⁸⁵ Given the robustness of these mechanisms,

78. See *id.* at 747 (describing the claim as a “classic prior restraint of speech”).

79. *Id.* at 737.

80. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165 (1998) (explaining that copyright injunction determinations are historically and presently pro-plaintiff).

81. 786 F.3d at 747.

82. 471 U.S. 539 (1985).

83. *Id.* at 558.

84. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[C]opyright law contains built-in First Amendment accommodations.”).

85. See, e.g., *Balsley v. LFP, Inc.*, 691 F.3d 747, 758–61 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170–83 (9th Cir. 2012).

there appears to be no credible concern that, as a principled matter, copyright protection for dignitary or privacy concerns risks converting authorship into censorship.

3. Better Fit

Courts and scholars also commonly dismiss any copyright protection for dignitary concerns with the argument that privacy law—privacy tort law in particular—is a better fit for such concerns.⁸⁶ Part of this objection has to do with the normative essentialism discussed previously and the belief that privative claims are hard to reconcile with copyright’s utilitarian basis. Relatedly, though, it also derives from the idea that privacy torts are better suited to protecting dignitary interests. It is this last point that deserves some additional attention.

As noted earlier, the dignitary interest underlying disseminative harm and privative copyright claims entails more than just a concern with privacy. It implicates considerations of personality and personal autonomy, in the way of *authorial autonomy*. This is hardly an incidental feature of such actions—it is central to their existence. And the involvement of authorial autonomy adds a distinctive component to the action that takes it away from a mere concern with privacy. Courts routinely overlook this point.⁸⁷

To fully appreciate this divergence, consider the difference between an intimate photograph taken by the person who is both the subject of the photograph and its author (the “selfie”), and an intimate photograph taken by a third party without the subject’s consent (the “paparazzi photo”). An unauthorized public distribution of the photograph is likely to be seen as troubling by the subject of the photo in both instances, but for similar yet qualitatively distinct reasons.

With the paparazzi photo, both the creation and distribution of the photo are incursions on the subject’s ability to represent intimate details about himself or herself to the world in public. With the selfie, the creation is obviously not an issue, but its distribution is. Here, the

86. See, e.g., *Garcia*, 786 F.3d at 745 (“Privacy laws, not copyright, may offer remedies tailored to [Plaintiff’s] personal and reputational harms.”); *New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1505 (S.D.N.Y. 1988) (“An individual who seeks to protect the privacy of the content of private letters may do so by bringing suit under the right of privacy.”).

87. Indeed, they overlook this point even while granting a plaintiff’s claims. See, e.g., *Monge*, 688 F.3d at 1168–73 (omitting any discussion of the Plaintiff’s status as author of the works at issue, even while finding in favor of the Plaintiff). *Garcia*, which is routinely—and wrongly—set forth as an example of a failed privacy or dignitary claim, involved a fundamental contest to the authorial status of the Plaintiff, which made it qualitatively different from a regular privative claim since the very existence of a valid authorial dignitary interest was thereby contested. See 786 F.3d at 740–45.

distribution of the photograph certainly amounts to an interference with the subject's self-representation to the world, but that interference is compounded by the representation of the subject's own authorship to the public. In other words, what is harmful to the subject is not just a revelation of the intimate details contained in the photograph but also the disclosure of the subject's own authorship of those details in the photograph. The two are inextricably bound up, rendering the selfie different from the paparazzi photograph. The subject-authored nature of the expression adds an important component to the nature of the concerns that the subject is likely to have, making it distinct in an important way from the nonconsensual paparazzi photograph.

The fact that the subject authored the photograph himself or herself makes the harm from the unauthorized distribution more—rather than less—significant, in that the subject-driven (and thus more authentic) nature of the creation is itself potentially more damaging to the author-subject. The photograph was created for one purpose, as determined by its author, yet used by the defendant for another. This act represents a denial of autonomy to the subject of the photograph, not just in her capacity as subject but more importantly in her capacity as subject-author, where the two cannot be disconnected.

These two scenarios might be contrasted with a third where a professional photographer takes an intimate photograph of a subject with the subject's consent (the "posed photo"). Now the subject of the photograph has no claim, be it in privacy or copyright, against the professional photographer because of the subject's consent (in the case of privacy) and the photographer's authorship and ownership of the work (in the case of copyright). If a third party seeks to make an unauthorized distribution of the photograph, the subject is now dependent on the photographer bringing the action.⁸⁸ No considerations of authorial autonomy are implicated for the subject of the photograph. Should the subject (as transferee of the copyright) seek to bring a claim against the third party, it would be primarily as owner of the work—based on the idea of artifact autonomy. The contrast between these three scenarios above serves to highlight how the dignitary interest underlying privative copyright claims functions.

Privative copyright claims therefore involve a combination of representational and authorial concerns that are incapable of disaggregation. Privacy torts, most notably the tort of public disclosure of private facts, focus on representational autonomy and the

88. As was the case in *Balsley*. See 691 F.3d at 755 ("Plaintiffs sought ownership of the photographs so that they would have a legal means of ending the photographs' dissemination.").

individual's ability to control public representations of her persona.⁸⁹ They view the denial of such autonomy as emanating from the subject's choice to keep certain facets of her persona private, and then scrutinize the existence and parameters of that choice rather carefully. The nonconsensual public disclosure of such facts is seen to cast the subject into the public and in turn produce potential emotional and reputational harm. This analytical structure is ill-suited to situations where the subject exercises a critical role in the production of the content that is made public and then chooses to control whether and when to disseminate it. In these situations, the subject's autonomy is not just about self-representation to the public but instead about self-representation to the public *as author*. And this makes privative copyright claims a rather poor fit for privacy torts.⁹⁰ Adjudicating such claims will involve addressing questions such as the appropriate scope of authorship, which privacy torts are unconcerned with.

In summary, the claim that disseminative harm and its underlying deontological interest are better served through privacy laws does not withstand serious analytical and normative scrutiny. It instead emanates from an overly simplistic understanding of the interests involved in such claims, coupled with an exalted view of what privacy torts can cover. Indeed, hardly any scholar or court advancing the view that privacy law rather than copyright should be where these claims are brought has actually shown how privative copyright claims and the interests that they seek to vindicate might actually work under the tort of privacy. In the end, much of the argument appears to be driven by a desire to maintain a normatively coherent account of copyright law, which, ironically, contradicts the very evolution of the privacy/copyright divide.

89. The continued viability of this tort remains suspect, and scholars have long noted how its invocation is strongly disfavored. *See, e.g.*, Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 *YALE J.L. & HUMAN.* 171 (2010); John A. Jurata Jr., *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 *SAN DIEGO L. REV.* 489 (1999).

90. Indeed, there are aspects of privacy law doctrine that render it inapposite for privative copyright claims. If one considers the privacy tort of "public disclosure of private facts," a rather fundamental requirement is that the content disclosed is "highly offensive to a reasonable person," which is a largely objective determination. *RESTATEMENT (SECOND) OF TORTS* § 652D(a) (*AM. LAW INST.* 1977). This would eliminate a huge swath of privative copyright claims that are hardly offensive on their face, but nevertheless remain an affront to the dignitary interest of the author. Additionally, the tort's concept of "public disclosure" does not track the concept of "publication" such that private or semiprivate communications that are not accessible by members of the public are unlikely to qualify as violations. *See id.* § 652D cmt. a (" 'Publicity,' on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. ").

B. Warren and Brandeis and the Privacy/Copyright Conflation

As discussed above, courts and scholars routinely take the position that while privacy and dignitary interests are legitimate and deserve some protection, they are nevertheless not relevant to copyright and its purposes.⁹¹ The criticism is closely tied to the independent development and flourishing of “privacy torts,” private causes of action under state law that purport to protect a plaintiff’s reputational, personal, and emotional interests against invasion by defendants.⁹² The origin of these privacy torts is commonly traced to a seminal article penned at the end of the nineteenth century by Samuel Warren and Louis Brandeis, wherein they articulated a rationale and analytical basis for the common law to develop an independent set of actions for privacy.⁹³ Consequently, their argument is seen today as the basis for excising personal, dignitary considerations from copyright and quarantining them into the independent category of privacy torts.

The Warren and Brandeis argument, however, betrays an important irony. In developing their logic and reasoning for the protection of privacy—or the “right to be let alone,”⁹⁴ as they put it—Warren and Brandeis make an important move that scholars writing about the copyright/privacy interface overlook or underplay. Warren and Brandeis base the entirety of their reasoning on copyright law as it worked at the time, specifically on the extant protection that nineteenth-century copyright law afforded disseminative harm through privative claims for infringement. Warren and Brandeis make the entire premise of their article abundantly clear fairly early on, with the observation that “the legal doctrines relating to infractions of what is ordinarily termed the common law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.”⁹⁵ In attempting to derive the logic for an independent right to privacy, the article goes to some length to attempt

91. See, e.g., Leval, *supra* note 65 at 1130 (“[C]opyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so.”). Judge Leval took the same position in one of his opinions addressing the question at the district court level. See *New Era Publ’ns Int’l*, 695 F. Supp. at 1504 (“It is universally recognized, however, that the protection of privacy is not the function of our copyright law.”).

92. See Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

93. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

94. *Id.*

95. *Id.* at 198.

to undermine the legitimacy of privative claims and disseminative harm within copyright. Yet its reasoning to this end is spurious.

As noted above, Warren and Brandeis locate the general logic of privacy within the domain of copyright, specifically within common law copyright, since statutory copyright at the time did not apply to unpublished works, a distinction that has since been abrogated. They then set out the core of their argument with the following description of copyright protection and privative claims:

The existence of this right [i.e., copyright] does not depend upon the particular method of expression adopted. . . . Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. . . . *In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. . . . The right is lost only when the author himself communicates his production to the public. . . . [T]he common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.*⁹⁶

If copyright law at the time covered what they were advocating, what then was the basis for taking it *out* of copyright, and into a distinct cause of action? For them, the answer lay in copyright's supposedly mistaken reliance on the notion of "property." They thus argue:

But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation of that term. . . . [T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. . . . The principal which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.⁹⁷

As support for this observation, they cite to a leading nineteenth-century copyright law treatise, which merely notes that the term property as applied to privative claims was "an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite."⁹⁸ They then rather hastily surmise that the primary reason that the law had been

96. *Id.* at 198–200 (emphasis added) (footnotes omitted).

97. *Id.* at 200–01, 205 (footnotes omitted).

98. GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT IN BOOKS, DRAMATIC AND MUSICAL COMPOSITIONS, LETTERS AND OTHER MANUSCRIPTS, ENGRAVINGS AND SCULPTURE, AS ENACTED AND ADMINISTERED IN ENGLAND AND AMERICA; WITH SOME NOTICES OF THE HISTORY OF LITERARY PROPERTY 94 (The Lawbook Exch., Ltd., 2005) (1847).

using the term “property” for these claims was in order to make the entitlement applicable against the world at large—that is, *in rem*—citing to the landmark copyright case of *Folsom v. Marsh*, which involved a dispute over the publication of George Washington’s collected letters.⁹⁹ Warren and Brandeis argue that Justice Story’s adoption of the property idea for copyright in that case was *in order to* overcome the notion of privity that would have precluded an action for breach of an implied contract.¹⁰⁰ Yet a close reading of the opinion hardly suggests this motive but instead merely indicates that Justice Story recognized the ability of the owner to go after third parties not in privity as a *consequence* of such ownership.¹⁰¹

What their analysis misses is the reality that by the nineteenth century, common law copyright—or indeed all of copyright—no longer needed to be characterized as “property” for its *in rem* nature to be accepted. While courts and scholars did continue to refer to copyright as “literary property,” the act of unauthorized copying had quite independently come to be understood as an injurious wrong analogous to a regular tort that allowed an action to be brought against third parties independent of a contract.¹⁰² To the extent that courts deployed property language, it is fairly obvious that they were doing so as part of their dicta and for largely expository—rather than analytical—purposes.

Nevertheless, by emphasizing the connection between copyright claims and the idea of property, Warren and Brandeis were making an implicit analytical move that proved to be influential. And this was the

99. 9 F. Cas. 342 (C.C.D. Mass. 1841).

100. See Warren & Brandeis, *supra* note 93, at 211 (“Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but . . . this doctrine could not afford all the protection required . . .”).

101. Justice Story thus observes: “The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. A fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest or curiosity, or passion.” *Folsom*, 9 F. Cas. at 346. His use of the term “a fortiori” clearly implies the identification of a consequence rather than a cause, contrary to what Warren and Brandeis claim.

102. As an example, consider the 1834 Supreme Court case of *Wheaton v. Peters*. 33 U.S. 591 (1834). *Wheaton* was the first copyright case decided by the Court and centered on the existence of common law copyright after the enactment of the federal copyright statute in 1791. See *id.* at 592. What is interesting to note, however, is that even though the Court (and the litigants) use property rhetoric in the case, the action itself was brought using an “action on the case,” *id.* at 596, a writ that had developed to conflate the distinction between property and personal actions, and had come to recognize that the existence of a property interest could be secondary to the existence of an injurious wrongdoing by the defendant. See *Keeble v. Hickeringill* (1707) 103 Eng. Rep. 1127; see also Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142 (1937).

idea that property implied an economic motivation, which privative copyright claims lacked, in contrast to more standard pecuniary copyright claims. The idea of property thus served to drive a wedge between standard (meaning economic) copyright claims and privative copyright claims, with the latter then seemingly more aligned with other nonpecuniary causes of action.

An additional reason for courts' invocation of property in dealing with privative copyright claims—which Warren and Brandeis happily ignore—relates to the remedy that plaintiffs ordinarily sought in those cases, namely, an injunction. As is well known, equity allowed an injunction to follow whenever an entitlement was classified as a form of “property,” an artificial classification that came under criticism fairly early on and was eventually repudiated.¹⁰³ The early privative copyright cases, many of which Warren and Brandeis rely on,¹⁰⁴ routinely lean on this distinction in invoking their equitable jurisdiction in favor of plaintiffs. The characterization of the copyright entitlement as property had little analytical basis and was therefore a unique product of equity's own rigidity. None of this, of course, mattered to Warren and Brandeis.

Given their explicit agenda, which was the identification and derivation of an independently protectable privacy interest in the common law, Warren and Brandeis had little need to be cautious in their characterization of these past copyright cases and the language therein. In relying on the emptiness of property language for their argument, they offer no independent understanding of property as a limiting idea to show that privacy is analytically (or normatively) distinct from property. Indeed, they equivocated in their own analysis by conceding that property may have meant little more than the right to exclude (as an *in rem* entitlement), in which case courts' invocation of the idea for noneconomic harms might obviously seem less problematic.¹⁰⁵

Despite their reliance on common law copyright to derive the right to privacy, Warren and Brandeis do not once mention a central

103. For an early account of this distinction, see Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916) (describing this position and criticizing it).

104. As a prime example, consider the case of *Gee v. Pritchard*, (1818) 36 Eng. Rep. 670, 678; 2 Swans. 403, 424–25 (emphasizing the nature of the copyright interest as property in order to validate an injunction). Warren and Brandeis refer to *Gee*, but completely overlook this aspect of the decision. See Warren & Brandeis, *supra* note 93, at 200 n.3 (quoting the decision).

105. See Warren & Brandeis, *supra* note 93, at 213 (“[T]he rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property . . .”).

feature of all the privative copyright claims that they rely on: namely, that the action in each case was brought by the author of the work, rendering it functionally a personal claim and throwing direct focus not just on the representational issue but also on authorial autonomy. Emphasizing the authorial aspect of privative copyright claims would have perhaps undermined their case for a standalone right to privacy; nevertheless, given the centrality of authorship as a normative matter to those claims, its omission is stark.

Despite all of this, the Warren and Brandeis article had the effect of influencing state courts in the creation of privacy torts.¹⁰⁶ In this development, though, courts seem to have paid scant attention to the possibility of copyright—common law or statutory—offering plaintiffs a more efficacious remedy in certain situations, given its structure as a strict liability action and the statute’s provision of rather direct and clear remedies, including statutory damages. The main indirect effect over time was simply that these claims, which had once been a legitimate part of copyright jurisprudence, eventually came to be seen as palpably illegitimate within copyright.¹⁰⁷ Copyright law’s eventual utilitarian turn only served to solidify this view and build on the property/nonproperty logic that the Warren and Brandeis article put forth.

Even if Warren and Brandeis are seen to have made a compelling argument for the development of independent privacy torts and the existence of a “right to privacy,” nowhere does their analysis recommend eliminating the personal claims that they identify from the ambit of copyright law. To the contrary, insofar as they identify copyright law to be a subset of a general action to protect individual privacy, they seem to imply the continuing legitimacy of such claims under copyright.¹⁰⁸ While this may not be true for privacy claims that involve neither authorial subject matter nor original expression, it is certainly the case for material that involves one or both of these elements. And yet, scholars have read the Warren and Brandeis article as recommending a dramatic reduction in copyright’s scope, in furtherance of a right to privacy.¹⁰⁹

106. For an early discussion of this influence by 1960, see Prosser, *supra* note 92, at 384–89.

107. So much so that by 1985, the Supreme Court noted that “[i]t is true that common law copyright was often enlisted in the service of personal privacy,” reversing the order that Warren and Brandeis had identified in their argument. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985).

108. See Warren & Brandeis, *supra* note 93, at 195–98 (discussing copyright law as “the next step which must be taken for protection of the person”).

109. See, e.g., Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 654–55 (1991) (“Because they desired to construct a right of privacy that extended protection to an entire inviolate personality and not just to its

What is also perplexing, though perhaps an unremarkable reality of its era, is that the Warren and Brandeis article offers no normative justification for treating privacy claims as a separate cause beyond a formalist treatment of the property idea. Nor does it offer any structural or procedural reasons for it. To the contrary, it disregards the possibility of there being strong normative reasons for retaining these claims (at least partially, if not wholly) within copyright law—reasons deriving from the ideas of authorship and authorial autonomy discussed previously.

As Warren and Brandeis see it, disseminative harm is the very basis of the right to privacy. While they may be right to see in it elements of the need “to be let alone,” they altogether disregard the centrality of authorship and self-expression in instances of such harm, which formed the very basis for copyright’s inclusion of such harm within its overall ambit. Much of their analysis is strongly persuasive when it involves informational claims that do not involve original expression or implicate third-party nonauthor plaintiffs.

Contrary to much of today’s accepted wisdom, then, the right to privacy does not exhaust the gamut of claims and interests that plaintiffs have over personal content. The intellectual lineage of the Warren-Brandeis argument and their disaffection for the analytical and normative basis of privative copyright claims on which they based their entire analysis aptly reveal this point. The expanding domain of privacy law coupled with the utilitarian turn in copyright have only served to allow their argument to flourish, while ignoring the reality that disseminative harm is a distinct form of harm within the panoply of legitimate copyright harms.

C. Simulating (and Enlarging) the Moral Right of Disclosure

While privacy torts may thus be an imperfect home for the dignitary interest involved in privative copyright claims, there is nevertheless a cause of action recognized in some countries that presents a closer analog: the moral right of disclosure.

Until the year 1990, federal copyright law consciously distanced itself from providing authors with “moral rights,” a set of rights that

products, Warren and Brandeis believed that they were forced to dismantle the property law structure of common law copyright.”). *But see* Pamela Samuelson, *Protecting Privacy through Copyright Law?*, in *PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS* 191 (Marc Rotenberg et al. eds., 2015) (analyzing the privacy/copyright connection in the Warren & Brandeis article and, unlike other scholars, remaining equivocal about allowing copyright to retake some of the domain that has been excised from it in the name of privacy).

have long been recognized and protected in civil law jurisdictions.¹¹⁰ Premised on the idea of ensuring respect for the work and the author's connection to it, these rights are seen as emanating from the very act of authorship, inalienable and functionally distinct from copyright's exclusive economic rights.¹¹¹ Of the myriad moral rights recognized in these jurisdictions, the attribution right and the integrity right remain the best known—and are indeed the only moral rights that are today recognized at the federal level in the United States.¹¹² A right that is infrequently invoked, yet of some significance, is the right of disclosure.

The right of disclosure protects the author before her work is released publicly. Until the author is ready to divulge or disclose it publicly, the right allows her to prevent any dissemination of the work against her wishes.¹¹³ As a corollary, it also allows the author to prevent its dissemination if she chooses to abandon or discard the work without publicly distributing it. Essential to the operation of the right is that the work be deemed incomplete by the author.¹¹⁴ In essence, therefore, it is directed at protecting the creative process and the author's autonomy and control over deciding when that process has terminated and when the work is ready for release to the public—in other words, the decision of when to become an author.

Upon joining the Berne Convention in 1989, Congress decided to accord authors some minimal form of moral rights protection in the United States, through the Visual Artists Rights Act of 1990.¹¹⁵ It did so by recognizing the rights of integrity and attribution, the only rights

110. For a general overview of moral rights protection, see MIRA T. SUNDARA RAJAN, *MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY* 31–110 (2011); Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 75 (1951); and Rigamonti, *supra* note 13.

111. See RAJAN, *supra* note 110, at 7 (explaining that notions of “the author as an independent creator” coincided with the rise of the moral rights doctrine).

112. See Visual Artist Rights Act of 1990, 17 U.S.C. § 106A (2012) (explicitly granting these rights to “author[s] of a work of visual art”); see also Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) (probing the relationship between the 1976 Copyright Act and moral rights).

113. See Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467–73 (1968); see also Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 203–06 (1995); Carl H. Settlemeyer III, Note, *Between Thought and Possession: Artists' Moral Rights and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2329–44 (1993).

114. As one leading scholar of French law put it:

So long as a work of art has not been completely created—of which the artist alone can be the judge—it remains a mere expression of its creator's personality, and has no existence beyond that which he tentatively intends to give it. . . . He alone is able to determine when it should be disclosed, put into circulation, and treated as a chattel which may be exploited for profit.

Sarraute, *supra* note 113, at 467.

115. 17 U.S.C. § 106A.

which the convention recognized.¹¹⁶ The legislative history of the 1976 Act reveals that Congress was well aware of the disclosure right and made a conscious decision to avoid recognizing it in the statute at the time.¹¹⁷ Congress adhered to this position in 1990.

Privative copyright claims operate as a substantial (if not complete) replacement for the moral right of disclosure.¹¹⁸ Even prior to the Act of 1976, common law copyright afforded authors protection for their unpublished creations, which was seen as doing the same work as the disclosure right.¹¹⁹ Indeed, in some respects the common law protection was broader insofar as it was not limited to incomplete works, unless of course the act of publication was seen as part of the completion. With the abolition of common law copyright for published works and the simultaneous elimination of publication as a prerequisite for federal copyright protection, privative copyright claims—based on the exclusive rights to publicly distribute and display the work—operate as a full replacement for the disclosure right. In reality, post-1976 claims go further than their common law equivalents in allowing for protection even when the work is fixed and published, but not *publicly* distributed or displayed.

The revenge pornography example, discussed above,¹²⁰ offers a useful illustration of this equivalence and indeed of the more protective nature of privative copyright claims. The victim of the unauthorized dissemination would not have had a claim under the moral right of disclosure, for two interrelated reasons. First, from the moment the picture was taken, it was complete; and second, it was indeed “disclosed” in some sense, even if only to the private recipient. By contrast, neither of these issues present obstacles to a successful privative copyright claim.

Conversely, if one examines the most prominent continental cases where the moral right of disclosure was successfully invoked, it is apparent that they would each be sufficiently covered by the scope of

116. See *id.*; see also Berne Convention for the Protection of Literary and Artistic Works art. 6 bis, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986), 1161 U.N.T.S. 3 (amended Sept. 28, 1979) (affording authors certain moral rights protections).

117. William Strauss, *Study No. 4: The Moral Right of the Author*, in SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION 120–21 (Comm. Print 1961).

118. For an early recognition of this point, see James M. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 AM. J. COMP. L. 487, 493 (1968). For a recent argument advocating for the right in order to protect privacy interests in American copyright law, see Keller, *supra* note 65, at 38.

119. See Treece, *supra* note 118, at 493 (comparing American “common law copyright” to the French “right of disclosure”).

120. See discussion *supra* notes 6–9 and accompanying text (discussing the use of copyright law to combat revenge pornography in *Doe v. Elam*).

modern privative copyright claims. These cases usually involve a familiar pattern.¹²¹ An artist enters into an agreement with a buyer to produce a work of art and then prior to the work's completion, the artist either dies or abandons the project.¹²² When the buyer then chooses to display and distribute the work publicly, the author (or her heirs) successfully invokes the right of disclosure to prevent this from happening.¹²³ In the United States, under post-1976 copyright law, these cases would all be covered by privative copyright claims—emanating from the public distribution right, the public display right, or both. The buyer's actions in each instance unquestionably amount to either a public distribution or public display which was not authorized by the artist, allowing for a successful claim. Consequently, privative copyright claims, especially after 1976, more than substitute for the lack of a moral right of disclosure in U.S. copyright law.

Indeed, the normative logic for the existence of the right of disclosure in continental jurisdictions originates from the idea of avoiding disseminative harm to the author of the work. It stems from a trenchant commitment to authorial autonomy, a commitment that views the author or creator as the “master” of the work, with personal and potentially idiosyncratic preferences and choices that nevertheless deserve respect and serious validation in order to preserve such autonomy.¹²⁴ Such is the strength of this right that even in situations where it would be objectively wasteful and meaningless to allow the right to be exercised (and for the work to be withheld from the public), the exercise of the right by an author is permitted in the interests of preserving such autonomy.¹²⁵ In Anglo-American copyright systems, privative copyright claims afford authors nearly the same amount of protection against disseminative harm as the moral right of disclosure.

121. See Sarraute, *supra* note 113, at 467–73 (discussing the *Whistler*, *Camoin*, *Rouault*, and *Bonnard* cases).

122. See *id.*

123. See *id.*

124. *Id.* at 467–68 (quoting *Whistler v. Eden*, Cour de cassation [Cass. 1e civ.] [supreme court for judicial matters] Seine, Mar. 14, 1900, D.P. 1900, I, 497, 500 (Fr.) as using this language to describe the artist's control over the work).

125. This was the situation in the *Camoin v. Carco* case, where the artist had trashed his incomplete work of art, but a third party found it and sought to restore and display it, which resulted in the court siding with the artist and disallowing the third party's actions despite the obvious wastefulness of this outcome. See Cour d'appel [CA] [regional court of appeal] Paris, Mar. 6, 1931, D.P. 1931, II, 88, note Mast (Fr.).

III. THE EVOLUTION OF PRIVATIVE COPYRIGHT CLAIMS

Privative copyright claims are almost as old as Anglo-American copyright law itself. The logic underlying their functioning began to take shape shortly after the passage of the Statute of Anne in 1710. In the three centuries since, they have mutated and adapted to society's changing conceptions of privacy, personal autonomy, and copyright's coverage of new subject matter. This Part describes the evolution of privative copyright claims since the early eighteenth century. Despite its shifting contours, copyright law has remained steadfast in its protection for the dignitary interest underlying these claims, a reality that is often forgotten in modern discussions of the subject.

An examination of privative copyright claims over the years reveals three interrelated trends that are worth describing at the outset. First, fairly early on in the development of privative copyright claims, we see courts disavowing an objective verification of the dignitary interest involved—and the corresponding disseminative harm—and instead allowing the author to assert a subjective conception of the interest and corresponding harm from the defendant's actions. This had the obvious effect of expanding the scope of privative claims.

Second, in keeping with the move away from assessing the personal content of the work, we see courts occasionally justifying privative copyright claims using an inchoate labor theory of authorship.¹²⁶ Unlike a Kantian approach based on authorial autonomy (and compelled authorship), the labor-based account enabled courts to focus on the process of authorship without having to examine or assess the product of that process—that is, the content of the work.

Third, with the increased application of fair use to privative copyright claims under the 1976 Act, copyright jurisprudence has diluted the uniqueness and significance of the dignitary interest involved. Courts either translate—simplistically—the interest involved into economic terms, or they completely ignore the unique nature of the interest and operate using the formal language of the law that is outwardly agnostic to the nature of the interest at issue.

126. Inchoate only in the sense that it was never built into a fuller labor theory of ownership along the lines offered by some applying Locke's theory to copyright. For applications of Locke to copyright, see Carys J. Craig, *Locke, Labour, and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright*, 28 QUEENS L.J. 1 (2002); Jonathan Peterson, *Lockean Property and Literary Works*, 14 LEGAL THEORY 257 (2008); and Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

A. Early English Law

The earliest form of privative copyright claims involved private letters, which at the time were seen as embodying an individual's most personal (and honest) statements about the world, meaning their unauthorized publication and revelation could produce more than just pecuniary harm. With the passage of the Statute of Anne in 1710,¹²⁷ the first Anglo-American copyright statute, it did not take long for a case involving private letters to make its way to court. The case was also one of the first ever copyright cases under the statute to be brought by an author, the new recipient of rights under the legislation.¹²⁸ The case was *Pope v. Curl*, well known among copyright scholars and historians as the first case to hold that copyright protection subsists in letters, even when physical possession of those letters had been transferred to another.¹²⁹

Decided in 1741 by the Court of Chancery, *Pope* involved a claim by the famous poet Alexander Pope against a Defendant bookseller who sought to publish a collection of letters between Pope and the famed author Jonathan Swift.¹³⁰ The extremely short opinion of just one page does little justice to the complexity of the case. As Mark Rose has documented, the case was in many ways a setup wherein Pope sought to manage his image "as a gentleman and a scholar rather than as a professional."¹³¹

When the Defendant in the case published Pope's correspondence without his authorization, Pope made his argument for copyright infringement in personal rather than economic terms, arguing that such publication was a form of "betraying Conversation" and socially harmful.¹³² There appears to have been nothing particularly problematic or embarrassing in the content of the letters themselves, which Pope of course knew.¹³³ This also pushed his legal argument in the case (made forcefully by William Murray, who would go on to become none other than Lord Mansfield, the noted copyright

127. Statute of Anne 1710, 8 Ann. c. 21 (Eng.) (repealed 1842).

128. See Mark Rose, *The Author in Court: Pope v. Curl (1741)*, 21 CULTURAL CRITIQUE 197, 197-98 (1992) (describing *Pope* as "an important transitional moment in the concept of authorship and author's rights").

129. See *id.*

130. See *Pope v. Curl* (1741) 26 Eng. Rep. 608, 608; 2 Atk. 342, 342.

131. Rose, *supra* note 128, at 202.

132. *Id.* at 203-04.

133. See *id.* at 202-05.

jurist¹³⁴) in the direction of content neutrality by disentangling the unauthorized dissemination from its underlying content.

The Defendant, however, sought to rebut Pope's claim in two primary ways. First, on the question of property, he argued that the true owners of the letters were their recipients, rather than their authors.¹³⁵ And second, he sought to refute the idea of content neutrality by claiming that the copyright statute was designed with literary works in mind, which these letters could not be fairly said to represent. The court's decision responded to both points.¹³⁶

While acknowledging that the Statute of Anne was designed for "the encouragement of learning," the court nevertheless refused to make a distinction between a book of letters and "any other learned work."¹³⁷ It offered no reason other than that such a distinction "would be extremely mischievous."¹³⁸ On the property question, the court drew a distinction between ownership of the physical letter and ownership of its content, noting that it was only the latter that authorized publication and which vested in the author.¹³⁹ The opinion then returned to the question of the statute and offered some additional clarification on its conclusion that letters could obtain protection:

It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.¹⁴⁰

This is a peculiar but nevertheless important observation for our purposes. What the court is suggesting is that the very fact that the work at issue was intended to be kept private renders it in some ways more worthy of protection as a learned work—perhaps because it presents a more honest picture of the subject.¹⁴¹ What this observation and the overall opinion reveal is a court that is on the one hand unwilling to directly examine whether the Plaintiff suffered any specific

134. See Bernard L. Shientag, *Lord Mansfield Revisited—A Modern Assessment*, 10 *FORDHAM L. REV.* 345, 354 n.35 (1941).

135. *Pope*, 26 Eng. Rep. at 608, 2 Atk. at 342.

136. *Id.*, 2 Atk. at 342–43.

137. *Id.*, 2 Atk. at 342.

138. *Id.*, 2 Atk. at 342.

139. See *id.*, 2 Atk. at 342.

140. *Id.*, 2 Atk. at 343.

141. The law of evidence adopts a similar position, which is perhaps what the court was alluding to. Modern evidence law considers contemporaneous written accounts of an event to represent an exception to hearsay and as such makes them admissible when the declarant is available to testify. See *FED. R. EVID.* 803(1) (setting forth the "Present Sense Impression" exception).

harm as a result of the publication, but on the other engaging with the question of protectability by trying to show how letters are themselves literary works in the spirit of that category.

The observation is particularly noteworthy because it appears to be little more than dicta in the case, since *Pope* did not involve an unpublished work at all.¹⁴² Contrary to some prominent misreadings of the case,¹⁴³ scholars have long noted that *Pope* involved the Plaintiff's assertion of a statutory copyright claim on the basis of an authorized publication of the letters undertaken prior to the Defendant's actions.¹⁴⁴ *Pope* was therefore not a privative copyright case strictly speaking, even though its observations about the value and protectability of letters offer a theory for analogous privative claims.

Pope set forth the principle that letters were protectable subject matter under statutory copyright. And soon enough additional cases followed suit, most of which did indeed involve privative claims.¹⁴⁵ And whereas the Plaintiff and court in *Pope* had refrained from addressing the objective content of the letters and the effects of its publication, later litigants became more willing to use the private and potentially embarrassing content of the letters to advance an objective view of the harm that would accrue from its publication.

Perhaps the earliest privative copyright case was *Thompson v. Stanhope*, where the Plaintiffs were the executors of a well-known earl.¹⁴⁶ Over the course of his lifetime, he corresponded extensively with his son and in these letters "drew the characters of persons, and wrote upon the subject of politics" in addition to a variety of other matters intended as instruction for his son.¹⁴⁷ When his son died, the earl allowed the letters to remain in the possession of his widow, the

142. I am grateful to Professor Tomas Gomez-Arostegui for this point, and his generous assistance with the original archival materials from the case.

143. The misreading of the case is pervasive and extends to both judicial opinions and scholarly work examining the case. Much of the confusion appears to emanate from the manner in which *Pope* brought about the prior publication of his letters. For characterizations of the case as involving an unpublished work, see *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837, 842; *Millar v. Taylor* (1769) 98 Eng. Rep. 201, 221 & n.2; 4 Burr. 2303, 2340 & n.2; ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 38–39 (2010); RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775) 73–74 (2004); and BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW 12 n.6 (1999).

144. See, e.g., David J. Brennan, *The Root of Title to Copyright in Works*, 2015 INTELL. PROP. Q. 289, 292–93 (noting that, surprisingly, the case was pleaded under the Statute of Anne and not under a common law right).

145. See, e.g., *Perceval v. Phipps* (1813) 35 Eng. Rep. 225, 225; 2 Ves. & B. 19, 19 (dissolving an injunction against publication of private letters); *Granard v. Dunkin* (1809) 1 Ball & Beat. 207 (Ir. Ch.) (granting an injunction against publication of private letters).

146. *Thompson v. Stanhope* (1774) 27 Eng. Rep. 467, 476; Amb. 737, 737.

147. *Id.*, Amb. at 737.

Defendant.¹⁴⁸ Following the earl's death, the widow sought to have the letters published.¹⁴⁹ The earl's heirs objected, arguing that his intention was always to have the letters destroyed after his death, and sought an injunction.¹⁵⁰ Implicit in their objection was that publication would impact the public reputation and honor of the letters' author, who had always intended to keep them private for this reason. Without much reasoning, the court granted the injunction.¹⁵¹ Pressed with the argument that the letters contained valuable content that the public deserved to see, the court "recommended it to the executors to permit the publication, in case they saw no objection to the work upon reading it."¹⁵²

Whereas *Pope* chose to remain completely agnostic to the content of the Plaintiff's letters and proceed on the mere recognition of the letters as literary works, *Thompson* apparently acknowledged the potentially embarrassing and personal nature of the content, but almost completely outsourced that recognition to the Plaintiff without any further scrutiny.

Privative copyright claims reached their fullest recognition a short while later, in the case of *Gee v. Pritchard*,¹⁵³ where the court was asked to grapple with the sensitive nature of the expression involved. The Defendant in the case was the stepson of the Plaintiff, and over the course of his life had corresponded with the Plaintiff.¹⁵⁴ In such correspondence, the Plaintiff had often communicated matters "of a private and confidential nature" to him "relating to his morals and conduct in life."¹⁵⁵ When they had a falling out, the Defendant threatened to publish the correspondence, which the Plaintiff contested as a "violation of [her] right and interest" and noted that it was "intended to wound her feelings."¹⁵⁶ On this basis, she sought an injunction.

What is interesting about the case is that it is reported as a colloquy between the court and the Plaintiff, wherein the court appears to be searching for an appropriate basis on which to afford relief. Early on in the argument, the court rejects the Plaintiff's argument about hurt feelings, noting that "the continuance or the discontinuance of [a]

148. *Id.*, Amb. at 737.

149. *Id.*, Amb. at 737.

150. *Id.*, Amb. at 738.

151. *Id.* at 477, Amb. at 740.

152. *Id.*, Amb. at 740.

153. *Gee v. Pritchard* (1818) 36 Eng. Rep. 670; 2 Swans. 403.

154. *See id.* at 670, 2 Swans. at 403.

155. *Id.*, 2 Swans. at 403–04.

156. *Id.* at 671, 2 Swans. at 405.

friendship” can form no basis for the relief.¹⁵⁷ While expressing some limited skepticism about the principle, the court nevertheless concluded that letters were legitimate literary works and could qualify for protection as property, which would entitle the Plaintiff to an injunction.¹⁵⁸ All the same, the argument about “feelings” was not completely irrelevant, as it triggered the following observation from the court:

I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.¹⁵⁹

While intriguing, the court’s language has been the subject of significant interpretive disagreement ever since.¹⁶⁰ It is rooted in the distinction between law and equity, which soon became defunct.¹⁶¹ Premised on the idea that “equity follows the law,” courts of equity often required proof of a right at law before they would interfere and grant relief.¹⁶² The court appears to be advancing the argument that although the Plaintiff’s subjective assessment of dignitary harm cannot form the jurisdictional basis of its intervention, it may nevertheless be the basis for the court’s relief once such jurisdiction is established on the basis of “property”—that is, copyright. Warren and Brandeis saw in *Gee* a move toward recognizing wounded feelings as the basis for its intervention, which is obviously incorrect.¹⁶³ Instead, the court drew a distinction between the basis of its jurisdiction for intervention and the Plaintiff’s

157. *Id.* at 674, 2 Swans. at 413.

158. *See id.*, 2 Swans. at 414.

159. *Id.* at 678; 2 Swans. at 426.

160. *See* W.B.G., Note and Comment, *A Re-interpretation of Gee v. Pritchard*, 25 MICH. L. REV. 889 (1927) (arguing *Gee* has been misunderstood and does not in fact stand for the idea that “the office and jurisdiction of equity[,] unless enlarged by express statute[,] are limited to the protection of rights of property”). *See generally* MEGAN RICHARDSON, *THE RIGHT TO PRIVACY: ORIGINS AND INFLUENCE OF A NINETEENTH-CENTURY IDEA* 27–28 (2017) (“[G]iven the circumstances of this case, . . . it might be argued that breach of confidence was the more appropriate doctrine for the protection of privacy . . .”).

161. For an account of the law/equity distinction and its origins see F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936) (1909) (offering an extensive analysis of equity); and S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 74–87 (1969) (discussing the rise of early equity in England). For an account of the law/equity merger and its effects, see Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1 (2002).

162. For an account of this maxim and its application, see Zechariah Chafee, Jr., *Does Equity Follow the Law of Torts?*, 75 U. PA. L. REV. 1 (1926).

163. *See* Warren & Brandeis, *supra* note 93, at 200–05 (arguing that the court’s use of property was a stand-in for privacy concerns). For a criticism of this interpretation, see W.B.G., *supra* note 160, at 890 (“[N]aturally both court and counsel would be searching for the right and threatened tort in the field of property.”).

reasons for seeking relief.¹⁶⁴ Authorial property justified the former, the Plaintiff's subjective claim of dignitary harm the latter.

The court's refusal to fully engage the nature of the "feelings" and the specific nature of harm likely to accrue from the publication of the work may be partially explained by a rule that prevailed at the time, which denied both common law and statutory copyright protection for works that were unlawful or immoral.¹⁶⁵ Lord Eldon, the author of the opinion in *Gee*, had in the year before decided another well-known case involving the right of first publication; in that case, the Plaintiff had transmitted the manuscript of a libelous poem to the Defendant with the intention of publishing it, but the Plaintiff ultimately changed his mind before its publication.¹⁶⁶ When the Defendant nevertheless went ahead and published it, the Plaintiff sought an injunction, claiming a violation of his right.¹⁶⁷ Lord Eldon denied the relief on the basis that the Plaintiff's very right was in question because the work was not "innocent."¹⁶⁸ Consequently, a fuller investigation into the nature of the Plaintiff's dignitary interest in privative copyright cases would have had courts running into considerations of libel, morality, and bad faith, which would have sullied the nature of the right at issue and undermined their jurisdiction. It is perhaps for this reason that Lord Eldon himself is fairly cryptic in *Gee* about the nature of the feelings at issue, an approach that would cement the subjective nature of the harm involved in such cases.

The broadest—and most controversial—expansion of privative copyright claims was to come a few years later, in the celebrated case of *Prince Albert v. Strange*.¹⁶⁹ The case cemented the basis for a court's intervention on a subjective conception of dignitary harm but made the further move toward identifying a distinctive privacy interest. The case involved drawings and etchings that the Queen and her husband were in the practice of making as a hobby for their amusement.¹⁷⁰ These drawings were "of subjects of private and domestic interest to themselves" and, to ensure their privacy, the couple took great pains to have them printed by a private press and retained possession of the

164. See W.B.G., *supra* note 160, at 890 ("Criminal libel was suggested and promptly rejected on the familiar principle that equity has no jurisdiction to enjoin the commission of crimes.")

165. EATON S. DRONE, A TREATISE ON THE COMMON LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES: EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 112–13 (1879).

166. *Southey v. Sherwood* (1817) 35 Eng. Rep. 1006, 1006–07; 2 Mer. 435, 435–37.

167. *Id.* at 1006; 2 Mer. at 435–36.

168. *Id.* at 1007; 2 Mer. at 437–38.

169. (1849) 41 Eng. Rep. 1171; 1 Mac. & G. 25.

170. *Id.* at 1172; 1 Mac. & G. at 26.

plates themselves.¹⁷¹ Somehow the drawings got into the hands of the Defendant, who proposed to hold a public exhibition showcasing them and, to that end, printed a catalogue describing all the works that were to be exhibited.¹⁷² The Plaintiffs took exception to this and sought an injunction.¹⁷³

In its opinion, the court considered it wholly unexceptional that the work at issue was a work of art—rather than a literary work—and readily acknowledged the Plaintiff's right.¹⁷⁴ The principal basis of the Plaintiff's argument rested on the “right to determine whether [to] publish [the work] or not,” that is, the “right to the first publication,” to which the court acceded.¹⁷⁵ Yet, the court went one step further. It held that the Defendant's catalogue was nothing more than “a means of communicating knowledge and information of the original,” which would harm the Plaintiff's personal interests just as much, and accordingly enjoined the publication and distribution of the catalogue as well.¹⁷⁶ While this extension of protection heralded the onset of a separate privacy interest in the common law, it also had the effect of conflating the dignitary interest underlying the Plaintiff's copyright claim, which was rooted in both representational and authorial autonomy, unlike the privacy claim that sounded in personal autonomy.

Nevertheless, for our purposes, *Prince Albert* suggests that by the mid-nineteenth century, privative copyright claims had become largely unexceptional, especially at equity where the relief sought was an injunction. The court's statement that “[t]he property of an author or composer of any work, whether of literature, art, or science, in such work unpublished and kept for his private use or pleasure, cannot be disputed” is telling in this regard.¹⁷⁷ Not only was it now irrelevant whether the work qualified for protection under the statute, but the law had grown perfectly content with assuming the existence of a dignitary interest based on the plaintiffs' assertions and deferring to them on the question. This eventually got turned into the right of first publication, specifically for unpublished works.

The early development of privative copyright claims highlights a few things. First, courts' principal concern in these cases—at least initially—centered around whether the works at issue could qualify as protectable subject matter under the terms of the statute. They readily

171. *Id.*; 1 Mac. & G. at 26–27.

172. *Id.* at 1172–73; 1 Mac. & G. at 28–29.

173. *Id.*; 1 Mac. & G. at 28–29.

174. *Id.* at 1174; 1 Mac. & G. at 33.

175. *Id.* at 1176; 1 Mac. & G. at 37.

176. *Id.* at 1178; 1 Mac. & G. at 43.

177. *Id.*; 1 Mac. & G. at 42.

answered this in the affirmative by denying the need for any scrutiny of the work's substantive merits, a position that would continue well into the future. (A secondary concern was the extent to which a plaintiff's claim had been abandoned by virtue of the limited or private communication of the content, for which they relied on the distinction between possessory and incorporeal property.) Second, while courts recognized the dignitary nature of plaintiffs' motivations, they did no more than suggest that these concerns were legitimate and consciously avoided any deeper examination of their credibility. In so accepting a subjective version of the plaintiff's account of harm, they were likely avoiding getting entangled in the domestic affairs of the litigants, many of whom were prominent personalities at the time, or in the complex interplay between copyright, libel, morality, and public policy. It also had the effect of allowing them to proceed using the formal language of the law without having to make any special exceptions for the nature of the interest at issue. This, in turn, allowed the domain of privative claims to expand beyond just literary works, to other categories where the plaintiff asserted similar motivations and showed the existence of a valid right. Third, and finally, an overwhelming majority of these cases were brought at equity, since the plaintiff was seeking an injunction. This enabled the court to exercise a greater degree of flexibility and discretion in molding the bases for its jurisdiction and interference in the case.

B. Early American Law

The first U.S. copyright statute, the Act of 1790, was modeled in large part on the Statute of Anne.¹⁷⁸ The earliest reported privative copyright claim was brought shortly after, in 1811, and adopted a noticeably different approach from its English counterparts.¹⁷⁹ While it relied on English precedents for its position, the court openly embraced a more objective approach to the dignitary interest at issue.¹⁸⁰

The case of *Denis v. LeClerc* illustrates this objective approach.¹⁸¹ The facts involved a letter written by the Plaintiff to a lady wherein he sought to "pay[] his addresses" to her, that is, he attempted

178. Compare 1 Stat. 124 (1790), with Statute of Anne 1710, 8 Ann. c. 21 (Eng.) (repealed 1842).

179. *Denis v. LeClerc*, 1 Mart. (o.s.) 297 (Orleans 1811).

180. *Id.* at 305 ("A defendant is not to be enjoined from doing an act, on account of the benefit which he expects to derive therefrom, but on account of the injury which it may occasion to the plaintiff.").

181. *Id.*

to court her.¹⁸² The content of the letter was therefore obviously private and potentially embarrassing. The Defendant, through means unknown, obtained copies of the letter and sought to publish it, to which the Plaintiff objected.¹⁸³ At first, the Plaintiff obtained an injunction.¹⁸⁴ In his answer to the injunction, the Defendant annexed a copy of the letter and filed it in the office of court clerk, after which he advertised publicly that others interested in reading the letter might do so by visiting the clerk's office.¹⁸⁵ The Plaintiff then approached the court again, seeking to hold the Defendant in contempt.¹⁸⁶ The court obliged in an elaborate opinion.

The court initially described the relevant English authorities to confirm the validity of the Plaintiff's right to the injunction.¹⁸⁷ Interestingly enough, the Defendant attempted to distinguish these authorities by pointing out that whereas the defendants in those cases had all been seeking to publish the letters at issue and thereby seek a profit, he had clear nonmonetary reasons for his actions in that he was doing so "with the sole view of disclosing the writer's secrets and wounding his feelings."¹⁸⁸ The court found this argument to be of no consequence, but instead to even more strongly favor the Plaintiff's right.¹⁸⁹ Additionally, this concession by the Defendant allowed the court to venture into the nature of the harm that the Defendant was attempting to bring about, which required a closer examination of the work itself.¹⁹⁰

Canvassing a whole set of French, English, and Roman authors on the ethics and morality of publishing private correspondence, the court observed that when letters were "written with mystery and contain[ed] confidential things," the wrong from revealing their content was even "greater when the secret of a letter is unveiled *with the only design of* DOING AN INJURY to the writer."¹⁹¹ The Plaintiff's effort to "open his heart, without any apprehension of that being revealed" in his letter, which was covered in "mystery and confidence," was worthy of additional protection from the Defendant's public actions, which were

182. *Id.* at 312.

183. *Id.* at 318.

184. *See id.*

185. *Id.*

186. *Id.*

187. *Id.* at 300–05.

188. *Id.* at 305.

189. *Id.* at 305–06.

190. *Id.* at 312.

191. *Id.* at 310.

entirely to “vex the plaintiff.”¹⁹² And thus the court adopted an overtly objective approach toward the Plaintiff’s dignitary interest and the corresponding disseminative harm through a closer examination of the contents of the letter and the Defendant’s motives in publicizing it. In so doing, it unwittingly broke with prior English precedents.¹⁹³

While early American cases approvingly cited and relied on English precedents for their principles, they at the same time went out of their way to add more justificatory content for their holdings. This is in clear contrast to their English counterparts, which were tersely worded and often structured using the language of formal rules and principles. In so doing, American courts often unknowingly deviated from English law. Much of this appears to have also been influenced by prominent legal treatise writers, many of whom were deeply influential in the jurisprudence of the time.¹⁹⁴

Joseph Story, for instance, in his classic work on equity, devoted an entire section to understanding how courts of equity approached the issue of injunctions in cases involving the publication of private letters.¹⁹⁵ While he drew from the finite set of English precedents, he attempted to synthesize them using rational principles. This synthesis added a gloss that was hardly appreciated at the time. Unlike any of the English cases, Story offered a rationale for protecting the publication of private letters:

In a moral view, the publication of such letters . . . is perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined. It strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments, between relatives and friends, and correspondents, which is so essential to the well-being of society, and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress, from the public display of facts and circumstances, which were reposed in the bosoms of others under the deepest and most affecting confidence, that they should for ever remain inviolable secrets.¹⁹⁶

192. *Id.* at 310, 312.

193. As an apparent last effort, the Defendant in *Denis* also raised the argument that the injunction impeded the “freedom of the press” embodied in the First Amendment. *Id.* at 313–14. Again, the court rejected this argument with the observation that an open-ended claim of this sort would mean that any “propagation” of a slander or libel would remain nonactionable. *Id.* at 315. It then entered a judgment for the Plaintiff, found the Defendant to be in contempt, and imposed a monetary fine on the Defendant in addition to ordering that he be imprisoned for “ten days” owing to the contempt. *Id.* at 313–15, 321.

194. For the authoritative account of this, see A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 668–74 (1981) (describing the contrasting influence and growth of American legal treatises and their English counterparts).

195. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 946 (11th ed. 1873).

196. *Id.* § 946.

Story thus offered a theory of harm for copyright law's intervention in such instances. While his account of harm encompassed disseminative harm—of a private nature—it also interestingly adopted a collectivist mindset. In other words, the harm was not just the actual effect on the plaintiff-author, but additionally the effect on the fabric of society as a whole, since it would alter the form and nature of individual communications as a result. Of course, not all legal treatises were this forceful; some merely offered an account of English precedents.¹⁹⁷

But Story's account formed the basis for the court's intervention in the 1855 New York case of *Woolsey v. Judd*, regarded as having settled the question of copyright protection for private letters under American law.¹⁹⁸ The case also cemented the legitimacy of private copyright claims. The Defendant in *Woolsey* was the editor of a local newspaper who had come into possession of a few private letters written by the Plaintiff and sought to publish them.¹⁹⁹ His motive was "fixing upon the plaintiff . . . the imputation of being the authors or instigators of certain anonymous and abusive publications, relative to a religious society."²⁰⁰

The court began its elaborate and wordy opinion by first noting that the Copyright Act of 1831 specifically empowered courts to grant injunctions to "restrain the publication" of a work sought to be published "without the consent of the author."²⁰¹ It then canvassed the English authorities in exquisite detail to confirm the existence of the Plaintiff's right *qua* author of the letters.²⁰² Relying on Story's exposition, the court agreed that the basis for its intervention needed to be an actual legal property right, and not just the possibility of harm to the Plaintiff from the publication.²⁰³ The basis of this right was in the court's view just like the ordinary rights of chattel ownership. Just as an artist who produces "a painting [that is] a wretched daub" or a "statue [that is] a lamentable abortion" has the right to prevent "its public exhibition" against his will, which would "disgrace the artist," the same would apply to literary property.²⁰⁴ According to the court, the nature of this right was "absolute," in that ensuring the nondissemination of the work was a viable basis for relief.²⁰⁵ "As owner,

197. See, e.g., CURTIS, *supra* note 98, at 89–100.

198. 11 How. Pr. 49, 53–54 (N.Y. Sup. Ct. 1855).

199. *Id.* at 49–51.

200. *Id.* at 51.

201. *Id.* at 51–52.

202. *Id.* at 54–79.

203. *Id.* at 53–55.

204. *Id.* at 57.

205. *Id.* at 58.

he has an absolute right to suppress as well as to publish; and he is as fully entitled to the protection and aid of the court, when suppression is his sole and averred object, as when he intends to publish.”²⁰⁶

The *Woolsey* court went to great lengths to distance the basis of copyright protection in the Plaintiff’s work from any need to show either market significance or literary merit. Neither “intended publication” nor “pecuniary value” were requirements for protection as copyrightable subject matter, in the court’s view.²⁰⁷ The court also rejected any scrutiny of the substance of the work for its “intrinsic merits,” so as to connect it to the Plaintiff’s basis for suppressing it.²⁰⁸

A related move seen in the opinion is the court’s effort to distance the Plaintiff’s attempt to suppress the work—that is, its privative nature—from what is often described as the right of first publication.²⁰⁹ As an affirmative right, the right of first publication entitles the author to determine when and how to publish the work.²¹⁰ Yet, as an analytical matter, it appears premised on the existence of an intention to publish the work, which could be taken to imply that when the author openly disavows such an intention, the right disappears.²¹¹ Early English case law on the right of first publication had largely involved pecuniary motives on the part of either or both plaintiffs and defendants.²¹² To the *Woolsey* court, the two were analytically distinct, even if considered sides of the same coin. The right in the unpublished letters was the right “to control the act of publication, and, in the exercise of his own discretion, to decide whether there shall be any publication at all.”²¹³ To equate the two would be to deny “that the writer has any title to relief at all, when his object is not to publish, but [to] suppress.”²¹⁴

In settling a host of interpretive questions surrounding unpublished letters, *Woolsey* also confirmed the place of privative copyright claims under American copyright law. And it did so not just as a matter of common law copyright, but as an interpretation of the federal statute and its allowance for an injunction to restrain an

206. *Id.*

207. *Id.* at 70.

208. *Id.* at 71–72.

209. For an excellent account of the right of first publication, see Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y U.S. 585 (2011).

210. *Id.* at 586.

211. Of course, this was incorrect analytically, as understood today. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 553 (1985).

212. See Linford, *supra* note 209, at 597–600 (examining the case law).

213. *Woolsey*, 11 How. Pr. at 72.

214. *Id.*

unauthorized publication. Perhaps most importantly, though, in seeking to strengthen the independent analytical basis of the plaintiff's right, which it described as "absolute" and "unlimited," the court effectively returned the law of privative copyright claims back to relying on a purely subjective conception of harm.²¹⁵ Indeed, in some respects, *Woolsey* went beyond the English precedents insofar as it consciously allowed for the possibility that the plaintiff might have *no verifiable reason* for the exercise of her right through the claim. Such a possibility would nevertheless enable the court to move forward on a presumption of some reason since the law was to concern itself with no more than the bare existence of the right. Later courts adopted the logic of *Woolsey* and maintained its adherence to an absolute conception of the right, which would entitle the plaintiff to suppress the work for any reason, without inviting the court's scrutiny of the particular harm being complained of.²¹⁶

Early American jurisprudence on privative copyright claims built on English doctrine and in so doing, synthesized, rationalized, and justified the analytical basis of these claims. While American courts as a whole took the nature of the plaintiff's dignitary interest and corresponding disseminative harm much more seriously in their actual exposition of the case and their rationalization of claims therein, they at the same time sought to distance the legal doctrine itself from being contingent on proof of such disseminative harm, preferring instead to validate the outcome in the formal doctrinal concepts of property (ownership or title) and tort (wrong). This latter move was but a reflection of an approach to legal reasoning that dominated at the time, but it had the effect of cementing the legitimacy of privative copyright claims by allowing disseminative harm to flourish as an independent—yet unstated and unexamined—category of harms that could legitimately form the basis for a plaintiff's copyright claim. This expository aspect of harm highlights an important transition in the development of privative copyright claims: it moved the doctrine away from the domain of *damnum sine injuria* (harm without an actionable injury) but not quite into the territory of *injuria sine damno* (an actionable injury without proof or verification of harm).²¹⁷ That latter move towards *injuria sine damno* occurred in the modern era, as

215. *See id.* at 58.

216. *See, e.g.,* *Barrett v. Fish*, 47 A. 174, 175 (Vt. 1899) ("Such protection is based solely on the property of the writer or possessor of such letters therein."); *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 488–89 (1867) ("[Publication] by the act of the recipient would be an infringement of the author's exclusive right, which he may prevent by injunction.")

217. For a fuller account of the distinction, see HERBERT BROOM, COMMENTARIES ON THE COMMON LAW: DESIGNED AS AN INTRODUCTORY TO ITS STUDY 75–86 (4th ed. 1873).

copyright law became heavily statutory, and with it judicial decisions on the topic became less expository and more interpretive.

C. Modern Federal Copyright Law

The Copyright Act of 1909 was Congress's first major foray into an omnibus revision of the copyright statute.²¹⁸ Despite attempting to federalize significant parts of copyright law, it nevertheless chose to allow state common law protection for literary works to subsist in tandem. This bifurcation revolved around the idea of "publication." The act of publication caused a work to lose its common law protection and potentially obtain federal statutory protection (subject to certain other conditions).²¹⁹ Unpublished works retained their common law protection under state laws.

The Act of 1909 expressly preserved common law protection by providing that its provisions were not to be construed "to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent."²²⁰ Notable in this preservation was the reference to equity and the fact that the right extended to preventing the unauthorized "use" of the work.

The language of the 1909 Act cemented the legitimacy of privative copyright claims. The works underlying such claims (for example, letters) were given an overtly neutral classification as "unpublished works," and the absolute nature of the right at issue was statutorily recognized by granting its author or owner the exclusive right to *use* the work. Of course, since the provision of the Act merely preserved existing law, it never formed the basis of courts' continued recognition of privative copyright claims.

For the most part, courts continued to apply a subjective approach to the content of the works and the disseminative harm being alleged by the plaintiff. Instead of seeking to derive the logic for privative claims in the individualized nature of the work and the dignitary interest at issue, they looked to principles of labor instead as justifying a claim of ownership. In *Baker v. Libbie*, a case decided by the Supreme Judicial Court of Massachusetts, the Plaintiff sought an injunction to restrain the publication of a private unpublished letter.²²¹

218. Pub. L. No. 60-349, 35 Stat. 1075 (1909) (repealed 1976).

219. For a general overview, see Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 469-70 (1955); Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 185 (1956).

220. Copyright Act of 1909 § 2, 35 Stat. at 1076.

221. 97 N.E. 109, 109 (Mass. 1912).

Looking to both English and American authorities, the court considered the question of protectability settled and granted the Plaintiff's request.²²² The basis of this right, to the Court, was a matter of principle since "[t]he labor of composing letters for private and familiar correspondence may be trifling, or it may be severe, but it is none the less the result of an expenditure of thought and time" and "[t]he market value of such an effort may be measured by the opinions of others, but the fact of property is not created thereby."²²³

What is also intriguing about the opinion is the court's express recognition that it did not need to scrutinize the Plaintiff's motives for the action, or the underlying basis for the harm. In seeking to examine the nature of the right at issue, the court noted that some kinds of letters—those of "extreme affection and other fiduciary communications"—may imply an obligation of secrecy.²²⁴ Yet, the court observed: "This case does not involve personal feelings or what has been termed the right to privacy . . . [since] there appears to be nothing about these letters, knowledge of which by strangers would violate even delicate feelings."²²⁵ Taken in isolation, these comments may suggest the court's adoption of an objective approach to the disseminative harm; yet when viewed entirely as part of the court's dicta, handed down *after* its finding for the Plaintiff without any basis other than ownership, it suggests something else. It instead reveals the court's efforts to distance the Plaintiff's invocation of literary property, that is, common law copyright, from the "right to privacy" as a stand-alone cause as advocated by Warren and Brandeis in their article, which the court readily cited.²²⁶ The court's solution to bifurcate privative copyright claims from privacy claims was an attempt to situate the latter as entailing wounded feelings, while limiting the former to an account of ownership. And yet, ownership was not an economically driven argument, but instead one justified by labor and the individualized effort put into the creation.

Other courts were less ambitious in this regard and preferred to adopt the formal rule of ownership without any discussion of the underlying content in the letter.²²⁷ This is not to suggest that courts

222. *Id.* at 112.

223. *Id.* at 111.

224. *Id.* at 112.

225. *Id.* (citations omitted).

226. *Id.*

227. *See, e.g.*, *Ipswich Mills v. Dillon*, 157 N.E. 604, 606 (Mass. 1927) ("The original letters from the plaintiff to the defendants belonged to the defendants. They were the recipients, and therefore owned them."); *King v. King*, 168 P. 730, 732 (Wyo. 1917) ("[T]he holding generally has

altogether ignored the content at issue. To the contrary, when called on to examine the content—either by the plaintiff or by the defendant’s attempted reliance on an exception to the traditional principles of ownership—courts engaged in that task and on occasion denied the claim. The United States Court of Appeals for the Second Circuit’s decision in *Knights of the Ku Klux Klan v. International Magazine Co.* is illustrative.²²⁸ Called on to intervene and grant an injunction against the Defendant’s attempt to publish a letter that would reveal the inner workings of the Plaintiff organization and discourage membership, the court refused; it concluded instead that the letter appeared to be “an instrument or means for the accomplishment of some unlawful purpose or object,” which could not form the basis of the court’s equitable intervention.²²⁹

The comprehensive codification of copyright that occurred in 1976 changed most of what had transpired in relation to privative copyright claims under the common law. Whereas prior copyright statutes had revolved around the act of “publication,” thereby creating a bifurcated system wherein unpublished works obtained protection under common law copyright and published works under the statute, the 1976 Act eliminated the centrality of publication altogether. In its place, it introduced the idea of “fixation,” under which any original work of authorship that was fixed in a medium of expression became eligible for copyright from the moment of such fixation.²³⁰ The obvious result was that works that had been the basis of privative claims under common law copyright now became eligible for statutory copyright protection. The Act also incorporated the right of first publication, which had formed the basis of privative copyright claims at common law, into the exclusive distribution right.²³¹

However, the most significant effect on privative claims from the codification and merger of the two systems was undoubtedly the availability of the fair use doctrine to defendants. The fair use doctrine can exempt defendants from copyright infringement; it entails scrutinizing various factors relating to the work at issue, the defendant’s use of it, and the related effects of such usage.²³² Developed by Justice Story in the mid-nineteenth-century decision of *Folsom v.*

been . . . that . . . [the receiver] has the right of possession and property in the paper and parchment, but the property in the contents for the purpose of publication . . . is in the author.”).

228. 294 F. 661 (2d Cir. 1923).

229. *Id.* at 663.

230. H.R. REP. NO. 94-1476, at 52–53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665–66.

231. H.R. REP. NO. 94-1476, at 61–62, *reprinted in* 1976 U.S.C.C.A.N. at 5675.

232. H.R. REP. NO. 94-1476, at 64–66, *reprinted in* 1976 U.S.C.C.A.N. at 5678–79.

Marsh,²³³ the doctrine came to be understood as a defense to statutory copyright infringement actions.²³⁴ Indeed, no reported common law copyright decision invoked the doctrine. The 1976 Act for the first time codified—albeit as a common law restatement—the fair use doctrine.²³⁵ But in eliminating common law copyright for fixed, yet unpublished, works, it subjected an entirely new set of works to the doctrine for the first time.

Unsurprisingly, courts initially struggled to make sense of the fair use defense in relation to unpublished works. In *Harper & Row*, a case involving an unpublished work (though not a privative claim), the Supreme Court equivocated on the extent to which the unpublished nature of the work influenced fair use, eventually concluding that the unpublished nature disfavored fair use.²³⁶ The best known intersection of fair use and privative claims occurred a few years later in the Second Circuit's decision in *Salinger v. Random House, Inc.*²³⁷ The case involved personal letters written by the reclusive novelist J.D. Salinger, which had fallen into the hands of a biographer, Ian Hamilton.²³⁸ Hamilton, who was working on a biography of Salinger, chose to quote from them and paraphrase them rather extensively in the book.²³⁹ When Salinger learned of this, he objected to the biography's reliance on his unpublished letters and commenced an action for copyright infringement.²⁴⁰ The Defendant in turn asserted fair use as a defense.²⁴¹ The district court found for the Defendant, applying the fair use doctrine without any modification to the works at issue.²⁴² On appeal, the Second Circuit reversed.

In a well-known opinion authored by Judge Newman, the court concluded that “special weight” had to be accorded to the fact that the

233. 9 F. Cas. 342, 345–49 (C.C.D. Mass. 1841).

234. As has been shown, Story quite consciously conflated common law and statutory copyright in his reasoning in *Folsom*. See L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 436–37 (1998) (“Story thus disregarded the distinction between the common law copyright and the statutory copyright.”).

235. See H.R. REP. NO. 94-1476, at 66, *reprinted in* 1976 U.S.C.C.A.N. at 5680 (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

236. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985) (noting that if a plaintiff's work is unpublished, courts are more reluctant to accept a fair use defense, but that it is not an “absolute rule” and may be “tempered in practice by the equitable nature of the fair use doctrine”).

237. 811 F.2d 90 (2d Cir. 1987).

238. *Id.* at 92–93.

239. *Id.*

240. *Id.* at 92–94.

241. *Id.* at 94.

242. See *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 423–26 (S.D.N.Y. 1986).

work was unpublished.²⁴³ Using this rubric and analyzing the facts through the various fair use factors, the court found there to be no fair use.²⁴⁴ Judge Newman’s opinion seemingly sought to give implicit effect to privacy considerations through the language and structure of fair use.²⁴⁵ Particularly salient was the court’s observation that unpublished works “normally enjoy complete protection against copying any protected expression.”²⁴⁶ A later opinion of the same court reiterated this position, effectively placing unpublished works—and privative claims—on a pedestal seemingly beyond the reach of fair use.²⁴⁷ These developments prompted Congress to intervene in 1992 because it was worried that the fair use doctrine would cease to have any application to unpublished works.²⁴⁸ It amended the fair use provision in the 1976 Act to provide that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”²⁴⁹

The amendment resulted in fair use being asserted on a regular basis against privative copyright claims, and with a good degree of success. On the rare occasion that plaintiffs prevailed in this balancing, courts nevertheless went out of their way to emphasize that they were not giving effect to the plaintiff’s privacy interests, but instead limiting themselves to copyright, as though this was not obvious.

All the same, when courts allowed the fair use claim to succeed, they placed significant reliance on the absence of any provable harm (actual or potential) to the market for the plaintiff’s work from the defendant’s actions—the well-known fourth fair use factor.²⁵⁰ Examining the existence (or absence) of market harm for privative copyright claims is an obvious mismatch, something that courts seem unwilling to recognize in their commitment to copyright’s utilitarian goals. In recent work, one scholar has described this as courts’ use of “market gibberish” to mask other considerations.²⁵¹

Regardless of courts’ reasons for this market-oriented move, it nevertheless had the long-term effect of deterring privative copyright claims being brought as privative claims, that is, with an overt

243. *Salinger*, 811 F.2d at 96.

244. *See id.* at 100.

245. For evidence of this impulse, see Newman, *supra* note 5, at 460 & n.2.

246. *Salinger*, 811 F.2d at 97.

247. *See* New Era Publ’ns Int’l, ApS v. Henry Holt & Co., 873 F.2d 576, 583–84 (2d Cir. 1989).

248. *See* H.R. REP. NO. 102-836 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2553.

249. 17 U.S.C. § 107(4) (2012).

250. *See* 17 U.S.C. § 107 (“[T]he effect of the use upon the potential market for or value of the copyrighted work.”).

251. *See* Gilden, *supra* note 65.

assertion of disseminative harm, whenever a fair use defense was plausible. This trend continues to this day. Plaintiffs instead prefer to assert—and indeed sympathetic courts are willing to infer—some kind of market harm, even if only to a licensing market, purely in order to get around courts’ myopic construction of the fair use doctrine. The fairly recent Ninth Circuit decision in *Monge v. Maya Magazines, Inc.* is a perfect example of this phenomenon.²⁵²

The Plaintiffs in the case were a well-known pop music star and her manager, who got married in secret.²⁵³ In order to maintain the secrecy of the wedding, the couple limited the number of witnesses and took a very limited number of photographs, which “were intended for the couple’s private use.”²⁵⁴ Through unscrupulous means, the photographs fell into the hands of an individual who sold them to the Defendant, a gossip magazine that published them.²⁵⁵ The district court found for the Defendant, concluding that the publisher’s use of the photographs constituted fair use.²⁵⁶ On appeal, the Ninth Circuit reversed, in a rare denial of fair use for a privative claim.²⁵⁷

The court’s decision was predicated on an analysis of the four fair use factors.²⁵⁸ On the first factor, the nature of the protected work, the court placed extraordinary emphasis on the unpublished nature of the work.²⁵⁹ Describing this fact as a “critical element,” the court found it to weigh in favor of the Plaintiffs.²⁶⁰ On the second factor, the amount and substantiality of the copying, the court was swayed by the fact that the Defendant published *all* six of the wedding photographs that it received.²⁶¹ In the court’s words, the “use was not just substantial, it was total,” which “weigh[ed] decisively against fair use.”²⁶² Yet, it was the fourth factor that would make a difference, since in the court’s own view, it was “the single most important element of fair use.”²⁶³ On this factor, the district court had taken the view criticized above—that there was no market harm since the Plaintiffs did not intend to publish and

252. 688 F.3d 1164, 1181–82 (9th Cir. 2012).

253. *Id.* at 1168–69.

254. *Id.* at 1168–69.

255. *Id.* at 1169.

256. *Id.* at 1168.

257. *Id.* at 1183–84.

258. *Id.* at 1183.

259. *See id.* at 1177–78.

260. *Id.* at 1177–78.

261. *Id.* at 1179.

262. *Id.* at 1178–80.

263. *Id.* at 1180 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

distribute the photographs.²⁶⁴ The Ninth Circuit concluded that there was in fact “an actual market” for the photos.²⁶⁵ This market was presumed to exist because the couple was “in the business of selling images of themselves and they ha[d] done so in the past.”²⁶⁶ The Defendant’s actions lowered the “demand for the pictures in the actual market” which weighed against fair use.²⁶⁷

It is the court’s reasoning on this last factor that is most puzzling. By the court’s own admission, the Plaintiffs’ primary (if not exclusive) motivation in retaining the photographs as unpublished was the intended “secrecy” and “private use.”²⁶⁸ Such secrecy no doubt has a potential price—in that the scarcity renders the information more valuable. Yet, to use that fact to presume an actual market for the work remains something of a stretch. In the end, what the court was undoubtedly motivated by was the private nature of the work at issue, seen in the court’s discussion of the embarrassment that the Plaintiffs suffered upon the public revelation of their marriage.²⁶⁹ Despite the majority opinion’s sympathy for the couple, its failure to understand the nature of the dignitary interest involved did more harm than good for privative copyright claims. Judge McKeown’s observation, albeit in dicta, that a celebrity’s private messages to another somehow render the message nonprivate and therefore unprotected under copyright law’s distribution and display rights, showcases this failure.²⁷⁰ The court’s unfortunate reasoning was, however, a mere representation of how the fair use doctrine has come to be understood by courts and misapplied in relation to privative copyright claims.

A more plausible (and analytically defensible) application of the fair use doctrine to privative claims, such as the one in *Monge*, would have entailed treating the fourth fair use factor as largely unhelpful in the context of claims driven by disseminative harm. This would have allowed the court to focus on the other factors, including the unpublished nature of the work, which might have produced the same outcome but on a firmer footing.

264. *Monge v. Maya Magazines, Inc.*, No. CV 09-5077-R, 2010 WL 3835053, at *3 (C.D. Cal. Sept. 30, 2010) (“The fourth factor weighs in favor of fair use because the publication did not usurp a market that properly belonged to the Plaintiffs because no such market existed.”).

265. *Monge*, 688 F.3d at 1181.

266. *Id.*

267. *Id.* at 1181–83.

268. *Id.* at 1169.

269. *See id.* (describing, for example, *Monge*’s husband getting “berat[ed]” by his mother, from whom he had kept the marriage a secret).

270. *Id.* at 1175 n.8 (arguing that celebrities who sent photos by text message had published them and thus eliminated their interest in keeping the message private).

The dissenting opinion in the case offered an even more problematic approach to the fourth fair use factor. According to the dissent, since the Plaintiffs had evidenced a clear intention to keep the work secret and never publish it, the facts revealed a “market failure” that required finding the fourth fair use factor in favor of the Defendant.²⁷¹ In the dissent’s view, the refusal to publish was motivated by “a desire unrelated to the goals of copyright,” since it was not market related.²⁷² Implicit in this framing was the idea that noneconomic considerations such as those at the heart of privative claims were irrelevant to copyright. For this proposition, the dissent relied on a well-known law review article on fair use and market failure.²⁷³ Yet, it failed to note the author’s clear statement therein that “fair use should not be used to force disclosure of works that the author has heretofore kept secret.”²⁷⁴

The court’s opinion in *Monge* is hardly unique in its failure to reflect on the obvious mismatch between fair use and privative claims. Prior courts, including district courts, have encountered the same predicament, and some have even gone so far as to call out the anomaly and suggest reforms. In *Lish v. Harper’s Magazine Foundation*, the Plaintiff was a well-known fiction writer who brought an infringement action against a newspaper that published his letter to prospective students without his consent.²⁷⁵ The newspaper made editorial revisions to the letter and made it seem as though the edited version had been authored by the Plaintiff, but thereafter used the editing to claim fair use of the letter.²⁷⁶

Despite never having published or marketed a letter before, the Plaintiff argued that the Defendant’s unauthorized publication affected the actual and potential market value of the work.²⁷⁷ The court saw through this and rejected the argument, finding there to be no market effect—present or potential—from the publication.²⁷⁸ Yet, in so doing the court cast doubt on the singular importance of the fourth fair use

271. *Id.* at 1192 (Smith, J., dissenting).

272. *Id.* at 1191–92 (quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 n.2 (9th Cir. 2000)).

273. *Id.* Judge Smith excerpted language from a prior Ninth Circuit opinion that quoted Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1634 (1982).

274. Gordon, *supra* note 273, at 1634 n.191.

275. 807 F. Supp. 1090, 1092–93 (S.D.N.Y. 1992).

276. *Id.* at 1095–96.

277. *Id.* at 1103–04.

278. *Id.* at 1104.

factor as interpreted by some courts.²⁷⁹ In direct response to the Defendant's assertion that the noneconomic nature of the Plaintiff's work suggested weaker copyright protection and correlated to a clearer fair use argument, the court made clear that "providing economic incentives for the creation of works of art is not necessarily the only value which the fair use doctrine embodies or protects."²⁸⁰

The *Lish* opinion is an interesting and bold recognition of the mismatch between the dominant incentives-based understanding of copyright under the 1976 Act and the nature of interests and motivations involved in privative copyright claims. All the same, it highlights the state of privative claims under modern copyright doctrine. Due to the utilitarian emphasis in current law, plaintiff-authors bringing these claims consciously *mask* the nature of the dignitary interest involved in the claim instead of highlighting it. When presented with a defense of fair use and its overt need for a showing of market harm—or its absence—they then recast or embellish their overtly neutral claim with arguments about hypothetical markets and monetary values. In the process, both the true nature of the interest at stake and the form of harm involved get little attention or explication by courts, who—even while finding for plaintiffs—are forced to do so in starkly utilitarian terms.

IV. ADJUDICATING PRIVATIVE COPYRIGHT CLAIMS

As the prior discussion reveals, privative copyright claims have fallen into disrepute in modern times due to the overt utilitarian focus that copyright jurisprudence and scholarship have assumed. This remains the case even though these claims have a defensibly independent analytical and normative basis for their existence within the copyright landscape. All the same, privative copyright claims are hardly without their share of problems, the most obvious of which is their ability to interfere with free speech by enabling authors to censor publication and distribution under the garb of a dignitary interest. Indeed, as noted previously, much of the concern with these claims originates from the belief that the line between privative copyright claims and censorship is a difficult one to regulate.

This Part sets out a mechanism for courts to use when adjudicating privative copyright claims—which at once entails recognizing the independent legitimacy of these claims and balancing

279. *See id.* at 1104 n.11 (citing *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 21 (S.D.N.Y. 1992)).

280. *Id.* at 1105.

their underlying motivations against competing considerations. The mechanism developed here has four interconnected components: (1) identifying legitimate privative copyright claims, (2) adapting the fair use defense to the nature of the interests involved in these claims, (3) integrating a “newsworthiness” limit to such claims through fair use, and (4) developing an appropriate remedial response for the disseminative harm involved.

A. Sifting Through Infringement Claims

For the most part, modern copyright law does not care about a plaintiff’s motives for commencing an infringement action, an approach that fits with how private law areas work.²⁸¹ This has obviously allowed a plurality of considerations to influence plaintiffs in their actions and helps account for the emergence of privative copyright claims brought for nonpecuniary motives. All the same, there is nothing to prevent courts from taking a closer look at the facts at issue to scrutinize a plaintiff’s reasons for the claim and examine its fit.

A somewhat related domain where federal courts have begun an approach along these lines within copyright litigation involves the phenomenon of “copyright trolling”—a catch-all phrase that broadly represents efforts by copyright plaintiffs to monetize their litigation actions and generate an independent revenue stream through litigation rather than through the marketplace for the work itself.²⁸² While courts disfavor such plaintiffs, they have routinely been at a loss for appropriate mechanisms to rein trolling in.²⁸³ In recent times, however, they have shown a marked openness to scrutinizing the plaintiff’s motives for bringing the action and have exercised their discretion—embedded within various procedural doctrines—when they deem the motives inappropriate, then interpreting and applying copyright’s various doctrines on the basis of such motives.²⁸⁴

281. See Fromer, *supra* note 65, at 551 (arguing that “assertions of rights with ill-fitting motivations are sufficiently worrisome that courts ought to strongly consider weighing these motivations before granting relief”).

282. For a general overview of copyright trolling, see Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 746 (2013); Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015); and Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 574 (2018).

283. See Balganesh, *supra* note 282, at 730–31 (“[C]ourts struggle to rein in copyright trolls and invariably resort to rules and principles that are at best indirect ways of addressing the problem.”).

284. See, e.g., *McDermott v. Monday Monday, LLC*, No. 1:17-cv-09230-DLC, 2018 WL 1033240, at *3 (S.D.N.Y. Feb. 22, 2018) (“Plaintiff’s counsel . . . is a known copyright ‘troll’ . . . Thus, whether or not an attorney’s fee award could be properly awarded against the plaintiff under Section 505, such an award against plaintiff’s counsel may be appropriate in an

A similar approach would serve privative copyright claims well and enable courts to address the unique nature of these claims on their own terms. A privative copyright claim should be identifiable by three overarching features, which a court should be able to easily discern from the plaintiff's filings.

First, the plaintiff bringing the action should be the putative author or creator of the work.²⁸⁵ This is essential, since the interest at the heart of these claims is a distinctively dignitary one, which is hard to sustain with a market-based alienation or assignment. A limited exception might be carved out for heirs, who inherit some of the dignitary concerns of the original author, as such transfers are distinctively noncommercial and involuntary in nature.²⁸⁶

Second, the work must have remained “private” at the time that the lawsuit is brought. While this is hardly an independent category within copyright law, it is showcased through the work being both unpublished and unlicensed. The author should not have publicly distributed the work, nor should she have allowed strangers to use it indiscriminately in a manner that contradicts the existence of the disseminative harm, which is at the core of the claim.²⁸⁷ All the same, it is important to appreciate that a limited distribution to private members—such as the intended recipient of a confidential message—is

exercise of this Court's inherent power.”); *Creazioni Artistiche Musicali, S.r.l. v. Carlin Am., Inc.*, No. 1:14-cv-09270-RJS, 2017 WL 3393850, at *4 (S.D.N.Y. Aug. 4, 2017) (“Turning to Plaintiff's motivation in bringing suit, the Court finds that Plaintiff's lawsuit was not driven by an improper motive that would justify an award of attorney's fees.”); *Malibu Media, LLC v. Doe*, No. 1:15-cv-04369-AKH, 2015 WL 4092417, at *6 (S.D.N.Y. July 6, 2015) (“In light of [copyright troll]'s history of abuse of court process and its failure to show ‘good cause,’ I decline to give it the benefit of an exception to the normal rules of discovery.”); *Patrick Collins, Inc. v. John Does 1 through 37*, No. 2:12-cv-01259-JAM-EFB, 2012 WL 2872832, at *3 n.2 (E.D. Cal. July 11, 2012) (“Nothing in the record presently suggests that plaintiff is using the court to ‘pursue an extrajudicial business plan,’ but the court notes some growing concern among district courts about these sorts of expedited discovery matters.”).

285. This is not obvious, since copyright law allows the “legal or beneficial owner” of the copyright to bring an action for infringement. 17 U.S.C. § 501(b) (2012). The term is defined to include an exclusive license as well. 17 U.S.C. § 101 (2012) (defining “transfer of copyright ownership”).

286. 17 U.S.C. § 201(d)(1) (2012) (dealing with inheritance of copyright).

287. Contrary to what some courts have claimed, the requirement that the work be registered with the Copyright Office as a precondition to an infringement action hardly destroys the idea that the work must remain private. *See* 17 U.S.C. § 411(a) (2012) (“[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”); *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988) (“In addition, our statute requires the copyright owner to make public disclosure of his work as a precondition to protecting his copyright interest.”). The *New Era* opinion cites to 17 U.S.C. § 407 (2012) as the basis for its proposition. *Id.* Yet 17 U.S.C. § 407 specifically exempts “unpublished works” from its ambit. U.S. COPYRIGHT OFFICE, CIRCULAR 7D, MANDATORY DEPOSIT OF COPIES OR PHONORECORDS FOR THE LIBRARY OF CONGRESS 5 (2017) (“[U]npublished works . . . are not subject to this requirement.”).

not the same as a public distribution, a difference that some courts have failed to make.²⁸⁸ Thus, it is essential that the work be legally unpublished, though not necessarily undistributed.²⁸⁹

Third, the work must be revelatory of the author's identity. This is an important requirement that gets at the root of the dignitary interest and the idea of compelled authorship discussed previously. Yet at the same time, it remains an open question whether this is something that courts should scrutinize on their own, rendering the requirement an objective one, or whether they should merely defer to the plaintiff's assertions on this, making it a subjective requirement. Current privative copyright jurisprudence adopts the latter approach, which avoids a host of subjective judgments on the part of the court for works that fall into a grey area—for example, photographs of body parts.

Once satisfied, these three requirements would together allow the court to classify the claim as a privative claim, which would then enable it to apply copyright's various other doctrines in different ways, in the process both protecting privative claims and safeguarding against the possibility of overreach, to which we next turn.

B. Fair Use for "Dignitary" Works

The idea that "providing economic incentives for the creation of works . . . is not necessarily the only value which the fair use doctrine embodies or protects"²⁹⁰ is hardly new. And yet, few courts have successfully instantiated this idea into their interpretation and application of the fair use doctrine. When Congress codified fair use in the current copyright statute, it made clear that it intended for courts to continue to develop the doctrine in the common law fashion, as they had done before the codification, and that the four factors embodied in the provision were nonexhaustive.²⁹¹ Despite this, courts today take few liberties with the four factors and feel compelled to run their analysis through them in an almost rote manner.

The only real exception to this trend has been the Supreme Court's opinion in *Campbell v. Acuff-Rose Music, Inc.*, which introduced the idea of a "transformative use" under the first factor (the nature and

288. See *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1175 n.8 (9th Cir. 2012).

289. It is worth noting that a private—as opposed to public—distribution does not qualify as a publication under the statute's definition of a publication. 17 U.S.C. § 101 (defining "publication").

290. See *Lish v. Harper's Magazine Found.*, 807 F. Supp. 1090, 1105 (S.D.N.Y. 1992).

291. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 ("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

purpose of a defendant's use), and thereafter allowed classification of use under that factor to influence analysis within the others.²⁹² In principle, there should be no impediment to courts doing the same for privative claims—but this time under the second factor, the nature and character of the protected work. Already, the work's classification as “unpublished” remains a legitimate part of the analysis, which has caused some conflict among courts.²⁹³ Yet, the category of unpublished does not fully capture the interest at stake in privative claims.

A more apt category for courts to consider under the second factor would be the “dignitary” nature of the work, a combination of its being (1) unpublished, (2) private, and (3) embodying expression directly implicating the author's persona and identity. While this classification should of course not be dispositive in the overall analysis, it should weigh heavily and influence the interpretation and application of the other factors. Much like with the classification of a defendant's use as “transformative,” the identification of a plaintiff's work as being of dignitary significance should inflect the court's analysis of factor three—the amount and substantiality of what was taken.²⁹⁴ The quantity and quality of the defendant's copying would thus come to be assessed against the extent to which it impinges on the plaintiff's dignitary concerns. A small amount of copying might have serious dignitary ramifications owing to its revelatory nature, even if it is otherwise quantitatively insignificant in the abstract.

While the first fair use factor could be interpreted and applied without much modification, the fourth factor, relating to the value of the work and the market effects of the copying, should be understood as receding in importance once the work is classified as “dignitary” in nature. This would obviate the need for courts and litigants to identify an artificial market for the work and speculate about the effects of the defendant's use on that presumptive market. Some have suggested that courts take the provision's use of the term “value” in the fourth fair use factor literally and incorporate considerations of noncommercial value into their analysis.²⁹⁵ Creative as this may be, it is unlikely to prove helpful in privative claims, where the defendant's publication will inevitably interfere with the subjective dignitary value of the work to

292. 510 U.S. 569, 579, 586–88 (1994).

293. *Compare* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551 (1985) (noting that unpublished status tends to negate the fair use defense), *with* Salinger v. Random House, Inc., 811 F.2d 90, 95 (2d Cir. 1987) (“[T]he 1976 Act explicitly makes all of the rights protected by copyright, including the right of first publication, subject to the defense of fair use.”).

294. *See* 17 U.S.C. § 107(3) (2012) (setting out the third factor, but showing no overt connection to the first in the text).

295. *See* Gilden, *supra* note 65, at 49.

the author. Consequently, the fourth fair use factor is best treated as unhelpful for privative copyright claims lest it become a factor that will invariably favor the plaintiff.

The fair use analysis would thus effectively revolve around the first three fair use factors. As an example of its application, consider again the facts in *Monge*, where a celebrity couple had taken photographs of their secret wedding and the Defendant magazine somehow obtained copies of those photographs and published them in an exposé.²⁹⁶ On the first factor, the Ninth Circuit concluded that the publication by the newspaper was a commercial use, which was only marginally transformative, even though the Defendant claimed to be engaging in the act of “news reporting.”²⁹⁷ This factor was found to be neutral, at best.²⁹⁸ On the second factor, applying the formulation above, a court would now examine whether the work was a dignitary work—in being unpublished, private, and implicating the authors’ personas.²⁹⁹ All three of these elements were present in the photographs at issue in *Monge*, in the court’s own description of the facts.³⁰⁰ This factor would thus favor the Plaintiffs and now influence the analysis of the third factor relating to the amount and substantiality of the copying. The facts revealed that the Defendant had published “every single photo of the wedding and almost every photo of the wedding night.”³⁰¹ The copying thus heavily implicated the dignitary component of the works at issue insofar as it was revelatory of personal and private details, well beyond what might have been needed for the news story. Given the absence of a market for such dignitary works, the fourth factor might be treated as irrelevant.

Analyzing the facts of *Monge* through the proposed framework would have produced the same outcome the Ninth Circuit arrived at,

296. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1168–70 (9th Cir. 2012).

297. *Id.* at 1173–74, 1176.

298. *Id.* at 1177.

299. An important observation about the facts in *Monge* is in order here. In its recitation of the facts in the case, the court never fully considers the fact that the photographs were taken by the employees of the chapel using the Plaintiff’s camera and at her direction, *id.* at 1169, 1170 n.2, which could generate a plausible claim of authorship by the employees rather than the Plaintiff. This was presumably irrelevant to the court because of the role that the Plaintiff played in directing the production of the photographs, including in supplying the camera, since it is well-established that the author of a photograph is the person who is its “effective cause,” which need not be the person actually taking the photograph. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (finding a photograph to be an original work authored by the individual responsible for the production of the subject matter, including by arranging and posing the subject).

300. The work was unpublished. *Monge*, 688 F.3d at 1177–78. It was additionally private, in the court’s own conclusion. *Id.* at 1169. And lastly, the pictures clearly revealed the identity of the authors on their very face. *Id.* at 1169–70.

301. *Id.* at 1178.

except that the court would now overtly recognize the disseminative harm at issue and the dignitary concerns uniquely implicated in the works involved. The fair use framework proposed here remains perfectly compatible with the terms of the statute and with Congress's intent behind it. All that remains is for courts to acknowledge that fair use—much like copyright itself—embodies multifarious normative ideals.

C. Newsworthiness

Privative copyright claims very often involve defendants who seek to undo the private and unpublished nature of the work in the name of “news,” on the assumption that the public deserves to be informed of the content and authorship of the work involved, even if against the wishes of the author. There is at times significant merit to this objective, especially when the work involves matters of legitimate public concern rather than just gossip or entertainment. To impede the publication of such matters risks allowing privative claims to be used as a form of censorship, potentially running afoul of the First Amendment.

Copyright law has long been reluctant to recognize an independent newsworthiness exception to infringement. In *Harper & Row*, the Supreme Court expressly rejected the idea, especially in relation to unpublished works, worrying that it would incentivize defendants to “clothe” their copying in journalistic language, and at the same time counterintuitively accord works of “greatest importance to the public” lesser protection under the law.³⁰² All the same, privacy law—especially the action for public disclosure of private facts, the closest noncopyright privative claim to privative copyright claims—has come to recognize an independent newsworthiness defense, in the interests of free speech.³⁰³ Both these considerations are capable of being given substantial recognition by copyright doctrine.

Creating an independent (or *per se*) newsworthiness exception is of course well beyond the prerogative of federal courts. All the same, the idea itself is capable of being given more direct treatment within the first fair use factor, where it is today analyzed in cursory terms at

302. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557–59 (1985).

303. See generally Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 350–62 (1983); Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 148–49 (1996) (stating that courts remain sensitive to infringements on the freedom of speech and consequently recognize a broad newsworthiness defense that renders the public disclosure tort largely impotent).

best.³⁰⁴ And in so doing, the analysis might benefit from the approach adopted by courts in privacy law.

Within the domain of privacy law, the idea of newsworthiness has moved away from being a defense that would apply automatically once the defendant identifies its own purpose as relating to news. Instead, courts today ask whether the content of the claimed news was a matter of “legitimate public concern.”³⁰⁵ This allows the category to keep up with changing journalistic practices as well as the “mores of the community,” but requires courts to scrutinize the particular content at issue to match it with the claimed newsworthiness.³⁰⁶ Indeed, this approach goes some way in mitigating the concern raised in *Harper & Row*, namely that a newsworthiness exception would incentivize newspapers to clothe their copying in the garb of journalism and require courts to scrutinize the content of the publication and the newspaper’s real motives behind it.

The newsworthiness exception and the notion of matters having a “legitimate public concern” have received rather expansive treatment in the law of privacy, given that this area deals with the protection of *factual* information.³⁰⁷ Translating it to the copyright context therefore requires modifying it for *expressive* rather than factual content, given that copyright law abjures protection for purely factual content. The approach to newsworthiness taken by the U.S. Court of Appeals for the First Circuit in the case of *Núñez v. Caribbean International News Corp.* presents an important initial foray into adopting this idea.³⁰⁸ The case involved the Defendant television station’s display of scantily clad photographs of a model taken by the Plaintiff, for the purpose of asking the audience to judge whether they were “pornographic” in nature.³⁰⁹ The Plaintiff was a photographer who had taken pictures of a model

304. See, e.g., *Monge*, 688 F.3d at 1173.

305. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. LAW INST. 1977) (distilling this principle and citing to cases relying on the new standard).

306. *Id.* cmt. g (treating news as a category within the idea of matters involving a “legitimate public concern”).

307. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”); *Paige v. Drug Enf’t Admin.*, 665 F.3d 1355, 1363 (D.C. Cir. 2012) (“Paige’s FTCA claim also fails because the accidental discharge was a matter of public concern.”); *Veilleux v. Nat’l Broad. Co.*, 206 F.3d 92, 134 (1st Cir. 2000) (“In short, we hold that Kennedy’s drug test results were of legitimate public concern such that defendants may not be liable for invasion of privacy under an unreasonable publication theory.”); *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 487 (Cal. 1998) (“We agree with defendants that the publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort.”).

308. 235 F.3d 18 (1st Cir. 2000).

309. *Id.* at 21.

who had just recently been crowned Miss Universe Puerto Rico.³¹⁰ In a nuanced analysis, the court concluded that the nature of the Defendant's reporting revealed a legitimate newsworthy purpose insofar as it was not merely for entertainment: the pictures "were shown not just to titillate, but also to inform . . . [and] [t]his informative function is confirmed by the newspaper's presentation of various news articles and interviews in conjunction with the reproduction."³¹¹ The court was careful to note that it was not creating a separate newsworthiness exception.³¹²

An appropriate way of incorporating newsworthiness into the fair use inquiry would thus be through utilizing the first factor to examine the extent to which the defendant's actions represent a genuine attempt to publish content of a legitimate public concern. The category of legitimate public concern might be understood in similarly expansive and contextual terms as in the law of privacy, except that it should be understood to categorically exclude the mere attempt to publicly attribute a work to the author-plaintiff (the essence of compelled authorship), unless the author has publicly claimed otherwise.³¹³ A newspaper's attempt to publish a celebrity's private wedding photographs in order to establish the fact of the marriage so as to rebut the celebrity's claims of being single might thus qualify as a newsworthy use under the "legitimate public concern" standard.³¹⁴ At the same time, the newspaper's use of the couple's "wedding night" photographs appear to have little content of legitimate public concern, and thus would seem undeserving of such classification.³¹⁵ Similarly, if an individual has publicly disavowed certain views but a newspaper obtains a letter authored by that individual and sent to some private individuals, its publication might qualify as a newsworthy publication. Without the disavowal, however, it would do no more than publicly force authorship on the individual.

Without thus creating an independent newsworthiness exception, the fair use doctrine might be adapted to incorporate the idea under factor one. The key lies in having courts police the claim of

310. *Id.*

311. *Id.* at 22.

312. *Id.* ("[N]or does it establish a general 'newsworthiness' exception.").

313. As a historical matter, traditional copyright principles relating to the publication of private letters allowed the recipient to publish the letter if it was essential to refuting a false allegation when made against the defendant. *See* DRONE, *supra* note 165, at 136–39 ("[T]he receiver of a letter acquires in its contents a special or qualified property or right, which entitles him to publish it for the purpose of vindicating his reputation from false charges or unjust imputations made by the writer.").

314. *See* Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1168–70, 1186–87 (9th Cir. 2012).

315. *See id.* at 1169–70.

newsworthiness, as they do in privacy law, so as to ensure that the expressive content of the work or its origins are a matter of legitimate public concern, rather than just an effort to sensationalize or entertain. To some this may seem problematic, insofar as it treats “the court as the final arbiter” of newsworthiness.³¹⁶ Yet, in the absence of a tailored approach, courts will be moved in the direction of altogether disregarding newsworthiness as a legitimate purpose.

D. Remedial Equilibration

The final—and perhaps most significant—domain where privative copyright claims require balancing against competing interests and considerations relates to their enforcement and the availability of remedies. If privative copyright claims are indeed a distinct and legitimate category of copyright infringement claims and deserve separate recognition as such, then it is essential that copyright’s standard remedial framework be adapted to the unique nature of the harm that they purport to redress and the motivations driving such claims.

It is also in the domain of remedies that courts have interpreted the guarantees of the First Amendment to impose significant restrictions on private law actions. While these restrictions may not carry over to privative copyright claims as a requirement of the law, they nevertheless provide important insights into how copyright’s remedial framework may be adapted to ensure that privative copyright claims do not operate as covert attempts at censorship.

Given their expurgatory motivation and the reality that plaintiffs in privative copyright claims are principally concerned with ensuring that the work at issue is not disseminated without their consent, an injunction is often a remedy sought by plaintiffs. Of course, the injunction only makes sense *prior* to the defendant’s dissemination of the work, after which it becomes largely futile as a remedy, except for further acts of dissemination by the same defendant. And rarely do plaintiffs have advance notice of the defendant’s intended actions prior to their commission. All the same, injunctions are often sought by privative copyright plaintiffs either in conjunction with a claim for damages (to prevent additional or ongoing dissemination) or when the defendant’s actions are imminent.

In its 2006 decision in *eBay Inc. v. MercExchange, LLC*, the Supreme Court set out the standard for courts to apply in considering

316. *Id.* at 1188 (Smith, J., dissenting).

the grant of injunctions.³¹⁷ The case pertained to permanent injunctions, and while it was decided within the context of the Patent Act, it has since been extended to copyright law as well, especially since the Court's opinion drew from copyright jurisprudence.³¹⁸ In the opinion, the Court emphasized that in awarding injunctions, courts were to consider and examine the applicability of each of the traditional four equitable factors to the case before deciding on relief. These four factors were (1) irreparable injury, (2) inadequate remedy at law, (3) balance of hardships favoring equitable relief, and (4) the public interest.³¹⁹

The first three factors should have few problems being adapted to the unique nature of privative copyright claims. Disseminative harm is by its nature irreversible, and no amount of monetary relief can substitute for the reputational and dignitary consequences of an unauthorized distribution of the work. The remedy of damages—actual or statutory—is thus inadequate and mismatched to the nature of the harm at issue, and in an overwhelming majority of cases the balance of hardships will favor the plaintiff in that the failure to grant the injunction is likely to cause more harm to the plaintiff than would the actual grant to the defendant. Much like in most intellectual property cases, the first three factors are likely to favor the privative copyright plaintiff.³²⁰ Yet, it is through the fourth equitable factor—the “public interest”—that important considerations may enter the picture that have hitherto not been directly considered in copyright adjudication.

The public interest prong of the test for injunctive relief has received little focused attention from courts.³²¹ As scholars have noted, courts use it as a mechanism through which to affirm their decision on the merits, and one court described the factor as little more than a “wild card” given its lack of consistent application in the jurisprudence.³²² Leaving aside courts' (non)application of the prong in other areas, the public interest factor is capable of being given direct validation in

317. 547 U.S. 388, 390 (2006).

318. *Id.* at 392–93; *see* *Salinger v. Colting*, 607 F.3d 68, 74–75 (2d Cir. 2010).

319. *eBay*, 547 U.S. at 391.

320. A position implicitly affirmed by Chief Justice Roberts in his concurring opinion in *eBay*. *Id.* at 395 (Roberts, C.J., concurring).

321. *See, e.g.*, Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 405 (1983) (“Federal courts have lapsed into careless, sweeping language to state the importance of statutorily based injunctions to the public interest.”); Orin H. Lewis, Note, “*The Wild Card That Is the Public Interest*”: *Putting a New Face on the Fourth Preliminary Injunction Factor*, 72 TEX. L. REV. 849, 850–52 (1994) (“The public interest doesn’t get much respect. As one of the four factors in the traditional test for preliminary injunctive relief, it has been called a ‘make weight’ in ‘the vast majority of cases’ . . .”).

322. *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986).

privative copyright claims. Indeed, the lack of a coherent jurisprudence for this factor suggests that courts adjudicating privative copyright claims might be able to exercise their equitable discretion in this area with few problems.

Copyright jurisprudence has resisted the creation of an independent newsworthiness defense to infringement, and for good reason. Yet, newsworthiness as understood today in terms of legitimate public interest remains a perfect idea for courts to instantiate at the remedial level in determining whether to issue an injunction and enjoin the defendant's actions. A court could determine that the defendant's actions serve the broader public interest because of the nature of the content being disseminated—for instance, when it involves matters of contemporary political relevance, such as the correspondence of someone running for political office. While a court should of course not give that fact dispositive consideration in the fair use analysis, it should be able to do so when considering the plaintiff's request for an injunction.

Requiring courts to exercise their equitable discretion in a manner commensurate with the nature of the interest at issue is in keeping with how courts of equity have long approached their task.³²³ As is well known, equity historically forbade courts from issuing injunctions against defamatory speech, a rule that has come to be relaxed only in recent times.³²⁴ Resurrecting the public interest prong and repurposing it toward collectivist considerations underlying the content at issue would thus be in keeping with this long equitable tradition. But perhaps more importantly, it would serve the important role of introducing a direct mechanism for First Amendment and free speech concerns to be weighed against privative claims during their enforcement.

CONCLUSION

Normative purity is indeed an attractive ideal in the law, and one that modern copyright thinking and scholarship have all too willingly gravitated toward. Justified by the seemingly utilitarian

323. *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring).

324. See David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 18 (2013) (“The no-injunction rule [in defamation cases] has been a fixture of Anglo-American law for more than three centuries.”); Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 157–58 (2007) (“The traditional answer is that equity will not enjoin a defamation”); Pound, *supra* note 103, at 640–41 (“[I]f an injury to personality is threatened, wholly destructive of plaintiff's dearest interests, we are told that his only recourse is the legal remedy of damages”).

phrasing of the Constitution as well as the influence of neoclassical economic thinking, modern U.S. copyright law has come to be shoehorned into a theory of creator incentives, according to which copyright exists exclusively to function as a market-based incentive for creativity. In its quest for theoretical coherence, this view of copyright law has all too readily ignored the important noneconomic ideals that the institution of copyright has enshrined since its origins.

Despite recurrent efforts to move them into the domain of privacy law, privative copyright claims have remained a staple of the Anglo-American copyright landscape. Built on considerations of autonomy and dignity, as they relate to authorship, privative copyright claims today present courts with a unique set of challenges. All of these challenges, rather ironically, derive from courts' unwillingness to recognize the distinctive nature of these claims and their role within the overall copyright landscape. But the problem is hardly insurmountable. All that it requires is a basic open-mindedness about copyright's normative commitments and a recognition that in this domain, copyright law can learn from the functioning of other types of privative claims, which have succeeded in balancing the plaintiff's private interests against censorship concerns emanating from the First Amendment.

Copyright has always been an institution that has affirmed a plurality of normative values, and the persistence of privative copyright claims confirms this reality. Courts and scholars might find this messy, complex, and theoretically inelegant. Yet it represents the story of copyright's evolution, which is hard to ignore or erase. Theoretical coherence in the law, while desirable in the abstract, is often at the cost of practical reality and experience. Justice Holmes famously noted that "to know what [the law] is, we must know what it has been, and what it tends to become."³²⁵ Here, as elsewhere, copyright law would do well to look to its growth and evolution over time, which together reveal that its life has been much more about pragmatism than logic.

325. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Holmes Press 2012) (1881).