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COPYRIGHT TO THE RESCUE: SHOULD COPYRIGHT PROTECT PRIVACY?

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[T]he claim that lies beneath the notion of intellectual property is similar or identical to the one that underpins notions of privacy. . . . [T]he need we have to be able to do something by convention that is impossible by force: . . . to ringfence certain information.²

I. Introduction

In the summer of 2015 amidst the beginnings of the 2016 presidential campaign,³ historic Supreme Court decisions,⁴ and regular reports of protests,⁵ some might have missed the copyright angle to the Ashley Madison story. In fact, many may have missed the Ashley Madison story altogether. It is worth retelling, in brief, because it highlights the question with which this article is concerned – to what extent should copyright protect privacy.

In the summer of 2015, Ashley Madison, a website that bills itself as “The Original Extramarital Affairs Site”⁶ the tagline for which was, “Life is Short, Have An Affair,”⁷ was hacked.⁸ The e-mail addresses and credit card information of its 37 million users were accessed

² NICK HARKAWAY, *THE BLIND GIANT: BEING HUMAN IN A DIGITAL WORLD* 128 (2012).

³ Nicholas Confessore et al., *Presidential Race Just Starting? Not According to the Spending*, N.Y. TIMES (July 25, 2015), <http://www.nytimes.com/2015/07/26/us/presidential-race-just-started-not-according-to-the-spending.html>; Peggy Noonan, *The 2016 Contest Begins to Take Shape*, WALL STREET J. (July 17, 2015, 6:15 PM), <http://www.wsj.com/articles/the-2016-contest-begins-to-take-shape-1437089919>.

⁴ Robert Barnes, *Affordable Care Act Survives Supreme Court Challenge*, WASH. POST (June 25, 2015), http://www.washingtonpost.com/politics/courts_law/obamacare-survives-supreme-court-challenge/2015/06/25/af87608e-188a-11e5-93b7-5eddc056ad8a_story.html; Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

⁵ Wale Aliyu, *Police Pepper Spray Crowd After “Black Lives Matter” Conference*, USA TODAY (July 27, 2015, 8:01 AM), <http://www.usatoday.com/story/news/nation/2015/07/27/police-pepper-spray-cleveland/30722441/>; Howard Blume & Kate Mather, *Black Lives Matter Activists Charged in Fracas at Event*, L.A. TIMES (June 29, 2015, 8:56 PM), <http://www.latimes.com/local/lanow/la-me-ln-black-lives-matter-activists-charged-20150629-story.html>; Sam Frizell, *Sanders and O’Malley Stumble During Black Lives Matter Protest*, TIME (July 18, 2015), <http://time.com/3963692/bernie-sanders-martin-omalley-black-lives-matter/>; Nicole Norfleet, *St. Paul Black Lives Matter Group Pushes Ahead With State Fair Protest Plans*, STAR TRIB. (Aug. 28, 2015, 10:55 AM), <http://www.startribune.com/st-paul-black-lives-matter-group-pushes-ahead-with-state-fair-protest-plans/323173881>.

⁶ ASHLEYMADISON.COM, <https://www.ashleymadison.com/> (last visited Sept. 17, 2015).

⁷ See, e.g., Chris Mills, *AshleyMadison Confirms Hack, Purges Leaked Info from Internet*, GIZMODO (July 20, 2015, 9:43 PM), <http://gizmodo.com/hackers-threaten-to-expose-40-million-cheating-ashleyma-1718965334/1719170821>. The tagline “Life Is Short, Have an Affair” is even trademarked, with U.S. registration number 3745718. *Trademark Status & Document Retrieval*, U.S. PAT. AND TRADEMARK OFF., http://tsdr.uspto.gov/#caseNumber=3745718&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch (last visited Sept. 1, 2016).

⁸ Mills, *supra* note 7.

and downloaded.⁹ The hackers, who called themselves The Impact Group, posted a sample of the information they obtained online along with a manifesto threatening to post all of Ashley Madison's users' sensitive information unless the site was taken down.¹⁰ Predictably, the site was not taken down and The Impact Group made good on its threat.¹¹

Following the hack, the owner of Ashley Madison, Avid Life Media ("Avid"),¹² promptly issued a statement acknowledging the breach and assuring its subscribers that Avid would make sure the leaked information would be removed from the internet.¹³ A number of websites where the hacked content had been posted acquiesced to Avid's demands.¹⁴ The tool Avid used to accomplish the seemingly impossible task of having information removed from the internet was the 1998 Digital Millennium Copyright Act's ("DMCA") takedown provision.¹⁵

Avid's use of the DMCA takedown procedure poses a number of interesting questions. Those addressed contemporaneously by legal commentators focused primarily on the doctrinal questions of whether: (1) the content in question was copyrightable and (2) Avid should be considered the author or copyright owner of that content, for purposes of the DMCA.¹⁶ This piece, on the other hand, considers the normative question of whether copyright ought to protect privacy interests in scenarios like the Ashley Madison hack or, more broadly, whether the Copyright Act has a role to play in the protection of privacy.

While some courts have held that "[i]t is universally recognized . . . that the protection of privacy is not the function of our copyright law,"¹⁷ the remedies afforded copyright owners make pursuing copyright claims an attractive option to privacy plaintiffs.¹⁸ Copyright remedies include

⁹ *Id.*

¹⁰ James Temperton, *Hackers Threaten 37 Million AshleyMadison "Cheaters" with Exposure*, WIRED UK (July 20, 2015), <http://www.wired.co.uk/article/ashley-madison-hacked>.

¹¹ Kim Zetter, *Hackers Finally Post Stolen Ashley Madison Data*, WIRED (Aug. 18, 2015, 5:55 PM), <http://www.wired.com/2015/08/happened-hackers-posted-stolen-ashley-madison-data/>.

¹² Note that the owner has since changed its name to Ruby Corp. See, Erik Larson, *Adultery Site Ashley Madison Puts Hacking Affair Behind It*, Bloomberg Law (December 14, 2016), <https://bol.bna.com/adultery-site-ashley-madison-puts-hacking-affair-behind-it/>.

¹³ Mills, *supra* note 7.

¹⁴ Hope King, *Ashley Madison Tries to Stop the Spread of Its Leaked Data*, CNN MONEY (August 21, 2015, 5:14 PM), <http://money.cnn.com/2015/08/21/technology/ashley-madison-dmca-requests/>.

¹⁵ See 17 U.S.C. § 512(g) (2012) (insulating service providers from liability upon good faith removal of allegedly infringing material); Jeff John Roberts, *In Ashley Madison Hack, Copyright "Solution" Is Worse Than No Solution*, FORTUNE (July 21, 2015, 1:30 AM), <http://fortune.com/2015/07/21/in-ashley-madison-hack-copyright-solution-is-worse-than-no-solution/>; see also, Joseph Cox, *Ashley Madison Sent Me a DMCA Request for Tweeting Two Cells of a Spreadsheet*, MOTHERBOARD (August 15, 2015), <http://motherboard.vice.com/read/ashley-madison-sent-me-a-dmca-request-for-tweeting-two-cells-of-a-spreadsheet>.

¹⁶ See, e.g., Stephen Carlisle, *The Ashley Madison Hack: Why is a Website for Cheating Spouses Sending Out Dubious DMCA Notices?*, NOVA SOUTHEASTERN U. (July 23, 2015), <http://copyright.nova.edu/ashley-madison-hack/> ("The facts aggregated by [Avid Dating Life] are purely the result of who signs up for the service, and who has removed themselves from the database by deleting their account. In other words, the facts have self-selected themselves.").

¹⁷ See, e.g., *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988).

¹⁸ See, e.g., Erica Fink, *To Fight Revenge Porn, I had to Copyright My Breasts*, CNN MONEY (April 27, 2015, 1:32 PM), <http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/>.

the removal of digital copies from the internet and the destruction of physical copies.¹⁹ The extent to which copyright ought to protect privacy interests has been considered in various jurisdictions recently²⁰ but has not been treated comprehensively by contemporary legal scholars in the United States.²¹ This piece seeks to undertake that treatment.

Part II of this paper begins this consideration by discussing two cases in which plaintiffs asserted copyright claims in addition to privacy allegations, though the underlying injuries were clearly primarily privacy-based. Part III provides a brief overview of the current state of privacy law. Part IV then considers the theoretical and jurisprudential overlap between privacy and copyright, and highlights the problems presented by protecting privacy through copyright. Part IV also suggests two relatively modest legislative solutions: (1) a limited federal statute that would provide a plaintiff alleging online privacy infringement with a remedy analogous to the DMCA's takedown provisions available to those alleging online copyright infringement; and (2) statutorily adopting the moral right of disclosure already recognized in other countries in order to codify the common law right of first publication.²² Finally, Part V concludes by returning to the Ashley Madison example to consider the potential of the proposed solutions to address the problems presented.

II. Recent Privacy Cases Brought Under the Guise of Copyright Claims

While Americans tend to speak of rights in absolute terms,²³ it is clear that all rights are not created equal. One of the most important theoretical contributions of the legal realists is the understanding that remedies are “constitutive components” of rights.²⁴ It is impossible to understand the scope and substance of a stated right without understanding the remedies that may follow infringement of that right.²⁵ Therefore, understanding why a plaintiff seeking to stop the dissemination of a particular work might proceed under a copyright theory rather than, or in addition to, a privacy theory, requires a basic understanding of the available remedies and the relative ease and promptness of halting dissemination under each paradigm.

None of the four privacy torts effectively address the concerns raised by plaintiffs who assert copyright to defend privacy interests. This is so, at least in part, because the remedies for privacy tort liability pale in comparison to the remedies available for copyright infringement. The

¹⁹ 17 U.S.C. §§ 503, 512 (2012).

²⁰ See *infra* part IV.C.

²¹ See, e.g., Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS 191, 198 (Marc Rotenberg et al. eds., 2015) (“Whether courts should allow copyright claims to protect personal interests in cases such as these is a question left to another day.”). See also Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 557–64 (2015) (considering cases in which privacy and reputational interests are actually at stake in copyright litigation).

²² For a discussion of copyright as a moral right, see Peter K. Yu, *Moral Rights 2.0*, 1 TEXAS A&M L. REV. 873 (2014).

²³ See, generally, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (The Free Press 1991).

²⁴ HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM AND RETHINKING PRIVATE LAW THEORY 148 (2013) (“Situating remedies at the core of our understanding of rights, that is, perceiving remedies as constitutive components of rights, is one of the most important lessons of legal realism.”).

²⁵ *Id.*

Copyright Act provides definite and substantial statutory remedies.²⁶ These include damages of up to \$30,000 or \$150,000 in cases in which willful infringement can be demonstrated.²⁷ In addition, the plaintiff may be entitled to injunctive relief.²⁸ Moreover, the prevailing party in an action for copyright infringement may also be awarded substantial attorney's fees and costs.²⁹ In light of these statutory remedies, the DMCA's takedown procedure can be a highly effective tool.³⁰ It provides sites that host content with a safe harbor against claims of copyright infringement so long as they diligently aid copyright owners in removing infringing content from the sites.³¹ Given the potential alternative of expensive copyright litigation and the significant potential damages that may be awarded, internet service providers are very motivated to act in accordance with the wishes of copyright owners.

On the other hand, the remedies for invasion of privacy are far from definite. The right to privacy tort is governed by state law and the available remedies vary from state to state.³² Finally, nothing like the immediate relief the DMCA provides is readily available through a lawsuit for invasion of privacy. A privacy plaintiff's best-case scenario is to file a lawsuit with the hopes of obtaining a temporary restraining order or preliminary injunction early in the litigation. Given the vagaries in privacy law amongst the states, this is far from certain. Internet Service Providers and other potential defendants are therefore not nearly as likely to take the requests of a privacy plaintiff seriously.

Terry Bollea's dispute with Gawker highlights some of the problems a privacy plaintiff seeking to halt dissemination, particularly online, might encounter that a plaintiff proceeding under a copyright theory would not.³³ The Bollea / Gawker dispute arose in 2012 when Gawker posted approximately 100 seconds of video footage in which Mr. Bollea is seen having sex with a woman. At the time the footage was shot, both Mr. Bollea and the woman in the video were married to other people.³⁴ After filing suit in federal court alleging copyright infringement, and then dropping that suit,³⁵ Bollea filed suit in Florida State Court. Although the jury in Bollea's state court action

²⁶ 17 U.S.C. § 504 (2012).

²⁷ 17 U.S.C. § 504(c) (2102).

²⁸ 17 U.S.C. § 502 (2012).

²⁹ 17 U.S.C. § 505 (2012). *See also* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1253 (11th Cir. 2014) (noting that the District Court had awarded Defendant nearly \$3 million in attorney's fees and costs.).

³⁰ *See, e.g.,* Maryanne Stanganelli, *The DMCA Through the "Lenz" of Fair Use: The Ninth Circuit Finds Fair Use Analysis Required Before Sending a DMCA Takedown Notice*, IP INTELLIGENCE (Sept. 15, 2015), <http://www.ipintelligencereport.com/2015/09/15/the-dmca-through-the-lenz-of-fair-use-the-ninth-circuit-finds-fair-use-analysis-required-before-sending-a-dmca-takedown-notice/>.

³¹ 17 U.S.C. § 512(c).

³² *See, e.g., Cal. Prac. Guide Civ. Pro. Trial Claims and Def. Ch. 4(V)-E; 14 N.Y.Prac., New York Law of Torts* § 1:66; *21 Fla. Prac., Elements of an Action* § 1503:1 (2015-16 ed.).

³³ Terry Bollea is the former professional wrestler better known as Hulk Hogan. *See*, Complaint, at 6-8, *Bollea v. Gawker Media, LLC*, 913 F.Supp.2d 1325 (M.D. Fla. 2012) (No. 8:12-02348-T-27TBM, Dkt. 1).

³⁴ *See, e.g.,* Dan Good, Janelle Irwin, and Leonard Greene, *Hulk Hogan takes the stand in \$100M sex tape trial, says mean wife drove him to romp with pal's spouse*, N.Y. Daily News (Mach 7, 2016), available online at <http://www.nydailynews.com/news/national/hulk-hogan-takes-stand-100m-lawsuit-gawker-article-1.2555554>.

³⁵ Notice of Rule 41(a)(1)(A)(i) Voluntary Dismissal Without Prejudice (December 28, 2012), *Bollea*, 913 F.Supp.2d at 1325 (Dkt. 68).

ultimately awarded Bollea \$115,000,000 in compensatory damages³⁶ and \$25,000,000 in punitive damages,³⁷ none of Bollea's pleas for injunctive relief succeeded.³⁸

If Bollea owned the copyright in the video at the time that Gawker posted the clip, Bollea and Gawker may never have ended up in court in the first place. The Digital Millennium Copyright Act provides a ready remedy for copyright owners who find their content improperly posted online.³⁹ The Bollea narrative demonstrates the attractiveness of proceeding under a copyright theory to a plaintiff who alleges her privacy has been infringed online. However, the appeal of a copyright claim to a plaintiff with privacy concerns is in no way limited to online conduct. *Hill v. Public Advocate of the United States* demonstrates the potential advantages of copyright claims in cases where dissemination occurs entirely offline.⁴⁰

The plaintiffs in *Hill* were two men who posted their engagement pictures online, and their photographer friend, who took the pictures.⁴¹ The defendants were various individuals and entities responsible for the production and dissemination of a political campaign flyer that utilized one of the engagement photographs in connection with campaigns against various candidates for public office whom, it was asserted, were supportive of rights for gay people.⁴² Below is the original photograph alongside one of the flyers:

³⁶ Nick Madigan and Ravi Somaiya, *Hulk Hogan Awarded \$115 Million in Privacy Suit Against Gawker*, N.Y. Times (March 18, 2016), http://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html?_r=0. (Note well that the Florida state court case that resulted in this tremendous award was initiated after the voluntary dismissal of the federal case including a copyright claim. The federal case is discussed *infra* notes 247, 248 and 252 and accompanying text.)

³⁷ Paul Callan, *Hulk Hogan Verdict body-slams Gawker*, CNN (March 22, 2016), available online at <http://www.cnn.com/2016/03/20/opinions/hulk-hogan-verdict-warning-shot-media-opinion-callan/>.

³⁸ The Federal District Court rejected the request for injunctive relief. *See, Bollea*, 913 F. Supp. 2d at 1328 (“Plaintiff’s motion for preliminary injunctive relief is due to be denied because he has produced no evidence demonstrating that he will suffer irreparable harm absent a preliminary injunction.”). The Florida Court of Appeals reversed the Circuit Court decision to grant a temporary injunction. *See also, Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2d Dist. 2014) (“Because the temporary injunction is an unconstitutional prior restraint under the First Amendment, we reverse.”).

³⁹ 17 U.S.C. § 512(c) (“A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider . . . upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”).

⁴⁰ *Hill v. Public Advocate of the U.S.*, 35 F.Supp.3d 1347 (D. Colo. 2014).

⁴¹ *Id.* at 1351.

⁴² *Id.* at 1352.



The plaintiffs filed suit in District Court in Colorado alleging misappropriation of the likenesses of the pictured plaintiffs, as well as infringement of the photographer's copyright.⁴³ The District Court of Colorado interpreted the photographed couple's claims as privacy allegations and dismissed those claims on First Amendment grounds.⁴⁴ Conversely, the defendants' asserted fair use argument failed to overcome the photographer plaintiff's copyright infringement claim.⁴⁵ The parties settled shortly after the Court's ruling on the defendants' motion to dismiss.⁴⁶

While *Hill* and *Bollea* demonstrate why a plaintiff with privacy concerns might proceed under a copyright theory, this paper is more interested in whether courts ought to entertain copyright allegations in those circumstances. This question has received brief consideration lately, with particular attention paid to potential First Amendment concerns.⁴⁷ While this paper will touch briefly on these concerns,⁴⁸ its particular focus will be on two problems not yet addressed in the literature. First, seeking to vindicate the privacy rights of subjects through the current copyright regime is complicated and perhaps inappropriate because copyright is fully alienable and as such, the copyright owner of a particular work is often neither the subject, nor the author, of the work.⁴⁹ Second, courts considering privacy issues under the guise of copyright claims have a propensity to perceive a constitutional privacy issue where the facts only support a tort claim.

What follows immediately is a brief overview of the history and development of the right to privacy in the United States, which will demonstrate two important points. First, tort privacy and constitutional privacy are distinct rights—the first a right against other individuals, the second,

⁴³ *Id.* at 1351.

⁴⁴ *Id.* at 1354, 1357.

⁴⁵ *Id.* at 1360 (“the Plaintiffs' have stated a plausible copyright infringement claim . . . and I DENY Public Advocate and the Defendants' Motions To Dismiss . . . to the extent they seek dismissal of the Plaintiffs' copyright infringement claim based on the fair use doctrine.”).

⁴⁶ Notice of Settlement, *Hill*, 35 F.Supp.3d 1347 (No. 12–02550–WYD–KMT, Dkt. 149); *see also*, Caitlin Gibson, *Case against advocacy group tied to Loudon County supervisor ends in settlement*, WASH. POST (June 19, 2014), available online at https://www.washingtonpost.com/local/virginia-politics/case-against-advocacy-group-tied-to-loudoun-county-supervisor-ends-in-settlement/2014/06/19/e6ea1b1e-f7cc-11e3-a3a5-42be35962a52_story.html (July 22, 2016).

⁴⁷ *See, e.g.*, Hon. M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1 (2016).

⁴⁸ Section IV *infra*.

⁴⁹ 17 U.S.C. 201(d).

a right against the government. Second, privacy is personal; that is to say, it is an inalienable right that belongs to individuals.

III. Privacy Law, In Brief

A. General Principles

Warren and Brandeis described privacy as a nascent concept in the common law, which they conceived of as a “right to be let alone.”⁵⁰ Warren and Brandeis’ article, *The Right to Privacy* has recently been hailed as “the most influential of all law review articles.”⁵¹ At the time Warren and Brandeis were writing, no court of last resort in the United States had yet recognized a common law right to privacy.⁵² In fact, it wasn’t until fifteen years after *The Right to Privacy* was penned that the Georgia State Supreme Court would become the first court of last resort in the United States to recognize the right to privacy.⁵³ It would take another sixty years for the United States Supreme Court to recognize a constitutional right to privacy.⁵⁴ Today, the right to privacy is widely recognized by state statute and common law,⁵⁵ and is constitutionally protected against governmental intrusion.⁵⁶

Since Warren and Brandeis wrote *The Right to Privacy*, some general principles regarding the right to privacy have emerged. Chief among these for the purposes of this article are the personal nature of the right to privacy, and the development of two distinct strands of jurisprudence: (1) state law articulating the privacy tort as a matter of state statutory law and common law; and (2) federal law enunciating a constitutional right to be free from governmental interference.

⁵⁰ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). On the poetic license Warren and Brandeis are utilizing here, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1187, 1190 (“Warren and Brandeis defined privacy as the ‘right to be let alone,’ a phrase adopted from Judge Thomas Cooley’s famous treatise on torts in 1880. Cooley’s right to be let alone was, in fact, a way of explaining that attempted physical touching was a tort injury; he was not defining a right to privacy.”).

⁵¹ Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1503 (2012).

⁵² RICHARD A. GLENN, *THE RIGHT TO PRIVACY: RIGHTS AND LIBERTIES UNDER THE LAW*, 56 (ABC-CLIO, Inc. 2003).

⁵³ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 386-88 (1960).

⁵⁴ Anita L. Allen, *The Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1199 (2012).

⁵⁵ See ROBERT M. O’NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 77 (2001) (“It is true that most states now permit recovery of damages for some types of invasion of personal privacy. Minnesota joined the pack in 1998, leaving North Dakota and Wyoming as the only two states whose courts have never recognized privacy as a cause of action.”).

⁵⁶ See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 737 (1989) (“This Article is about the constitutional right to privacy, a right that many believe has little to do with privacy and nothing to do with the Constitution. By all accounts, however, the right to privacy has everything to do with delineating the legitimate limits of governmental power. The right to privacy, like the natural law and substantive due process doctrines for which it is a late-blooming substitute, supposes that the very order of things in a free society may on certain occasions render intolerable a law that violates no express constitutional guarantee.”).

i. Privacy is Personal

The first court of last resort in the United States to recognize a right to privacy made clear that the right to privacy is personal, belonging to particular individuals. The Georgia State Supreme Court in *Pavesich v. New England Life Ins. Co.* stated, “[t]he right of privacy, or the right of the individual to be let alone, is a personal right. . . . It is the complement of the right to the immunity of one’s person.”⁵⁷ In initially theorizing the right to privacy, Warren and Brandeis spoke of the right of “each individual . . . [to] determin[e], ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”⁵⁸ In articulating the constitutional right to privacy, the Supreme Court agreed that this is, in fact, a personal right.⁵⁹ The right to privacy is inalienable. That is to say, invasions of the right to privacy can only be vindicated in a suit by the individual whose privacy has been invaded.⁶⁰ Relatedly, corporate entities do not enjoy a right to privacy under either tort theory or constitutional theory.⁶¹

ii. The Privacy Tort and the Constitutional Right to Privacy are Distinct

Although the right of privacy tort and the constitutional right to be free from governmental intrusions have similar theoretical underpinnings, as one commentator notes, these two types of privacy are “categorically” distinct.⁶² “Certain privacy encroachments stem from the actions of private individuals, and other privacy encroachments result from intrusive governmental action. The first type of privacy encroachment . . . [is] *tort privacy*.”⁶³ On the other hand, “[c]onstitutional privacy has come to mean the right of the individual to be free from unwanted and unwarranted *governmental intrusion* in matters affecting fundamental rights.”⁶⁴ The Supreme Court recognized this in *Katz v. U.S.*, stating, “the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”⁶⁵ The Court also stated: “the Constitution protect[s] personal privacy from . . . *governmental invasion*.”⁶⁶ The remainder of this Section addresses constitutional privacy and tort privacy, in turn.

B. Constitutional Protections

The constitutional right to privacy was first recognized by the Supreme Court in *Griswold v. Connecticut* in 1965.⁶⁷ To properly understand the myriad ways in which the Constitution protects privacy and the ways in which those protections are related to each other and to the privacy

⁵⁷ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78 (Ga. 1905).

⁵⁸ Warren & Brandeis, *supra* note 50, at 198 (internal quotation marks and citations omitted).

⁵⁹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

⁶⁰ See, e.g., Robert C. Post, *Rereading Warren and Brandeis: Privacy Property, and Appropriation*, 41 CASE W. RES. 647, 667 (1991).

⁶¹ Restatement (Second) of Torts §652I, comment c (“A corporation, partnership or unincorporated association has no personal right of privacy.”).

⁶² GLENN, *supra* note 52, at 5.

⁶³ *Id.* (emphasis in original).

⁶⁴ *Id.* at 6 (emphasis added).

⁶⁵ *Katz v. U.S.*, 389 U.S. 347, 350-51 (1967) (internal citations omitted).

⁶⁶ *Id.* at 350 (emphasis added).

⁶⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

tort,⁶⁸ we must consider a line of Supreme Court decisions that includes *Griswold*, but neither begins nor ends there. Interestingly, Brandeis, whose article first articulated the right to privacy tort, also figures prominently in the narrative of the constitutional right to privacy.⁶⁹

What follows is a brief treatment of the Constitution's role in protecting privacy.⁷⁰ The remainder of this section proceeds in four parts. First, I will consider the concept of decisional privacy that developed from the Court's decision in *Griswold v. Connecticut*, which is widely recognized as the first time the Supreme Court recognized a right to privacy.⁷¹ Next I will consider Fourth Amendment jurisprudence in which the concept of a "reasonable expectation of privacy" developed. Then, I will consider the various ways in which the First Amendment protects privacy interests. Finally, I conclude this section with a synopsis of these various constitutional privacy protections.

i. Decisional Privacy

Sixty years after the Georgia Supreme Court recognized the right to privacy tort,⁷² the Supreme Court of the United States recognized the constitutional right to privacy. In a splintered decision, the Court in *Griswold v. Connecticut*⁷³ held that although the Constitution does not

⁶⁸ See, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1357 (1992) ("Many commentators have attempted to sever the 'expectation of privacy' which has evolved in American jurisprudence under the Fourth Amendment, from the tort of privacy created by Warren and Brandeis in 1890, the 'fundamental-decision privacy' later introduced in *Griswold v. Connecticut*, and other forms of privacy which have concurrently taken shape in American law. Such a sharp division is unfortunate, however, because history confirms that the various offshoots of privacy are deeply intertwined at the roots, owing their origins to the same soil.").

⁶⁹ NEIL RICHARDS, *INTELLECTUAL PRIVACY*, 7 (Oxford University Press 2015) ("Later in his life, [Brandeis] penned a second major contribution to privacy—his dissent in *Olmstead v. United States*. This introduced modern concepts of privacy into constitutional law. It led to the "reasonable expectation of privacy" test governing Fourth Amendment law, and shaped the constitutional right to privacy recognized in *Griswold v. Connecticut* and *Roe v. Wade*.").

⁷⁰ Some of the privacy literature treats the development of constitutional privacy protections at the state level. See, e.g., Timothy O. Lenz, *'Rights Talk' About Privacy in State Courts*, 60 ALB. L. REV. 1613 (1997). (Discussion of the interaction of state constitutional privacy protections and copyright is beyond the scope of this article.)

⁷¹ See generally JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* (University Press of Kansas 2005).

⁷² *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); see *infra* notes 141, 147-149.

⁷³ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (J. Douglas delivered the opinion of the Court. There were three separate concurrences and a dissent. The first concurrence, written by J. Goldberg and joined by C.J. Warren and J. Brennan was intended to "emphasize the relevance of [the Ninth] Amendment to the Court's holding." The second, written by J. Harlan concurs in the judgment only. Harlan would have based the decision not on the rights enumerated in the Bill of Rights or "any of their radiations" but, rather, on the "concept of ordered liberty. . . ." The third concurrence was written by J. White. It too concurs in the judgment only and locates the basis of the right claimed by *Griswold* in the Fourteenth Amendment. White's concurrence focuses on Connecticut's failure to articulate a compelling state interest. Finally Justice Black, joined by Justice Stewart dissented. Black and Stewart were wary of granting Constitutional protection to what they say had previously been understood as merely a tort:

The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. Thus the Supreme Court of Georgia, in granting

affirmatively articulate a right to privacy, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁷⁴ Within these penumbras, the Court identified a constitutional right to privacy that guarantees freedom from “governmental intrusion.”⁷⁵

Justices Kennedy, O’Connor, and Souter penned the Court’s most descriptive articulation of the right to privacy in *Planned Parenthood v. Casey*,⁷⁶ stating:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Our precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁷⁷

This line of constitutional privacy cases demonstrates that the Constitution recognizes a zone of privacy around individuals within which each individual must be free to make certain fundamental decisions without governmental intrusion.⁷⁸ More recently, in *Lawrence v. Texas*,⁷⁹ the Supreme

a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that “A right of privacy in matters purely private is . . . derived from natural law” and that “The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law” Observing that “the right of privacy . . . presses for recognition here,” today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with “privacy.” (internal citations omitted).

⁷⁴ *Id.* at 484.

⁷⁵ *Id.* at 483 (emphasis added).

⁷⁶ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁷⁷ *Id.* at 851 (internal citations omitted).

⁷⁸ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (characterizing the right recognized in *Roe v. Wade* and its progeny as “independence in making certain kinds of important decisions.”); GLENN, *supra* note 52, at 12; DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* 31 (Harvard University Press 2009) (“[T]he Court has conceptualized the protection of privacy as the state’s noninterference in certain decisions that are essential to defining personhood.”); *Id.* at 166 (“*Griswold*, *Eisenstadt*, and *Roe* all protect against what I call ‘decisional interference’—that is, governmental interference with people’s decisions regarding certain matters in their lives. These cases extend to decisions relating to sex and sexuality, as well as parent’s child-rearing decisions.”).

⁷⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

Court overturned its prior decision in *Bowers v. Hardwick*⁸⁰ and held that a Texas state law prohibiting sex between homosexuals was unconstitutional.⁸¹

The line of cases stretching from *Griswold* to *Lawrence* demonstrates that within the constitutional zone of privacy are issues including, but certainly not limited to, contraception,⁸² abortion,⁸³ same-sex intercourse,⁸⁴ and child-rearing.⁸⁵ *Griswold* was the first Supreme Court decision to specifically articulate privacy as a constitutional right, and these privacy cases are the starting point for understanding constitutional privacy protections.⁸⁶ However, Justice Brandeis actually planted the seed for the idea that there is a constitutional aspect to privacy in his dissent to the Court's decision in *Olmstead v. U.S.*⁸⁷

ii. Reasonable Expectation of Privacy

In 1928, nearly forty years after co-authoring *The Right to Privacy* with Samuel Warren, Louis Brandeis was in his twelfth year as a Supreme Court Justice.⁸⁸ That year, the Court heard *Olmstead v. U.S.*⁸⁹ in which it was to decide whether wiretapping without a warrant violated a criminal defendant's rights under the Constitution.⁹⁰ The majority held that such wiretapping violated neither the Fourth Amendment's prohibition against unreasonable searches and seizures nor the Fifth Amendment's prohibition against self-incrimination.⁹¹ Dissenting in *Olmstead*, Brandeis specifically called attention to the right to privacy. Rejecting the majority's narrow reading of the Fourth and Fifth Amendments, Brandeis said:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone* – the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion *by the Government* upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth

⁸⁰ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁸¹ *Lawrence*, 539 U.S. at 578-79.

⁸² *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right recognized in *Griswold* to unmarried persons).

⁸³ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

⁸⁴ *Lawrence*, 539 U.S. at 558.

⁸⁵ *Meyer v. Nebraska*, 262 U.S. 390, 398-403 (1923).

⁸⁶ See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 33 (1999).

⁸⁷ Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1295-96 (2010).

⁸⁸ See Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPP. L. REV. 919, 934-36 (2012).

⁸⁹ *Olmstead v. U.S.*, 277 U.S. 438 (1928).

⁹⁰ *Id.* at 455 (“[W]hether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments.”)

⁹¹ *Id.* at 462-66.

Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.⁹²

Just as Warren and Brandeis conceived of the right to privacy in response to technological advances in photography,⁹³ Brandeis based his reading of the privacy right into the Constitution on technological advances: “Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”⁹⁴

It would take nearly forty years, but ultimately, Brandeis’ dissent in *Olmstead* would win the day in *Katz v. U.S.*,⁹⁵ in which the Court held that warrantless wiretapping did indeed violate the Fourth Amendment.⁹⁶ Recently, in *Riley v. California*,⁹⁷ the Court further considered the Fourth Amendment in the context of newly-developed technology; specifically, cell phones. In *Riley*, the Court held that warrantless search of an arrestee’s cell phone violated the Fourth Amendment.⁹⁸ The Court stated: “A search of the information on a cell phone bears little resemblance to the type of brief physical search [incident to arrest]”⁹⁹ This Fourth Amendment jurisprudence is primarily important to the analysis of the copyright / privacy overlap because it demonstrates the continuing importance of technological advancement in the development of privacy jurisprudence. What follows is a brief discussion of the First Amendment’s role in protecting privacy interests.

iii. The First Amendment and Privacy

The relationship between the First Amendment and privacy is complicated and multifaceted.¹⁰⁰ The potential conflict between privacy and the First Amendment has been treated extensively in the literature.¹⁰¹ The most common form of conflict occurs where the First Amendment right to freedom of the press conflicts with an individual’s asserted privacy interest.¹⁰²

⁹² *Id.* at 478-79 (Brandeis dissenting) (emphasis added).

⁹³ Warren & Brandeis, *supra* note 50, at 195 (“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”).

⁹⁴ *Olmstead*, 277 U.S. at 473. It is interesting to note how closely this language tracks the language from Warren & Brandeis, *supra* note 50.

⁹⁵ *Katz*, 389 U.S. 347.

⁹⁶ *Id.* at 353 (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”).

⁹⁷ *Riley v. California*, 134 S. Ct. 2473 (2014).

⁹⁸ *Id.* at 2494-95.

⁹⁹ *Id.* at 2485.

¹⁰⁰ See, e.g., RICHARDS, *supra* note 69; O’NEIL, *supra* note 55; Rubinfeld, *supra* note 56; Gormley, *supra* note 68.

¹⁰¹ See, e.g., Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139 (2001).

¹⁰² See, e.g., Gary Wax, *Popping Britney’s Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 LOY. L.A. ENT. L. REV. 133 (2009); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004).

This conflict relates to the pursuit of copyright infringement claims in factual scenarios that raise privacy questions. As such, this article will address such conflict in Section IV, below.¹⁰³ This section will now consider the extent to which the First Amendment's protection of the right to freedom of speech may also be seen as protective of privacy.¹⁰⁴

The First Amendment's freedom of speech clause is seen as protecting privacy in at least two distinct ways. First, the First Amendment has been understood to encompass the right not to speak since as early as 1943.¹⁰⁵ Courts have also long recognized the First Amendment interests of unwilling listeners.¹⁰⁶

In 1977, the Supreme Court of the United States, relying upon its decision in *W. Va. State Bd. of Educ. v. Barnette*,¹⁰⁷ declared, “[t]he right of freedom of thought . . . as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all.”¹⁰⁸ Since then, “[f]or the most part, government attempts to force individuals to affirm beliefs contrary to their own . . . are subject to strict scrutiny and struck down.”¹⁰⁹ In *Wooley v. Maynard*, the Court stated, “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”¹¹⁰ Chief Justice Rehnquist's dissenting opinion in *Wooley* affirmed the existence of the right not to speak while finding that the case at hand implicated no such right.¹¹¹ The Chief Justice said:

The State has not forced appellees to “say” anything, and it has not forced them to communicate ideas with nonverbal actions reasonably likened to “speech,” such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that all noncommercial automobiles bear license tags with the state motto, “Live Free or Die.” Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.¹¹²

Rehnquist's dissent in *Wooley* demonstrates that while the Supreme Court was unanimous in recognizing that the right not to speak is inherent in the First Amendment's freedom of speech

¹⁰³ See *infra* notes 286 - 291 and accompanying text.

¹⁰⁴ Other scholars have considered how the freedom of association protected by the First Amendment is related to privacy. See, e.g., Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014) (focusing on the freedom of speech and freedom of the press aspects of the First Amendment because those are the aspects that tend to overlap with copyright issues).

¹⁰⁵ See, e.g., Anna M. Taruschio, *The First Amendment, the Right Not to Speak, and Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1013 n.80 (2000) (characterizing the Court's reasoning in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), as follows: “the First Amendment invalidates state efforts to coerce private speech.”).

¹⁰⁶ Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65 (2010).

¹⁰⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁰⁸ *Id.* at 645.

¹⁰⁹ Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1283 (2014).

¹¹⁰ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637).

¹¹¹ *Id.* at 720 (Rehnquist, C.J., dissenting).

¹¹² *Id.*

clause, reasonable people may disagree on what constitutes an infringement of that right.¹¹³ For Rehnquist, in order for the right to be implicated the government must be compelling persons to communicate particular speech and the display of a state slogan on a license plate simply did not meet that criteria.¹¹⁴ A number of cases since *Wooley* have recognized the right not to speak.¹¹⁵ Recent scholarly treatment of the First Amendment recognizes the public's interest in being free from compelled disclosures.¹¹⁶

In addition to protecting the "right not to speak," the First Amendment is also seen as protecting the "right not to listen."¹¹⁷ The right not to listen concept is understood as having developed out of a privacy interest.¹¹⁸ As such, what we might ordinarily understand as tort privacy seems to take on a "quasi-constitutional" aspect.¹¹⁹ Political or religious speech may lose its First Amendment protection because the intended audience is not willing to listen and that unwillingness trumps the protections that would normally be afforded to such speech.¹²⁰ These cases present an interesting scenario in which one private party has allegedly invaded the First Amendment rights of another, and the court deems the interests at issue to be constitutional.

While the concepts of the right not to speak and the right not to listen are well-established, recent scholarship considers the role of the First Amendment in intellectual privacy and informational privacy. Neil Richards recently considered the concept of "intellectual privacy."¹²¹ Richards asserts that the First Amendment plays a role in creating a space for formulating and articulating ideas prior to or even in the absence of disseminating those ideas.¹²² Utilitarian theory supports this line of reasoning by specifically focusing upon the First Amendment's role in protecting privacy as a necessary prerequisite to the development of political ideas and the resulting enhancement of political discourse.¹²³ As articulated by Richards, intellectual privacy is important for analyzing the relationship between copyright and privacy because the development

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 18-23 (2012) (collecting and analyzing cases).

¹¹⁶ Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 352-53 (2008).

¹¹⁷ Hartley, *supra* note 106, at 79-89 (tracing the development of the right not to listen in constitutional jurisprudence).

¹¹⁸ *Id.* at 85 (characterizing *Frisby v. Schultz* as a "paradigmatic example of the Court concluding that the unwilling listener's interest surmounts the speaker's free speech claims" and noting that in *Frisby* the Court was considering the constitutionality of an "ordinance [which] recited . . . [its] primary purpose as 'the protection and preservation of the home' through assurance 'that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy.'").

¹¹⁹ Gormley, *supra* note 68, at 1375 ("there are those cases in which privacy intersects with free speech -- for instance, where a door-to-door religious solicitor may seek to convey a message to an unwilling listener in the home. It is here, it will be argued, that privacy has evolved into a third species, quasi-constitutional in nature.").

¹²⁰ *Id.* ("one person may have a right to knock on doors or deliver sermons through loudspeakers in the park -- arguably protected "speech" under the First Amendment -- but there is a competing notion of privacy inherent in the audience which at some point overtakes the free speech interest.").

¹²¹ RICHARDS, *supra* note 68.

¹²² *Id.*

¹²³ This focus on the political is to be expected given the First Amendment's particular solicitude for political speech. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression. . .").

of political ideas will likely produce copyrightable content. Similarly, informational privacy, which is defined as “the right of the individual to control dissemination by the government of information concerning his or her person”¹²⁴ concerns arguably copyrightable content. Interestingly, although the Supreme Court has thus far refused to protect informational privacy as a constitutional right,¹²⁵ a number of scholars continue to advance it as an important concept in the digital age.¹²⁶

The First Amendment’s contributions to protecting privacy are important in understanding the extent to which copyright law ought to protect privacy. The “right not to listen” is conceptually related to the ways in which copyright owners have asserted the First Amendment. “Right not to listen” cases present scenarios in which an individual’s privacy interest is deemed superior to the asserted First Amendment rights of the putative speaker, although there appears to be no state action.¹²⁷ Meanwhile, in *Harper and Row Publishers, Inc. v. The Nation Magazine*, the Court relied on the “right not to speak” to protect privacy interests that had previously been protected by the right of first publication.¹²⁸ Likewise, the concept of intellectual privacy is related to the production of copyrightable content and the concept of informational privacy deals directly with halting dissemination of content that may well be copyrightable.

iv. Constitutional Privacy Protections: A Brief Wrap-Up

The three constitutional protections that are most relevant to considering the extent to which copyright ought to protect privacy are decisional privacy, the Fourth Amendment conception of reasonable expectation of privacy, and the First Amendment freedom of speech privacy protections. Decisional privacy is important because it was the first constitutional right to privacy recognized by the Supreme Court. Decisional privacy jurisprudence articulates the scope of the subject matter protected within the zone of privacy. The Fourth Amendment’s “reasonable expectation of privacy” line of cases demonstrates how privacy jurisprudence has evolved in response to technological advancement. The First Amendment’s freedom of speech clause has previously been asserted as protective of privacy interests in the context of copyright litigation.¹²⁹ Finally, intellectual privacy and informational privacy, though not previously considered in the

¹²⁴ GLENN, *supra* note 52, at 13.

¹²⁵ Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 BRANDEIS L.J. 643, 651 (2007) (“But to this point, there has not been constitutional protection for informational privacy. The Supreme Court has considered informational privacy in a couple of contexts, under the Due Process Clause and under the First Amendment. In both areas, informational privacy has failed to receive a favorable reaction from the Supreme Court.”).

¹²⁶ See, e.g., Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000).

¹²⁷ See discussion *infra* Section IV.B.ii.

¹²⁸ *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 554-55 (1985) (“[C]ommon-law copyright was often enlisted in the service of personal privacy. . . . In its commercial guise, however, an author's right to choose when he will publish is no less deserving of protection. The period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the "right to control the first public distribution" of his work, House Report, at 62, echos [sic] the common law's concern that the author or copyright owner retain control throughout this critical stage.”(internal citations omitted)).

¹²⁹ See *infra* section IV. B. ii. and accompanying text.

context of copyright litigation, have to do with the creation and dissemination of potentially copyrightable content.

Understanding each of these provides a foundation from which we may consider whether copyright's potential contribution to privacy protection is more analogous to constitutional privacy protections or tort privacy protections. The next section discusses the privacy tort. This piece then turns to the copyright scholarship and cases taking up the relationship between privacy and copyright.

C. The Invasion of Privacy Tort

While Warren and Brandeis are viewed as the progenitors of tort privacy,¹³⁰ Professor Prosser is credited with harmonizing the various cases in which the right to privacy developed.¹³¹ The Restatement reflects Prosser's categorization.¹³² It reads:

The right of privacy is invaded by

- (a) unreasonable intrusion upon the seclusion of another; or
- (b) appropriation of the other's name or likeness; or
- (c) unreasonable publicity given to the other's private life; or
- (d) publicity that unreasonably places the other in a false light before the public.¹³³

The tort of invasion of privacy was first recognized by a court of last instance in *Pavesich v. New England Life Ins. Co.*,¹³⁴ in which the Georgia State Supreme Court found New England Life Insurance Company liable for using a photograph of Pavesich in connection with an advertisement without Pavesich's consent.¹³⁵ Today, more than 110 years since *Pavesich*, the tort of invasion of privacy is recognized in the vast majority of American jurisdictions.¹³⁶ The

¹³⁰ Gormley, *supra* note 68, at 1341.

¹³¹ *Id.* at 1341 (citing William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960)).

¹³² Neil M. Richards and Daniel J. Solove, *Prosser's Privacy at 50: A Symposium on Privacy in the 21st Century: Article: Prosser's Privacy Law: A Mixed Legacy*, 98 Calif. L. Rev. 1887, 1903 ("Prosser's final source of influence over the development of tort privacy was in his role in the American Law Institute's revision of the 1934 Restatement of Torts. Prosser served as the reporter for the revised Restatement, and *he quite predictably incorporated into the Restatement his formulations of the privacy torts*. In 1967, the privacy torts section of the Restatement was complete, and an ailing Prosser resigned as reporter in 1970, two years before his death in 1972. Although the Restatement was not published until 1977, the privacy torts section was largely untouched from the version Prosser oversaw." (citing Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. Cin. L. Rev. 887, 897 n.64 (2006) and Amy Gajda, *Judging Journalism, The Turn Toward Privacy and Judicial Regulation of the Press*, 97 Calif. L. Rev. 1039, 1052 n.63 (2009))(emphasis added).

¹³³ Restatement (Second) Torts §652A.

¹³⁴ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

¹³⁵ *Id.*

¹³⁶ *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234 (Minn. 1998) (Recognizing the invasion of privacy tort and noting that prior to its decision "[o]nly Minnesota, North Dakota, and Wyoming [had] not yet recognized any of the four privacy torts.").

Pavesich decision warrants further consideration both for its conceptualization of the right it enunciated and because it has influenced the development of the right to privacy in other states.¹³⁷

The *Pavesich* Court framed the issue it was considering as “whether an individual has a right of privacy which he can enforce, and which the courts will protect against invasion.”¹³⁸ In answering this question in the affirmative, the Supreme Court of Georgia recognized that it was making new law, meticulously discussed the state of existing law and stated the justifications for its holding. In explaining its reasoning, the *Pavesich* Court called upon natural rights, saying:

The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which “was not simply the external legality of acts, but the accord of external acts with the precepts of the law, prompted by internal impulse and free volition.”¹³⁹

Later on in the decision, the Court brought together the concepts of property, assault, and privacy, saying:

The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone.¹⁴⁰

This important maneuver bridged the gap between the right to be let alone in the context of assault, and the right to privacy that the *Pavesich* Court was pronouncing.¹⁴¹ The Court also called on prior precedent that relied upon property theories under similar factual circumstances. The Court went on to consider the utilitarian justifications for a right to privacy. It said:

[A]s to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty, and, if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which

¹³⁷ Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 756 (2005).

¹³⁸ *Pavesich*, 50 S.E. at 69.

¹³⁹ *Id.* at 69-70.

¹⁴⁰ *Id.* at 78.

¹⁴¹ Given that Warren and Brandeis had relied upon Cooley's articulation of the “right to be let alone” in the assault context, this maneuver by the *Pavesich* court was even more important. See Warren & Brandeis, *supra* note 50 and accompanying text.

nature has provided him, as well as those which the ingenuity of man has placed within his reach.¹⁴²

The *Pavesich* Court expounded upon the utilitarian basis for recognizing a right to privacy, stating, “the peace and good order of society would be disturbed by each individual becoming a law unto himself to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family.”¹⁴³ By engaging both natural rights and utilitarian theory, the *Pavesich* Court demonstrated both the need to recognize the right to privacy for the benefit of individuals and the public interest in recognizing that right. Having articulated the theoretical bases for recognizing the right to privacy, the *Pavesich* Court went on to explain its choice to break with the existing jurisprudence, which emphasized property or contract theories.

The *Pavesich* Court understood that by finding in the plaintiff’s favor it was recognizing a right that had not previously been articulated in American law. The Court:

conceded that prior to 1890 every adjudicated case . . . which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like, and that therefore a claim to a right of privacy, independent of a property or contractual right . . . had, up to that time, never been recognized¹⁴⁴

The Court criticized what it referred to as the “conservatism of the judiciary,”¹⁴⁵ noting: “[a]ny candid mind will, however, be compelled to concede that, in order to give relief in many of those cases, it required a severe strain to bring them within the recognized rules which were sought to be applied.”¹⁴⁶ Finally, the Court noted, as Warren and Brandeis had,¹⁴⁷ that technological advances made it more likely that one’s privacy would be invaded by an errant photographer.¹⁴⁸

Tort law regarding privacy has developed significantly since Warren and Brandeis conceptualized it and the Georgia Supreme Court first recognized it. Still, Prosser’s categorization continues to represent the definitive word on the various iterations of the tort.¹⁴⁹ The remainder of this section treats intrusion, public disclosure, false light, and misappropriation in turn.

¹⁴² *Pavesich*, 50 S.E. at 78.

¹⁴³ *Id.* at 77.

¹⁴⁴ *Id.* at 69.

¹⁴⁵ *Id.* at 78.

¹⁴⁶ *Id.* at 77.

¹⁴⁷ Warren & Brandeis, *supra* note 50 at 195 (“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”).

¹⁴⁸ *Pavesich*, 50 S.E. at 78 (“Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual’s face and form, in invitum their owner. While, so far as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of the individual’s privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be.” (quoting *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 450 (N.Y. 1902) (Gray, J., dissenting))).

¹⁴⁹ See, e.g., Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 482-83 (2006).

Intrusion, public disclosure, and false light will be treated together as they bear a number of similarities. Because misappropriation overlaps in some complicated ways with the right of publicity, this section concludes with a consideration of the similarities and differences between the two.

Intrusion, public disclosure, and false light all require intentional acts that would be seen as highly offensive by a reasonable person.¹⁵⁰ Moreover, each of these can be seen as overlapping with some previously existing tort. For example, false light is often criticized, and some States have refused to recognize it,¹⁵¹ because it is seen as too similar to defamation.¹⁵² Finally, all three of these are thought to protect against mental anguish.¹⁵³ Therefore, the remedies available are usually monetary damages aimed at compensating the plaintiff for mental harm suffered.¹⁵⁴

Unlike the first three privacy torts, misappropriation is seen as somewhat commercial in nature.¹⁵⁵ That is to say, the interest protected by the misappropriation tort is not merely mental in nature.¹⁵⁶ In harmonizing the privacy jurisprudence and distinguishing among the types of harms encompassed in the invasion of privacy cases, Prosser said, “[i]t seems sufficiently evident that appropriation is quite a different matter from intrusion, disclosure of private facts, or a false light in the public eye. The interest protected is not so much a mental as a proprietary one, in the exclusive use of the plaintiff’s name and likeness as an aspect of his identity.”¹⁵⁷ And, while some courts and scholars seek to separate the privacy tort of misappropriation from the right of publicity,¹⁵⁸ others mix these categories in ways that make it difficult to tease apart the distinct

¹⁵⁰ Restatement (Second) of Torts §§ 652B, 652D, and 652E (1977); *see, e.g.*, *Ruzicka Elec. & Sons, Inc. v. Int’l Bhd. of Elec. Workers, Local 1*, 427 F.3d 511, 523 (8th Cir. 2005) (Plaintiff asserted that Defendants “unreasonably intruded upon [Plaintiff]’s seclusion when they trespassed at his private residence early in the morning and late at night in order to conduct surveillance on [Plaintiff].”) (cited in Restatement (Second) of Torts § 652B (1977)).

¹⁵¹ *See, e.g.*, *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 326, 312 S.E.2d 405, 413 (1984) (“the recognition of claims for relief for false light invasions of privacy would reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly.”). For a thorough explication of the state of the false light tort in various States as of 2011, *see* Sandra F. Chance & Christina M. Locke, *When Even the Truth Isn’t Good Enough: Judicial Inconsistency in False Light Cases Threatens Free Speech*, 9 FIRST AMEND. L. REV. 546, 557- 567 (2011).

¹⁵² RESTATEMENT (SECOND) OF TORTS § 652E (1977) cmt. b (“The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is. In many cases to which the rule stated here applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander under the rules stated in Chapter 24. In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both, although he can have but one recovery for a single instance of publicity.”).

¹⁵³ *Id.* at § 652H.

¹⁵⁴ *Id.*

¹⁵⁵ Prosser, *supra* note 53 at 406-407 (“It seems quite pointless to dispute over whether such a right is to be classified as ‘property.’ If it is not, it is at least, once it is protected by the law, a right of value upon which the plaintiff can capitalize by selling licenses. Its proprietary nature is clearly indicated by a decision of the Second Circuit that an exclusive license has what has been called a ‘right of publicity,’ which entitles him to enjoin the use of the name or likeness by a third person.”).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 406.

¹⁵⁸ *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 167-77 (1993).

claims, interests, and available remedies.¹⁵⁹ For the purposes of this paper the important difference between the right to publicity and misappropriation as encompassed in some definitions of the invasion of privacy tort is that the right of publicity is generally seen in many jurisdictions as fully alienable.¹⁶⁰

In cases that raise both privacy and copyright claims, copyright claims often persist past the dismissal of privacy claims. This article considers whether courts ought to entertain alternative copyright claims when privacy concerns are at the heart of the alleged harm. What follows in Part IV is a discussion of the relationship between privacy and copyright, the problems that arise when copyright is deployed to protect privacy, and potential solutions to those problems.

IV. The Copyright / Privacy Nexus

In order to fully consider whether copyright should protect privacy, it is important to first consider the theory underpinning both regimes. To the extent that the theoretical commitments of each are irreconcilable, it is difficult to see how copyright might protect privacy interests. As copyright and privacy have a long history of interconnectedness, considering the scholarship and jurisprudence articulating those connections is vital. The Section that follows considers that theory and history and then moves on to consider the problems posed by seeking to protect privacy through copyright; specifically, copyright's misfit for protecting privacy, a personal right, and the potential for courts to misconstrue privacy as protected through copyright as having constitutional proportions.

A. Considering the Compatibility of Copyright and Privacy Theory

The most commonly asserted justification for U.S. copyright law is the utilitarian theory, pursuant to which copyright law exists simply to incentivize creators to give the public access to their works.¹⁶¹ Copyright in the United States is therefore not generally seen as an end in itself.¹⁶²

¹⁵⁹ See, e.g., J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2000).

¹⁶⁰ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 *Geo. L.J.* 185, 186 (2012) ("Courts and scholars have routinely described the right of publicity as such a freely transferable property right.").

¹⁶¹ Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 *BROOKLYN L. REV.* 229, 238-39 (2003) ("Case law and commentary likewise uniformly describe copyright as a utilitarian device for maximizing social utility. As the Supreme Court most recently put it, 'Copyright law serves public ends by providing individuals with an incentive to pursue private ones.' Specifically, copyright aims to alleviate the market's failure to give adequate incentives for producing expressive works. Absent that pressing need, copyright would have no justification at all, a view supported by the history of U.S. copyright law and modern economic theory." (citing 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.03A (2002); I Paul Goldstein, *Copyright* § 1.13.2 (2d ed. Supp. 2003) ("utilitarianism is American copyright law's founding premise . . .").

¹⁶² See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the . . . public good."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" (quoting U.S. CONST. art. I, § 8, cl. 8)).

Rather, giving the public access to creative works is the desired end, and the grant of copyright is merely a means to achieve that end.¹⁶³

Unlike copyright, however, privacy is seen as an end in and of itself.¹⁶⁴ The theory behind this view of privacy is that all human beings are entitled to certain basic rights; among these is privacy.¹⁶⁵ While no consensus exists as to the precise contours of this privacy right,¹⁶⁶ it is widely asserted that it amounts to a “right to be let alone.”¹⁶⁷ One interpretation of this concept is that the “right to be let alone” is the right to be free from disclosure of certain personal facts.¹⁶⁸

Bridging the gap between a copyright regime that is primarily a means by which to encourage creation and dissemination and a privacy regime that seeks to prevent the disclosure of certain private information will require more than an understanding of the primary normative arguments behind these doctrines. Once one breaches the superficial arguments for why we grant copyright and protect privacy, the overlap in these regimes becomes more apparent.

The Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁶⁹ This clause is understood as a utilitarian authorization of intellectual property rights.¹⁷⁰ More specifically, the Supreme Court has recently stated, “[e]vidence from the

¹⁶³ Shane D. Valenzi, *Rereading a Canonical Copyright Case: The Nonexistent Right to Hoard in Fox Film Corp. v. Doyal*, 36 HASTINGS COMM. & ENT. L.J. 89, 90 (“In the United States, granting this exclusionary monopoly is done for the benefit of the public, in the hope that granting authors exclusive economic control over their creative output will provide the necessary incentive for more authors to create and distribute more works to the public. Any benefit to an author is secondary, and rewarding an author for his creative labors is only for the benefit of the public, not as a means to an end itself.”); see also Sara K. Stadler, *Forging a Truly Utilitarian Copyright* 91 IOWA L. REV. 609 (2006). For an interesting and recent argument that IP theory ought to move away from the law and economics approach to utilitarianism and toward a more comprehensive utilitarian theory, see Estelle Derclaye & Tim Taylor, *Happy IP: replacing the law and economics justification for intellectual property rights with a well-being approach*, 37 EUR. INTELL. PROP. REV. 197 (2015).

¹⁶⁴ See, e.g., J. Roland Pennock, *Introduction*, 13 NOMOS: PRIVACY, xii (J. Roland Pennock & John W. Chapman, eds. 1971) (“Privacy is at least a penultimate good; perhaps, in certain usages - such as autonomy- it is an ultimate good, desirable for its own sake and grounded on nothing more final.”).

¹⁶⁵ Warren & Brandeis, *supra* note 49 at 193.

¹⁶⁶ See, e.g., PRIVACY AND PERSONALITY, xi (J. Rowland Pennock & John W. Chapman, eds., 1971) (“What is privacy? Like many concepts, it has a commonly accepted core of meaning with an indefinite or variable periphery.”). For the purposes of this Article, the discussion of the right to privacy will be limited to existing doctrinal understandings as developed in both tort and Constitutional jurisprudence. The normative consideration of the extent to which these doctrinal understandings live up to the philosophical commitment to privacy has been and continues to be treated extensively in the literature. See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153-1154 (2004).

¹⁶⁷ Warren & Brandeis, *supra* note 50, at 195. On the poetic license Warren and Brandeis are utilizing here, see Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1100 (“Warren and Brandeis defined privacy as the ‘right to be let alone,’ a phrase adopted from Judge Thomas Cooley’s famous treatise on torts in 1880. Cooley’s right to be let alone was, in fact, a way of explaining that attempted physical touching was a tort injury; he was not defining a right to privacy.”).

¹⁶⁸ Jared A. Wilkerson, *Battle for the Disclosure Tort*, 49 CAL W. L. REV. 231, 233 (2012-13).

¹⁶⁹ U.S. CONST. art.1, § 8, cl. 8.

¹⁷⁰ ROBERTA ROSENTHALL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 24 (2010) (“[T]he evidence suggests that the Framers’ primary policies were influenced heavily by the utilitarian goals of promoting progress, safeguarding public access, and protecting the public domain as the mechanism ensuring access to information and facts in expressive works.”); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 173 (Stephen R. Munzer ed.,

founding . . . suggests that inducing dissemination . . . was viewed as an appropriate means to promote science.”¹⁷¹ While this utilitarian theory of copyright is the most popular theory justifying copyright,¹⁷² there is no question that courts and commentators alike also take seriously various alternative theories. Chief among these are labor theory¹⁷³ and personhood theory.¹⁷⁴ These alternative theories merit additional discussion because although neither is suggested by the Constitution both arise in U.S. copyright cases and may help to bridge the gap between the normative bases for copyright and privacy.

The labor theory of copyright is based upon John Locke’s now notorious proclamation that “[t]hough the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person, this nobody has any right to but himself. The labour [sic] of his body, and the work of his hands, we may say, are properly his.”¹⁷⁵ This proclamation, as applied to copyright, suggests that while ideas should be “free to common use,”¹⁷⁶ an author’s work embodied in her particular expression of those ideas is worthy of copyright protection.¹⁷⁷

While it was widely believed that the Supreme Court’s decision in *Feist v. Rural Telephone Co.*¹⁷⁸ undercut labor theory as a viable basis for copyright protection in the United States,¹⁷⁹ the

2001) (“[T]he constitutional provision upon which the copyright and patent statutes rest indicates that the purpose of those laws is to provide incentives for creative intellectual efforts that will benefit the society at large.”).

¹⁷¹ *Golan v. Holder*, 132 S. Ct. 873, 888 (2012).

¹⁷² Bell, *supra* note 161 at 238.

¹⁷³ See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523-29 (1990); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 31-67 (2011).

¹⁷⁴ Hughes, *supra* note 173 at 330:

The most powerful alternative to a Lockean model of property is a personality justification. Such a justification posits that property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person. Professor Margaret Radin describes this as the ‘personhood perspective’ and identifies as its central tenet the proposition that, ‘to achieve proper self-development-to be a person-an individual needs some control over resources in the external environment.’ According to this personality theory, the kind of control needed is best fulfilled by the set of rights we call property rights.

Like the labor theory, the personality theory has an intuitive appeal when applied to intellectual property: an idea belongs to its creator because the idea is a manifestation of the creator’s personality or self.”

(citing Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)).

¹⁷⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689).

¹⁷⁶ *International News Serv. v. Associated Press*, 248 U.S. 218, 250 (1918) (Brandeis, J., dissenting).

¹⁷⁷ Hughes, *supra* note 173, at 314 (“The courts’ ad hoc approach in this area suggests that copyrightability may be based as much on what we feel are people’s deserts as on what we feel are society’s informational needs. It has been said that the idea/expression issue is uniquely well-suited for juries. I suggest that this is so not because juries care about a doctrine that ameliorates copyright and first amendment tensions and not because they know what idea-making is, but rather because jurors sense what *labor* is.”).

¹⁷⁸ *Feist v. Rural Telephone Co.*, 499 U.S. 340 (1991).

¹⁷⁹ Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 SOCIAL PHIL. & POL’Y 283, 293 (2012) (“intellectual property scholars widely believe that *Feist* represents an unequivocal rejection of Locke’s labor theory of property in copyright law. . . .”).

court's recent decision in *Golan v. Holder*¹⁸⁰ has arguably reinvigorated this theory.¹⁸¹ In *Golan*, Justice Ginsburg, writing for the majority, noted that the legislation in question "gives [copyright owners] nothing more than the benefit of their labors during whatever time remains before the normal copyright term expires."¹⁸² Justice Breyer, dissenting in *Golan*, took particular issue with this statement, stating, "insofar as [the majority decision] suggests that copyright should in general help authors obtain greater monetary rewards than needed to elicit new works, it rests upon primarily European, but not American, copyright concepts."¹⁸³ Notwithstanding Justice Breyer's dismissal, labor theory has long been influential in American copyright.¹⁸⁴ The majority decision in *Golan* suggests that influence persists.¹⁸⁵

Personhood theory, which is related to labor theory,¹⁸⁶ suggests that policymakers ought to consider the extent to which copyright allows for the fulfillment of basic human needs.¹⁸⁷ Among these basic needs are autonomy and self-realization.¹⁸⁸ Many scholars have asserted that moral rights serve this personhood protective function in other countries.¹⁸⁹ While the U.S. has largely been skeptical of moral rights in general, the rights of attribution and integrity have been partially codified in American law by way of the Visual Artists Rights Act.¹⁹⁰

In some sense, the fault line between utilitarian theories and natural rights theories is the distinct focus of each. Utilitarian theories focus on the benefits that accrue to the public while natural rights theories are concerned with the rights that vest in the copyright owner. Many see policy choices in copyright law as exclusively in line with either utilitarian theories or natural rights theories.¹⁹¹ However, this is a false dichotomy. Rather, these theories actually operate in tandem. Instead of seeking to confer rights upon authors or to bring about a public benefit, policy

¹⁸⁰ *Golan v. Holder*, 132 S. Ct. 873. (2012).

¹⁸¹ Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 543 (2012) ("Although the Supreme Court soundly rejected this [labor] theory in 1991 in *Feist Publications, Inc. v. Rural Telephone Co.*, the Court's recent decision in *Golan v. Holder*, at least arguably, breathed new life into this theory." (footnote omitted)).

¹⁸² *Golan*, 132 S.Ct. at 893.

¹⁸³ *Id.* at 911 (Breyer, J., dissenting).

¹⁸⁴ Mossoff, *supra* note 179.

¹⁸⁵ See Keller, *supra* note 181 and accompanying text.

¹⁸⁶ These theories are related in that both come within the rubric of natural rights, as opposed to utilitarian theories.

¹⁸⁷ See, e.g., Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993).

¹⁸⁸ See, e.g., Karla M. O'Regan, *Downloading Personhood: A Hegelian Theory of Copyright Law*, 7 CAN. J. L. & TECH. 1, 28-38 (2009).

¹⁸⁹ See, e.g., STEVEN ANG, THE MORAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS 130 (2013) ("copyright and patent in respect of the moral rights of authors and inventors, give special protection of certain aspects critical to maintaining personhood..."); see also Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 81 (1998) ("Property rights, it was observed, are a means to protect the personality interest or 'personhood' of individuals; this seemed especially true with intellectual property rights that are draped over creations of the human mind. Along these lines, personhood proponents could understandably be found in the vanguard of 'moral rights' for authors . . ."); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014 n.3 (1982) (mentioning the development of the *droit moral* (moral right) claim aimed at giving artists the right to protect their works from alteration and destruction).

¹⁹⁰ 17 U.S.C. §106A. It is often claimed that the United States fully complies with the command of the Berne Convention to protect moral rights because it protects these through the derivative works rights and other concepts. See, e.g., Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap,"* 3 UTAH L. REV. 659, 709 (2007).

¹⁹¹ See, e.g., HUW BEVERLEY-SMITH, THE COMMERCIAL APPROPRIATION OF PERSONALITY 299-300 (2002).

makers tend to seek to strike the appropriate balance between these.¹⁹² The policy question, then should be, what types of proprietary rights incentivize the optimal amount of creation and dissemination?¹⁹³

Understanding which theories are at work in individual cases becomes a bit more complicated. Despite the fact that the United States has repeatedly eschewed protection of moral rights, when examining individual cases it is apparent that personhood theory is, in fact, operative.¹⁹⁴ Courts, by and large, take seriously the argument that authors may have a relationship to their works that is not proprietary but, rather, dignitary.¹⁹⁵

Just as it is necessary to go beyond the most obvious justification for copyright in order to fully understand how copyright and privacy may be reconciled, it is also essential to consider more than just the primary privacy theory. Since the concept of privacy was initially introduced in American legal scholarship, privacy scholars have historically argued from the perspective of individual rights.¹⁹⁶ In *The Right to Privacy*, Warren and Brandeis stated:

[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 enforcement of the more general right of the individual to be let alone. . . . The principle 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.¹⁹⁷

Much of privacy scholarship has accepted this individually focused theory as sufficient to support privacy rights.¹⁹⁸

¹⁹² Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497, 505 (2004) (“In the United Kingdom and the United States, natural right theories were used alongside utilitarian theories as a basis for justifying copyright.”).

¹⁹³ Of course, the “optimal amount of creation and dissemination” is not a matter of easy consensus. See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 34 (2004) (“No one knows the optimal shape of IP rights. That is, no one knows what length or breadth of patent or copyright protection would maximize innovation.”) (citing Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 322 (1970)).

¹⁹⁴ Keller, *supra* note 181 at 545-49.

¹⁹⁵ See, e.g., Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976) (reversing the district court’s denial of injunctive relief and finding that the plaintiffs were likely to prevail on their claims including a claim that defendant’s editing of their work constituted actionable mutilation of the work).

¹⁹⁶ See, e.g., Maeve Cooke, *A Space of One’s Own: Autonomy, Privacy, Liberty*, 25:1 PHIL. & SOC. CRITICISM, 23 (1999).

¹⁹⁷ Warren & Brandeis, *supra* note 50 at 205.

¹⁹⁸ See, e.g., Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*, PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 156, 163 (Ferdinand David Schoeman ed., 1984) (describing the interest protected by the tort of the invasion of privacy as “the individual’s independence, dignity, and integrity . . . man’s essence as a unique and self-determining being.”).

However some contemporary privacy scholars are engaged in considering alternate bases for privacy protection.¹⁹⁹ For example, Neil Richards, in his 2015 book, *Intellectual Privacy*,²⁰⁰ argues that there are utilitarian reasons to protect privacy.²⁰¹ Richards suggests that idea formation requires intellectual privacy.²⁰² Privacy, he argues, allows for the freedom of thought that is necessary for the creation of works of authorship.²⁰³ In this way, he harmonizes the First Amendment with privacy protection insofar as the end result is free expression.²⁰⁴

Since Richards is primarily focused upon articulating an alternative to the asserted conflict between privacy and the First Amendment, he focuses upon the role idea formation plays in political discourse.²⁰⁵ There is no doubt that the expression of ideas, assuming originality and fixation, ordinarily results in the creation of copyrightable content. The argument that privacy is a necessary precursor to the creation of intellectual works has long been present in copyright cases and scholarship.²⁰⁶

If one considers merely the most proffered bases for copyright and privacy, it is difficult to see how these two can be reconciled. However, once you scratch the surface, it becomes clear that the cases for copyright and privacy have quite a bit in common. Utilitarian and natural rights theories are present in both copyright and privacy jurisprudence and scholarship. Moreover, both of these regimes argue for personal rights in the service of utilitarian ends. Recent privacy scholarship suggests that the utilitarian ends of copyright and privacy are, in fact, overlapping. The protection of privacy creates a space where people can think freely which allows for idea formation that enhances both our public discourse and, ultimately, the public domain.

Given the capacity to harmonize the theoretical underpinnings of privacy and copyright, the connection of these concepts in the case law is no surprise. In fact, in first articulating the right to privacy, Warren and Brandeis relied heavily on copyright concepts. Immediately following is an exposition of copyright's role in the development of the idea of the right to privacy.

B. Copyright and Privacy Through the Ages

i. The Historical Connection: From the Common Law Right of First Publication to Copyright Preemption

Until the adoption of the Copyright Act of 1976, protection of works of authorship was bifurcated: before publication, the work was protected by common law copyright, or the right of

¹⁹⁹ See, e.g., James Rachels, *Why Privacy is Important*, PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 290, 290-99 (Ferdinand David Schoeman ed., 1984) (positing privacy as a prerequisite to social relationships).

²⁰⁰ RICHARDS, *supra* note 69.

²⁰¹ *Id.* at 4-6.

²⁰² *Id.* at 95-108.

²⁰³ *Id.* at 109-122.

²⁰⁴ *Id.* at 153-168.

²⁰⁵ *Id.*

²⁰⁶ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”).

first publication.²⁰⁷ After publication, the work was protected by statute, assuming that the statutory requirements were met.²⁰⁸ Common law copyright protected the author's right to decide when and if the work was communicated to the public.²⁰⁹ There is a general consensus that the right of first publication lasted only until the work was published.²¹⁰ Scholars and courts also agree that the common law right of first publication was more comprehensive than the statutory copyright.²¹¹

The common law copyright is sometimes characterized as control over the physical copy of the work.²¹² Other scholars consider the right of first publication as the right of market entry.²¹³ Still others regard it as primarily protective of privacy.²¹⁴ Samuel Warren and Louis Brandeis took the argument that common law copyright served to protect privacy a step further by arguing that it had the capacity to protect the privacy of persons other than authors; specifically, the subjects of creative works. In fact, their argument that the right of privacy was already present in the common law in 1890 was largely based on the right of first publication.²¹⁵ They stated, "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."²¹⁶

The Copyright Act of 1976 specifically preempts state and common law protections.²¹⁷ As such, any protection of privacy that copyright is supposed to provide must be located somewhere in the statutory language of the Copyright Act. Those who have considered whether the language of the Act supports privacy protections have concluded that the publication right in Section 106 of the Copyright Act subsumes the common law right of first publication.²¹⁸ Because of the historical relationship between the right of first publication and privacy, commentators have located the current Act's protection of privacy in the publication right contained in Section 106.²¹⁹ However, the rights delineated in Section 106 are not limited in any way to the author. Instead, they are

²⁰⁷ Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 589-90 (2011).

²⁰⁸ *Id.* at 590.

²⁰⁹ *Id.* at 589-90.

²¹⁰ Though there is a good deal of disagreement in American copyright law about what constitutes publication in different contexts, the Copyright Act of 1976 defines publication as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101 (2010).

²¹¹ *See, e.g., Stanley v. Columbia Broad. Sys., Inc.*, 221 P.2d 73, 78 (Cal. 1950) (en banc) ("[C]ommon-law rights in unpublished works are of a wider and more exclusive nature than the rights conferred by statutory copyright in published works.").

²¹² *See, e.g., Wendy J. Gordon, The Core of Copyright: Authors, not Publishers*, 52 HOUS. L. REV. 613 (2014).

²¹³ Linford, *supra* note 207.

²¹⁴ *See, e.g., Ned Snow, A Copyright Conundrum: Protecting Email Privacy*, 55 U. KAN. L. REV. 501 (2007).

²¹⁵ Samuelson, *supra* note 21 at 191 ("In making their now-famous argument for recognition of a legal right to privacy, Samuel Warren and Louis Brandeis relied surprisingly heavily on copyright norms and caselaw to support the idea that privacy was and should be a protectable interest.").

²¹⁶ Warren & Brandeis, *supra* note 50 at 198.

²¹⁷ 17 U.S.C. § 301 (1998).

²¹⁸ *See* Linford, *supra* note 207, at 592.

²¹⁹ *Id.* at 592, 594.

specifically deemed to be fully alienable by the statute.²²⁰ The next section of this article reflects on cases in which courts have recognized privacy interests in copyright infringement cases.

ii. From *Harper & Row* to *Salinger v. Colting*: Deploying the “Right Not to Speak” in Copyright Infringement Cases

2015 marked thirty years since the Supreme Court decided *Harper & Row Publishers, Inc. v. Nation Enterprises*,²²¹ in which it held that The Nation Magazine had infringed the copyright in Gerald Ford’s memoir by publishing an article featuring excerpts of some 300 words.²²² In so holding, the Court brought together concepts of privacy, first publication, and the right not to speak in the context of a copyright infringement suit.²²³

The Supreme Court was faced with *Harper & Row* just eight years after it decided *Wooley*.²²⁴ The Nation Magazine argued that its publication of the article excerpting Nixon’s autobiography fell within the scope of the First Amendment’s protection of freedom of the press.²²⁵ In rejecting that argument, the Supreme Court relied upon *Wooley* to declare that a copyright owner has a right not to speak.²²⁶ In addition to *Wooley*, the Supreme Court cited a number of lower court decisions including *Schnapper v. Foley*²²⁷ and *Estate of Hemingway v. Random House*.²²⁸

In *Schnapper*, the D.C. Circuit relied upon the right not to speak to hold that the First Amendment did not require the court to issue a compulsory license allowing for the use of the copyrighted works.²²⁹ The Court said, “[w]e see no reason why the same freedom [i.e., the right not to speak] should not be granted to the unwilling speaker when it is a public television station. There is no question but that these non-commercial broadcasters are fully protected by the First Amendment.”²³⁰ *Schnapper* is an interesting case because, like *Harper & Row* and *Salinger v. Colting*,²³¹ the allegedly infringed works were already published. Therefore, the works would not have been protected by common law copyright before the implementation of the 1976 Act. Yet, the Court still extended protection to those works by reference to the Constitution. Setting aside the lack of state action in *Schnapper*, the application of the common law copyright bolstered by the right not to speak seems incongruous in this context because the works in question had already been published.²³²

²²⁰ *Id.* at 624 (stating that copyright protection not only “provides an incentive for author to create works,” but also “encourage[es] the public dissemination of those works”).

²²¹ 471 U.S. 539 (1985).

²²² *Id.* at 569.

²²³ *Id.* at 554, 552-53, 559.

²²⁴ *Id.* at 539.

²²⁵ *Id.* at 540.

²²⁶ *Id.* at 559.

²²⁷ *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981).

²²⁸ *Estate of Hemingway v. Random House*, 244 N.E.2d 250 (N.Y. 1968).

²²⁹ *Schnapper*, 667 F.2d at 114-15.

²³⁰ *Id.* at 114 (internal quotation marks and citation omitted).

²³¹ *Salinger v. Colting*, 607 F. 3d 68 (2d Cir. 2010).

²³² *See Keller*, *supra* note 181 at 537-38.

In the case involving Hemingway's estate, however, the plaintiff apparently sought to stop dissemination of previously unpublished communications.²³³ As such, the use of common law copyright and, perhaps even the right not to speak, seems more appropriate.²³⁴ It is worth noting, however, that Hemingway was already deceased at the time of the suit.²³⁵ The statutory protection of the right to privacy in New York has always been limited to living persons,²³⁶ which makes the attempt to protect Hemingway's right to privacy rather odd.²³⁷ The attempt to interpose copyright to accomplish an end that the tort of invasion of privacy simply could not is deeply problematic. In any event, imbuing that privacy interest with constitutional aspects simply lacks any support in the privacy jurisprudence or copyright law.

The *Harper & Row* Court's characterization of privacy interests as embodied in the right of first publication and protected by reference to the "right not to speak" was initially read as a near prohibition on the fair use of unpublished works.²³⁸ Rejecting The Nation's argument that it could make a fair use of material the author had demonstrated an intent to publish, the Court stated, "[t]his argument assumes that the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination. It is true that common-law copyright was often enlisted in the service of personal privacy."²³⁹ The Court then went on to qualify that statement saying, "[i]n its commercial guise, however, an author's right to choose when he will publish is no less deserving of protection."²⁴⁰ The Court then upped the ante on protection by invoking the right not to speak:

The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect. Courts and

²³³ *Estate of Hemingway*, 244 N.E.2d at 254 n.1.

²³⁴ *Id.* at 255 ("The essential thrust of the First Amendment is to prohibit improper restraints on the Voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom Not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.").

²³⁵ *Id.* at 253 ("Hemingway died in 1961.").

²³⁶ Laurie Henderson, *Protecting a Celebrity's Legacy: Living in California or New York Becomes the Deciding Factor*, 3 J. BUS. ENTREPRENEURSHIP & L. 165, 177 (2009); see also Marie Andree, *Post Mortem Right of Publicity, in Massachusetts and Arizona*, LAW OFFICE OF MARIE-ANDREE WEISS (July 25, 2014) <http://www.maw-law.com/right-of-publicity/post-mortem-right-publicity-massachusetts-arizona/> ("New York does not recognize post mortem right of publicity. As I wrote on the EASL blog a few years ago, the S.D.N.Y. ruled in 2007 that Marilyn Monroe could not have passed any postmortem right of publicity through the residuary clause in her will, because she did not own any post mortem right of publicity at the time of her death in 1962, *Shaw Family Archives Ltd v. CMG Worldwide, Inc.*, 486 F.Supp.2d 309 (S.D.N.Y. 2007). This decision led to the introduction of a bill, A08836 to amend New York Civil Rights Law §§ 50, 51. It would have provided a postmortem right of publicity to personalities, but was never enacted.").

²³⁷ See *supra* Parts III.A. & III.A.i. on the inalienability of privacy rights.

²³⁸ Stephen S. Morrill, *Harper & Row, Publishers v. Nation Enterprises: Emasculating the Fair Use Accommodation of Competing Copyright and First Amendment Interests*, 79 NW. U. L. REV. 587, 616-617 (1984).

²³⁹ *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 554 (1985).

²⁴⁰ *Id.*

commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value.²⁴¹

The right not to speak was largely a dead letter within the context of copyright infringement litigation for more than twenty years, but experienced a resurgence in the Second Circuit's 2010 decision in *Salinger v. Colting*.²⁴² The *Salinger* Court, in deciding whether to reverse the district court's grant of preliminary injunctive relief, asserted infringement of the copyright owner's right not to speak in support of a finding of irreparable harm.²⁴³ The Court stated:

Next, the court must consider whether the plaintiff will suffer irreparable harm in the absence of a preliminary injunction, and the court must assess the balance of hardships between the plaintiff and defendant. Those two items, both of which consider the harm to the parties, are related. The relevant harm is the harm that (a) occurs to the parties' legal interests and (b) cannot be remedied after a final adjudication, whether by damages or a permanent injunction. The plaintiff's interest is, principally, a property interest in the copyrighted material. But as the Supreme Court has suggested, a copyright holder might also have a First Amendment interest in *not* speaking.²⁴⁴

The *Salinger* Court went on to say: "the loss of First Amendment freedoms, and hence infringement of the right *not* to speak, for even minimal periods of time, unquestionably constitutes irreparable injury."²⁴⁵ Given that the *Salinger* decision is the first Second Circuit decision applying *eBay* in the context of preliminary injunctive relief in a copyright infringement suit,²⁴⁶ it seems likely that the deployment of the right not to speak to establish irreparable harm will become more common. In fact, litigants in another jurisdiction have already advanced this argument.²⁴⁷ In *Bollea*, the plaintiff employed this argument in the context of what was very obviously a privacy case.²⁴⁸ So far, however, it appears that the right not to speak argument has only succeeded in lower courts in the Second Circuit.²⁴⁹

²⁴¹ *Id.* at 559-60 (citations omitted).

²⁴² *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

²⁴³ *Id.*

²⁴⁴ *Id.* (citations omitted).

²⁴⁵ *Id.* (citation omitted).

²⁴⁶ *Id.* at 77 ("Two district court decisions have noted that the scope of *eBay* remains an open question in this Circuit and have decided the cases before them without determining whether the *eBay* or pre-*eBay* standard applied. . . . We hold today that *eBay* applies with equal force (a) to preliminary injunctions (b) that are issued for alleged copyright infringement.").

²⁴⁷ *See, e.g.*, Motion for Preliminary Injunction to Enjoin Copyright Infringement at 8, *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012) (No. 8:12-cv-02348-T-27TBM) ("[T]he Supreme Court has recognized that within the First Amendment there is 'a concomitant freedom *not* to speak,' and stated that 'Courts and commentators have recognized that copyright . . . serve[s] this countervailing First Amendment value.'" (emphasis in original) (citations omitted)).

²⁴⁸ *Bollea*, 913 F. Supp. 2d at 1330 ("The main concern proffered by Plaintiff—the concern that spurred this litigation—well before Plaintiff obtained his purported ownership of a copyright in the Video—is that the 'private' Video portrays him in poor light and in an embarrassing fashion.").

²⁴⁹ *See, e.g.*, *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 617 (S.D.N.Y. 2011) ("According to the Second Circuit, harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult

In *Bond v. Blum*,²⁵⁰ the Fourth Circuit unequivocally stated:

[T]he protection of privacy is not a function of the copyright law. To the contrary, the copyright law offers a limited monopoly to encourage ultimate *public access* to the creative work of the author. If privacy is the essence of [Plaintiff]'s claim, then his action must lie in some common-law right to privacy, not in the Copyright Act.”²⁵¹

More recently, the U.S. District Court for the Middle District of Florida, citing *Bond* approvingly, disallowed injunctive relief where, “[t]he main concern proffered by Plaintiff—the concern that spurred this litigation—well before Plaintiff obtained his purported ownership of a copyright in the Video — is that the ‘private’ Video portrays him in poor light and in an embarrassing fashion.”²⁵² On the other hand, cases conducting fair use analyses of unpublished works do consider the copyright owner’s asserted privacy interests.²⁵³ Given this split in authority, it is unclear to what extent common law privacy protection survived the adoption of the 1976 Act.

Whatever privacy interest was protected by common law copyright prior to the adoption of the 1976 Act, it was not an interest, when properly understood, that rises to constitutional proportions. As such, the deployment of the right not to speak to protect any such privacy right is out of line with copyright norms, privacy norms, and jurisprudence. The next section of this article considers recent cases in which plaintiffs attempted to deploy copyright to protect against harms ordinarily understood as invasions of privacy.

C. The Problems Posed by Protecting Privacy Through Copyright

Pamela Samuelson has suggested that several recent cases raise the question of “whether copyright has recently become, at least in some instances, a more effective way to protect privacy interests than privacy law alone would allow.”²⁵⁴ In considering this question, Samuelson has presented four vastly different cases that question whether copyright may be utilized to halt dissemination of a work.²⁵⁵ While the four cases diverge factually, they bear striking similarities that demonstrate the problems that may result from protecting privacy through copyright. These

to measure, or that it is a loss that one should not be expected to suffer. In copyright cases, harm can often be irreparable either in light of possible market confusion, because it is notoriously difficult to prove the loss of sales due to infringement, and *because of loss of the First Amendment right not to speak.*” (emphasis added) (citations omitted)).

²⁵⁰ *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003).

²⁵¹ *Id.* at 395 (emphasis in original) (citations omitted); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1129 (1990) (“The occasional attempt to read protection of privacy into the copyright is also mistaken.”).

²⁵² *Bollea*, 913 F. Supp. 2d at 1330.

²⁵³ See, e.g., Kate O’Neill, *Against Dicta: A Legal Method for Rescuing Fair Use From the Right of First Publication*, 89 CALIF. L. REV. 369, 377 (2001) (collecting and analyzing cases and arguing that “in attempts to fit privacy into a traditional doctrinal paradigm that does not easily accommodate it, the courts have debased the discourse in the courts and in the publishing industry about the kinds of expression that should be protected and the mechanism that should be employed.”).

²⁵⁴ Samuelson, *supra* note 21 at 193.

²⁵⁵ Samuelson, *supra* note 21.

issues primarily stem from two challenges. The first is differentiating between authorship and copyright ownership. Second, courts must consider First Amendment protection issues raised in the context of copyright infringement suits. What follows immediately is a discussion of these two issues.

i. The Subject / Author / Copyright Owner Conundrum

Distinguishing between the party protected by the right to privacy and the party protected by copyright is a problem that has existed since the right to privacy was first articulated. *The Right to Privacy* is clearly focused on the privacy of the subject of photographs and newspaper articles:

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for . . . extension [of a cause of action for invasion of privacy] If casual and unimportant statements in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity.²⁵⁶

Interestingly, Warren and Brandeis clearly understood that the existing common law right of first publication inhered in authors rather than subjects:

The aim of those [copyright] statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the 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.²⁵⁷

Moreover, Warren and Brandeis published *The Right to Privacy* six years after the Supreme Court's decision in *Burrow-Giles Lithograph Co. v. Sarony*.²⁵⁸ In this landmark case, the Court held that photographs are copyrightable content and that the owner of the copyright was the photographer.²⁵⁹ The decision established that any copyright in photographs would belong to the photographer rather than the subject of the photograph.²⁶⁰ Yet, Warren and Brandeis never

²⁵⁶ Warren & Brandeis, *supra* note 50, at 213-14.

²⁵⁷ *Id.* at 200.

²⁵⁸ 111 U.S. 53 (1884).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 60 (“the photograph in question . . . is a ‘useful, new, harmonious, characteristic, and graceful picture, and that plaintiff [photographer] made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.’ . . . These findings, we think, show this photograph to be an original work of art, the product of plaintiff’s intellectual invention, of which plaintiff is the author. . . .”).

mention this decision or seek to reconcile its holding with their assertion that common law copyright provides precedent for the protection of the privacy of the subjects of photographs.²⁶¹

Recent attempts to protect privacy by way of the 1976 Copyright Act demonstrate a similar difficulty in determining whose privacy is being protected. In fact, recent cases complicate this matter by adding the copyright owner as a potential party whose privacy interests can be asserted through a claim of copyright infringement, even if the owner is not the author or the subject of the work.²⁶² Warren and Brandeis' argument that the privacy of subjects of copyrightable content deserves protection has, of course, won the day.²⁶³

This misfit of copyright law to remedy privacy harms is evident in the cases Samuelson has highlighted. In two of the cases, the authors of the asserted works are not parties to the suit.²⁶⁴ In *Balsley*, the plaintiff purchased the copyright from the author (in this case, the photographer);²⁶⁵ and in *Monge*, it is entirely unclear whether the plaintiffs had a copyright interest in the works in question at all.²⁶⁶ The *Monge* Court relied upon registration certificates produced by the plaintiff and declined to “express [an] opinion as to the ownership of copyright regarding the sixth photo [or] . . . as to the ultimate copyright status of any of the photos.”²⁶⁷ Samuelson has speculated, “Monge must have purchased the copyrights in order to bring the lawsuit.”²⁶⁸ Unfortunately, nothing in the opinion definitively answers whether the plaintiffs actually owned the copyrights in question.

Likewise, in *Garcia v. Google, Inc.*,²⁶⁹ one of the primary points of contention between the majority and dissenting opinions was whether the plaintiff could properly be described as an author protected by the 1976 Copyright Act.²⁷⁰ Disagreement regarding authorship and copyright ownership, as was seen in the two opinions, is ultimately caused by the difficult fit between the Copyright Act and the protection of privacy interests. This is because copyright subsists initially in the author (as opposed to the subject) of a work.²⁷¹ The author may of course alienate her interest in the work however she sees fit.²⁷² However, once an author parts with her interest in the work, it is the copyright owner, as opposed to the author or subject, who is protected by the Copyright Act.²⁷³ Given the full alienability of copyright interests, privacy protection for the

²⁶¹ Warren & Brandeis, *supra* note 50, at 198 (“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 [sic] a remedy for the evils under consideration.”).

²⁶² *Infra* notes 264-284 and accompanying text; note that in *Harper & Row v. The Nation*, 471, U.S. 539 (1985), the claim is being asserted not by Gerald Ford but, rather, by his publisher, Harper & Row.

²⁶³ See *supra* Part III.A.

²⁶⁴ *Balsley v. LFP, Inc.*, 691 F.3d 747, 754-55 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1168-70 (9th Cir. 2012).

²⁶⁵ *Balsley*, 691 F.3d at 754-55.

²⁶⁶ *Monge*, 688 F.3d at 1168-70.

²⁶⁷ *Id.* at 1170 n.2.

²⁶⁸ Samuelson, *supra* note 21 at 195.

²⁶⁹ *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014).

²⁷⁰ *Id.* at 1263, 1271-73.

²⁷¹ 17 U.S.C. § 201(a) (2014).

²⁷² 17 U.S.C. § 201(d) (2014).

²⁷³ *Id.*

subject of a work through the Copyright Act is complicated even further. A brief foray into the facts of *Balsley v. LFP, Inc.* will more fully demonstrate these difficulties.

In *Balsley*, the Sixth Circuit considered whether the defendant was entitled to a reversal of the district court's denial of its motion for judgment as a matter of law after a jury had rendered a verdict of copyright infringement.²⁷⁴ In March 2003, the plaintiff, Catherine Balsley, was photographed in various states of undress as she participated in a wet tee shirt contest at a bar in Florida.²⁷⁵ The photographer, Gontran Durocher, posted the photographs of Balsley on lenshead.com.²⁷⁶ In 2004, Balsley obtained and registered the copyrights in the photos taken by Durocher.²⁷⁷ In 2005, a reader of the magazine nominated Balsley for *Hustler Magazine's* "Hot News Babes" contest.²⁷⁸ Employees of the magazine located the photos online and published one of them in the February 2006 edition of *Hustler Magazine*.²⁷⁹ Balsley learned of the publication of the photograph and sued, alleging copyright infringement and violation of Ohio's right of publicity statute and common law right of privacy, among other claims.²⁸⁰ The only claim ultimately tried was the claim of copyright infringement, on which the jury found for the plaintiff and awarded damages in the amount of \$135,000.²⁸¹ The defendant moved for judgment as a matter of law on the issue of fair use and then appealed the trial court's denial of that motion.²⁸²

One of the most interesting things about *Balsley* is that the "*Plaintiffs sought ownership of the photographs so that they would have a legal means of ending the photographs' dissemination.* They negotiated with Durocher, who sold, transferred, and assigned all rights, title, and interest in the copyright to the photographs to Plaintiffs. Plaintiffs then registered their acquired copyright with the United States Copyright Office."²⁸³ What this means, of course, is that in order to be in a position to use the Copyright Act to "end the photographs' dissemination" Balsley had to negotiate with Durocher who, at least arguably, was himself responsible for a significant incursion upon Balsley's right to privacy.²⁸⁴ Note that as the subject of the photograph, Balsley had no protectable copyright interest in the picture. Rather, that interest arose in Durocher, who took the picture and was responsible for its initial online dissemination. A system that requires Balsley to negotiate with Durocher as a prerequisite to properly protecting her privacy interests seems bizarre to say the least.

The problem of using copyright to protect the privacy interests of subjects has inhered in privacy theory since its inception, when Warren and Brandeis avoided the ambiguity between author and subject in their initial exposition of the right to privacy. The move to locate the privacy protection previously understood as provided for by common law copyright within a statutory

²⁷⁴ *Balsley v. LFP, Inc.*, 691 F.3d 747, 757 (6th Cir. 2012).

²⁷⁵ *Id.* at 755.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 756.

²⁸¹ *Id.* at 756-57.

²⁸² *Id.* at 757.

²⁸³ *Id.* at 755 (emphasis added).

²⁸⁴ Durocher's dissemination of the picture of Balsley is, at least arguably, a misappropriation of Balsley's likeness and/or her right of publicity.

provision providing rights that are fully alienable further complicates matters by adding the copyright owner to the author and subject as persons potentially seeking to enforce the right. But, that isn't the only problem presented by seeking to use copyright to protect privacy. Doing so also raises real First Amendment concerns.

ii. The Problem of Constitutional Privacy Rights in Tort Privacy Circumstances

Samuelson posits that copyright infringement claims are attractive to litigants seeking to stem the dissemination of particular works, at least in part, “because of . . . the inhospitable reception courts have had to First Amendment defenses in copyright cases.”²⁸⁵ In three of the four cases Samuelson describes, in addition to the copyright infringement claim(s), the plaintiffs asserted claims for either infringement of the right to privacy or the right of publicity.²⁸⁶ In *Hill*, while the copyright infringement action proceeded, the right of publicity claim was dismissed due to a perceived conflict with the First Amendment.²⁸⁷ In *Balsley*, the Court granted the defendant’s Motion for Summary Judgment as to the right to privacy and right of publicity claims.²⁸⁸ The trial court in *Monge* dismissed the misappropriation claim and granted summary judgment in favor of the defendant on the issue of fair use.²⁸⁹ The plaintiffs only appealed the fair use holding.²⁹⁰ What all of these outcomes demonstrate is that copyright infringement allegations are more likely to hold up for a plaintiff than are right to privacy or right of publicity claims. This helps to explain why one seeking to stop the dissemination of a particular work might opt to proceed under copyright in addition to any extant privacy causes of action. While a cursory examination of these cases demonstrates the validity of Samuelson’s insight, closer analysis also reveals some of the potential hazards that may arise when one whose privacy interest is endangered by dissemination of a work proceeds under copyright.

The protection of privacy interests through the copyright statute creates some troubling First Amendment conundrums. As the immediately preceding discussion makes clear, plaintiffs who cannot proceed under privacy protections without running afoul of the First Amendment are able to circumvent the First Amendment by acquiring the copyright in the works at issue. This ought to concern policy makers considering the usefulness of copyright as a privacy protection mechanism. The Supreme Court simply got this wrong in *Harper & Row*.²⁹¹ Courts making these determinations now ought to refuse to perpetuate that reasoning. What follows immediately are some modest suggestions for alternative paths forward.

²⁸⁵ Samuelson, *supra* note 21, at 198.

²⁸⁶ *Balsley*, 691 F.3d at 756 (claiming infringement of both the common law right of privacy and the statutory right of publicity); *Hill v. Public Advocate of the U.S.*, 35 F. Supp. 3d 1347, 1351 (D. Colo. 2014) (asserting claims of both copyright infringement and the Colorado state tort of appropriation of name or likeness); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012) (“[A]sserting claims for copyright infringement, statutory misappropriation of likeness, and common law misappropriation of likeness.”).

²⁸⁷ *Hill*, 35 F. Supp. 3d at 1357 (“use of [Plaintiffs’] name and likeness was primarily noncommercial and that it reasonably relates to a legitimate matter of public concern. As such, the First Amendment privilege bars the . . . claim for appropriation of name or likeness and that claim is DISMISSED WITH PREJUDICE.”).

²⁸⁸ *Balsley*, 691 F.3d at 756.

²⁸⁹ *Monge*, 688 F.3d at 1170.

²⁹⁰ *Id.*

²⁹¹ *Supra* Part IV.B.ii.

D. Potential Legislative Solutions

The Supreme Court's deployment of the right not to speak to protect the asserted interests of President Ford in *Harper & Row v. The Nation*,²⁹² as relied upon by the Second Circuit in *Salinger v. Colting*,²⁹³ epitomizes the worst-case scenario that results when Courts utilize copyright to protect privacy interests. Protecting privacy interests by reference to the existing common law paradigm is superior to utilizing the Copyright Act and suggesting that constitutional privacy interests are somehow implicated. This is because traversing the copyright route could potentially fail to protect the subject of the work and presents serious First Amendment concerns.²⁹⁴ Of course, this leaves privacy plaintiffs without any remedy akin to the takedown procedure the DMCA provides.²⁹⁵ It also, arguably, fails to recognize the privacy protection provided to authors by way of the common law right of first publication. What follows is a brief consideration of some potential legislative actions that may address those issues.

i. A Federal Privacy Statute for the Internet

Protecting privacy on the internet is imperative.²⁹⁶ The Ashley Madison leak demonstrates the very real need for a mechanism like the Digital Millennium Copyright Act's takedown procedure to enable privacy victims to have an immediate remedy. Although federal legislation to protect individuals from online privacy violations has been proposed a number of times,²⁹⁷ currently, there does not appear to be political will to pass such legislation. Moreover, the proposed bills have been criticized for being both too narrow and toothless.²⁹⁸ Given the privacy plaintiff's propensity to use the Copyright Act as a mechanism to alleviate invasions of privacy, the remedies provided for in the Copyright Act may provide a model for the type of remedy that could be effective in protecting privacy online.

Of course, any such remedy must be sensitive to the potential First Amendment implications of removing content at the behest of a person who is depicted in it. Specifically, the challenge will be articulating the class of content that, if objected to by the subject, is private. Matters of public record, such as the marriage of the plaintiffs in *Monge v. Maya Magazines, Inc.*²⁹⁹ are very plainly excluded from common law privacy protection and ought to be excluded from any federal statutory protection as well. The more difficult line drawing will have to take place in considering what matter is private on its face. This is so because a matter that is considered private for a non-public figure, may be considered public for a public figure. Moreover, the law has long

²⁹² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539 (1985).

²⁹³ *Salinger v. Colting*, 607 F.3d 68, 68 (2d Cir. 2010).

²⁹⁴ *Supra* Part IV.C.

²⁹⁵ *Supra* Part II.

²⁹⁶ Ari Ezra Waldman, *Durkheim's Internet: Social and Political Theory in Online Society*, 7 NYU J.L. & LIBERTY 342 (2013).

²⁹⁷ See, e.g., Tony Romm, *White House Preps Expansive Online Privacy Bill*, POLITICO (Jan. 28, 2015, 7:22 PM), <http://www.politico.com/story/2015/01/online-privacy-bill-white-house-114696>.

²⁹⁸ David Nimmer, *Appreciating Legislative History the Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 931-34 (2002).

²⁹⁹ *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012).

recognized that an individual may be a limited-purpose public figure if she finds herself embroiled in a matter of public concern.

Parsing these distinctions has, of course, proven difficult for courts and commentators addressing privacy claims. Legislating in this area on the federal level poses the same difficulties and presents additional difficulties by asking internet service providers to engage in exceedingly difficult decision-making. We have already seen the difficulties associated with fair use and, by extension, First Amendment questions in the context of the DMCA. That said, if we value privacy interests at least as much as we do copyright interests, it makes sense to attempt such legislative reform despite the associated difficulties. Likewise, if we are committed to the common law principle of protecting authors' privacy (as opposed to the privacy of subjects), we ought to consider doing so transparently by adopting the moral right of disclosure.

ii. Amending the Copyright Act to Limit Privacy Claims by Adopting the Moral Right of Disclosure

Under the common law, the right of first publication inhered in the author.³⁰⁰ No subject had any interest in the work or any right to allow for or restrict dissemination.³⁰¹ The right of first publication expired upon the authorized publication of the work.³⁰² The right of first publication was viewed as a protection of authorial privacy, so the choice to publish effectively waived any privacy concerns.³⁰³ The move to protect privacy through federal statute failed to account for the alienability of the rights represented in the Copyright Act of 1976.³⁰⁴ As such, what was constituted as protection for authorial privacy under the common law has now morphed into an unrecognizable and unjustifiable right that may be asserted regardless of the identity of the person asserting it. This is entirely out of line with both the common law copyright and the right to privacy jurisprudence. If, in undertaking a wholesale revision of the Copyright Act, it is deemed appropriate to protect the privacy of authors as the common law had done, the simplest mechanism for doing so may be to statutorily adopt the moral right of disclosure which “recognizes the author as the ultimate judge of when and under what conditions a work can be disseminated.”³⁰⁵

V. Conclusion

Returning to where this paper began, what Ashley Madison ultimately needed was a particular, enforceable remedy to remove its subscribers' personal information from the internet. In seeking to fulfill that need, Avid, the owner of the Ashley Madison website, reached for the regulatory scheme best equipped to provide the desired result—the Digital Millennium Copyright Act. As contemporaneous commentators noted, it is entirely plausible that the content in question was not copyrightable in the first place. Even if it was, there was at least a colorable argument that Avid was not the author or copyright owner of the content. In this article I have argued that even if copyright can be contorted to cover a case like the Ashley Madison case, perhaps it should

³⁰⁰ See, e.g., *Harper & Row Publishers., Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

³⁰¹ Linford, *supra* note 207, at 602.

³⁰² See, e.g., *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007).

³⁰³ Linford, *supra* note 207, at 608.

³⁰⁴ Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 884-85 (1987).

³⁰⁵ Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U.L. REV. 1519, 1524 n.26 (2011).

not. This contortion has the potential to create both doctrinal and practical problems, including, most notably, providing perverse incentives to copyright owners to threaten to post content to the internet unless the subject pays up.

Note, though, that suggesting that copyright does not provide a remedy in situations like this is not meant to suggest that no remedy ought to be available. Rather, this article suggests that the appropriate paradigm for considering such a remedy is a federal privacy statute that provides a takedown mechanism analogous to the one provided in the Digital Millennium Copyright Act. It would, of course, be entirely appropriate for such a paradigm to import the free speech and freedom of the press protections already present in the common law of privacy. As for providing copyright owners with the right of first publication that inhered in the common law long before the passage of the current Copyright Act, there is no need to reinvent the wheel, as many other countries already protect an author's moral right of disclosure. As Congress begins to develop the next great copyright act, it might do well to consider whether statutorily adopting such a right would be appropriate.