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Copyright’s Memory Hole

Eric Goldman,* Jessica Silbey**

There is growing interest in using copyright to protect the privacy and reputation of people depicted in copyrighted works. This pressure is driven by heightened concerns about privacy and reputation on the Internet, plus copyright’s plaintiff-favorable attributes compared to traditional privacy and reputation torts.

The Constitution authorizes copyright law because its exclusive rights benefit society by increasing our knowledge. But copyright law is being misdeployed by suppressing socially valuable works in a counterproductive attempt to advance privacy and reputation interests. This results in “memory holes” in society’s knowledge, analogous to those discussed in George Orwell’s dystopian novel 1984.

This Article identifies some limited circumstances where copyright’s goals are benefited by considering privacy and reputational interests. In other circumstances, treating copyright law as a general-purpose privacy and reputation tort harms us all.

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INTRODUCTION

Copyright law encourages the production and dissemination of socially valuable works by giving the creator (or a designee) some control over the works’ dissemination. This control allows copyright owners to establish and manage distribution channels for their works and stop competitive free-riding on the creator’s investments. When this paradigm works properly, society benefits from the knowledge disseminated in copyrighted works, which advances the constitutional goal of “promot[ing] the [p]rogress of [s]cience.”

It is an essential feature of copyright law that copyright owners can suppress their works from the public. Indeed, there are many circumstances where such suppression advances copyright’s goals. For example, windowed releases (when the works temporarily have limited or no distribution) can help copyright owners maximize their overall economic returns, and the suppression of unpublished works can spur their production and development.


3. See infra Part B. There are other reasons copyright owners may suppress the publication of unpublished works, including for reasons related to relationship building or preservation, and reasons unrelated to economic situations. Copyright law is not practically limited to economic motives. See, e.g., JESSICA SILBIEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 274–85 (2015) [hereinafter SILBIEY, EUREKA MYTH] (summarizing empirical findings from within various creative and innovative communities that demonstrate multiple bases for asserting copyright claims beyond utilitarian and economic reasons); Joanne C. Fromer, Should the Law Care Why Intellectual Property Rights Have Been Asserted?, 53 HOUS. L. REV. 549, 557–58 (2015). Further, we understand that “promot[ing] the Progress of Science” is a broad and evolving mandate that includes generating copyrighted works and increasing knowledge and understanding.
The Internet’s popularity has accelerated interest in a qualitatively different type of suppression, where copyright owners target works for suppression based on privacy or reputational concerns. Sometimes, the continued online publication of works causes severe and life-changing consequences. For example, people may support legal recourse—including copyright law—for nonconsensual pornography victims to stop further publication. Copyright’s doctrinal features make it a potent legal tool to redress these and other sympathetic situations. As a result, it can be tempting to turn copyright law into an all-purpose tool for suppressing content online.

Unfortunately, when deployed as a general-purpose tort, copyright law also can cause over-suppression. People concerned about their privacy or reputation can “weaponize” copyright law to suppress works that they personally object to but that otherwise benefit society’s knowledge base. Unlike other laws custom-built for those purposes, copyright law was not designed to be a general-purpose privacy- or reputation-enhancing law. As a result, copyright law lacks the doctrinal features necessary to accommodate privacy and reputational considerations and still yield the expected social benefits from copyrighted works.

Copyright over-suppression brings to mind the fictional Ministry of Truth’s “memory hole” in George Orwell’s dystopian


6. Cf. Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018) (Fox News restricted a third party news aggregator database to prevent its clips from being used to criticize the network); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (holding that an author’s control over unpublished letters supersedes third parties’ rights to publish extracts under fair use).

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novel *1984*, which permanently erased documents containing embarrassing or inconvenient accounts of the past. Copyright can create the legal analogue of a memory hole. Copyright’s memory holes may not be motivated by authoritarianism, but the consequences for society are no less perilous. The resulting depletion of knowledge paradoxically conflicts with the Constitutional justification of copyright law to promote the progress of knowledge. This Article explores that paradox.

This Article proceeds as follows. The first Part briefly explains the memory hole analogy. The second Part describes the legal landscape regarding privacy and reputation management online and why copyright law has emerged as a popular choice for privacy- and reputation-management. The third Part provides a taxonomy, with several case studies, of how copyright owners try to create memory holes and explains why these efforts are pernicious. The fourth Part explores when privacy considerations might complement or conflict with copyright’s goals. The fifth and final Part suggests some reform proposals to restrict misuse of copyright’s memory hole.

I. THE MEMORY HOLE ANALOGY

George Orwell’s novel *1984* described a censorious government that restricts all efforts at free speech. One of the government’s speech-control tools was the memory hole:

In the walls of the cubicle there were three orifices. To the right of the speakwrite, a small pneumatic tube for written messages, to the left, a larger one for newspapers; and in the side wall, within easy reach of Winston’s arm, a large oblong slit protected by a wire grating. This last was for the disposal of waste paper. Similar slits existed in thousands or tens of thousands throughout the building, not only in every room but at short intervals in every corridor. For some reason they were nicknamed memory holes. When one knew that any document was due for destruction, or even when one saw a scrap of waste paper lying about, it was an automatic action to lift the flap of the nearest memory hole and drop it in, whereupon it would be whirled away on a current of warm air to the enormous furnaces which were hidden somewhere in the recesses of the building. 8

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The memory holes in 1984 are designed to remove ideas, facts, and expressions from human society, which creates gaps in society’s information and knowledge. The information in the destroyed papers may linger in human minds, only to be forgotten eventually.

A miscalibrated copyright law can cause similar consequences. Copyright law may only protect the expression of ideas and facts, not the facts or ideas themselves, but controlling copyrightable expression can be enough to effectively suppress the underlying ideas and facts being expressed. Thus, copyright law can hinder and potentially reverse truth-seeking processes, expressive diversity, and the progress of science that copyright law aims to promote. In the worst-case outcomes, memory holes can facilitate the rewriting of history and undermine resistance to authority figures who may not be acting in the community’s best interests.

Admittedly, the memory hole analogy is imperfect. 1984 addressed government censorship, while this Article addresses private actors who seek to protect their privacy or reputation. We expect (sometimes over-optimistically) that the government tries to benefit its constituents, which makes censorship—especially one designed to support or protect the government’s power and authority—an unconscionable affront to the public welfare. In contrast, copyright law by design assumes that copyright owners will maximize their private welfare, so it is not surprising or inherently anti-social when copyright owners do that (even if by suppressing speech). Still, the memory hole analogy highlights how the control or censorship of facts and ideas (and the expressive works that communicate them) can hurt society, whether it is done by the government or private citizens.

Also, the Ministry of Truth’s memory hole effectively erases all traces of the suppressed material. The system targeted not only the pieces of paper but also the facts and ideas they contain for the memory hole. In contrast, copyright cannot suppress facts or ideas, so facts and ideas from a suppressed work can be extracted pre-
suppression and then freely disseminated in other works without further intervention from copyright. Thus, copyright’s memory hole is less thorough and effective than the Ministry of Truth’s.

Nevertheless, suppressing copyrighted works can relegate the facts and ideas which those works contain to persisting only in people’s memories. With the works suppressed, those facts and ideas can fade out of circulation—and eventually fade away altogether. Alternatively, when copyright law suppresses the source of facts or ideas, it can remove the most credible evidence to validate or contest those facts and ideas, creating opportunities to undermine the search for truth in the first place.

Thus, despite its limits, the memory hole analogy has some explanatory value. Imagine the relevant universe of known content as a large fabric sheet. Successful litigation based on suppressing copyrighted content tears little pieces of fabric out of the sheet—leaving holes where the knowledge used to be. These holes represent gaps in our knowledge caused by copyright. Should the holes become too numerous or too large, they threaten the integrity of the entire sheet.

In other words, when copyright owners suppress published content for their private benefit, their actions in the aggregate can negatively affect us all. Orwell’s memory holes served totalitarianism fueled by ignorance. Copyright’s memory holes may not advance totalitarianism, but the consequences may be dystopian nevertheless. By facilitating the selective suppression of

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12. Cf. Fromer, supra note 3 (discussing how recluse tycoon Howard Hughes tried to control literary material about him by acquiring exclusive rights to the stories).

13. See id. at 571 (“When rightsholders want to protect their privacy or reputation, they frequently care less about keeping protected expression out of the public eye and more about keeping private unprotected facts or ideas.”); cf. Ray Bradbury, Fahrenheit 451 (1953) (involving efforts to keep the memories of burned books alive through oral transmission). Admittedly, sometimes a person may want their memories to fade, but they should not be able to force other people’s memories to fade or be forgotten entirely. For further discussion of this point, see infra Part 3, discussing “nostalgic remembrances.”

14. Of course, not all copyrighted works clarify facts and ideas; works can mislead and distort as well. However, First Amendment doctrine, which copyright law incorporates, tends to favor more speech to clarify and correct false or misleading speech instead of its censorship or erasure. This is known as the “counterspeech doctrine,” and while not always an optimal solution, especially when time is of the essence, it is deeply rooted in constitutional law. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).
information for private benefit, copyright can shape how society thinks—one of the key preconditions for 1984’s dystopia. The copyright memory hole analogy helpfully highlights these stakes.

II. WHY COPYRIGHT IS USED TO CREATE MEMORY HOLES

In the digital age, people seek—sometimes desperately—legal recourse to suppress undesirable information about them. Where some United States law makes such efforts difficult, including the First Amendment and speech-enhancing statutes like Section 230, copyright law has emerged as a tool of choice to create memory holes.

A. Reputation vs. Privacy

This Article discusses people’s privacy and reputation considerations, sometimes freely switching between the two concepts despite their different objects of concern. However, for this Article’s purpose, privacy and reputation law share the same motivations and consequences of their deployment.

People routinely deploy both privacy- and reputation-management laws to control how other people think about them. This similarity is especially apparent when a person’s image is widely used and copied to expose the private information it depicts, such as a politician engaging in a scandalous but private sexual affair. In these circumstances, privacy and reputation laws both serve the same purpose of controlling the image’s display.

Moreover, the Internet’s critical role in our modern society compounds the overlap between privacy and public reputation. The Internet increasingly dominates our information flows. The Internet’s potential global visibility raises the stakes on reputation formation and management and correspondingly shrinks the zones of personal privacy. A person’s reputation can be instantly—and sometimes permanently—defined by a single, “private,” and minor incident that is publicized on the Internet. Affected individuals

15. There are surely circumstances where a person or company may be interested in privacy for reasons that have nothing to do with reputation, as we discuss infra in Part B, where we critique copyright law as a suppression tool.

16. For example, a South Korean woman who failed to clean up her dog’s excrement gained worldwide recognition as the “Dog Poop Girl” after a video of her inaction went viral. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: Gossip, Rumor, and Privacy on the Internet 2 (2007). In another example, public relations professional Justine
scramble to find legal tools to successfully reestablish control over their public identity. Both privacy and reputation laws can serve as those tools.

The legal protections for privacy (especially common law privacy torts) and for reputation (especially defamation) share common doctrinal features. They both govern the dissemination of information, have similar remedies, and are subject to significant First Amendment limits. Indeed, they are often lumped together in legal taxonomies and fields of study.

To the extent there is a difference between reputation and privacy, this Article focuses on the copyright/privacy interface—that is, efforts to treat copyright law like privacy law. Copyright law has other provisions that bear directly or indirectly on professional and authorial reputation, such as moral rights that allow visual artists to control their reputation when connected with a work of art; protections for copyright notices; and protections for copyright management information that help an author associate a work with his or her name. The interfaces between these specific statutory provisions and other tort-based reputation protection laws are beyond this Article’s scope.


20. Id. § 506(c)–(d).

21. Id. § 1202.

22. The effectiveness of the U.S. moral rights regime has been broadly debated and comes under attack from both sides (for weaker or stronger moral rights). Compare with Amy M. Adler, Against Moral Rights, 97 Calif. L. Rev. 263 (2009), with Justin Hughes, American Moral Rights and Fixing the Dastar “Gap,” 2007 Utah L. Rev. 659. The First Amendment limits the reach of a moral rights regime in the United States, in contrast to Europe. See, e.g., Peter K. Yu, Moral Rights 2.0, in Landmark Intellectual Property Cases
B. Copyright’s Quid Pro Quo

The U.S. Constitution contemplates a quid pro quo to justify copyright protection of expressive works in order to promote the progress of science. Authors can receive “the exclusive [r]ight to their respective [w]ritings” in exchange for society receiving the benefit of those works circulating in society under various market conditions. This quid pro quo improves society if the circulating works contribute to the diffusion of cultural production and the accumulation of knowledge.

Superficially, it may seem counterintuitive that copyright can enhance society’s knowledge by restricting the flow of copyrighted works. However, some types of dissemination restrictions can increase incentives to create the works. For example, controlling or superseding older works may improve readership of and financial returns from a subsequent work. The student textbook market partially relies upon this. Also, a copyright owner might experiment with multiple genres of works, and then decide to suppress some genres to cultivate or maintain a reputation in other genres with more commercial potential. Or, a copyright owner may temporally stagger releases of a work (“windowing”) to price discriminate against consumers willing to pay for early access. In these and other circumstances, restricting the dissemination of works can be consistent with the copyright’s utilitarian incentive-based rationale.

Of course, some copyright creators do not care about financial payoffs or seek to maximize their returns on investment. Copyright owners assert their copyright interests for non-financial

AND THEIR LEGACY 13 (Christopher Heath & Anselm Kamperman Sanders eds., 2011). This Article considers only U.S. law and does not address the complexities raised by foreign moral rights schemes.

26. E.g., Schruers, supra note 2.
27. See SilbeY, EUReKA MYTH, supra note 3 (establishing this empirically across creative fields).
reasons as well. Copyright owners may do so by refusing to license the works for new contexts or derivative purposes because they want to control all versions of their work—for example, sequels, abridgments or spin-offs. Copyright owners may also decide to completely withdraw their work from the public sphere.

These alternative motivations can create friction for copyright doctrines predicated on utilitarian justifications. However, they fit more comfortably within other theories that justify copyright protection, such as the Lockean/”natural rights” theory that people should be rewarded for their labor or the Kantian “personhood” theory that authors should control work that is an extension of their personality. This Part focuses on copyright’s utilitarian justification. Part IV relaxes that assumption.

When copyright is properly understood as an intermediary benefit for authors and owners in exchange for society receiving those works as a contribution to the “progress of science,” privacy claims that suppress the work violate copyright’s quid pro quo. Indeed, privileging privacy over dissemination reverses the hierarchy of copyright’s beneficiaries, putting the author or copyright owner above the social welfare of “progress” that the Constitution’s Intellectual Property Clause contemplates as the ultimate goal. As a creature of positive law, and not as a natural right, copyright functions as an incentive to create and disseminate expressive works. The incentive may be easily misunderstood as creating a natural right to one’s expression equal to society’s interests in accumulating knowledge, especially as copyright has expanded over decades to be longer and stronger than in the past. But copyright’s quid pro quo does not work that way. Rights are granted with the expectation that the expression protected will contribute to the common weal.

28. See, e.g., id. at 218–25.
30. Fromer, supra note 3.
32. Jessica Litman, Billowing White Goo, 31 COLUM. J.L. & ARTS 587 (2008) (explaining how copyright’s exclusive rights have been expanding while fair use’s “footprint” has remained static).
C. Memory Holes Without Copyright

Because every Internet-posted work has the potential to reach a global audience, people regularly seek legal tools that give them control of content about them.

The European Union’s “right to be forgotten” (RTBF) is one such tool. RTBF allows individuals to remove search engine links to irrelevant, outdated, or otherwise objectionable information about them, unless there is sufficient countervailing public interest. For example, a person can request that Google remove links to personal information about the person’s finances (such as a bankruptcy) that was published in a newspaper. The original newspaper publication is not erased—RTBF is not a comprehensive memory hole—but the material is “obscured” by becoming harder to find.

RTBF is hugely popular. As of December 12, 2018, Google had received over 750,000 removal requests covering nearly three million URLs. And, the RTBF concept is expanding to jurisdictions beyond Europe.

In contrast to RTBF and other international content suppression doctrines, United States law heavily restricts erasing or removing content both constitutionally and statutorily. The First Amendment prohibits state or federal governments from “abridging the freedom of speech,” which significantly limits legally compelled suppression for most types of speech. The First Amendment’s speech and press freedoms further protect publishers’ editorial

33. Because the content remains on the original publisher’s site and only the search engine links are removed, the “forgotten” reference is a misnomer. It might be more accurately characterized as a right to make the content harder to find or to obscure the content. See Woodrow Hartzog & Evan Selinger, Obscurity: A Better Way to Think About Your Data Than ‘Privacy’, ATLANTIC (Jan. 17, 2013), https://www.theatlantic.com/technology/archive/2013/01/obscurity-a-better-way-to-think-about-your-data-than-privacy/267283/.
38. U.S. CONST. amend. I.
discretion (what they choose to publish) by severely limiting prior restraints of speech, such as pre-publication content suppression. As a result, except with respect to a few specific classes of unprotected speech (such as obscenity, child pornography, incitements to imminent violence, etc.), most laws that restrict dissemination on the basis of their content are subject to the highest level of constitutional protection (“strict scrutiny”) and are presumptively invalid.

Legislatures have the authority to supplement the First Amendment’s baseline protection with additional speech-enhancing statutory provisions, and legislatures frequently do so. For example, about 30 states have enacted “anti-SLAPP” laws—“strategic lawsuits against public participation”—aimed at prohibiting abusive lawsuits designed to suppress socially beneficial speech. If a lawsuit qualifies as a SLAPP, the anti-SLAPP law usually provides for procedural “fast lanes” to end the lawsuit quickly and award attorneys’ fees to the defendant.

Content suppression lawsuits may be considered SLAPPs. Congress also enacted a significant free speech-enhancing statute in 1996, codified at 47 U.S.C. § 230. Section 230 immunizes online publishers for tort liability (including privacy and reputational claims) attributable to content that originates from third parties. Due to Section 230, online publishers cannot be compelled to suppress third-party content—even if they receive takedown notices or demand letters targeting the content, they

40. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015) (content-based restrictions are subject to strict scrutiny); Near, 283 U.S. at 723 (previous restraints are presumptively unconstitutional).
42. GEORGE W. PRING & PENELope CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT (1996).
“know” that the targeted content violates the law,45 and (perhaps most surprisingly) a court orders the content’s removal.46

Because of Section 230’s powerful protections for free speech, most legal demands for removal of online third-party content are not successful. Most apropos to this Article, Section 230 means that online publishers, virtually without exception, are not liable for privacy violations or reputational injuries attributable to content provided by third parties and are not obligated to remove content in response to complaints or legal threats.47 This makes a European-style RTBF currently impossible in the United States; it would conflict with both the First Amendment and Section 230.48

Section 230 has several statutory exceptions, including an exclusion for intellectual property (discussed below). In the last few years, plaintiffs have also found some common law gaps in Section 230’s immunity.49 However, for the most part, Section 230’s broad immunity rule for online hosts and publishers remains a significant enabler of Internet speech and a limitation on redressing privacy and reputational concerns online.

Thus, the difficult-to-penetrable shield of the First Amendment, supplemented by statutory protections, drives people seeking content suppression to explore other legal options. This creates a balloon-squeezing dynamic: as the primary legal tools that protect privacy and reputation appear unavailable or weak, plaintiffs’ demand for legal redress gets pushed toward the edges of legal options, such as copyright law.50

48. Id.
50. McKeown, supra note 5, at 1 (describing “the growing number of claims that invoke copyright protection to remedy a broad array of personal harms—such as invasion of privacy—and in the process trample on the First Amendment”).
D. Copyright’s Appeal as a Memory Hole

Copyright is an attractive tool for suppressing Internet content and public discourse for five reasons.\(^{51}\)

First, the First Amendment is already (nominally) accommodated in the copyright statute. The Supreme Court has said that copyright doctrine incorporates First Amendment concerns through the idea/expression dichotomy, which says copyright protects only expression of facts and ideas but not the facts and ideas themselves, and the fair use doctrine, which excuses secondary uses of copyrighted works to enable other specified expressive activities deemed socially beneficial, such as education, news reporting, and critique.\(^ {52}\)

Accordingly, there is no independent First Amendment defense to a copyright infringement claim. If a copyright owner has a valid copyright claim, the lawsuit does not conflict with First Amendment doctrines. So when copyright owners use copyright law to advance privacy or reputation concerns, they bypass the typical First Amendment limits on privacy and reputation claims.\(^ {53}\)

Second, Section 230 contains a statutory exclusion for “intellectual property” claims, including federal copyright claims.\(^ {54}\) Section 230 does not protect online publishers from liability for other people’s intellectual property infringement. Indeed, copyright law is filled with cases where online services have been held liable for, and gone out of business due to, user-directed


\(^{52}\) Golan v. Holder, 565 U.S. 302 (2012); Eldred v. Ashcroft, 537 U.S. 186 (2003); see also 17 U.S.C. § 102(b) (2018) (ideas and concepts are not protected); id. § 107 (deeming uses of works for the purposes of teaching, news reporting, comment, and criticism fair uses, and reciting a four factor test).

\(^{53}\) See infra Part III; see also Keller, supra note 51.

\(^{54}\) In the Ninth Circuit, Section 230 may nevertheless immunize state copyright law claims. Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); cf. Eric Goldman, The Defend Trade Secrets Act Isn’t an “Intellectual Property” Law, 33 SANTA CLARA HIGH TECH. L.J. 541 (2017) (explaining the interaction between state IP laws and Section 230). Compare with 17 U.S.C. § 1401(g) (2018) (federal protection for pre-1972 sound recordings are excluded from Section 230’s immunity). This minor exception is immaterial to our analysis.
copyright infringements.\textsuperscript{55} By asserting a copyright claim, the copyright owners avoid Section 230’s immunity.\textsuperscript{56}

Third, in 1998, Congress enacted the Digital Millennium Copyright Act (DMCA). One of the DMCA’s provisions partially backfills Section 230’s lack of immunity for online publishers from liability for third party copyright infringements. The DMCA provides a safe harbor for online publishers from liability for third party content so long as the publishers expeditiously remove allegedly infringing items upon the copyright owner’s request (a provision frequently called “notice-and-takedown”).\textsuperscript{57} The DMCA’s notice-and-takedown approach can help copyright owners suppress allegedly infringing content simply by asking.\textsuperscript{58}

Online publishers who receive a copyright takedown notice have the legal right to forego the DMCA’s safe harbor by ignoring the notice. Few online publishers choose this option. Without the DMCA’s safe harbor protection, the publisher faces uncertain liability and potentially ruinous financial outcomes.

Thus, the DMCA sets up carrot-and-stick incentives that push online publishers towards over-suppression: removing content in response to takedown notices preserves their eligibility for the safe harbor, while ignoring takedown notices potentially leads to dire consequences. The result has been a tsunami of copyright takedown notices,\textsuperscript{59} many of which are not motivated by copyright

\textsuperscript{55} E.g., MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); EMI Christian Music Grp., Inc. v. MP3Tunes, LLC, 844 F.3d 79 (2d Cir. 2016); Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013); In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003); Arista Records LLC v. Lime Grp. LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010); cf. UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011) (Veoh, a video hosting site, was bankrupted by the lawsuit that confirmed its eligibility for the DMCA safe harbor).

\textsuperscript{56} E.g., Bambauer, supra note 4, at 2055 (viewing Section 230’s limitation as a benefit of expanding copyright liability).

\textsuperscript{57} 17 U.S.C. § 512(c), (d).


\textsuperscript{59} For example, Google alone has received requests to remove nearly four billion URLs as of December 2018. Requests to Delist Content Due to Copyright, GOOGLE, https://transparencyreport.google.com/copyright/overview (last visited Nov. 7, 2019).
concerns. Unless the online publisher has some extra incentive to defend the third party’s uploaded work, the DMCA takedown notices typically lead to removal of the targeted work, even if the publication is not copyright infringing.

Fourth, copyright infringement is a strict liability offense. Plaintiffs do not have to show intent or knowledge of wrongdoing on the part of the alleged infringer. Copyright plaintiffs avoid the First Amendment scienter requirements for privacy and reputation laws, such as the actual malice requirement for some defamation claims. Without any scienter requirements, copyright claims are easier, and may be cheaper, to win than analogous privacy or reputation tort claims.

Fifth, copyright law provides powerful remedies. In some circumstances, copyright owners can obtain attorney’s fees and statutory damages of up to $150,000 per work, irrespective of the actual harm suffered by the copyright owner. Among other benefits, the statutory damages do not have minimum scienter prerequisites, unlike some defamation damages.

61. E.g., Tehranian, supra note 51, at 273–76.
64. Cf. Eric Goldman, Why Section 230 Is Better Than the First Amendment, NOTRE DAME L. REV. ONLINE (forthcoming 2019) (discussing how Section 230’s statutory protection has procedural and financial benefits over First Amendment litigation, even if the legal conclusions were the same).
65. Keller, supra note 51.
67. Id. § 505.
68. Gertz, 418 U.S. at 348–50; Mike Steenson, Presumed Damages in Defamation Law, 40 WM. MITCHELL L. REV. 1492 (2014). Copyright statutory damages may be awarded in higher
Copyright law also provides for equitable relief, including injunctions against continued dissemination, which courts routinely grant. Because copyright-based injunctions are not subjected to First Amendment scrutiny, copyright may effectuate “prior restraints” that would be nearly impossible when alleging either a pure First Amendment claim or claims with explicit First Amendment exemptions.

Thus, copyright owners can obtain remedies that are not available to plaintiffs asserting typical privacy or reputation law claims—including, most crucially, injunctions that send content to the memory hole. The framers of the Constitution and the Congress that enacted the first Copyright Act in 1790 intended copyright to be an engine of the First Amendment’s freedom of speech and of the press. They did not intend copyright law to enable memory holes. Even so, copyright law has evolved remarkably well for that purpose.

amounts if the defendant engaged in willful infringement. 17 U.S.C. § 504(c)(2). However, a court can still award statutory damages even if the defendant unintentionally infringed. Id. 69. 17 U.S.C. § 502.


71. See Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L.J. 147, 173–74 (1998); McKeown, supra note 5, at 5 (“I refer to the use of copyright injunctions to impose what amounts to prior restraints on offensive, unpopular or sensitive speech. These kinds of cases look, feel and smell like the real First Amendment cases. They are fundamentally about censorship of unpopular speech.”).

72. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); see also McKeown, supra note 5, at 1 (“[C]opyright and the First Amendment are both in tension and in synergy with each other.”).

73. Ironically, copyright’s origin in the Stationer’s guild in England was to suppress speech critical of the Crown. Tyler T. Ochoa & Mark Rose, The Anti-Monopoly Origins of the Patent and Copyright Clause, 84 J. PAT. & TRADEMARK OFF. SOC’y 909, 914 (2002). This law evolved into the Statute of Anne in Britain and the Copyright Act in the United States, both of which sought to promote expression rather than control it. Id. at 914, 929; cf. Shyamkrishna Balganesh, Privative Copyright, 73 VAND. L. REV. (forthcoming 2020) (describing early “censorial” roots by authors in copyright law).

74. Cf. Tehranian, supra note 51, at 251 (“[W]ould-be censors have converted losing tort claims, such as defamation, false light, invasion of privacy, and intentional infliction of emotional distress (immunized, as they are, by the First Amendment), into viable copyright infringement claims that punish their foes for legitimate speech-related activity.” (footnotes omitted)).

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III. HOW COPYRIGHT OWNERS EFFECTUATE MEMORY HOLES

This Part describes three legal strategies that copyright owners have pursued to suppress unwanted content for reasons unrelated to copyright law’s purpose. As the cases illustrate, plaintiffs struggle to succeed on the merits of their copyright claims when deploying these techniques.

Nevertheless, plaintiffs’ attempts cause substantial content suppression for two reasons. First, many defendants remove content upon demand rather than defend their positions in court. As a result, merely by asserting the positions discussed in this Part, copyright owners may effectively suppress content without any judicial oversight. Second, when plaintiffs succeed with any one of these positions, they establish a template that others may follow. Part V will discuss ways to prevent both of these threats of content suppression. This Part taxonomizes the positions to better understand their mechanisms and flaws.

A. Acquisition Before Creation: The Case of Medical Justice

A person or business can seek to obtain copyright ownership over works that have not been created yet. We call this “pre-creation acquisitions.”

Most pre-creation acquisitions are typical copyright transactions that are part of the ordinary process of creating and disseminating copyrighted works. For example, companies routinely retain contractors to perform services and prospectively obtain copyright ownership over the materials produced by the contractors. This quid pro quo—payment in exchange for new works—advances copyright’s goals by encouraging the production of new socially valuable works that the hiring party uses to grow its company’s enterprise. We are not concerned with these typical copyright transactions.

75. A hiring party can obtain copyright ownership from third parties via contractual assignment or as a “work made for hire.” 17 U.S.C. § 201 (2018). The primary copyright law distinction between the two mechanisms is that assigned works are subject to a non-waivable “termination of transfer” after thirty-five to forty years when the owner can take back ownership of the work, id. § 203. Works made for hire are not subject to that termination of transfer. Id. § 203(a). This distinction isn’t material to this Article’s analysis, so we do not distinguish between ownership acquired via assignment and works made for hire.
In contrast, other types of pre-creation acquisitions can clearly undermine copyright’s goals of incentivizing creation and dissemination. Consider the example of suppressing online reviews of service providers through pre-creation acquisition.

In the 2000s, online review of healthcare providers became more prevalent. This concerned healthcare providers in part because they felt like the Health Insurance Portability and Accountability Act of 1996 (HIPAA) limited their ability to rebut patient reviews. In response to this perceived limitation, an organization called Medical Justice offered a form contract that healthcare providers could adopt; the form required patients to assign copyright in any as-of-yet unwritten reviews of their healthcare provider. The healthcare provider could then assert its acquired copyright interest in those reviews to remove any unwanted reviews from the Internet—effectuating copyright’s memory hole.

Without Medical Justice’s workaround, Section 230 would protect review websites from any healthcare provider’s demands to remove unwanted patient reviews. However, by allowing healthcare providers to frame their demands as copyright infringement claims, the demands fall outside Section 230’s immunity, which expressly excludes intellectual property claims. Instead, the healthcare provider’s copyright demands implicate the DMCA’s notice-and-takedown scheme. Review websites would have to either accede to the healthcare provider’s

78. The contract was named a “Mutual Agreement to Maintain Privacy,” but because HIPAA already required that healthcare providers maintain their patients’ privacy, any promise by the provider to maintain patient privacy was illusory. Myths: True or False: A Closer Look at Some of Medical Justice’s Key Claims, DOCTORED REVIEWS, https://www.doctoredreviews.com/medical-justice-myths/ (last visited Nov. 7, 2019).
copyright takedown demands or forego their valuable DMCA safe harbor protection.\textsuperscript{80}

A combination of industry pressure, adverse litigation, government regulation, and legislative reform doomed Medical Justice’s purported copyright workaround. The Department of Health and Human Services’ Office of Civil Rights issued an opinion that doctors could not implement these copyright-from-patient transfers.\textsuperscript{81} Few healthcare providers asserted the contract in court, but when they did the assertions were met with judicial skepticism.\textsuperscript{82} Several review websites independently decided not to honor the DMCA takedown notices predicated on Medical Justice’s contract, signaling that they would be willing to forego the DMCA’s safe harbors to protect their consumers’ free speech rights.\textsuperscript{83} And the Federal Trade Commission received a complaint that Medical Justice was falsely advertising the efficacy of its contracts in light of these roadblocks.\textsuperscript{84} In response to these developments, Medical Justice decided to “retire” its contracts, and it advised its healthcare-provider customers to stop using its forms.\textsuperscript{85}

In 2016, Congress enacted the Consumer Review Fairness Act (CRFA),\textsuperscript{86} which partially redressed the problems exposed by

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{80} The review sites would be responding to the doctors’ demands, not patients who have changed their minds.
\item\textsuperscript{81} U.S. Dep’t of Health & Human Servs., Private Practice Cases Conditioning of Compliance with the Privacy Rule, HHS, https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/examples/all-cases/index.html#case29 (last visited Nov. 7, 2019).
\item\textsuperscript{82} E.g., Lee v. Makhneveich, No. 11 Civ. 8665(PAC), 2013 WL 1234829 (S.D.N.Y. Mar. 27, 2013).
\end{itemize}
\end{footnotesize}
Medical Justice’s technique. The CRFA expressly prohibits businesses from using form contracts that “transfer[] or require[] an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content.”

The CRFA makes any ongoing deployment of Medical Justice’s form contracts, or any copycat efforts, ineffectual and unlawful.

However, the CRFA does not eliminate the potential for pre-creation copyright acquisitions to suppress consumer reviews or other types of content. First, the CRFA only applies to “form contracts.” Businesses could individually negotiate contracts with consumers to achieve the same outcome. Second, the CRFA does not apply to restrictions on “unlawful” content, which might include defamatory reviews that are otherwise protected by Section 230 and the First Amendment. This means that prospective copyright assignments could target defamatory reviews for suppression, avoiding hard-to-win defamation law to achieve the same end.

Third, the CRFA does not prevent contractual limits based on trade secrets or confidentiality. Finally, the CRFA only applies to “a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person.” There are many other types of content that may be targeted for pre-creation acquisition beyond this statutory scope. As such, although Medical Justice’s copyright workaround failed and the CRFA banned any efforts to redeploy it, many situations remain where pre-creation copyright acquisition could be deployed to facilitate memory holes.

the California law does not expressly address prospective copyright assignments and may not apply to them.

88. Id. § 2(b)(1).
89. Id. § 2(b)(3)(D).
90. Goldman, supra note 85.
B. Post-Publication Acquisition Through Transfer

After content has been published, a person can try to suppress it by acquiring and then asserting ownership of the content’s copyright. Three cases from the Internet era illustrate different ways that people have tried to deploy this technique.93

1. Scott v. WorldStarHipHop94

A student recorded a classroom brawl on his phone between Mr. Scott (a student) and his current and former girlfriends and then posted the recording to WorldStarHipHop, a user-generated content video site similar to YouTube. The title of the posting was “Disgraceful: College fight in NYC Breaks Out Between A Guy, His Girl and Another Girl in Class! (Man Strong Arm’s [sic] The Student. Hitting Her with Body Shots).”95

Unhappy about the video’s publication, Scott acquired the video’s copyright from his classmate and demanded that WorldStarHipHop remove the video. WorldStarHipHop refused, likely foreclosing any DMCA safe harbor it might have claimed. Scott sued WorldStarHipHop for copyright infringement, privacy violations, publicity rights violations, and negligent infliction of emotional distress. Two years into the case, the court dismissed the privacy and other non-copyright claims.96

The copyright claim persisted for two more years, going through several rounds of procedural and substantive motions. Four years after first filing suit, the parties settled the copyright

93. These cases reflect the digital age, but there are similar cases from the pre-Internet era, such as Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), where Howard Hughes acquired the copyright in a magazine article about himself to control its reuse in an unauthorized biography.


96. Id.
claims on confidential terms. The two additional years of litigation demonstrate the extra costs borne by the defendant specifically due to the copyright claims compared to the parallel privacy and reputation claims.

2. Katz v. Chevaldina

Katz is a Florida real estate magnate and part-owner of the Miami Heat professional basketball team. One of his tenants, Chevaldina, published a blog post that criticized Katz’s business practices. Chevaldina’s post included a photo she copied and pasted from a newspaper website. The photo shows Katz with his tongue hanging out of the side of his mouth. Katz acquired the photo’s copyright and then sued Chevaldina for copyright infringement.

After nearly four years of litigation, the district court ruled, and the appeals court affirmed, that Chevaldina’s publication of the photo constituted fair use and awarded Chevaldina over $150,000 of attorneys’ fees pursuant to copyright’s fee-shifting provision. As part of its fair use analysis, the appeals court highlighted the photo’s noncommercial and educational fair uses, that is, to criticize Katz’s business practices.

The appeals court also explained that Chevaldina’s critical use would not diminish the market value of the photo. Katz did not


99. As the appeals court remarked, Katz’s “tongue protrudes askew from his mouth.” Katz v. Google, 802 F.3d at 1180.


acquire the photo’s copyright to make money from its dissemination, but rather to suppress its publication.

Chevaldina’s use of the Photo would not materially impair Katz’s incentive to publish the work. Katz took the highly unusual step of obtaining the copyright to the Photo and initiating this lawsuit specifically to prevent its publication. Katz profoundly distastes the Photo and seeks to extinguish, for all time, the dissemination of his “embarrassing” countenance. Due to Katz’s attempt to utilize copyright as an instrument of censorship against unwanted criticism, there is no potential market for his work.103

In Katz and WorldStarHipHop, both plaintiffs sought to permanently suppress embarrassing online content of which they are the subject, not the author. However, the cases differ in two important ways.

First, Katz was a public figure. He was sufficiently well-known to be the subject of news before Chevaldina wrote about him. As a result, compared to private figure Scott, Katz may have had diminished privacy expectations, and his visibility strengthened the argument in favor of Chevaldina’s fair use.

Second, the uploader in WorldStarHipHop granted the online service copyright permission to publish the video before Scott acquired the copyright, whereas Chevaldina never had authorization to use the Katz photo because she copied it from the Internet. As a result, in Katz, the photographer (or his copyright assignee) who originally published the Katz photo could have sued for Chevaldina’s subsequent and unauthorized use of the photo on her blog. This difference seemingly tilts in favor of Katz, as in theory he assumed the photographer’s existing right to sue Chevaldina. However, the copyright transfer from the photographer to Katz materially changed the reasons for the copyright enforcement. The original photo publisher might have sought to protect the photo’s licensing potential and the photographer’s authorial interests in the photography. In contrast, Katz used the copyright to permanently suppress embarrassing but true content from the Internet that he had no role in generating or interest in publishing.

103. Katz v. Google, 802 F.3d at 1184.
3. Small Justice v. Xcentric\textsuperscript{104}

Small Justice involves the website Ripoff Report, which allows users to post negative reviews of businesses. Ripoff Report differs from most other user-generated content websites in three ways that are material here. First, Ripoff Report requires authors to grant the site an irrevocable and partially exclusive license to their submissions. This makes Ripoff Report a partial copyright owner of the submissions.\textsuperscript{105} Second, Ripoff Report does not provide authors with any contractual or operational right to edit or delete their content once submitted (unlike the WorldStarHipHop service). Third, Ripoff Report has a policy that it will not remove user submissions once published, even in the face of legal threats.\textsuperscript{106}

A pseudonymous author published a negative review of the Small Justice law firm on Ripoff Report, alleging improper personal and professional conduct by the law firm.\textsuperscript{107} The law firm acquired the copyright to the published review, purported to terminate the copyright license to Ripoff Report, and when Ripoff Report did not remove the review, sued Ripoff Report for copyright infringement.

What makes this case unusual is how Small Justice purportedly acquired copyright ownership of the content it sought to suppress. Because the review author was pseudonymous, Small Justice could not directly negotiate an acquisition of the


\textsuperscript{105} See 17 U.S.C. § 101 (defining a “transfer of copyright ownership” to include an assignment or exclusive license “of a copyright or of any of the exclusive rights comprised in a copyright,” but expressly excluding nonexclusive licenses).

\textsuperscript{106} Terms of Service, RIPOFF REPORT, https://www.ripoffreport.com/terms-of-service (last updated May 2, 2019) (“Ripoff Report is intended to be a permanent record of disputes, including disputes which have been fully resolved. In order to maintain a complete record, information posted on Ripoff Report, subject to the Terms outlined herein, will not be removed. By posting information on Ripoff Report, you understand and agree that the material you post will become part of Ripoff Report’s permanent record and will NOT be removed even at your request.”).

\textsuperscript{107} The law firm’s principal is Richard Goren. For simplicity, we treat Goren and Small Justice as a single plaintiff.
copyright. Instead, Small Justice sued the pseudonymous author in state court for libel and intentional interference with prospective contractual relations (reinforcing that, like the other cases in this Part, privacy/reputation concerns drove the speech-suppression strategy). When the author failed to appear in the state case, Small Justice obtained a default judgment against the author.

As a remedy for the default judgment, Small Justice convinced the state court to award it the author’s copyright to the negative review. Armed with copyright ownership, Small Justice demanded that Ripoff Report erase the post or face copyright infringement liability. Neither Small Justice nor the original review author had the technical capacity to delete the post from the site. As a result, Ripoff Report’s anti-removal policy virtually necessitated court intervention for Small Justice to suppress the review.

Small Justice eventually lost the suit in federal court and could not compel suppression of the negative review about the law firm.108 Nonetheless, this case highlights numerous problems with post-publication copyright acquisition and enforcement that are likely to repeat often.

First, state courts almost never see federal copyright cases (because federal courts have original jurisdiction over federal copyright cases),109 so the Small Justice state court’s mistaken transfer of the copyright110 is not that surprising—especially on a default judgment when the defendant is not around to point out the court’s error.

Second, most online services take only nonexclusive licenses that can be canceled by the user (usually by logging into the account and deleting the content). When the online service has only a nonpermanent and nonexclusive license, the copyright owner—even if it acquires the copyright post-publication—may have the legal grounds to terminate the license with the online service and expose it to copyright infringement risk. Ripoff Report is relatively unusual in that it attempts to take a permanent ownership stake in user submissions.

110. 17 U.S.C. § 201(e) (2018) (“[N]o action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title . . . .”).
Third, pseudonymous and anonymous authors present service of process issues. It is not surprising that the pseudonymous author of the Small Justice negative review did not appear in court because there is a good chance he or she was not properly identified or served. In cases involving pseudonymous or anonymous authors who do not appear to contest lawsuits against them, judges do not benefit from the adversarial error correction on which our adjudication system is predicated.

Fourth, default judgments create other abuse possibilities. Professor Eugene Volokh has documented dozens of times that plaintiffs obtained or forged illegitimate default judgments to get court-ordered content removals. To increase the odds of winning these court orders, a plaintiff can intentionally sue the wrong defendant (especially when the author is pseudonymous) to ensure that no defendant appears to contest the lawsuit. Or, a plaintiff can sue defendants who would be embarrassed or harmed by having the content publicly attributed to them. Either way, the resulting court orders are fundamentally invalid and can cause substantial mischief. But no one may be willing or procedurally capable to challenge the defective orders.

Fifth, most online content authors will not stand behind their content when someone makes legal threats over it. They prefer settlement to fighting back. This makes settlement particularly attractive if all that is required is a copyright assignment, which has little or no inherent financial or personal value to the author.


114. In this respect, efforts to create copyright memory holes may resemble and take advantage of the practice of copyright trolling. See, e.g., Shyamkrishna Balganesh, The Uneasy
The threaten-and-settle technique makes it easy—perhaps too easy—for people unhappy with copyrighted works to take possession of the copyright and weaponize it to proliferate copyright’s memory holes.

Despite suppression efforts often failing, for the reasons discussed in this section, post-publication suppression efforts are costly and present a clear danger of persistent information distortion. Copyright law can be easily abused by plaintiffs because of the federal law’s complexity, the likelihood of default judgments, and the cost and nuisance of litigation. These case outcomes may seem like common sense to most lawyers, but the proliferation of these cases, their time to resolution, and the basic procedural maneuvers on which they are based, raise real concerns about copyright law’s ongoing and persistent use as a suppression tool.

C. Acquisition Through Depiction

A third way a person may suppress a copyrighted work that depicts them is by claiming to own the copyright by authoring the work. We call this authorship-through-depiction. Some authorship-through-depiction ownership situations are ordinary and appropriate. If the depicted person superintended the work, controlled its arrangement and production, and authorized fixation of the work, it would be expected and reasonable for the person to own the copyright. For example, musicians or dancers may own copyrights in their live performances if they make a simultaneous recording of the performance. In contrast, we are concerned when depicted people claim to author their performances simply by being depicted and then assert the performance copyright to control the recordings depicting them. These mutant authorship-through-depiction claims can turn copyright on its head, stripping control of the work from the


intended copyright owner and giving that control to the depicted person (or persons), who can use it to suppress the work.\textsuperscript{117}

Consider how an authorship-through-depiction argument may have appeared in the WorldStarHipHop situation discussed above. Scott, the fist-fighting boyfriend caught on video, could assert that he had a copyright in his fighting movements, so publishing a video depicting the brawl infringed copyright in those movements. This would give him control over the video’s publication without the cost or other hassles of post-creation acquisition from the videographer. As we have already seen, even if the pugilist’s copyright claim is dubious, a colorable argument can be weaponized for years.

Based on black-letter copyright law, these arguments for copyright authorship and ownership through depiction should fail. First, copyright only protects “original works of authorship,”\textsuperscript{118} and it is unlikely a spontaneous sequence of fighting movements would satisfy this standard.\textsuperscript{119} Second, federal copyright law only protects “fixed” works that are recorded in a tangible medium.\textsuperscript{120} Video-recording would ordinarily qualify as a fixation method. However, to properly fix a recording requires that it was made “by or under the authority of the author.”\textsuperscript{121} Scott, making an authorship-like claim over a fixed work, cannot legitimately assert that his classmate’s independent video-recording of the fight was made under his authority. As such, Scott cannot claim copyright in the recording. He never fixed his fighting moves, so federal copyright

\textsuperscript{117} More frequently, people can control their images through right of publicity, which has direct roots in privacy law but has evolved over the twentieth century to overlap with both copyright and trademark law. See JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018). For discussions of photographic subjects asserting rights in their images as against photographers, see Jessica Silbey, Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment, 42 COLUM. J.L. & ARTS 351 (2019); Eva E. Subotnik, The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia, 39 COLUM. J.L. & ARTS 449 (2016).

\textsuperscript{118} 17 U.S.C. § 102(a).

\textsuperscript{119} See, e.g., Bikram’s Yoga Coll. of India, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1044 (9th Cir. 2015) (denying protection to a sequence of yoga poses because, among other reasons, “successions of bodily movement’ often serve basic functional purposes”). Compare with Bambauer, supra note 4, at 2070–78 (advocating to treat unscripted sexual activity as authorship).

\textsuperscript{120} 17 U.S.C. § 102(a).

\textsuperscript{121} Id. § 101 (defining “fixed” works).
law does not protect those moves separately from the video itself, and the videographer owns the copyright to that.122

While the *WorldStarHipHop* pugilist’s copyright claim might seem fanciful, the facts of *Garcia v. Google*123 may appear more sympathetic to the claimant. The legal claims are equally unmeritorious, however.

*Garcia* involved a movie entitled *The Innocence of Muslims*. The movie producer retained actress Cindy Lee Garcia originally to appear in a video called *Desert Warrior*. Allegedly, Garcia and the producer never signed a written contract. The producer misrepresented to Garcia the nature of the final video; instead of being a story about life in Egypt 2000 years ago, the producer made a video with an anti-Muslim message. That video included a five second clip of her performance, but the producer dubbed anti-Muslim words over her clip. As a result, the public video did not include Garcia’s voice or recorded dialogue; it only depicted her likeness and movements.

The producer posted the video to YouTube. Garcia’s depiction in the published video led to a fatwa condemning her (and others involved in the video) to death, resulting in death threats against her.

Seeking to remove the movie from YouTube, Garcia sued YouTube in state court for a variety of privacy torts.124 These claims were preempted by Section 230, so the trial court denied a request for a temporary restraining order taking down the video.125

This ruling pushed Garcia to seek legal alternatives that would avoid Section 230’s immunity. As a result, Garcia dropped her privacy claims.126 Instead, she claimed she owned a copyright in her acting performance and sent multiple takedown notices to

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122. Federal copyright law does restrict the unauthorized recording of (unfixed) live musical performances (bootlegging). *Id.* § 1101(a). Many states have analogous statutes.

123. *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014), amended by 766 F.3d 929 (9th Cir. 2014); *re’d en banc*, 786 F.3d 733 (9th Cir. 2015). Professor Goldman contributed to amicus briefs encouraging the Ninth Circuit to take the case *en banc* and reverse the three-judge panel ruling. Brief of Amici Curiae Internet Law Professors in Support of Google, Inc. and YouTube, LLC’s Petition for Rehearing En Banc, *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014) (No. 12-57302).


YouTube under the DMCA for unlawful publication of her allegedly copyrighted work.\textsuperscript{127} YouTube refused the takedown request on the basis that the filmmaker, not Garcia, was the lawful claimant under the DMCA. Garcia then filed suit in federal court\textsuperscript{128} alleging that she had a copyright in her acting performance and that YouTube’s publication of the video infringed that copyright. The district court denied her request for a preliminary injunction.\textsuperscript{129}

On appeal, a three-judge panel of the Ninth Circuit issued an overbroad and disturbingly secret takedown order to YouTube,\textsuperscript{130} apparently motivated by the death threats against Garcia. Then, the Ninth Circuit reheard the case \textit{en banc} and reversed the ruling in favor of Garcia in a 10-1 decision.\textsuperscript{131}

The \textit{en banc} majority principally based its ruling on a conclusion that movie actors do not have a copyright interest separate from the movie recording, even when the actor does not have a written agreement with the producer.\textsuperscript{132} The majority also noted the obvious fixation problem:

\begin{quote}
For better or for worse, [the film producer] “fixed” Garcia’s performance in the tangible medium . . . . However one might characterize Garcia’s performance, she played no role in fixation. On top of this, Garcia claims that she never agreed to the film’s ultimate rendition or how she was portrayed in \textit{Innocence of}
\end{quote}

\begin{flushright}
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{E.g., Venkat Balasubramani, In Its \textquotedblleft Innocence of Muslims\textquotedblright{} Ruling, the Ninth Circuit Is Guilty of Judicial Activism—Garcia v. Google, TECH & MARKETING L. BLOG (Feb. 27, 2014), http://blog.ericgoldman.org/archives/2014/02/in-its-innocence-of-muslims-ruling-the-ninth-circuit-is-guilty-of-judicial-activism-garcia-v-google.htm.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{E.g., Venkat Balasubramani, In Its \textquotedblleft Innocence of Muslims\textquotedblright{} Ruling, the Ninth Circuit Is Guilty of Judicial Activism—Garcia v. Google, TECH & MARKETING L. BLOG (Feb. 27, 2014), http://blog.ericgoldman.org/archives/2014/02/in-its-innocence-of-muslims-ruling-the-ninth-circuit-is-guilty-of-judicial-activism-garcia-v-google.htm.}
\end{flushright}
Muslims, so she can hardly argue that the film or her cameo in it was fixed “by or under [her] authority.”¹³³

The court concluded that “Garcia’s harms are too attenuated from the purpose of copyright” and denied her copyright claim and request for relief.¹³⁴

Important for our purposes, the majority understood that Garcia was using copyright as an end-run around privacy law:

Privacy laws, not copyright, may offer remedies tailored to Garcia’s personal and reputational harms. On that point, we offer no substantive view. Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a “right to be forgotten,” although recently affirmed by the Court of Justice for the European Union, is not recognized in the United States.¹³⁵

The majority made particular note of how copyright can effectuate prior restraints, “the least tolerable infringement on First Amendment rights.”¹³⁶

[The panel’s takedown order] gave short shrift to the First Amendment values at stake. The mandatory injunction censored and suppressed a politically significant film—based upon a dubious and unprecedented theory of copyright. In so doing, the panel deprived the public of the ability to view firsthand, and judge for themselves, a film at the center of an international uproar.

. . . The panel’s takedown order of a film of substantial interest to the public is a classic prior restraint of speech.¹³⁷

Without explicitly addressing the privacy or copyright overlap, the court concluded that caution must be taken when copyright is

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¹³³. Garcia v. Google, 786 F.3d at 744.
¹³⁴. Id. at 746.
¹³⁵. Id. at 745. As Judge McKeown later wrote, “[T]here was a fundamental mismatch between Garcia’s claimed harm (death threats and reputational harm) and the purpose of the copyright laws (to stimulate creative expression, not to protect secrecy). . . . [C]opyright laws were not the right vehicle for her legitimate beef . . . .” McKeown, supra note 5, at 7 (footnote omitted).
¹³⁷. Garcia v. Google, 786 F.3d at 747 (citing Alexander v. United States, 509 U.S. 544, 550 (1993)); see also Amended Order, Garcia v. Google, Inc., No. 12-57302 (9th Cir. 2015) (Judge Reinhardt’s dissent to the denial of an emergency en banc rehearing, expanding on the multitudinous First Amendment problems with the takedown order).
used to suppress content on the Internet. The doctrine and purpose must align, and when other claims are more germane, such as privacy torts, those remedies should be considered instead.  

We agree. For reasons related to sound copyright policy (production, dissemination, and progression of knowledge), copyright claims like Garcia’s should be swiftly dismissed. Failure of copyright claims does not affect the success or failure of the appropriate tort claims, however. It is to those we now turn.

IV. Reflecting Privacy Values in Copyright Law

As this Article demonstrates, there is significant interest in using copyright law as a memory hole. And as Professor Margaret Chon has said, “privacy concerns have always been a part, albeit a minor aspect, of copyright law.” So under what conditions should copyright actually facilitate memory holes? This Part identifies the social values that privacy law protects and the circumstances in which those values coincide with proper copyright claims.

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138. For contrary perspectives about the breadth of actors as copyright authors, see, for example, F. Jay Dougherty, Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law, 49 UCLA L. REV. 225, 228, 306 (2001); Hughes, supra note 132.
139. Copyright claims can be asserted for reputation or privacy-related reasons in other ways beyond the three we discuss. For example, purported employers or joint-authors, both exaggerating their rights under the work-for-hire or joint-authorship doctrines, can attempt work-arounds of ownership and authorship rules in order to suppress speech for privacy and reputational reasons. Both of these doctrines avoid the otherwise-strong statute of frauds rule for copyright transfers, 17 U.S.C. § 204(a) (2018), and may provide sympathetic factual bases for ruling in the copyright claimant’s favor. To the extent that these doctrines seek to suppress content for reasons unrelated to “promot[ing] the progress of science and the useful arts,” they should also fail. U.S. CONST. art. I, § 8, cl. 8. These cases concern dubious attempts at copyright acquisition to assert rights unrelated to authorship. Consumers or depicted subjects who are also copyright authors and seek to retract their own expression or prevent distortion of their expression present a separate, but related, issue, addressed infra Part B.
141. Other articles addressing the copyright/privacy overlap include: Balganesh, supra note 75; Chon, supra note 4; Gilden, supra note 4; Patrick R. Goold, Unbundling the “Tort” of Copyright Infringement, 102 VA. L. REV. 1833 (2016); Gordon, supra note 7; Keller, supra note 51; Edward Lee, Suspect Assertions of Copyright, 15 CHI.-KENT J. INT’L. PROP. 379 (2016); McKeown, supra note 5; Pamela Samuelson, Protecting Privacy Through Copyright Law?, in PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS 191 (Marc Rotenberg et al. eds., 2015); Ned Snow, A Copyright Conundrum: Protecting Email Privacy, 55 U. KAN. L. REV. 501 (2007); Tehranian, supra note 51; Tushnet, supra note 4.
142. Chon, supra note 4.
A. A Taxonomy of Privacy Interests

The U.S. Constitution provides a baseline set of principles for protecting privacy. The Bill of Rights, in particular, defines boundaries between the individual and the state that shape our fundamental right to privacy as well as its relationship to the right of free speech.143

Although constitutional interpretation is flexible to ensure relevance for future generations, it is also grounded in textual promises in the Bill of Rights, as well as fundamental values such as liberty and autonomy.144 Meant “to be adapted to the various crises of human affairs,” the U.S. Constitution is a “great outline” that delimits (through its federalism structure and its protection of individual rights) basic principles for negotiating the relationship between individual freedoms, regulated group behavior, and government (state and federal) power.145

Through constitutional interpretation, privacy has been inextricably linked to these fundamental values in cases such as Meyer v. Nebraska (1923) (protecting a person’s choice to direct education of one’s children),146 Griswold v. Connecticut (1965) (protecting a person’s choice to use birth control),147 and Katz v. United States (1967) (reasonable expectation of privacy in telephone calls).148 Furthermore, privacy itself acts as a cornerstone of

143. ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 4 (Cheshire Calhoun ed. 2011) (describing everyday meanings of privacy that “fall into a handful of easily illustrated categories,” partially tracking the constitutional protection against governmental intrusion of physical and spatial privacy and decisional and associational privacy); see also ERWIN CHEREMINSKY, REDISCOVERING BRANDENBURG’S RIGHT TO PRIVACY, 45 BRANDEIS L.J. 643 (2007) (identifying deeply rooted constitutional privacy concepts).

144. Equality as a fundamental value did not return to the Constitution until after the Civil War and the Fourteenth Amendment, but it originated as a national value in the Declaration of Independence.


146. Meyer v. Nebraska, 262 U.S. 390 (1923) (holding unconstitutional a state law that prohibits teaching in a school any language but English because the law intrudes into childrearing privacy and autonomy).

147. Griswold v. Connecticut, 381 U.S. 479 (1965) (identifying a “zone of privacy” through the Bill of Rights, the Ninth Amendment, and the concept of “ordered liberty” in the Fourteenth Amendment that protects a married couple’s decision from state intrusion concerning whether to use contraception and bear children).

constitutional rights and civil liberties today.149 These cases and others developed the right of privacy throughout the twentieth century to reflect industrial, medical, and technological advances. Since the mid-twentieth century, the Supreme Court has used the concept of “reasonable expectations of privacy” to interpret society’s evolving needs and desires for privacy in light of these changes.150

Supreme Court case law interpreting the Constitution’s Bill of Rights describes how it advances privacy interests in several identifiable categories.

1. Spaces and things

The Third and Fourth Amendments protect privacy for a person’s spaces and things,151 including one’s “houses, papers, and effects.”152 This protection has expanded over time to include chattel, such as cars and cellphones.153 This privacy interest may provide the strongest case for recognition in copyright law as a way to protect intangible works of expression embodied (or “fixed”) in tangible property.

2. Bodies

Constitutional privacy also protects various aspects of a person’s body, including restrictions on forced medical treatments, bodily searches, and reproduction or sterilization.154 Copyright law

149. Neil M. Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 5–7 (2015) (harmonizing civil liberties of privacy and free speech); see also Carpenter v. United States, No. 16-402, slip. op. at 12 (2018) (extending Fourth Amendment protections to new technologies and relationships with technology intermediaries that enable an unforeseen ability to track “familiar, political, professional, religious, and sexual associations” from location records that “hold for many Americans the ‘privacies of life’”) (citations omitted).

150. Katz, 389 U.S. at 358–59 (search of telephone communication subject to limitation of “reasonable expectation of privacy” in those communications, extending Fourth Amendment protection to new technologies).


152. U.S. Const. amend. IV.


is not a good candidate for protecting a person’s interests in their physical body. However, copyright law sometimes protects depictions of people, and that protection can implicate bodily integrity and autonomy. We discuss in Part IV.B the doctrinal difficulty raised by these cases, especially with post-publication retraction attempts.

3. Beliefs and relationships

The right to privacy also extends to a person’s relationships and beliefs via the First Amendment and its penumbra. This can include spiritual and intellectual privacy when the state’s intrusion into religion and political association degrades intellectual freedom.

Courts often apply the First Amendment and the Fourteenth Amendment together to protect privacy in personal relationships. For example, the Supreme Court recently declared that states cannot criminalize consensual sexual adult intimacy because doing so “demean[s] [people’s] existence or control[s] their destiny by making their private sexual conduct a crime.” The Supreme}

v. Texas, 539 U.S. 558 (2003), by looking at its role in abortion jurisprudence and sexual liberty rights).


156. See Chemerinsky, supra note 143, at 646.

157. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1160–61 (2d ed. 1988) (“The free exercise clause was at the very least designated to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief.”); see also RICHARDS, supra note 149.

158. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2016) (quoting Lawrence, 539 U.S. at 578). One root of these privacy cases is Griswold v. Connecticut, as Justice Roberts states in his dissent in Obergefell.

The majority suggests that “there are other, more instructive precedents” informing the right to marry. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental “right of privacy.” Griswold, 381 U.S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. Id. at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of “the police to search the sacred precincts of marital bedrooms.” Id. at 485. In the Court’s view, such laws infringed the right to privacy in its most basic sense: the “right to be let alone.” Eisenstadt v. Baird, 405 U.S. 438, 453–54 n.10 (1972) (internal quotation marks omitted); see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
Court declared marriage one of the “great relations in private life” and what goes on in the bedroom is protected by privacy “in its most basic sense.” Indeed, many friendships, families and intimacies—the bonds of civil society—are unimaginable without privacy.

Copyrighted works may represent, critique, or expose an author’s or other person’s beliefs and relationships. The desire to control the public presentation of these beliefs and relationships leads some to want to temporarily or permanently suppress copyrighted content (and the facts and ideas it contains). Protecting people’s beliefs and relationships is a key value for privacy law, but these interests can collide with other important social interests and fundamental values, such as free speech, facilitating knowledge and scientific progress, and the intellectual autonomy of speakers. In Part IV.B, we discuss cases concerning this collision and advocate for limiting copyright’s ability to suppress already-published information concerning relationships and beliefs, despite their sometimes-private nature.

4. Personal Information

Privacy in personal information remains weakly constitutionalized, but a growing number of statutes regulate personal data and information. Alan Westin’s seminal book *Privacy and Freedom* described circles of personal information: that which we tell no one (innermost circle); that which we tell only our intimates (next innermost circle); and so on until there is information known to everyone. Today, federal and state statutes draw these circles for us around educational information, health information, and financial information, for example. However, to

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Obergefell, 135 S. Ct. at 2619–20 (Roberts, J. dissenting) (some citations omitted).
160. Id. at 2620.
161. Charles Fried, Privacy, 77 YALE L.J. 475, 477 (1968) (“Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.”).
date, the constitutional right to protect personal factual information does not exist.163
Nevertheless, the Supreme Court has addressed the privacy intrusion of the aggregation of information in photographs, emails, telephone contacts, physical movements, and “familial, political, professional, religious and sexual associations” contained therein.164 Preventing government from accessing the private collection (by a cellphone company) of massive amounts of factual information—e.g., geographic locations and phone calls—implicates the right of privacy.165

What counts as “personal information” subject to regulation and protection from governmental intrusion and forced divulgence reflects contemporary concerns.166 The origins of this debate about the fundamental protection of personal information is commonly attributed to the 1890 Harvard Law Review article, The Right to Privacy, by Samuel Warren and Louis Brandeis.167 This was around the time of the popularity of the “snap camera” and the rise of yellow journalism, which collectively made it possible for the penny press to broadly expose an individual’s private life.168 Warren and Brandeis wrote:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone.” Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make

163. Chemerinsky, supra note 143, at 649–51 (describing the various constitutional spheres of privacy and how information privacy has yet to be included except statutorily).
165. Id.
166. Chemerinsky, supra note 143, at 649. For a discussion of how to determine whether a person has a reasonable expectation of privacy for private information shared under a theory of social networks, see Lior Jacob Strahilevitz, A Social Networks Theory of Privacy, 72 U. Chi. L. REV. 919 (2005).
168. Id. at 195.
good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”

In response to these new technological developments, Warren and Brandeis proposed a “right to privacy” that “secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.” They disconnect this right to privacy in personal information from copyrighted works, regardless of the work’s “nature or value.” They say:

Under our system of government, [a person] can never be compelled to express [his thoughts, sentiments and emotions] (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, the thought, sentiment, or emotion is expressed.

Other than recent United States Supreme Court cases protecting individuals from the state’s intrusive collection of aggregated information without a warrant—through GPS tracking or cell phone towers, for example—no constitutional right to protect the privacy of personal information has yet arisen from the Warren and Brandeis article. Instead, over the past century, we have seen

169. Id.
170. Id. at 198.
171. Id. at 199. For a critique of Warren and Brandeis’ analysis of copyright as excluding privacy interests and their insufficient consideration of the authorial interests in “censorial copyright” claims, see Balganesh, supra note 73.
173. See, e.g., Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (government collection of third-party cellphone tower data for a suspect is subject to Fourth Amendment
the proliferation and widespread recognition of four privacy torts: public disclosure of private facts, false light, misappropriation (commonly called “publicity rights”), and intrusion into seclusion.\textsuperscript{174}

Warren and Brandeis acknowledged several First Amendment caveats to their argument for a right to privacy, including: (1) matters that are in the “public or general interest” (an admittedly broad category), and (2) “publication of the facts by the individual, or with his consent.”\textsuperscript{175} The common law privacy tort doctrines incorporate these concerns by including First Amendment defenses that reflect the prerogative of the freedom of speech and press. Common law privacy torts are further constrained by federal copyright preemption.\textsuperscript{176} By definition, copyright does not protect facts or ideas, whether or not those facts or ideas were private or previously undisclosed.\textsuperscript{177} Accordingly, copyright’s federal preemption of overlapping state law prevents state-based torts from providing copyright-like protection for facts and ideas.\textsuperscript{178}

Despite these limitations, privacy law and theory has grown in importance over the past several decades alongside major technological developments. Contemporary theories of “intellectual privacy” extend Warren and Brandeis’ article by claiming a “right to be let alone,” making strong arguments for protecting private conversations and spaces. Such a right would foment the ability to think and develop ideas without social and political constraints, especially in a world more crowded than ever with surveillance and privacy-reducing technology.\textsuperscript{179} Contemporary intellectual privacy, a mixture of the forms of privacy described above, is said to protect the “diversity of personal choices and actions,”\textsuperscript{180} promote social order through the

\textsuperscript{174} Daniel J. Solove, \textit{A Brief History of Information Privacy Law}, in \textit{PROSKAUER ON PRIVACY} §§ 1.3–1.4 (Kristen J. Mathews ed., 2006). A fifth tort, breach of confidence, is not widely recognized. \textit{Id.} at § 1.4.1[A][2][d]. \textit{See also} Prosser, \textit{supra} note 17, at 389.

\textsuperscript{175} Warren & Brandeis, \textit{supra} note 167, at 214, 218.


\textsuperscript{177} See \textit{id.} § 301.

\textsuperscript{178} See \textit{id.} § 102(b).

\textsuperscript{179} \textit{RICHARDS}, \textit{supra} note 149.

\textsuperscript{180} \textit{HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE} 77 (2010).
flourishing of debate (which is essential to democratic self-government), bind communities together around shared interests despite individualized differences, and foster the production of aesthetic and scientific goods.\footnote{Id. at 86–88 (citing Priscilla M. Regan, Legislating Privacy (1995)).} In the digital age, the demands for these forms of privacy have only grown louder.

As the exponential growth of digital data has increased interest in constitutional and statutory privacy law, copyright law finds itself more often pressed into service to protect personal information and intellectual privacy. As a result, the “partnership” of privacy and copyright creates troubling tensions for copyright doctrine understood to promote the public dissemination of expression and knowledge.

\textbf{B. When Should Copyright Facilitate Memory Holes?}

The previous section categorized constitutional privacy interests and traced their intersections with copyright law. This subpart considers when copyright protection should incorporate privacy considerations, i.e., when the pairing of privacy and copyright law makes sense in terms of aligned policy goals.\footnote{We focus on liability considerations, but there may be other helpful interplays between copyright and privacy doctrines. Cf. J. remy green, A (Nude) Picture is Worth a Thousand Words – But How Many Dollars?: Using Copyright as a Metric for Harm in “Revenge Porn” Cases, 45 Rutgers L. Rec. 170 (2018) (arguing that copyright damages are a good way of measuring harm in nonconsensual pornography cases); Keller, supra note 51 (copyright remedies could provide a model for remedies in online privacy violations).} We approach this by considering four types of works: (1) never-published or disseminated works, (2) limited-dissemination works, (3) nostalgic remembrances by heirs, and (4) photographs and videos.

\textit{1. Never-disseminated works}

Copyright law has long protected an author’s decision about how and when to first publish his or her works. Unauthorized publication of unpublished works formed the basis of a key
eighteenth-century British copyright case,\textsuperscript{183} which concluded that the core right of copyright is the author’s right to first publication.\textsuperscript{184}

Publishing a work without the author’s permission can harm the author in several ways. Prior to 1978, publication was a prerequisite for federal copyright protection (unpublished works were only eligible for protection under state/common law).\textsuperscript{185} Unauthorized publication divested the author of copyright protection, including the decision whether the work should be published at all.\textsuperscript{186} Unauthorized publication also preempts the author’s decision about what constitutes the final version of a work, including what details it includes or excludes. If the work was never intended for publication, unauthorized publication may disclose the private information of the author and others, invading the author’s intellectual privacy.\textsuperscript{187} This may discourage authors from recording their thoughts as part of intellectual exploration and knowledge dissemination. These potentially significant unwanted consequences contravene copyright’s purpose. For these reasons, Congress and the courts strongly protect authors’ first publication decisions.\textsuperscript{188}


\textsuperscript{184} For a history of the right of first publication in copyright, see Deborah R. Gerhardt, \textit{Copyright Publication: An Empirical Study,} \textit{87 Notre Dame L. Rev.} 135, 140-142 (2011).

\textsuperscript{185} Gordon, \textit{supra} note 7, at 45–46. Because copyrights are now principally governed by federal law, we do not address past or current state/common-law copyrights. Unlike the federal statute, state common-law copyright statutes do not necessarily advance the U.S. Constitution’s aim to “promote the progress of science and the useful arts.” See, e.g., Zvi S. Rosen, \textit{Common-Law Copyright,} \textit{85 U. Cin. L. Rev.} 1055, 1061 (2018) (demonstrating the significant breadth and scope of state common-law copyright compared to federal copyright). Also, federal copyright law expressly preempts inconsistent state laws. 17 U.S.C. § 301 (2012). To the extent federal copyright law conflicts with some forms of privacy claims to suppress copyrighted works as works, any residual common law copyrights should be preempted. See, for example, \textit{Rothman, supra} note 117, arguing for the separation of privacy and copyright to protect different interests in the digital age.

\textsuperscript{186} Gerhardt, \textit{supra} note 184, at 136 (describing consequences of uncontrolled publishing—in this case without notice or registration—of Martin Luther King, Jr.’s “I Have a Dream” speech).

\textsuperscript{187} Balganesh, \textit{supra} note 73; Keller, \textit{supra} note 51.

Thus, it seems appropriate to provide copyright protection for unpublished works even when an author seeks to enforce those rights for authorial privacy considerations. However, the privacy interests should be qualified by copyright’s existing doctrinal limits, such as the idea/expression dichotomy and fair use.\textsuperscript{189} We discuss fair use in more detail in Part V.A.

\textit{Monge v. Maya Magazines} illustrates the tensions between never-disseminated works, privacy, and copyright. In \textit{Monge}, a celebrity singer and model sued a gossip magazine over dissemination of wedding pictures leaked by an assistant.\textsuperscript{190} Though the singer did not take the photographs, the court let her bring a copyright claim anyway.\textsuperscript{191}

The Ninth Circuit held that the photos’ potential newsworthiness did not justify fair use,\textsuperscript{192} even though news reporting normally qualifies for fair use.\textsuperscript{193} The court instead concluded that the publication was not transformative and was “undisputedly commercial in nature.”\textsuperscript{194} Even more significant, the couple kept the photos secret—secluded, in constitutional privacy parlance—from everyone, even their own families.\textsuperscript{195} The court concluded that the right of first publication was stronger than the public’s right to know.\textsuperscript{196} Further, the Court explicitly sidelined privacy law:

Although the published photos were not highly artistic in nature, they do have a defining and common characteristic—until Issue 633 hit the stands, they were unpublished. We pointedly note that we address the unpublished status of the photos only under copyright principles, not privacy law . . . . Maya’s publication

\begin{footnotesize}
\textsuperscript{189} Following the \textit{Harper & Row} decision, Congress amended the fair use statute to say: “The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors.” 17 U.S.C. § 107 (2012).
\textsuperscript{190} Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012).
\textsuperscript{191} Samuelson, \textit{supra} note 141, at 194–95 (speculating that Monge purchased the copyrights from the photographer).
\textsuperscript{192} Monge, 688 F.3d at 1176; cf. Núñez v. Caribbean Int’l News Corp., 235 F.3d 18, 22 (1st Cir. 2000).
\textsuperscript{193} Monge, 688 F.3d at 1173. \textit{See also} 17 U.S.C. § 107 (2012) (including “news reporting” as exemplary of fair uses).
\textsuperscript{194} Id. at 1176.
\textsuperscript{195} Id. at 1169.
\textsuperscript{196} Id. at 1164.
\end{footnotesize}
undoubtedly supplanted Plaintiffs’ right to control the first public appearance of the photographs.\textsuperscript{197}

The legal wrinkles in the plaintiff’s case—the plaintiff’s dubious copyright ownership in the photos and the fact that a secret wedding between two celebrities is news—did not persuade the majority, despite a lengthy dissent.\textsuperscript{198} Indeed, but for the seclusion interest, \textit{Monge v. Maya} resembles the Supreme Court case of \textit{Harper & Row v. Nation}, in which the Court held that first publication of a purloined manuscript detailing critical historical events was not fair use.\textsuperscript{199}

The \textit{Monge} case provides a sympathetic set of facts for the plaintiff, but so will most cases involving the unconsented first publication of never-published works that may not have been meant for publication. It is reasonable for copyright law to apply to never-disseminated works that were “purloined” and published for the first time by an unauthorized publisher, whether or not the author or copyright owner ever intended to publicly disseminate the work.

The ease of broad distribution on the Internet raises the likelihood that more cases will be brought by sympathetic plaintiffs, such as Cindy Lee Garcia, for whom the copyright claim is weak but the sympathies for the plaintiff are strong. In those cases, especially when there has been only limited publication of the work as described more below, courts may be tempted to stretch copyright law to rule in the plaintiff’s favor. For all the reasons already discussed, we urge restraint to conform with copyright’s ultimate aim of the “progress of science” through dissemination.

2. \textit{Limited-dissemination works}\textsuperscript{200}

Never-disseminated works pose the most favorable situation where the law should accommodate the overlaps between copyright and privacy. However, such facts are relatively rare,

\textsuperscript{197} \textit{Id.} at 1177–78 (quotation marks omitted). For critiques of this reasoning, see Andrew Gilden, \textit{Copyright’s Market Gibberish}, WASH. L. REV. (forthcoming 2020); Balganesh, \textit{supra} note 73.

\textsuperscript{198} \textit{Monge}, 688 F.3d at 1170 n.2.


\textsuperscript{200} This subpart focuses on writings. A later subpart looks more closely at the unauthorized dissemination of photographs and videos.
especially in the Internet era. More common are “limited-dissemination” cases.

Copyrightable works can be disseminated on a limited basis, something between never-disseminated (always in the author’s possession) and fully published to the public. Indeed, limited dissemination was fairly common historically. Many copyrightable works, such as personal letters, were seen only by the small number of people who had physical access to them.

These works remained with a limited audience intentionally or because of the costs of reproducing the work onto new chattel and distributing the chattel to third parties. Because chattel access functionally limited the audience for the work, many copyrightable works had some degree of de facto privacy.

Copyright law explicitly distinguishes ownership of the chattel from ownership of copyrighted works that are part of the chattel. For example, the recipient of a physical letter owns the letter as chattel but does not obtain any copyright interest to publish the letter’s contents further. This divided ownership rule protects the author’s privacy interest in expressing themselves by giving the author some control over who gets to see the content. This implicit authorial control reinforces the broader policy interests in first publication.

The concept of “limited” publication has lost some coherence due to the Internet, which facilitates the reproduction and dissemination of works at virtually zero marginal cost. A content publisher might try to share the work with a limited audience through technological controls such as paywalls or password

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201. Gerhardt, supra note 184 at 171–175.
205. Gerhardt, supra note 184, at 140–42 (describing problem of limited publication doctrine and significance of first publication in copyright).
207. Schlachter, supra note 24, at 20.
authentication, but such works often leak from the initial intended audience to reach larger audiences.²⁰⁸ This makes it increasingly unrealistic to expect that expression communicated over the Internet can be restricted to limited audiences without significant effort. In other words, a limited Internet dissemination in the ordinary course may be an oxymoron.

Sometimes, limited-dissemination works raise similar authorial privacy interests as never-disseminated works, such as fomenting communication, relationships, and intellectual autonomy as a precursor to valuable public expression. Because of these potential contributions to the intellectual commons, providing copyright protection to limited-dissemination works can also advance copyright’s overall policy goals. This is true when authors use password controls on digital works (such as emails, text messages, or web postings) in an attempt to keep the expressive work from the general public.

Two recent cases demonstrate the implications when copyright claims for limited Internet disseminations do not advance these goals.²⁰⁹ *Swatch* involved the unauthorized dissemination of a conference call transcript for investors, which a third party published to expose a competitor’s business dealings.²¹⁰ *Diebold* involved the publication of internal emails discussing flaws in voting machines.²¹¹ In both cases, the plaintiffs articulated privacy concerns but brought copyright infringement claims. Each court held that the unauthorized dissemination of the private communications was not copyright infringement.


²⁰⁹. See Leval, supra note 140, at 1119 (“Notwithstanding that nearly all writings may benefit from copyright, its central concern is for the protection of material conceived with a view to publication, not of private memos and confidential communications that its authors do not intend to share with the public. The law was not designed to encourage shoppers to make written shopping lists, executives to keep orderly appointment calendars, or lovers to write love letters.”).


The Swatch outcome reflects that privacy was not a necessary condition for the investor conference call, which was intended to communicate important information to a wide group of people.\textsuperscript{212} In Diebold, arguably the employee-author assumed the email would remain within the company. While not a classic authorial privacy interest, the author’s expectation of a limited audience might have been essential to the email’s creation. Nevertheless, the countervailing social interests in voting machine flaws—not dissimilar to the issues raised by whistleblowers—properly outweigh the privacy considerations.\textsuperscript{213}

As a result, the courts rightly concluded that the disseminations did not constitute copyright infringement. In fact, the precise injury in both cases was more like breach of confidence and trust, an ancient and rarely used tort,\textsuperscript{214} not copyright infringement.\textsuperscript{215} Copyright is the wrong claim given its policy goals of production and dissemination of socially valuable knowledge and information and the plaintiffs’ aim in both cases for erasure or secrecy of that information. Information about voting machine flaws and investor concerns of publicly traded companies are properly of public interest and were at risk in both of these cases because of copyright law’s expanding use in privacy contexts. In contrast to the Swatch and Diebold examples, some limited-dissemination works, such as nonconsensual pornography, may lack both qualities of intentional authorship and socially valuable knowledge and information. We revisit those complexities in Part IV.B.4 below as part of our discussion of photos and videos.

In sum, limited-dissemination works may retain enough privacy characteristics that they are the functional equivalent of never-disseminated works, in which case it is appropriate to recognize the copyright/privacy overlaps. Otherwise, limited dissemination sufficiently and properly erodes privacy interests as protected through copyright. Distorting copyright law to

\textsuperscript{212} Swatch, 756 F.3d at 92.
\textsuperscript{213} Diebold, 337 F. Supp. 2d at 1203 (N.D. Cal. 2004) (“It is hard to imagine a subject the discussion of which could be more in the public interest. If Diebold’s machines in fact do tabulate voters’ preferences incorrectly, the very legitimacy of elections would be suspect.”).
\textsuperscript{214} Richards & Solove, supra note 204, at 156–57; see also Ari Ezra Waldman, A Breach of Trust: Fighting Nonconsensual Pornography, 102 IOWA L. REV. 709, 713 (2017).
\textsuperscript{215} See Leval, supra note 140, at 1119.
accommodate those circumstances undermines copyright’s social balance.

3. Heirs and “nostalgic remembrances”

We refer to heirs’ control over the deceased’s copyrighted works as “nostalgic remembrances.” Exercising this control raises complex and emotional interpersonal dynamics. Sometimes, the heirs seek to maximize the economic returns from the copyright legacy, and their copyright management practices resemble the practices of other profit-maximizing copyright owners.

Other times, heirs exercise their control to address personal considerations, such as keeping public audiences from intruding into the private expressive domain of authors and their families. For example, the estates of authors Willa Cather, James Joyce, and J.D. Salinger used copyright claims to restrict public access to the deceased’s drafts, letters, journals, and notes, including information contained therein. In privacy terms, the heirs’ decisions hindered intrusion into seclusion of intellectual and spatial dimensions—the right to keep one’s effects and mind free from the oversight of others.


218. See, e.g., Gilden, supra note 4, at 93-98. Professor Gilden describes how copyright can help manage personal boundaries, which can help promote kinship, community, and autonomy as well as shape the cultural memory of departed family members and other loved ones. These concerns are not limited to the deceased, however, so this argument pushes copyright to morph into a general-purpose tort for redressing a wide range of social ills. We prefer to keep copyright focused on the problems it was designed to solve, because expanding copyright more broadly creates several new problems, including the ill effects on speech discussed throughout this Article.

219. Subotnik, Artistic Control, supra note 216 (discussing cases). During his lifetime, J.D. Salinger successfully sued a biographer, Ian Hamilton, and his publisher, Random House, to enjoin a biography that incorporated his unpublished letters. Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (holding that an author’s control over unpublished letters supersedes third parties’ rights to publish extracts under fair use). However, soon after this ruling, Congress amended fair use to make sure courts did not overweight unpublished status, which may have undermined the precedential authority of the Second Circuit’s ruling.

220. See U.S. CONST. amends. I, IV; see also Chemerinsky, supra note 143, at 645.
In other situations, heirs seek to manage the reputation of the deceased or people associated with the deceased. This may include preventing the publication of works that would sully the deceased’s reputation as an artist or creator, or works that may advance ideas or arguments antithetical to the deceased’s views. And, like other situations illustrated in this Article, heirs’ privacy- and reputation-driven decisions can create tension with standard copyright doctrines.

The copyright tensions can be exacerbated by the deceased’s instructions in a will or otherwise, as seen in well-known examples of authors instructing their estates to destroy all unpublished drafts, as Kafka famously did, or keep unpublished writing and letters private. With respect to never-disseminated works, the deceased’s desire for control after death can support the intellectual freedom while they are alive (i.e., providing authors with the freedom to think and explore without interference from prying eyes). Knowing that this non-interference will extend post-mortem enhances the freedom and possibly also the works’ creation. Using copyright to control the first publication of works, even when also protecting privacy interests related to publication, makes sense.

If privacy concerns are so strong, it might be tempting to expect the authors to destroy their private works while they are still alive, if the works’ effects, this becomes analogous to a limited dissemination—and when used for scholarly purposes should usually be fair use. See Paul K. Saint-Amour et al, James Joyce: Copyright, Fair Use, and Permissions: Frequently Asked Questions, 44 James Joyce Q. 753 (2007).
rather than risk posthumous divulgation. However, this is a bad idea from an intellectual privacy perspective and inconsistent with our understanding of how authors actually work and express themselves. Authors initially write or create works principally for themselves, not for an audience.\textsuperscript{226} For many artists and authors, creating work is synonymous with thinking; it is essential to processing the world and one's experiences in it.\textsuperscript{227} Capturing those expressions helps authors keep track of their lives and better understand them. If these materials are destroyed while the author is still alive, the author loses a lot more than paper. Authors often analogize the destruction of their works to suicide or death.\textsuperscript{228}

Fortunately, Max Brod (Kafka’s friend who was directed to destroy his works) did not burn Kafka’s manuscripts, and Willa Cather’s heirs eventually released her letters. Those documents will eventually enter the public domain.\textsuperscript{229} Still, the peace of mind that Cather and Kafka felt about copyright’s control over their private effects and intellectual works may have facilitated both living and writing as well as they did.

These cases of heirs using copyright to exert posthumous control of never-published works contrast with copyright claims seeking to control already-published works of the deceased. These latter cases are weaker from copyright policy perspective despite raising similar privacy concerns. Two recent examples follow.

First, The Beastie Boys sued the toy company Goldiblox for its parody of the song \textit{Girls} in an advertisement for an engineering toy

\begin{footnotes}
\item\textsuperscript{226} \textsc{Mihaly Csikszentmihalyi}, \textit{Creativity: Flow and the Psychology of Discovery and Invention} 107–26 (1996) (describing the fun of creating and the pleasure of flow that sustains creativity).
\item\textsuperscript{227} \textit{Id.} at 113–15 (describing creators’ goals centered on challenges, building skills and intrinsic problem solving about the world as they find it); \textit{see also} SilbeY, \textit{Eureka Myth}, \textit{supra} note 3, at 39 (describing an author’s experience of writing as her “filter on the world” and how she “recycle[s] an experience . . . [to] ma[k]e order out of all this stuff that’s so hard to navigate”).
\item\textsuperscript{228} SilbeY, \textit{Eureka Myth}, \textit{supra} note 3, at 87–88 (scientist comparing the shuttering of his project to his child’s death).
\item\textsuperscript{229} Subotnik, \textit{Artistic Control}, \textit{supra} note 216, at 56 (describing risk that authors might destroy works rather than rely on untrustworthy heirs or an inconsistent legal system and arguing that allowing authors to preserve privacy through trusts may be a way to promote creativity so that when destruction is likely, trusts should be allowed). Also, copyrights last at least 70 years, while privacy rights usually expire upon death. Publicity rights can endure beyond the person in some states, like California’s extension for 70 years beyond death (\textsc{Cal. CIV. CODE} § 3344.1 (West 2012)). In contrast, New York’s publicity rights terminate at death (\textsc{N.Y. CIV. RIGHTS LAW} § 51 (Consol. 1995)).
\end{footnotes}
directed at young girls. Deceased Beastie Boy Adam Yauch’s will specified that his music should not be used for “advertising purposes,” and the remaining band members sued to preserve that request.

Second, Marvin Gaye’s heirs sued Robin Thicke and Pharrell Williams over the song Blurred Lines. Gaye’s children explained that “through [dad’s] music . . . we find our compass and our paths moving forward. We are his children, but we too are his fans and we hold his music dear.” They described their vigilance in terms of being “caretakers” with “an obligation to . . . preserve[e] the integrity of the music so that future generations understand its origins and feel its effect as the artist intended.”

Heirs may frame their concerns in terms of their perception of the deceased’s artistic integrity, but copyright law does not recognize moral rights of non-authors, and it recognizes author’s moral rights only under very limited circumstances. Moreover, the heirs’ copyright assertions for already widely disseminated works do not advance interests in private spaces, things, bodies, existing relationships, or information. Instead, the heirs wield copyright to control how the public ascribes meaning to these works—a motivation that conflicts with copyright’s fair use doctrine and principles of the First Amendment.

Heirs also appear motivated to preserve their families’ honor or “reinforce family ties” with the deceased. As Andrew Gilden and Eva Subotnik have explained, family and friends sometimes seek to


231. Id.; see also Subotnik, Artistic Control, supra note 216, at 269.

232. Spanos, supra note 222.

233. Id.


235. Gilden, supra note 216. Professor Gilden argues that copyright assertions by heirs (including for published works) may advance interests in bodily autonomy and personal relationships. He describes these interests as “boundary-management.” We see the copyright/privacy interface as largely rooted in constitutional notions of privacy. Professor Gilden’s article addresses much broader conceptions beyond privacy, including social relations and what he calls “kinship” and “community.”

236. Eva Subotnik, Free as the Heir?: Copyright Successors and Stewardship [June 12, 2017] (unpublished manuscript) (on file with author); Subotnik, Artistic Control, supra note 216, at 276 (describing “reinforc[ing] family ties” as a basis for “dead-hand control”).
preserve memories of the deceased as they wished them to be, without modification by other people who remain alive.\textsuperscript{237} Although privacy law protects family relationships,\textsuperscript{238} those privacy interests usually terminate at death.\textsuperscript{239} Heirs’ claims are posthumous by definition.

Heirs’ efforts to control memories of authors are especially problematic when inhibiting the ability of other authors to build upon the cultural foundation of already-disseminated works. For example, Robin Thicke listened to and learned from past musicians, including Marvin Gaye, to make his own music. This is the way copyright law envisioned authors learning from and building upon each other’s works. Similarly, Goldiblox used the Beastie Boys’ song to make the important point that once derogatory and demeaning connotations—”Girls” objectified because of gender—can be transformed into empowering messages. By allowing this accretive creative process, copyright law enables authors to extend earlier works and create new understandings of them.

In sum, when heirs claim copyright to protect the deceased’s privacy or reputational interests, they affect other people’s lives and expressions. Suppressing the already-published work of the deceased author, even to protect a private relationship with the heir, erases memories for other people as well.\textsuperscript{240} The decision to create memory holes in other people’s lives should not reside solely in the hands of copyright heirs.\textsuperscript{241} Furthermore, excising the work


\textsuperscript{238} Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2016); \textit{e.g.}, Lawrence v. Texas, 539 U.S. 558 (2003).


\textsuperscript{240} Professor Abraham Drassinower frames this discussion in terms of speech, not memories. \textit{Abraham Drassinower, What’s Wrong With Copying?} (2015). Drassinower describes copyright as a “bilateral” right of both authors and speakers; thus, if copyright tilts too much towards authors’ interests, it does not sufficiently protect the rights of other speakers, including subsequent authors. For this reason, Drassinower believes that giving a copyright owner the right to enjoin other people’s speech conflicts with the fundamental structure of copyright law.

\textsuperscript{241} Heirs sometimes feel constrained to manage the copyrights of the deceased in ways they may otherwise wish to avoid by force of inheritable transfer and to pay taxes. Our critique in this paper is with the management choices, not with the problem of inheritable copyright per se. But one way to alleviate the burden of descendible copyright is for it to
from public discourse distorts and depletes the information and cultural understandings about these works and relationships already in circulation. Privacy law does not permit such control over public work in light of the First Amendment and after one’s death. Copyright law should not permit such claims either.

4. Photos and videos

Visual media (e.g., photos and videos) potentially create extra conflicts between privacy and copyright. Photos and videos typically convey more comprehensive information compared to word descriptions. Moreover, a controversial or revealing photo or video circulates more widely and rapidly on the Internet than writing about the same person or event. In addition, the social meaning of exposed photos or videos that were intended to remain private, as is the case of many sexual images, is vastly different from the array of social meanings of already-published written works by authors. Thus, people depicted in photos or videos may feel that their dissemination is especially troublesome. Perhaps for this reason, the law (including privacy and copyright) tends to give photos and videos extra legal protections compared to other media.

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242. This argument might also apply to audio recordings, which are also subject to extra privacy protections such as laws against nonconsensual recordings. For simplicity, we focus on visual media.


Nonconsensual pornography—sometimes imprecisely called “revenge porn”—highlights some of the difficult doctrinal tensions between privacy and copyright protection for photos and videos. Nonconsensual pornography is “the distribution of private, sexually explicit images of individuals without their consent.” Plaintiffs in nonconsensual pornography cases often do not own the copyright to the photo or video depicting them, so they have incentives to adopt some of the copyright acquisition techniques discussed in Part III. For all of the reasons discussed there, copyright may be ill-designed to redress the depicted person’s paramount privacy interests.

So the question is: What are the respective scopes of privacy and copyright protection for photos and videos, and when should one doctrine fill any “gaps” in the other? Two cases (in addition to the cases discussed in Part III) provide some additional insights into the opportunities and pitfalls of copyright/privacy overlaps in this category.

a. Hill v. Public Advocate. This case involved a conservative anti-marriage equality advocacy organization that featured an engagement photo of a gay couple in an anti-gay political campaign. The professional photographer and the married couple sued Public Advocate for copyright infringement and misappropriation of likeness. The court dismissed the misappropriation claim on First Amendment grounds because Public Advocate’s use of the photo “reasonably relate[d] to . . . a matter that is newsworthy or of legitimate public concern.”

However, the photographer’s copyright claim survived. The court concluded that the photo’s reuse may be infringing and not fair, despite its arguably transformative nature. In other words, the photograph’s newsworthiness extinguished the privacy claim but

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249. Id. at 1355.
not the copyright claim. Public Advocate settled the copyright infringement claim by paying the photographer $2501.250

b. Balsley v. LFP. The plaintiff in this case, a television newscaster, participated in a wet T-shirt contest in a public bar.251 Without her consent, a photographer took a photo of her contest participation and published it in Lenshead.com, an adult website. After the photograph’s dissemination, the plaintiff lost her job. To limit further dissemination, the plaintiff bought the photo’s copyright. Subsequently, Hustler, a pornographic magazine, republished the photo, and the plaintiff sued Hustler for copyright infringement, privacy violations, and publicity rights violations. However, only the copyright infringement claim reached the jury. Finding no fair use, the jury awarded plaintiff $135,000 plus fees, and the Sixth Circuit affirmed.

Balsley and Hill resemble several other cases discussed in this Article (Monge, Garcia, and Katz). Unlike the claims in Garcia and Katz, the copyright claims in Balsley and Hill succeeded.252 Why?

The circumstances concerning the photographs are materially different between the cases. For example, in both Balsley and Hill (unlike in Monge), the photo’s initial dissemination was by, or authorized by, the author. Balsley closely resembles Katz in that a public figure (or quasi-public figure) plaintiff acquired a photo’s copyright in order to suppress it. Unlike the plaintiff in Katz, however, the Balsley and Hill plaintiffs prevailed over a fair use defense.


252. We do not analyze the publicity rights of both plaintiffs because they are beyond the scope of this article. See ROTHMAN, supra note 117.

253. Two other unsuccessful copyright enforcements involving photographs or videos include: (1) Dhillon v. Does 1–10, No. C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014) (the defendant reused the plaintiff’s headshot fairly to criticize plaintiff’s political views); and (2) Caner v. Autry, 16 F. Supp. 3d 689 (W.D. Va. 2014) (a university president sought to suppress further dissemination of videos of which he was not the author because they supported others’ claims that he lied).

These cases implicate false light more than intrusion upon seclusion or other privacy doctrines because the depictions were already widely disseminated. Nevertheless, they failed on both copyright and privacy grounds because the depictions were not false, and they had substantial newsworthiness and transformative value.
One hypothesis is that the Balsley and Hill plaintiffs had stronger arguments to undermine fair use. The fair use doctrine excuses some secondary copyright uses by using a multifactor test with the ultimate purpose of enabling more expression. When considering whether a secondary use is fair, courts evaluate the purpose and character of the secondary use, including whether the secondary use transformed, commented on, or critiqued the original work in any way. Other factors include the nature of the original work, the amount and substantiality of the original work taken by the secondary use, and the secondary use’s effect on the market for the original work or the value of the original work.254

In Balsley, the photo republication was not transformative because the Lenshead and Hustler publications served the same purposes—voyeuristic entertainment. Conversely, in Katz and Hill, the republication criticized the photo’s subject, a classic fair use. Also, even though the plaintiff in Balsley didn’t have any interest in commercializing the photo, the jury found that the republications reduced her ability to market it (which would be relevant to fair use’s “market harm” factor).255 That conclusion seems artificial because the plaintiff wanted to keep the photo out of the marketplace entirely in order to erase all public knowledge of it (which was not the case in Hill).256 This is qualitatively different than a copyright owner “windowing” content257 to maximize economic returns. A suppression motivation is precisely what copyright law should not support.

Yet, it is easy to imagine the jury sympathized with the plaintiff in Balsley. Balsley never had the choice of whether to publish the photo, and its dissemination damaged her career. The photo’s presentation was objectionable; Hustler included the photo in its “Hot News Babe” contest and described the plaintiff as a “tasty talking head.”258 Also, like cases involving nonconsensual pornography, Balsley involves “grave emotional and dignitary

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255. Id. § 107(4) (“[T]he effect of the use upon the potential market for or value of the copyrighted work.”).
256. For a critique of this weak market harm analysis, see Gildén, supra note 197; see also Balganesh, supra note 73 (discussing the weak market harm analysis in Monge as well).
257. See supra text accompanying notes 2 and 3.
258. Balsley v. LFP, Inc., 691 F.3d 747, 756 (6th Cir. 2012). Similarly, had Hill reached a jury, the jury might have been sympathetic to the engaged couple and the fact that a political organization targeted their choice to be married.
harms,” increased “risks of physical assault,” and “chill[ed] self-expression and ruin[ed] lives.” If the case did not involve sexualized images and the media’s exploitation and objectification of women, the plaintiff’s opportunistic copyright interest might have been less compelling to the jury.

The jury also might have sympathized with the plaintiff in Balsley because the wet T-shirt contest took place before a limited audience. In contrast, the Garcia actress expected to be in a widely disseminated film. However, this does not explain the pro-plaintiff result in Hill, which involved photos taken in the open that were published first, with plaintiffs’ permission, on a public website. The plaintiffs in Hill or Monge might have secured their photos more carefully if they had feared their widespread dissemination and reuse, but they still would have created the photos. Authorial privacy interests were therefore less at play in both Hill and Monge.

Balsley also participated in the wet T-shirt contest behind a business establishment’s doors, which ordinarily means that her actions would not be viewable to the world. However, the business establishment—a bar—arguably was still a public space. Both privacy law and the First Amendment allow reporting and depiction of events in public spaces. Copyright law should not usurp this public reporting function. The plaintiff in Balsley might have preferred not to have her participation in a wet T-shirt contest recorded, but her participation was squarely in the public sphere. Copyright law should not be used to erase content representing consensual public behavior at the expense of promoting other authors’ speech and public debate (the speech of bystander photographers, subsequent speakers about the photographs, and the media).


261. Debate exists as to what kind of film Garcia consented to, but she did at least consent to her performance being published as a film. As the appellate decision indicates, she might have a fraud claim, but not a copyright claim.

262. See, e.g., Rebecca Tushnet, Fair Use’s Unfinished Business, 15 CHI.-KENT J. INTELL. PROP. 399, 405 (2016) (critiquing copyright claims that assert privacy interests when they are not interests of authorship).
The pseudopublic location of Balsley’s activities weakens her privacy interests, making it especially problematic to distort copyright doctrine in an attempt to accommodate those privacy interests. But changing the focus of the privacy interests—say, activity in private spaces such as nonconsensual pornography—should not strengthen the copyright interests of works that have been disseminated, even in a limited fashion. Authored works that have never been disseminated, however, may properly be the subject of a copyright claim as described above, aligning the spatial privacy and bodily privacy with the never-disseminated aspect of the copyrighted work. Nonconsensual pornography does not fall into that category, however, when it is not authored by the victim (when it is authored and owned by the defendant who disseminates without permission), or when it is authored and disseminated by the subject, albeit to a limited audience.\(^{263}\) The sympathetic nature of nonconsensual pornography claims has led to the persistent misuse of copyright in privacy-invasive settings by both courts and complainants, as previously discussed.\(^{264}\) However, it has also led to more focused law reform efforts to protect victims outside the scope of copyright law.\(^{265}\)

In sum, although photos and videos can be especially privacy invasive, they should not be treated differently from other copyrighted works. Moreover, the qualities of photographs and videos as particularly attention-grabbing and capable of conveying comprehensive information reinforce the value of separating privacy and copyright interests. Otherwise, these very qualities of photographs and videos risk prioritizing privacy interests in every copyright case and paying inadequate attention to the other social values encoded into copyright law.

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\(^{264}\) See discussion of Monge and Garcia supra notes 131–146 and 207.

5. Why valorize copyright?

Stepping back, the privacy injuries in most of the cases discussed in this Article are cogent and significant, namely bodily appropriation, intrusion into seclusion, and misappropriation of identity. Yet, these privacy claims fail. In contrast, the copyright claims are doctrinally slippery and misguided, yet sometimes they prevail. Why?

Perhaps the success of the copyright claims and the failure of privacy claims is part of a broader phenomenon of the “propertization” of IP, where legal rights in intangible assets are considered to be “property” rights supported by strong property social norms that attach to ownership and control of land and personal property. If so, the law is biased in favor of property, and because privacy is not property, privacy claims fail. An alternative hypothesis is that privacy and free speech are both important constitutional rights, but when they conflict, free speech prevails. In contrast, copyright is sometimes characterized as a private right that does not conflict with other important fundamental rights, such as the right of privacy and free speech. These characterizations of copyright and privacy would naturally lead to copyright succeeding in cases where privacy claims must yield to the First Amendment.

However, these characterizations are flawed. Copyright law is not just a private right. It aims to promote progress of science to benefit the public. As a power granted to Congress in pursuit of the public interest, permissible copyright limitations on free speech require consideration of public benefits as well as private interests. We cannot simply focus on the private benefit from suppressing photos and videos without considering the value of the secondary speech they promote. Otherwise, copyright law becomes a tool for

\[266.\] For an overview of the literature and a critique of its inevitable strengthening of IP rights, see Michael A. Carrier, Cabining Intellectual Property Through a Property Paradigm, 54 Duke L.J. 1 (2004).

\[267.\] We do not condone this hierarchy of property over privacy or, for that matter, the characterization of copyright as property. See DRASSINOWER, supra note 240, at 22 (arguing against treating copyright as a property instead of a relationship between a person, his or her speech, and the audience).

\[268.\] Eldred v. Ashcroft, 537 U.S. 186, 190, 219 (2003) (describing copyright as a “marketable right to the use of one’s expression” and that “[the First] Amendment and the Copyright Clause were adopted close in time . . . indicat[ing] the Framers’ view that copyright’s limited monopolies are compatible with free speech principles”).
scrubbing unwanted content, an Orwellian device that stifles diverse expressions and critical conversations. If privacy must be protected—and there is much to deride in the privacy-invasive behavior of defendants described above—privacy law (or some other tort law) should protect it. Drafting copyright to perform that job derogates copyright’s service to the public interest in the progress of science.

6. Recap

Copyright and privacy can partner to spur creation and eventual dissemination of socially valuable works. The most significant and effective partnership is that of protecting never-disseminated works during the author’s lifetime, where unapproved dissemination, or even the threat of such dissemination, can undermine the author’s intellectual freedom and thus authorial productivity. In most instances, however, using copyright to protect privacy produces untenable conflicts with fundamental rights, such as the right of free speech and the public interest in science and self-government that free speech promotes. Copyright law famously does not distinguish between high value and low value works (however that may be defined), leaving discrimination of treatment based on aesthetic or moral features of the work to the audience. Were privacy interests to become the proxy for aesthetic or content discrimination, enabling plaintiffs to claim stronger copyright because the subject of the work is particularly privacy invasive or allegedly not socially valuable,

269. Using copyright to suppress factually misleading or inaccurate content to prevent distortion through deletion is equally problematic. First, these claims are better suited for defamation actions, with their balanced proof requirements and remedies. Second, First Amendment doctrine, which copyright incorporates, defaults to more speech (a “marketplace”), not less, to promote optimal quantity and quality of expression. See supra text accompanying note 14 (discussing the counterspeech doctrine).

270. Leval, supra note 140; Tushnet, supra note 4, at 2349 (rejecting the use of copyright to protect subjects of intimate photographs from their unwanted dissemination and suggesting “the case for a new intellectual property (or more properly, privacy or dignity) right for people depicted in intimate photos and videos could most persuasively be made on its own merits”); see Jeffrey L. Harrison, Privacy, Copyright, and Letters, 3 ELON L. REV. 161 (2012).

271. Samuelson, supra note 141, at 198 (arguing that Warren and Brandeis “recognized that copyright’s utility in protecting privacy interests was salient only when works were unpublished”).

copyright law’s promise of promoting diversity of expression and
democratic engagement would falter. This outcome is worth
resisting, and the next Part will explain how to do so. However, we
do not intend to derogate the availability of recourse pursuant to
privacy and reputation laws in situations where copyright recourse
is improper or unavailable.

V. FIGHTING COPYRIGHT’S MEMORY HOLE:
SOME REFORM PROPOSALS

This Article has explained how copyright’s deployment can
erase content in order to protect privacy and reputation. It has also
identified some limited circumstances in which copyright may be
an appropriate tool for protecting privacy interests, especially
when the work has never been disseminated and is not yet part of
a public “memory.” In most or all other circumstances, deploying
copyright to manage privacy and reputation abuses the purpose of
copyright law and its foundation in the public interest and should
not be countenanced. This Part considers doctrinal steps to inhibit
the misapplication of copyright law for privacy purposes.

A. Enhancing the Fair Use Doctrine

The fair use doctrine is a multifactor test rendering the
unauthorized use of a copyrighted work beyond copyright law’s
proscription.273 It considers: the purpose and character of the
secondary use (including whether the secondary use
“transformed” the work), the nature of the original work, the
amount and substantiality of the original work taken by the
secondary use, and the secondary use’s effect on the market for the
original work or value of the original work.274

Fair use already thwarts abusive enforcement actions, as Katz
has demonstrated. The fair use doctrine can be further enhanced to
inhibit and perhaps prevent other similar actions, especially using
fair use’s “nature of the work” prong.275

Typically, as part of this second factor, courts consider whether
the work is more fact-like or fiction-like. In the cases concerning
photography, for example, courts struggle with the level of

275. Id.
creativity and factual nature of the work. Where the use of the photo provides information that text could not adequately convey, such as the details of the WorldStarHipHop fight, fair use should favor disclosure. On the other hand, where text would communicate just as effectively as photos or videos, such as communicating the fact that the marriage took place in Monge, the second fair use factor might weigh against disclosure. Even then, where the depicted person might improperly dispute the facts, showing the photo or video helps discern the truth, and fair use should support that truth-validating function.\(^{276}\)

Courts also consider the published or unpublished nature of the work as part of the second fair use factor. When a work was not published but only disseminated privately, or first published without authority, protecting the work from further disclosure should be counted against fair use to protect the author’s or owner’s privacy interest in seclusion and the intellectual privacy coincident with authorship.\(^{277}\) This might fit the facts of Balsley and Monge, for example. Conversely, when a work was initially published legitimately, as in Hill and Katz, and the copyright claim is more akin to false light rather than first publication or intrusion into seclusion, the extant publication of the work should weigh towards fair use.

The second fair use factor should also consider how and when copyright acquisition occurs. Post-publication acquisition by the person depicted in the work for the purpose of suppression should weigh towards disclosure.\(^{278}\) This would include works “about the owner” (as opposed to “by the owner”), such as headshots,
business reviews, and videos taken of public activities.\textsuperscript{279} This implicitly privileges authors over other copyright owners,\textsuperscript{280} but such privileging is not unprecedented in copyright law. For example, the termination of transfer right is available only to a work’s author and heirs and not to assignees.\textsuperscript{281}

These suggestions indicate that the second fair use factor—typically given little love in fair use analyses—has a much more significant role to play when copyright claims implicate privacy concerns. As a secondary benefit, this would take some pressure off the first and fourth factor, both of which confound courts when market injury or transformation is contestable. As illustrated in \textit{Katz}, courts sometimes apply the “market effect” factor to acknowledge that the erasure attempt is illegitimate. However, in other cases (such as \textit{Balsley} and \textit{Monge}), courts analyze the fourth factor in ways that tautologically favor plaintiffs instead.\textsuperscript{282}

Fair use can be a costly defense to litigate. Courts are reluctant to grant fair use defenses on motions to dismiss,\textsuperscript{283} so a fair use defense usually would entail the costs of discovery and preparing summary judgment motions—efforts that can easily consume hundreds of thousands or even millions of dollars.\textsuperscript{284} The substantial time and expense needed for fair use defenses act as a deterrent to litigating them, even if the court might subsequently award attorneys’ fees. Therefore, configuring fair use doctrines to efficiently sort legitimate copyright claims from those motivated primarily by privacy concerns would be a good step, but the recourse still may not be cost effective.

\textsuperscript{279} Some works, like selfies, are both “by” and “about” the owner. The “by the owner” part should be given priority in those cases.

\textsuperscript{280} See Balganesh, supra note 73 (proposing to limit the ability to bring “censorial copyright” claims to authors).


\textsuperscript{282} Balsley v. LFP, Inc., 691 F.3d 747, 761 (6th Cir. 2012) (“We agree with Plaintiffs that their current desire or ability to avail themselves of the market for the Bosley photograph is immaterial to the issue outlined by the statute, namely, whether there is potential for an adverse effect on the market for the photograph should the challenged use become widespread.”). See Balganesh, supra note 73, at 55 (suggesting that the fourth fair use factor should “recedes in importance” when privacy interests are claimed through copyright).

\textsuperscript{283} WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 10:159 (2019); Tehranian, supra note 51, at 267–68.

\textsuperscript{284} AIPLA, 2017 REPORT OF THE ECONOMIC SURVEY I-189 (2017), (the mean cost for copyright litigation inclusive of discovery, motions, and claim construction is $125,000; that goes up to $278,000 when including pre-trial, trial, post-trial, and appeal costs).
Furthermore, fair use is a multifactor and equitable test, and appellate circuits often develop their own idiosyncratic jurisprudence. Thus, even if courts started to adapt fair use principles to recognize privacy considerations (positively or negatively), it could take decades before those principles became predictable and recognized nationally. Congress could accelerate that process by amending the fair use statute, like it did to avoid overprivileging unpublished works\textsuperscript{285} after the Supreme Court’s decision in \textit{Harper & Row Publishers, Inc.}\textsuperscript{286} However, Congress has only made that one substantive statutory amendment to fair use in forty years. Courts cannot expect Congress to redress this issue.

\textbf{B. Attorneys’ Fees}

Section 505 of the Copyright Act authorizes courts to award attorneys’ fees to prevailing parties at their discretion.\textsuperscript{287} In \textit{Kirtsaeng}, the Supreme Court reinforced that fees can be awarded to the prevailing party “even when the losing party advanced a reasonable claim or defense.”\textsuperscript{288} Therefore, courts have the power to award attorneys’ fees to defendants in cases seeking illegitimate copyright suppression.

Such fee awards have two salutary benefits: they compensate the defendant for defending the content against illegitimate erasure in violation of public discourse and free speech principles, and they deter future plaintiffs from bringing copyright claims to suppress speech. Courts have already recognized the need to award attorneys’ fees in some memory hole cases,\textsuperscript{289} and the \textit{Kirtsaeng} case should encourage courts to make such awards even more routine.

\textbf{C. Anti-SLAPP Law}

This Article has highlighted numerous examples of copyright lawsuits that are motivated by the desire to suppress already

\footnotesize{285. 17 U.S.C. § 107 (2012). (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).}


\footnotesize{287. 17 U.S.C. § 505 (2012).}


published and socially beneficial speech—material that, in many
cases, helps educate audiences about matters already circulating
and in the public interest. As described in Part II, anti-SLAPP laws
do two things: (1) they expedite dismissal of unmeritorious
lawsuits by putting the burden on the plaintiff to establish their
case in the complaint,²⁹⁰ and (2) they provide attorneys’ fee shifting
for defendant-victims.²⁹¹ Many privacy lawsuits framed as
copyright cases are SLAPPs²⁹² and should be treated as such.

Unfortunately, to our knowledge, no copyright enforcement
action has been deemed a SLAPP.²⁹³ This reflects several factors,
including the presence of anti-SLAPP laws only in state civil
procedure law, not federal, and the general inapplicability of state
procedural laws to federal substantive law claims. To remediate
this, Congress should enact a federal anti-SLAPP law and have it
apply to copyright claims that meet the statutory standards of
suppressing socially beneficial speech.²⁹⁴

Applying anti-SLAPP protection to copyright cases that are
designed to advance privacy interests at the expense of socially
beneficial speech would have several benefits, including: (1)
accelerating dismissal of the case, which relieves defendants from
time, money and harassment involved in fighting unmeritorious
lawsuits; (2) narrowing the scope of discovery only to the merits of
the anti-SLAPP motion, which curbs invasive and harassing
discovery requests; (3) implicitly shifting the fair use burden to
plaintiffs, who would have to establish the tenability of their case

²⁹⁰. Instead of filing a motion to dismiss or a state-law equivalent (such as a demurrer), a
SLAPP defendant typically files a “motion to strike.”

²⁹¹. Most state anti-SLAPP laws make such fee shifts mandatory. State Anti-SLAPP Law
Scorecard, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your
-states-free-speech-protection/ (last visited Sept. 15, 2019). Others leave it to the judge’s discretion. At least one
state, Washington, imposes a mandatory penalty in addition to the fee shift. WASH. REV.

²⁹². Other examples can be found in Tehranian, supra note 51.

²⁹³. In the one case we know of, Johnson v. Saunders, No. A104475, 2004 WL 1874671
(Cal. Ct. App. Aug. 23, 2004), a state court granted an anti-SLAPP motion to strike in response
to a woman’s allegation that she had “copyrighted her name.” Her copyright claim was
defective on several key grounds, including the fact that state courts do not have jurisdiction
over federal copyright cases. Apparently, the Court interpreted the plaintiff’s name-related
claim as a trademark claim, despite its labeling as a copyright claim.

²⁹⁴. See Tehranian, supra note 51, at 283–86.

Disclosure note: Professor Goldman is a member of the board of directors of the Public
Participation Project, a non-profit organization advocating for a federal anti-SLAPP law.
in the complaint, including why obvious fair use defenses would not succeed; and (4) making fee-shifting mandatory, which provides defendants with more confidence in financial reimbursement than the copyright law’s discretionary fee shift that Section 505 provides. This may encourage more defendants to fight abusive copyright SLAPPs rather than acquiesce to plaintiffs’ demands. It would also discourage copyright owners from initiating unmeritorious lawsuits as they know that they would have an increased risk of paying the defense costs.295

Enacting a federal anti-SLAPP law is a good idea.296 Providing enhanced protection for copyright defendants who are targeted for disseminating socially beneficial speech provides another compelling justification.

D. Duration

In numerous areas of privacy law, including many tort and constitutional claims, plaintiffs must be alive to have a right of action. This is justifiable because the fundamental value of privacy runs with the person. Why should copyright be any different when it is being used to assert similar kinds of claims? Instead, when copyright is asserted to protect privacy interests—to suppress private expression rather than to selectively or eventually disseminate it—the copyright duration should parallel that of privacy.

When the privacy interest is asserted through or embedded in the copyrighted work, heirs to the copyright should not have standing to assert it, and neither should subjects. Moreover, when privacy is asserted through copyright, and the author voluntarily published the copyrighted work (despite the subject’s possible contrary interests), the claim of privacy by the author or subject (whether brought as a copyright claim or not) should be waived or limited to actual damages as it would in a privacy dispute.

295. A related approach would be to strengthen 17 U.S.C. § 512(f) (2012), which creates a cause of action for sending spurious copyright takedown notices. If § 512(f) were stronger, it would discourage copyright owners from seeking removals not grounded in legitimate copyright interests.


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CONCLUSION

We do not seek to disturb the fundamental quid pro quo animating copyright law: that by giving some exclusive rights to copyright owners, society will benefit from the resulting works that are produced by that benefit. However, the quid pro quo function is not linear. Dialing up the protection for copyright benefits society to a point. After that point, overprotection for copyright law becomes a net detriment to society by excessively interfering with social discourse. This Article has explored one of those situations where expansive applications of copyright exclusivity leads to memory holes that are counterproductive to copyright’s purpose.

Unquestionably, the rise of the Internet has exposed some doctrinal weaknesses in privacy law. Despite the legitimate and sometimes profound harms experienced by some privacy victims, copyright law should not be manipulated to fix privacy law’s problems. Instead, copyright law should remain focused on the purposes it is designed to serve. If those purposes coincidentally counsel in favor of redressing privacy violations—as they may with the unauthorized publication of never-disseminated works and limited other cases—then copyright law is the right tool. In all other cases, it is not the right tool; and attempts to stretch copyright law into a general-purpose privacy law pose a grave threat to free and diverse social discourse, and ultimately to our society.

297. McKeown, supra note 5, at 16 (“[C]opyright cannot be everything to everybody . . . No matter how noble and important the values of privacy and protection of reputation, copyright is not the direct vehicle for their vindication.”).

298. Id. at 8 (“[A] weak copyright claim cannot hijack the First Amendment.”).