

## COPYRIGHT'S OTHER FUNCTIONS

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### INTRODUCTION

As Judge McKeown carefully explains, copyright provides incentives to create works that may have commercial value. As a not unforeseen part of the statutory bargain, copyright holders hold a governmentally granted means to prevent others from exercising full expression. Speech is primarily impacted by copyright when the defendant is proven to have infringed the plaintiff's protected work. In that case, the danger to the expressive freedoms of the defendant can be mitigated by copyright safety valves (or policy levers)<sup>1</sup> such as the scope of protection (narrowed by the idea/expression distinction, for instance), applicable defenses (such as fair use), and (hopefully) a reasonably limited term of protection.

This logic is how the tension between copyright and the First Amendment is usually resolved. Yet, as Judge McKeown also carefully explains, we are beginning to observe a new type of tension that challenges this long-observed truce. In this still emerging scenario, speech is impacted when copyright holders use their statutory grant as a means to express non-market-based motivations and to further individual and social goals besides creativity. These other motivations and goals are neither necessarily personally wrong nor socially irrelevant; however, they fall within the penumbra rather than the core of copyright's policy concerns because they do not engage with the commercial instrumentalism broadly underlying our intellectual property laws. In *Garcia v. Google, Inc.*, for example, the plaintiff's copyright claim was made to further her interest in personal public safety and to distance herself from the content in a protected work with which she did not agree, rather than to profit from its revenue stream. Garcia clearly did not have a commercial interest in the work; indeed, she was interested in making sure that its dissemination, whether commercial or

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1. See generally Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575 (2003).

otherwise, was curtailed. This desire *not* to distribute a work, for privacy or public safety, or other reasons not related to commercial interests, raises new possibilities of censorship in the guise of authorship.

I refer to these as other concerns or goals as the “other functions” of copyright not because they are unimportant or trivial, but because they do not seem to align with the dominant commercial rationale for copyright. Judge McKeown and other commentators, such as Jeanne Fromer,<sup>2</sup> worry about the growing reliance by plaintiffs upon these other functions of copyright. They discuss *Garcia* both to draw attention to this trend and to express their dissatisfaction with it. Judge McKeown refers to this evolution in case law as “[c]opyright as the Go-To Tool,”<sup>3</sup> and Fromer finds that, in these types of cases, “ill-fitting motivations . . . that are not congruent with the commercial instrumental aims of intellectual property and which may introduce distortionary effects on intellectual property law as a whole.”<sup>4</sup> While the outcome of *Garcia* seems inevitable despite a sympathetic plaintiff (because to have held otherwise, pragmatically, would have created huge hold-up and anti-commons effects in large, collaborative and expensive-to-create works such as motion pictures), the technical holding regarding ownership of copyright<sup>5</sup> should not obscure the larger dilemma it raises: *How should courts treat the other functions of copyright law?*

The Internet challenges us to understand copyright law as taking a more capacious role in overall knowledge governance. Unlike observers such as Judge McKeown, or scholars who would prefer that intellectual property be organized according to market-based principles,<sup>6</sup> the greater danger I see is that copyright’s justifiable uses for ends other than pure commercial incentive might be overshadowed by copyright formalism. This response makes several points in support of viewing some other functions of copyright as legitimate responses to the decentralized technical architecture of digital networks. The motivations of copyright owners are diverse and are not always or purely about commercial gain in the marketplace. This is certainly

2. Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 556 (2015) (discussing “examples of different motivations for asserting rights, including privacy and reputational interests, protection of one’s market beyond the intellectual property right, and extraction of rents from third parties without sufficient contribution to the progress underlying the granting of the right”).

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

4. *Id.* (“The law sometimes accounts for these motivations, but at other times it does not”).

5. *Cf.* Brief for Amici Curiae, *Garcia v. Google, Inc.*, (9th Cir. Dec. 5, 2014) (No. 12-57302), 2014 WL 7040101.

6. Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251 (2014).

true lately in the context of the huge amounts of user-generated content in digital networks.<sup>7</sup> If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present. And even if the primacy of copyright's commercial instrumentalism is conceded, the actual constitutional mandate pertains to "progress of science," which can also (perhaps counterintuitively) include the right not to exploit a work at all—what could be viewed as a largely unexplored negative right of copyright.<sup>8</sup>

Furthermore, and perhaps more to the point, privacy concerns have always been a part, albeit a minor aspect, of copyright, and the fair use doctrine has largely been the primary doctrinal category under the 1976 Act to recognize this concern.<sup>9</sup> Supplementing fair use, copyright provides an additional policy lever for an unpublished work. As the U.S. Supreme Court acknowledged in *Harper and Row, Publishers, Inc. v. Nation Enterprises*,<sup>10</sup> the right of first publication is historically connected to privacy interests of the author, because the work has not yet entered the commercial realm. That is, to the extent that we are concerned about impacting free expression through recognition of incidental copyright functions—such as claims motivated by privacy or safety rather than commercial gain—these concerns can be mitigated by the very same copyright policy levers as are applied to works made for commercial gain. Copyright may need adjustment in the non-commercial context, but non-commercial goals of copyright are fair game for doctrinal nuances and evolution. Privacy and other functions of copyright should not be categorically excluded as beyond the legitimate purview of copyright's concerns, and copyright will not be stretched beyond its breaking point by incorporating them.

These points are illustrated further here through a case study of a growing public policy problem—cyber-harassment through the use of non-consensual pornography ("NCP") posted on the Internet, typically but not always by ex-partners. This case study is chosen for several different reasons. It poses the same equities present in *Garcia*; both situations involve breach of the terms of a private agreement by one party, in consequence of which the victim of that breach turns to copyright to assert control over

7. See generally Edward Lee, *Warming Up to User-Generated Content*, 2008 U.ILL.L.REV. 1459 (2008).

8. *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U.J. INTELL. PROP. & ENT. L. 422, 442 (2014) ("Revenge porn victims are a perfect example of the ways in which negative copyrights incentivize creation: those images would never have been shared if victims did not believe they could control who saw them.").

9. *Salinger v. Random House, Inc.*, 811 F.2d 90, 94 (2d Cir. 1987).

10. 471 U.S. 539, 554 (1985).

distribution of content for compelling reasons. However, unlike the *Garcia* plaintiff, NCP plaintiffs typically do not participate in the creation of content for commercial gain or for public consumption. And so while the questions of ownership and subsequent control over NCP works may have ripple effects on other collaborative works, the fact that they are created largely in confidential, non-commercial and/or private contexts is a key distinction that can aid courts in surgically targeting these cases within broader copyright doctrine.

Additionally, the NCP cases are different from the other cases described by Judge McKeown as part of a “litigation cottage industry” of privacy cases involving celebrities, because both parties in NCP cases are typically non-public figures and the content is typically not newsworthy (except to the extent that it is posted online and creates unwanted attention upon the plaintiff, thereby creating a collateral and typically unwanted notoriety). Thus, NCP cases thus fall within an area where the First Amendment claims are relatively weak, and the corresponding privacy claims and ensuing social benefits asserted through copyright are strong.

In short, privacy concerns expressed through copyright are not an anomaly and can be addressed, if in limited and targeted fashion, through copyright’s current doctrinal framework. Thus copyright doctrine *can* perform the narrow tailoring in response to a defendant’s fundamental right of expression, at least in the realm of NCP.

#### BALANCING COPYRIGHT’S OTHER FUNCTIONS AND THE FIRST AMENDMENT: A CASE STUDY OF NCP

A proverbial spate of law review articles and books has recently highlighted the issue of what is colloquially dubbed “revenge porn.”<sup>11</sup> In this response, the term “non-consensual pornography” is chosen as an umbrella term to highlight the harms inflicted. As a recent observer states: the

typical revenge porn scenario . . . includes an image captured or obtained consensually, two intimate partners, a break-up, and a revenge post of the image. But this is not the only scenario in which the non-consensual distribution of sexually explicit images occurs. Sometimes, friends, classmates, or co-workers of an individual obtain and distribute such images. Or friends, exes, or strangers hack into individuals’ computers to acquire images to distribute later. And in some instances, the distributors capture and post images without the individuals’ knowledge or

11. See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014); Ann Bartow, *Copyright and Pornography*, 91 OR. L. REV. 1, 44–45 (2012).

consent. . . . Although popular media tends to use the term “revenge porn” to describe all of the scenarios just mentioned, a more accurate label is non-consensual pornography (NCP). NCP, of which revenge porn is a subset, includes the distribution of any sexually explicit image of an individual without her consent, regardless of how the distributor obtained the image and regardless of whether the situation involved an ex. . . . [T]herefore, [t]he term NCP [may be used] to clarify that the revenge porn problem expands beyond vengeful ex-lovers.<sup>12</sup>

The problem of NCP is no mere moral panic. According to one estimate, this type of activity affects up to 850,000 victims each year.<sup>13</sup> Federal and state criminal lawsuits have begun to address this issue.<sup>14</sup> Last year, both California and Washington state passed criminal statutes targeting NCP (two of a handful of states to do so), and California’s Attorney General Kamala Harris recently successfully prosecuted one of the more flagrant purveyors of NCP on the Internet.<sup>15</sup> Civil suits have also been filed, largely the work of pioneering law school clinics and pro bono lawyers.<sup>16</sup>

A recent Federal Trade Commission (“FTC”) settlement illustrates both the problem and the steps now being taken by regulators to target this

12. Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 183–84 (2015).

13. David Bateman & Paula Martersteck, *Copyright Law and the Fight Against Revenge Porn: Q&A with David Bateman of the Cyber Civil Rights Legal Project* (Feb. 19, 2015), <http://www.jdsupra.com/legalnews/copyright-law-and-the-fight-against-reve-54213/> (stating “[i]f you could find a way to fund it, you could have an infinite number of clients. I was at a conference recently and they said there an estimated 850,000 victims a year.”).

14. *People v. Barber*, 2014 NY slip op. 50193(U), 42 Misc. 3d 1225(A), 992 N.Y.S.2d 159 (Crim. Ct.); *State v. Parsons*, No. A-3856-10T3, 2011 WL 6089210 (N.J. Super. Ct. App. Div. Dec. 8, 2011); see also Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore is Sentenced to Prison*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/>. According to various news outlets, Moore purchased nude photographs acquired by Charles Evans, a computer hacker who accessed email accounts to acquire the photos. *Id.* Furthermore, the photos identified their subjects by name and sometimes included the subjects’ contact or social media information. *Id.* Moore pleaded guilty to “one count of unauthorized access to a protected computer to obtain information for purposes of private financial gain and one count of aggravated identity theft.” *Id.* He was sentenced to two and a half years in federal prison, followed by three years of supervised release.

15. CAL. CIV. CODE § 1708.85 (West 2015) (July 1, 2015); WASH. REV. CODE § 9A.86.010 (2015) (creating the crime of wrongfully distributing intimate images, effective as of Sept. 26, 2015); Danielle Citron & Woodrow Hartzog, *The Decision That Could Finally Kill the Revenge-Porn Business*, THE ATLANTIC (Feb. 3, 2015), <http://www.theatlantic.com/technology/archive/2015/02/the-decision-that-could-finally-kill-the-revenge-porn-business/385113/> (“California’s Attorney General Kamala Harris is prosecuting revenge-porn businesses exploiting confidential communications for financial ends); see also David Wagner, *San Diego Man Found Guilty in Revenge Porn Trial*, KBPS PUBLIC BROADCASTING (Feb. 2, 2015), <http://www.kpbs.org/news/2015/feb/02/san-diego-man-found-tkttk-revenge-porn-trial/> (convicting revenge-porn operator Kevin Bollaert on several charges of extortion and identity theft.).

16. *Patel v. Hussain*, No. 14-14-00459-CV, 2016 WL 270014 (Tex. App. Jan. 21, 2016); Matthew Goldstein, *Law Firm Finds Project to Fight “Revenge Porn”*, N.Y. TIMES (Jan. 29, 2015), [http://dealbook.nytimes.com/2015/01/29/law-firm-finds-project-to-fight-revenge-porn/?\\_r=0](http://dealbook.nytimes.com/2015/01/29/law-firm-finds-project-to-fight-revenge-porn/?_r=0).

behavior.<sup>17</sup> Filed on December 28, 2015, the FTC complaint alleged that Craig Brittain, the owner of [www.isanybodydown.com](http://www.isanybodydown.com) and five other similar websites, posted pictures that he had received anonymously through the website, violating the FTC Act (15 U.S.C. §§ 41–58). The FTC accused Brittain of tricking women into sharing nude photos with him by impersonating a woman and vowing to keep the photos confidential; it alleged that it was unfair for Brittain to exploit personal information shared in confidence for commercial gain. A number of individuals, mainly women, claimed that when they saw their images posted on Brittain's website, Brittain refused to comply with requests to take the images down from the site.<sup>18</sup> Donald S. Clark, the Secretary of the Commission, issued the decision which (1) required the websites to obtain consent in writing from individuals who appear in videos and photos submitted to the website, (2) restrained and enjoined the websites from misrepresenting material facts, (3) required that Brittain destroy any materials for which written consent was not obtained, and (4) maintain copies of consent forms in a manner which could be retrieved and disclosed to the FTC.<sup>19</sup>

Danielle Citron and Woodrow Hartzog note that this FTC action is part of an emerging wave of successful civil and criminal actions in response to breaches of privacy.<sup>20</sup> Just as it took time for the legal system to recognize sexual harassment in the workplace, Citron has argued that it is now slowly but increasingly recognizing that sexual information brought unilaterally outside of personal, intimate relationships should be scrutinized.<sup>21</sup> The core of the harm that has been “overlooked or minimized [is] the confidential relationships in which intimate images are shared . . . . Personal information is often exchanged in the course of relationships. Those relationships engender responsibilities when serious harm results from their breach.”<sup>22</sup>

All commentators to date are well aware of the First Amendment issues involved in targeting NCP, as well as the inadequacy of existing privacy and

17. *In re* Craig Brittain, FTC Matter 132 3120 (Jan. 8, 2016), <https://www.ftc.gov/enforcement/cases-proceedings/132-3120/craig-brittain-matter>.

18. *In re* Craig Brittain, Complaint at 1–2, <https://www.ftc.gov/system/files/documents/cases/160108craigbrittaincmpt.pdf>.

19. *In re* Craig Brittain, Decision & Order at 2–5, <https://www.ftc.gov/system/files/documents/cases/160108craigbrittaindo.pdf>.

20. Citron & Hartzog, *supra* note 15 (“Businesses are now on notice that it is illegal to exploit information shared in confidence and with an expectation of privacy. Stalking-app providers and revenge-porn site operators should heed the warning: Repurposing confidential relationships, and the information shared in them, for commercial gain could prompt action by consumer-protection agencies.”).

21. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 96–102 (2014).

22. Citron & Hartzog, *supra* note 15.

criminal protections.<sup>23</sup> Some commentators offer legal solutions that they suggest are not overly broad restrictions on speech, while still addressing the privacy concerns of the victims. For example, one student note argues for an amendment to the safe harbor provided by § 230 of the Communications Decency Act so that internet service providers (“ISPs”) are stripped of immunity if they encourage the posting of illegal or tortious content, or contribute materially to illegal or tortious conduct.<sup>24</sup> Another offers a model criminal statute,<sup>25</sup> which addresses gaps around cross-jurisdictional enforcement. And several commentators have noted the potential remedies provided by copyright law.

An early scholar examining copyright and pornography, Ann Bartow, advocated NCP “copyrights to be recognized and even registered, but then to vest ownership of the copyrights in the victims, so that they could use the notice and takedown provisions of the DMCA to try to reign in the online distribution of works of revenge pornography.”<sup>26</sup> Various plaintiffs who have been victims of NCP have adopted as a litigation strategy the notice and takedown approach Bartow suggests.<sup>27</sup> When photos taken are by the victims themselves (so-called “selfies”), the photographer then indubitably hold copyright to the content. These plaintiffs can then wield the tools provided by the DMCA to ask ISPs to take down content.<sup>28</sup>

23. See, e.g., Levendowski, *supra* note 8, at 438–39 (“From a First Amendment perspective, targeted revenge porn legislation occupies a tricky space: imprecisely drafted revenge porn legislation protects many victims but risks criminalizing protected expression, but whittling down legislation to avoid trammeling free speech excludes many of the victims the law intended to protect. Although broad legislation makes it easier to prosecute revenge porn uploaders and traffickers, it could also have unintended consequences on protected speech by criminalizing distributions made in the public interest, linking to revenge porn websites for purposes of critique, or disclosures made to document the harassment itself.”).

24. Layla Goldnick, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 *CARDOZO J.L. & GENDER* 583, 626 (2015); see also Levendowski, *supra* note 8, at 428 (“Although Section 230 broadly protects websites from liability, it does not give ISPs carte blanche to allow any and all content without concern for liability. ISPs are not required to monitor or proactively remove user-generated content, but Section 230 immunity does not extend to violations of child pornography, obscenity, or copyright laws. Similarly, Section 230 immunity does not apply if the ISP is also an “information content provider.” Immunity does not extend to original information or content that an ISP creates or develops.”).

25. Poole, *supra* note 12, at 181.

26. Bartow, *supra* note 11, at 45–46 (2012).

27. Goldstein, *supra* note 16; Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, *THE ATLANTIC* (Feb. 4, 2014), <http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>.

28. Poole, *supra* note 12, at 203 (“Copyright law is clearly a possibility for some NCP victims. Indeed, a survey of 864 victims indicates that 80% of NCP images are “self-shots,” meaning the subject is the author and thus copyright holder. This large percentage suggests that copyright law is a viable option for many victims”).

Much of this “content” is arguably unpublished work, as it was created for the purposes of sharing between intimate partners and not intended for public distribution. This is an important point to which I return below. In the context of unpublished works, Amanda Levendowski correctly states that:

Section 104 of the Copyright Act grants the authors of unpublished and published works the same rights and protections. Limited distribution of a copyrighted work—to a prospective publisher or a love interest—has no effect on the exclusive rights granted to an author. The author of an unpublished work retains the exclusive right to decide whether to publish a work, and exercise or authorize any reproduction or display of the copyrighted work.<sup>29</sup>

Moreover, as she also observes:

[V]ictims do not need to register their copyrights or hire a lawyer to file a takedown notice. Victims need only submit their name and signature; identify the image; and provide links to the infringing material, contact information and written verification that they believe the use is unauthorized. . . . Victims can also issue de-indexing requests to search engines, like Google or Yahoo, to remove infringing links from search results.<sup>30</sup>

These relatively powerful federal remedies, compared to piecemeal state privacy protections, are appealing to plaintiffs who are victims of NCP. Copyright is not a complete solution, as it would not cover NCP in which the victim is not the author or owner of the work, and/or some ISPs might choose not to take down a work even after notification.<sup>31</sup> Furthermore, on the Internet, there is always the issue of mirror sites and ISPs beyond the jurisdiction of federal copyright enforcement power. Practically, however, copyright may be the only route for removing content from the Internet. And rather than seeking damages for harm, the goal of many NCP victims is removing these harmful images.<sup>32</sup>

29. Levendowski, *supra* note 8, at 440–41.

30. *Id.* at 443; *see also* Poole, *supra* note 12, at 203 (“Section 230 does not immunize websites and service providers from copyright infringement claims. Rather, the Digital Millennium Copyright Act (DMCA) provides a safe harbor for websites that remove infringing items upon learning that their websites are hosting infringing materials. Once the provider receives a complaint from the author, the website is obligated to remove the photo or face liability as a secondary infringer.”).

31. Poole, *supra* note 12, at 203 (“Unfortunately, copyright law does not protect victims in scenarios where they do not take the pictures themselves.”). David A. Bateman, a lawyer with the Cyber Civil Rights Legal Project, describes three different buckets into which NCP can fall: (1) selfies; (2) together filming jointly; and (3) a recorded video chat. Interview with David A. Bateman, Partner, K&L Gates (Feb. 26, 2016) (on file with author). He also described the difficulty that NCP victims face in finding adequate representation, in part because relatively few lawyers understand copyright notice and takedown and partly because many of the cases require cyberforensics expertise. *Id.*

32. Goldstein, *supra* note 16 (quoting Mary Ann Franks, Miami Law professor). Last year, California Attorney General Kamala Harris launched a Cyber Exploitation Working Group, together with a resource hub, to assist NCP victims in seeking legal redress. Press Release, Attorney General Kamala D. Harris, Tech Leaders and Advocates Launch Offensive in Fight Against Cyber Exploitation (Oct. 14,



This present use of copyright law to address NCP squarely raises the question of whether it is a distortion of copyright or whether this is a natural evolution of copyright's underlying policies in response to the sweeping scale of digital networks. Yet addressing privacy harms is well within the accepted historical, and therefore current, functions of copyright, particularly regarding unpublished works. And the use of copyright as one tool (among others) in knowledge governance and policymaking is essential in ubiquitous digital networks.

Much of the content comprising NCP is unpublished, as it is intended for distribution between parties within the context of private relationships. The 1909 Copyright Act predicated statutory protection upon publication, and thus, copyright under this act historically turned on a key distinction between published and unpublished works. While the 1976 Act abolished publication as a pre-requisite for copyrightability,<sup>33</sup> the current statutory framework retains more than a vestige of the earlier common law and statutory approaches towards unpublished works.<sup>34</sup> While scholars such as Jake Linford generally advocate a market-based approach to the right of first publication (especially the fair use doctrine), courts have "treated the right of first publication as analogous to chattel property rights in unpublished manuscripts." Linford notes the influential effect of the Ninth Circuit's decision in *White v. Kimmel*,<sup>35</sup> which articulated the difference between limited and general publication:

At first glance, there appears to be a hierarchy of dissemination in the first publication cases. Sending a letter to one person, or entrusting a copy of your manuscript to someone with whom you have privity of contract, is

2015). <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-tech-leaders-and-advocates-launch-offensive>.

33. *Harper & Row Publishers, Inc. v. The Nation Enterprises*, 471 U.S. 539, 552 (1985) ("Among its other innovations, it eliminated publication 'as a dividing line between common law and statutory protection,' extending statutory protection to all works from the time of their creation. It also recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works. The Report of the House Committee on the Judiciary confirms that 'Clause (3) of section 106, establishes the exclusive right of publications. . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work.'" (internal citations omitted).

34. Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 605 (2011) ("Wheaton also produced marginal notes and a syllabus, for which statutory protection could be secured. The court did not hesitate to recognize Wheaton's right of first publication as a property right in the manuscript. The majority concluded, however, that once the work was published, it could only be protected by the statutory grant, and to secure statutory protection, the owner must observe all the requisite formalities. From Wheaton's ruling on formalities, one can trace the development of the right of first publication prior to its incorporation in the Copyright Act of 1976. Under the 1909 Copyright Act, books and similar printed works qualified for statutory protection if they were published with the proper notice.").

35. *White v. Kimmel*, 193 F.2d 744 (9th Cir. 1952).

not sufficient to amount to publication at law of a copyrighted work, but disseminating it in a newspaper amounts to such a publication.<sup>36</sup>

And as he further observes, “A privacy rationale purportedly drove the Ninth Circuit’s opinion in *White*. The court in *White* referred to ‘private . . . publication’ as synonymous with ‘limited publication’ . . .”<sup>37</sup>

Furthermore, in *Harper & Row*, the U.S. Supreme Court grappled squarely with the potential conflict between the First Amendment and copyright in unpublished works by a public figure. The Court’s majority clearly expresses that privacy concerns are not only historically compatible with copyright, but also embedded within the current copyright statutory framework. In the course of deciding against fair use of excerpts of a work written by a public figure (former President Gerald Ford), the Court acknowledged that

common-law copyright was often enlisted in the service of personal privacy. In its commercial guise, however, an author’s right to choose when he will publish is *no less deserving of protection*. . . .<sup>38</sup>

*Harper & Row* primarily addresses commercial harm and injury,<sup>39</sup> but the words “no less deserving of protection” suggest strongly that non-commercial harms are equally legitimate to the commercial harm at issue in that case. Moreover, an equitable current runs through the majority’s opinion in *Harper and Row*, which disapproves twice of the “purloined” aspect of

36. Linford, *supra* note 34, at 610 (“Courts have generally followed the Ninth Circuit’s articulation, in *White v. Kimmel*, of the difference between limited and general publication. There, the court articulated three elements of a limited publication: the publication must ‘communicate[] the contents of a [work] to a definitely selected group and for a limited purpose, and without the right of further diffusion, reproduction, distribution or sale.’”) One question beyond the scope of this response but highly relevant to NCP is how the *Kimmel* taxonomy would be applied to text photos between two intimate partners, or to personal e-mail messages.

37. *Id.* at 618–19.

38. *Harper & Row*, 471 U.S. at 554 (emphasis added) (internal citation omitted). Despite Justice O’Connor’s invocation of the seminal Warren and Brandeis article on privacy, Linford notes “[r]ecent [scholarship that] suggests that the English privacy law tradition of recognizing confidentiality based on expectations of trust in relationships—instead of the Warren and Brandeis concept of privacy based on an individual’s ‘inviolate personality’—may stem in part from these publication cases. Linford, *supra* note 34, at n.81 600; see Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path*, 96 GEO. L. J. 123, 136 (2007).

39. Regarding commercial exploitation, Justice O’Connor wrote further in the context of a fair use analysis:

The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced “sharing” of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.

*Harper & Row*, 471 U.S. at 553.

the manuscript—a pejorative characterization of the defendant journal’s acts that were vigorously disputed by the dissenting Justices.<sup>40</sup> Importantly, the Court directly refers to, and indirectly approves, non-commercial rationales for exercising copyright control over private manuscripts, both historically and currently. As Justice O’Connor clarifies,

Perhaps because the fair use doctrine was predicated on the author’s implied consent to “reasonable and customary” use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author’s as yet unpublished works. Under common-law copyright, ‘the property of the author . . . in his intellectual creation [was] absolute until he voluntarily part[ed] with the same.’<sup>41</sup>

As the *Harper and Row* Court further states, “freedom of thought and expression “includes both the right to speak freely and the right to refrain from speaking at all.” . . . Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value.”<sup>42</sup> Moreover, in the Court’s earlier *Stewart v. Abend* decision, the Court (again through Justice O’Connor) emphatically stated that “nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.”<sup>43</sup>

The conclusion from both historical and current case law is that copyright’s commercial purpose is absolutely consistent with functions such as privacy protection, and can survive First Amendment scrutiny. Admittedly, this does not answer a different question: the use of copyright to further unsavory or socially harmful purposes such as suppressing criticism.<sup>44</sup> Professor Fromer and others have rightly criticized the use of copyright by religious organizations to suppress dissent, or by heirs to ward off negative commentary on a famous deceased relative.<sup>45</sup>

The answer, at least for purposes of this response, lies in the fairly specific context of NCP. Under closer scrutiny, the analogy between the privacy interests of the NCP victim and of those who might suppress valid dissent does not hold up. NCP is different from the other scenarios that Judge

40. *Id.* at 542, 563, 592–93.

41. *Id.* at 551.

42. *Id.* at 559–60.

43. *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990).

44. McKeown, *supra* note 3 (describing the former dean of Liberty University who tried to use copyright to take down videos that criticized him for making misrepresentations).

45. Fromer, *supra* note 2, at 563–64.

McKeown and Fromer rightly criticize, because of the pre-existing confidential, and indeed intimate, sexual relationship between two partners, and the desire of one of those partners to keep the work private pursuant to their original agreement.<sup>46</sup> As the legislative history to Washington state House Bill 2160, which codified the tort of distributing intimate images, reminds us:

The tort of invasion of privacy is based on the common law tort of public disclosure of private facts. Invasion of privacy occurs when a person gives publicity to a matter concerning the private life of another. A person who invades another's privacy is subject to liability to the other person if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public.<sup>47</sup>

To the extent that a work is intended for commercial markets, courts have traditionally respected the right of the author to control when and if the first publication occurs; the *Harper & Row* Court approved of the author's "creative control" in that regard.<sup>48</sup> In the context of non-commercial content production of NCP, courts can perform an analogous inquiry into the copyright interest of the author, as well as any fair use defense. Factors could include the creative origins of the work, the intent of the parties regarding public access (or publication), the creative and other control justifications of the author, the non-market harms to the author by allowing the defendant to publish the work, as well as the social benefits and harms of allowing the work to remain unpublished. If the social benefit of allowing publication is large, that benefit could be weighed against the copyright interest of the author, as part of the "breathing space"<sup>49</sup> provided by the fair use doctrine. Commercial authors, such as J.D. Salinger, have exerted privacy interests via copyright and in response, courts have tried their best to accommodate the competing individual authorial concerns with compelling arguments regarding the need for public access and breathing room for follow-on creativity.<sup>50</sup>

46. Although it is beyond the scope of this response to address joint works or works in which the victim is arguably not the author, I suggest that the question of ownership of these works and any implied license should take into account the circumstances in which they are made. The author of photographs and videos is not simply the person who pushes the "record" button.

47. WASH. REV. CODE § 4.24.795 (2015) (concerning the distribution of intimate images, effective as of Sept. 26, 2015).

48. 471 U.S. 539, 554 (1985) ("The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing.").

49. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

50. Kate O'Neill, *The Content of Their Characters: J.D. Salinger, Holden Caulfield, Fredrik Colting*, 59 J. COPYRIGHT SOC'Y U.S.A. 291 (2012).

NCP is also different in most cases involving other functions of copyright, because neither party is a public figure nor is the content newsworthy in the classic First Amendment sense. From a First Amendment perspective, the same malfeasance (breach of confidential relationship) that may point in the direction of authorial control also provides a rationale for take-downs that do not conflict with the First Amendment. Geoffrey Stone has observed that the concept of “non-newsworthiness is staggeringly problematic”<sup>51</sup> in the context of the Internet, and admonishes that “[t]he most realistic way to protect privacy today is at its source. B[ut b]y prohibiting highly intrusive methods of gaining information that people want to keep confidential, it is still possible to enable individuals who truly care about their privacy to preserve it.”<sup>52</sup> By paying attention to the crucial context in which copyrighted content is acquired, including breach of a confidential relationship, copyright law can incorporate serious privacy concerns while at the same time not trampling upon free expression. Moreover, the Harper & Row Court declined to “expand[] the doctrine of fair use to create what amounts to a public figure exception to copyright.”<sup>53</sup>

It is important too to deconstruct the “litigation cottage industry” around other functions of copyright. The number of trials in federal court has largely fallen, except for intellectual property cases.<sup>54</sup> The increase in copyright litigation over the past twenty years is due largely to two recent phenomena: RIAA’s “John Doe” lawsuits beginning in 2004 and the growing number of lawsuits brought by pornographers against consumers who download content without payment.<sup>55</sup> Copyright recognizes specific categories of harm as a matter of course (the commercial value of popular musical works and sound recordings or of pornographic audiovisual works), while it has been slow to recognize others (the privacy, reputations and safety of NCP plaintiffs). This asymmetry in the law’s recognition of harm by itself should give us pause. Copyright’s other function to further Internet privacy is a response to this systematic valorization (and conversely devaluing) of certain legal and social categories. The assumptions that “progress” can only

51. Geoffrey R. Stone, *PRIVACY, THE FIRST AMENDMENT, AND THE INTERNET*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 174, 192 (Saul Levmore & Martha C. Nussbaum, eds. 2010).

52. *Id.* at 194.

53. *Harper & Row*, 471 U.S. at 560.

54. Team 6, *The Vanishing Civil Trial*, *IP INN OF COURT* (Oct. 3–4, 2015), <http://www.docfoc.com/the-vanishing-civil-trial-team-6-2-a-panel-discussion-with-hon-john-coughen>.

55. Matthew Sag, *IP Litigation in U.S. DISTRICT COURTS: 1994 TO 2014*, 101 *IOWA L. REV.* 110 (2015).

be expressed through the smooth functioning of market mechanisms reinforces, and even magnifies, the structured nature of economic, gender and other forms of inequality. Intellectual property, as I have argued elsewhere, operates within a larger frame of human flourishing.<sup>56</sup>

Copyright law's response to the issue of cyber harassment can be part of an overall legal response to a very real public health and public policy problem. In conjunction with public agencies such as the FTC, state attorneys general and the U.S. Attorney General, lawyers acting as private attorneys general can connect copyright to a larger social response, which some have started to call cyber civil rights.<sup>57</sup> Because of the sensitivity of free expression values, cyber civil rights activists engage in what Frank Pasquale has called "tailored regulatory responses"<sup>58</sup> to the problem of Internet hate speech. As he points out, "[c]opyright and trademark law are two instances where the unfettered right to free speech yields to larger social [concerns]"<sup>59</sup> couched largely, but not exclusively, within the realm of business torts, and encompassing other functions of copyright as well. DMCA notice and take down provisions are as apropos in the context of NCP as they are in the context of other allegedly infringed content. As such, copyright law serves as one mechanism in a broader governance approach to knowledge circulating within digital networks.

#### CONCLUSION: COPYRIGHT AND KNOWLEDGE GOVERNANCE

The case study of NCP shows that context matters in the overall policy balance between copyright's other functions and the free expression. As argued here, the privacy concerns expressed by plaintiffs in NCP cases can be accommodated with little distortion, either to copyright first principles, or to First Amendment concerns. Indeed, it will be interesting to see how

56. Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2813, 2813–2904 (2006); Margaret Chon, *Copyright and Capability for Education*, 40 *U.C. DAVIS L. REV.* 803 (2007); see also Elizabeth Rosenblatt & Rebecca Tushnet, *TRANSFORMATIVE WORKS: YOUNG WOMEN'S VOICES ON FANDOM AND FAIR USE, EGIRLS, ECITIZENS*, 385 (Jane Bailey & Valerie Steeves eds., 2015).

57. See CITRON, *supra* note 21, at 24–26; see also Elisa D'Amico & Luke Steinberger, *Fighting for Online Privacy with Digital Weaponry: Combating Revenge Pornography*, in *The First Annual Tyler Clementi Internet Safety Conference*, 26 *NYSBA ENTMT, ARTS & SPORTS L.J.* 24, [http://www.klgates.com/files/Publication/9f340f2d-82f5-43ff-855e-7d1e0ebfaf92/Presentation/PublicationAttachment/52228d43-b9f5-4683-bb09-805363c0578c/Fighting\\_for\\_Online\\_Privacy\\_with\\_Digital\\_Weaponry\\_Combating\\_Revenge\\_Pornography.pdf](http://www.klgates.com/files/Publication/9f340f2d-82f5-43ff-855e-7d1e0ebfaf92/Presentation/PublicationAttachment/52228d43-b9f5-4683-bb09-805363c0578c/Fighting_for_Online_Privacy_with_Digital_Weaponry_Combating_Revenge_Pornography.pdf).

58. FRANK PASQUALE, *Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 107, 122 (Saul Levmore & Martha C. Nussbaum eds., 2010).

59. *Id.* at 122–23 (internal quotations omitted).

copyright doctrine continues to develop in response to the growing number of disputes triggered by salacious and unruly digital content, rather than maintaining a singularity of purpose as an engine of commerce. These digitally-based challenges may even give copyright a much-needed second act in an era where artificial scarcity of knowledge is no longer the given baseline.<sup>60</sup>

This approach of incorporating copyright's other functions into the mainstream of copyright instrumentalism also reflects a critical and structural inquiry into copyright's larger goal of "progress of science." Cyber harassment of all kinds, including NCP, has reached epidemic proportions and affects multiple vulnerable populations. The largely, although not entirely, gendered nature of the harms of NCP, which disproportionately affects women as victims, must be acknowledged.<sup>61</sup> To do otherwise would result in the adoption of a formalist approach to copyright that isolates its instrumental purpose to the singularity of promoting commercial activity without regard to its role in generating many other social benefits and costs.

60. See Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015); Pamela Samuelson & Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175 (2010).

61. See Martha C. Nussbaum, OBJECTIFICATION AND INTERNET MISOGYNY, THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 68–87 (Saul Levmore & Martha C. Nussbaum eds., 2010); CITRON, *supra* note 21, at 96–101. In the words of a recent NCP victim whose experiences and advocacy led to the 2015 enactment of the Washington state criminal provision, WASH. REV. CODE § 9A.86.010, a typical response is to "blame the victim, that [she] shouldn't have these kinds of things on [her] computer. But we don't have that reaction when people store financial and other kinds of highly personal information on their computers." Telephone Interview with K.L. (Feb. 21, 2016) (unpublished notes on file with author).