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PRIVACY, COPYRIGHT, AND LETTERS

JEFFREY L. HARRISON*

I. INTRODUCTION

The focus of this article is the privacy of letters—the written manifestations of thoughts, intents, and the recollections of facts directed to a person or a narrowly defined audience.¹ The importance of this privacy is captured in the novel *Atonement*² by Ian McEwen and in the film based on the novel.³ The fulcrum from which the action springs is a letter that is read by someone to whom it was not addressed.⁴ The result is literally life-changing, even disastrous for a number of characters. One person dies, two people seemingly meant for each other are torn apart, and a family is left in shambles.⁵ This example is, of course, drawn from fiction but there is no doubt that it is a case of art imitating life. It is hard to imagine someone who has not been affected in one way or another by the reading of a message by someone for whom it was not intended.

Is this an appropriate topic for a conference that is at least focused in part on the impact of technological advances? In order to answer that, consider this statement:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for secur-

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¹ I am grateful to Elon University School of Law and the organizers of the *Elon Law Review's* 2011 Symposium for giving me an opportunity to participate.

² IAN MCEWEN, *ATONEMENT* (Nan A. Talese 2001).

³ *ATONEMENT* (Universal Studios 2008).

⁴ The letter is from one lover to another and contained the following: "In my dreams I kiss your cunt, your sweet wet cunt. In my thoughts I make love to you all day." MCEWEN, *supra* note 2, at 80. As it turns out the letter writer mistakenly sent the letter, thinking he had sent a less provocative one. It was, however, read by a party for whom it was not intended. *Id.* at 125.

⁵ MCEWEN, *supra* note 2.

ing to the individual what Judge Cooley calls the right “to be let alone.” Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”⁶

In the spirit of “so what else is new?” some readers may recognize this passage. It is from the classic article by Samuel Warren and Louis Brandeis, *The Right to Privacy*, published in 1890.⁷ New technology is a relative concept and always exists. It is a function of what came before and almost all the questions we face today are no different in kind from those that started when humans began writing on cave walls.⁸

This is not to say the magnitude of the issues or ways it is to be addressed are the same. Well before mass copying was possible, the writers and intended recipients of letters had some chance of controlling who read their letters. A letter existing in a single copy could be burned or shredded or at least secreted away. Nothing rivals the Internet with respect to the potential for instant and massive dissemination. A message can be available to millions of unintended readers within seconds and one’s fortunes altered just as quickly.

A great deal of law as it relates to the privacy of letters has evolved in the context of copyright law under a fair use analysis.⁹ In this article I argue that focus on copyright and letters detracts from examining the real character of letters and the interests to be protected, and that privacy interests¹⁰ should be put at the forefront. In fact, I argue letters

⁶ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

⁷ *Id.* See generally Benjamin E. Bratman, *Brandeis and Warren’s The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623 (2002); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703 (1990). For a discussion of very early cases, see MORRIS L. ERNST & ALAN U. SCHWARTZ, *PRIVACY: THE RIGHT TO BE LEFT ALONE*, 24-43 (Macmillan 1962).

⁸ For a recent discussion of privacy and copyright issues in the context of e-mail, see Ned Snow, *A Copyright Conundrum: Protecting Email Privacy*, 55 U. KAN. L. REV. 501 (2007).

⁹ Under a fair use analysis, a use of a work that would otherwise be an infringement is not if the use passes a four step analysis that weighs the nature of the use, the nature of the copied work, the amount used, and the impact of the use on the value of the original. 17 U.S.C. § 107 (2006). For a review of how fair use has been employed in the context of letters see Benjamin Ely Marks, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376 (1997).

¹⁰ As discussed below, the protection of privacy is viewed here as a means to an end. That end is “peace of mind” or a decrease in the anxiety that one’s expressions in letters will be revealed to others. It is not the end of protecting one’s earning power.

should not be copyrighted at all. Copyright is fundamentally about encouraging the production of works by allowing authors to internalize the benefits of those works. In the context of copyright law, privacy is really something to be avoided. In stark terms the issue might be thought of like this: If we assume our thoughts are private, is there any *policy* interest in changing that status once we record them in tangible form in order to communicate with specified others. This turns less on copyright policy than it does on the rightful privacy expectations of letter writers.

Before focusing on these themes, I want to make one observation and refine what I mean by privacy for purposes of this article. The first point involves the irony of technology as it relates to information. Maybe the most outstanding and beneficial aspect of the Internet is the reduction of transaction costs.¹¹ Information of all kinds can be found in seconds, thus lowering search costs and making markets more competitive and education less expensive. The transaction cost reducing impact of the Internet is not all for the good. While mutually beneficial transactions are less expensive,¹² there are a host of activities that are not beneficial to both parties which are also less expensive. In effect, technology has raised the costs of protecting privacy and reset the cost benefit analysis. Technology unlocks windows and doors and lowers the costs of those who want to bypass the market altogether. It forces us to reconsider how much privacy to which one is entitled.

When it comes to privacy, I am referring to the desire of individuals for the peace of mind associated with knowing that information and expressions they do not want disclosed will not be disclosed. In a recent comprehensive analysis, Daniel J. Solove identifies a number of ways in which privacy can be viewed, ranging from issues raised by surveillance to blackmail.¹³ Using his classification system, the interests here are “disclosure”¹⁴ and, to some extent, “intrusion.”¹⁵ According to

¹¹ Transaction costs in normal usage are the costs of an exchange. They do not refer to the actual cost of the item exchanged but search costs, drafting expenses, and the like. When transaction costs exceed the benefits of the exchange an otherwise productive exchange does not take place. For example, the principle function of eBay is to lower transaction costs. The notion of transaction cost can be extended to other resource reallocations. For example, burglar alarms raise the cost of theft.

¹² Lowering transaction costs is comparable to reducing friction.

¹³ Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006). See also Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002).

¹⁴ Solove, *supra* note 13, at 530.

¹⁵ *Id.* at 552.

Solove, disclosure occurs when “true information about a person is revealed to others.”¹⁶ Intrusion, on the other hand, is involvement in another person’s life sufficient to cause him to alter his activities.¹⁷ Although intrusion refers to inserting one’s self into the life of another,¹⁸ the disclosure of information is also likely to have the potential to be activity altering.

The theme of this article is also derived from the classic 1890 Warren and Brandeis article quoted above. In that article they identify a right “to be let alone.”¹⁹ In particular, the authors focus on letters²⁰ and observe that where the value of production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance of that term.²¹

Perhaps more importantly, the privacy interest as envisioned here extends beyond that expressed in traditional tort law. For example, under the Restatement Second of Torts, Section 652A, a privacy interest is invaded when there is “unreasonable publicity given to the other’s private life, as stated in 652D.”²² Under 652D an invasion occurs when [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.²³

In particular, “peace of mind” as employed here means more than simply being protected from disclosures that would be *highly* offensive. On the other hand, as described here, there is a limit to privacy when non-disclosure would mean the likelihood that an important right of others is endangered. For example, a letter in which the writer expresses an intent to cause another bodily harm could be disclosed.

¹⁶ *Id.* at 531.

¹⁷ *See id.* at 553.

¹⁸ *See id.*

¹⁹ Warren & Brandeis, *supra* note 6, at 195.

²⁰ *Id.* at 201.

²¹ *Id.* at 200-01.

²² RESTATEMENT (SECOND) OF TORTS § 652A (1977).

²³ *Id.* § 652D.

More technically, this can be viewed as a “harm to others defense.”²⁴ One can view this as a balancing of interests. Although the value of peace of mind to the letter writer is valued, so is the peace of mind of the potential victim of harmful acts.

II. LETTERS ARE DIFFERENT

There are a number of ways that personal letters differ from works ordinarily protected by copyright law. The first difference is part of an underlying imperfection in the application of copyright law generally. It is undisputable that American copyright law,²⁵ apart from some rights afforded the creator of visual works,²⁶ is not about protecting moral rights.²⁷ It is based on an underlying utilitarian rationale.²⁸ The author is permitted to internalize the benefits of his or her work as a means of benefitting the public by producing that work. The United States Supreme Court has viewed it as a contract between the public and the author.²⁹ The public gives up something—access to the work—in exchange for the author’s efforts to produce what one hopes will be enriching to the public. In effect, the author has exclusive rights for a limited period of time that may be sold.³⁰ Underlying the

²⁴ The actual importance of this exception may be quite small. General knowledge that threats or other harmful intents may be disclosed will only discourage putting those feelings in letters.

²⁵ Article 1, Section 8 of the Constitution, which authorizes Congress to enact laws pertaining to copyright, provides that the power is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

²⁶ The Visual Artists Rights Act protects the creators of certain types of works from misattributions and destruction of those works under specific circumstances. 17 U.S.C. § 106A (2006).

²⁷ See generally Dana L. Burton, Comment, *Artists’ Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639 (1995).

²⁸ This has been expressed repeatedly by the Court. In *Fox Films Corp. v. Doyal*, 286 U.S. 123, 127 (1932), Justice Hughes wrote “[t]he sole interest of the United States . . . in conferring [a copyright] lie[s] in the general benefits derived by the public from the labors of authors.” Similarly Justice Douglas expressed, “[t]he copyright law, like the patent statutes, makes reward to the [author] a secondary consideration.” *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). Finally in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Court assessed the rationality of a copyright term extension by reference to incentives for authors. As noted in the text, however, the Court likely imagined incentives where none existed.

²⁹ *Eldred*, 537 U.S. at 214.

³⁰ See Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1003-04 (1970). Currently, for works produced on or after January 1, 1978, this period begins when the work is fixed and extends for the life of the author plus seventy years. 17 U.S.C § 302(a) (2006).

law is the belief that the copyright incentive leads to the creation of various types of work.³¹ At least ideally this means that there should be something akin to a proximate cause relationship between the production of a work and the anticipated award.

The problem is that a great number of “works” are created without the expectation of gain by virtue of copyright.³² Letters are a prime example. One person writing to another hardly has the income in mind that will accrue once he or she can sell the “rights” to the letter. In short, it is unlikely that personal letters need copyright protection in order to come into existence. Indeed, the fact that they may become public through a fair use analysis may even limit their use and raise the cost of communication to those who value their peace of mind. In this respect, the proximate cause notion may work in reverse. Due to fair use possibilities, letters may not be relied upon as a mode of communication. In short, there is simply a disconnect between the purpose of copyright and the existence of these works.³³

This disconnect between copyright and letters is similar to the “logic” found in the Court’s relatively recent opinion in *Eldred*³⁴ in which it considered the retroactive extension of copyright duration. There the Court reasoned that works created before the extension were motivated by the expectation of authors decades earlier that if the period of copyright were extended, they would be the beneficiaries.³⁵ Obviously this connection is very doubtful.³⁶

³¹ See, e.g., *Eldred*, 537 U.S. at 206 (“The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States.”); *Paramount Pictures*, 334 U.S. at 158 (“It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.”).

³² New styles in clothes are not copyrightable but appear nonetheless each season as producers strive to increase profit. No doubt, numerous poems are written and photographs taken without a thought about copyright and internalization made possible by virtue of copyright.

³³ Typically a proximate cause analysis involves the connection between an action and an eventual consequence. In the case of copyright, the analysis runs in the opposite direction. Does the existence of a possible gain give rise to the creativity? When it does not, the financial gain is unnecessary. In effect, copyright is not the proximate cause of the creativity.

³⁴ 537 U.S. at 186.

³⁵ *Id.* at 214-15.

³⁶ Justice Breyer’s dissenting opinion is very helpful in this regard. See *id.* at 254 (Breyer, J., dissenting) (“No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.”).

A second element of letters that makes them different is that the writer typically has little interest in having his or her work exposed to a greater audience. A letter is not a work in the sense that the author desires to express publicly some emotion. In fact, the author may want it exposed to no one but the intended recipient or may be indifferent to whoever sees it and whether that exposure results in any income. Indeed, letters are similar to most other copyrighted works merely by virtue of the fact that they are fixed writings.³⁷

A third element that makes letters different from other copyrighted works is that the concern of a letter writer is not that the work will be *copied* but that it will be *read*. The writer who has concerns about his letters being exposed to others is indifferent as to whether 1,000 copies are made of the letter and read by 1,000 people or 1,000 people read the original letter.³⁸ Put differently, the information is what counts here and not what is generally protected by copyright law—the expression. Thus, unlike the film production company or the book publisher who is injured by virtue of lost sales if bootleg copies are made, there is no usurpation of a market the letter writer expected to exploit. In short, the letter writer is concerned that secrets not be revealed regardless of whether copying has occurred.

To be sure, the Copyright Act also protects the author from unauthorized public performance and public display of literary works.³⁹ Reciting is included in the definition of performance.⁴⁰ Thus, reading a letter publically would be an infringement. Unfortunately, the Copyright Act does not directly define “work” but, as discussed above, the central argument here is that something should not be a “work” for copyright purposes unless it is drawn forth by the implicit bargain between the public and the author.

There is another way in which letters differ from most other copyrighted works. They typically are labeled in a way that someone coming upon a letter knows whether or not he or she has been authorized to read it. Much like a wrapped gift, the label “to” is like the salutation “dear” and makes the writer’s intent clear. There are analogies to this in other areas of law. For example, in contract law an offer may only be accepted by the person or persons to whom the offer was made. So

³⁷ Fixation is a necessary but not sufficient reason for a work to be copyrighted.

³⁸ This distinction may seem minor but could be the key in a First Amendment analysis. See notes 57 & 58 *infra*.

³⁹ 17 U.S.C § 106 (2006).

⁴⁰ 17 U.S.C § 101 (2006).

too with a letter, the writer of the letter can be viewed as the only person who may designate who the reader is to be.⁴¹

Although the argument here is that letters should not be copyrightable, there is an important analogy in copyright law itself. For this purpose, it is important to note a distinction between ownership of a letter and the use of a letter. When one party sends a letter to another there seems to be little doubt that the recipient owns the physical letter. That does not necessarily mean that the person owns the right to the work.⁴² In the case of a letter, there is no reason to think the transmission of the information therein carries with it an expectation that the same information will be further transmitted or read by someone other than the recipient.

A final distinction concerns remedies. The standard infringement remedy is damages plus the disgorgement of profits.⁴³ Injunctive relief and statutory damages are available,⁴⁴ but the theme is that there is a monetary substitute for the loss of control of one's work. The courts go to extraordinary lengths to determine the amounts due to the author whose work has been infringed.⁴⁵ The assumption, though, is that what has been taken is an income earning asset.⁴⁶ The valuation of the embarrassment or sense of violation that occurs when one's letters are published is a far cry from what copyright remedies envision. In fact, there may be no monetary equivalent to those losses. The possibility of putting the person in the position he or she would have been in may be lost forever.⁴⁷

⁴¹ This may resolve the problem of the unintended recipient. In the novel *Atonement*, the wrong letter was sent and read by someone for whom it was not intended. A common problem that seems to occur regularly with electronic communications is sending the right letter to the wrong person. For example, a writer may intend to reply to one person and accidentally click on "reply to all." Or, the writer may rely on a preexisting list of addressees and use the wrong one. A position consistent with the views expressed here is that the unintended recipient should not, out of respect for the privacy of the writer (a respect the recipient would like if the roles were reversed), read the message if the mistake is obvious.

⁴² See 17 U.S.C. § 106 (2006).

⁴³ 17 U.S.C. § 504 (2006).

⁴⁴ *Id.* § 502 (injunctive relief); *id.* § 504(c) (statutory damages).

⁴⁵ See, e.g., *Frank Music Corp. v. MGM Inc.*, 886 F.2d 1545 (9th Cir. 1989).

⁴⁶ See 17 U.S.C. § 504(b) (authorizing the copyright owner to recover profits from the infringer "attributable to the infringement").

⁴⁷ This is not to say that copyright remedies have the same goal as contract or tort remedies. Instead, the goal seems to be to discourage those who would claim to engage in an "efficient infringement." See *infra* note 88.

The point thus far is that there is little or no connection between the purposes of copyright law and the privacy and peace of mind of the letter writer. An approach to copyright law that is true to the Enabling Provisions of the Constitution would result in the disqualification of letters as copyrightable works.

There remain a few loose ends to tie up. The fact that letters should not be copyrightable does not mean there is no value in protecting them. That is a different question. Indeed, some of the arguments against copyright protection actually highlight the reasons for protecting letters. For example, protecting letters under a privacy theory may encourage freer expression of one's innermost feelings.

The second caveat is that some literary works may take the form of a letter. For example, a general communication may begin with the familiar "Dear _____." Perhaps the best example of this possibility is Martin Luther King's "Letter from Birmingham Jail."⁴⁸ The letter, although addressed to a number of fellow clergymen, seems hardly to have been intended to be kept secret or intended only for the eyes of the recipients.⁴⁹ This is not to say that the work qualifies for copyright protection. It seems indisputable that Dr. King's motivations were hardly the consequence of some distant belief that there were financial awards to be internalized. The point is that the assessment of whether a writing is a letter is a question of substance rather than form.

An additional loose end follows this pattern. As a young person, one creates a number of works that are at the time irrelevant in terms of market value. Years, perhaps decades, later the same person becomes a celebrity. Publishers and, in particular, biographers are interested in the earlier works. The writer, or his or her estate,⁵⁰ may try to claim the newfound value of those works. This effort to recapture profit by way of *copyright* for works that had no value even to the writer but for subsequent events is a windfall and unrelated to benefits that may accrue to the public. On the other hand, the writer's privacy interest does not vary with the new celebrity. The value to others may increase and the writer may sell the right for a higher price, but the desire for peace of mind was important to the author well before intruding upon it became important to others. In effect, the desire for

⁴⁸ Martin Luther King, Jr., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 85 (Signet Classics 2000).

⁴⁹ *Id.* (addressing the letter to "My Dear Fellow Clergymen," but noting that the text of the letter has been polished "for publication").

⁵⁰ Of course, the peace of mind interest may end with the death of the letter writer.

peace of mind is likely to be independent of the newfound celebrity even though outside intrusions may increase dramatically.

The issue of the use of letters by others often comes up in the context of a fair use analysis.⁵¹ Fair use is a defense to what would otherwise be regarded as a copyright infringement.⁵² It is a subjective four-step analysis that focuses primarily on the purpose of the use and the financial consequences to the author.⁵³ The outcome of the analysis is marked by uncertainty and, perhaps, some circularity.⁵⁴ Moreover, when it comes to letters, the issue of whether fair use extends to unpublished works whether intended for eventual publication or not is a complicated one. Taking personal letters out of copyright would reduce this uncertainty for those who wish to communicate their thoughts and intents to others but cannot be sure when those works might become available to all simply because at some time in the future the writer is the focus of historians and gossips.

III. COPYRIGHT RELIANCE AND THE COST OF ELIMINATING COPYRIGHT PROTECTION FOR LETTERS

The case made thus far is that personal letters do not match the policy goals of copyright. The problem is that secret-keepers may tend to rely on copyright for a purpose that is the opposite of their intention. Indeed one could argue that eliminating copyright protection for letters does mean that biographers and historians would have access to letters in order to create important and profitable copyrightable works.

The empirical question is how much letter writers have come to rely on copyright protection when they record their thoughts in a tangible medium. Although the uncertainty of the fair use analysis would suggest this reliance would be foolish, it remains a possibility. If this possibility exists, then a known lack of copyright protection raises the cost of keeping secrets to those inclined to do so. Presumably, secret keepers will devise new ways of concealment, including not recording

⁵¹ See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); Sonali R. Kolhatkar, Comment, *Yesterday's Love Letters are Today's Best Sellers: Fair Use & the War Among Authors*, 18 J. MARSHALL J. COMPUTER & INFO. L. 141 (1999); Marks, *supra* note 9.

⁵² Marks, *supra* note 9, at 1377.

⁵³ *Id.* at 1377-78.

⁵⁴ One step of the analysis requires an assessment of the impact of the use on the value of the author's original work. The impact on the value though involves an assessment of what the author owns. And what the author owns cannot be truly determined without a fair use analysis.

their thoughts at all.⁵⁵ In the long run, this means a lower “supply” of letters. This would make biographers, historians, and, most importantly, the general public worse off. From this perspective, copyright, if viewed as a form of privacy right, actually may have achieved in the case of letters, in a roundabout way, what the Framers seemed to desire.

All in all, this negative possibility seems slight at best. It would suggest that, let’s say, a letter writer preparing to record his thoughts, like the young author in *Atonement*, records his or her thoughts with the idea in mind that “no one will know what is here because this is copyrighted.” Prior to the last quarter of the Twentieth Century this would require the author to be knowledgeable on matters of what is publication and whether or not notice and recordation were required to protect his or her interest.⁵⁶ Moreover, the level of protection with regard to facts, ideas, and theories would have to be understood⁵⁷ as well as the breadth of fair use. In short, although possible in theory, the lack of copyright protection seems unlikely to stem the flow of private communications.

IV. PRIVACY AND PERSONAL LETTERS

A. *The Problem*

If we strip the issue of letters to its essence, it is a question of whether people have a right to control *access* to their thoughts, intents, or perceptions of facts.⁵⁸ If they do, what difference does it make that those same things can be found in a written form and addressed to identifiable others? This section addresses that question and discusses issues that can arise. The key point here is that letters are more properly viewed in the context of the right to personal autonomy and not in the context of property rights as reflected in the copyright laws. This is an important distinction. Copyright and even basic property law can be viewed as based on the idea of internalization. Privacy is quite different. The question becomes: To what extent are individuals entitled

⁵⁵ The idea that one does not write what he or she wants to be kept secret is hardly a novel one. As stated by one person who recently confided in this author: never put in writing what you would not want to see on the front page of *The New York Times*. Ironically, the advice was a perversion of the more ethical saying that one should not do what he would not want reported on the front page of *The New York Times*.

⁵⁶ Post-1977, works are protected when fixed as opposed to when published.

⁵⁷ These are not subject to protection.

⁵⁸ At one point in copyright this could hinge on whether the letter was regarded as published and whether it was recorded and included copyright notice.

not to have their thoughts exposed to others when there is no internalization goal?⁵⁹ Of course, protection of any right is but a means to an end. In this case, the focus is on affording the letter writer the “peace of mind” that what is not intended to be public will not become public.

This idea was captured some time ago by Samuel Warren and Louis Brandeis. In their classic 1890 article, they wrote:

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property; and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance of that term.⁶⁰

Warren and Brandeis argue that the protection in the case of letters rests not on the ownership of property, which would be more consistent with copyright,⁶¹ but in the notion of the right to privacy.⁶² Today’s letter writers, to the extent they are concerned at all, are no less concerned about privacy. In fact, they have more to fear. The letter writer, as opposed to the traditional author for copyright purposes, is more similar to the homeowner who keeps his blinds drawn or closes the door. Indeed, the more appropriate analogy may be to Fourth Amendment rights and expectations of privacy.

B. *The Legitimacy of a Right to Privacy in Letters*

Although Warren and Brandeis distinguish property rights from privacy rights, it is not clear that the distinction is all that sharp. In either case, the key idea is that of “a right to exclusivity,” however labeled. The larger question is whether that *right* should exist at all. There are a number of ways to argue that this is the case, albeit some ways more convincing than others. One is based on the Lockean, or

⁵⁹ Often those who consider the question of privacy and letters view copyright law, in one form or another, as the logical starting point. See Snow, *supra* note 8; see also Kolhatkar, *supra* note 51.

⁶⁰ Warren & Brandeis, *supra* note 6, at 200-01 (footnotes omitted).

⁶¹ Under current copyright law, the owner of the letter has the right to grant it to someone else or to sell it. This means, along with other factors, that those who rely on copyright as a means of promoting secrecy are likely to be disappointed.

⁶² See Warren & Brandeis, *supra* note 6, at 200-05.

natural law, notion of property rights.⁶³ Locke argues that property rights originate with the right to the fruits of one's labor.⁶⁴ When this labor is combined with something taken from the state of nature, a property right is created.⁶⁵ In effect, whatever the product of this combination, it cannot be taken by another without also taking the labor of the originator.

This rationale can be seen as applying equally or even to a greater extent to privacy. One's thoughts, feelings, and perceptions of facts are no less self-generated than one's labor. "Taking" someone's privacy can be seen as an intrusion into the autonomy of the individual. What is appealing about this approach is that it avoids some of the criticisms of the Lockean method. For example, in the case of property rights one might ask why it is that an individual has a right to the entire value of the property created as opposed to simply the value added by labor.⁶⁶ When it comes to one's peace of mind, nothing is combined with what exists in a state of nature. Quibbles about value added and the person's entitlement to anything other than value added make little sense.

Another approach borrows from Rawls⁶⁷ and asks how people behind the veil of ignorance would define privacy and one's rights when it comes to letters.⁶⁸ Behind the veil, decision makers would not know if they would be secret keepers or those interested in the secrets of others when they step from behind the veil.⁶⁹ Obviously, Rawls wrote in terms of general principles but underlying his analysis is an assumption that people would be risk averse.⁷⁰ In the case of the privacy of letters the question is how rights would be assigned before the parties know what will be in their self interest. The answer, of course, is not knowable, but the risk-averse position is likely to be one in which the

⁶³ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 307 (Peter Laslett ed., Cambridge Univ. Press 1960).

⁶⁴ *Id.* at 306.

⁶⁵ *Id.*

⁶⁶ Robert Nozick makes the point that someone dumping a can of tomato juice in the ocean so that it spreads throughout the ocean would not be regarded as laying claim to the ocean. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174-75 (1974); see also Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 38 (1989).

⁶⁷ See JOHN RAWLS, A THEORY OF JUSTICE (1971).

⁶⁸ See *id.* at 136-42.

⁶⁹ See *id.*

⁷⁰ This is most evident in Rawls' "Difference Principle." Social and economic inequalities are to be arranged so that they are both "(a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all." *Id.* at 53.

parties choose to be protected from embarrassment as opposed to being forced to take affirmative steps to protect against intrusions that may be life-changing, increasingly expensive, and of varying degrees of certainty. Indeed, uncertainty may be the key. Behind the veil, the uncertainty of negative events is likely to be treated as something to be avoided.

Two other approaches have utilitarian underpinnings. The first asks who values the right more. The question might be posed in terms of who owns the right to the contents of letters once written and transmitted. The idea under this alternative is to imagine a right that can be defined in two ways. Under one version, one is assured of the privacy of personal letters. Under the other version, no such assurance is available and the right is a “right to read.” Those familiar with the Coase Theorem⁷¹ and externalities will recognize this as an instance of competing uses, only the resource involved is far less tangible than the rights to air, sun or water. Here, those seeking privacy could be viewed as giving rise to an externality with respect to those who desire information. Those attempting to acquire information could be viewed as creating an externality for those who want to be left alone. Consequently, the question can be posed in terms of who has the right to use the “privacy space.”

In a sense, this is a single right that can be owned by one group or another. The problem is how one defines the default position or who owns the right initially. One could take a utilitarian perspective and define the right in a way that maximizes utility. The problem, as with all utilitarian-based policy prescriptions, is that an interpersonal comparison of utility is not possible.

A related approach would be to define the right or assign its ownership on the basis of who values it the most. One can envision an auction with competing parties—privacy seekers and “right to read” proponents—bidding for their preferred version of the right. This approach has some appeal and may in some respects reflect reality, in that people currently do invest in efforts to both protect their privacy and to discover information about others.⁷² Still, there is a serious

⁷¹ See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see generally JEFFREY L. HARRISON & JULES THEEUWES, *LAW AND ECONOMICS* 81-101 (2008).

⁷² Alix Vance, *The Digital Universe, Information Shadows, and Paying for Privacy*, THE SCHOLARLY KITCHEN, May 17, 2010, <http://scholarlykitchen.sspnet.org/2010/05/17/the-digital-universe-information-shadows-and-paying-for-privacy>.

question of whether one's privacy should be contingent on the ability to pay for it. In fact, the problem here is not unlike that which arises under the Fourth Amendment in which privacy is clearly a function of income. In that context, there seems to be little dispute that money and wealth mean greater privacy.⁷³ The same is likely to be true with respect to communications—those who can afford different means of communication and devices that assist in protecting privacy are afforded greater peace of mind.⁷⁴ In effect, this economic solution, if it could be determined, just gives rise to the normative question of whether rights should be determined by economic means.

The second economic approach, "Pareto Superior," has its roots in Kant's Categorical Imperative.⁷⁵ Reallocations are Pareto Superior when at least one party is better off and no one is worse off.⁷⁶ The problem is that in a regime in which privacy rights like those considered here do not exist, it is difficult to describe the person whose letters are read by those for whom they were not intended as "worse off." Without a consensus with respect to what it means to be better or worse off, which itself must be based on legitimate expectations, a Paretian analysis does not advance the overall analysis.

In sum, although the issue is not free from doubt, there are good arguments that there should be an expansive right to keep one's personal communications private. For the purposes of this discussion that right is broader than stated in the Restatement (Second) of Torts but independent of any rights that may accrue under copyright law. Indeed, copyright law may mean reliance on protection that is arguably inappropriate and overly narrow.

C. Some Questions to Consider

Having offered a case for the privacy of letters, there are a number of complications that arise from a focus on the letter writer's "peace of

⁷³ See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999); see also *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).

⁷⁴ See Adam Cohen, *The Government Can Use GPS to Track Your Moves*, TIME, Aug. 25, 2010, available at <http://www.time.com/time/nation/article/0,8599,2013150,00.html>.

⁷⁵ See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? (Lewis White Beck trans., 2d ed. rev. 1990) (1785); see also JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 57-65 (1970); Alan H. Goldman, *Rights, Utilities and Contracts*, in NEW ESSAYS ON CONTRACT THEORY 131 (Kai Nielsen & Roger A. Shiner eds., 1977).

⁷⁶ STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 19 n.2 (2002).

mind.” To understand the first concern, consider the factual assertions that may be found in a letter—“after visiting the store I met Marge and we made love.” Under copyright law, facts are not protected, although their expression may be. Should a letter writer be able to protect truthful facts? In a sense, the idea is unattractive. The writer does not “own” the facts. On the other hand, unless there is a compelling reason, as noted above,⁷⁷ there is little reason not to protect the writer’s communication of facts the writer knows and others do not.⁷⁸

An additional question is how long does one “own” his or her privacy. In copyright, because a work is regarded as comparable to traditional property, it is an asset that can be passed from generation to generation as though it were the family farm.⁷⁹ Privacy, as defined here, is not an income-earning asset. In fact, one could argue that the letter writer can only enjoy peace of mind as long as he or she is mindful. At death, so the argument would go, the interest in privacy ends. One argument for this approach is that it actually may make letters more available to others once the letter writer dies. Those who prefer a copyright approach because it holds open the potential of fair use access may find they are in a better position if the peace of mind interest ends with the death of the letter writer. There are two qualifications that should, however, enter into this analysis. First, suppose the facts and views found in a letter would infringe on the peace of mind of a third party. For example, in the letter involving Marge, suppose she does not want the letter to be read because of fear that it will upset Homer. Second, there is the possibility that the knowledge that the letter will be available for reading when one dies causes a loss of peace of mind to the writer while living.

Both of these possibilities counsel for more extensive protection than the life of the writer. The first, third party impacts, is more compelling because the third party has a privacy interest and the revelation of information can have a distinct negative impact. Less compelling is the extension of protection beyond the life of the author when the

⁷⁷ These are instances in which knowledge of the letters could lead to avoiding the harm to others.

⁷⁸ In this sense a privacy interest in letters is more expansive than what would be offered under copyright law.

⁷⁹ Of course, the life plus 70 years rule for duration means that the actual period during which internalization is permitted can vary greatly and seems disconnected from an economic rationale.

only interest is the author's peace of mind. In these cases, a bright line test should be sufficient, with the letter writer's understanding at the time of writing that all will be fair game in the future. Knowing the rule means the letter writer can account for today's peace of mind with respect to after-death uses when deciding what to write today.

There is a further consideration that shadows either of the above approaches. When rights are assigned there must be a method of protecting those rights. The conventional way of thinking about protecting rights, as expressed in the seminal work by Guido Calabresi and Douglas Melamad,⁸⁰ is to consider whether they are best protected by a "property rule" or a "liability rule."⁸¹ Under a property rule, a right may not be taken without permission.⁸² In effect, a property rule encourages a voluntary exchange, typically at a price agreed upon by the parties.⁸³ Liability rules require payment of damages after the fact.⁸⁴ For a number of reasons, including both the importance of consent and the comparison of relative value when determining price,⁸⁵ property rules are preferable unless transaction costs are so high that they preclude a mutually beneficial exchange.⁸⁶ When transaction costs are high, liability rules become the only option.⁸⁷

Copyright law's remedy of damages plus disgorgement of profits earned by the infringer create what is in essence a property rule by (in theory) eliminating any gain from use of a work without permission.⁸⁸ In the context of letters, a property rule also seems appropriate. First, in the context of letters, transaction costs are relatively low. The recipient of the letter as well as the writer is identifiable. In fact, if the au-

⁸⁰ Guido Calabresi & A. Douglas Melamad, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁸¹ *See id.* at 1092 (introducing the "property rule" and "liability rule" as ways to protect rights).

⁸² *See id.* (noting that "[a]n entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction").

⁸³ *See id.* (recognizing that a "property rule" encourages a voluntary exchange "in which the value of the entitlement is agreed upon by the seller").

⁸⁴ *See id.* at 1106-09 (demonstrating how payment under a "liability rule" operates through the examples of eminent domain and accidents).

⁸⁵ *See* HARRISON & THEEUWES, *supra* note 71, at 93-95.

⁸⁶ *See id.*

⁸⁷ Another possibility, a rule of inalienability, seems inapplicable in this context.

⁸⁸ In essence, it eliminates the possibility of what has been called "efficient infringement." An efficient infringement would occur if an infringer could earn enough to fully compensate the owner of the work for his or her loss and still experience a net gain. *See* Walker v. Forbes, Inc., 28 F.3d 409, 412 (4th Cir. 1994).

thor is not identifiable (and transaction costs high), the peace of mind justification becomes irrelevant. Probably more important is that property rules protect subjective values. For example, in the case of a liability rule of damages to real property, an award equal to fair market value arguably restores the plaintiff to the *ex ante* position. On the other hand, the damage to one's peace of mind cannot be valued without the input of the individual involved. The valuation point is before the harm occurs.⁸⁹

A final and very important point involves the intersection of privacy rights and the First Amendment. One way to avoid the problem involves an analysis that is possibly too cute. The peace of mind at issue when it comes to letters is connected to the reading of private communications, not the dissemination. While this is technically true, the writer's peace of mind is not so much related to a single reader but to the broad dissemination of the information. This does raise First Amendment concerns. In the field of copyright law, the First Amendment question is arguably satisfied by noting the distinction between ideas (not protected) and expression (protected) and the fair use opportunity.⁹⁰ These measures are found within the Copyright Act itself.⁹¹

The problem is whether one can detach letters from copyright law and still claim that the protection of letters as discussed here will pass First Amendment muster. This is well-traveled ground,⁹² and the conflict is obvious but perhaps not as severe as it may initially appear. In fact, there are powerful arguments that privacy interests in letters do not invoke the values associated with free speech. I do not intend to summarize the arguments and the literature here other than to note a few factors that are particular to letters. First, it should be noted, that the privacy requirement is not wholly separable from the right not to speak. The letter writer prefers not to make the communication public or have it expressed publically—while the intruder wants to commu-

⁸⁹ Criminal law may come into play when individuals attempt to change property rules to liability rules. See Calabresi & Melamad, *supra* note 80, at 1124-27.

⁹⁰ *Eldred*, 537 U.S. at 219-22.

⁹¹ 17 U.S.C. §§ 102(b), 107 (2006).

⁹² See, e.g., Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1012-13 (1996); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 723 (1996); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 967 (2003); Lorelei Van Wey, *Private Facts Tort: The End is Here*, 52 OHIO ST. L.J. 299, 299-300 (1991).

nicate. Nevertheless, the content of that expression is dependent on the letter writer and thus any rights claimed by the repeater are arguably subordinate to those of the writer without whom there would be nothing to communicate.

Closely related to this is the question of the impact of reducing the privacy of letters. Almost certainly it means fewer letters. People will keep to themselves, speak rather than write, and destroy records. Images of disappearing ink and self-destructing messages come to mind. The effect is permanent. In a very real sense, the ability to have writings to reflect upon and speak about in the future may be a function of the privacy afforded today. Obviously, there is no empirical evidence to examine on this point, but quite clearly one cannot reduce the privacy of letters and expect there to be no impact. Moreover, under the proposal offered here, there is no privacy in communications that have a serious impact on the welfare of others. In addition, unlike copyright, peace of mind and the resulting privacy interests require that the author possess the capacity to be mindful. Thus, privacy can play an important role in encouraging more information and greater diversity of expression.

V. CONCLUDING REMARKS

Everyone from the love sick teenager to the college professor who misaddresses an email would prefer to have his or her privacy in letters observed. Technological changes mean it is increasingly difficult to assure that privacy. With a click of a button a letter can be disseminated worldwide and a life changed permanently. There is a tendency to think about copyright law and the right to first publication when considering the privacy of letters. The point made here is that letters should not be copyrighted. Copyright is largely based on the opposite of privacy. It stems from a belief that authors should be permitted to internalize the benefits of their works when disseminated. Letter writers do not want to internalize; for the most part they desire the peace of mind associated with avoiding disclosure and intrusion.

This means that privacy interests are more relevant than copyright-like property interests. This article argues that there are moral or economic bases for supporting the privacy of letters as long as the information therein does not reveal a serious danger to the welfare of others. It also suggests that the "peace of mind" rationale, with limited exception, ends with the letter writer's life. This solution may be superior for both privacy seekers and for those who have concerns about the availability of information and a diversity of expression.

