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Publishing Privacy: Intellectual Property, Self-Expression, and the Victorian Novel

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Publishing Privacy: Intellectual Property, Self-Expression, and the Victorian Novel

by

JESSICA BULMAN*

I. Introduction	74
II. Intellectual and Historical Context	77
1. Urbanization and Industrialization	77
2. Conceiving Privacy Through Intellectual Property.....	79
3. Authors on Copyright.....	84
4. The Novel.....	87
III. Plotting Privacy: Charles Dickens and Elizabeth Gaskell.....	89
1. The Author's Plea: Privatizing Intellectual Property.....	90
A. Charles Dickens.....	90
B. Elizabeth Gaskell	94
2. Commodifying Privacy: The Threat of Blackmail.....	97
3. The Privilege of Communal Privacy	100
IV. The Reader and the Novel's Private Community.....	106
V. Conclusion.....	115

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I. Introduction

“Gentlemen, as I have no secrets from you, in the spirit of confidence you have engendered between us,” Charles Dickens addressed a Connecticut audience during his 1842 American tour, “I would beg leave to whisper in your ear two words, International Copyright.”¹ This conflation of intellectual property interests and confidentiality typified Dickens’s savvy strategy for addressing the question of transatlantic copyright; he recognized that casting his listeners as privileged intimates and his concern as personal, rather than financial, would in fact bolster his argument for a lucrative public agreement. But his appeal, I would argue, also suggestively harnessed two concepts that were of vital importance to Victorian authors—privacy and intellectual property. Because professional authorship in the nineteenth century was a contested territory,² Dickens and his contemporary and friend, Elizabeth Gaskell, often cloaked their literary endeavors in secrecy. More fundamentally, they regarded writing as a personal matter. Even as their novels circulated in the burgeoning literary marketplace, they understood their artistic creations to have unique private value, and within their fiction they impressed the importance of privacy and its strong conceptual relationship to intellectual property.

The relationship between privacy and intellectual property has resurfaced with a twist at the turn of the twenty-first century. If Victorian authors regarded intellectual property as private, contemporary proposals instead urge us to regard private information as property. In response to technological developments that have facilitated unprecedented invasions of individuals’ privacy, some scholars have advocated legally classifying private information as a form of property.³ These scholars insist that the best way to respond

1. *Quoted in* ALEXANDER WELSH, FROM COPYRIGHT TO COPPERFIELD: THE IDENTITY OF DICKENS 32 (1987).

2. *See generally* MARY POOVEY, THE PROPER LADY AND THE WOMAN WRITER: IDEOLOGY AS STYLE IN THE WORKS OF MARY WOLLSTONECRAFT, MARY SHELLEY, AND JANE AUSTEN (1984) (discussing the problematic nature of professional authorship for female writers).

3. *See, e.g.*, Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1246-94 (1998); Kenneth C. Laudon, *Extensions to the Theory of Market and Privacy: Mechanics of Pricing Information*, in PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE 43 (U.S. Dep’t of Commerce ed., 1997); Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 63-65 (1999); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L. J. 1, 26-41 (1996); Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L. J. 2381, 2383 (1996);

to privacy violations, particularly corporate commodification of personal data,⁴ is to invest people with property rights that would furnish control over their personal information.⁵ Insofar as intellectual property rights are currently understood to protect commodities, such proposals could dangerously redefine privacy rights and commodify the self.⁶ If, however, we instead conceptualize intellectual property as Victorian authors urged, a careful mapping of intellectual property onto privacy could offer robust protection. A relatively unheralded development of moral rights in nineteenth-century intellectual property law, advanced by authors in courtrooms and literary works alike, insisted that the right to control written expression stemmed from its close connection to the self and treated copyright as a matter of personal, rather than solely economic interest. The earliest arguments for a legal right to privacy, at the end of the nineteenth century, capitalized on this understanding: to ground the individual's right to control private information, the most influential of these proposals, Samuel Warren and Louis Brandeis's "The Right to Privacy," invoked copyright cases that defined literary

Pamela Samuelson, *A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy*, 87 CAL. L. REV. 751, 769-73 (1999) (book review). See generally Symposium, *Cyberspace and Privacy: A New Legal Paradigm?* 52 STAN. L. REV. 987 (2000) (containing arguments both for and against treating private information as property). Although privacy encompasses many different areas, including physical privacy and decisional privacy, I focus in this paper on informational privacy.

4. See, e.g., FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 14-15 (1997); John Hagel III & Jeffrey F. Rayport, *The Coming Battle for Customer Information*, HARV. BUS. REV. 53 (1997); Kang, *supra* note 3, at 1198-99. In the U.S., a right of privacy does not exist when a person has published a matter by communicating it to a third party. See WILLIAM L. PROSSER & JOHN W. WADE, *TORTS: CASES AND MATERIALS* (1962), at 934. The licensing of information by one company to another, when the information has voluntarily been communicated to the first company, therefore does not constitute a violation of privacy rights. In Europe, by contrast, it is illegal for a firm to release personal data to a third party or to use such data for a purpose unrelated to the reason for which it was collected. See Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 6, 7, 1995 O.J. (L 281) 31. For a comparative analysis of the regulation of personal information in the U.S. and Europe, see PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW* (1996).

5. See *supra* note 3; see also Kenneth C. Laudon, *Markets and Privacy*, COMM. ACM SEPT. 1996, at 92 ("Why not let individuals own the information about themselves and decide how the information is used?"); Pamela Samuelson, *Information As Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 366 (1989) (suggesting the inevitability of treating private information as property).

6. See, e.g., Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1143 (2000) (comparing treating privacy as a form of property to commodifying voting rights and citing Pamela S. Karlan, *Not By Money But By Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994)).

works as articulations of their creators' personalities and held that the right to control such works inhered in their intimate relationship to the self.⁷

The Victorian novels of Gaskell and Dickens anticipated the *fin-de-siècle* argument that privacy is about control over personal information and is therefore closely related to intellectual property rights. In their works, these authors treat various forms of intellectual property as uniquely private creations, and they also use intellectual property as a model for privacy because it furnishes control without necessitating commodification. Dickens's and Gaskell's fiction accentuates the interpersonal nature of both privacy and intellectual property. Because it concerns more than one character, the novel probes how people negotiate privacy concerns, and it simultaneously fosters an intimate relationship among characters, author, and reader. Indeed, while Dickens's appeal to his Connecticut audience may strike us as curious because he seeks intimacy with a mass audience, this is precisely what he and Gaskell attempted in their novels. They compensated for financial motives and mass publication by casting their literary endeavor as the creation of an almost domestic intimacy; and they sheltered the privacy of their novels by suggesting that readers engendered their confidences through the very act of reading, much as the Connecticut gentlemen seemingly euded Dickens's personal reflections through the mere act of listening. Ultimately, Dickens's and Gaskell's novels dramatize privacy and intellectual property as mutually constitutive concepts, and the privileged view we attain through reading, I will argue, can usefully inform current debates.

In Part II of the paper, I establish the historical context, using Warren and Brandeis's article to frame my discussion. I also explore the novel's distinctive relationship to both copyright and privacy. In Part III, I examine the careers and works of Charles Dickens and Elizabeth Gaskell and discuss how these authors placed questions of privacy and intellectual property in a dialogue in their lives and their novels. I focus on how Dickens's and Gaskell's works illustrate privacy's interpersonal dimensions: their novels dramatize the threat to autonomy and intimacy that results from market-driven appraisals of personal information, but they also posit a communal privacy that ensures the dignity of individuals. In Part IV, I address the reader's relationship to the privacy of the novel and maintain that novels do

7. Samuel Warren & Louis Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 200-05 (1890).

not hypocritically invade privacy, as many critics have argued, but rather teach their readers to value private information within a literary framework. I conclude the paper with a discussion of how Victorian novels can inform contemporary debates about intellectual property and privacy.

II. Intellectual and Historical Context

In 1890, Samuel Warren and Louis Brandeis published their foundational argument for the individual's right to privacy. In their article, the lawyers turn with particular enthusiasm to intellectual property cases from the mid-Victorian years, when an array of developments in both people's lifestyles and the common law drew attention to and changed the nature of privacy concerns. Relying on British and American copyright cases from this era, Warren and Brandeis extract a right to privacy from rulings that granted authors control over the publication of self-expression. But it was not, I will argue, nineteenth-century judicial opinions that most thoughtfully advanced the individual's privacy. Rather, in their literary works, Victorian novelists presented a compelling model of the relationship between privacy and artistic expression and, in so doing, prefigured Warren and Brandeis's advocacy of a right to privacy grounded in intellectual property rights.

1. Urbanization and Industrialization

Urbanization and industrialization in the nineteenth century posed threats to the self and self-expression that effected a new awareness of privacy, and recognition of the individual's vulnerability endowed privacy with social meaning.⁸ A primary focus of Victorian privacy concerns was the doctrine of separate spheres. This prescriptive doctrine defined government and market as a public, masculine sphere and championed the home as a private, feminine sphere, even as political manifestos and artistic depictions offered up domesticity for mass consumption. Intersecting with this gendered discourse was a growing preoccupation with individuals' control over

8. Privacy has not always been valued: "In ancient feeling the privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state of being deprived of something We no longer think primarily of deprivation when we use the word 'privacy,' and this is partly due to the enormous enrichment of the private sphere through modern individualism," which occurred particularly in the eighteenth and nineteenth centuries. HANNAH ARENDT, *THE HUMAN CONDITION* 38 (Univ. of Chicago Press 1998) (1958).

personal information, as industrialization and urbanization increased both publicity and spatial proximity.

Urbanization at once seemed to threaten and secure individuals' privacy. The astounding growth of cities brought strangers into immediate physical contact, but it also facilitated anonymity. In contrast to life in the country, which typically offered spatial isolation but little informational privacy, urban settings furnished virtually no physical privacy, but enabled people to keep personal matters to themselves.⁹ As if to counteract their loss of seclusion, city dwellers came to appreciate the private value of personal information, and they were alive to both their own secrets and those of their neighbors. Dickens's *A Tale of Two Cities* reflects upon the "wonderful fact . . . that every human creature is constituted to be [a] profound secret and mystery to every other" and describes the realization, upon entering a city at night, "that every one of those darkly clustered houses encloses its own secret; that every room in every one of them encloses its own secret; that every beating heart in the hundreds of thousands of breasts there, is, in some of its imaginings, a secret to the heart nearest it!"¹⁰ Much as politicians and artists paradoxically underscored the privacy of the domestic sphere by subjecting it to society's gaze, public proclamations of privacy, particularly in literature, became essential to city residents' belief that their private lives were shielded from view.

As urbanization recast personal information as a valuable private good, the Industrial Revolution transformed public information into a valuable social commodity: "Among the vast array of goods and materials produced during the aggressive onset of industrialism in Britain in the early Victorian period, none was more widely disseminated, more instrumental to everyday life, more essential to the shaping of industrial culture than information."¹¹ Paper production multiplied, stamp taxes were repealed, and railroads

9. See GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 336-37 (Kurt H. Wolff ed. & trans., 1950) (arguing that "modern life has developed, in the midst of metropolitan crowdedness, a technique for making and keeping private matters secret, such as earlier could be attained only by means of spatial isolation"); IAN WATT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON AND FIELDING* 179 (2000) (1957) (claiming that the "combination of physical proximity and vast social distance is a typical feature of urbanisation").

10. CHARLES DICKENS, *A TALE OF TWO CITIES* 17 (Random House 1993) (1859).

11. Joseph W. Childers, *Industrial Culture and the Victorian Novel*, in *THE CAMBRIDGE COMPANION TO THE VICTORIAN NOVEL* 77, 77 (Deirdre David ed., 2001). See also RICHARD DANIEL ALTICK, *THE ENGLISH COMMON READER: A SOCIAL HISTORY OF THE MASS READING PUBLIC: 1800-1900* (1983).

flourished, facilitating the ready distribution and widespread availability of printed material. In this hearty culture of information, literacy rates increased dramatically, and people were willing to pay for knowledge—the sales of newspapers and serial publications soared. Notably, society’s very dependence on information betokened that it might have market value not only upon publication, but also when kept secret; concealing certain matter could be desirable precisely because of its worth to others.

The coupling of urbanization and industrialization created conditions for both greater privacy and greater publicity. Developments that decreased seclusion and rendered information a valuable commodity increased the desirability of keeping personal matters secret, while at the same time increasing the likelihood that privacy would be invaded. Privacy’s dialectical relationship with its violation ensured that it was often valued to the extent that it was threatened. Victorian privacy was also conceptually linked to writing, and specifically to works circulating in the public sphere. Because writing could be the site of personal disclosures as well as a form of property, concerns about informational privacy were bound up in questions of intellectual property, and Victorian authors convincingly articulated the relationship between these concepts.

2. Conceiving Privacy Through Intellectual Property

At the end of the nineteenth century, Samuel Warren and Louis Brandeis published their seminal proposal for a common-law right to privacy in the *Harvard Law Review*.¹² “The Right to Privacy” casts privacy as a peculiarly modern need; as the press has invaded personal lives, the lawyers argue, people have “become more sensitive to publicity, so that solitude and privacy have become more essential to the individual.”¹³ Their article therefore proclaims the right of the individual to be “let alone” and establishes as the basis for this right the principle of an “inviolable personality.”¹⁴

To establish legal precedent for a right to privacy, Warren and Brandeis turn to several intellectual property cases, which, they argue, actually hinged on the author’s right to privacy. In some

12. Warren & Brandeis, *supra* note 7. As Warren and Brandeis themselves note, their article was preceded by Judge Thomas Cooley’s inclusion of the right “to be let alone” as a class of torts in 1880, as well as a July 1890 article by E.L. Godkin in *Scribner’s Magazine*. *Id.* at 195. Nonetheless, Warren and Brandeis’s article is so much more expansive than these precedents that it is fitting to regard it as the first theory of the right to privacy.

13. *Id.* at 196.

14. *Id.* at 205.

respects, their reliance on intellectual property law appears misguided. Despite a degree of confusion in their own text about whether privacy rights should be distinguished from property rights or should be regarded as a species of property rights,¹⁵ Warren and Brandeis ultimately attempt to disentangle the individual's privacy from property. Given the longstanding Anglo-American tradition of protecting artistic works because of the labor that has gone into producing them and of granting economic, rather than personal rights in such works,¹⁶ the lawyers' reliance on intellectual property law could be considered a counterproductive move that would indelibly link privacy and property.

It would seem that Warren and Brandeis should have looked instead to the continental European system of the *droit moral*, or "moral right," which grants authors a bundle of personal and

15. They argue, for instance, "The right of property in its widest sense, . . . hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested." *Id.* at 211. But they also insist, "The principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an inviolate personality." *Id.* at 205. Walter Benn Michaels argues that Warren and Brandeis's "explicit attempt to shift privacy away from property nonetheless produced a dramatic extension of property rights, produced, in effect, new property." Walter Benn Michaels, *The Contracted Heart*, 21 *NEW LITERARY HIST.* 495, 526 n. 13 (1990).

16. Anglo-American property law, including intellectual property law, is based fundamentally on John Locke's conception of property, which maintains that "every man has a *property* in his own *person* Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 27 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). Labor is central to this conception, and statutes have traditionally awarded economic rights in intellectual property. For its entire early history, British intellectual property law did not even protect the interests of authors; instead, both printing patents, granted by the crown, and the Stationers' Company guild system settled property rights on the printers and sellers of works. For a thorough history of publishing in early modern England, see ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* (1998). Other valuable histories of intellectual property include JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* (1994); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); PAUL K. SAINT-AMOUR, *INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION* (2003); DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* (1992); *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds., 1994). It is noteworthy that the "sweat of the brow" theory, rewarding labor, has been largely revised in American law. *See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 US 340 (1991) (rejecting the "sweat of the brow" basis for intellectual property rights and holding that the determining factor in was the originality of the creation, not the labor expended on its creation).

inalienable rights in their works.¹⁷ Such rights include: the *droit de divulgation* (the right of disclosure, which allows authors to decide when and where to publish);¹⁸ the *droit de repentir ou de retrait* (the right to correct or withdraw published works);¹⁹ the *droit de paternite* (the right to be acknowledged as the author);²⁰ and the *droit au respect de l'oeuvre* (the right of integrity, which prevents mutilation or distortion that would harm the author's reputation).²¹ The *droit moral* explicitly recognizes the personal connection between authors and their creations and lends rights to safeguard the individual's private self as expressed in artistic works. Protection is based on the individual's personality, and this intellectual property system, rather than the Anglo-American tradition, therefore appears more conducive to Warren and Brandeis's argument.²²

Warren and Brandeis themselves acknowledged certain limitations of grounding a right to privacy in Anglo-American intellectual property rights.²³ They also, however, recognized a subterranean development of the moral right in eighteenth- and nineteenth-century common law, and it is this development that they

17. Law on the Intellectual Property Code, No. 92-597 of July 1, 1992, in World Intellectual Property Org., Copyright and Neighboring Rights, Laws and Treaties (1996) [hereinafter French Act]; Urheberrechtsgesetz (UrhG) § IV.2, arts. 12-14 <<http://iecl.iuscomp.org/gla/statutes/UrhG.htm>> [hereinafter German Act]. The term *droit moral* was coined by Andre Morillot, a French jurist, and later codified in the French Intellectual Property Code. See *Code de la Propriete Intellectuelle*, in ANDRE RANCON, COURS DE PROPRIETE LITTERAIRE, ARTISTIQUE ET INDUSTRIELLE 289-322 (1993). The German term *Urheberpersönlichkeitsrecht* means the "author's right of personality" and more closely conveys the idea that the rights concerned are perceived as arising from the creator's personality. See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N. C. L. REV. 1, 6, n. 40 (1997).

18. French Act, *supra* note 17, art. L. 121-2; German Act, *supra* note 17, art. 12.

19. French Act, *supra* note 17, art. L. 121-4.

20. French Act, *supra* note 17, art. L. 121-1; German Act, *supra* note 17, art. 13.

21. French Act, *supra* note 17, art. L. 121-1; German Act, *supra* note 17, art. 14.

22. In recent years, moral rights have become increasingly visible not only in international intellectual property agreements, but also in Anglo-American intellectual property law. Most important, and likely spurred by the United States' accession to the Berne Convention for the Protection of Literary and Artistic Works in 1989, the Visual Artists Rights Act (VARA) of 1990 explicitly recognizes limited moral rights for visual artists. Visual Artists Rights Act, Pub. L. No. 101-650, 601-610, 104 Stat. 5089, 5128-33 (codified as amended in scattered sections of 17 U.S.C.). I will argue, however, that moral rights in Anglo-American intellectual property law extend back to Victorian times, although the codification of such rights was a vexed and contradictory process. See generally Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988) (arguing for the existence of certain moral rights for authors under American common law).

23. See Warren & Brandeis, *supra* note 7, at n. 33 and accompanying text (discussing intellectual property rights as a reward for labor).

turn to in their article.²⁴ Noting that copyright statutes have secured for authors the profits from publication of their works, Warren and Brandeis insist that a more robust common-law tradition has enabled authors to “control absolutely the act of publication.”²⁵ In their article, such control over self-expression and, more generally, self-relevant information becomes the central component of privacy: “the individual is entitled to decide whether that which is his shall be given to the public.”²⁶

Most notably, Warren and Brandeis look to a case that upheld authors’ prepublication rights in Victorian England: *Prince Albert v. Strange*.²⁷ At stake in this case was whether authors owned their works prior to publication, and thus whether they could keep their works to themselves if they so chose. The judges explicitly cited *Prince Albert*’s property rights to enjoin the printing of a catalogue of his etchings, but they further implied a right to privacy in written works: “Upon the principle, therefore, of protecting property, it is that the common law . . . shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known.”²⁸ Because the quality of the work was immaterial to the author’s right to determine whether to publish, the judges maintained that their decision applied to all creations, whether

24. A personality rationale for intellectual property rights, which grounded literary property interests in conceptions of the self, appeared in England as early as the eighteenth century. *Pope v. Curl* famously conflated issues of privacy and property to rule that the material property of letters did not convey copyright in the contents, which remained with the author until publication was granted. Justice Hardwick rejected Edmund Curll’s claim that a letter is a gift to the receiver and separated the material contents of the letter (which belonged to the receiver) from the intangible expressions (which belonged to the writer). He thereby established copyright as the protection of the immaterial and authors as independent creators with the right to control their works’ publication. *Pope v. Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (Ch. 1741). In *Donaldson v. Beckett*, the court treated literary works in an analogous fashion: Justice Yates argued that publication of a literary work was a gift to the public, but the majority rejected his claim in favor of the author’s sole ownership. *Donaldson v. Beckett*, 17 Parl. Hist. Eng. 953 (H.L. 1774). Both the prevailing and dissenting opinions of such cases as *Pope v. Curl* and *Donaldson v. Beckett* informed later rulings in British copyright disputes, as judges wrestled with questions about where copyrightable material resided (e.g., in the sequence of words, the immaterial ideas, the expression’s personality, the possession of the document). See generally, ROSE, *supra* note 16; THE LITERARY PROPERTY DEBATE: SIX TRACTS, 1764-1774 (Stephen Parks ed., 1975); THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774-1775 (Stephen Parks ed., 1974). Warren and Brandeis particularly focus on nineteenth-century cases in their article.

25. Warren and Brandeis, *supra* note 7, at 200.

26. *Id.* at 199.

27. 41 Eng. Rep. 1171 (1849), *aff’d*, 64 Eng. Rep. 293 (1849).

28. *Id.* at 312.

publishable or not.²⁹ The ruling turned on the belief that artistic works were not mere commodities, but rather forms of self-expression that authors had the right to keep to themselves. *Prince Albert v. Strange* thus seemed to acknowledge that artistic creations deserved protection because they were intimately connected to their creators' private selves, and to cast personality as the basis of literary property.

Generalizing from this and similar cases,³⁰ Warren and Brandeis extract a right to privacy from intellectual property law. "[T]he common-law right to intellectual and artistic property" is an application "of a general right to privacy,"³¹ they maintain, for "[t]he same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay."³² For Warren and Brandeis, intellectual property rights protect individuals' decisions about whether to communicate their thoughts and emotions, and necessarily implicate privacy, which concerns the individual's right to control information about the self. Indeed, Warren and Brandeis argue that the intellectual property cases they discuss are not ultimately about property, but rather privacy: "Although the courts have asserted that they rested their decision on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine," namely the individual's right to privacy.³³

Warren and Brandeis make a compelling argument that these cases furnish more capacious protection of personal thoughts and sentiments than intellectual property law traditionally would have provided. *Prince Albert v. Strange*, for example, would seem to protect not only expression (the province of copyright law), but also the ideas underlying such expression, with the ultimate goal of sheltering the individual. While these cases extend beyond intellectual property rights to implicate privacy, they also highlight the unique nature of intellectual property. By underscoring authors'

29. The Vice Chancellor noted that an author, "whether he is famous or obscure, low or high," had the right to control the publication of his manuscripts, "whether interesting or dull, light or heavy, saleable or unsaleable." *Quoted in Warren & Brandeis, supra* note 7, at 199 n. 5.

30. Most relevant, Warren and Brandeis cite the American case *Woolsey v. Judd*, which held that the publication of private letters without the consent of the writer was a violation of the writer's property interest. *Woolsey v. Judd*, 11 How. Pr. 49, 51, 4 Duer 379, 383, 11 N.Y. Super. Ct. 379, 383 (1855). Warren and Brandeis also discuss *Millar v. Taylor*, 98 Eng. Rep. 201 (1769), *cited in Warren & Brandeis, supra* note 7, at 198, n. 2., and *Jefferys v. Boosey* 10 Eng. Rep. 681 (1854), *cited in Warren & Brandeis, supra* note 7, at 194, n. 6., 200, n. 2.

31. Warren & Brandeis, *supra* note 7, at 198.

32. *Id.* at 199.

33. *Id.* at 204.

personal investments in their works, Warren and Brandeis suggest that the creation of intellectual property is often necessarily a private and personal activity.

3. Authors on Copyright

It is perhaps natural, then, that while the courtroom regulated struggles over copyright and laid the groundwork for “The Right to Privacy,” it was authors themselves who most persuasively advocated for moral rights in their artistic creations. At the turn of the nineteenth century, the Romantics began to stress the individuality and uniqueness of literary works. In earlier centuries, authors had been regarded as craftsmen, but Romantics including Edward Young, Immanuel Kant, and Johann Gottlieb Fichte insisted that authors did not merely imitate nature, but rather created original works derived from their own personalities.³⁴ So too, England’s Romantic Poets—William Wordsworth, Samuel Taylor Coleridge, Percy Bysshe Shelley, John Keats, and William Blake—celebrated the author as a solitary and unique genius.³⁵ The English language even nodded to this new conception of authorship, as the word “original” underwent a semantic reversal. During the Middle Ages, it meant “having existed from the first,” but in the late eighteenth century it came to mean “underived, independent” and was often used in conjunction with “genius” to express an author’s particular novelty.³⁶

One Romantic author in particular took his claims outside of the lines of poetry and embarked on a political crusade on behalf of extended copyright privileges. Wordsworth urged Thomas Noon Talfourd to propose a copyright bill so that he could pass on property rights in his works as an inheritance. Wordsworth was driven no doubt in large part by economic motives, but he was also deeply protective of his poetry as a personal emanation, something

34. See generally FREDERICK NEUHOUSER, *FICHTE’S THEORY OF SUBJECTIVITY* (Cambridge Univ. Press 1990); Martha Woodmansee, *THE AUTHOR, ART & THE MARKET: REREADING THE HISTORY OF AESTHETICS* 53-54 (1994) (quoting Edward Young’s conjecture that an original work “may be said to be of a vegetable nature; it rises spontaneously from the vital root of genius; it grows, it is not made”).

35. See, e.g., SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA* (1817). See generally M.H. ABRAMS, *THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION* (1958); HAROLD BLOOM, *THE VISIONARY COMPANY: A READING OF ENGLISH ROMANTIC POETRY* (1961); LESLIE BRISMAN, *ROMANTIC ORIGINS* (1978); LOGAN PEARSALL SMITH, *FOUR WORDS: ROMANTIC, ORIGINALITY, CREATIVE, GENIUS* (1924).

36. WATT, *supra* note 9, at 14.

intimately linked to his conception of self.³⁷ For him, literary property “embodied an aspect of essential character; a function of individual identity, it was inalienable.”³⁸ He sought protection for his literary creations not only for financial reasons, but also because they were inextricably linked to his identity. Similarly, Talfourd compared literary property to a person’s character: “[W]hy do you protect moral character as a man’s most precious possession, and compensate the party who suffers in that character unjustly by damages? Has this possession any existence itself half so palpable as the author’s right in the printed creation of his brain?”³⁹ Both Wordsworth and Talfourd argued that literary works were fundamentally related to authors’ persons and should therefore remain under their control. Some fifty years later, Warren and Brandeis would echo this argument in their “Right to Privacy.”

Wordsworth, Talfourd, and other authors, including Dickens, successfully brought intellectual property issues to national attention, and several copyright statutes, furnishing increasing protections, were promulgated in England in the mid-nineteenth century.⁴⁰ The most important of these was the Copyright Amendment Act of 1842, which

37. John Milton perhaps prefigured not only Wordsworth’s poetry but also his legal wrangling when he insisted in 1649 that Sir Philip Sidney owned *Arcadia* because it was an emanation of his person. When King Charles I appropriated part of the poem on the eve of his execution, Milton called this “a trespass also more than usual against human right, which commands that every author should have the property of his own work reserved to him after death, as well as living.” JOHN MILTON, *EIKONOKLASTES*, in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 781, 794 (Merritt Y. Hughes ed., Odyssey, 1957).

38. SUSAN EILENBERG, STRANGE POWER OF SPEECH: WORDSWORTH, COLERIDGE, AND LITERARY POSSESSION 204 (1992). See also Paul M. Zall, *Wordsworth and the Copyright Act of 1842*, 70 PMLA 133 (1955) (arguing that in the copyright debate, Wordsworth insisted on the difference between works of art and other commodities).

39. Quoted in SAUNDERS, *supra* note 16, at 128. For a comprehensive discussion of Talfourd’s struggles on behalf of copyright reform in the early nineteenth century, see CATHERINE SEVILLE, LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT (1999).

40. The process by which authors came to enjoy greater control over their works during the mid-Victorian era was in fact two-fold: they learned how to gain back control over rights they had once signed away, and new rights were also created. Additional rights came first through customary usages within the profession. For instance, American publishers, forfeiting profits because many copies of each pirated book appeared on the market, developed a system of “courtesy of the trade” to limit competition: they respected the first house to announce a publication of a title not protected under American copyright laws, such as an English novel, and thereby maximized profits of “authorized” editions. See LEWIS A. COSSER, CHARLES KADUSHIN, & WALTER W. POWELL, BOOKS: THE CULTURE AND COMMERCE OF PUBLISHING 20 (1982). New rights also emerged through domestic statutes and bi-lateral and international treaties. During the nineteenth century, then, authors both increasingly asserted rights over their works and benefited from the development of new rights.

was the first piece of legislation put forth by and for authors.⁴¹ This Act established the term of copyright as the author's lifetime plus seven years or 42 years from publication—whichever was longer. It therefore specifically aligned the property rights of authors with their lives and classified written works as expressions of self deserving special protection. In the 1854 case *Jefferys v. Boosey*, Lord Justice Erle vividly extended the analogy between a work and its author: “[I]n ordinary life no two descriptions of the same fact will be in the same words The order of each man's words is as singular as his countenance.”⁴²

This particular trajectory of intellectual property law developments, spearheaded by authors themselves, thus provided the conceptual grounding for privacy rights. Copyright established a precedent for conferring property rights on immaterial expression, and, more important, suggested that people were entitled to control self-relevant information. Sociologist Georg Simmel maintains, “Just as material property is, so to speak, an extension of the ego, and any interference with our property is, for this reason, felt to be a violation of the person, there is also an intellectual private property, whose violation effects a lesion of the ego in its very center.”⁴³ As he proposes, personal information can be considered a species of intellectual property over which the individual exercises control. Many theorists of privacy have indeed cast control, rather than inaccessibility, as its central element. Charles Fried writes that “privacy is not simply an absence of information about us in the minds of others; rather, it is the *control* we have over information about ourselves.”⁴⁴ Such legal control over private information

41. Copyright Act, 1842, 5 & 6 Vict., c. 45 (Eng.). Authors argued that the 1709 Statute of Anne had invested them, rather than publishers, with copyright, and indeed the Statute did grant rights to authors. Statute of Anne, 8 Ann., c. 19, § 1 (1709) (Eng.). A primary purpose of the Statute, however, was to promote competition among printers and booksellers, and the rights of authors were not realized in practice. *See generally* RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); ROSE, *supra* note 16.

42. 10 Eng. Rep. 681, 703 (H.L. 1854).

43. SIMMEL, *supra* note 9, at 322.

44. Charles Fried, *Privacy*, 77 *YALE L. J.* 475-482 (1968). Similarly, Alan Westin defines privacy as the “claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.” ALAN WESTIN, *PRIVACY AND FREEDOM* 7 (1967). *See also* SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 19-20 (1982) (arguing that “[c]ontrol over secrecy provides a safety valve for individuals in the midst of communal life—some influence over transactions between the world of personal experience and the world shared with others”); AVISHAI MARGALIT, *THE DECENT SOCIETY* 201, 204 (Naomi Goldblum trans., 1996) (maintaining that violations of privacy restrict “individuals’ control, against their will, over what is supposed to be within their

fundamentally resembles and is derived from copyright, which, as Warren and Brandeis argued, furnishes authors not only with profits arising from sales, but also with the more expansive personal right to regulate the publication of their works.

4. The Novel

While Warren and Brandeis productively looked to legal rulings to ground their right to privacy, it is not judicial opinions that best illustrate privacy's relationship to intellectual property, but rather literary works themselves. Victorian novels in particular illuminate the connection between our modern conceptions of privacy and intellectual property, which were, in many ways, coincident with the rise of the novel. The novel has consistently been associated with intellectual property rights—as the only literary genre wholly connected with print, it is unequivocally protected under copyright, which has traditionally covered written, but not oral, works. From its inception, the novel has also been concerned with private experience.⁴⁵ Ironically, however, the novel posits the importance of its characters' privacy while circulating their stories in public. Dickens's discussion of the city's secrets in *A Tale of Two Cities* underscores the potential gap between the privacy novelists champion and the publicity their novels effect.⁴⁶ According to some critics, the novel demonstrates its concern with privacy by invading the private sphere and displaying it to a mass audience.⁴⁷

The novel's exploration of private lives, however, is not ultimately a hypocritical violation of the privacy novelists claim to

control"); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000) (exploring legal, technological, and cultural changes that have undermined the individual's control over how much personal information is communicated to others, and arguing that the injury inflicted by invasions of privacy is that of being judged out of context). *But see* ANITA ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988) (arguing that inaccessibility, rather than control, is the most important aspect of privacy).

45. WATT, *supra* note 9, at 174-207.

46. *See* DICKENS, *supra* note 10.

47. *See, e.g.,* PETER BROOKS, *BODY WORK: OBJECTS OF DESIRE IN MODERN NARRATIVE* (1993); KAREN CHASE & MICHAEL LEVENSON, *THE SPECTACLE OF INTIMACY: A PUBLIC LIFE FOR THE VICTORIAN FAMILY* (2000). The publicity of privacy also resembles Foucault's assertion that modern societies speak about sex endlessly "while exploiting it as *the secret*." MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* 35 (Robert Hurley trans., 1980). There may in fact be a direct connection, because much of what is private in modern societies concerns sexual behavior, and, as Kate Flint argues, there was a close "proximity of textuality and sexuality in discourses of reading throughout the Victorian and early Edwardian period." KATE FLINT, *THE WOMAN READER: 1837-1914*, at 4 (1993).

champion. Rather, privacy is valued and protected through the privileged communion among reader, characters, and author. By dramatizing both invasions and protections of personal information, fiction illustrates privacy's significance, and it models approaches to private information for the reader. The novel's exploration of characters' inner lives also effects a deep identification of readers with these characters, so that as novels portray private lives, they influence the reader's own consciousness. The solitude in which people typically read novels further fosters their intimacy with the text. Walter Benjamin argues that stories are heard in the presence of others, and readers of poems are prepared to utter words aloud, but novel readers withdraw into themselves, so that the "reader of a novel . . . is isolated, more so than any other reader."⁴⁸ It is also worth noting that the novel's rise in the eighteenth century was contemporaneous with increased domestic privacy, which entailed the establishment of separate sleeping quarters for every member of the family and locks on doors.⁴⁹ The novel accordingly came to be associated with domestic spaces and a retreat from others. Even when novels were read in public, for example on trains during the Victorian era, they were a means of obtaining privacy in a public space; writers of Victorian advice manuals recommended that women traveling alone carry books that would serve as "bodyguards" by enabling them to avoid conversation with strangers.⁵⁰

The novel is, then, a doubly private genre, for it explores the subjectivity of characters and is also a site of the reader's private experience. In addition, the novel reflects concerns about the author's own privacy and self-expression, and these are bound up with questions of intellectual property. As several nineteenth-century legal cases suggest, Victorian authors believed their literary creations were connected to their inmost selves, and they argued for the natural right of authors to control publication. In publishing their works, these authors carefully negotiated their own privacy with regard to their readers. Within their novels, an emphasis on the importance of characters' control over personal information highlights the strong conceptual relationship of intellectual property and privacy, and

48. Walter Benjamin, *The Storyteller*, in ILLUMINATIONS 83, at 100 (Hannah Arendt ed., 1968).

49. WATT, *supra* note 9, at 188. These are clearly middle- and upper-class privileges, and indeed privacy has traditionally been a class-based entitlement. The Victorian novels of Dickens and Gaskell, however, insist that privacy rights must not be limited to those who can afford them, as I will discuss.

50. FLINT, *supra* note 47, at 105.

anticipates the intellectual-property-grounded right to privacy posited by Warren and Brandeis. Much as copyright inheres in individuals' ability to control the publication of their self-expression, privacy in these novels inheres in individuals' control over personal information.

Charles Dickens and Elizabeth Gaskell, who were among the most popular writers of the Victorian era, offer particularly compelling access to Victorian authors' ideas about privacy and intellectual property. Their later works sold tens of thousands of copies, and their novels were read by people of all classes and ages, and by men and women alike. They also both published in serials, including Dickens's own *Household Words* and *All the Year Round*, so that readers continuously enjoyed their novels throughout the mid-Victorian era. Their voices at once informed and responded to public opinion. Both novelists locate private information prominently in their works and employ their own intellectual property to show not only how privacy should be valued and preserved in the imagined communities of their novels, but also how the reader—by assuming the proper relationship to the author's intellectual property and the characters' privacy—can become a part of these private novelistic communities.

III. Plotting Privacy: Charles Dickens and Elizabeth Gaskell

Given Dickens's and Gaskell's immense popularity, it may seem ironic that private information holds a privileged place in their novels. This is only a superficial paradox, however, for the mass circulation of their works impressed upon them the importance of protecting privacy and of exercising control over literary expression. Indeed, in their often embittered battles to protect copyright in their works, Dickens and Gaskell invoked their personal relationships to their texts and the privacy concerns that, they argued, lay at the heart of their desire to control these works. Within their novels, they imaginatively explore the status of intellectual property, and they insist that the author of a novel, or letter, or architectural plan, has the right to control the publication of this creation because it is a form of self-expression. Taking a cue from their treatment of intellectual property, Dickens and Gaskell conceptualize privacy along similar lines—for their characters, control over personal information is the defining feature of privacy. In their novels, as in their lives, the authors situate privacy and intellectual property in a mutually enriching dialogue: casting private information as a form of personal intellectual property furnishes the individual with the right to control it, while casting intellectual property as a private communication

highlights its personal connection to the author and invests it with unique importance.

1. The Author's Plea: Privatizing Intellectual Property

A. Charles Dickens

For Dickens in particular, concerns about copyright manifested as concerns about privacy, and he skillfully wove a discourse of private investment and interpersonal confidences around his literary works. The United States, in his life and fiction, came to symbolize the need for both privacy and intellectual property rights, because he associated the country with intrusions into his personal life and the pirating of his literary works. During his 1842 tour, he complained of being “so beset, waylaid, hustled, set upon, beaten about, trampled down, mashed, bruised and pounded by crowds, that I never knew less of myself in all my life, or had less time for those confidential interviews with myself whereby I earn my bread, than in the United States of America.”⁵¹ As this passage suggests, invasions of privacy threatened both Dickens's sense of himself and his ability to write. Throughout his life he needed solitude for his literary endeavors, and his works stemmed from self-communion. By invading his privacy, Americans also tampered with his artistic output.

Dickens's association of privacy and textual integrity not only reflected a personal concern during this trip, but also lay at the center of his visit's agenda—to make his voice heard in the contentious debate over international copyright.⁵² If he believed that literary creations were in some important way private, he also realized that embedding intellectual property concerns in a vocabulary of privacy could earn him the sympathy and trust of his audience. In a letter to Jonathan Chapman about international copyright, he wrote, “I open my whole heart to you, you see! I write in such a spirit of confidence that I pour out all I have felt upon this subject,—though I have said nothing in reference to it, even to my wife.”⁵³ As I have discussed, Dickens similarly attempted to establish intimacy with an audience in

51. Quoted in J. Hillis Miller, *The Sources of Dickens's Comic Art: From American Notes to Martin Chuzzlewit*, 24 *NINETEENTH-CENTURY FICTION* 467, 469 (1970). Dickens also described young women requesting locks of his hair and complained that, while he was still on the ship, “[A] party of ‘gentlemen’ actually planted themselves before our little cabin, and stared in at the door and windows while I was washing, and Kate lay in bed.” *Id.*

52. See WELSH, *supra* note 1, at 30. Welsh extensively cites Dickens's American speeches, and I draw upon his wealth of information.

53. 3 *THE LETTERS OF CHARLES DICKENS* 77 (Madeline House et al. eds., 1974) (Feb. 22, 1842).

Connecticut by implying that the assembled crowd had solicited his confidences and then whispering the words “International Copyright” in their ears.

One reason, no doubt, for his treating intellectual property issues as a private subject was his desire to distance himself from pecuniary motives, which were, nonetheless, of utmost importance to him. An international copyright agreement would have been a boon for Dickens, who was immensely popular in the U.S. as well as England, but advocating for such an agreement was precarious in a time when professional authorship was considered an ungentlemanly pursuit. Propriety demanded that a degree of privacy surround the debate over a transatlantic copyright agreement. Dickens’s description of his interest in more elevated terms—as the protection of his personality—also reflects, however, his belief that intellectual property was not like other property, for it was the expression of the private self. His American speeches and letters reveal both his awareness that disavowing monetary interest was, paradoxically, the best way to make copyright pay, and his more fundamental conviction that intellectual property was the site of his private investment. He not only masked, but also compensated for his economic motives by discussing intellectual property as a personal matter and by creating an intimate relationship with the “dear reader” of his novels.⁵⁴

Martin Chuzzlewit responds directly to Dickens’s American experiences and is, characteristically, both a playful and scathing account. A pivotal moment in the novel is Martin’s discovery that Mr. Pecksniff has usurped his grammar-school design. According to the novel’s logic, this theft is inevitable; when Pecksniff first asks Martin to design the school, the narrator notes that “there were cases on record in which the masterly introduction of an additional back window, or a kitchen door, or a half-a-dozen steps, or even a water spout, had made the design of a pupil Mr. Pecksniff’s own work, and had brought substantial rewards into that gentleman’s pocket.”⁵⁵ This is, of course, what happens when Pecksniff adds four windows to Martin’s design and claims credit, leaving Martin fuming, “My grammar-school. I invented it. I did it all. He has only put four windows in, the villain, and spoilt it!”⁵⁶

54. See *infra* Part IV for a discussion of Dickens’s relationship with his reader. See also GARRETT STEWART, *DEAR READER: THE CONSCRIPTED AUDIENCE IN NINETEENTH-CENTURY BRITISH FICTION* (1996) (discussing reader address in the Victorian novel).

55. CHARLES DICKENS, *MARTIN CHUZZLEWIT* 94 (Penguin Books 1999) (1843-44).

56. *Id.* at 522.

Legally, Pecksniff has committed no offense, because Martin was in his employ when he designed the building. Nonetheless, readers experience this as an odious theft: Pecksniff has stolen Martin's unique creation. Martin's exclamation that Pecksniff has "spoil it" highlights his personal investment in the work and contrasts with Pecksniff's greedy pecuniary motives. For Martin, intellectual property is no mere commodity, but an expression of the self; Pecksniff's theft has stripped him of control over his creation, so that, unlike the successful plaintiffs in Victorian intellectual property cases, he has lost his prepublication rights and suffered the attendant violation of his self. Within *Martin Chuzzlewit*, Dickens dramatizes his own crusade on behalf of international copyright; he distinctly separates personal and pecuniary motives in the characters of Martin and Pecksniff and privileges Martin's orientation. Martin's concern with his personal investment and self-expression rather than money underscores Dickens's insistence that the author's natural right to his works trumps financial considerations.⁵⁷

If *Martin Chuzzlewit* suggests the private value of intellectual property generally, *David Copperfield* extends that novel's claims to literary property. This rather autobiographical work examines literary privacy from the standpoint of a character-author who is in many ways a surrogate for the novelist himself, and David's authorial career conflates the ownership of private experience and written works. Like Dickens, who needed solitude to write and first published under a pseudonym, David carefully conceals his writing: "I have taken with fear and trembling to authorship. I wrote a little something in secret, and sent it to a magazine, and it was published in the magazine."⁵⁸ He is anxious about publishing, it seems, because his works are closely tied to his person and reflect his private self even as they are constituted as property. It is the reflection of the author, Dickens insists, that merits protection, and he advances this claim indirectly in his own preface to the novel by linking the book to himself: "an Author feels as if he were dismissing some portion of himself [when he publishes a book]."⁵⁹

Given the association of privacy and intellectual property in Dickens's life and novels, it is perhaps not surprising that he

57. See Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of Martin Chuzzlewit*, in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 16, at 260, 269.

58. CHARLES DICKENS, *DAVID COPPERFIELD* 582 (Random House 2000) (1849-1850).

59. *Id.* at xxvii.

fictionally models invasions of privacy as thefts of intellectual property. In *Martin Chuzzlewit*, Pecksniff echoes his theft of Martin's design when he eavesdrops on a secret conversation between Tom Pinch and Mary Graham and then usurps Tom's role in the discussion. Whereas Mary had spoken to Tom confidentially about Pecksniff's unwelcome advances, Pecksniff accuses Tom of addressing "Miss Graham with un-retuned professions of attachment and proposals of love."⁶⁰ He even pretends that Tom's feelings of disillusionment are his own and thereby appropriates Tom's private emotions to justify firing him. Much as Pecksniff steals and transforms Martin's grammar-school, he steals and transforms Tom and Mary's private discussion. These two thefts are in many ways parallel cases; in both instances, Pecksniff impinges on other characters' personalities and recasts their self-expression as a form of property that he controls. What had been meaningful because of its intimate connection to the self, in Pecksniff's hands assumes a value independent of its proper owner and serves to advance his own interests.

It is not only through Pecksniff's usurpation that Martin's personal information becomes another's property, for his entire American experience, like Dickens's, is an exercise in invasions of privacy that transform his personal life into a public commodity. From the moment he arrives in the U.S., newspaper editors bombard the ship to advertise their papers. As their names signify, the *New York Family Spy*, *New York Private Listener*, *New York Peeper*, and *New York Keyhole Reporter* commodify the private information of others as their exclusive property. As Dickens would complain in *American Notes*, these newspapers occupy themselves by "pulling off the roofs of private houses, . . . pimping and pandering for all degrees of vicious taste."⁶¹ After some of his personal letters appear in the *Watertoast Gazette*, Martin learns just how closely he must guard his private information from becoming public property, for not only newspapers, but nearly every "distinguished gentleman" he meets "procur[es] information of any sort in any kind of confidence, and afterwards pervert[s] it publicly."⁶² By the end of his trip, Martin has a newfound appreciation for privacy and a desire to protect his personal information, and this makes him acutely sensitive to Pecksniff's theft of his intellectual property upon his return to

60. DICKENS, *supra* note 55, at 472.

61. CHARLES DICKENS, 1 *AMERICAN NOTES FOR GENERAL CIRCULATION* 210, 211 (1842).

62. DICKENS, *supra* note 55, at 504.

England. Upon Dickens's own return from the U.S., he continued to crusade for an international copyright agreement that would protect his intellectual property and his privacy, and he advanced his agenda in part by embedding his concerns in his copyrighted novel, *Martin Chuzzlewit*.

B. Elizabeth Gaskell

Elizabeth Gaskell's first novel, *Mary Barton*, which she published anonymously, similarly engages questions of privacy and publicity that have a direct bearing on her own experience. The mapping of private and public spheres, which occurs throughout the novel, is most apparent when Mary's former lover is killed by her father, who works at his factory, and blame falls on Jem Wilson, Mary's future husband. Mary's testimony at the widely attended murder trial suggests some of the complications of female privacy in the Victorian era. She is called to testify about her relationship to Jem and is asked to publicly disclose information that conventions of female modesty would prevent her from sharing even with Jem himself—that she loves him. For a woman to declare her love, other than in response to a male offer of marriage, was to cast herself as a desiring subject and therefore to disregard propriety.

Female modesty, so highly valued during the Victorian era, was defined in terms of privacy, but in fact strictures of modesty meant that women often did not have control over what they did and did not disclose. They were required not to discuss certain matters, and their personal information was therefore not their own to publish or not as they saw fit. Immediately after Mary refuses Jem's marriage proposal, for instance, she realizes that she loves him, but she cannot tell him because “[m]aidenly modesty . . . seemed to oppose every plan she could think of for showing Jem how much she repented her decision against him.”⁶³ Victorian modesty, then, conformed to a model of privacy-as-inaccessibility, rather than privacy-as-control, and it highlights potential shortcomings of the former approach. Unlike the control model, which is informed by intellectual property and stresses individual decisions about personal information, the inaccessibility model does not accommodate the individual's choice of what *should* be published.

Ironically, the public trial enables Mary to disclose her love: “[N]ow she might even own her love. Now, when the beloved stood thus, abhorred of men, there would be no shame to stand between her

63. ELIZABETH GASKELL, *MARY BARTON* 132 (Penguin Books 1996) (1848).

and her avowal.”⁶⁴ The rules of female modesty are subordinate to justice during the trial, and Mary temporarily becomes an autonomous legal subject. The public courtroom fosters meaningful privacy, for it empowers her to choose whether to share her personal information. She keeps to herself certain private knowledge that would be devastating evidence—that her father is the murderer—while disclosing her love for Jem. The very demands of the public trial paradoxically allow her more complete control over, and ownership of, private information than she could typically exercise as a woman in Victorian society.

Mary’s desire to retain privacy and not become a spectacle following the trial approximates Gaskell’s own desire to keep the authorship of the anonymously published *Mary Barton* private. Although Mary’s friend tells her, “You can’t hide it now, Mary, for it’s all in print. . . . Why! it was in the *Guardian*,—and the *Courier*,”⁶⁵ Mary recedes from the public view and attempts to shelter herself and Jem. Similarly, once Gaskell’s novel was “all in print” she tried to retain control over the private information that she was the author. In a letter to Edward Chapman, she expressed her displeasure with the publication process in terms of privacy: “Hitherto the whole affair of publication has been one of extreme annoyance to me, from the impertinent and unjustifiable curiosity of people, who have tried to force one either into an absolute denial, or an acknowledgement of what they must have seen the writer wished to keep concealed.”⁶⁶ The very first sentence of her preface to the novel further expresses her desire to maintain privacy despite publication: “Three years ago I became anxious (from circumstances that need not be more fully alluded to) to employ my self in writing a work of fiction.”⁶⁷ Like her heroine, who wants both to enter the public sphere and to keep

64. *Id.* at 325.

65. *Id.* at 358.

66. THE LETTERS OF MRS. GASKELL, at 64 (J.A.V. Chapple & Arthur Pollard eds. 1967) (1966) (Dec. 5, 1848). Apparently Gaskell also hid beneath the breakfast table when *Mary Barton* was mentioned: “Elizabeth Gaskell, the anonymous novelist who ducked under the breakfast table to hide her embarrassment at the mere mention of *Mary Barton*, duplicates Mary’s mixed humiliation and pride in her position at the center of the spectacle.” HILARY SCHOR, SCHEHEREZADE IN THE MARKETPLACE: ELIZABETH GASKELL AND THE VICTORIAN NOVEL 41 (1992).

67. GASKELL, *supra* note 63, at 3. This is, of course, a teasing comment, and critics have sought to uncover these private circumstances, which most take to be the death of her ten-month-old son, William, in 1845. Margaret Homans discusses another private impetus for Gaskell’s writing: the death of her first child, a stillborn daughter, some fifteen years earlier. MARGARET HOMANS, BEARING THE WORD: LANGUAGE AND FEMALE EXPERIENCE IN NINETEENTH-CENTURY WOMEN’S WRITING 224 (1986).

certain matters private, Gaskell wants to publish her novel without forfeiting her personal privacy. Literary publication, she insists, must not be incongruous with privacy, for the author, not the audience, should control the terms of disclosure.

In *The Life of Charlotte Brontë*, a biography that Gaskell wrote in 1857 following her friend's death, Gaskell suggests that her concerns about privacy upon literary publication were shared by contemporary female authors. For Brontë, the act of publishing threatened a publication of the self, and following the publication of *Jane Eyre* she too insisted upon her right to privacy, declaring to a correspondent, "I have given no one a right to gossip about me."⁶⁸ Sounding much like Gaskell upon the publication of *Mary Barton*, she further invoked legal terminology to insist, "I have given no one a right either to affirm, or to hint, in the most distant manner, that I was 'publishing.'"⁶⁹

As the similarity of Gaskell's and Brontë's concerns implies, Victorian women found themselves in a precarious position when they wrote for publication and monetary gain. Nineteenth-century literary discourse assumed its authority by distancing itself from the masculine sphere of the market; writing was feminized, but in a way that had nothing to do with actual women and depended instead on an idealized view of the domestic sphere.⁷⁰ Accordingly, "for a woman to depart from that idealization by engaging in the commercial business of writing was to collapse the boundary between the spheres of alienated and nonalienated labor. A woman who wrote for publication threatened to collapse the ideal from which her authority was derived."⁷¹ Gaskell sought to balance issues of propriety, privacy, and literary property in her publishing, and she negotiated her position in the literary marketplace by treating her novels as personal creations and casting remuneration as a response to time and emotion. "I am also inclined to put a very high value upon [my copyright], because, naturally I value it according to the anxiety thought & trouble it has cost me," she told her publisher, George Smith.⁷²

68. ELIZABETH GASKELL, *THE LIFE OF CHARLOTTE BRONTË* 266 (Penguin Books 1997) (1857).

69. *Id.*

70. *See generally* MARY POOVEY, *UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND* (1988).

71. *Id.* at 125.

72. *THE LETTERS OF MRS. GASKELL*, *supra* note 66, at 427 (Dec. 20, 1856).

It was not, though, only female authors who treated their intellectual property as inalienable self-expression, and Gaskell's comment could readily have come from Dickens's pen as he attempted to distance his intellectual property interests from monetary concerns. Like Dickens, but with more at stake because of her gender, Gaskell contended that her literary works were intertwined with her private life even as she negotiated lucrative contracts regarding the publication of her works. She treated copyright as a matter of recognizing writers' close relationships to their creations, and she insisted upon exercising control over her works. In turn, because her literary works were the site of many of her own privacy concerns, Gaskell's conception of intellectual property informed her fictional representation of privacy, which inhered for her in the individual's control.

2. Commodifying Privacy: The Threat of Blackmail

Of course, as Gaskell and Dickens were keenly aware, treating private information as a form of intellectual property might not so much confer the right to control its publication as turn privacy itself into a commodity. One reason that the two authors invoked the personal basis of their literary creations was, in fact, to bolster their commercial interests in their works; by casting literary works as personal they made a compelling claim for remuneration. But as I have argued, this is but a partial explanation, for Dickens and Gaskell genuinely believed their works were intimately connected to themselves. So too, they recognized private information as something of particular personal value, and in their works they specifically condemned blackmailers for treating private information as a commodity rather than an aspect of self. By dramatizing the threat to autonomy and intimacy that results from blackmailers' market-driven appraisals, Gaskell and Dickens emphasized the specifically non-commercial value of private information and intellectual property.⁷³

Dickens's most memorable characters are his oily villains who invade other characters' personal lives and trade in private information. In *Martin Chuzzlewit*, not only Pecksniff but also Tigg Montague perverts personal information by blackmailing Jonas Chuzzlewit. Montague transforms Jonas's secret into information with an explicit monetary value—Jonas must pay him to keep his

73. For an important discussion of blackmail in the Victorian novel and the work of George Eliot in particular, see ALEXANDER WELSH, *GEORGE ELIOT AND BLACKMAIL* (1985).

secret, and Montague threatens exposure: “Reason the matter. If you don’t my secret is worthless to me; and being so, it may as well become the public property as mine.”⁷⁴ Taken together, Montague’s and Jonas’s disparate assessments of private information constitute a central aspect of blackmail. The blackmailer regards secrets as a commodity, while the victim prizes secrets because they represent the self. In Dickens’s novels, the perspective of the individual who suffers blackmail is privileged—private information, like intellectual property, is valuable because of its relation to the self. Blackmailers’ threats of publicity highlight their corrupt understanding of private information, which is not a commodity to be placed on the market, but rather a form of intellectual property that should be controlled by the individual it concerns.

In *Bleak House*, Dickens again focuses on blackmail to stress privacy’s value, and he documents the harm that occurs when others treat one’s private information as property. In the novel’s economy, the more private a communication, the more it is worth to other characters, who will exploit it as a commodity. Mr. Tulkinghorn, who slyly “carries family secrets in every limb of his body and every crease of his dress,” particularly excels at appropriating other people’s identities and thereby controlling them.⁷⁵ Most notably, he claims ownership of Lady Dedlock’s most valuable secret—her private past. When he blackmails her, she says “If, sir, in my knowledge of my secret—” and he interrupts, “It is no longer your secret. Excuse me. That is just the mistake. It is my secret If it were your secret, Lady Dedlock, we should not be here holding this conversation.”⁷⁶ Lady Dedlock’s private information becomes property at the very moment she loses control over it. Tulkinghorn redefines her life story: what had been valuable to her as information about her private self is now valuable to him because it gives him power over her, and he uses it to deny her privacy and self-determination.

Ultimately, this blackmail leads to the consumption of Lady Dedlock’s life, the narrative of which becomes public property. Her private history comes to ground others’ reputations, as “people who know nothing and ever did know nothing about her, think it essential to their reputation to pretend that she is their topic too and to retail her at second-hand with the last new word and the last new manner.”⁷⁷ This publication and commodification of Lady Dedlock’s

74. DICKENS, *supra* note 55, at 598.

75. CHARLES DICKENS, *BLEAK HOUSE* 176 (Penguin Books 1980) (1853).

76. *Id.* at 664.

77. *Id.* at 790.

life constitutes such a serious invasion of privacy that, as the property of others, she can no longer live. The loss of her control over private information entails, quite literally, a loss of self.

In Elizabeth Gaskell's final and unfinished novel, *Wives and Daughters*, a pivotal invasion of privacy again positions itself at the intersection of gossip and blackmail, and gossip compounds blackmail's injury. As in all of Gaskell's novels, gossip is predominantly a harmless staple of communal living. Anticipating Warren and Brandeis's description of gossip in physical terms as a crop to be harvested,⁷⁸ Gaskell writes that "gossip had been [Mrs. Goodenough's] daily bread through her life, gossip was meat and wine to her now."⁷⁹ Aware of gossip's prevalence, the novel's characters selectively guard their private lives from view. Lady Cumnor, for instance, lets anyone read her husband's letters, for "[t]here was no fear of family secrets oozing out in his sprawling lines of affection,"⁸⁰ but she closely guards her daughters' letters, which may well ooze secrets to attentive eyes. Like Warren and Brandeis who note, "Even gossip apparently harmless, when widely and persistently circulated, is potent for evil,"⁸¹ Lady Cumnor recognizes that gossip can function as a species of blackmail by transforming an individual's private information into another's valuable property. In the case of gossip, which is inherently communal, gain is usually social rather than financial. Nonetheless, in *Wives and Daughters*, the gossip of the town women complements the central blackmail plot and threatens to ruin the heroine Molly's reputation, which for a Victorian woman was one of the most valuable forms of property.

As in Dickens's novels, the blackmail plot of *Wives and Daughters* illustrates how the relationship between privacy and intellectual property can be perverted by the commodification of private information. Molly's stepsister Cynthia became engaged to Mr. Preston at a young age, in part because she owed him money. She now wishes to break the engagement, but Mr. Preston insists that she is bound to him, and he threatens to publish her private letters, which contain not only vows of love but also derisive comments about her mother. It is precisely because these letters contain personal information that they have value for Mr. Preston, and he treats them as a commodity, with which he can barter. Molly demands that he

78. Warren & Brandeis, *supra* note 7, at 196.

79. ELIZABETH GASKELL, *WIVES AND DAUGHTERS* 415 (Penguin Books 1996) (1866).

80. *Id.* at 103.

81. Warren & Brandeis, *supra* note 7, at 196.

return Cynthia's letters and tells him he has no right to them. He responds, "No legal, or no moral right? which do you mean?"⁸² Cases such as *Pope v. Curl* and *Woolsey v. Judd* suggest that Mr. Preston would have no legal right to publish these letters, but she steers clear of the law and makes a moral argument that he has no right "as a gentleman, to keep a girl's letters when she asks for them back again, much less to hold them over her as a threat."⁸³ The situation becomes still more complicated when Molly is seen alone with Mr. Preston, and the town comes to believe *she* is carrying on a relationship with him. Ultimately, through some complex plotting, Cynthia retrieves and destroys her letters and the widespread rumors about Molly are corrected. By leading us through Mr. Preston's misevaluation and the town's eager gossip, Gaskell underscores the proper way to value private information and written communications.

3. The Privilege of Communal Privacy

Blackmail depends on one individual's having access to another's privacy, but Dickens and Gaskell are careful to stress that its harm inheres in a malignant understanding rather than mere access, and they repeatedly champion the sharing of private information in more positive contexts. Here again, the authors take their cue from intellectual property rights. If a potential downside of conceptualizing private information along the lines of intellectual property is commodification, a benefit of this model is a recognition of the inalienable nature of both written works and privacy. Intellectual property rights explicitly honor the author's competing needs for privacy and publicity, for to publish a literary work is not to divest oneself of unique ownership of it. Dickens and Gaskell perceived their literary works as expressions of self in which they possessed particular rights even as these works circulated among an audience.

Similarly, they acknowledged that to share private information with a sensitive audience must not be to lose control over it. Like a written work, a secret can be conveyed to another while remaining in the possession of its original owner. Both privacy and intellectual property rights, recognizing that people exist in social networks, accommodate the desire to protect certain information without isolating oneself.⁸⁴ In Dickens's and Gaskell's novels, intimacy is

82. GASKELL, *supra* note 79, at 479.

83. *Id.*

84. Intellectual property rights protect expression but not underlying ideas, while the kind of privacy Dickens and Gaskell champion protects ideas. There is, nonetheless, a

incorporated into privacy, as characters share personal information with close friends and family members. The authors insist that that intimacy is an aspect of privacy rather than its antithesis and that the sharing of secrets need not erode privacy. In their fiction, characters are respected as the authors, and therefore owners, of their private experiences, which they can selectively publish. Personal information remains under the control of the person it concerns even as this information circulates among members of a group, much as intellectual property remains under the control of its author even as it circulates among an audience. As long as each person respects the other's unique interest in, and control over, personal information, sharing secrets in intimate relationships enhances privacy's meaning.

In both *Bleak House* and *Wives and Daughters*, the injury of blackmail is underscored by affirmative disclosures of personal matters. Those disclosures simultaneously enhance individual subjectivity and interpersonal bonds. If Tulkinghorn threatens Lady Dedlock's privacy and identity, the narrator Esther carefully protects her birthmother's personal life. Esther learns about her own heritage and Lady Dedlock's past in a letter. Respecting the privacy of the letter, Esther reads it only when she is "[s]afe in [her] own room,"⁸⁵ and she immediately burns it to prevent an accidental disclosure. Though it concerns her own past, she regards the secret as Lady Dedlock's property, much as *Pope v. Curl* deemed unpublished letters the legal property of their authors rather than recipients: "[T]he secret I had to keep . . . was not mine, and I did not feel that I had a right to tell it."⁸⁶ Esther respects Lady Dedlock's message as private property that she has been privileged to see but does not own. She does not treat the correspondence as a commodity or in any way exercise control over its contents. Much as intellectual property remains the inalienable property of the author even when communicated to another, Lady Dedlock's secret remains within her control even though she has shared it with Esther. Because Esther guards this private information, her shared knowledge is a comfort to Lady Dedlock.

Similarly, in *Wives and Daughters*, privacy is not a question of inaccessibility but one of control, and implicit contracts protect individuals' private lives and guarantee selective disclosure. The most significant secret in the novel—that Osborne Hamley is married—

fundamental similarity. I discuss the distinction between ideas and expressions *infra* at note 137 and accompanying text.

85. DICKENS, *supra* note 75, at 520.

86. *Id.* at 525.

becomes not the gold of a blackmailer, but rather the center of an agreement to protect privacy. While Molly is visiting Hamley Hall, Osborne receives a letter from his wife and does not notice that Molly is present in the room. He is devastated by the publication of this secret to “a third person,” but Molly promises him she will never speak of it.⁸⁷ She recognizes the secret as his private property and respects his right to retain control over this personal information. When he realizes that she will not exploit his inadvertent trust, he casts his private information as a shared possession and tells her, “It is a relief to think that some one else has my secret.”⁸⁸ Gaskell insists that private information can be shared for the good of all and that intimacy is often a more desirable form of privacy than solitude. Osborne benefits from sharing his private information with a trusted friend, and he retains his privacy, because Molly’s motives with regard to the secret are identical to his own.

Shared privacy also proves essential in untangling the novel’s blackmail plot. Molly intervenes on her stepsister’s behalf, and Cynthia finds great relief in sharing her secret. If Mr. Preston’s commodification and exploitation of Cynthia’s personal information is a sign of his weakness, Molly’s handling of this information speaks to her high character. Unlike Mr. Preston, who claims Cynthia’s letters as his own property, Molly recognizes her stepsister’s secret as Cynthia’s property to disclose or not as Cynthia chooses. Even when her own reputation is impugned by town gossip, Molly insists that she has no right to invade Cynthia’s privacy: “Papa, I cannot tell you all. It is not my secret.”⁸⁹ She sounds much like *Bleak House*’s Esther discussing Lady Dedlock’s secret. Indeed, Molly resembles an Esther with more gumption. Like Esther, Molly recognizes that another’s private information should remain within her own control.

Gaskell’s most extended meditation on the positive aspects of sharing private information with an intimate group occurs in her novel *Cranford*, in which she posits a communal privacy. This privacy protects the self-determination of its members and allows them to form close relationships through sharing, while retaining ownership of their private information. In his foundational discussion of eighteenth-century novels, Ian Watt argues that the “privacy of the suburb is essentially feminine,”⁹⁰ and that letter writing is “the form of personal intercourse most suited to the way of life which the suburb

87. GASKELL, *supra* note 79, at 210.

88. *Id.* at 494.

89. *Id.* at 516.

90. WATT, *supra* note 9, at 187.

represents.”⁹¹ The suburb Cranford takes these generalizations to the extreme, for it “is in possession of the Amazons; all the holders of houses above a certain rent, are women,” who communicate with each other and the outside world, gendered male, largely through written correspondence.⁹² Letters in this novel straddle concerns of privacy and intellectual property and reproduce in literary form individuals’ personalities. Miss Jenkyns’s letters are “stately and grand, like herself,” while Miss Matty’s letters are “nice, kind, rambling.”⁹³ Moreover, Miss Matty values her family letters because they seem to keep “the warm, living hearts that so expressed themselves” perpetually alive, and she insists on destroying these letters so they do not “fall into the hands of strangers.”⁹⁴ Nonetheless, she shares the letters with *Cranford*’s narrator, Mary Smith, and thereby impresses that information need not be exclusive to a single individual to be private. By characterizing these letters as “only interesting to those who loved the writers,”⁹⁵ Miss Matty offers a communal way of valuing private information. This view is the inverse of blackmail—whereas blackmail turns on a recognition of and disregard for the private meaning of personal information, these letters are precious only to someone who has access to their private meaning.

Mary Smith’s letter to Peter Jenkyns depends on just such an assessment of private information. She writes to Miss Matty’s long-lost brother to inform him of his sister’s bankruptcy and carefully protects Miss Matty’s privacy; the letter “should affect him if he were Peter, and yet seem a mere statement of dry facts if he were a stranger.”⁹⁶ The figure of speech with which Mary refers to her letter drives home the writing’s status as an extension of the self. She notes, “It was gone from me like life—never to be recalled. . . . [T]he little piece of paper, but an hour ago so familiar and commonplace had set out on its race.”⁹⁷ Her comment highlights the peculiar status of intellectual property: publication sends it into the world, but it remains intimately connected to its author, according to Mary, as a child. Indeed, Mary’s metaphor recalls seventeenth- and eighteenth-century copyright debates, in which a book was cast as an author’s

91. *Id.* at 190.

92. ELIZABETH GASKELL, *CRANFORD* 39 (Penguin Books 1986) (1851-53).

93. *Id.* at 51.

94. *Id.* at 85.

95. *Id.* at 89.

96. *Id.* at 180.

97. *Id.* at 182.

child. As Daniel Defoe wrote, “A Book is the Author’s Property, ’tis the Child of his Inventions, the Brat of his Brain.”⁹⁸

Gaskell’s treatment of letters in *Cranford* also highlights a noteworthy point about all forms of intellectual property: they are unique creations of authors but are nonetheless informed by other works. Seemingly ironically, Miss Jenkyns, whose letters Mary describes as “like herself,” has developed her personal style by copying the writing of Samuel Johnson. As Miss Jenkyns insists, “Dr. Johnson’s style is a model for young beginners. . . . I have formed my own style upon it.”⁹⁹ More generally, British letter-writing manuals emphasized correspondents’ ability to express themselves naturally and transparently, but such naturalness was actually a cultivated art that demanded studying collections of published letters: “The skills of private revelation and intimate conversation were learned through the public medium of print. Many correspondents . . . shaped their subjectivity through their letter writing, but they were able to do so only because of the models and conventions that were publicly available to them.”¹⁰⁰ Contrary to the Romantics’ claims, literature is also never entirely original; as Northrop Frye has famously argued, “Poetry can only be made out of other poems; novels out of other novels.”¹⁰¹

So too, the private self can only develop through social interaction. The very fact that Miss Jenkyns’s letters do resemble her and that subjectivity could be shaped through letter writing underscores that subjectivity and autonomy are the products of social relations. Individuals do not develop in isolation, but rather form the

98. Quoted in ROSE, *supra* note 16, at 39. Catherine Gallagher argues that alongside of and competing with this metaphor of authorship-as-paternity was the “degradingly female” metaphor of authorship-as-prostitution. Catherine Gallagher, *George Eliot and Daniel Deronda: The Prostitute and the Jewish Question*, in *SEX, POLITICS, AND SCIENCE IN THE NINETEENTH-CENTURY NOVEL* 39, 40 (Ruth Bernard Yeazell ed., 1986). Addressing this dichotomy in the seventeenth century, Harold Love writes, “[T]he modes of reproduction characteristic of print and script pointed, at the level of metaphor, towards a socially approved and a socially disapproved mode of procreation.” HAROLD LOVE, *THE CULTURE AND COMMERCE OF TEXTS: SCRIBAL PUBLICATION IN SEVENTEENTH-CENTURY ENGLAND* 153 (1993). Diverging from both paternity and prostitution, Mary posits a legitimate female metaphor for authorship—the author as mother.

99. GASKELL, *supra* note 92, at 48.

100. John Brewer, *This, That, and the Other: Public, Social, and Private in the Seventeenth and Eighteenth Centuries*, in *SHIFTING THE BOUNDARIES: TRANSFORMATION OF THE LANGUAGES OF PUBLIC AND PRIVATE AND THE EIGHTEENTH CENTURY* 1, at 11 (Dario Castiglione & Lesley Sharpe eds., 1995).

101. NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* 97 (1957).

self in response to others.¹⁰² One such way people negotiate their personalities is through public discourse and writing. The private self depends on the public sphere of print, of articulation and communication, to forge itself.¹⁰³ In *Cranford*, public writings are incorporated into the private self, which then reproduces its thoughts as writing.

As the private self responds to the larger community, personal information can also be the property of a group, and Gaskell suggests that communal privacy can be the basis for individual dignity. In *Cranford*, the very act of protecting privacy fosters intimacy, for privacy flourishes through an unspoken agreement to protect the dignity of each woman and the group as a whole. The gentility of the Cranford women is a mass fiction in which they all voluntarily participate. When Captain Brown dares to acknowledge his poverty “not in a whisper to an intimate friend, the doors and windows being previously closed; but in the public street! in a loud military voice!” the women look upon this as treacherous, for they have all “tacitly agreed” to ignore their poverty.¹⁰⁴

Although some instances of protecting privacy seem ridiculous, the women’s actions more often preserve human dignity. All of the townspeople, for instance, know about Miss Matty’s love for Mr. Holbrook, but they allow her to believe her “effort at concealment” has succeeded.¹⁰⁵ After Mary watches Miss Matty to detect signs of this love, she feels “almost guilty of having spied too curiously into that tender heart” and resolves “not to speak of its secrets,—hidden, Miss Matty believed, from all the world.”¹⁰⁶ Because the community does not discuss her love, Miss Matty retains control over this private information; she can discuss it or not as she chooses. Although her love is not secret, her friends allow her to believe it is, and this strengthens both her sense of autonomy and the community’s

102. Object relations theory holds that the self develops through relationships with others and stresses the early mother-child relationship. For a review of the literature, see JAY GREENBERG & STEPHEN MITCHELL, *OBJECT RELATIONS IN PSYCHOANALYTIC THEORY* (1983).

103. See, e.g., JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 49 (Thomas Burger trans., 1989).

104. GASKELL, *supra* note 92, at 42.

105. *Id.* at 81.

106. *Id.* at 80.

intimacy.¹⁰⁷ Similarly, when Miss Matty goes bankrupt, Miss Pole calls a private meeting of her friends, and each woman writes down how much money she can contribute on a sealed paper, which will be opened by Mary's father under pledge of secrecy. This confidentiality serves two functions: the women can give "in a secret and concealed manner, so as not to hurt [Miss Matty's] feelings" by making her aware that they know of her bankruptcy, and the women also preserve their own privacy and dignity by not sharing their financial status with one another.¹⁰⁸ Each individual retains control of her private information, and the communal arrangement secures the utmost privacy for everyone.

What is fundamentally at stake in Gaskell's and Dickens's fiction is not so much the ownership of specific information as the ownership of the self and the chance for individuals to represent themselves as they choose. The authors take advantage of fiction's unique ability to make us imaginatively experience others' violations of privacy, and we judge characters through their dealings with privacy. As we encounter both positive and negative models for handling privacy within the novels, we may ourselves take a cue for reading and choose to align ourselves with the positive models, regarding our access to the novel's private information as a privilege we must respect.

IV. The Reader and the Novel's Private Community

Of course, it seems ironic to locate privacy in the Victorian novel, which dramatizes the private lives of characters for a mass audience. While the personal information the novel discloses is, of course, fictional, it is not the reality of the privacy, but rather the call for its invasion that seems problematic. Peter Brooks maintains that "the novel's concern with privacy is necessarily constituted as an invasion of privacy," for it "can make private life the object of its concern only through invading the private sphere by opening it up to the irrevocable publicity of writing."¹⁰⁹

If writing signals an ironic erosion of privacy, it is the act of reading that ultimately seems to undermine the championing of privacy within the novel, for the course of the narrative depends on the reader's desire to discover hidden information, and the teleology

107. D. A. Miller discusses secrecy in *David Copperfield* in related terms, maintaining that the social function of secrecy "is not to conceal knowledge, so much as to conceal the knowledge of knowledge." D. A. MILLER, *THE NOVEL AND THE POLICE* 206-7 (1988).

108. GASKELL, *supra* note 92, at 191.

109. BROOKS, *supra* note 47, at 30-32.

of Victorian novels requires that the reader uncover all secrets in the end. Reading well often entails the unique invasion of discovering secrets unknown to the characters themselves. Readers, for instance, almost inevitably understand love interests before the characters involved. We know that David Copperfield loves Agnes before he admits it to himself, and the same goes for Molly and Roger in *Wives and Daughters*. The structure of the detective novel—a favorite of nineteenth-century literary inventions—is particularly antithetical to privacy. In *Bleak House*, for example, readers want to uncover Lady Dedlock's secret and Esther's past as much as the novel's detectives do, and Dickens encourages our probing by both temporarily obstructing and finally rewarding our efforts.

Decisive moments in two other popular Victorian novels—Charlotte Brontë's *Shirley* and Wilkie Collins's *The Woman in White*—perhaps best convey the reader's apparent invasion of privacy. In Brontë's novel, Louis Moore enters Shirley Keeldar's room when she is absent and examines her private space and possessions. As Barbara Leah Harman argues, "Louis's investigation of Shirley's private places is really a *violation* of her private places."¹¹⁰ After he inspects her things, he begins to write in his journal, and the narrator encourages us to inspect his writing: "Come near, by all means, reader; do not be shy: stoop over his shoulder fearlessly, and read as he scribbles."¹¹¹ Our bold reading mirrors his own, and just as his investigation invades Shirley's privacy our reading of his journal would seem to invade Louis's. The narrator even casts our invasion as physical, so that it occurs on the same narrative plane as his. Ours is, then, a double violation: we invade Shirley's privacy with Louis, perhaps even as we condemn his behavior, and we proceed to invade his own privacy. Later in the novel, the narrator offers another passage from Louis's journal and addresses the reader directly: "Yet again, a passage from the blank book, if you like, reader; if you don't like it, pass it over."¹¹² This acknowledgment that we may not wish to read the passage underscores our earlier encouraged violation, as well as our continuing invasion of privacy, because, of course, the narrator is not only censuring, but inciting our reading.

In Wilkie Collins's *The Woman in White* we similarly read extracts of Marian Halcombe's diary and, upon reaching the end, encounter a postscript written by the villainous Count Fosco, who, it

110. BARBARA LEAH HARMAN, *THE FEMININE POLITICAL NOVEL IN VICTORIAN ENGLAND* 41 (1998).

111. CHARLOTTE BRONTË, *SHIRLEY* 487 (Penguin Books 1985) (1849).

112. *Id.* at 580.

turns out, has been reading Marian's diary along with us. Fosco expresses his genuine admiration for Marian and writes, "My strict sense of propriety restores [the diary] (by the hands of my wife) to its place on the writer's table."¹¹³ We are disturbed, I believe, both by Fosco's invasion of Marian's privacy and by his hypocritical respect for propriety. We may even feel violated by Count Fosco's reading over our shoulder, as it were, even though we too are reading a private diary. How can we condemn his reading of this private document while condoning our own? We might ask a similar question of reading *David Copperfield*, which David presents as a personal history we should not be seeing. The full title of the work is *The Personal History, Experience, and Observation of David Copperfield The Younger of Blunderstone Rookery Which He has Never Meant to be Published on any Account*, and throughout the novel David repeatedly refers to the privacy of his history, as when he writes, "[T]his manuscript is intended for no eyes but mine."¹¹⁴ How, then, do we understand our reading of this novel as something other than an invasion of privacy?

The Victorian novel, I contend, does not present invasions of privacy so much as it draws the reader into an inner circle of privacy and teaches us to value the personal information of characters. The very intimacy of reading stems from our sharing private knowledge and our interest in characters' welfare. We are not like Fosco, because we do not wish to harm Marian's sister, but instead desire her well-being. As readers we have the firm conviction that characters, including Marian, would willingly share their private lives with us, because we would value them as such.

Our approach to the novel's privacy is modeled for us by characters, who, as I have discussed, often protect each other's privacy through an implicit contract. Very few secrets are known to one person alone; rather, information is shared between characters, such as Esther and Lady Dedlock or Cynthia and Molly. One individual reveals a secret when she is sure that the other will keep it private, and this information becomes a shared possession of the characters and fosters their intimacy. Such disclosures do not threaten privacy, for the characters attribute the value of the information to its personal nature, rather than its commercial potential, and they respect one another's control. These interactions within the novel are mirrored by the reader's own experience with the text: a gradual

113. WILKIE COLLINS, *THE WOMAN IN WHITE* 359 (Penguin Books 1974) (1860).

114. DICKENS, *supra* note 58, at 563.

introduction to the private lives of characters makes us care about and feel intimate with them, and we therefore believe that our access does not undermine their privacy. Like individuals in the novels, we respect characters' control over their personal information.

There is an irony underlying our sense of these characters' lives as personal: "It is paradoxical that the most powerful vicarious identification of readers with the feelings of fictional characters that literature had seen should have been produced by exploiting the qualities of print, the most impersonal, objective, and public of the media of communication."¹¹⁵ It is, however, the impersonal nature of print that allows us to lose consciousness of the artifice of writing and to regard the book as an "extension of our personal life—a private possession."¹¹⁶

While reading, moreover, we not only experience the private information of characters as something valuable because of its personal meaning, but also regard the novel as a form of intellectual property related to its author's personality, rather than a commodity. We come to develop a relationship with this author, who in the Victorian novel, often dramatizes himself or herself and addresses us directly. This personalization of the reader's relationship with the author is also rather ironic, for it occurred as novels were being mass produced for an ever-expanding audience. Over the course of the nineteenth century, novels became deeply embedded in the market economy through serial production, but authors partially defied the market's burgeoning commodifying power by understanding the value of their works in personal terms. To resist commodification, authors not only advocated on behalf of intellectual property rights as personal interests, but also strove to cast their relationships with readers as intimate. Acutely conscious of the tension between what Pierre Bourdieu has labeled material exchange and symbolic exchange, circulation and communication,¹¹⁷ authors recognized their novels as material goods circulating in the market, but they also regarded them as a communication between themselves and their readers. It is the communicative aspect of their creations that they chose to emphasize. Precisely because their novels were being mass produced, Victorian authors wrote their own personalities into the text and engaged directly with the reader, whom they apostrophized as an individual. As Thackeray wrote of Dickens, there is "a

115. WATT, *supra* note 9, at 206.

116. *Id.* at 198.

117. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (Richard Nice trans., 1997).

communion between the writer and the public . . . something continual, confidential, something like personal affection.”¹¹⁸ Mary Poovey similarly suggests that in *David Copperfield*, the protagonist’s authorship seems to be “simultaneously an expression of self and a gift to others.”¹¹⁹ By treating their novels as works that had value independent of the market, authors both defined intellectual property as a unique, personal kind of property and increased their market share.

Dickens’s idea for a periodical that he would call “The Cricket” exemplifies this highly productive, if tenuous, relationship between mass production and personalization. He wrote to John Forster that he would be like a cricket chirping on family hearths: “I would at once sit down upon their very hobs and take a personal and confidential position with them which should separate me, instantly, from all other periodicals published.”¹²⁰ Dickens’s novels further reflect this desired mass intimacy with readers, for he begins each with a preface that establishes a confidential relationship between author and audience. In *Martin Chuzzlewit*, Dickens speaks of this ritual as something particularly meaningful to him, writing that he includes the preface “more because I am unwilling to depart from any custom which has become endeared to me by having prevailed between myself and my readers on former occasions of the same kind, than because I have anything particular to say.”¹²¹ Throughout the novel, he continues to address his readers directly. The fact that he calls attention to our presence means that we do not feel we are invading the private realm within the novel. We are not snooping or spying, like Louis Moore or Count Fosco, because the author is aware of our presence, and perhaps by implication the characters are as well.

In *Dombey and Son*, moreover, Dickens implies that not all publications of private information are violations. Writing about his 1842 visit to the U.S., he had complained about newspapers “pulling off the roofs of private houses, as the Halting Devil did in Spain; pimping and pandering for all degrees of vicious taste.”¹²² But in *Dombey and Son*, he associates his own writing with an innocuous version of these invasions of privacy and calls “for a good spirit who would take the house-tops off, with a more potent and benignant

118. Quoted in POOVEY, UNEVEN DEVELOPMENTS, *supra* note 70, at 104.

119. *Id.* at 101.

120. 4 THE LETTERS OF CHARLES DICKENS, *supra* note 53, at 328 (July 1845).

121. DICKENS, *supra* note 55, at 5.

122. DICKENS, *supra* note 61, at 210.

hand than the lame demon in the tale.”¹²³ Taking off house-tops is not only the Halting Devil’s project, but Dickens’s own, yet he insists that his novelistic depictions of the private sphere are different from those of the newspapers because of his “benignant hand.” Through Dickens’s authorial role, the reader, too, assumes a benevolent stance toward the characters and their private information, and this orientation casts our reading as a welcomed sharing, rather than an invasion of privacy.

In *Bleak House* Esther herself, in her dual role as narrator and character, perceives the reader as a friend, and her highly self-conscious narration repeatedly appeals to our sympathy. Her first words are, “I have a great deal of difficulty in beginning to write my portion of these pages, for I know I am not clever,” and she proceeds to discuss her childhood doll, to whom she told all of her secrets.¹²⁴ By associating readers with her doll, she makes us intimate friends, an audience for her secrets. In her closing words, Esther bids her “unknown friend,” the reader, goodbye, “Not without much dear remembrance on my side. Not without some, I hope, on his or hers.”¹²⁵ Because she specifically addresses us and prepares her story for our eyes, we feel secure that we are not invading her privacy. Dickens’s novel stresses that information can remain private, through the intimate relationship among character, author, and reader, even as it is published.

Somewhat curiously, the novel that insists we are invading its characters’ privacy is also the one in which Dickens’s communal model for privacy is most apparent: *David Copperfield*. Despite David’s claims that his manuscript is for his eyes only, he addresses us directly throughout his work and invokes our privileged understanding: “The reader now understands, as well as I do, what I was when I came to that point of my youthful history to which I am now coming again.”¹²⁶ So too, the actual author of David’s life story welcomes the reader as a close friend. In the preface to the First Edition, Dickens writes that his interest in the novel is so great that he is in danger of “wearying the reader whom I love, with personal confidences, and private emotions.”¹²⁷ In his preface to a later edition

123. CHARLES DICKENS, *DOMBEY AND SON* 540 (Oxford Univ. Press 1999) (1846-48).

124. DICKENS, *supra* note 75, at 30.

125. *Id.* at 877.

126. DICKENS, *supra* note 58, at 54.

127. DICKENS, *supra* note 58, *Preface to the First Edition*, available at <http://www.bibliomania.com/0/0/19/1992/26457/1.html> (last accessed Jan. 27, 2004).

he adds, “I can only take the reader into one confidence more. Of all my books, I like this the best.”¹²⁸ With this admission, Dickens demands our special consideration of his novel according to the implicit contract governing our reading. Through his prefaces and David’s addresses, the foreboding portion of the title, “*Which He has Never Meant to be Published on any Account*,” becomes not a sign of the reader’s violation but rather an injunction to share the novel’s respect for privacy. We have been taken into both David’s and Dickens’s confidences, and this leads us to see the book as an intimate confession, rather than a story we are not meant to read.

A communal privacy, in which readers share and respect the secrets of characters, is still more apparent in Gaskell’s novels. The narrator of *Mary Barton* casts herself as an active “I” within the text; she tells us that she was not at Jem’s trial, and of legal summonses writes, “Many people have a dread of those mysterious pieces of parchment. I am one. Mary was another.”¹²⁹ By repeatedly addressing the reader in the second person, she draws us onto the narrative plane of the fiction and positions us as her friend and correspondent. As we read, we experience the narrator as a vivid, personal presence, and we regard the novel as a personal communication between ourselves and this embodied writer, who holds a pen and creates the text we are reading.¹³⁰ Gaskell advanced such a personal relationship with the reader not only within the novel, but also in her own correspondence. In one letter, she declared, “Do you think I cd say or write in a letter (except one that I was sure wd be regarded as private by some dear friend) what I have said both in MB [*Mary Barton*] & *Ruth*? It may seem strange & I can’t myself account for it,—but it *is* so.”¹³¹ Her ability to address private subjects in her novels could, of course, have followed from the distance between herself and the reader, as well as the possible distance between herself and her narrative voice. But the comment also implies that her novels are, in some essential sense, private communications. She would not share the information in a letter that would be public, but she specifically constructs her relationship with her readers so that we resemble intimate friends. Our reading of her novels is therefore markedly different from a stranger’s seeing a personal letter. Because Gaskell establishes

128. DICKENS, *supra* note 58, *Preface to the “Charles Dickens” Edition*, available at <http://www.bibliomania.com/0/0/19/1992/26458/1.html>.

129. GASKELL, *supra* note 63, at 255.

130. See ROBYN WARHOL, *GENDERED INTERVENTIONS: NARRATIVE DISCOURSE IN THE VICTORIAN NOVEL* 56, 65 (1989).

131. THE LETTERS OF MRS. GASKELL, *supra* note 66, at 255-56 (Dec. 6, 1853).

intimacy, she trusts that her relationship with us will be one of mutual respect and concern.

Cranford is still more intimate a communication than *Mary Barton*. The entire novel is written as a letter by Mary Smith to a London resident, and the letters within the novel are therefore microcosms of the novel itself. Gaskell's description of Mary's letter to Peter powerfully documents the process of writing and publishing a novel for a possibly unreceptive audience and underscores the kind of audience Gaskell seeks in us.¹³² As readers, we must exhibit the respect for the novel and its characters that these characters show for each other's letters. When Miss Matty and Mary read and burn the family epistles so that they do not fall into the hands of strangers, we become a part of their community of readers, rather than the strangers from whom the correspondence must be hidden. Similarly, much as Mary's letter to Peter protects the privacy of all involved and Miss Matty's family's letters are interesting only to those who loved the writers, *Cranford* itself is a bundle of stories, largely lacking plot, and only of interest to those who care about the characters. Through the novel's discussions of letters, Gaskell indicates the proper manner of reading to her audience: *Cranford* is a letter that allows author and reader to enter into an intimate private community.¹³³

As this suggests, we learn from *Cranford*'s characters how to relate to the novel's private information. When Mary feels guilty for spying into Miss Matty's heart, she resolves not to discuss or ask about her past love; although she knows Miss Matty's secret, she is not free to violate her privacy. We must similarly respect the privacy of information we encounter in the novel and not pry too much. As Hilary Schor argues, "Not only does Miss Matty's 'affection' stay a secret but narrative knowledge is secret; Mary Smith is a closet narrator, and the role of literature is to present secrets as somehow intact in their secrecy."¹³⁴ Of course, our lack of respect for characters' privacy would not have the same consequences as other characters' violations of trust. By temporarily immersing us within a fictional

132. See SCHOR, *supra* note 66, at 116.

133. There is, significantly, a sense in which *Cranford* was more than just a novel for Gaskell, who described it as "the only one of my books that I can read again." THE LETTERS OF MRS. GASKELL, *supra* note 66, at 747 (Feb. 1865). She made repeated references in her letters to life itself being like a story from *Cranford*; for example, she told Eliza Fox about a deal she got on ribbons and declared, "'Elegant Economy,' as we say in Cranford." *Id.* at 174 (Dec. 1851). Similarly, she told John Forster "a Cranfordism" about an old woman who said she could not spell since she lost her teeth. *Id.* at 290 (May 17, 1854).

134. SCHOR, *supra* note 66, at 101.

community, however, the novel illuminates private relations in a particularly valuable way. Our imaginative engagement with characters' personal lives provides a vivid model for actual interactions and shows us what is at stake in individuals' control over private information.

Like Mary Smith in *Cranford*, Gaskell herself is both character and narrator in *The Life of Charlotte Brontë*, and this creates a strong sense of community with the reader. She enhances this personal relationship by revealing her anxieties about publishing private information, such as details of Brontë's married life, which is "considered by some, at first sight, of too private a nature for publication."¹³⁵ Despite drawing our attention to a possible invasion of privacy, Gaskell's very anxiety makes us respect her disclosures as private; we do not feel that she is violating Brontë's privacy so much as communicating sensitive information to an intimate circle. At the end of the biography, Gaskell explicitly turns "from the critical, unsympathetic public" and commits the memory of Brontë to the "larger and more solemn public."¹³⁶ It is curious that Gaskell casts her sympathetic readership as the "larger" public, for we might expect it to be the smaller circle. This, however, draws attention to a fundamental aspect of reading itself: the intimacy that emerges between author and reader. Gaskell is confident that the very nature of reading will lead the majority of her readers to actively engage with Brontë's private life and respect her privacy, and her final statement serves as an appeal and injunction for readers to recognize themselves as part of a private community that is privileged to access Brontë's private life.

The way in which the reader of Gaskell's and Dickens's novels has access to private information while not being in control of it reflects not only the personal relationship that authors establish among themselves, their characters, and their readers, but also a central aspect of intellectual property. Unlike other forms of property, which can be appropriated only through a specific transfer, such as a sale or theft, intellectual property can belong to the author while also being imaginatively appropriated by the reader.¹³⁷ Indeed,

135. GASKELL, *supra* note 68, at 397.

136. *Id.* at 429.

137. Brook Thomas discusses the two ways to possess a work of art: "On the one hand, someone can hold legal title to it and copyright the earning power brought about by its publication. On the other, someone with no legal claim at all can 'possess' a work through an imaginative act of appropriation." BROOK THOMAS, *AMERICAN LITERARY REALISM AND THE FAILED PROMISE OF CONTRACT* 79 (1997).

intellectual property laws prohibit readers from copying works or using the author's expressions as their own, but readers are welcome to appropriate the ideas within books, and this is precisely what it means to be a good reader. Readers share the novel's ideas with the author, but the author retains control over the expression of these ideas. This has been a consistent facet of intellectual property for centuries; in the eighteenth century, distinctions were already drawn between ideas and expression. Echoing Justice Hardwick's separation of material and immaterial aspects of a letter in *Pope v. Curl*, Fichte wrote that the material book belongs to the reader upon purchase, while the form in which ideas are presented remains the property of the author; and he went a step further than Hardwick, declaring ideas the common property of author and reader.¹³⁸

The ideas we appropriate through the act of reading, moreover, become incorporated into our own private selves, so that the intellectual property of others becomes a part of our subjectivity. George Eliot stressed the particularly influential nature of literary texts when she declared that humans are "imitative beings. We cannot, at least those who ever read to any purpose at all, . . . help being modified by the ideas that pass through our minds."¹³⁹ As with letters in *Cranford*, then, the very subjectivity of readers is informed by the writings of others. Dickens acknowledges this relationship in *David Copperfield* when David discusses his library and insists that he has been shaped by *Tom Jones*, *Don Quixote*, and *Robinson Crusoe*. Through an act of intellectual appropriation, he has made these books both the shared property of himself and their authors and a part of his private self, which he now pours into his manuscript. By reading *David Copperfield*, we enter David's private world and in turn incorporate his ideas into our own subjectivity. As Dickens's novel joins the other works of David's library on our bookshelves, David Copperfield joins these eponymous heroes in our consciousness.

V. Conclusion

Today, concerns about privacy are again prevalent as new technologies threaten our ability to control information about ourselves. What mass publication and urbanization were to the Victorians, it seems, computer databases and Cyberspace have

138. See WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 51 (1994).

139. 1 THE GEORGE ELIOT LETTERS 23 (Gordon Haight ed., 1954-78).

become to us. These new “technologies of the self”¹⁴⁰ again have the paradoxical effect of both enhancing privacy and facilitating invasions of this privacy, and our false sense of security in private information makes invasions all the more troublesome.

As invasions of privacy have called attention to the importance of private information for both the autonomous self and intimate relationships, a number of legal scholars have suggested treating private information as a form of intellectual property.¹⁴¹ Many effects of this proposal would be positive; for example, property rights would recognize the individual’s sense of ownership of personal information and also accommodate people’s desires for differing degrees of privacy. Interestingly, both proponents and detractors of this proposal highlight its commodification of information: advocates argue that property rights will enable individuals to control their personal information,¹⁴² while critics insist that privacy should not be commodified.¹⁴³

It is at this juncture, I believe, that the Victorian novel’s treatment of privacy and intellectual property is particularly informative. Victorian authors use intellectual property as a model for informational privacy precisely because it offers control without necessarily entailing commodification. Dickens’s and Gaskell’s novels stress that the value of intellectual property inheres in the author’s self-expression and that the right to control this property stems from its link to the self. Similarly, in their novels, characters must retain control over their private information in order to resist commodification by others, and, as with intellectual property, the right to control this information derives from its close relationship to the self. By using intellectual property as a model for private information, Dickens and Gaskell explore how individuals’ control

140. Brewer, *supra* note 100, at 17.

141. See *supra* note 3.

142. See, e.g., Kang, *supra* note 3; Laudon, *supra* note 5; Murphy, *supra* note 3; Samuelson, *supra* note 6, at 1134-35.

143. See, e.g., Simon G. Davies, *Re-engineering the Right to Privacy: How Privacy Has Been Transformed from a Right to a Commodity*, in TECHNOLOGY & PRIVACY: THE NEW LANDSCAPE 125 (Philip E. Agre & Marc Rotenberg eds., 1997), at 161 (“The process of commodification [of private data] is inimical to privacy”); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000) (concluding that a property rights approach would in fact encourage the market in personal data rather than constraining it). A necessary corollary of treating personal information as property is that others are prohibited from speaking about an individual, and several critics have drawn attention to the First-Amendment implications of such a proposal. See, e.g., Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1113 (2000).

over their personal information can create a robust sense of privacy and enhance both self-determination and intimacy.

By contrast, most contemporary proposals that advocate treating private information as a form of intellectual property nonetheless cast privacy as a commodity. In their initial incarnation, intellectual property rights protected not the author, but rather booksellers and stationers—the closest thing early modern England had to corporations. In the eighteenth and nineteenth centuries, several intellectual property cases and statutes acknowledged the intimate connection of authors to their works and relocated property interests in the self-expression of these authors. Despite the much-touted “death of the Author”¹⁴⁴ in recent years, Anglo-American law continues to recognize authors as the creators and owners of unique works. What has changed, however, is that an author is as likely to be a corporation as an individual, and forms of intellectual property are widely regarded as commodities rather than expressions of authors’ selves.¹⁴⁵ Today companies predominantly exercise intellectual property rights as any other property right. Lawrence Lessig argues that corporations are over-served by our modern system, and he decries the bloating of intellectual property law; focusing on the Internet’s transition from an open forum for ideas into a mechanism protecting corporate interests, he argues for a return to traditional understandings of copyright that balanced the rights of the public to access works with the rights of individuals to control their creations.¹⁴⁶ The Victorian novel offers readers just such a model of the organic connections among author, creation, and audience.

A reconsideration of intellectual property rights that emphasizes the author’s close relationship to the work would also usefully inform contemporary debates about privacy rights. Indeed, Victorian authors’ understandings of copyright, which relied on the work’s connection to the self, are more conducive to protecting privacy rights

144. Roland Barthes has famously argued that “the birth of the reader must be at the cost of the death of the Author.” Roland Barthes, *The Death of the Author*, in IMAGE, MUSIC, TEXT 142, 148 (Stephen Heath trans., 1978). Michel Foucault maintains that “the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses.” Michel Foucault, *What is an Author?*, in THE FOUCAULT READER 101, 118-119 (Paul Rabinow ed., 1984).

145. See, e.g., Catharine Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J. L. & HUMAN. 1, 1 (2003) (arguing that the author “has been subsumed into the identity of his corporate employer. His disappearance is by now almost complete. Although he has gone on writing, the corporation has become the author of his oeuvre”).

146. See Lawrence LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

than current understandings. Rather than accept the severance of self-expression and control, we should regard the right to control self-expression and private information as stemming from their ties to the autonomous self. When we value private information as a commodity, we reinforce corporations' usurpations of personal data as property and overlook what is truly important about protecting private information. As readers of Victorian novels understand, people must be able to control their personal information because what is ultimately at stake is not this information alone, but the integrity of the self.