

# E-mail Privacy

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In a major article examining the strength of legal arguments to protect private e-mail expression, a University of Arkansas law professor concludes that, based on the historical common law, today's Federal Copyright Act does not protect someone from copying and distributing another person's private expression, which means that forwarding e-mail without permission of the sender may be against the law.

"Going back more than 250 years, the common law recognized that authors of personal correspondence hold absolute property rights in their private expression," said Ned Snow, assistant professor of law.

"Although the Copyright Act has been construed to preempt common law rights of expression and thereby deprive authors of privacy, there is no such preemption. Under the Constitution, private expression falls outside the scope of expression that is subject to federal regulation. The routine practice of e-mail forwarding violates principles of common-law copyright regardless of what the Federal Copyright Act says."

Forwarding an e-mail message is as simple as clicking a button. Sharing an e-mail with a third party inhibits free expression, Snow contends, because senders feel they cannot be candid. Senders face the possibility that their communication may be sent to a third party without permission. He examined the extent to which an e-mail sender may enforce property rights to e-mail and determined that electronic communication is subject to the same common-law principles as conventional mail.

Snow's article demonstrates that the common law secures privacy of

expression through what is known as the right of first publication, which gives authors exclusive control over whether and when a letter would be published to a third party. If the author decides against publishing the expression to anyone other than its intended recipient, the common law protects the author's privacy indefinitely. The intended recipient of the author's expression is not allowed to copy and re-distribute the expression. Accordingly, because e-mail forwarding deprives the sender of privacy, it violates common-law copyright. However, if an author carbon-copies a third party, the author relinquishes this control and forfeits privacy.

"Common-law copyright afforded this right to authors without requiring the author to follow any formal procedure, registration or otherwise," Snow said. "So the author was protected without a formal request that the recipient not send the letter to a third party. That is the assumption - that the letter will not be forwarded."

Common-law privacy protection had been absolute until 1976, when Congress passed the Copyright Act, which defines U.S. law regarding intellectual property. The Copyright Act states that it preempts, or replaces, all other law that provides "equivalent" rights. However, the act does not protect privacy interests.

One of the purported rights that the act is supposed to preempt is that of first publication, which, as Snow emphasizes, is the key to protecting privacy interests under the common law. The Copyright Act, then, seems to excuse unauthorized e-mail forwarding. On deeper analysis, however, Snow concluded that the Copyright Act does not preempt common-law rights that protect privacy of expression, basing this argument on language set forth in the Copyright Clause of the U.S. Constitution.

Snow's article will be published this summer in Volume 55 of the Kansas Law Review. It may be downloaded at [ssrn.com/abstract=981729](https://ssrn.com/abstract=981729)

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