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PROPERTY AND CONTRACT ON THE INTERNET

WILLIAM W. FISHER III*

The premise of this essay is a prediction: the creators of intellectual products suitable for distribution on the Internet will soon come to rely less and less on intellectual property law to enable them to charge consumers who wish access to their products, and more and more on a combination of contractual rights and technological protections. The principal argument of this essay is that courts and legislatures should not only facilitate and reinforce that shift, but should also require that creators (and consumers) when setting up such "private" arrangements abide by restrictions designed to protect the public interest.

Part I of the essay contends that sensible legal regulation of the Internet requires simultaneous solution of two questions: (a) What should the default rules governing the relative rights of creators and users be? (b) In what ways (if any) should creators and users be permitted to use contracts or technology to rearrange the pattern of entitlements created by these default rules? Part II proposes a set of criteria that could be used to choose among various possible combinations of responses to those two questions. Parts III-VI rely on those criteria to propose, for regulating the uses of intellectual products on the Internet, a composite regime centered on the following propositions: Creators should be accorded only a modest set of entitlements by the default rules. Creators and users should be permitted (indeed encouraged) to modify those entitlements to their mutual advantage. The parties' contractual freedom should, however, be curtailed by a set of compulsory terms.

Many of the topics addressed in this essay have been well chewed by other writers. I will touch on those topics only lightly, merely suggesting how they figure in the overall analysis, concentrating my attention on the portions of my argument that are more-or-less original.

* Professor of Law, Harvard University. I am grateful for the comments and suggestions of Ian Ayers, Ed Baker, Yochai Benkler, James Boyle, Julie Cohen, Matthew Funk, Wendy Gordon, Peter Jaszi, Mark Lemley, Jessica Litman, Margaret Jane Radin, and Diane Rosenfeld.
Suppose Frank writes a decent novel using a standard word-processing program on his "laptop" computer. He has not yet printed it out; it exists only as a set of "1"s and "0"s on his hard drive. Grace would like access to the novel—to read it and to use it in various other ways for fun and profit. How might the law regulate the relative rights of Frank and Grace vis-à-vis the novel? (Postpone, for the moment, the question of what institutions make and apply this "law.")

One imaginable legal regime would permit Grace to use any and all means to obtain the novel and to do whatever she wished with it once she had it. She could tear the computer out of Frank's hands, copy the data file containing the novel onto a "floppy" disk, make myriad duplicates of the disk, sell them to bookstores, translate the text into Spanish, etc. Frank, in turn, would be permitted to use any and all means to frustrate Grace's stratagems. Using the vocabulary invented by Wesley Hohfeld, both Frank and Grace could be said to enjoy, in such a regime, a large set of "privileges" (governmental permissions to engage in specified activities) and an equally large set of correlative "no rights" (inabilities to invoke the aid of the state to control the behavior of the other party).

In a second, slightly altered regime, Grace would be permitted to do all of the things allowed above except seize the computer by force. If a digital copy of the novel came into her hands lawfully, she could do whatever she pleased with it. But she could not obtain it by forcibly depriving Frank of possession of his computer. In Hohfeldian terms, Frank would enjoy in this altered regime a "right" to invoke the aid of the state to prevent Grace from grabbing the computer, and she would assume a correlative "duty" not to grab it.

Other possible ways in which the law might alter (to Frank's advantage) their relative entitlements include:

- Grace may not obtain a copy of the novel by fraud—e.g., by telling Frank falsely that she is an agent of his publisher.
- Grace may not obtain the data through improper means—e.g., by "hacking" into Frank's computer when he connects it to a network—if he has used reasonable precautions to

2. See id. at 30-32.
shield the data.

- Grace may not copy the novel—even if she has obtained a digital version of it lawfully.
- Grace may not resell a lawfully obtained copy of the novel.
- Grace may not rent a lawfully obtained copy of the novel to a third party.
- Grace may not include excerpts from the novel in an essay criticizing it.
- Grace may not mock or parody the novel.
- After reading Frank’s novel, Grace may not write a novel of her own whose plot is strikingly similar.
- Grace may not independently write a novel of her own whose plot is strikingly similar.
- Grace may not use in a novel of her own a well-defined character who figures in Frank’s.
- Grace may not make a movie based on Frank’s novel.
- Grace may not read Frank’s novel out loud to her children.
- Grace may not discuss the novel with anyone.
- Grace may not do anything at all with or to the novel without Frank’s permission.

Many more specific entitlements could, of course, be added to this list, but these are sufficient to suggest the range of issues that the legal system must (and does) address.

The rules that, in the United States, currently control these various issues are complex, partly because they are derived from many different sources and jurisdictions. Some are governed by state common-law rules—the laws of torts, property, and crimes. Others are governed by state statutes—for example, trade-secret statutes. Others are governed by federal statutes—specifically, copyright and telecommunications laws. Still others are controlled by the First Amendment to the federal Constitution. The entitlements currently generated by these layers of norms may be summarized as follows:
<table>
<thead>
<tr>
<th>Grace is forbidden to: ³</th>
<th>Grace is permitted to: ⁴</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seize Frank’s computer by force</td>
<td></td>
</tr>
<tr>
<td>Obtain the novel by fraud</td>
<td></td>
</tr>
<tr>
<td>“Hack” into Frank’s computer to get the novel</td>
<td></td>
</tr>
<tr>
<td>Copy the novel</td>
<td></td>
</tr>
<tr>
<td>Resell a copy of the novel</td>
<td></td>
</tr>
<tr>
<td>Rent a copy of the novel to someone else</td>
<td></td>
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<tr>
<td>Quote from the novel in a critical review</td>
<td></td>
</tr>
<tr>
<td>Mock or parody the novel</td>
<td></td>
</tr>
<tr>
<td>Aware of the novel, write a very similar story</td>
<td></td>
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<tr>
<td>Independently write a very similar story</td>
<td></td>
</tr>
<tr>
<td>Use in her novel a well-defined character from Frank’s novel</td>
<td></td>
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<tr>
<td>Make a movie based on Frank’s novel</td>
<td></td>
</tr>
<tr>
<td>Recite the novel in private</td>
<td></td>
</tr>
<tr>
<td>Discuss the novel with others</td>
<td></td>
</tr>
</tbody>
</table>

A comprehensive map of their relative rights would, of course, be even more elaborate.

What accounts for this patchwork pattern of entITLEMENTS? In a very rough way, it can be traced to lawmakers’ efforts to balance a familiar set of competing objectives. On one hand, they have sought to create incentives for the production of novels and other intellectual products. On the other hand, they have sought to promote the widespread dissemination of intellectual products and to create safe harbors for a variety of educational or transformative uses of those products. (A much more detailed instrumental analysis of this general sort will be ventured in Part II.) But it would be a serious

³ In other words, Frank has a right to invoke the aid of the state to prevent Grace from engaging in these activities, and she has a duty to refrain.

⁴ In other words, Grace enjoys privileges to engage in these activities, and Frank has a no-right to ask the state to stop her.
mistake to attribute too much rationality to the pattern. As the chart makes clear, a wide variety of lawmakers (judges and legislators at both the state and the federal levels) have contributed to its construction—each of whom typically has had in view only a piece of the overall system. Substantiating the claim that many features of this doctrinal regime are senseless and could easily be improved would take us far afield. Suffice it to say for now that the system is far from perfect, even when measured against the goals it is conventionally thought to advance.

Another feature of the extant pattern of entitlements bears emphasis. Frank's ability to control the ways in which Grace uses his novel plainly is limited. In some senses, Frank "owns" the novel, but Grace is permitted to do many things with or to it that Frank might find objectionable. Some commentators have suggested that, in this respect, intellectual property is different from real (in both senses) property. But in fact the allocation of entitlements to the "owners" and "nonowners" of land is similar to the allocation of entitlements to the owners and nonowners of novels. For example, although a landowner is commonly said to enjoy a "right to exclude" others from his premises, he is forced, in many American jurisdictions, to tolerate a wide variety of intruders: travelers on adjacent roads who find their way blocked; lawyers and health-care workers who wish to supply legal and medical services to migrant farm workers living on his land; protesters who wish to distribute leaflets in his mall; airplanes flying at a reasonable height through his airspace; etc. The other entitlements customarily included in his bundle of sticks—the "right to quiet enjoyment," the "right to lateral and subjacent support," and the right to water—are all similarly qualified. In short, there exists, at least in the United States, no such thing as an "absolute," "pure," or "unqualified" property right—either in ideas or in dirt.

Let's return now to the struggle between Frank and Grace.


Suppose that Frank’s novel is “posted” on the Internet. (Ignore, for the moment, the important question of how it gets there.) How, if at all, should the entitlements in traditional settings be adjusted to take into account this new medium? For example, when Grace uses her web browser to read the novel on her computer screen, without “downloading” the data file to a disk, should she be deemed to have “copied” it in violation of section 106 of the Copyright Act? What if she does download a small portion of the novel—say, for inclusion in a critical review? More specifically, if, using the Internet, Frank makes it easy for Grace to pay him a small sum in return for the right to copy that portion, but Grace still refuses to pay the fee, should courts nevertheless excuse as a “fair use” Grace’s nonpermissive copying?

A great deal of time and energy has been devoted during the past five years to questions of these sorts. Some scholars and government officials argue that, to offset the increased danger of “piracy” on the Internet, the rules should be “tightened”—i.e., more of the toggle switches should be flipped in favor of Frank. Others contend equally vehemently that the rules should be “loosened”—i.e., more switches should be flipped toward Grace. In a moment, I will venture some opinions on those issues. For the time being, however, I wish merely to establish the framework for the analysis. For that purpose, the central point is that the impact the initial setting of switches will have upon the fortunes of Frank and Grace—and upon the welfare of society at large—depends in important ways on the extent to which Frank and Grace are permitted to reassign the entitlements.

To illustrate, suppose for the sake of argument, that only the first three of the topics listed in the chart on page—are resolved in favor of Frank. Grace is forbidden to obtain the novel by force, fraud, or “improper means” but is not otherwise hampered in her ability to

make use of the novel. Frank will be unhappy, of course, but he will not be wholly powerless. Those three entitlements will at least enable him to limit users' access to his creation. He may be able to employ that power to extract from Grace a variety of concessions not assigned to him by the default rules. For example, he might agree to provide Grace (through the Internet) access to a website, from which she could download a copy of the novel, only if she consents to do one or more of the following:

- Pay him $10;
- Pay him $.10 for every page she reads;
- Pay him $.00003 times her gross income during the preceding calendar year for every page she reads;
- Not resell the downloaded copy of the novel;
- Not use the downloaded copy to make a second (or third) copy;
- Not parody the novel;
- Not criticize the novel publicly; or
- Not buy or read a rival's novels.

As a practical matter, there are two ways in which Frank might extract from Grace concessions of these sorts. First, the two parties might enter into a contract. On the Internet, such a contract would most likely be structured as a license agreement—of the sort that has come to be known as a “click-on” or “click through” license. Frank would organize his website so as to require Grace, before she is able to download the data file containing the novel, to “click” on an icon expressing her willingness to abide by a specified set of conditions—and Grace would subsequently be bound thereby.\textsuperscript{12}

Second, Frank might employ one of a growing set of technological devices to prevent Grace from using the novel in a manner inconsistent with his conditions. Devices of this sort include:

\textsuperscript{12} Here, for example, is an excerpt from the “Terms and Conditions” associated with the Martindale-Hubbell website:

You are hereby granted a nonexclusive, nontransferable, limited license to view, reproduce, print, and distribute insignificant portions of materials retrieved from this Site provided (a) it is used only for informational, non-commercial purposes, (b) you do not remove or obscure the copyright notice or other notices. Except as expressly provided above, no part of this Site, including but not limited to materials retrieved therefrom and the underlying code, may be reproduced, republished, copied, transmitted, or distributed in any form or by any means. In no event shall materials from this Site be stored in any information storage and retrieval system without prior written permission Martindale-Hubbell.

"scramblers" that render copies made without permission unusable; combinations of electronic components designed to discourage "serial" copying; "cryptolopes" and "trusted systems" that prevent anyone who does not have a digital "key" supplied by the producer from gaining access to the products; devices that prevent a product from being used more than a prescribed number of times or for more than a prescribed period of time; and systems for measuring (and thus charging for) the amounts that digital products are used.\(^{13}\)

Systems of these sorts plainly make it possible for Frank to demand payment from Grace before permitting her to gain access to the novel. In addition, they sharply reduce the risk that Grace will create additional, duplicate copies of the novel without his permission. However, at present, these technologies do not enable creators to strike bargains with users as refined as the deals that can be arranged using contracts. For example, Frank would not be able—using extant forms of encryption—to prevent Grace from parodying the novel while allowing her to make use of it in other ways. These limitations on the flexibility of technological protections are likely to diminish over time. For example, the techniques for tracking intellectual products are improving swiftly. As a result, it will soon be much easier for creators to monitor the ways in which their creations are being employed—and thus to enforce contractual limitations on permissible uses. And, encryption technology will likely enable creators in the future to differentiate ever more precisely permissible from impermissible activities.

Neither of these two ways of extracting concessions from users, it should be emphasized, are the exclusive province of copyright owners. (To that extent, the terms commonly used to describe some of the encryption systems—such as "Copyright Management Systems"—are misleading.) The producers of kinds of intellectual products that are not eligible for copyright protection—such as

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databases that fail to satisfy the *Feist* standard of originality\(^{14}\)—have even greater reason to avail themselves of these options.\(^{15}\)

To summarize, Frank might employ either a contract or a technological device to parlay a meager bundle of rights into a much more generous set of entitlements. The legal system might adopt any of a wide range of postures toward such deals. We might set our faces against them—for example, by forbidding the development or use of a specified sort of encryption technology. Less drastically, we might permit the use of a specified technology but discourage it—for example, by imposing heavy taxes on its manufacture or sale. Alternatively, we might not only permit the use of that technology but encourage it—for example, by criminalizing the manufacture or use of devices that enable others to circumvent it. Instead of adopting a blanket rule toward all uses of the technology in question, we might permit its use for some purposes but not for others.

A similar spectrum of options exists with respect to "click-on" licenses. We might refuse to enforce any of them—for example, by deciding that they are all "unconscionable" or that they are all preempted by the Copyright Statute. Alternatively, we might enforce all such license agreements. We might go even further and reinforce the usual remedies for breach of contract (damages and specific performance) with criminal sanctions—as we have done, for example, with breaches of confidentiality by employees.\(^{16}\) We might permit and enforce some sorts of licenses but not others. Finally, taking our cue from the Anglo-American law of servitudes, we might permit some sorts of agreements (but not others) to "run with" the intellectual property to which they pertain—i.e., to be enforceable not only against the promisee, but also against third parties who acquire the intellectual property from the promisee.\(^{17}\)

Which of these options makes most sense? It should by now be apparent that the answer to that question depends upon the magnitude of the set of entitlements assigned to creators by the default rules. Our overall goal, recall, is to hold out to creators a set

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of incentives sufficient to induce them to produce intellectual products from which we will all benefit, but not so great as to impede public dissemination and use of those products. We might strive to achieve that happy medium by according creators a generous set of entitlements through default rules but then limiting their ability to use those entitlements to extract from users still greater rights. Alternatively, we might accord creators a minimal package of rights through the default rules, but then give them wide latitude in leveraging those rights into other concessions. Many intermediate options are of course available.

In short, the question of the proper scope of intellectual property rights on the Internet and the question of the proper magnitude of contractual freedom on the Internet should be understood as interdependent. Neither can be resolved sensibly without attention to the other.

Before attempting actually to resolve them, however, we need to be more precise concerning the objectives we are trying to achieve. Up to this point, we have relied upon a conventional, rough-and-ready view that we need somehow both to encourage the creation of intellectual products and to clear the channels for their dissemination. If we wish to provide lawmakers real guidance, we need a more detailed account of our ultimate ends. To that project we now turn.

II. ASPIRATIONS

To understand (and to evaluate) the normative theory upon which this essay depends, it is helpful to have in view the larger set of theories from which it is drawn. Section A outlines that set. Section B elaborates my particular approach.

A. Theories of (Intellectual) Property

Political theorists and legal scholars have developed four main ways of shaping and justifying property rights in general, and intellectual property rights in particular. None of the four can convincingly claim to provide policymakers a determinate method for creating and allocating legal entitlements. Rather, each is best understood and employed as a language—a paradigm helpful in identifying considerations that ought to be taken into account when determining who should own what.

The first approach springs from the proposition that a person
who labors upon resources that are either unowned or "held in common" has a natural property right to the fruits of his or her labor—and the state has a duty to respect and enforce that natural right. These ideas, originating in the writings of John Locke, are widely thought to be especially applicable to the field of intellectual property, where the pertinent raw materials (facts and concepts) do seem to be "held in common" and where (intellectual) labor seems to contribute so importantly to the value of the finished product. Agreement upon this basic proposition, however, has not produced consensus on details. Scholars who work this theoretical vein continue to argue over such questions as: Does any sort of intellectual labor give rise to natural property rights, or must the labor be socially valuable, or unpleasant, or especially creative to support such a claim? Does the creator of an intellectual product deserve to charge whatever the market will bear for access to her creation, or are her entitlements more limited? Does the famous Lockean "sufficiency" proviso (or the more general no-harm principle latent in other parts of Locke's work) limit in any way the scope of the entitlements the creator acquires?

The principle that powers the second of the four approaches is that a policymaker's beacon when shaping property rights should be the greatest good of the greatest number. In other words, he should strive to select a set of entitlements that (a) induces people to behave in ways that increase socially valuable goods and services and (b) distributes those goods and services in the way that maximizes the net pleasures people reap from them. A modified version of this principle is the main article of faith of those lawyer/economists who


continue to march under the banner of the Kaldor-Hicks criterion. The literature (both judicial and scholarly) on the law of intellectual property is rife with invocations of this ideal. Its popularity, however, has not produced consensus concerning its implications. Proponents of the utilitarian approach to intellectual property continue to argue over the proper shape of many doctrines—ranging from the kinds of creations that should be rewarded with copyright protection to the scope of the power patentees should enjoy to control improvements on their inventions.

The heart of the third approach is that private property rights are crucial to the satisfaction of some fundamental human needs or interests; policymakers should thus strive to select the set of entitlements that is most conducive to human flourishing. Much of the interest—and controversy—associated with this approach concerns the difficult job of identifying exactly which human needs or interests are both implicated by property rights and deserving of respect. The following are among the ideals emphasized by different theorists who have adopted this strategy: autonomy; self-realization as an individual; self-realization as a social being; security and leisure; control over the presentation of one's self to the world; personal responsibility; identity; peace of mind; privacy (and associated opportunities for intimacy); citizenship (and the associated value of civic virtue); and benevolence. The task of determining which system of intellectual property rights would best promote the widespread realization of each of these ten ideals has only just begun. The fourth approach—upon which this essay is founded—is rooted in the proposition that property rights can and should be shaped so as to help foster the achievement of a just and attractive culture. This perspective is less well known than the other three—


24. For affirmations of various of these ideals, see, e.g., Charles Fried, Right and Wrong (1978); Thomas Hill Green, Lectures on the Principles of Political Obligation (London, Longmans, Green & Co. 1941) (1879); Abraham Lincoln, Address at the Wisconsin State Fair, in The Political Thought of Abraham Lincoln 134 (Richard Current ed. 1967) (1859); Margaret Jane Radin, Reinterpreting Property (1993); Jeremy Waldron, The Right to Private Property (1988); Carol Rose, The Comedy of the Commons, in Property and Persuasion (1994).

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each of which has both a familiar moniker (Labor-Desert Theory; Utilitarianism; and Personality Theory) and a famous ancestor (Locke; Bentham; Hegel). But once charted, the provenance of the fourth approach is equally impressive; theorists who have approached property rights in this spirit include Jefferson, the early Marx, the Legal Realists, and the various proponents (ancient and modern) of classical republicanism. It lacks only a label to give it credibility. For that purpose, Greg Alexander offers “proprietarian” theory; my own preference is for “social-planning theory.”

To be sure, the boundaries between these four approaches are far from precise. With a little effort, they can be shown to blur. For example, as Alan Ryan has shown, much of Locke’s labor-desert argument depends upon recognition of the social advantages of inducing people to labor—and thus incorporates a utilitarian theme. Similarly, while the distinction between the personality and social-planning theories is clear enough in the abstract (the former urges the selection of property rights that help fulfill fundamental individual needs, while the latter seeks to promote a just and attractive culture), the examples of civic virtue and classical republicanism—as well as many of the issues discussed in the following section—suggest that they sometimes overlap in practice.

It is not my objective here to sharpen or defend those boundaries. (My sense, in general, is that the four perspectives, though not wholly autonomous, are useful as ideal types—but I will not undertake now to defend that claim.) Rather, the purpose of the foregoing quick sketch of the principal property theories has been to identify—by contrasting it with its main rivals—the methodology that undergirds this essay.

B. A Vision

The fourth approach, to repeat, counsels crafting legal rights in general—and property rights in particular—so as to promote a just and attractive culture. Well, then, what are the features of a just and attractive culture? The difficulty of answering that question is, I

27. See GREGORY ALEXANDER, COMMODITY AND PROPRIETY (1997).
think, the principal reason the method has not gained more adherents—and it would be foolhardy to attempt a comprehensive response in a preface to an essay on the Internet. But, at least a rough sketch is essential to the argument that follows. Set forth below, in very brief form, are the components of the vision—with emphasis (for obvious reasons) on characteristics that are related to intellectual property.\(^2\)

**Consumer Welfare.** I begin with the proposition—derived directly from the utilitarian approach—that, other things being equal, a society whose members are happy is better than one whose members are (by their own lights) less happy. Applied to the field of intellectual property, this guideline urges us to select a combination of rules that will maximize consumer welfare by optimally balancing incentives for creativity with incentives for dissemination and use. This deceptively simple objective\(^3\) does not, however, exhaust the set of appropriate aspirations for the legal system. Rather, in a good society, it would be tempered by a series of goals not reducible to “the greatest good of the greatest number.” The remainder of this section discusses those goals.

**A Cornucopia of Information and Ideas.** An attractive culture would be one in which citizens have access to a wide array of information, ideas, and forms of entertainment—wider, perhaps, than an unregulated market in intellectual products might produce. Variety, in this sense, helps stimulate and enrich life. Access to a broad range of intellectual products is also crucial to widespread attainment of two related conditions central to most conceptions of the good life—namely, self-determination\(^3\) and self-expression—both by providing persons the materials crucial to self-construction, and by fostering a general condition of cultural diversity, which (in ways best described by John Stuart Mill) enables and compels individuals to shape themselves.\(^2\)

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29. Fuller descriptions of each component may be found in Fisher, *Fair Use Doctrine*, supra note 5.

30. For a powerful—and very complex—analysis attempting to work out the implications of this guideline for copyright law in general, see Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996).

31. To emphasize self-determination is to deny neither the fact that persons' identities are to a substantial degree socially determined nor the value of persons' cultivating attachment to groups. It is, rather, to recognize the importance of each individual taking some degree of responsibility for herself. See JOHN STUART MILL, *ON LIBERTY* (1859); George Kateb, *Democratic Individuality and the Claims of Politics*, 12 POL. THEORY 331 (1984); Port Huron Statement, in *THE NEW LEFT: A DOCUMENTARY HISTORY* 166-67 (M. Teodori ed. 1969).

32. See WILHELM VON HUMBOLDT, *THE SPHERE AND DUTIES OF GOVERNMENT* 11-13
A Rich Artistic Tradition. As Ronald Dworkin has persuasively argued, the more complex and resonant the shared language of a culture—including, above all, its "vocabulary of art"—the more opportunities it affords its members for creativity and subtlety in communication and thought.\textsuperscript{33} As Dworkin suggests, recognition of that fact points toward governmental policies designed to make available to the public "a rich stock of illustrative and comparative collections [of art]\textsuperscript{34} and, more generally, to foster "a tradition of [artistic] innovation."

Distributive Justice. Specification of the ways in which wealth would be distributed in a just society would take us very far afield.\textsuperscript{36} For present purposes, a much more modest (though not trivial) assertion should suffice: to the greatest extent practicable, all persons should have access to the informational and artistic resources described above.

Semiotic Democracy. In an attractive society, all persons would be able to participate in the process of meaning-making. Instead of being merely passive consumers of cultural artifacts produced by others, they would be producers, helping to shape the world of ideas and symbols in which they live.\textsuperscript{37} Active engagement of this sort would help both to sustain several of the features of the good life—e.g., meaningful work\textsuperscript{38} and self-determination—and to foster cultural


\textsuperscript{34} See Dworkin, supra note 33, at 155.

\textsuperscript{35} See id. at 153-56.

\textsuperscript{36} For an opinionated review of the pertinent literature, see Fisher, Fair Use Doctrine, supra note 5, at 1756.


\textsuperscript{38} Meaningful work means a job that requires skill and concentration, presents the worker with challenges she can meet only through the exercise of initiative and creativity, and is embedded in a larger project she deems socially valuable and must take into account when making her decisions. Not all jobs can conform closely to this ideal, of course, but to the extent feasible, all persons should have access to work of this sort. See JON ELSTER, MAKING SENSE OF MARX 74-82, 521 (1985); MARX, supra note 26, at 110-11, 137; ADAM SCHAFF, ALIENATION AS A SOCIAL PHENOMENON 57-62 (1980).
diversity.

Sociability. Recognition of the importance to the good life of self-determination does not point toward a society characterized by radical individualism; on the contrary, it suggests that we strive to cultivate a society rich in opportunities for community. To be willing and able to avail oneself of a range of life choices, one must have a secure sense of self and a capacity for reflection—attributes most likely to be found in persons grounded in "communities of memory." Moreover, persons' capacities to construct rewarding lives will be enhanced if they have access to a variety of "constitutive" groups—in "real" space and in "virtual" space.

Respect. Semiotic democracy does not imply that persons should be free to manipulate the creations of others without any restraints whatsoever. Appreciation of the extent to which self-expression is often a form of self-creation should make people respectful of others' work.

There are tensions among some of the goals just canvassed—for example, between the value of self-expression and the value of respect. But for the most part, I contend, they hang together. They reinforce one another and (if elaborated substantially) would together constitute a coherent picture of an attractive society. Substantiation of that bald assertion is plainly beyond the scope of this essay. But my intention is to offer, not a list of ideals that pull in inconsistent directions, but an integrated vision.

Armed with that (regrettably, but inevitably) brief sketch of a set of aspirations, we can return to the problem at hand: the content of the rules that should govern nonpermissive uses of material available in cyberspace.

III. REGULATING THE NET

What combination of default intellectual property rules for the Internet and opportunities for contractual modification of those rules would be most likely to advance the vision outlined above? The short

40. See id. at 85-112; MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 147-50 (1982).
answer is that we can’t be sure. The Internet is changing very fast; we
can’t be certain what it will look like in a decade or even a year. For
that reason, I agree wholeheartedly with those commentators who
urge lawmakers to be cautious and not try to impose a permanent,
comprehensive regulatory regime on this protean medium.42

Caution is also consistent with the methodology advocated in this
essay. The vision outlined in Part II is nothing more than a sketch—
or, to change metaphors, merely one contribution to an ongoing
conversation about the sort of society we wish to live in. The Internet
is a potentially revolutionary medium—socially, economically, and
politically. Engagement in and with it is bound to change our sense of
how we might implement our existing ideals. And, it may well alter
our values themselves. We should be open to such possibilities—and
should not foreclose them through premature efforts to impose order
on the system.

But, being cautious does not mean doing nothing. If we can
nudge the system in more attractive directions—or prevent it from
drifting in pernicious directions—we should do so, always leaving
open the possibility that whatever rules we adopt will have to be
modified soon. In that spirit, I propose that we move toward a
regulatory regime that combines a modest (though not trivial) set of
intellectual property rights for creators with significant (though not
unlimited) opportunities for contractual rearrangements of those
rights.

The following three sections describe and defend specific
components of that composite recommendation. While we are in the
midst of those trees, however, it is important not to lose sight of the
forest. The overall goal, remember, is to craft a system that, in the
aggregate, helps foster a just and attractive society.

IV. A MODEST SET OF DEFAULT ENTITLEMENTS

An important group of lobbyists, government officials, and
scholars have argued that the creators and distributors of intellectual
products currently enjoy too little protection against nonpermissive
uses of their works on the Internet.43 Accordingly, they have urged
lawmakers—in the United States and in the World Intellectual

42. See, e.g., Frank H. Easterbrook, Cyberspace and the Law of the Horse, 1996 U. CHI.
43. See supra note 10.
Property Organization ("WIPO")—to tighten up the copyright regime, giving the creators of original forms of expression effective protection against cyberspace "piracy." For example, they commonly advocate more generous interpretations of the terms "copying" and "distribution" (thereby expanding copyright owners' ability to control the manner in which their works are used); increased exposure of Internet service providers for carrying infringing material; constriction of the kinds of uses of copyrighted works privileged by the fair-use doctrine; and strong proscriptions of encryption-circumventing "black boxes." \(^4\)

Most of these reforms are, I suggest, unnecessary and ill-advised—unnecessary, because the ability of creators to collect money from people who wish to gain access to their creations on the Internet can be adequately protected by contractual and technological options (discussed in Part V); ill-advised, because they will unduly impede opportunities for transformative and socially valuable nonpermissive uses of intellectual products (discussed in Part VI). This is not to suggest, however, that we should dispense with all intellectual property rights on the Web. A modest but not insignificant set of entitlements do deserve protection through the default rules. A tentative list of these is set forth below. \(^5\)

A. People, who intentionally or recklessly post copyrighted material on the Internet, should be liable for copyright infringement.

B. Creators' moral rights of attribution and disclosure should be respected, but not their interests in integrity or withdrawal.

C. "Framing" should be deemed a form of misappropriation, but "deep linking" and "caching" should not.

A detailed defense of these propositions would take many pages. Fortunately, however, the first and third have already been analyzed persuasively by other scholars. I, therefore, will discuss them quickly, incorporating by reference the work of my predecessors.

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44. See, e.g., Tom W. Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. REV. 557 (1998). Cf. Hardy, supra note 6 (arguing that the copyright system should be rejected in favor of an even more expansive set of "pure" property rights).

45. An interesting related problem concerns when, if ever, persons who register as Internet domain names should be liable for trademark infringement or dilution. Because there is already a large scholarly literature on that topic, see Domain Names (visited June 4, 1999) <http://eon.law.harvard.edu/property/domain/> [hereinafter Domain Names], and because it is largely peripheral to the concerns addressed in this paper, I put it aside.
A. Posting Copyrighted Material

There are two legitimate reasons why creators of intellectual products might complain when their works are made available on the Internet without their permission. First, and most obviously, nonpermissive posting may threaten their ability to derive revenue from traditional markets for those works. Suppose, for example, that a fan of a popular musician creates a website devoted to that musician and then includes, in the collection of celebratory material, a menu of the musician's (copyrighted) recordings. A visitor to the site can, by clicking on the title of a particular recording, download to her own computer a compressed digital copy of it, which she can then play (for free) through her computer's speakers. If she has a read-write CD-ROM drive, she can use the downloaded files to prepare custom CDs, which she (or her friends or customers) can then play through home audio systems. As the technology for making use of such sites becomes more widely and cheaply available, the construction of sites like this plainly will erode the market for traditional musical recordings. Much the same can be said for the increasingly common practice of posting on the Web "bootleg" MPEG copies of (copyrighted) movies. If it spreads, this activity clearly will erode the rental market for videotapes and videodisks—and thus indirectly impair the revenues that can be collected by movie companies. Unless we curb behavior of these sorts, we run a serious risk of eroding incentives for creativity.

Second, some creators have legitimate nonmonetary interests in exercising some degree of control over how their works are disseminated. A painter or photographer may feel that the distribution to the world of multiple digital copies of his creations (the appearance of which inevitably deviates somewhat from the originals) degrades his art. A musician who believes that nothing but a live performance can convey the true spirit of his music may feel the same way about bootleg recordings. Similar concerns may be found

46. The technology that makes this possible is known as MP3 (short for Motion Picture Experts Group Layer 3 Compression Format). For a description of the technology and of increasingly common uses of the Internet resembling those described in the text, see T.R. Reid & Brit Hume, MP3 Standard Endows Music with Freedom of the Internet, BUFFALO NEWS, May 26, 1998, at E12.

in the letter, written by Gary Larson to the operator of a website featuring his cartoons, in which he pleaded (successfully) with the operator to cease and desist.\(^48\) In short, the values of integrity and respect may be impaired by posting works on the Net against the wishes of their creators.

Current copyright law probably proscribes all of the activities discussed above. Certainly the MPEG bootleggers are making "copies" (or perhaps "derivative works") of the movies when they set up their pirate website—and thus run afoul the provisions of section 106 of the American Copyright Act\(^49\) and similar provisions in the laws of other countries. But, what if the operator of such a site—say, our hypothetical music fan—had acquired *legitimately* the copies of

\(^48\) The letter may be found (at least for the time being) at Gary Larson—*Cartoon of the Week (The Far Side)* (visited June 4, 1999) [http://www.portmann.com/farside/].

TO WHOM IT MAY CONCERN:

I'm walking a fine line here.

On the one hand, I confess to finding it quite flattering that some of my fans have created web sites displaying and/or distributing my work on the Internet. And, on the other, I'm struggling to find the words that convincingly but sensitively persuade these Far Side enthusiasts to "cease and desist" before they have to read these words from some lawyer.

What impact this unauthorized use has had (and is having) in tangible terms is, naturally, of great concern to my publishers and therefore to me—but it's not the focus of this letter. My effort here is to try and speak to the intangible impact, the emotional cost to me, personally, of seeing my work collected, digitized, and offered up in cyberspace beyond my control.

Years ago I was having lunch one day with the cartoonist Richard Guindon, and the subject came up how neither one of us ever solicited or accepted ideas from others. But, until Richard summed it up quite neatly, I never really understood my own aversions to doing this: "It's like having someone else write in your diary," he said. And how true that statement rang with me. In effect, we drew cartoons that we hoped would be entertaining or, at the very least, not boring; but regardless, they would always come from an intensely personal, and therefore original perspective.

To attempt to be "funny" is a very scary, risk-laden proposition. (Ask any stand-up comic who has ever "bombed" on stage.) But if there was ever an axiom to follow in this business, it would be this: be honest to yourself and—most important—respect your audience.

So, in a nutshell (probably an unfortunate choice of words for me), I only ask that this respect be returned, and the way for anyone to do that is to please, please refrain from putting The Far Side out on the Internet. These cartoons are my "children," of sorts, and like a parent, I'm concerned about where they go at night without telling me. And, seeing them at someone's web site is like getting the call at 2:00 a.m. that goes, "Uh, Dad, you're not going to like this much, but guess where I am."

I hope my explanation helps you to understand the importance this has for me, personally, and why I'm making this request.

Please send my "kids" home. I'll be eternally grateful.

Most respectfully,

Gary Larson

the songs that he places on his hard drive and thereby makes available to the world. In such a case, because he did not engage in any nonpermissive copying, he might not be deemed to have violated the Copyright Act—although, presumably, the fans who downloaded the songs from his site would. To ensure that the person who sets up such a site does not slip through the net of liability, the delegates at the recent WIPO Conference in Geneva included a new Article 8 in their Copyright Treaty which, when given teeth through implementing legislation in the member countries, would make clear that authors enjoy the exclusive right to "authoriz[e] any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."50 For the reasons suggested above, this adjustment (or clarification) of current law seems wise.

In short, copyright law has an important role to play on the Internet in preventing the deliberate uploading of material without the permission of its creators. However, to address that problem, we may not need to apply current copyright doctrine in all its glory to this new medium. Copyright infringement is a strict-liability offense. If a person without permission engages in any of the activities listed in section 106 of the statute,51 he is exposed to a wide range of serious penalties regardless of his intent or state of mind. Wholesale adoption of this regime would render actionable many activities that pose no significant threat to creators' legitimate interests—like posting on the Web a recording of an interview taken in a café where a Bob Dylan song happens to have been playing in the background.52 A better system would be one limiting liability to persons who engage in the activities proscribed by section 106 intentionally or with reckless disregard for the copyright status of the works they upload.

A state-of-mind requirement of that sort might also provide a solution to the problem of Internet-service-provider ("ISP") liability that has bedeviled both courts and commentators.53 What happens

52. This example is drawn from a semi-serious dispute between Prof. Charles Nesson and the company that manages the copyrights in Dylan’s songs.
when the subscriber to a service like CompuServe uses the company's facilities to upload—and thus make available to the world—withstanding material? Should CompuServe (in addition to the individual subscriber) be liable for copyright infringement—either directly or "contributorily"? On one hand, as Niva Elkin-Koren has persuasively argued, imposing liability on ISPs under such circumstances would likely compel them to police the behavior of the customers. The unavoidable crudity of that supervision would, in turn, severely curtail the opportunities generated by the Internet for semiotic democracy. On the other hand, enforcement of a rule against unauthorized uploading of copyrighted material would be difficult if ISPs could with impunity knowingly carry infringing material on their servers and ignore the complaints of copyright owners who become aware of infringing conduct. A rough but attractive compromise between these two concerns could be achieved by making the ISPs liable if, and only if, they intentionally or recklessly carry infringing material—either by knowingly allowing it to be posted in the first instance or (more likely) by failing to remove it when notified by the copyright owners.

Frank Music Corp. v. CompuServe, No. 93-8153 (S.D.N.Y., filed Nov. 29, 1994) (dismissed with prejudice and without costs or attorney fees to any party, Dec. 19, 1995).


55. In October 1998, while this article was in press, Congress adopted H.R. 2281, popularly known as the Digital Millenium Copyright Act or DMCA. Available in (visited June 4, 1999) <http://www.hrrc.org/2281enrolled.pdf>. Title II of the Act (known as the Online Copyright Infringement Liability Limitation Act) limits the liability of Internet service providers in a fashion roughly congruent with the recommendations offered in the text. The pertinent sections of the statute provide that:

(1) A service provider shall not be liable... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider—
(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1) (1998). An ISP can only claim the benefit of the “safe harbor” provisions described above if it “has designated an agent to receive notifications of claimed infringement.” Id. § 512(c)(2).
Finally, it should be emphasized that the usual defenses to copyright liability would continue to be available in this context. So, for example, uploading material under circumstances that would, in any other medium, be excused by the fair-use doctrine (e.g., uploading short excerpts for the purposes of criticism or parody) would continue to be privileged.

Would such a regime ensure that copyrighted material is never posted on the Web without the permission of the owners? Of course not. There would be leakage—as there is through all of the barriers erected by intellectual property law. But there is reason to be optimistic that the leakage would not become a flood. Most importantly, in the past few months, technologies capable of detecting wrongful posting of copyrighted material have become widely—and reasonably cheaply—available to creators. Those technologies include digital watermarks, digital fingerprinting, search engines that prowl the Net looking for infringing material, and bits of code buried in digital works that (like the harp in “Jack and the Beanstalk”) alert their owners when they are being copied without permission. Such devices, combined with the severe penalties the Copyright Act provides for willful violations, should be sufficient to keep the leakage to a tolerable level.

B. Moral Rights

An artist’s “moral rights” are conventionally understood to include the following entitlements: (a) a “right of integrity” (a right not to have one’s creations mutilated or destroyed); (b) a “right of attribution” (encompassing the rights to be given credit for one’s work, to publish anonymously or pseudonymously, and not to be given credit for a work one did not create); (c) a “right of disclosure” (the right to determine when and how one’s work is first released to

Because of the strong incentives created by the statute for ISPs to avail themselves of its protections, there is some danger that they will remove material too hastily. But, with that exception, the particular provision of the DMCA seems sensible. For commentary on the statute, see Jonathan Band, The Digital Millenium Copyright Act (visited June 4, 1999) <http://www.dfc.org/html/jb-memo.html>.


the public); (d) a "right of withdrawal" (the authority to remove one's works from public circulation—usually understood to carry with it a duty to indemnify the persons from whose possession it is withdrawn); and (e) a "droit de suite" (the right to collect resale royalties). No legal system in the world currently protects fully all of these entitlements, but European regimes typically shield a much larger subset of them than state or federal law in the United States.58

Should entitlements of these sorts be protected on the Internet? Entitlement (c), the "right of disclosure," seems important for the reasons similar to those explored in the preceding section: It is closely connected with creators' interests in privacy and in controlling the faces they present to the world.59 Lack of protection for this right would also distort the creative process—for example, by making creators unduly secretive in order to shield embryonic forms of their works from premature release.60 Last but not least, recognition of this right is essential to protect a creator's ability to demand compensation from users of his work.

Entitlement (b), the "right of attribution," seems worthy of protection for a different reason: Permitting an author both to claim credit for work he has produced and to avoid being credited with work he has not produced seems central to the ideal of respect identified in Part II of this essay. Many of the same intuitions that underlie our understandings and customary practices concerning plagiarism also rightly make us cringe at the notion that someone could make a copy of an artifact I had posted on the Web, and recirculate it under his own name. Equally worrisome is the notion that someone could copy one of my works, modify it substantially, and then recirculate it with my name still attached to it. If (as seems likely) the largely extralegal sanctions that limit the incidence of plagiarism in other media61 will have little grip on the Internet, we should be chary of curtailing copyright protection so far as to remove all disincentives to engage in such behavior.

A firm defense of moral rights would go even further. Shouldn't creators be able to object when their works are mutilated and then

58. See Yonover, supra note 41, at 995-97.
59. See Paine, supra note 25, at 251.
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recirculated (even without their names attached)? If you have come to regret a work you posted on the Net, shouldn’t you be able to withdraw it? Perhaps, but the benefits secured through the protection of such rights would be swamped by the concomitant threats to other aspects of the society we wish to promote. Specifically, the resultant curtailment of opportunities for self-expression and semiotic democracy would be severe.

Protection of the right of attribution, fortunately, would have few side-effects of this sort. Little would be lost and much would be gained by requiring Net users, when they copied substantial portions of a work, to leave the name of its creator on it. But what if they modified the work sufficiently to make the creator regret the retention of his name? The appropriate norm in that context is less obvious, but the following might work: If person A creates a work, posts a copy on the Internet, and indicates in the document itself the URL where it may be found, and person B then modifies the work and makes it available on the Net in modified form (either in isolation or as a part of some composite work), then B must not remove A’s URL—i.e., A’s indication of a site where an unadulterated version of the work may be found. It would then be A’s responsibility to maintain that site.

Discussion of entitlement (e), the “droit de suite” is postponed—for reasons that will become apparent—to Part V of this essay.

C. Framing, Linking, and Caching

One of the ways in which producers (and compilers) of informational products have sought to make money on the Internet has been through the sale of advertisements. In the simplest form of this strategy, newspaper N creates a website containing all (or more commonly, a portion of) N’s articles. Visitors to the site arrive first at an index or “homepage,” which contains links to other pages containing individual articles. The homepage contains advertisements, while the subordinate pages do not. A more complex

62. Activities of these sorts are already multiplying. One website, for example, features the images of a variety of “alternative Barbies” (“Possessed Barbie,” “Fat and Ugly Barbie,” “Mentally Challenged’ Barbie,” etc.) that, not surprisingly, have enraged Mattel. See Mark Napier, Excerpts From The Distorted Barbie (visited June 4, 1999) <http://ezone.org:1080/ez/e7/articles/napier/barbie.html>. For a provocative discussion organized by Elizabeth Rosenblatt and Jen Carpenter of Barbie dispute and similar, related controversies, see Respect & Integrity (visited June 4, 1999) <http://eon.law.harvard.edu/property/respect/>.

63. See Litman, supra note 11.
version of the same strategy entails posting advertisements, not merely on the homepage, but in a frame that surrounds the textual material in all subordinate pages as well.64

At least three sorts of activities threaten the effectiveness of these strategies. First, X—a rival of N, or simply a party unrelated to N—can establish in its own homepage links to subordinate pages in N’s system. Internet users who gain access to N’s system through X’s homepage rather than through N’s homepage thus miss the first wave of N’s advertisements. Second, X may go further, placing advertisements in a frame around its own homepage—a frame that obscures comparable advertising frames on N’s subordinate pages when users link to them. Third, X may organize its system in such a way that it “caches” for substantial periods of time N’s homepage—in other words, stores N’s page on X’s system. The result is that there will be a delay between the time when N changes its advertisements and the time when those changes appear on the version of N’s page that users see when they gain access to it through X’s page.

N might invoke at least two doctrines in an effort to halt these practices.65 First, each of these activities might be characterized as “copying” (at least for brief periods of time in the memory of a computer) without permission N’s copyrighted material—and thus deemed to violate the Copyright Act.66 Second, N might argue that X is “misappropriating” the “hot news” contained in the articles—which N had gathered through the expenditures of substantial labor and money—in violation of state unfair-competition law.67

64. For an excellent review of the technology that makes each of these connections possible, and a careful study of the legal issues they present, see Maureen A. O’Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 MINN. L. REV. 609, 631 (1998).
65. Other, more esoteric legal theories may be available. For example, N might claim that X has “diluted” N’s trademark, or that X, by “framing” N’s material, has created a “derivative work” in violation of section 106(2) of the Copyright Act, or that, by creating links that enable surfers to copy (albeit briefly in RAM) the material in N’s articles, X has engaged in contributory copyright infringement. See, e.g., Brad Templeton, Linking Rights (visited June 4, 1999) <http://www.templetons.com/brad/linkright.html>.
67. Several cases have arisen in which such arguments have been raised. Thus far, however, all have been settled—so the law remains unclear. See, e.g., AltaVista Cannot Use Its Name on Products or Services, MA Judge Says, 10 SOFTWARE L. BULL. 81 (1997); Matt Jackson, Linking Copyright to Homepages, 49 FED. COMM. L.J. 731 (1997); Martin J. Elgison & James M. Jordan III, Trademark Cases Arise from Meta-Tags, Frames: Disputes Involve Search-Engine Indexes, Web Sites Within Web Sites, as Well as Hyperlinking, NAT’L L.J., Oct. 20, 1997, at C6; Microsoft’s Link to Ticketmaster Site Spurs Trademark Lawsuit, COMPUTER & ONLINE INDUS. LITIG. REP., May 6, 1997 at 24,087; Jacqueline Paige, Scottish Court Orders Online Newspaper to Remove Links to Competitor’s Web Site, BNA PAT., TRADEMARK & COPYRIGHT L. DAILY, Nov. 4, 1996; Shetland Islands Linking Lawsuit Settled, COMPUTER L. STRATEGIST, Nov. 1997,
Should N prevail under either of these theories? We are unlikely to answer that question sensibly by extrapolating from the ways in which copyright law and misappropriation doctrine have been applied in other contexts. (This is especially true with regard to misappropriation, which is a notoriously inconsistent and unpredictable field.) A much more promising strategy would ask whether application of these theories would be likely to promote the set of cultural conditions sketched in Part II.

Because all three of the activities described above would reduce N’s revenue (and thus erode N’s incentive to construct websites of this sort in the first instance) we should be wary of them—for the obvious reason, that they would reduce the production of informational works. Unless the availability of these options served other, more important ends, we should interpret one or another of the available doctrines to proscribe them.

Do these activities serve other, important ends? With respect to “deep linking” (the first of the activities described above), the answer would seem to be yes. Deep links have two valuable functions: they make it much easier for users of the Net to gain access to the sort of material they want and need; and the act of constructing them is an important way in which people express themselves and help take control of the meaning of the Net. Deep linking, consequently, should be permitted.

With regard to “framing,” however, the answer would seem to be no. Neither self-expression nor semiotic democracy would be materially advanced by permitting deep linkers to obscure, with their own advertising frames, the advertisements on the pages to which they link. It is true that a ban on framing would reduce the incentives for people to set up sites like X’s, which in turn would diminish to some degree the ease with which surfers could move around the Internet. But, this effect seems less substantial and important than the effects of the alternative: eroding N’s incentive to create its site in
the first instance, and impairing N's ability to control the manner in which its material is presented to viewers. So, framing should probably be proscribed.

"Caching" is harder to assess, but the balance seems to tilt in favor of permitting the activity—partly because of its advantages from users' standpoints (it dramatically reduces the time that a visitor to X's site must wait before seeing N's site) and partly because the threat to N's revenues (and thus N's incentives) seems modest.

It should be emphasized that the judgments ventured in the preceding three paragraphs are tentative, and technological innovations might trump them altogether. They are offered in the hope of modeling a method for addressing such questions, not as definitive answers.

D. Commissions and Omissions

The default rules outlined above assign to creators more entitlements than are advocated by "copyright minimalists." An Internet organized on the basis of such default rules plainly would not be a "copyright-free zone." On the other hand, the proposed regime falls far short of the package of entitlements advocated by the "copyright maximalists." Very few of the recommendations contained in the now-notorious "White Paper," for example, are included. In addition, in one crucial respect, the proposed system is less protective of creators' interests than current copyright law: It contemplates that users of the Net would not be liable for copyright infringement for viewing, downloading, copying, or retransmitting any material they find on the Net—including material posted in contravention of the guidelines set forth in section A.

69. See, e.g., Templeton, supra note 65. "It's also worth pointing out that it is possible, though a pain, to build a web server so that access to internal pages is done through ever-changing URLs with magic cookies that only appear in the binding or navigating pages. This technique can prevent people from offering links to internal pages or doing inline inclusions of other people's graphics because each URL works only once." For other technological ways of discouraging linking and framing, see O'Rourke, supra note 64, at 646.

70. See supra note 11.

71. See supra note 10.


73. See supra notes 51-57 and accompanying text. In this respect, the default rules advocated here are even less protective of copyright owners than the recommendations of several of the "minimalists." See Marci A. Hamilton, The TRIPS Agreement: Imperialistic,
Why withdraw that seemingly fundamental stick from the bundle of entitlements enjoyed by copyright owners? A facile response is that it is largely infeasible to detect and police putatively infringing behavior of this sort, so copyright owners would not be losing much. A more serious answer is that the freedom to read, copy, and (with the limited restrictions discussed in section B, above) transform material one finds on the Net would go far toward advancing the diverse, stimulating, playful, participatory, and egalitarian society sketched in Part II.

But what about the revenues of creators? If they can't make money on the Net, because users can view or copy their creations free of charge, won’t they keep their material off the Net—or, worse yet, reduce their levels of production altogether? If they had no alternative way of using the Web to raise revenue, that concern would be very serious. The following two Parts, however, outline an alternative system for protecting creators' legitimate interests in controlling access to their material—a system that, compared to the copyright regime, entails fewer transaction costs, greater economic efficiency, a more egalitarian system for regulating access to intellectual products, and greater attention to the cultural values celebrated in this essay.

V. PERMISSIBLE MODIFICATIONS OF THE DEFAULT RULES

The principal claim of the remainder of this essay is that some kinds of contractual or technological rearrangements of the entitlements described in the preceding section should be permitted, but others should be proscribed. This section contains an illustrative set of desirable rearrangements. Part VI describes some that should be disallowed.

A. Access Charges

Let’s begin with a relatively easy case. Should Frank be allowed to demand a fee from Grace in return for permitting her to download the novel from his website? It is hard to see why not. Surely, Frank would be permitted to demand from Grace a fee in return for providing her a “hard” copy of the novel. That, after all, is the way novelists (through the intermediation of publishers) ordinarily make

Outdated, and Overprotective, 29 VAND. J. TRANSNAT’L L. 613, 631 (1996); Litman, supra note 11, at 41-43.
money. Allowing Frank to make a similar demand for Internet access to his creation would not seem to run afoul any of the values catalogued in Part II. At least provisionally, therefore, we should permit the parties to rearrange their entitlements to this extent.

B. Copy Protection

Frank’s ability to charge Grace for access to his novel will enable him to generate some income. However, unless he can prevent Grace from producing multiple copies of the novel, his revenue-gathering power will be sharply limited. Grace will buy a single copy, use digital copying technology to make a virtually unlimited number of copies at minimal cost, and sell (or give) those copies to Frank’s potential customers. Witnessing this sequence of events, potential authors, who are not independently wealthy or willing to live in garrets, will despair. Realizing that they will never be able to recoup the costs of creation (in the form of time, effort, word-processors, and foregone opportunities), they will abandon their craft and become lawyers. The net result is that the world will be deprived of their potential creations.

The social desirability of avoiding this familiar scenario is the primary traditional economic justification for copyright law. The problem with intellectual products, it has often been said, is that they are “public goods.” Like lighthouses, they can be enjoyed by unlimited numbers of persons without being “used up,” and (partly as a result) it is difficult to prevent persons who have not paid for them from enjoying them. These circumstances are likely to lead to their underproduction. To avoid that danger, we forbid consumers to reproduce (certain kinds of) intellectual products, thereby enhancing the ability of their creators to charge for access and sustaining the incentives for their creation.

Two considerations, however, suggest that these traditional objectives of copyright law could be achieved more effectively and efficiently through the use of contracts and copy-protection technology. First, technological shields are likely to be far more effective on the Net than copyright doctrine. As many observers of the new medium have noted, the ease with which digital materials can (in the absence of technological safeguards) be reproduced, the difficulty of detecting such reproduction, and the strongly anarchic culture of the Net, in combination, make piracy rampant. Section IV.A., above, identified some reasons for cautious optimism about
our capacity to detect and punish deliberate and large-scale nonpermissive postings of copyrighted material. Barring a technological breakthrough enabling such detection, however, our ability to prevent ordinary users of the Net from copying and retransmitting materials they find there is likely to be extremely limited. Copy protection technology, though surely not absolutely secure, is far more effective.

Second, transaction costs are likely to be substantially lower if we permit producers to employ the contract/technology strategy rather than limiting them to the copyright protections. Many of these mechanisms are essentially self-enforcing; consumers are simply unable to make use of the products unless they comply with the producers’ conditions. By contrast, the total public and private costs of enforcing copyright laws on the Internet—even if it could be done effectively—would be very large. To be sure, the contract/technology regime would not be costless; to keep ahead of hackers, producers would be obliged to continue refining their information-protecting technology. But the need to innovate—and the associated social waste—could be much reduced through the adoption of anti-circumvention statutes.

The benefits of copy-protection technology are not unalloyed, however. Liberating creators to use it will likely have two regrettable side effects. First, by using copy-protection technology, creators can engross greater power than they are allocated by copyright law, and permitting them to exercise this power would threaten several of the ideals catalogued in Part II. For example, creators would be able, thereby, to prevent others from copying portions of their works in order to parody them—something they most likely cannot do using copyright law. Similarly, a copyright expires at some point (currently, depending on the pertinent jurisdiction, the lifetime of the author plus 50 or 70 years). Many commentators think that term is excessive, but at least it has a limit. Copy-protection technology, by contrast, would enable creators to keep their works out of the public domain forever—thereby both reducing public access to their creations and impeding the ability of other creators to build upon them.

Second, copy-protection technology (as noted above) can be

74. See supra notes 56-57 and accompanying text.

employed by the creators of kinds of material that either would not be eligible for copyright at all or would enjoy only "thin" protection. The most important example is databases—"white-page" telephone directories; compilations of primary legal materials; etc.\textsuperscript{76} It is commonly thought that excluding such things from the ambit of copyright is wise, insofar as adequate incentives already exist for their creation. Enabling creators to circumvent that exclusion using technology may thus be socially undesirable.

For the time being, I merely note these drawbacks of permitting creators to substitute technological for legal protection. Whether they can somehow be neutralized I leave to Part VI.

\textit{C. Price Discrimination}

From the standpoint of creators (and, I will argue, from the standpoint of society at large) contracts and technology have an additional potential advantage over the copyright regime. To understand it requires a brief foray into the world of microeconomics.

When the creator of an intellectual product for which there are no good substitutes (a decent novel, for example) is awarded a copyright, she becomes a monopolist. In other words, she need no longer fear that, if she charges more for each copy of her work than the marginal cost of producing it, she will be undersold by a rival producer—because now she (or her licensees) has the exclusive right to make copies of the work. If she wishes to maximize her profits (and, for simplicity, we will assume for the moment that that is her only goal), she will thus charge substantially more than marginal cost. If she has good information concerning the potential demand for her work, she will adopt the strategy indicated in Figure 1:

By offering her books at price B, she is able to sell quantity F, yielding the profits represented by the shaded area. Should we be disturbed by the fact that she is able, in this fashion, to make so much money? Not at all. The whole point of intellectual property protection (for the reasons discussed in the preceding section\textsuperscript{77}) is, by holding out to potential creators the chance of earning profits of this sort, to induce them to produce socially valuable things they would otherwise not produce. But, adoption of this strategy is not costless. More specifically, it alters the fortunes of consumers in the fashions suggested by Figure 2:

\textsuperscript{77} See supra section V.B.
Consumers able and willing to pay more than price B for the product (i.e., consumers represented by line OF) plainly are worse off than if they had been able to obtain it for the marginal cost of producing it (price C). Put differently, their consumer surplus (the difference between the value they place on the product and the price they pay for it) has been reduced from zone ACED (rectangle 1 plus triangle 2) to zone ABD (triangle 2). More seriously, consumers represented by line FH (i.e., those who are not able and willing to pay price B) are "priced out of the market" altogether. In the vernacular of economics, the result is a "deadweight loss" in the form of a loss of potential consumer surplus represented by zone DEG (triangle 3).\(^78\)

Can't our hypothetical author somehow gain access to the market represented by line FH? Isn't there some way that she could offer her work to poorer (or less eager) consumers without foregoing the profits she makes from the eager buyers? For that matter, can't she contrive some way to charge the very eager consumers (clustered

\(^78\) More precisely, the deadweight loss is represented by the difference between the size of zone DEG and the consumer surplus those consumers are able to reap by purchasing their next-most-desirable good or service. Because that refinement does not materially alter the analysis presented in the text, it will be ignored in the ensuing discussion.
close to the vertical axis on this graph) more than price B? Fine tuning of this sort is known as price discrimination. The current copyright system limits the ability of creators to subdivide markets in this way, primarily through the first-sale doctrine. A marginal consumer, to whom the author sells the product at a low price, may, under current doctrine, resell his copy to an eager consumer for a higher price, thereby depriving the author of the revenue she could have received from the latter. Opportunities for arbitrage of this sort radically limit the author's ability to differentiate among consumers.

If we permit our hypothetical author to limit access to her work through customized contracts and technology, her ability to engage in price discrimination will increase sharply. The primary reason is that she will be able, using such systems, to forbid or prevent consumers from reselling the copies they purchase. Once arbitrage has been shut down, all sorts of techniques for subdividing her market become available. She can charge businesses a high price, individual consumers a lower price, and students a still lower price. She can tie prices to the frequency with which each consumer uses the product. She can establish a system of "microcharges"—under which consumers pay a small amount for each bit of information they employ. The economic effects of such techniques are represented in

79. See F.M. Scherer, Industrial Market Structure and Economic Performance 320-22 (2d ed. 1980). In an earlier essay, I explored the relationship between price discrimination and copyright law and argued that the fair-use doctrine should be construed to facilitate such discrimination. See Fisher, Fair Use Doctrine, supra note 5, at 1709-10, 1742. The present essay builds on that analysis.


82. Some degree of price discrimination is still possible—typically by segregating the market chronologically. Thus, for example, hardcover editions of novels are typically sold at high prices to eager and wealthy consumers; after the demand for the hard-cover edition has subsided, a paperback edition is made available to less eager consumers for a much lower price. More refined versions of the same technique underlie the seemingly contorted ways in which motion pictures are marketed. See Paul Goldstein, Copyright's Highway 8 (1994). But the first-sale doctrine sharply limits the possibilities for non-chronological subdivisions of markets.

83. See Meurer, supra note 80, at 874-75.

84. An example might give this analysis more texture: Suppose that you had the option, instead of receiving each morning a paper copy of your municipal daily newspaper (say, the Boston Globe), of viewing on a computer screen (or a paper printout) only those portions of the paper in which you were interested. If you wanted to see the whole paper on a given day, you would be charged 15 cents. (Why so much less than the cost of the paper version? Because the newspaper company would save the cost of printing and delivering the paper copy.) If you
Figure 3: Economic Impact of Partial Price Discrimination

To milk the market to best advantage, the author divides the pool of consumers into segments, and then charges the members of each group what the author thinks they are able and willing to spend. Thus, on the simplified assumptions embodied in Figure 3, she will charge the consumers represented by line 0-U price p, charge consumers U-V price q, charge consumers V-W price r, charge consumers W-X price s, and charge consumers X-Y price t.

By engaging in price discrimination of this sort, our hypothetical author has been able to increase her monopoly profits substantially. (Compare the size of zone 1 in Figure 3 with the size of zone 1 in Figure 1.) Plainly, that is good from the standpoint of creators. Is wanted to read only the Sports section or only the front page, you would be charged 10 cents. If you wanted to see only the news about the Red Sox, you would be charged 5 cents. If you were enrolled in a college or university, all of these prices would be reduced by one third. If you lived in Concord, Massachusetts (a wealthy suburb), all of these prices would be increased by one third. (Of course, if you were too busy on a given morning to read the paper, you would not be charged anything.) In all of these cases, you would be prevented—either legally or technologically or both—form redistributing the news you received to your neighbors, co-workers, etc. When and how would you pay these fees? Most likely, they would appear as a monthly charge on your credit card bill. In short, instead of writing a separate check to the newspaper company, you would write a check in a slightly larger amount to Mastercard.
that bad from the standpoint of society at large? Not necessarily. Before passing judgment, we should at least consider the impact of her marketing strategies on other parties. Notice that price discrimination has substantially reduced the consumer surplus enjoyed by wealthy and eager buyers (near the Y axis), but has made the product available to a much larger set of consumers, who are now enjoying surpluses of their own. Whether total consumer surplus has increased or decreased is impossible to determine. But, we can say with confidence that many more consumers are now benefiting from the author’s creation. To rephrase the point in terms consistent with Part II of this essay, price discrimination leads to substantial improvements in distributive justice—better approximation of the ideal of affording all persons access to works of the intellect.

85. See W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 290-95 (2d ed. 1995); Meurer, supra note 80, at 897-98.

The probability that permitting creators to engage in partial price discrimination would enhance rather than reduce consumer surplus would be increased, however, if we measured consumer surplus using “asking” prices rather than “offer” prices. The analysis presented in the text conforms to the convention of contemporary law-and-economics scholars in measuring the value to consumers of a good or service (in this case, a novel) by the amount of money that consumers would be able and willing to pay for it—i.e., their “offer” prices. But, as James Boyle observed in commenting on a draft of this article, there is no principled reason why we should not measure its value to consumers by the amount of money they would demand in return for surrendering the good or service in question—i.e., their “asking” prices. For a variety of reasons, “asking” prices ordinarily are higher than “offer” prices. See, e.g., Mark Kelman, Consumption Theory, Production Theory, and Ideology in the Coase Theorem, 52 S. CAL. L. REV. 669 (1979); Jack L. Knetsch, The Endowment Effect and Evidence of Nonreversible Indifference Curves, 79 AM. ECON. REV. 1277 (1989). More relevant to the present inquiry, however, is the fact that the gap between “asking” and “offer” prices is ordinarily larger for poor persons than for rich persons—because the so-called “endowment effect” (one of the sources of the gap) decreases with wealth. With these rough generalizations in mind, take another look at the differences between Figure 2 and Figure 3. The consumers clustered near the vertical axis (e.g., those represented by the line O-U in Figure 3) most likely are, on average, wealthier than those further from the vertical axis (e.g., those represented by the line X-Y in Figure 3). Why? Because ability and willingness to pay for entertainment [among other things] ordinarily increases with wealth.

Notice that the effect of permitting our hypothetical creator to engage in price discrimination is that the consumer surplus enjoyed by persons closer to the vertical axis shrinks while the consumer surplus enjoyed by person further from the vertical axis increases. See JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 137-39 (1988). If we used “asking” prices rather than “offer” prices, the injury sustained by wealthy consumers and the benefit enjoyed by poorer consumers would both be larger than the two graphs suggest. But the effect would be more dramatic for the poorer consumers—precisely because they are poor. In other words, using “asking” prices would magnify the benefits more than the injuries attributable to price discrimination. None of this requires us to alter the generalization ventured in the text: namely, that the net impact on consumer surplus of partial price discrimination is indeterminate. But it does increase somewhat the likelihood that the net impact will be positive.

86. But, won’t price discrimination reduce the access to digital material of users who value it highly—i.e. those located near the vertical axis on Figure 3? Yes—in the sense that such high-value users will be forced to pay more than they would in the absence of price discrimination. But it would plainly be senseless for the creators to charge that subset of their market more than
Price discrimination has other advantages as well. Notice that triangle 3 in Figure 3—representing deadweight losses caused by enabling the author to wield market power—is substantially smaller than triangle 3 in Figure 2. Moreover, the ratio of the monopoly profits enjoyed by the author to the concomitant deadweight losses (i.e., the ratio of zone 1 to triangle 3) is much larger in Figure 3. So what? That means, first of all, that social welfare losses have been reduced. In addition, we are getting much more bang for our buck—a much larger incentive for creative activity per unit of social cost. Such a system of rules, applied to the Internet, should move us faster than a copyright-based system in the direction of an informational society and rich artistic tradition.

To summarize, the use of contracts and technological protections to enable creators to engage in price discrimination would produce the following differences from the current copyright regime:

1. It would enable creators to make more money.
2. It would increase the ratio between the incentives for creativity and the concomitant deadweight losses—and thus should enhance net consumer welfare.
3. It would increase the likelihood that all persons would have access to works of the intellect.

Measured against the vision offered in Part II, the second and third of these effects seem plainly desirable. The first effect is less obviously advantageous—but we will consider, later in this essay, a way in which it might be put to good use.

VI. COMPULSORY TERMS

The considerations reviewed in the preceding section should be the price they were willing to spend. So, they will still have access; it will simply be costly.

A more subtle point has been suggested in conversation by Mark Lemley: Will not people who wish to put the novel to some transformative use (parody it, use a character from it in her own novel, etc.) be included in this cluster of high-value users, and shouldn’t we be especially concerned about discouraging them? The answer is yes—and a way of addressing this concern is outlined in section VI.C., infra.

87. This assertion must be qualified by the recognition that price discrimination is not costless. Creators have to set up and administer the systems for differentiating classes of consumers, the consumers themselves have to spend time clicking on the appropriate icons and paying the microcharges when they appear on their credit-card bills, etc. But the fluidity of the Internet is sufficient to keep those transaction costs remarkably low. Cf. Merges, supra note 17. The generalization offered in the text is thus likely to hold.


89. See infra pp. 1249-50.
sufficient to establish a *prima facie* case for permitting producers of material on the Internet to use contracts and technology to limit the ways in which consumers use their products. Unfortunately, this is not the end of the story. Given the authority to adopt such strategies, producers would be likely to use them in ways we would find less socially beneficial. A good sense of the range of conditions producers would be likely to demand from consumers can be obtained from Mark Lemley’s recent essay examining the use of shrinkwrap licenses. Lemley found that the licenses currently used by software manufacturers commonly contain terms of the following sorts:

a) Restraints on resale or rental by the consumer of his copy of the product;
b) Limits on the manufacturers’ warranties;
c) Prohibitions on modifying or tampering with the product (including disassembly and reverse engineering);
d) Prohibitions on uses of the product that would have been permitted by the application of the fair-use doctrine in copyright law;
e) Requirements that the consumer not contest the validity of the producer’s copyright or patent;
f) Requirements that the user pay royalties for a period longer than would be permitted by copyright or patent law.

Conditions of type (a), we have just concluded, are presumptively socially beneficial, insofar as they prevent the arbitrage that interferes with price discrimination. But some of the other conditions are troubling; they seem more likely to inhibit than to advance the social vision outlined in Part II.

Perhaps we should disallow terms of the latter sort. This section explores that possibility in the following stages: section A addresses the objections that creators are likely to voice against any limitations on their contractual freedom—and, in so doing, introduces a set of arguments that can be harnessed in our analysis of the Internet. Section B considers various procedural circumstances that might prompt us to be skeptical of some contractual terms. Section C then considers substantive reasons for skepticism. Finally, section D takes up the difficult question of *how* we might go about limiting the ways...

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91. See id. at 1242-48.
92. See supra notes 85-89 and accompanying text.
in which contracts and technology can be employed.

A. Context

The producers of informational products are likely to raise a hue and cry at the very suggestion of compulsory terms. "We created this material," they will say. "We could refuse to let anyone have access to it. Why shouldn't we be able to set as we wish the terms on which consumers will be afforded access to it?" More broadly, "why should we be forced to forego income in order to foster your vision of a just society; at a minimum, shouldn't such burdens be spread to the society at large?"93

The first step in meeting this collection of objections is to dispel the notion that limitations on contractual freedom on the Internet would be unprecedented or anomalous. Compulsory terms are ubiquitous in American law. Examples include: implied warranties of merchantability; implied warranties of habitability in residential leaseholds; rent control; minimum-wage laws; maximum-hours legislation; bans on child labor; compulsory terms in insurance policies; manufacturers' strict liability for injuries caused by their products; and protections for mortgagors and the occupants of migrant labor camps. In all of these situations, the parties are not obliged to enter into contractual relations. (The owner of a residential building is not obliged to rent out his apartments; a lawnmower manufacturer is not obliged to sell lawnmowers; an employer is not obliged to hire anyone.) But if they choose to enter into such relations, they must incorporate in their agreements the terms in question, and courts will refuse to honor even explicit, bargained-for, and compensated waivers of those terms.

Mandatory limitations on the forms or uses of technology are equally common. In countless situations, we compel persons who supply certain commodities to the public to include specified features. Seatbelts, airbags, catalytic converters, child-proof caps, warning labels (on cigarettes and drugs), construction features specified by building codes or the Americans with Disabilities Act, safety features in electrical appliances—the list is endless. The persons supposedly benefited by such features sometimes would happily do without them,

93. Cf. White Paper, supra note 72. "The Working Group rejects the notion that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of 'universal access.'"
but we refuse to allow manufacturers to omit them, and we usually forbid purchasers to disable them.

Why? What sorts of considerations could justify such severe limitations on the freedom of consenting adults? The rationales fall into six general categories. They are worth reviewing here—both to suggest the diversity and strength of the arguments for limits on contractual freedom in general and to suggest lines of inquiry when we return our attention to the Internet.

(1) *Bad Information.* It is often the case that one of the parties to a contract has inadequate information concerning either the content of the deal or the likely impact of the deal on his or her welfare. Under those circumstances, our usual assumption that voluntary transactions benefit all signatories no longer holds.94 Defects in the quality of the available information can sometimes be corrected by conditioning the enforceability of a bargain on full disclosure of all relevant data. So, for example, we require mortgagees to read and sign documents alerting them to the magnitude of their commitments before permitting them to sign their lives away. But, the mandatory-disclosure strategy is not always practicable. For example, it is sometimes said that no amount of disclosure can enable a prospective surrogate mother to fully appreciate the pain she may feel when she is later obliged to give up a baby she has carried to term. On that basis, many courts and commentators take the position that surrogacy contracts should be unenforceable—at least against the surrogate mother.95 A similar argument is sometimes used to justify the ban (in the United States and in a growing number of other countries) on sales of kidneys or other nonrenewable bodily parts.96

(2) *Externalities.* Left to their own devices, contracting parties in certain situations would likely enter into agreements that harmed third parties. To prevent those injuries, the contracting parties are either disabled from making certain

sorts of deals or are obliged to accept specified terms. For example, bans on insurance contracts that enable the insured to escape liability for willful misconduct are often justified on this basis. Avoiding "negative psychic externalities" (the emotional injuries sustained by third parties disturbed by the content of certain kinds of contracts) similarly is often cited to proscribe morally offensive deals.

(3) Arguments from Future Selves. We often limit persons' freedom on the theory that they will thank us tomorrow (or 20 years from now). Bans on suicide and requirements that motorcyclists wear helmets, for example, are rooted partially in such arguments. Forbidding a young person to sell his kidney in order to buy a sports car can (and has been) justified on a similar basis.

(4) Distributive Justice. Compulsory terms are sometimes justified on the ground that they redistribute wealth from richer to poorer people. Rent control and nonwaivable terms in residential leaseholds, for example, are said to redistribute wealth from (richer) landlords to (poorer) tenants. Whether they in fact have such an effect remains a hotly contested issue, but most (not all) participants in that debate agree that if they did so, they would be defensible.

(5) Public Policy. Certain kinds of contracts are forbidden on the ground that they are inconsistent with our collective vision of a decent and just society. Contracts for the sale of sexual services and child-labor contracts, for example, are commonly repudiated on this ground.

(6) Paternalism. Finally and most controversially, compulsory terms are sometimes forthrightly justified on the ground that public officials know better than the persons whose freedom is curtailed what is in those persons' best interest. In the volatile debate over the legitimacy of the


98. See, e.g., Bruce Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 YALE L.J. 1093 (1971); Duncan Kennedy, The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence, 15 FLA. ST. U. L. REV. 485 (1987); Kronman, supra note 97; Duncan Kennedy, The Ex Post Distributive Case for "Insurance-Like" Compulsory Terms in Consumer Contracts (draft of July 23, 1996).

nonwaivable implied warranty of habitability, for example, one often finds arguments of this sort. Tenants may think that they would be better off paying a lower rent for a shabbier apartment and using the extra money for something else, but lawmakers know better.\(^{100}\)

To summarize, the limitation of the freedom of the suppliers and consumers of material on the Internet to use either contracts or technology to rearrange the entitlements they enjoy under the default rules of intellectual property would surely not be unusual. And the arguments that have been deployed in support of analogous limitations on contractual freedom in other contexts may provide us with clues concerning how best to deal with this new medium.

**B. Procedural Problems**

In recent essays, Julie Cohen and Niva Elkin-Koren argue persuasively that the kinds of contracts likely to be arranged on the Internet differ sharply from the ideal of an individuated, negotiated, fully voluntary bargain.\(^{101}\) Click-through licenses and copyright management systems typically place potential consumers in a “take it or leave it” position. Opportunities for customized arrangements are virtually nonexistent. Customers commonly do not read the “terms and conditions” they are agreeing to. Finally, and perhaps most importantly, the potential consumers of an intellectual product are often not in a position, before deciding whether to agree to a limitation on its use, to predict how valuable the product will be to them and how burdensome will be the limitation in question. In short, Internet-related contracts commonly implicate a dangerous combination of two conditions: the impediments to customization typical of contracts of adhesion;\(^{102}\) and informational asymmetries analogous to those that afflict consumer credit contracts and surrogacy contracts.\(^{103}\)

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103. See the text accompanying notes 94-96, supra. It is possible, as several readers of drafts of this article have suggested, that these informational asymmetries will diminish over time. To entice consumers, website operators will offer them “previews” of the menu of materials they might purchase—or “trial” versions of software that expire after a specified period of time.
Do these conditions suggest that we should disallow all Internet-related contracts? No. But they go far toward eliminating the presumption of social desirability usually accorded voluntary bargains. Some Internet-related contracts—and equivalent technological protections—may well benefit both the parties thereto and society at large. But, the fact that the consumers who submit to such arrangements have limited information and even more limited choices significantly increases the likelihood that deals of a particular sort would be substantively undesirable and, consequently, should be disallowed. That likelihood is considered in the following section.

C. Substantive Problems

With relative ease, we can identify two overlapping categories of contractual terms and equivalent technological systems that are difficult to reconcile with the vision sketched in Part II. The first consists of restrictions on the authority or ability of consumers to modify informational products. An example, taken from the Lemley’s list, would be a prohibition on altering or reverse engineering a software program for any purpose—including the facilitation of interoperability. Restrictions of this general sort pose serious threats to several related ideals: self-expression, semiotic democracy, and cultural diversity. We should look for ways to encourage, rather than retard, manipulation by consumers of informational products and tools.

The second type of highly problematic contractual provision consists of restrictions on uses of informational products traditionally privileged by the fair-use doctrine—parody, criticism, scholarship, etc. We have a strong social interest in continuing to permit, indeed promote, behavior of these various sorts. Many of these activities necessitate (or are facilitated by) copying significant portions of the products—which of course would run afoul section 106 of the

Indeed, one can already find many instances of these marketing strategies on the Web. One worries about the representativeness of some of the trailers. Nevertheless, if this trend continues, the second of the two procedural objections to on-line contracts will weaken.

104. See the text accompanying note 91, supra.
105. See Netanel, supra note 37, at 378.
106. By “traditionally,” I mean activities shielded by the fair-use doctrine—understood as a device to protect the public interest, not to cure market failures. See Merges, supra note 17, at 130-36 (comparing the two approaches and suggesting that the former should be “revived” for use on the Internet).
Copyright Act.\footnote{107} One of the purposes of section 107 has been to authorize copying in such contexts.\footnote{108} We do not wish to enable producers to circumvent section 107 through the use of contracts or technology.

The arguments offered in the preceding two paragraphs have been phrased in the language of "public policy" (the fifth of the six conventional arguments for compulsory terms reviewed in section A). They might be rephrased in the vocabulary of microeconomics (the second of the six approaches) as follows: Consumers collectively have a strong interest in preserving opportunities for transformation, parody, and criticism of intellectual products. Uses of those sorts increase the range of products available to consumers as a group. More importantly, such uses enable consumers to assess more accurately the quality of each entry on the menu of intellectual products which they are presented, thereby increasing the chances that the products they choose will actually please them. The resultant efficiency gains are large.\footnote{109} Unfortunately, the interest of each individual consumer in preserving such opportunities is small. Moreover, each individual has an incentive to "free ride" on the willingness of other consumers to insist upon (and pay for) the right to engage in criticism and parody. These conditions create a serious danger that consumers, acting individually, will strike deals that, in the aggregate, hurt them. To overcome this collective-action problem, we will compel them all to accept a contractual term that is really in their best interest.

The foregoing analysis has a good deal of force, but something crucial has been lost in the translation.\footnote{110} A more honest—although controversial—way of presenting the argument would acknowledge that it is paternalistic in character (the sixth of the approaches). Americans would be better off, I have argued, if they lived in a more culturally diverse and artistically rich society, in which they had greater opportunities to participate in the shaping of their cultural environment. Even in the absence of collective-action problems, they might well be inclined to waive contractual provisions designed to foster such a society, but we should not let them.

\footnote{108} See id. §107.
\footnote{109} See Fisher, Fair Use Doctrine, supra note 5, at 1712 (presenting this point in more detail).
\footnote{110} See Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987).
So far, we have addressed only contractual and technological restrictions on activities that either might be characterized as "transformative" or would have been privileged by the traditional forms of the fair-use doctrine. But these by no means exhaust the kinds of conditions that creators are demanding—or are likely soon to demand.

Some of those terms seem relatively benign. Indeed, even some activities that might formerly have fit within a generous interpretation of the fair-use doctrine do not seem crucial to protect. For example, it does not seem essential to the social vision set forth in Part II that producers be forbidden to require consumers to pay when they use small portions of an informational product. "Microcharges" of this sort represent one way of fine-tuning the system of price discrimination—which, for the reasons outlined above, is presumptively socially advantageous. As long as producers are willing to permit (for a fee) such uses, rather than forbid them, it is hard to see why we should object.111

What about contractual provisions extending beyond the copyright term the period in which consumers are obliged to pay for Internet access to works? One's first reaction to such provisions is

111. At a conference at Yale at which this article was discussed, the participants identified two grounds on which one might find such a regime objectionable. First, Wendy Gordon contended that a system of microcharges would both enhance the "granularity" of social life and erode our sense of gratitude for the fact that we daily receive for free the enormous value of the culture generated by prior generations. "If I had to pay for every little thing, that gratitude might dry up." Second, Larry Lessig pointed to the danger that information producers, in their efforts to obtain the information necessary to fine-tune their price-discrimination systems, would seriously invade personal privacy. The nightmare, of course, is a world in which access to information and entertainment is regulated by a set of digital certificates that enable suppliers (and other organizations, including the state) to know almost everything about everyone.

The first danger does not seem especially great. Recall the system for distributing daily newspapers, described in note 84, supra. Would that make people resentful or ungrateful? To be sure, subscribers would be aware that they had to pay for every slice of information. On the other hand, their total costs would be significantly lower than at present. And they might well be grateful for the fact that they did not have to pay anything on mornings when they were either too busy to read or on vacation. Finally, the "granularity" of the scheme would be hidden (for better and worse) in the monthly credit-card bill.

The second danger seems more serious. Under this regime, information providers would indeed have an incentive to ferret out as much information as they could concerning each potential consumer—her preferences, her income, her health, etc. The appropriate response to the resultant threat to our privacy would seem to be a separate regulation—in the general spirit of the recent European initiative—limiting the collection and dissemination of personal information. Such a regulation would, of course, prevent information suppliers from approaching perfect or "first-degree" price discrimination—in which each consumer is charged exactly what the product is worth to him or her. But that effect would not be altogether bad. Among other things, it would improve the chances that the partial price discrimination in which the producers are able to engage would have the effect of increasing, rather than decreasing, total consumer surplus. See supra note 84.
probably that they will rarely have any practical bite—insofar as the commercial life of the vast majority of material likely to be made available on the Internet will be much shorter than the life of the author plus fifty years. No great harm, consequently, would result from permitting them. Nevertheless, such a clause seems somehow offensive—greedy. Underlying that intuition is a serious general concern. Intellectual property law, it is often said, deliberately offers limited rewards to authors and inventors. Our goal is to give creators enough entitlements to induce them to produce the works from which we all benefit but no more—thus increasing the likelihood that their creations will get into the hands of consumers (at prices the consumers can afford). More precisely, our aspiration, when designing or reforming the intellectual property system, is to increase the set of entitlements enjoyed by creators only up to the point past which the social losses caused by empowering creators to limit access to their works would exceed the social gains caused by increasing their collective output of works. We lack the information necessary to achieve this objective with any precision, but the general idea is clear enough, and has guided the interpretation or reform of a wide variety of doctrines in the field.

This general observation has important implications for the management of Internet contracts. For the reasons outlined above, permitting producers to use such contracts will usually enable them to make money from their products more effectively than they could through reliance upon copyright law—an effect that we accept because of its potential benefits in efficiently fostering an informational society and rich artistic tradition. But the superiority in this respect of the contractual strategy reinforces the principle that producers’ income-generating entitlements need not and should not be unlimited. Our aspiration, when shaping their contractual powers, should be the same as our aspiration when shaping the entitlements of copyright owners: to cut off their rights at the point beyond which social losses would exceed social gains. That point is just as difficult to identify in this context as it is in the traditional copyright context. (Perhaps more so, insofar as the social gains and losses we are comparing are no longer limited by the economic calculus that has

traditionally shaped the copyright inquiry.) But the general observation can and should help guide our decisions concerning which sorts of contractual terms we wish to permit.

Fortified by this discussion, let's return to the question of provisions that permit producers to charge fees for longer than the copyright term. Considering the range of entitlements that we have so far contemplated conferring on producers and the minimal value to them of income streams longer than their lives plus fifty years, it seems plausible that we should prohibit the use of such a contractual provision. But we may wish to go much further—to limit much more dramatically the payments producers can extract from consumers. In view of the ephemeral nature of much of the material on the Internet, limiting (even much more sharply) the permissible duration of Internet contracts is likely to be a clumsy or ineffective way of achieving that end.\(^\text{113}\) Limiting the prices producers could charge would be more effective,\(^\text{114}\) but would have several disadvantages: it would entail a sacrifice of many of the benefits (including distributive justice) of partial price discrimination, and it would be administratively complex and thus costly. A better strategy would be to privilege the kinds of activities we consider especially socially valuable—i.e., forbid producers from charging anything to consumers who put their products to those ends.\(^\text{115}\)

A comprehensive list of such activities would be impossible, given the rapidity with which the Net is evolving, but here are some suggestive possibilities:

- **Educational Uses.** Creators should be obliged (as a condition of being permitted to charge other kinds of consumers) to provide students and faculty in schools of all levels free access to their creations.

- **Political Uses.** Creators should be similarly obliged to permit consumers to copy their products for the purpose of stimulating or substantiating political debate.\(^\text{116}\)

113. For this reason, I do not support this aspect of Neil Netanel's interesting package of reform proposals. See Netanel, supra note 37, at 369.

114. Analogous regimes would include compulsory licensing systems, which are reasonably common in copyright law, and rent control.

115. Cf. Merges, supra note 17, at 134-35 (suggesting a similar strategy).

116. Yochai Benkler has identified a real case involving the kind of copying that would be privileged by this compulsory term:

   [A] website . . . called the Free Republic . . . includes a forum where conservatives share news clippings and exchange opinions on line. Users who read articles they think deserve comment cut and paste them onto the forum. They then post a
• *Browsing in Public Libraries.* Public libraries have traditionally functioned in the United States as important educational institutions and vehicles of distributive justice, providing free access to informational products to persons unable to purchase it. Those roles should—and could—be preserved in the new medium, by permitting visitors to libraries to browse (for free) materials for which, on their home or office computers, they would have to pay.

• *Scientific or Medical Research.* Ensuring that researchers were not priced out of the markets for intellectual products would be especially important in the cases of databases. In exchange for allowing the developers of such databases to charge for access to them (i.e., for not declaring such arrangements preempted by the Copyright Act), we might insist that they afford free access to all researchers who can show that they will not profit thereby.

In all of these instances, it would be appropriate to allow creators to bury in their products devices that prevented serial copying, thus reducing the risk that the material, once made available without charge to privileged users, would become available for free to all users.

Note that the effect of shielding activities of these sorts would be a pattern of entitlements sharply different from those commended by recent commentators on the fair-use doctrine. Tom Bell, for example, expects and hopes that copyright management technology, by making it easy to charge consumers for access to small portions of copyrighted works, will reduce the set of activities excused as "fair" under section 107. My argument, rather, is that the new technology, combined with a tolerant posture toward price discrimination, will permit creators to enhance their revenues substantially. Those increased profits would then be (partially or wholly) offset by a

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comment, and other users participate in a threaded discussion of the article. In October 1998 the Washington Post and the L.A. Times decided that public discourse may well be a good thing, but not when someone else uses their stories to evoke it. So they brought a copyright action to prevent the users of Free Republic from posting the newspapers' stories to their political forum.


118. See Bell, *supra* note 44.
dramatic expansion of the set of activities privileged under the fair-use doctrine.\textsuperscript{119} The net result: creators will be no worse off, and society at large—in the senses described above—will be much better off.

D. Mechanics

How should compulsory terms of these sorts be established and enforced? The difficulty of answering this question is perhaps the most serious threat to the proposal advanced in this paper. Two circumstances afflict all efforts to implement a scheme of the sort sketched above. First, while the Internet is “worldwide” in its scope and operation, both contract and intellectual property law are, for the time being, formulated and enforced either by individual nations or by separate states within nations. International institutions—most importantly, the World Intellectual Property Organization—are helping to mitigate the balkanization of Internet law, but we are still a long way short of a fully international law of the Internet.\textsuperscript{120} Second, the protean character of the Internet strongly suggests that the boundary between legitimate and illegitimate contracts and uses of

\textsuperscript{119} An interesting problem identified by Ed Baker and Matthew Funk: Might not the types of creators benefited by the ability to engage in price discrimination be different from the types harmed by the expanded set of compulsory terms? If so, would not the proposed scheme cause a substantial reallocation of resources among various types of informational and entertainment goods? For example, less investment might go toward textbooks (because of their exposure to the educational privilege) while more investment were devoted to popular music. The business of making mainstream movies might become even more lucrative, while making a profit on cutting-edge films became even harder.

Perhaps. The complex economics of each of these industries make predictions difficult. But assume that such realignments occurred. Should we be disturbed? Probably—although it is not obvious that the allocation of resources effected by the current regime (under which, for example, Hollywood producers and software designers become wealthy, while painters and performance artists suffer) is demonstrably better than the allocation that would be produced by the proposed regime. A more serious answer is that, to offset distortions of this sort, different industries might be subjected to different sets of compulsory terms—producing a variegated contract law that the Legal Realists would have found congenial.

\textsuperscript{120} Some hope for the eventual emergence of an international governance system can be found in the recent emergence of the Internet Corporation for Assigned Names and Numbers (“ICANN”) and, more specifically, in the dispute-resolution responsibilities that the World Intellectual Property Organization has proposed that ICANN assume. See \textit{The Management of Internet Names and Addresses: Intellectual Property Issues, Interim Report of the WIPO Internet Domain Name Process} (Dec. 23, 1998) <http://wipo2.wipo.int/process/eng/rfc3/interim2.html>. There are many serious flaws in the WIPO proposal, see A. Michael Froomkin, \textit{Major Flaws in the WIPO Domain Name Proposal—A Quick Guide} (visited June 4, 1999) <http://www.law.miami.edu/~amf/quickguide.htm>. Nevertheless, the proposal has one important virtue: It may begin the process of constructing a system of law capable of governing the genuinely global phenomenon of the Internet. For a general discussion of the issues raised by ICANN, see \textit{Domain Names, supra} note 45.
technology should be regularly readjusted. The lawmaking institutions that might adopt the sorts of norms advocated above lack the necessary sensitivity and flexibility. In short, full implementation of the thesis of this paper most likely must await institutional reform.

With that major qualification, however, it is possible to identify a few ways in which at least a crude system of compulsory terms might be established. Each of these options is imperfect, but pursuing these avenues would be better than doing nothing. Here are the possibilities:

(1) State courts could define a regime of compulsory terms through the administration of ordinary contract law—just as they have done when defining implied warranties of merchantability. The doctrinal hooks on which such results could be hung are the familiar ones: unconscionability and the nonenforceability of contractual terms that violate public policy. Pursuit of this option would require rejection of the Internet Protection Act proposed by Representative White, which would prohibit states or municipalities from regulating rates, charges, practices, classification, facilities, or services on the Net.

(2) The ALI could provide the states guidance on this question by adopting a more refined version of the proposed UCC section 2B. Instead of validating virtually all "click through" licenses, the provision might authorize enforcement only of license agreements consistent with the guidelines identified in this paper. Or perhaps (taking a cue from Karl Llewellyn, the original draftsman of the code), it might confer upon judges some discretion to select and

124. The provision of the current draft that seems most hospitable to the argument advanced in this article is 2B-105(b), which provides:

If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the impermissible term, or it may so limit the application of any impermissible term as to avoid any result contrary to public policy, in each case, to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of that term.

U.C.C. 2B-105(b) (Feb. 1, 1999 draft), available in <http://www.law.upenn.edu/bl/ucl/ucc2b/2b299.htm>.
enforce a changing set of compulsory terms to adapt to the rapidly changing technology of the Internet.125

(3) The federal courts could declare all contracts inconsistent with the guidelines outlined in this paper to be preempted by the federal Copyright Act.126 Justifying such a result under the auspices of current copyright preemption doctrine would be no easy feat. But this strategy would have the important advantage of establishing—at least within the United States—a uniform system of rules governing permissible contracts.

(4) The federal courts could develop a doctrine of "copyright misuse"—analogizing from the well-established doctrine of patent misuse—and then tune it so as to forbid certain efforts to "leverage" intellectual property rights into other concessions.127

(5) The Librarian of Congress could exercise his or her authority, under the newly enacted anti-circumvention provisions of the Digital Millenium Copyright Act, to permit users of particular types of copyrighted works to employ encryption-defeating technology—on the ground that, without such permission, those users would be "likely to be . . . adversely affected . . . in their ability to make noninfringing uses of that particular class of works."128

(6) Congress could go further and forbid the use of technologies inconsistent with the guidelines proposed in this article—as it has forbidden the use of other sorts of encryption.

A final, practical objection to implementation of the system advocated by this paper merits brief mention. Price discrimination in the selling of digital products on the Internet may well be desirable from an economic and social standpoint, but would it not violate the antitrust laws? Specifically, does it not run afoul the Robinson-

125. For a discussion of the extent to which, and reasons why, Llewellyn wished to confer discretion on judges, see Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621 (1975).

126. Several commentators have already proposed that preemption doctrine be used to prevent enforcement either of all Internet-related contracts or some subset thereof. See, e.g., Netanel, supra note 37, at 385; Lemley, supra note 90, at 1273-74; David A. Rice, Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering, 53 U. PITT. L. REV. 543 (1992).

127. See ROBERT PATRICK Mergers, Patent Law & Policy (2d ed. 1997), Ch. 11; Mergers, supra note 17, section II.C.2.

128. 17 U.S.C. §1201(a)(1)(B). The text of the statute is currently available at (visited June 4, 1999) <http://www.hrrc.org/2281enrolled.pdf>. Among the disadvantages of this strategy is the fact that, at best, it could carve out a safe haven for consumers no larger than the safe haven currently provided by the fair-use doctrine. For other disadvantages, see Cohen, Copyright Management Systems, supra note 13, at 175-78.
Patman Act, which forbids price discrimination? The answer is: perhaps, but probably not. Three circumstances suggest that the Robinson-Patman Act would not be construed by federal courts today to outlaw the kinds of behavior commended here. First, the statute proscribes price discrimination in sales but not leases—and most of the transactions discussed in this paper would be (or could be) characterized as license agreements, not "sales." Second, the statute applies only to sales of "physical commodities," not to "intangibles." On that basis, it has been construed not to apply to sales of advertising. Again, most of the transactions discussed in this paper would likely slip through the statutory net. Finally, in recent years antitrust scholars have been nearly unanimous in their denunciation of the Robinson-Patman Act as economically senseless—and the courts seem to have responded to that chorus of criticism by limiting, whenever possible, the reach of the statute. Consequently, to the extent the foregoing interpretive questions were not clear-cut, the federal courts would likely resolve them in favor of allowing the challenged behavior to continue.

CONCLUSION

Many details of the legal regime proposed in this paper remain to be worked out, but the main features should be clear enough: a modest set of default entitlements established by a clipped version of copyright law; considerable authority accorded creators to employ contracts and technological protections to modify the entitlements arising from those default rules; and a substantial set of compulsory terms establishing the limits of that authority.

What would an Internet shaped by such a regime look like? For the reasons suggested at the outset of the paper, we cannot be sure. The relevant technology is changing rapidly, as are strategies of the artists, educators, and businesspersons who are trying to take advantage of the medium. But my best guess is that the resultant Net would be a smorgasbord of digital materials. Much of the stuff would continue to be available for free. Much would be draped with advertising. And, much would be encrypted and thus available only for a fee—although the fees would likely vary with the amount of material the user wished to obtain, and perhaps also with the status or

129. See Meurer, supra note 80, at 871 (reaching a similar conclusion).
130. See O'Rourke, supra note 64.
income of the user. Of the encrypted material, much would be available without charge to libraries and students. Finally, users of the Net would have access to a stimulating, irritating, enlivening, and offensive array of parodies, critiques, and taunts.

By my lights, this image is attractive, and we should adopt the legal reforms that would help make it a reality.