

2011

Information Wars and the Challenges of Content Protection in Digital Contexts

Raymond T. Nimmer

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Commercial Law Commons](#), [Intellectual Property Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Raymond T. Nimmer, Information Wars and the Challenges of Content Protection in Digital Contexts, 13 *Vanderbilt Journal of Entertainment and Technology Law* 825 (2020)
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol13/iss4/5>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Information Wars and the Challenges of Content Protection in Digital Contexts

*Raymond T. Nimmer**

ABSTRACT

We are in the midst of a fundamental conflict in law and policy between those who favor maintaining and expanding copyright and related rights in the digital context (“rights enhancers”), and those who favor letting rights atrophy (“rights restrictors”). This Article argues that strong intellectual property rights are essential. At minimum, they are important to support creativity in contexts where the creation, collection, or distribution of the content requires substantial investment of time and resources. The case for allowing creators’ rights to weaken is both untested and structurally suspect. Copyright law must construct a balance that fully supports creative activity of high-quality and high-investment works. An aggressive weak rights position fails to do that.

While copyright law in the United States is often associated with providing incentives to create and distribute works, its substantive content also plays an important role in setting social norms about whether copying the work of another is appropriate. A weak rights regime poorly serves this function—at least if we believe that creative authors should have some control over use of their works.

* © 2011 *Raymond T. Nimmer*. Nimmer is Dean and Leonard Childs Professor of Law at the University of Houston Law Center and co-director of the Houston Intellectual Property and Information Law Institute. He has also served as the Fulbright Distinguished Chair of International Commercial Law at Universidad Catholica in Lisbon. Dean Nimmer was the co-Reporter to the Drafting Committee on Revision of U.C.C. Article 2 and the Reporter for the Uniform Computer Information Transactions Act (UCITA). He is the author of over twenty-five books and numerous articles, including a three-volume treatise on Information Law, a multi-volume book on the Law of Computer Technology, a treatise on Modern Licensing Law, and a multi-volume treatise on the Law of Electronic Commercial Transactions.

Dean Nimmer is listed as among the Best Lawyers in America in intellectual property law and in information technology law, as well as in *Who's Who in America*, *Who's Who in Law*, the *International Who's Who of Internet Lawyers*, and the *International Who's Who of Business Lawyers*. The first edition of his book *The Law of Computer Technology* received a national book award from the Association of American Publishers.

As to incentives, reduced rights are conducive to supporting low (or no) cost works that often borrow heavily from the works of others. Strong rights are conducive to works that require significant investments or a need to recoup the investment of time or resources. In addition, weak rights on the Internet shift value from all content creators to corporate aggregators or search engines, not simply to end users. But a legal system that undermines the incentive to produce and distribute higher-cost content weakens the entire structure of the information society.

The policy conflict and the digital context makes copyright an unstable means of protecting distributed informational works. Information providers have turned to other laws to enhance commercialization of their works and these alternatives are and should be supported in law. This Article discusses two: contractual licenses and access controls under the DMCA. As to both, many rights restrictors argue that contracts or technology should not be permitted to alter the weak rights balance they believe should apply under copyright law. Courts properly reject these arguments—and rightly so.

Table of Contents

I.	THE COPYRIGHT CONTEXT.....	831
	<i>A. Norms and Copyright Law</i>	831
	<i>B. Balances Shape the Direction of Creative Expression</i> ...	836
	<i>C. The Conflict over Copyright</i>	839
	<i>D. Content Facilitators or Content Creators</i>	846
II.	OTHER LAW SYSTEMS	854
	<i>A. Contracts</i>	856
	<i>B. DMCA § 1201</i>	869
III.	CONCLUSION.....	877

Amid the information explosion created by Internet and digital technologies, many traditional information industries are under stress. We are in the midst of what may be a failure of the newspaper industry and significant economic pressure is being felt in the book

publishing, traditional bookstores, music, and other content industries.¹

Some of this economic pressure stems from the adjustments that rapidly changing technology fosters. But it would be an oversimplification to suggest that all of the pressure comes from technological change or that continued evolution in technologies will cure it.² Fundamental public policy and related legal issues are at work here that, unless properly managed, may yield a legal structure incapable of supporting content industries even remotely the scope and depth of those that currently exist. The Internet has created an upsurge in the amount of raw information available to individuals, governments, and businesses and removed many barriers to disseminating expressive works. But in this environment, perhaps more than ever, those who shape law and policy need to pay close attention to providing and maintaining a legal structure that supports information content industries that can generate the investment and maintain the resources often necessary to ensure quality in at least part of the information content distributed.

A conflict in modern law and policy exists between those who favor maintaining and expanding copyright and related rights in the modern digital context (“rights enhancers”), and those who favor letting rights atrophy through an inability to effectively enforce them or by reducing them through legislation or court decisions (“rights restrictors”).³ I argue that strong intellectual property rights adapted

1. See Richard Posner, *The Future of Newspapers*, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html> (discussing the accelerating decline of the newspaper industry and print journalism).

2. Compare Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 746–50 (2005) (contending that new technology has challenged the existing business model), with LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 298 (2004) (“The ‘problem’ with file sharing—to the extent there is a real problem—is a problem that will increasingly disappear as it becomes easier to connect to the Internet. And thus it is an extraordinary mistake for policy makers today to be ‘solving’ this problem in light of a technology that will be gone tomorrow. The question should not be how to regulate the Internet to eliminate file sharing (the Net will evolve that problem away).”). The fact that some of the economic stress comes from the mere fact of technological change can hardly be contested, but the premise that the changes in technology do not warrant responses in law or policy to protect investment-based content industries reflects a Pollyanna approach to the modern context and a simple pronouncement of a weak rights posture for the digital era.

3. These terms capture a conflict that has been noted in different language by other writers. See, e.g., MARK HELPRIN, *DIGITAL BARBARISM* 33 (2009) (criticizing rights-restrictors and commenting: “Make no mistake about this. They may protest that they are not against copyright itself but rather its abuses, extensions, and unnecessary inconveniences. This is an unartful dodge. Not only the persistent undercurrents of the logic and commentary, but their unselfconsciously expressed arguments show their true colors.”); James V. DeLong, *Defending*

to the modern digital environment are essential. At minimum, they are important to support work in those contexts where the creation, collection, or distribution of informational content requires substantial investment of time and resources. The case for strong intellectual property rights in those contexts is grounded in the reality of how costly such works are to create; it is also supported by the reality that content creation and distribution thrived when rights were being reinforced to reflect the developing digital systems.⁴ The case for allowing creators' rights to weaken is both untested and structurally suspect as to these types of informational works. The creation and enforcement of intellectual property rights entails finding a balance among competing interests, but that balance has historically favored support for the creative enterprise, with accommodation for the fact that aspects of prior works (ideas, small portions, and the like) may provide a basis for new works.⁵ Copyright law must construct and maintain that balance in a manner that fully supports creative activity of high-quality and high-investment works. An aggressive weak rights position fails to do that.

Part I of this Article discusses the context of modern copyright law and the conflict between the positions of rights enhancers and

Intellectual Property, in COPY FIGHTS 17, 19 (Adam Thierer & Wayne Crews, eds., 2002) (discussing the positions of various camps in the debate over intellectual property rights); Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"*, 89 MINN. L. REV. 1318, 1347 (2005) ("[E]ach side [in the copyright debate] tries to convince the other that its position is obvious and natural, whereas the other side's is radical and contrived."); Fred Koenigsberg, *Humpty-Dumpty in Copyrightland*, 51 J. COPYRIGHT SOC'Y U.S.A. 677, 679 (2004) ("There is a battle raging between those who support creativity – led by creative talents such as songwriters, composers, lyricists, authors, and the business entities underwriting them, such as music publishers and motion picture companies – and those who do not – such as those in the so-called Internet 'community' who claim 'information wants to be free.'"); David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 1 (2004) ("[T]hose who debate copyright often seem to talk past each other."); Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2332 (2003) (describing the anti-rights perspective as "IP Restrictors").

4. See STEPHEN E. SIWEK, INT'L INTELL. PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003–2007 REPORT (2009), available at www.iipa.com/pdf/IIPASiwiekReport2003-07.pdf.

5. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that the Copyright Act "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"). Compare Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) ("[U]ser rights, albeit important, should remain secondary. Without authors, there are no works to use."), with Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 325–27 (1970) (arguing that extending copyright protection would be more harmful than beneficial).

rights restrictors. Copyright law in the United States has been associated with providing incentives to authors and artists to create and distribute creative works.⁶ The substantive content of copyright law and the feasibility of its enforcement, however, also plays a role in setting social norms about whether copying the work of another is appropriate.⁷ A weak rights regime does not well serve this function of copyright law, especially in a digital era where fast and perfect copying is often possible—at least not if one believes that creative authors or artists should have some control over copying and distribution of their works.

Turning from the reinforcement of social norms to protect intellectual property and focusing on economic incentives, the outcome of the debate between stronger or weaker rights has different effects on works whose costs and purposes of creation differ. Reduced rights (weakened incentives) are conducive to supporting low (or no) cost works that often borrow heavily from the works of others. Strong rights (strengthened incentives) are conducive to works that require teams of reporters or artists, significant investments in creating or distributing the work, or a need (or desire) to commercially recoup the investment of time or resources. In addition, in modern digital contexts, the choice between a weak or a strong rights position online affects a third group. Weak rights on the Internet shift value from content creators to corporate aggregators or search engines. A need exists for a balance in copyright law that provides sufficiently strong protection and incentives for content providers.

The policy conflict between advocates of strong rights and advocates of weak rights makes copyright an unstable, albeit sometimes effective, means of protecting distributed informational works. Part II discusses two other bodies of law to which information providers have turned to enhance and control commercialization of their works. Both of these have received, and should continue to receive, support in courts and legislatures. First, there has been an increase in the use of contractual arrangements at all levels of the

6. See, e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating “[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors”).

7. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (discussing the relationship between law and social norms; see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (discussing the relationship between law and social norms); Geoffrey Neri, Note, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733 (2005).

distribution chain.⁸ Contracts are particularly useful in commercialization of digital content because contractual terms can tailor rights to the marketplace in ways that copyright law cannot, and can establish an alternative means of enforcement when copyright protection is not available.⁹ Not surprisingly, many rights restrictors argue that contracts should not be permitted to alter the weak-rights balance they believe should apply under copyright law.¹⁰ Courts properly reject this argument.¹¹

The second body of law comes from the anti-circumvention rules of the Digital Millennium Copyright Act (DMCA) that protect against circumvention of “a technological measure that effectively controls access” to a copyrighted work.¹² These access control provisions create a form of protection for copyrighted works that suits the digital environment by focusing on control of access to a work as a separate issue in addition to a right to control copying and distribution.¹³ Not surprisingly, rights restrictors have attacked these provisions as placing inappropriate restrictions on so-called rights of fair use and access to works placed in public distribution.¹⁴

8. See generally Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996); Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 129 (1997); Holly K. Towle, *The Politics of Licensing Law*, 36 HOUS. L. REV. 121, 161–68 (1999).

9. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1104–05, 1111 (9th Cir. 2010) (enforcing use terms and finding that a transaction was not a first sale because of contract terms); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (finding that fair use does not preclude contrary contract terms); *DaimlerChrysler Servs. N. Am., L.L.C. v. Summit Nat’l, Inc.*, 144 Fed. App’x 542, 548 (6th Cir. 2005) (finding § 117 rights irrelevant to a breach of contract claim), *claim dismissed*, No. 02-71871, 2006 U.S. Dist. LEXIS 32049 (E.D. Mich. May 22, 2006); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (noting that copyright does not preempt contract and enforcing contract despite lack of copyright claim).

10. See, e.g., David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 23 (1999) (“This balance [of copyright law] is disrupted when state [contract] law is permitted to enlarge the rights of copyright proprietors at the expense of copyright users.”); David A. Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine*, 30 JURIMETRICS J. 157 (1990).

11. See *supra* note 9 and accompanying text.

12. 17 U.S.C. § 1201 (2006).

13. See *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 942–58 (9th Cir. 2010) (applying the DMCA to access control measures in video-game software); see also RAYMOND T. NIMMER & HOLLY K. TOWLE, *THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS* ¶ 1.03 (2003 ed. & Supp. 2011) (discussing, among other things, the emergence of various forms of law relating to the control of access to intangible assets).

14. See *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202–04 (Fed. Cir. 2004) (reacting to these concerns and incorporating a restrictive and non-statutory requirement into enforcement of a DMCA action).

Given the rapid change of distribution systems and of information products in our economy and the diversity of the copyright industries, there is no single, silver bullet that will restore stability and strength to content industries, and certainly no magic that will fully restore older business models suited for a pre-digital era. But content creators and providers need to work with re-examined and adjusted business and legal models to maintain support for the types of investment and systematic development that contributes to a flow of high quality content. They also must work to establish and maintain respect for informational property by a significant part of society, along with a legal and enforcement structure that supports this in a digital context. In this, it is essential that a strong rights regime provide support for their efforts.

I. THE COPYRIGHT CONTEXT

This is an era in which many areas of law and of society are in flux. Copyright law in this fluid context has been transformed from a relatively narrow, backwater legal regime to a body of law that plays a central role in our economy and our society.¹⁵ As a consequence, the context in which copyright policy is made and enforced is both complex and economically significant.

A. Norms and Copyright Law

Copyright has several important functions associated with supporting informational works. The most frequently discussed involves establishing incentives for the creation and distribution of works of authorship by establishing rights in the author or artist that can be converted into economic or other benefits, or that at least can provide support for investment or other commitment of resources.¹⁶

Before discussing the role of incentives, however, it is important to understand a related function of copyright law. As with many other bodies of law, one role of copyright law involves reinforcing and shaping social norms or expectations, in this case with reference to the handling (copying and distribution) of works involving creative or other informational content.¹⁷ This may be the most

15. This expanded role tracks the increased economic importance of the copyright industries themselves. *See generally*, SIWEK, *supra* note 4.

16. *See supra* note 6 and accompanying text.

17. From the perspective of law and economics scholarship, the role of social norms in reference to law and social impact is most often seen as challenging or displacing the rational actor, individual choice model that underlies some of the scholarship in that field. *See generally*

important function of copyright from the standpoint of content creators or providers today. How copyright law is formulated and enforced helps shape the social context in which creative works are made and distributed.

That social context is critically important to the creative enterprise and to the copyright industries. A society in which a substantial majority believe that there is no value in protecting or respecting informational property rights will not support or sustain an effective copyright law regime or, ultimately, effective copyright-based industries.¹⁸ A society in which a substantial majority see no harm in routinely copying and widely distributing the work of another rejects a basic theme of copyright law and a basic pillar of copyright.

Copyright and its enforcement, along with enforcement of related laws, have a role in shaping societal perceptions. The impact can be substantial and sudden. Consider the related area of data protection privacy law, which provides rights for an individual to protect and control uses of personal, non-sensitive data held by a third party who obtained it properly.¹⁹ As recently as 1995, the widespread view in the United States was that the person in possession of such information could do with it what she chose, absent confidentiality restrictions, highly sensitive information, or illegal conduct.²⁰ Then, fueled in part by policies developed in Europe,²¹ a sea change in law

NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND* 171–76 (2d ed. 2006); POSNER, *supra* note 7. It is clear that there is an interaction between social norms or expectations and legal norms or rules. The role of norm-setting in reference to copyright issues has been less well-explored than has the idea that rules generally rejected by society will become unenforceable. *Cf* McAdams, *supra* note 7; Neri, *supra* note 7.

18. See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* xxiv (2009) (“Laws should be fair, fit for their purpose, and accountable to the reality of the world we live in. We do not respect, and will not follow, laws that conflict with the realities of our lives, nor should we.”); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 804 (2005) (“To the extent that citizens reject rules that target people unfairly, they may similarly reject the legal system that promulgates and enforces such rules. In these circumstances, enforcing rules that do not embody a shared community norm may actually undermine the formation of a norm against the forbidden conduct.”).

19. See generally RAYMOND T. NIMMER & HOLLY K. TOWLE, *THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS* ¶¶ 12:04–12:08 (2003 ed. & Supp. 2011).

20. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 812–18 (9th Cir. 2002); *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1355–56 (Ill. App. Ct. 1995) (finding no privacy breach for distribution of purchasing patterns of credit card customers); *State v. Simmons*, 955 S.W.2d 752, 761 (Mo. 1997) (finding that defendant relinquished any expectation of privacy in photographs by giving them to the developer).

21. See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31–39 (EC). See generally Joel Reidenberg,

occurred. Legislation, regulations, and litigation in state and federal venues focused on new rights of the data—subject to control use of the data in the hands of the third party, even if the data was not of a highly sensitive character or traditionally confidential.²² Today it is common to hear that “privacy” in this sense is severely “threatened” by the Internet and digital systems; many would now argue that “privacy” is a value whose “preservation” should be fought for, even though data privacy did not in fact exist as a widely protected value two decades ago.²³ The changes in law, coupled with other factors, contributed to a rapid change in social perceptions of data privacy on the part of a significant portion of our society.²⁴

Law matters in shaping societal expectations and norms. A bounded interaction exists between laws and social norms, with each influencing the other.²⁵ Law in a democratic society cannot reverse course and suddenly, fundamentally alter widespread and firmly held social norms.²⁶ But the direction in which law points can have a significant impact, especially when social norms are as unsettled as they are today.

With respect to copyright law and the content industries, sustaining norms that support strong rights is the point on which a weak rights approach may have its greatest adverse impact. In a world in which copying and redistribution is easy and many people seem to regard unauthorized copying as socially acceptable, what image of social acceptability should law support? At the extreme weak

Setting Standards for Fair Information Practice in the U.S. Private Sector, 80 IOWA L. REV. 497, 500 (1995) (discussing data protection law and the European Union’s Directive).

22. See NIMMER & TOWLE, *supra* note 13 ¶¶ 2.12, 2.16; 1 RAYMOND T. NIMMER, INFORMATION LAW §§ 8:1–8:96 (2006 ed. & Supp. 2010).

23. See sources cited *supra* note 20.

24. Whether or not the new laws can be effectively enforced remains to be seen. Indeed, given the burgeoning success of so-called social media, there clearly exists a segment of society that does not regard many personal facts as private and discloses them on the Internet, and it remains easy to discover large amounts of information about individuals on the Internet despite the sudden spike in legislative and regulatory attention to protecting data privacy. Perhaps David Brin was right when he said in 1996: “Privacy is history, get over it.” Sheldon Teitelbaum, *Privacy is History—Get Over It*, WIRED, Feb. 1996, <http://www.wired.com/wired/archive/4.02/brin.html>.

25. See McAdams, *supra* note 7, at 339–42; Neri, *supra* note 7, at 746 (“Of course, the distinction between ‘law’ and ‘social norms’ is somewhat artificial in that the two are interrelated and in constant interaction—the law shapes social norms and is simultaneously shaped by them.”).

26. See Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 716 (2000) (“Even if murder were suddenly made legal, most people would not commit murders because murdering someone would still be contrary to their own sense of what is right and wrong.”).

rights position, the answer is that law should support the view that in general what can be copied should be copied. One of the most discussed corporate copyright programs of the last decade illustrates this. It involved a multi-billion dollar corporation (Google) asserting that it had the right to make digital copies of all books in print without the prior approval of the copyright owners.²⁷ Google took the position that its copying was fair use and, in any event, that copyright owners were not harmed because, if they objected, Google would not copy their works.²⁸ The Google Book Project led to litigation and a proposed settlement on a class-action basis.²⁹

Putting aside the merits of that project or the proposed settlement, the Google Book Project epitomizes the weak rights perspective and communicates a powerful social message: Holding a copyright merely gives one a right to object, not a presumptive right to control use of a creative work. If accepted in law or in practice, the project's approach would tend to validate a culture of copying, rather than a culture of presumptive respect for the property rights of others. A similar observation could be made for those who would validate in copyright law widespread copying over P2P or similar systems. The message pulls social expectations and norms in the wrong direction.

Law should support a culture of presumptive respect for content creators' property. This does not mean that no unauthorized copying will occur or even that this should be viewed as a realistic goal. Thus, the fact that today many college students and others frequently copy digital works without authority to do so says little about the direction in which law should attempt to shape social expectations. The idea that perfect enforcement of any law can be achieved is a myth, whose pursuit only harms the debate about what an appropriate normative structure should be for the digital age. While many people make unauthorized copies of digital works, many others do not. Law should reinforce and spread the attitude and perspective of this latter group.

Support for strong copyright protection also does not mean that no other interests should be recognized. Copyright law has always entailed a balancing between author's rights and reserving some uses and some content for use by others,³⁰ but we need to understand

27. See Pamela Samuelson, *Google Book Search and the Future of Books in Cyber Space*, 94 MINN. L. REV. 1308 (2010).

28. See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 6.03 (5th ed. 2010).

29. *Id.*

30. See *id.*; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that the Copyright Act "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one

clearly what we are balancing and where the balance is being made. Copyright law exempts ideas and facts from protection, preserving them for use by subsequent authors.³¹ It also recognizes a privilege of fair use³² and a narrow first-sale exemption.³³ But the balance established by these and other exemptions in copyright law implies only a *limited* borrowing, and it often involves using the borrowed material to build new works or for purely personal non-commercial use.³⁴ As Professor Ginsburg has reminded us: “[U]ser rights, albeit important, should remain secondary. Without authors, there are no works to use.”³⁵

A line drawn in this way is far different from one drawn with expansive rights or privileges reserved for secondary parties and only narrow rights for original creators of works. It is far different, for example, from arguing that the purchaser of a CD has a right to copy songs from it and distribute copies to many of her friends and acquaintances or that the friends have a right to download copies from a peer-to-peer (P2P) system created and operated without the consent of the copyright owners.³⁶ A user may have a right to use small portions of a prior work along with his own expression to create a new work, but that is different from saying that he engages in fair use by making unauthorized copies of the entire prior work and using it for a *purpose* different from that intended by the copyright owner when he originally distributed it.³⁷

One author comments:

hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand”); Ginsburg, *supra* note 5, at 1468 (“[U]ser rights, albeit important, should remain secondary. Without authors, there are no works to use.”).

31. 17 U.S.C. § 102 (2006).

32. *Id.* § 107.

33. *Id.* § 109.

34. In some cases, the limited, narrow nature of the original work makes it inseparable from the idea it states or the facts it reports, and comprehensive copying is permitted, but this is the infrequent exception to the broader meaning of the rule that one can copy ideas and facts from a prior work. See 1 NIMMER, *supra* note 22, § 3:4. Compare *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 363–64 (1991) (determining that alphabetical telephone directory is unprotected by copyright), with *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991) (finding that a table of selected variables predicting baseball pitchers’ performance constituted protected expression).

35. Ginsburg, *supra* note 5, at 1468.

36. See *BMG Music v. Gonzalez*, 430 F.3d 888, 889–91 (7th Cir. 2005) (finding that downloading music files to review their content for possible future purchase was not fair use).

37. But the latter argument has been made and won in some cases. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that use of thumbnail image in commercial search engine was transformative and, thus, fair use); *A.V. v. iParadigms, L.L.C.*, 544 F. Supp. 2d 473, 484 (E.D. Va. 2008) (concluding that unauthorized use of manuscript in search system was fair use).

Even if traditional copyright doctrines may not apply comfortably in cyberspace, we could work to install their functional equivalents. The challenge though remains the same: how to enhance public welfare with some balance between the interests of copyright owners and those of users. Striking this balance has never been easy from a theoretical or political standpoint. But the struggle to do so must continue because its goal is a social imperative and worth the fight.³⁸

When balances are to be drawn, they should generally favor the author of the original work except as to limited copying for truly personal use, or copying of small parts of the original, or as to the ideas or facts expressed in the original, none of which threatens commercial incentives or social perspectives about the value of protecting copyright interests.

B. Balances Shape the Direction of Creative Expression

In the United States, copyright law is generally associated with a purpose of establishing incentives for the creation and distribution of expressive works of authorship.³⁹ The incentives flow from the author's ability to control for personal benefit various uses of the work. The author potentially obtains a personal gain, but more importantly, society as a whole benefits from an increased output of creative work. This general statement, however, masks important differences in how and why various types of works are created and, thus, how copyright-based incentives affect creative work effort. There is a vivid difference in the potential impact of copyright incentives between information content generated without editing or expectation of profit by individuals (e.g. home videos), on the one hand, and informational content created, generated or distributed at substantial cost and with at least the hope of economic gain, on the other (e.g., investigative news reports). Some works are expensive to make and some are not. Cost and investment correlate frequently, although not always, to relative quality. The motion picture *Avatar* may not be perfect entertainment, but the character and quality of that product differs starkly from the video placed on YouTube by Joe Smith who filmed himself eating pizza while watching *Avatar* on a flat screen television.⁴⁰ One does not have to denigrate Joe's work to recognize

38. LEAFFER, *supra* note 28, at 30 (footnotes omitted); *see also* Douglas G. Baird, *Changing Technology and Unchanging Doctrine*: Sony Corporation v. Universal Studios, Inc., 1984 SUP. CT. REV. 237, 238, 249–50 (describing the effect of time lag in litigation in context of rapidly changing technology).

39. *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

40. Although one of the themes of the weak rights side of the copyright debate involves a strong attraction for user-generated, low-cost content enabled by digital and Internet technology, even a leading advocate of the weak rights position acknowledges that much of such content has very low quality. *See* LAWRENCE LESSIG, REMIX 92 (2008) (“There’s no comparing ten

that society is the net loser if this type of content becomes the sole type of entertainment content available.

Not surprisingly, advocates of weak rights and broad public domain positions emphasize the value of low or no-cost content. For example, Professor Litman, one of the most articulate advocates of this position, once commented:

The most powerful engine driving this information space turns out not to be money—at least if we're focusing on generating and disseminating the content rather than constructing the hardware that it moves through. What seems to be driving the explosive growth in this information space is that people like to look things up, and they want to share. This information economy is largely a gift economy. The overwhelming majority of the information I'm talking about is initially posted by volunteers. Many of them are amateurs, motivated by enthusiasm for their topics, a desire to pass interesting stuff on, and, perhaps, an interest in attention and the benefits it may bring. When one is a volunteer, the time and effort one is willing to put into contributing to the information space can seem limitless. Volunteers move on, of course: they get bored, or broke, or caught up in other things, but there seems to be an inexhaustible supply of new volunteers to take their places, and, luckily, the new volunteers are able to build on earlier volunteers' foundations. I potentially know all of the information the other participants know. Their knowledge can be my knowledge with a few clicks of a mouse. In return, I make my knowledge available to anyone who happens by. Each of us can draw on the information stores of the others.⁴¹

The Internet in general and various social networking sites have led to an explosion of user-generated content (UGC).⁴² This is truly an important social development. Some UGC has fine creative value, but much does not. Some is entirely the “creative” work of the user who generates it, but much involves cutting or pasting substantial portions of the work of others and posting it on an Internet.⁴³ Indeed, YouTube, one of the currently most popular Internet sites, contains widespread infringing posts.⁴⁴

The vast difference between low-cost UGC with often high levels of copying, on the one hand, and high-cost works with high originality, on the other, underscores the policy choice underlying copyright law and content protection today. When we talk about a balance between rights given to original creators and privileges given

minutes produced by J. J. Abrams and ten minutes from any of the stuff that passes for video production on YouTube. . . . The vast majority of remix, like the vast majority of home movies, or consumer photographs, or singing in the shower, or blogs, is just crap. Most of these products are silly or derivative, a waste of even the creator's time, let alone the consumer's.”)

41. Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 8–9 (2004).

42. See generally *Id.*; *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen> (last visited Apr. 8, 2011).

43. See *Fair Use Principles for User Generated Video Content*, ELECTRONIC FRONTIER FOUND., *supra*, note 42.

44. See *Viacom Int'l, Inc., v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

to those who would use portions (or the entirety) of their works, we are in part at least discussing a policy choice about what type of creative works our intellectual property structure supports. Maintaining a supply of creative works like *Avatar* requires strong economic incentives and support to recover the substantial investment involved.⁴⁵ If we were to view the difference between these two types of content as residing on a continuum, the problems of economic sustainability fall closer to the *Avatar* side, while much of the information on Internet social network systems lies closer to the Joe Smith video. This point would be even clearer if the content Joe Smith “created” consisted merely of a digital copy of *Avatar* and his creative input involved finding and posting a copy.

A risk exists that as economic incentives weaken, the high-cost and high-investment products will be less frequently produced. For example, newspapers will strip their staff size and rely on lower cost, less experienced reporters; many newspapers will go out of business. This is already happening around the country.⁴⁶ Blogs increasingly provide news and other information and play a valuable social role, but they are unlikely to replace or replicate the investigative and other journalism that requires support of local and national newspapers.⁴⁷ We face a risk that the miraculous communications systems created by digital technology will communicate increasingly low grade information.⁴⁸

Our society needs a framework in which low-cost, true UGC (as compared to copies of another’s work who does not want the copies made) and higher-cost, creative works co-exist, and the incentive structure needed support the higher-cost works is maintained. There is no social value in allowing an end user to post an unauthorized, verbatim copy of a song for widespread copying by others.⁴⁹ There

45. See *Avatar (2009 film)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Avatar_\(2009_film\)#cite_ref-vanityfair_18-0](http://en.wikipedia.org/wiki/Avatar_(2009_film)#cite_ref-vanityfair_18-0) (last visited May 10, 2011) (*Avatar* had an original budget of \$237 million, with estimated actual costs of between \$280 million and \$310 million, plus \$150 million in promotion).

46. See Lauren M. Gregory, Note, *Hot Off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the “Hot News” Misappropriate Torts in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577 (2011).

47. *Id.*

48. See, e.g., LEAFFER, *supra* note 28, at 28 (“Some assert . . . we need a copyright paradigm for the protection of informational products to meet the digital challenge. Without the ability to exclude others in the networked environment, information providers will have little incentive to disseminate works that take a heavy investment in time and effort. The fear is that we may be left with these wonderful digital copying and transmission technologies with less and less worth copying.”).

49. See *BMG Music v. Gonzalez*, 430 F.3d 888, 889–91 (7th Cir. 2005) (finding that downloading music files to review their content for possible future purchase was not fair use);

may be value, however, for an end user who takes small portions of five works and mashes them together into an entirely new work of her own. The law needs to make the distinction.

C. *The Conflict over Copyright*

As described earlier, there are diametric views about the proper scope and balance of copyright rights and user privileges in the digital economy.⁵⁰ Rights restrictors believe, in general, that strong intellectual property rights stifle subsequent creative work and disrupt or preclude the creation of efficient, relatively low (or no) cost secondary markets for digital information.⁵¹ Strong rights, according to this view, diminish the ability of subsequent parties to use part or all of the original work in their own, or to use (e.g., copy or distribute) the entire work for purposes different than the original, intended work or simply to share the work with others.⁵² Rights restrictors thus push to truncate rights and expand privileges or defenses so as to enable subsequent parties to use (e.g., copy or distribute) portions or all of an original work in ways over which the copyright owner will not have control and from which no income will be derived.⁵³

The restrictive argument is not that *no* intellectual property rights should exist, but that the rights should provide only the *minimum* necessary protection. Rights restrictors ultimately argue

United States v. Slater, 348 F.3d 666, 669 (7th Cir. 2003) (“Limited copying may be permissible for certain noncommercial, educational purposes, taking into account the nature of the copyrighted work and market considerations. These factors, however, weigh against application of the fair use doctrine to cases involving Internet piracy. PWA allowed members to obtain unlawful, digital duplicates of thousands of commercially available software programs. . . . It is preposterous to think that Internet piracy is authorized by virtue of the fair use doctrine.”).

50. See 1 RAYMOND T. NIMMER, *LAW OF COMPUTER TECHNOLOGY* ch.1 (4th ed., 2009 & Supp. 2010). See generally ADRIAN JONES, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2009).

51. See, e.g., LESSIG, *supra* note 40; Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007); Julie Cohen, *Copyright as Post-Industrial Property*, 2011 WISC. L. REV. (forthcoming 2011), available at <http://www.law.georgetown.edu/faculty/jec/documents/postindustrialeconomy.pdf>; Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Malla Pollack, *A Listeners' Free Speech, A Reader's Copyright*, 35 HOFSTRA L. REV. 1457 (2007); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 326 (2003).

52. See, e.g., Litman, *supra* note 51 (contending that personal use is diminishing).

53. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); Litman, *supra* note 51; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 997–98 (1990). Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (establishing concept of transformative use as fair use).

that, when in doubt, courts and legislators should err on the side of reducing rights, rather than expanding them.⁵⁴ An important policy goal from this perspective is to protect a broad public domain of information assets from which authors, artists, and the general public can draw for their own purposes.⁵⁵ Those who accept this perspective argue that the information should be both free and freely available.⁵⁶ But of course, copyright law has always created a public domain in the sense of some content to which property rights do not attach, such as ideas, facts, and processes, and some works that are out of their copyright term.⁵⁷ But access to such material might not be cost-free—for example, finding and acquiring access to an out-of-print British novel from 1850 may be very expensive indeed although it is public domain material.

One author captures part of the fear of the rights restrictors that the new technologies and new means of creating and communicating information will exacerbate what they see as a problem of too much control by rights owners:

The emergent business model for the distribution of copyrighted works in the network environment seems to challenge the survival of an “informational commons.” The day may soon be upon us when copyrighted works reside primarily in electronic networks The trend is that readers, listeners, and viewers of copyrighted works are having less and less unencumbered lawful personal use of books, films, or music in a technological and legal environment in which uses are easier to trace, and charge for. . . . In short, technology may make it possible for information proprietors to treat every use as a new instance of “access.” The fear is that such proprietors could maximize profits while continuing to withhold their works from general scrutiny, including fair use.⁵⁸

This quotation accurately captures the range of emotional, sometimes conflicting concerns from this perspective that emerge as a result of new technologies. The transformation to digital and online distribution of information materials does shift attention toward controlling access to a work in law and in fact as a means of commercializing it, but this response to a changed technological environment to preserve profits and economic incentives does not necessarily threaten core values in an information society.⁵⁹

While the quotation refers to unencumbered “personal use,” suggesting use by an individual for personal or family purposes, the

54. See DeLong, *supra* note 3, at 17, 19.

55. See, e.g., Benkler, *supra* note 53; Boyle, *supra* note 53.

56. Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, <http://www.wired.com/wired/archive/4.01/white.paper.html>.

57. 17 U.S.C. § 102 (2006); see also Boyle, *supra* note 53.

58. LEAFFER, *supra* note 28, at 29–30.

59. See NIMMER & TOWLE, *supra* note 13, at ch. 2.

rights-restrictive perspective goes far beyond that. Rights restrictors often argue that commercial uses should be allowed—that verbatim copying for commercial use is a “fair use” if the copyright owner has not yet entered the same market,⁶⁰ that first sale doctrine permits commercial resale of copies even if the reseller is a licensee under a license that precludes resale,⁶¹ and that a commercial website is not liable for contributing to infringement even though it knows that infringing copies are ubiquitous on its site.⁶² One author suggests that a leading organization that supports the restrictive view apparently believes that when copyright law is in actual or perceived conflict with any other social interest, the other interest should prevail.⁶³

The nexus between the rights-restrictive approach and support for low-cost, user-generated-content can be seen in various contexts. One example is a report on user-generated content by the Electronic Frontier Foundation (EFF) and others:

Online video hosting services like YouTube are ushering in a new era of free expression online. By providing a home for “user-generated content” (UGC) on the Internet, these services enable creators to reach a global audience without having to depend on traditional intermediaries like television networks and movie studios. The result has been an explosion of creativity by ordinary people, who have enthusiastically embraced the opportunities created by these new technologies to express themselves in a remarkable variety of ways. The life blood of much of this new creativity is fair use, the copyright doctrine that permits unauthorized uses of copyrighted material for transformative purposes.⁶⁴

EFF itself acknowledges the obvious—that much of the “new creativity” enabled by new technology involves copying others’ work, protected only, if at all, by the doctrine of fair use.⁶⁵ The claim that fair use applies must be understood as advocacy—stating the rights restrictive view that fair use *should* apply, rather than stating any settled legal point. The applicability of the doctrine varies. Joe Smith might very well be engaged in fair use if the background of his pizza-eating video posted online consists of small snippets of *Avatar*, but if his video involves a digital copy of the movie with a small insert of him eating pizza in one corner of the screen, the video is not fair use.

60. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that use of thumbnail image in commercial search engine was transformative and, thus, fair use).

61. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1104–05, 1111 (9th Cir. 2010). This argument was accepted by the trial court, but rejected by the Ninth Circuit. *Id.*

62. *Viacom Int’l, Inc., v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010) (holding that YouTube qualified for safe harbor protection under 17 U.S.C. § 512(c)).

63. See DeLong, *supra* note 3, at 18–20.

64. *Fair Use Principles for User Generated Video Content*, *supra* note 42.

65. *Id.*

Importantly, EFF is a major rights-restrictive organization, and routinely appears in court, taking positions adverse to copyright owners.⁶⁶

Rights enhancers, on the other hand, focus on preserving strong support and incentives for creative work;⁶⁷ this approach is conducive to supporting work associated with the higher-cost end of the continuum discussed earlier. This approach is premised on the belief that strong intellectual property rights are *essential* to preserving the innovation that has led to the modern explosion in information assets and their widespread distribution.⁶⁸ Strong protection of intellectual property is important, especially with respect to the many contexts in which substantial time, cost, and effort are involved in creating a work or collecting, organizing, or promoting information. Modern technology, while offering new opportunities for creating and distributing information, also threatens the practical ability to enforce rights, thus weakening incentives established under copyright law.⁶⁹

The argument ultimately is that this effect should be offset by strengthened, tailored rights, or at least by the enforcement of existing rights in digital contexts.⁷⁰ The argument is not that there should be no exemptions or defenses to assertion of rights, but that the balance should be drawn in a manner favorable to maintaining robust incentives for creative work, even if that narrows room for secondary uses or requires new protections in the digital world:

In particular, corporate providers of copyrighted content . . . [view] the network environment [as] a place of great opportunity and tremendous risk. . . . [As to the risk,] they perceive the Internet as a present danger to their valuable intangible assets. Their

66. For a summary of the organizations activities, see ELECTRONIC FRONTIER FOUND., www.eff.org (last visited May 11, 2011).

67. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 22–28 (Stanford Univ. Press rev. ed. 2003) (1994); HELPRIN, *supra* note 3; Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 *BROOK. L. REV.* 229, 237 (2003); DeLong, *supra* note 3, at 31–33 (arguing that innovation will spread more rapidly if creators have incentives to find new uses for their creations and to open new markets for them); Ginsburg, *supra* note 5, at 1468 (“[U]ser rights, albeit important, should remain secondary. Without authors, there are no works to use.”); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 *U. CHI. LEGAL F.* 217, 259 (describing incentives for would-be authors to create informational works in cyberspace); Koenigsberg, *supra* note 3, at 679.

68. See 1 NIMMER, *supra* note 50, at ch. 1.

69. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001); see also *World Intellectual Property Organization Copyright Treaty*, Apr. 12, 1997, S. TREATY DOC. NO. 105–17.

70. Ginsburg, *supra* note 5, at 1468 (“[U]ser rights, albeit important, should remain secondary. Without authors, there are no works to use.”); see Hardy, *supra* note 67, at 259.

aim, then, is to make the network environment “safe” for digital commerce in information and entertainment products.⁷¹

When the conflict between restrictors and enhancers first emerged in the digital context, some characterized the pro-rights side as occupied by large corporations that control the production of content, while the restrictors were comprised of individuals and their public spirited activists.⁷² That was probably never true.⁷³ But to the extent it was true, the characterizations resulted from the fact that a weakening of the incentive structure strikes hardest against the higher-cost creative work projects, while it frees up individuals from paying for use of the work of others.

That caricature of the dispute—as being between big (pro-rights) and small (anti-rights) players—is certainly not true today. As described below, in modern digital systems, the weak rights position yields a value shift from creators of content and their distributors to online facilitators (aggregators and search engines) without compensation to the creators.⁷⁴ Massively wealthy search engine companies are among the strongest supporters of a rights-restrictive position, at least as to *others'* content and trademarks.⁷⁵ Also, large companies in the copyright industries are both users of others' work and creators and distributors of their own works, resulting in a sometimes schizophrenic corporate approach to the issues.⁷⁶ The best characterization is that both sides are populated by large and small

71. LEAFFER, *supra* note 28, at 28.

72. *See, e.g.*, LESSIG, *supra* note 2; Farber, *supra* note 3, at 1332.

73. *See, e.g.*, Farber, *supra* note 3, at 1360 n.64 (“This vision of the ‘little guy’ versus the corporations is clearly an oversimplification. Important corporate interests can be found on both sides of the debate, with the digital technology industry often aligned against content providers.” (quoting Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 15 BERKELEY TECH. L.J. 519, 533 (1999))).

74. *See, e.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,1168 (9th Cir. 2007) (holding that use of a thumbnail image in a commercial search engine was transformative and, thus, fair use; a search engine provider could make commercial use of the images without a license or any payment to content creator). This same result can spill over to other laws. *See, e.g.*, *Scranton Times, L.P. v. Wilkes-Barre Publ'g Co.*, No. 3:08-cv-2135, 2009 WL 3100963, at *5–6 (M.D. Pa. Sept. 23, 2009) (dismissing misappropriation claim against company that copied online obituaries from news site was preempted by copyright act; obituaries were, apparently, not copyrightable by the news site).

75. *See generally Perfect 10, Inc.*, 508 F.3d at 1172 ; *Rescuecom Corp. v. Google, Inc.*, 456 F. Supp. 2d 393, 401 (N.D.N.Y. 2006) (“[I]n the absence of allegations that defendant placed plaintiff's trademark on any goods, displays, containers, or advertisements, or used plaintiff's trademark in any way that indicates source or origin, plaintiff can prove no facts in support of its claim which would demonstrate trademark use.”); *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 704–06 (E.D. Va. 2004) (finding sufficient facts alleged to find use in commerce); Samuelson, *supra* note 27.

76. *See Holly K. Towle, The Politics of Licensing Law*, 36 HOUS. L. REV. 121, 161–68 (1999).

corporations, foundations, lawyers, academics, and individuals, all of whom have various levels of political, economic and personal stakes in the outcome of the debate.

As to copyright law, rights enhancers argue that doctrines of fair use and the non-protection of the ideas in a work are important, but should be cabined to their original purpose, which is to permit use of limited portions of a published work for productive purposes or truly personal, non-commercial use with no substantial adverse impact on the market for the work.⁷⁷ Under this view, it is not fair use to take a copy of a work verbatim and copy it for unauthorized commercial purposes⁷⁸ or to post it on the Internet or load it into a computer with peer-to-peer software in the system to be copied by others for their own use.⁷⁹ While copyright first-sale doctrine gives the owner of a copy certain privileges with respect to it, ownership depends on how the copyright owner chooses to distribute the copy; distribution pursuant to a restrictive license does not transfer ownership.⁸⁰

The strong rights approach is far superior to the weak rights approach in terms of incentivizing or otherwise supporting the creation of new works where commitments of substantial resources or investments are required. The weak rights approach ultimately seeks to shift the emphasis of copyright toward enabling secondary uses (including verbatim copying) and low (or no) cost works where compensation to, or investment by, the author are far less important. In a digital world, granting broad and unlimited rights to end users to make and distribute verbatim copies undermines core support for expensive work efforts in return for supporting conduct of often questionable value.⁸¹

77. Compare *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984) (holding that copying of broadcast television programs for purposes of later home viewing was fair use), with *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (holding that acts of individuals uploading and downloading music to central site were commercial uses and not fair use; users downloading obtain some or free that was otherwise only available at a cost).

78. But see *Perfect 10, Inc.*, 508 F.3d at 1172 (noting fair use where copy used for purpose different from the copyright owner's original purpose).

79. See *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (holding that downloading music files to review their content for possible future purchase was not fair use).

80. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107–09 (9th Cir. 2010); *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999).

81. But see LESSIG, *supra* note 40, at 92 (2008) (arguing that a hybrid or mixed system of free information and commerce can evolve, although acknowledging that much user-generated content has little value). The argument, however, is less than persuasive when matched against the cost of high investment content creation, such as in motion pictures.

The strong rights view also supports the use of alternative legal regimes such as contract, access controls, and civil actions under computer crime laws to establish control of access to informational works as an alternative to controlling copying in a digital world where copying is perfect, potentially instantaneous, widespread, and difficult to prevent.⁸² As discussed below, using other law to augment copyright in the digital environment is troubling to the rights-restrictive viewpoint, especially insofar as it threatens fair use and first-sale privileges.⁸³

The weak rights position is sometimes incorrectly connected to what one author describes as the “hive” development of works,⁸⁴ the creation of works by contributions from a broad community, such as in the various “Wiki” works online. The two phenomena do in fact flow from a similar ideology that values breadth of participation and freedom of use over central or proprietary control or development. Wiki projects, however, do not depend on weak intellectual property rights. The various contributors consent to their contributions’ use and modification by others.⁸⁵ Strong rights coupled with consent (licenses) to particular uses are fully consistent with a theory of strong rights.

Indeed, one of the most discussed community or hive development environments—the free software community—relies on strong copyright rights to enforce the licenses at the core of their communities.⁸⁶ In fact some participants in the free software community claim that their licenses are not contracts at all, indicating that the community’s legal right to enforce restrictions on transferees

82. See *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 937–42 (9th Cir. 2010) (recognizing that 17 U.S.C. § 1201(a) enacted federal judgment that digital environment merited the creation of a right to enforce control of access to a copyrighted work); see also Raymond T. Nimmer, *First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage*, in *COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES*, (Jonathan Griffiths & Uma Suthersanen, eds., 2005). *But cf.* Timothy B. Lee, *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act*, *POL’Y ANALYSIS*, no. 564, Mar. 21, 2006, available at <http://www.cato.org/pubs/pas/pa564.pdf>.

83. See, e.g., Rice, *supra* note 10; Samuelson, *supra* note 56. *But cf.* Towle, *supra* note 76.

84. JARON LANIER, *YOU ARE NOT A GADGET* 48–50 (2010).

85. See, e.g., *Terms of Use*, WIKIMEDIA FOUND., http://wikimediafoundation.org/wiki/Terms_of_Use (last visited Apr. 9, 2010).

86. See NIMMER, *supra* note 50, § 10:19; David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241; Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563.

to maintain the “free” nature of the software depends entirely on copyright.⁸⁷

D. Content Facilitators or Content Creators

There is another interest group that has a stake in the rights-restrictor versus rights-enhancer debate. The rights restrictor view of copyright as applied online shifts value away from content creators and towards content facilitators—aggregators, search engine providers, and providers of technology that facilitates copying or distribution of digital works.

The issue here is not whether these important participants in the digital network world deserve support. Rather, the important question is to what extent commercial content providers should share in the value, or have some control over use of their works, in these digital systems. The answer, in part, is that online, to the extent that assertion of rights against content facilitators is cut off, content creators lose a potentially important revenue stream, ceding it to technology operators.⁸⁸ The argument is not that the content providers should control all revenues from these secondary uses, but that based on their property rights they should participate in some of the revenue and control.

In the digital era, the tension between technology providers and content owners first surfaced in litigation involving so-called peer-to-peer (P2P) systems. The earliest cases were relatively easy to decide because they involved centralized systems facilitating massive amounts of unauthorized exchange of files. The appellate courts routinely held that operators of these systems were either direct or contributory infringers.⁸⁹ The users of the systems who copied or distributed works were also infringers.⁹⁰

87. See Eben Moglen, *Free Software Matters: Enforcing the GPL, I*, LINUX USER & DEVELOPER, Aug. 12, 2001, available at <http://moglen.law.columbia.edu/publications/lu-12.pdf>; Pamela Jones, *The GPL is a License, Not a Contract*, LWN.NET (Dec. 3, 2003), <http://lwn.net/Articles/61292>.

88. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (holding that a search engine provider could make commercial use of thumbnail images without a license or any payment to content creator).

89. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003), (holding the peer-to-peer system provider liable for indirect infringement; users were direct infringers); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001).

90. See *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (holding that downloading music files infringed and was not fair use); *A&M Records, Inc.*, 239 F.3d at 1029 (finding that downloading was commercial use, not fair use).

A more difficult case arose in *MGM Studios, Inc. v. Grokster*,⁹¹ which involved a decentralized software system that enabled users to make available and “share” (e.g., copy) content files residing on various users’ computers.⁹² *Grokster* defended against the contributory infringement claim arguing that it could not be held liable for infringing uses of a product that it distributed to third parties where there were substantial non-infringing uses of the product.⁹³ For example, the seller of a copying machine which can be used to infringe but also can be used for non-infringing purposes cannot be held liable for a particular buyer’s wrongful conduct.⁹⁴ That doctrine was established in *Sony Corp. of America v. Universal City Studios, Inc.*,⁹⁵ which held that makers of video recording machines could not be held liable for the infringing uses of the machines they sold because the machines had substantial non-infringing uses (i.e., the personal fair use in private households to copy broadcast program in order to shift the time when the person could watch them). The Supreme Court in *Grokster* confirmed that *Sony* set out a balance between allowing technology to advance without legal constraints grounded in copyright law, on the one side, and protecting informational content rights on the other. *Grokster* was not protected, however, because it *actively induced* use of its system to infringe copyrights.⁹⁶ As to the balance, the Court commented:

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works. . . . [The] indications are that the ease of copying songs or movies using software like *Grokster*’s and *Napster*’s is fostering disdain for copyright protection. As the case has been presented to us, these fears are said to be offset by the different concern that

91. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–23 (2005).

92. *Id.* at 922.

93. *Id.* at 933.

94. *Id.* at 934.

95. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

96. *Grokster*, 545 U.S. at 936–37 (“[T]he inducement rule . . . is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as [in] *Sony* . . . mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”).

imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies.⁹⁷

Thus, the perceived conflict is between protection of the property rights and protection of the interest in emerging technologies. But not all technologies are “beneficial,” and not all effects of even beneficial technologies are socially desirable when counterbalanced by the negative impact they may have on the rights of other parties, including copyright owners. More pertinently, the conflict between technology and property is not an all-or-nothing proposition. If the economics are such that a technological advance meets a market demand, it is likely to be deployed. The property-rights question deals with issues of participation: To what extent do content-rights owners participate in business models that exploit their content?⁹⁸ Most often, for the technology provider, the question becomes one of cost: To what extent does protection of, or deference to, the property rights of the copyright owner impose a cost on the distribution of the technology?

This issue is heightened in the Internet, where courts often get the result wrong. For example, the Ninth Circuit in *Perfect 10 v. Amazon.com* dealt with an online search engine that copied images from other websites and reduced them to thumbnail images which were then used commercially on a visual search engine.⁹⁹ All of this occurred without the permission of the copyright owners or any payment to them for use of their intellectual property.¹⁰⁰ Although the court acknowledged that these facts presented a *prima facie* case of direct infringement, it held that this verbatim copying was a protected fair use:

Just as a “parody has an obvious claim to transformative value” because “it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,” a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work¹⁰¹

The court, however, misapplied the concept of “transformative use” set out by the Supreme Court in *Acuff-Rose*.¹⁰² The Supreme Court there

97. *Id.* at 928–29 (citations omitted).

98. *See* *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 498 (2001) (discussing the extent to which authors would participate in decisions to computerize their contributions to collective works, or whether this was entirely under the control of the publisher).

99. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007).

100. *Id.*

101. *Id.* at 1165 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

102. *Acuff-Rose*, 510 U.S. at 579 (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersedes the objects’ of the original

dealt with the use of *part of a work* to create an entirely different work—a parody.¹⁰³ In *Perfect 10*, in contrast, the defendant made a complete copy of the work, albeit in altered form, and merely used it for a purpose different from that originally intended by the copyright owner. The different purpose, however, did not transform the work. But it did preempt a market for the work that the rights owner might have decided to enter through licensing.

More generally, the issue should not have been whether search engines provide a social benefit.¹⁰⁴ They clearly do. The issue should have been whether copyright owners should be forced to contribute their works to the search engine for free. This issue was one of allocating value between the copyright owner and the search engine aggregators. Certainly, the search engine would incur costs if required to obtain licenses for the use of images, but absolving it from those costs simply involves taking value from the copyright owner. The Ninth Circuit stretched copyright law in a manner that shifts value to the aggregator (search engine) and away from the content creator.

Additionally, *Perfect 10* presented the question of whether the search engine could be indirectly liable for the infringing content on some of the sites to which it linked.¹⁰⁵ Indirect liability occurs where a person (1) substantially contributes to the infringing conduct of another, (2) induces the infringing conduct, or (3) is vicariously liable for the infringement.¹⁰⁶ The court also protected the search engine on the indirect infringement issue, holding that “a computer system operator can be held contributorily liable [only] if it ‘has *actual* knowledge that *specific* infringing material is available using its system,’ and can ‘take simple measures to prevent further damage’ to copyrighted works, yet continues to provide access to infringing works.”¹⁰⁷ Requiring actual knowledge of specific infringements in an online system places virtually the entire burden of enforcement on the rights owner. This is consistent with a narrow view of copyright

creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” (internal citations omitted).

103. *Id.* at 572.

104. This same concept was recognized, but not resolved, in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 92–30, (2005).

105. *Id.* at 1157.

106. *See id.* at 929–31; *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003) (holding peer-to-peer system provider liable for indirect infringement; users were direct infringers); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

107. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). (internal citations omitted).

protection. It is a dubious policy choice, however, where the online provider is reaping a benefit from the work of others and where the online provider may very well be the lowest cost source for monitoring and preventing infringement.¹⁰⁸ It becomes a more suspect public policy when coupled with requiring action *only* if simple measures to prevent further damage exist.

The Seventh Circuit in *In re Aimster Copyright Litigation*, dealing with a different type of online service, set out a more balanced approach to the indirect liability risk of the online provider:

Even when there are noninfringing uses of an Internet file-sharing service . . . if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.¹⁰⁹

Whether elevated to explicit doctrine or used as a basis to set out a reasonable care or similar standard, this suggests a more nuanced and balanced adjustment of the interests of copyright owners and online providers as to the obligation to find or prevent infringing conduct on the site. It adopts the simple premise that one cannot blindly support and facilitate ongoing damage to the property of another. While the system discussed in *Aimster* differs from the search engine in *Perfect 10*, this simple policy premise should apply in both contexts.

This more balanced approach was also intended in § 512 of the DMCA,¹¹⁰ the so-called safe harbor provisions enacted as part of the DMCA. If a provider complies with the relevant standards of § 512, the safe harbors exclude copyright infringement claims against it. The most relevant safe harbor deals with the risk of liability for infringing works posted to the provider's system by third parties.

Section 512(c) gives protection to the online provider only if the provider does not receive a financial benefit from infringing activity it can control (e.g., prevent) and only if:

It does not have *actual knowledge* of infringement or infringing activity, or

It is *not aware of facts or circumstances* from which infringing activity is apparent, or

Upon obtaining such *knowledge or awareness*, it acts expeditiously to remove, or disable access to, the material.¹¹¹

Other provisions require an expeditious response to notices of infringement received by the site from the copyright owner.¹¹²

108. See *Aimster*, 334 F.3d at 653–54 (7th Cir. 2003) (giving discussion of cost-benefit balancing issues in determining indirect infringement liability).

109. *Id.* at 653.

110. 17 U.S.C. § 512 (2006); see 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 6.3 (3d ed. 2005).

111. *Id.* § 512(c)(1)(A).

On its face, this does not give safe harbor protection to every site owner who merely lacks “actual knowledge” of “specific” infringements. There is a second, lesser standard—awareness of facts or circumstances from which infringing *activity* is apparent.¹¹³ This statutory structure places some obligation on the online provider to participate in at least attempting to reduce infringing activity on its site. The extent to which this requires the online provider to police the site is unclear, but it requires more than willful ignorance; the provision requires action not only if there is *actual* knowledge of a *specific* infringement, but also if there is awareness of facts or circumstances from which infringing activity is apparent.

The difference presents a policy choice about allocating effort and cost that is important to enforcement of a copyright in online environments. The question is whether there should be a shared obligation in some situations, or whether online service providers have no obligations to prevent infringement until informed of it specifically. In fact, there should be some obligation in some cases. The site provider in a site with widespread infringing activity may be the lowest cost enforcer for at least reducing obvious infringement on its site. This may not be true where only a few, intermittent infringing posts occur.¹¹⁴ The copyright owner, in contrast, always faces the task of monitoring millions of sites and files. If an online provider has no obligation to act unless it has knowledge of a specific infringement (or receives specific notice), it can adopt a passive approach to controlling infringement on its site. But that is not what the statute suggests. Rather, the statute and appropriate policy is more consistent with the balancing approach set out by the Seventh Circuit quoted above: “if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.”¹¹⁵

Placing some obligation on online providers to prevent infringement, however, conflicts with a view that would narrow protection of informational property rights in favor of a shifting value to others (in this case, site operators or aggregators). The district

112. *Id.* § 512(c)(1)(C).

113. *Id.* § 512(c)(1)(A)(ii).

114. Judge Posner, in the *Aimster* case, provides an extensive and helpful discussion of the various factors that might be considered in the balance on whether the site operator has some obligation to police its site for infringing conduct, balancing both the cost of the effort involved and the degree of harm that will otherwise result to the rights holders' interests. *In re Aimster Copyright Litig.*, 334 F.3d 643, 650–54 (7th Cir. 2003).

115. *Id.* at 653.

court in *Viacom Int'l, Inc., v. YouTube, Inc.* adopted a rights-restrictive interpretation of § 512.¹¹⁶ The court held that, while it was clear to the online operator that the YouTube site housed many infringing copies, this was not enough to disallow the safe harbor under the standard that the infringing activity be apparent.¹¹⁷ Instead, the safe harbor would be denied only if the online provider had *actual knowledge* of a *specific infringing file*.¹¹⁸

But the statute does not say that. To be fair, the court referenced legislative history that might support its conclusion:

Subsection (c)(1)(A)(ii) can best be described as a “red flag” test. As stated in subsection (D), a service provider need not monitor its service or affirmatively seek facts indicating infringing activity . . . in order to claim this limitation on liability However, if the service provider becomes aware of a “red flag” from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a “red flag”—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.¹¹⁹

The *Viacom* court interpreted this legislative history as conflating the knowledge and the awareness standards (they both require actual knowledge) and as requiring knowledge of a specific infringement (rather than awareness of infringing “activity”¹²⁰). But the legislative history and the statutory language do not support this conclusion. Just concentrate on the last sentence: The legislative history focuses on whether infringing *activity* would have been apparent to a reasonable person.¹²¹ This standard does not require knowledge of specific acts of infringement. In *Viacom*, even the district court admitted that “[f]rom plaintiffs’ submissions on the motions, a jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website.”¹²²

The *Viacom* court misapplied the statutory framework and adopted bad policy. Many websites make important contributions to the information age and should be protected, but many sites benefit from widespread unauthorized use of the content of others. Especially

116. 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010).

117. *Id.* at 526.

118. *Id.* at 523.

119. *Id.* at 520–21 (citing S. REP. NO. 105-190, at 44–45 (1998)).

120. *Id.* at 523.

121. See S. REP. NO. 105-190, at 44–45.

122. *Viacom*, 718 F.Supp.2d at 518.

where this involves a substantial part of the site's activity, the site should share some obligation to protect informational property rights, so long as the effort to do so is not disproportionately costly. This is a fair reading of the statutory safe-harbor language which requires action even in the absence of actual knowledge of specific infringing activity.¹²³

The result in *Viacom* can be contrasted with the result in *Columbia Pictures Industries, Inc. v. Fung*,¹²⁴ which shows that a line can be drawn other than at the level of actual knowledge of specific infringing files in cases where infringement is ubiquitous and, in fact, encouraged by the site operator. In that case, the defendant operated a peer-to-peer file sharing system that involved massive amounts of infringement (evidence suggested that over 95 percent of the downloads may have been infringing).¹²⁵ The court found that the defendants were inducing their users to infringe.¹²⁶ According to the court, the operators of the site affirmatively fostered infringement by numerous means.¹²⁷ But what if the § 512 defense that *Viacom* suggests is present unless there is actual knowledge of specific infringing files? The court in *Fung* concluded that § 512 is designed to protect passive conduct and is not consistent with protecting *active* conduct to encourage infringement. It did not apply here where the defendant engaged in willful blindness.¹²⁸ The court went on to quote Judge Posner in the *Aimster* case to the effect that “[t]he common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’”¹²⁹

Viacom and *Fung* may be distinguished in that the site provider in *Viacom* did respond to complaints and made some effort to screen for some infringement, although the court's ruling was not grounded in those facts. Also, the site operator in *Fung* openly promoted infringing conduct by its users.

123. 17 U.S.C. § 512(c)(1)(A) (2006).

124. *Columbia Pictures Indus., Inc. v. Fung*, No. 06-5578, 2009 WL 6355911, at *8–10 (C.D. Cal. Dec. 21, 2009).

125. *Id.* at *4.

126. *Id.* at * 11.

127. *Id.* at *11–14.

128. *Id.* at *18 (“In light of this overwhelming evidence, the only way Defendants could have avoided knowing about their users’ infringement is if they engaged in an ‘ostrich-like refusal to discover the extent to which their systems were being used to infringe copyright.’ In other words, to avoid actual knowledge of infringement, Defendants would have had to engage in willful blindness.” (quoting *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003))).

129. *Id.* (quoting *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003)).

But the fundamental issue remains—how far should a company or individual profit or otherwise benefit from third party misuse of the property of others without bearing a burden in law to take proactive steps to at least reduce that activity.

II. OTHER LAW SYSTEMS

Copyright law does not and cannot exist in isolation. Transactions involving copyrighted material typically involve contracts.¹³⁰ License agreements are often used to establish use restrictions on works that copyright law alone would not have provided.¹³¹ In addition, many copyrighted works are held in secret, invoking privacy or trade secrecy laws that limit the use of or access to them.¹³² A wide range of other laws affects the ability of copyright owners to control the use of and access to their work. Copyright law is simply one stitch in a fabric of law and transactional options applicable to informational works.

Digital systems undermine the economic incentives for creative work intended to be established under copyright law and that are important especially for works that require substantial investment. This leads to not only an effort by advocates of strong rights to reinforce legal and social support for norms against copying, but also to reach into other areas of law to find alternative means of protecting or generating value in creative works.¹³³

The arguments against application of these other laws to informational works from the perspective of rights restrictors continue the theme found in copyright law debates: Too much control given to

130. See, e.g., Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 129 (1997); Maureen A. O'Rourke, *Rethinking Remedies at the Intersection of Intellectual Property and Contract: Toward a Unified Body of Law*, 82 IOWA L. REV. 1137, 1140 (1997).

131. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1112 (9th Cir. 2010) (finding that transaction was not a first sale because of contract terms); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); see also Towle, *supra* note 76, at 169.

132. See *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655 (4th Cir. 1993); *Aries Info. Sys., Inc. v. Pacific Mgmt. Sys. Corp.*, 366 N.W.2d 366 (Minn. Ct. App. 1985); 1 NIMMER, *supra* note 50, § 3:4.

133. The most visible of these ancillary bodies of law have been contract law and the DMCA as discussed in this Article. In addition, however, there has been extensive use of civil causes of action under federal computer crime laws dealing with unauthorized access to online computers, see NIMMER & TOWLE, *supra* note 13, ¶ 3.05, and causes of action for trespass to chattel, grounded in unauthorized access to computer systems, see, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004); *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV-99-7654, 2003 U.S. Dist. LEXIS 6483, (C.D. Cal. Mar. 6, 2003). As these developments suggest, the shift to Internet and related forms of content distribution has in fact caused a shift of attention to control of access as a mean of commercializing data and other content.

the information creator or distributor might stifle innovation and should not be permitted.¹³⁴ Rights established under law other than copyright, the argument further goes, would undermine the balance in copyright law, which advocates for a restrictive view sometimes describe as a “delicate balance” with narrow rights and expansive privileges for secondary users.¹³⁵

Alternative sources of law, however, provide important support for commercialization of informational works, potentially restoring strength where digital systems threaten weakening of legal support.¹³⁶ Many alternative sources of law exist. We discuss two. First, we discuss the use of contracts to set terms of use for informational works distributed in mass markets or other environments. Contracts establish enforceable rights between the contracting parties.¹³⁷ They apportion which copyright rights are transferred and which are withheld, allowing rights owners to optimize how their works are placed into the market.¹³⁸ Second, we discuss the Digital Millennium Copyright Act (DMCA) provisions against circumvention of devices that control access to copyrighted works.¹³⁹ The DMCA creates a legal regime that enables copyright owners to rely on the law to enforce technological controls they place on access to their copyrighted work, thus moving the point of potential enforcement up to a stage before actual copying occurs.¹⁴⁰

In practice, the efficacy of both the DMCA restrictions and contract terms in supporting value in copyrighted works are subject to practical questions of enforceability and market acceptability. Access controls or contractual use restrictions that are generally unacceptable in the market will not long be sustainable. In addition, if unacceptable to the broader society, they may be unenforceable in fact. As with copyright itself, these legal regimes create important

134. See, e.g., Nimmer et al., *supra* note 10, at 23 (“This balance [of copyright law] is disrupted when state [contract] law is permitted to enlarge the rights of copyright proprietors at the expense of copyright users.”).

135. See e.g., Anne K. Fujita, *The Great Internet Panic: How Digitization is Deforming Copyright Law*, 2 J. TECH L. & POL’Y 1 (1996); Nimmer et al., *supra* note 10, at 23; Samuelson, *supra* note 56; Howard Besser, *Recent Changes to Copyright: Attacks Against the Public Interest*, HOWARD BESSER’S HOMEPAGE (1998), <http://besser.tsoa.nyu.edu/howard/Papers/copyright99.html>.

136. See U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT (2001); see also Towle, *supra* note 76, at 169.

137. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

138. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

139. 17 U.S.C. § 1201(a) (2006).

140. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); Nimmer, *supra* note 82.

rights, but also are tools to shape social and market expectations and which shape them in turn.

A. Contracts

Contracts involve enforceable agreements that establish rights between the contracting parties.¹⁴¹ Property rights, such as those under copyright law, establish rights in the owner that apply to all others who deal with the property whether or not they engage in an agreed relationship.¹⁴² The two rights-creating legal regimes are parallel. Contracts do not depend on property rights and property rights (as compared to their transfer) ordinarily do not depend on contracts.

As digital information systems have presented new issues to the copyright and data industries, many rights holders have turned to contracts with substantial, substantive terms.¹⁴³ Contracts controlling the use and copying of informational works are common today.¹⁴⁴ A license for, as compared to a sale of, a copy of an informational product in a retail market is an ordinary occurrence.¹⁴⁵ Contractual licenses of access to online sites, or “access contracts,”¹⁴⁶ as described in the Uniform Computer Information Transactions Act (UCITA), are

141. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 2 (4th ed. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

142. See *ProCD, Inc.*, 86 F.3d 1447, 1454–55 (7th Cir. 1996) (holding that copyright does not preempt contract).

143. See *MDY Indus., L.L.C. v. Blizzard Entm't. Inc.*, 629 F.3d 928, 957–58 (9th Cir. 2010) (computer game); *Vernor*, 621 F.3d at 1111–12; *Schwartz v. Comcast Corp.*, 256 Fed. App'x 515 (3d Cir. 2007); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Briceno v. Sprint Spectrum, L.P.*, 911 So.2d 176 (Fla. Dist. Ct. App. 2005); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

144. See Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996); Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 129 (1997); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 23 (1999) (“This balance [of copyright law] is disrupted when state [contract] law is permitted to enlarge the rights of copyright proprietors at the expense of copyright users.”); Holly K. Towle, *The Politics of Licensing Law*, 36 HOUS. L. REV. 121, 161–68 (1999).

145. See, e.g., *Vernor* 621 F.3d at 1104–05, 1111 (enforcing license use terms in software contract); *MDY Indus., L.L.C.*, 629 F.3d at 942–58 (applying the DMCA to access control measures in video-game software); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (enforcing license in game contract); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (enforcing contract license regarding digital database). See generally Holly K. Towle, *The Politics of Licensing Law*, 36 HOUS. L. REV. 121, 161–68 (1999).

146. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 102(a)(1) (amended 2002) (“‘Access contract’ means a contract to obtain by electronic means access to, or information from, an information processing system of another person, or the equivalent of such access.”).

ubiquitous on commercial sites, although often incorporated as “terms of use” or “terms of service” and assented to by users of the site.¹⁴⁷

There are many reasons for the widespread (although not universal) presence of licenses and other contracts with terms regulating use, access to, and transfer of informational works as compared to simple sales of copies of digital informational products.¹⁴⁸ In some circumstances, in addition to establishing legal rights, the contracts serve a signaling or notice function, instructing the particular user (and the market as a whole) about what expectations exist regarding use of the site or the content. They can help build social norms and expectations if made explicit and visible to users; and of course, they must be accepted in the market and in the courts.

Enforceable contract terms also have more direct legal effects by creating a right of action independent of copyright law if the licensee fails to conform to the agreement.¹⁴⁹ This is significant in a number of ways. For example, data or other subject matter that copyright does not protect can be covered by enforceable contract terms limiting use.¹⁵⁰ Similarly, uses of copyrighted works that do not relate to the exclusive rights stated under copyright law can be regulated by the terms of the agreement.¹⁵¹ There also exists an interactive relationship between contract and copyright. Violation of a contractual license term granting permission to use a copyrighted work creates both a contract claim and, if the contract term is part of the scope of the license, a claim for infringement.¹⁵²

147. See, e.g., *Register.com, Inc.*, 356 F.3d at 408; *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002); *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927 (E.D. Va. 2010); *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV-99-7654, 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 6, 2003).

148. Indeed, some of these reasons do not deal with copyright or other rights-related issues. Depending on the type of information product involved or the nature of the online service provided, there may be liability risks or privacy and data protection issues to be addressed by contract. See NIMMER & TOWLE, *supra* note 13, at ch. 8 (discussing various terms of service online and their legal purpose).

149. See *MDY Indus., L.L.C.*, 629 F.3d at 957–58; *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115 (9th Cir. 1999); *ProCD, Inc.*, 86 F.3d at 1455 (enforcing a shrink wrap license).

150. See, e.g., *ProCD, Inc.*, 86 F.3d at 1454–55 (holding that copyright does not preempt contract; contractual use restrictions enforceable in reference to database that was not copyrightable).

151. See, e.g., *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079 (9th Cir. 2005) (holding that copyright did not preclude enforcement of contract clause limiting program use); *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000) (finding that a copy was licensed for educational use).

152. See, e.g., *MDY Indus., L.L.C.*, 629 F.3d at 935; *Sun Microsystems, Inc.*, 188 F.3d at 1117, 1124 (making distinction between scope provisions and mere covenant and remanding for determination of proper interpretation of the particular license); *Kepper-Tregoe, Inc. v. Vroom*,

Contractual use terms thus enable an information provider to efficiently differentiate among markets or desired usages. For example, a video game provider may make its game available at one price with a use restriction to a single standalone machine and at a different price for use interactively online, even though the game software in both cases is the same.¹⁵³ A music or other content provider may make its work available at one price for personal use only with no right to make copies, or separately at a different price with the contractual right to make and distribute fifty copies. A software provider may transfer software with a license limiting retransfer to educational uses only or separately for redistribution for any and all types of uses.¹⁵⁴ A licensee may acquire a right to make three thousand copies of a work for its offices, tailoring the number and cost to its actual needs.¹⁵⁵ The list is virtually endless. In a real marketplace, these kinds of distinctions have obvious benefits for both the provider and the user. Yet, none flow directly from the Copyright Act. Contracts extended into so-called "end-user space" (whether retail, online, or commercial) provide potentially powerful tools for tailoring products and protection and for optimizing commercialization.¹⁵⁶

Not surprisingly, because contract terms can displace copyright defenses and limitations, at least between the two parties, advocates of weak rights resist application of contract law restrictions, especially to end users and in the mass-market, retail, or online environments.¹⁵⁷ Among the earliest challenges to use of contract terms in end user contexts was the argument that no contract could be formed because no actual *negotiation* of terms occurs and because of the manner in

186 F.3d 283 (2d Cir. 1999); *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 779 (3d Cir. 1991) (holding that a licensor can sue for copyright infringement for use exceeding scope of nonexclusive license); *WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982) (finding that exceeding a license caused infringement).

153. See *MDY Industries, L.L.C.*, 629 F.3d at 935-36; *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

154. See *Adobe Sys. Inc.*, 84 F. Supp. 2d at 1088 (explaining that a licensee is not an owner of the copy licensed for educational use).

155. See, e.g., *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006) (explaining that the licensee is not an owner; making copies beyond the amount permitted by license is not fair use even though licensee never used more than the licensed amount at the same time).

156. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996); Towle, *supra* note 76.

157. See David Nimmer et al., *supra* note 10, at 23 ("This balance [of copyright law] is disrupted when state [contract] law is permitted to enlarge the rights of copyright proprietors at the expense of copyright users."); Rice, *supra* note 10.

which licensors presented the terms.¹⁵⁸ One party (the licensee) merely receives terms on a take-it-or-leave-it basis and in some cases, the terms are not seen or accepted until the product arrives at the licensee's house or office.¹⁵⁹ The challenges to these contracts were grounded in positions taken by both weak rights advocates and persons advocating a particular view of contract law theory.¹⁶⁰

But processes by which one party is presented terms on a take-it-or-leave-it basis are common in contracting practice, sufficiently so that a provision of the modern Restatement of Contracts deals with them: The terms are enforceable if the party manifests assent to them, presumably after an opportunity to review the terms.¹⁶¹ The framework of having the terms reviewed after an initial agreement occurs has come to be called "layered contracting" and presupposes that the licensee had reason to know that further terms were involved and had the right to return the product if the terms were not acceptable.¹⁶² Overall, the process corresponds to the Uniform Commercial Code (UCC) concept, also embodied in common law, that a "contract . . . may be made in any manner sufficient to show agreement, including . . . conduct by both parties which recognizes the existence of such a contract."¹⁶³ Today, the reported cases broadly support that this contract rule applies to licenses of information and to

158. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (refusing to enforce license terms because the terms were presented in conflict of forms setting); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000) (finding that the practice of using later terms is not as common in hardware industry); *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006) (finding that Article 2 applies; later terms not part of contract where parties had signed agreement that did not reference those terms or their being proposed).

159. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (finding the contract enforceable based on use of computer without objecting to terms); *ProCD, Inc.*, 86 F.3d at 1455 (enforcing the license.).

160. See, e.g., JOHN EDWARD MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* 178–84 (6th ed. 2006) (describing "shrinkwrap" contracts in *ProCD* and *Hill* as "rolling" or "layered" contracts because the offer "rolls" until the buyer has an opportunity to review its terms); see also Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 491 (2002) ("[W]e contend that UCITA maintains the contextual, balanced approach to standard terms that can be found in the paper world."); Rice, *supra* note 10; Towle, *supra* note 76.

161. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); see also W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–30 (1971) (stating that standard form contracts "account for more than ninety-nine percent of all the contracts now made" and that their "predominance . . . is the best evidence of their necessity").

162. See, e.g., *ProCD, Inc.*, 86 F.3d at 1453; *M.A. Mortenson Co., v. Timberline Software Corp.*, 970 P.2d 803 (Wash. Ct. App. 1999), *aff'd*, 990 P.2d 305 (Wash. 2000); see also UNIF. COMPUTER INFO. TRANSACTIONS ACT § 112 cmt. 9, § 202 cmts. 4, 6 (amended 2002).

163. U.C.C. § 2-204(1) (amended 2011).

online access contracts and that layered contracts are enforceable.¹⁶⁴ These contracts are enforceable if the terms are properly made available and assent is properly obtained.¹⁶⁵ UCITA, the uniform law whose promulgation served as a fulcrum for the attacks by those seeking to limit contract law as applied to digital subject matter, adopted a clarified version of common law:¹⁶⁶

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

(1) [signs] the record or term with intent to adopt or accept it; or

(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term. . . .

(c) With respect to an opportunity to review . . . :

(1) A person has an opportunity to review a record or term only if it is made available in a manner that *ought to call it to the attention of a reasonable person and permit review*. . . .

(3) If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if it has a right to a return if it rejects the record.¹⁶⁷

If terms and transactional frameworks are drafted or structured poorly (e.g., the person has neither knowledge nor reason to know that terms are proposed), then no contract results.¹⁶⁸ In addition, a few

164. See, e.g., *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (online contract enforced); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (shrink wrap license was effective); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (contract enforceable based on use of computer without objecting to terms); *ProCD, Inc.*, 86 F.3d 1447 (enforcing a shrink wrap license); *i.Lan Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002) (shrink wrap license enforceable under Article 2); *Briceno v. Sprint Spectrum, L.P.*, 911 So.2d 176 (Fla. Dist. Ct. App. 2005) (terms of cell phone agreement binding); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000) (license enforced).

165. See Hillman & Rachlinski, *supra* note 160, at 491.

166. See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 28–29 and 29 n.13 (2d Cir. 2002) (commenting that whether common law, Article 2, or UCITA applied to contract formation issue, the same result would occur).

167. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 112 (amended 2002).

168. See *Specht*, 306 F.3d at 34 n.17; see also *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937–38 (E.D. Va. 2010) (commenting that under UCITA and common law, no assent where notice of availability and the requirement of assent to terms not reasonably given: “[Under UCITA, individuals] are only deemed to have had an ‘opportunity to review’ a term if the term is ‘available in a manner that ought to call it to the attention of a reasonable person,’ or if the website ‘discloses the availability of the standard terms in a prominent place on the site’ and ‘does not take affirmative acts to prevent printing or storage of the standard terms for archival or review purposes.’” (internal citations omitted)). Assent does not require a statement or a signature, but can involve mere conduct. See *Register.com, Inc.*, 356 F.3d at 403–04 (finding that use of site suffices as assent); *Hill*, 105 F.3d 1147 (finding a contract enforceable based on use of computer without objecting to terms).

courts break from the general rule and reject the layered contract concept where the parties exchanged standard form contract proposals.¹⁶⁹ But the general enforceability of standard form contracts in this environment is clear when the terms are properly presented for agreement.¹⁷⁰

A second challenge to enforcement, more closely linked to the intellectual property rights debate, focuses on preemption by copyright law. Section 301 of the Copyright Act provides that copyright preempts any state law that creates rights equivalent to copyright with respect to the subject matter of copyright.¹⁷¹ Among other issues, § 301 generates litigation about whether general misappropriation law can be applied to acts of copying factual material¹⁷² and whether state law rights of “publicity” can apply where the unauthorized use of a person’s image involves copying and distributing copies of the image.¹⁷³

This Article, however, is concerned about preemption of contract law. Copyright is a property-rights law focused on regulating property rights in informational subject matter, whereas contract law deal with rights established by agreement—an entirely different matter. Except in cases where a pseudo-contract claim presented in court is in fact a copyright claim, courts consistently hold that copyright law does not generally preempt contracts.¹⁷⁴ The Seventh

169. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); *Rogers v. Dell Computer Corp.*, 138 P.3d 826 (Okla. 2005) (acknowledging that different results might apply if the case involved software, but concluding that the record was insufficient regarding whether terms and conditions of sale were enforceable).

170. See, e.g., *MDY Industries, L.L.C. v. Blizzard Entm’t Inc.*, 629 F.3d 928 (9th Cir. 2010) (computer game); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (software); *Schwartz v. Comcast Corp.*, No. 06-4855, 2007 WL 4212693 (3d Cir. Nov. 30, 2007); *Register.Com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (database available online); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (computer); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (enforcing contract license regarding digital database); *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176 (Fla. Dist. Ct. App. 2005) (terms of a cell phone agreement binding); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998) (computer); (cable service).

171. 17 U.S.C. § 301 (2006).

172. See, e.g., *Scranton Times LP v. Wilkes-Barre Publ’g Co.*, No. 3:08-cv-2135, 2009 WL 3100963, at *4–6 (M.D. Pa. Sept. 23, 2009).

173. See *Toney v. L’Oreal USA, Inc.*, 406 F.3d 905, 910 (7th Cir. 2005) (finding that a under the Illinois Right of Publicity Act was not preempted by the Copyright Act; Toney’s identity is not fixed in a tangible medium of expression and there is no “work of authorship” at issue). *But see* *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134 1145 (9th Cir. 2006) (finding that claim for right of publicity preempted where the essence of the claim had to do with copying a master recording; finding an actual equivalence of rights asserted).

174. *Telecom Technical Servs. Inc. v. Rolm Co.*, 388 F.3d 820, 833 (11th Cir. 2004) (finding claim requiring proof that defendants had violated the terms of the plaintiff’s software license for the benefit of third parties had an additional element that precluded preemption);

Circuit in *ProCD, Inc. v. Zeidenberg*,¹⁷⁵ for example, dealing with a shrinkwrap license relating to a database of telephone numbers, held that a contract does not create rights equivalent to copyright for purposes of preemption and that this result does not change simply because the contract limits use of information not protected under copyright law.¹⁷⁶ Property rights are rights as against the world, while contract rights work between the contracting parties.¹⁷⁷ Among the reasons that the difference is important is that a contract claim does not withdraw the information from the public domain—it merely establishes rights as between the contracting parties.¹⁷⁸

The *Zeidenberg* opinion goes directly to the fundamental point that leads to the conclusion that no preemption occurs: The rights protected under the two systems are simply not equivalent. Even if a contract deals with preventing copying or distribution, it builds rights based on an agreement and a promise not to copy, rather than a property right. Other courts reach the same result using what has become known as the extra-element test: State law claims are not preempted if they contain a qualitatively significant extra element than required for a copyright infringement claim.¹⁷⁹ In reference to contracts, the extra elements, like enforceable promises and breach thereof, abound.

Grosso v. Miramax Film Corp., 383 F.3d 965, 968 (9th Cir. 2004) (finding that an “extra element” precludes preemption of contract claim); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) (shrink wrap license was effective); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Ross, Brovins & Oehmke, P.C. v. Lexis/Nexis*, 348 F. Supp. 2d 845 (E.D. Mich. 2004) (finding that contract breach claim for license of collection of automated legal forms was not preempted; required extra element of existence of contract and breach of it); *Architectronics, Inc. v. Control Sys., Inc.*, 935 F. Supp. 425 (S.D.N.Y. 1996) (copyright did not preempt contract claim). *But see* *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436 (M.D.N.C. 2005). In *Madison River Management*, the plaintiffs claimed that the software licensee was making and modifying copies not authorized by the license. *Id.* Although characterized as a breach of contract claim, the plaintiffs in fact sought to enforce the same rights that exist under copyright law; the court found that the allegedly breached contract terms prohibited no more than unauthorized copying, distribution, or modification of copyrighted software. *Id.* at 863.

175. See *ProCD, Inc.*, 86 F.3d at 1454–55; see also *Architectronics, Inc.*, 935 F. Supp. at 441 (finding that copyright did not preempt contract claim).

176. *ProCD, Inc.*, 86 F.3d at 1454–55.

177. *Id.* at 1454.

178. *Id.* at 1455 (“Everyone remains free to copy and disseminate all 3,000 telephone books that have been incorporated into ProCD’s database. Anyone can add sic codes and zip codes. ProCD’s rivals have done so . . . [W]hether a particular license is generous or restrictive, a simple two-party contract . . . may be enforced.”).

179. See, e.g., *Telecom Technical Servs. Inc.*, 388 F.3d at 833 (finding that the claim requiring proof that defendants had violated the terms of the plaintiff’s software license had an additional element that precluded preemption); *Grosso*, 383 F.3d at 968 (finding that an “extra element” precludes preemption of contract claim).

A different preemption argument lies at the center of the rights debate: that contracts (especially standard form, end-user contracts) cannot as a *matter of policy* be used to alter user rights or privileges set out in the Copyright Act.¹⁸⁰ In regard to preemption, the argument posits that, independent of § 301, there are principles in copyright law that cannot be altered by contract terms, such as the doctrines of fair use and first sale.¹⁸¹ The theory could also be presented under a contract law theme that argues that these rules state fundamental public policy that trumps the fundamental public interest in enforcing contracts.¹⁸² Reflecting the copyright law grounding of the overall debate, however, it is typically presented as a preemption issue.

One branch of this argument focuses on the doctrine of fair use, arguing that contracts cannot preclude fair use of copyrighted works. Courts, however, routinely reject the idea that “fair use” trumps contract terms.¹⁸³ The question is essentially one of whether fair use privileges can be waived by agreement. The answer, as the courts have found, must be yes. There are many fundamental rights in our law that can be waived (e.g., the right to avoid self incrimination).¹⁸⁴

180. See Nimmer et al., *supra* note 10, at 23 (“This balance [of copyright law] is disrupted when state [contract] law is permitted to enlarge the rights of copyright proprietors at the expense of copyright users.”).

181. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (holding that transaction was not a first sale because of contract terms); *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (finding that fair use does not preclude contrary contract terms); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

182. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). This seldom-used provision in the Restatement provides: “A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is *clearly outweighed* in the circumstances by a public policy against the enforcement of such terms.” *Id.* § 178(1) (emphasis added).

183. See, e.g., *Davidson & Assocs.*, 422 F.3d at 639 (noting that fair use does not preclude contrary contract terms); *Bowers*, 320 F.3d at 1327–28 (finding that shrink wrap license was effective). *Cf.* *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006) (commenting that making copies beyond the amount permitted by license is not fair use even though licensee never used more than the licensed amount at the same time); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995) (commenting that use outside scope of license is not fair use).

184. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 200–01, (1995). In *Mezzanatto*, the Court writes: “The Ninth Circuit’s analysis is directly contrary to the approach we have taken in the context of a broad array of constitutional and statutory provisions. Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption.” *Id.* The Court goes on, stating: “A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.” *Id.* at 201 (citing cases holding double jeopardy defense, privilege against compulsory self-incrimination, right to jury trial, right to confront one’s accusers, and Sixth Amendment right to counsel, may be waived). Finally, the Court writes: “Likewise, absent some affirmative indication of Congress’ intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.” *Id.*

Fair use, while important, does not rise to the level of other, more fundamental rights such as the right to avoid self-incrimination, and waivers of many fundamental rights are clearly valid.¹⁸⁵

The fair use issue has been litigated regarding the right of the owner of a copy to make copies in order to examine the copyrighted work to discover its technical content. Case law holds that, in the absence of contrary contractual terms, the *owner* of a copy of a copyrighted work may make so-called “intermediate copies” to enable it to examine the work in order for it to create its own, different work.¹⁸⁶ This process often involves what is described as “reverse engineering”—a procedure of close examination and, often, disassembly of a product purchased by the company seeking to discover its secrets.¹⁸⁷ Should contract terms be allowed to prevent this type of fair use? The rights-restrictive view would argue “no,” because privilege to engage in reverse engineering entails an important aspect of the copyright law balance, especially in reference to technical digital works.

Courts, however, enforce the contract. For example, in *Davidson & Associates v. Jung* the court held that a shrinkwrap license that barred reverse engineering was not preempted.¹⁸⁸ The court said simply:

Appellants contractually accepted restrictions on their ability to reverse engineer by their agreement to the terms of the TOU [terms of use] and EULA [standard end user license agreement]. “Private parties are free to contractually forego the limited ability to reverse engineer a software product” . . . and “a state can permit parties to contract

185. See, e.g., *Davidson & Assocs.*, 422 F.3d at 639 (holding that fair use does not preclude contrary contract terms).

186. See *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 602–03 (9th Cir. 2000) (“[I]ntermediate copying could constitute copyright infringement even when the end product did not itself contain copyrighted material. . . . But this copying nonetheless could be protected as a fair use if it was ‘necessary’ to gain access to the functional elements of the software itself.”); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1539 n.18 (11th Cir. 1996) (“[A]lthough there has been some uncertainty as to whether reverse engineering constitutes copyright infringement, . . . [w]e find the *Sega* opinion persuasive in view of the principal purpose of copyright – the advancement of science and the arts.”); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, (9th Cir. 1992).

187. See UNIF. TRADE SECRETS ACT § 1 cmt. (2005) (“Discovery by ‘reverse engineering’ [means] starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must, of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful.”); see also 1 NIMMER, *supra* note 50, § 3:15; Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002).

188. 422 F.3d at 639.

away a fair use defense or to agree not to engage in uses of copyrighted material that are permitted by the copyright law if the contract is freely negotiated."¹⁸⁹

Typically, contracts are limited in their effect to creating rights and obligations between the contracting parties. When contractual use terms deal with information covered by copyright (or patent), however, they can impact third parties not privy to the agreement. This occurs when the initial transfer under a license withholds rights in a manner that also effectively withholds those rights from any third party transferees.¹⁹⁰ In commercializing copyrighted content, this possibility enhances the usefulness of contractual terms to the information rights owner because it enables the rights owner to control and differentiate distribution chains for the same content product (e.g., educational use, consumer use, commercial use, number of users).¹⁹¹ and to control resale of digital products through both contractual and property rights.¹⁹² There are several ways in which this can happen, but two are considered here.

The first concerns the scope of the license—terms of the license that define the scope of permission for the licensee to use the copyrighted work.¹⁹³ In any particular license, there might be a dispute about which terms comprise its scope,¹⁹⁴ but the concept is clear: Conduct outside that contractually defined scope that involves one or more of the exclusive rights under copyright law not only breaches the license, but also infringes the copyright.¹⁹⁵ The

189. *Id.* (quoting *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325–26, 1337 (Fed. Cir. 2003)).

190. *See, e.g.*, *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (finding that a transaction was not a first sale because of contract terms); *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994).

191. *See, e.g.*, *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 784–85 (9th Cir. 2006); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115 (9th Cir. 1999); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000).

192. *See, e.g.*, *Vernor*, 621 F.3d at 1107–08; *Harmony Computers & Elecs., Inc.*, 846 F. Supp. at 212–13.

193. *See generally* 1 RAYMOND T. NIMMER & JEFF C. DODD, *MODERN LICENSING LAW* ch. 6 (2011 ed.).

194. *See MDY Indus., L.L.C. v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010); *Sun Microsystems, Inc.*, 188 F.3d at 1121.

195. *See, e.g.*, *MDY Indus., L.L.C.*, 629 F.3d 928; *Wall Data Inc.*, 447 F.3d 773, 784–85 (explaining that the licensee is not the owner; making copies beyond the amount permitted by license is not fair use even though licensee never used more than the licensed amount at the same time); *Sun Microsystems, Inc.*, 188 F.3d at 1121; *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 779 (3d Cir. 1991) (holding that licensor can sue for copyright infringement for use exceeding scope of nonexclusive license); *WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982) (finding that exceeding license caused infringement).

significance of this for the licensee is that both contract and copyright remedies are potentially available.¹⁹⁶ The significance for third parties is that a transfer of a copy or of license rights does not eliminate the scope restriction.¹⁹⁷ In general, there is no concept of bona fide purchaser in copyright law.¹⁹⁸ As a result, if the transferee uses the content outside the scope of the original license, and this use involves one or more of the exclusive copyright rights, it is infringing.

A second circumstance where contracts regarding copyrighted works may affect third parties involves the copyright doctrine of “first sale.”¹⁹⁹ This doctrine has been a point of controversy between the competing sides in the rights debates, although the appellate courts have firmly come down on the side of rights owners and hold that contract terms determine whether or not a first sale occurs.²⁰⁰

First sale doctrine gives only limited privileges to the owner of a copy.²⁰¹ Chief among these is the privilege to redistribute the particular copy without permission of the copyright owner and despite the copyright owner’s exclusive right to distribute its work in copies.²⁰² The policy behind the first sale doctrine is that by obtaining full market value for a copy by an outright sale of the copy, the copyright owner’s economic interests in controlling distribution of that copy are fully satisfied.²⁰³ In effect, an unconditional sale exhausts the

196. See *MDY Indus., L.L.C.*, 629 F.3d at 949. See generally 1 NIMMER & DODD, *supra* note 193, § 6:5.

197. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1108 (9th Cir. 2010).

198. See, e.g., *id.*; *Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077 (D. Md. 1995); *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, (E.D.N.Y. 1994).

199. The doctrine was originated by the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350–51 (1908). It was subsequently codified in 17 U.S.C. §§ 109, 117 (2006).

200. See *MDY Indus., L.L.C.*, 629 F.3d at 935; *Vernor*, 621 F.3d at 1108; *DSC Commc’ns Corp. v. Pulse Commc’ns, Inc.*, 170 F.3d 1354 (Fed. Cir. 1999).

201. 17 U.S.C. §§ 109, 117.

202. *Id.* § 109(a).

203. See Robert H. Rotstein et al., *The First Sale Doctrine in the Digital Age*, 3 INTELL. PROP. & TECH L.J. 23, 23–24 (2010) (“The overall first sale scheme ‘rests on the principle that the copyright owner is entitled to realize the full value of each copy or phonorecord upon its disposition.’ The theory is that the price charged for the initial sale of a copyrighted book will account for the purchaser’s ability to subsequently resell the book. Thus, if a book’s resale value is \$5, the book’s initial price point can be set \$5 higher, such that a book with an initial value of \$7 can be sold for \$12. The author captures the value of both the initial sale and the resale in the initial value, and the purchaser is then free to dispose of his or her copy as the purchaser sees fit.”); see also *Bobbs-Merrill Co.*, 210 U.S. at 350; *LG Elecs., Inc. v. Bizcom Elecs., Inc.*, 453 F.3d 1364, 1369–70 (Fed. Cir. 2006) (“It is axiomatic that the patent exhaustion doctrine, commonly referred to as the first sale doctrine, is triggered by an unconditional sale. ‘An unconditional sale of a patented device exhausts the patentee’s right to control the purchaser’s use of the device thereafter. The theory behind this rule is that in such a transaction, the patentee has bargained for, and received, an amount equal to the full value of the goods. This exhaustion doctrine, however, does not apply to an expressly conditional sale or license. In such a transaction, it is

copyright owner's economic interest in distribution of that copy. The doctrine does not give the copy owner the right to make and distribute additional copies of the work.²⁰⁴ Historically, however, coupled with a business by many copyright owners in print and other media to sell copies in retail markets, this privilege set the stage for active secondary markets for some types of works, such as the market for used books.²⁰⁵ The value in these secondary markets thus flows to persons other than the content creators or initial distributors. Used print materials, of course, differ from new print books in many ways and the parallel markets comfortably co-exist.

With reference to digital works, however, the difference between a "used" copy and a "new" copy in the market may be immaterial. Both have the same physical appearance and utility. A "used" digital copy of *Avatar* placed in a resale market thus may compete *directly* with new copies offered in a "new" copy market. The copyright owner may, therefore have a direct economic interest in controlling, or at least participating in, the value created in this "secondary" market. This is true even though the secondary market does not involve the making of additional copies. Hence, license agreements often preclude or limit the terms of any transfer of the digital copy to a third party without the licensor's consent.²⁰⁶ If coupled with steps that prevent the initial transaction from establishing a first sale, this arrangement extends the copyright owner's rights into the "secondary" market. A predictable tension arises. In some markets, rights owners see this as an important step to protect their primary (original transfer) market from competition with resellers who can make available virtually identical product, and to glean value from the resale markets themselves. Consistent with a weak rights approach, however, others value an unencumbered secondary market more highly and argue that digital information should be free from restrictions on transferability and that the unencumbered secondary market of the print world should be preserved in the digital world—unencumbered by copyright claims

more reasonable to infer that the parties negotiated a price that reflects only the value of the 'use' rights conferred by the patentee." (internal citations omitted)); *Parfums Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1389 (C.D. Cal. 1993); U.S. COPYRIGHT OFFICE, *supra* note 136, at 5–9 (emphasizing policy against restraints on alienation).

204. 17 U.S.C. § 109.

205. U.S. COPYRIGHT OFFICE, *supra* note 136, at 19.

206. See, e.g., *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (copies licensed not sold; transferee of licensed copy not an owner; no multiple copying involved); *Adobe Systems Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 53 U.S.P.Q.2d 2003 (N.D. Cal. 2000) (licensee not an owner of the copy; resale of licensed copies prohibited).

restricting transfer.²⁰⁷ But, in the digital world, where this secondary market competes more directly with the primary market than is true in print markets, this is simply an argument for shifting value away from copyright owners in a digital environment.²⁰⁸

Under current law, the resolution of this conflict turns on deciding what conditions of transfer trigger first sale privileges. The first sale privilege only applies to an “owner” of a copy.²⁰⁹ Whether a transfer conveys ownership depends on the terms of the contract. A number of courts have held that a licensee who obtains a copy subject to significant *contractual* limitations on its use is not an owner of the copy.²¹⁰ No appellate courts have held to the contrary.²¹¹ In effect, use restrictions in an enforceable contract indicate that the transferee did not obtain and probably did not pay for the full economic value of the copy.

The most recent appellate court application of this concept occurred in the Ninth Circuit’s decision in *Vernor v. Autodesk Corp.*²¹² In *Vernor*, the court held that a licensee is not the owner of a licensed copy if the license: (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions.²¹³ The Court of Appeals for the

207. See, e.g., Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1, 79; John A. Rothchild, *The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1, 15–21 (2004); Henry Sprott Long III, Comment, *Reconsidering the “Balance” of the “Digital First Sale” Debate: Re-examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1185 (2008).

208. See Raymond T. Nimmer, *Copyright First Sale and the Over-Riding Role of Contract*, 51 SANTA CLARA L. REV. (forthcoming 2011).

209. 17 U.S.C. § 109(a) (2006) (“Notwithstanding the provisions of section 106(3), the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” (emphasis added)); *id.* § 117 (detailing similar ownership limitation with respect to copies of computer programs).

210. See, e.g., MDY Indus., L.L.C. v. Blizzard Entm’t, Inc., 629 F.3d 928 (9th Cir. 2010); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010); *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769 (9th Cir. 2006); *DSC Commc’ns Corp. v. Pulse Commc’ns, Inc.*, 170 F.3d 1354 (Fed. Cir. 1999); *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96 (D.C. Cir. 1998); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989); *NCR Corp. v. ATM Exch., Inc.*, No. 1:05CV383, 2006 WL 1401635 (S.D. Ohio May 17, 2006) (explaining that the buyer of a machine is not owner of software where copy was licensed, but not sold to original purchaser); *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000).

211. Cf. *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1179 (9th Cir. 2011) (holding that unsolicited, free CDs delivered to a large number of recipients with labels purporting to restrict use of the CDs in fact transferred title to the CDs where no contract was formed).

212. 621 F.3d at 1103–04.

213. *Id.* at 1110.

Federal Circuit many years before had likewise held that licensees are not owners of a copy if the license places restrictions on use that are inconsistent with ownership of the copy.²¹⁴

It is significant that *Vernor* did not involve an action between the rights-owner and its direct licensee, but rather a copyright issue between the rights owner and a third party who had obtained copies from the licensee and planned to resell them online. The court held that the license did not convey ownership of the copy to the licensee.²¹⁵ As a result, the licensee could not convey ownership of the copy to the third party and the first sale privilege to retransfer the copies did not apply to that third party (or to the licensee).²¹⁶

As these illustrations suggest, contractual terms provide important options for rights owners and, as such, enhance the ability to commercialize works or otherwise assert rights in them. Their use is consistent with copyright law and policy. The policy underlying the balance established in copyright law has always contemplated that in practice contractual terms will shape the conditions under which many informational works are transferred to others.²¹⁷ Contract terms are an important adjunct to the assertion of rights by informational content owners, both as to the persons with whom the provider deals directly and as to retaining rights against third parties.

B. DMCA § 1201

A second body of law that illustrates the conflict between rights restrictors and rights enhancers comes from § 1201 of the DMCA, which deals with the right to enforce restrictions on access to copyrighted works.²¹⁸ Section 1201 has been a focal point for debate on the scope and desired strength of rights in informational property.²¹⁹ This section has been controversial because it establishes

214. See, e.g., *DSC Commc'ns Corp.*, 170 F.3d at 1360; see also *Stenograph L.L.C.*, 144 F.3d at 148; *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 367 (E.D. Va. 1994).

215. *Vernor*, 621 F.3d at 1111.

216. *Id.*

217. The clearest statutory illustrations of this are the reference to so-called first-sale privileges for the owner of a copy (ownership most often being conveyed by a contract of sale, 17 U.S.C. § 109 (2006), and the statutory regulation of transfers of ownership by assignments and exclusive licenses, 17 U.S.C. § 204. For a discussion of the range of contract law issues surrounding the commercialization of informational property, see generally ROBERT W. GOMULKIEWICZ ET AL., *LICENSING INTELLECTUAL PROPERTY: LAW AND APPLICATION* (2008); 1 NIMMER & DODD, *supra* note 193.

218. 17 U.S.C. § 1201(a).

219. See, e.g., David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 702–34 (2000). One of the DMCA's exceptions is for encryption research,

rights that go beyond the exclusive rights in traditional copyright law and provides rights specifically tailored to the digital and online environment *in addition* to traditional copyright rules.²²⁰

The core of § 1201 is in §1201(a)(1), which precludes circumvention of a technological device that effectively controls *access* to a work protected under copyright law.²²¹ One violates this section by circumventing a technological safeguard that controls access to a copyrighted work, not by copying or violating any of the exclusive rights created under traditional copyright law.²²² Any unauthorized copying or distribution after the circumvention is separately actionable under general copyright law.²²³

In addition, § 1201 contains provisions that ban trafficking in, or producing technology, devices, or services that enable circumvention of access control technology²²⁴ and, in a separate subsection, trafficking in devices or services that enable “circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under [copyright law] in a work or a portion thereof.”²²⁵

The trafficking provisions enable rights owners who use technological controls to take action against upstream providers of circumvention technology, rather than focusing solely on downstream users who use that technology to circumvent protections on their own copy. Logistically, it is easier and more effective for rights owners to pursue upstream distributors than downstream end users. Upstream lawsuits present an opportunity to cut off the supply of potential enabling technologies, while lawsuits against individual end users may involve suing one’s own customers and in any event, involve a

but the exception may arguably warp the future progress of the field. See Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501 (2003); see also Cassandra Imfeld, *Playing Fair with Fair Use? The Digital Millennium Copyright Act’s Impact on Encryption Researchers and Academicians*, 8 COMM. L. & POL’Y 111 (2003); Samuelson, *supra* note 56.

220. See Nimmer, *supra* note 82.

221. 17 U.S.C. § 1201(a)(1)(A) (“No person shall circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act].”).

222. See *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010); *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005); *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (requiring a reasonable relation to preventing infringement, but not actual infringement).

223. Reflecting this, the anti-circumvention provisions contain a separate set of infringement liability rules, distinct from the liability rules applicable to infringement of the core copyright. Compare 17 U.S.C. § 1203 (remedies for DMCA violation), with 17 U.S.C. § 504 (remedies for infringement).

224. 17 U.S.C. § 1201(a)(2).

225. *Id.* § 1201(b)(1)(A).

large number of lawsuits that may not be manageable by the rights owner. Also, while some end users have the personal capability to circumvent technological controls, many require assistance from traffickers in circumvention technology.

The fact that Congress enacted two separate trafficking provisions makes clear that Congress recognized a distinction between technology that controls *access* to a work (i.e. access control technology), and technology that protects or enforces copyright *rights* in a work (e.g., anti-copying technology). Copyright owners, like other property owners, have always had the right to regulate access to their works.²²⁶ Section 1201(a) provides a statutory enforcement tool to protect certain types of access controls. The policy judgment underlying this section was that merely enabling lawsuits to prevent or collect damages for unauthorized copying or distribution may not be enough in a digital environment where easy copying characterizes digital systems.²²⁷ Instead, § 1201 created a right to control access and to legally enforce that control.

The access control right reflects a strong rights approach to informational products by providing additional support for commercialization of digital works. Of course, not all informational content producers will use technological controls; many will rely instead on other aspects of their product content or marketing. In some cases, market resistance may prevent use of this type of technology.²²⁸ Yet, § 1201 supports an option for content producers and distributors, many of whom do rely on technological controls, even if they never resort to DMCA protections.

226. The right to exclude stems from ownership of the property. DMCA adds to this basic right, the legal right to protect the excluding devices. For a case that preceded DMCA by many years, see *Hubco Data Prods. Corp. v. Mgmt. Assistance Inc.*, No. 81-1295, 1983 WL 1130, at *1 (D. Idaho Feb. 3, 1983). In this case, Management Assistance Inc. distributed operating systems with various levels of performance related to the price charged for the license. The various performance levels were established by limiting code in the program. The defendant developed a system to print the code, identify the restraints, and remove them. The court found that Management Assistance Inc. had a “reasonable probability” of finding that the defendant’s system infringed the copyrighted program by producing a direct copy of it. *Id.* at *1–2. See also *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 847 (11th Cir. 1990) (explaining that a system to defeat the scrambling signals was both direct and indirect infringement); *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741 (N.D. Ill. 1983).

227. See U.S. COPYRIGHT OFFICE, *supra* note 136, at 5–9.

228. For example, Digital Rights Management technologies have met with strong negative reactions from at least some portions of the public. See Brian Braiker, *Down With DRM*, NEWSWEEK, <http://www.newsweek.com/2006/11/19/down-with-drm.html> (last visited May 10, 2011); *Top Ten Arguments Against DRM*, LEARNOUTLOUD BLOG (Nov. 18, 2006), http://www.learnoutloud.com/content/blog/archives/2006/11/the_top_10_argu.html; Ashley Vernon, *Is DRM Even Worth It?* COPYRIGHT IN THE DIGITAL AGE 09 (Nov. 2, 2009), <http://blogs.cornell.edu/copyrightinthedigitalage09/tag/drm>.

Since § 1201 expanded rights of copyright owners, it predictably has been attacked from a rights-restrictive perspective. In one of the first appellate decisions dealing with the DMCA, the Second Circuit in *Universal City Studios, Inc. v. Corley* heard a variety of arguments that §1201 should be narrowed or declared invalid.²²⁹ The court rejected the arguments. Instead, it analogized the technological controls as equivalent to the right of any property owner to place a lock, fence, or other security device around its property and control access to it.²³⁰ As such, the DMCA was a content neutral and fully enforceable set of rules to augment the property rights of copyright owners.²³¹

The access control rules reflect the reality that digital technology and digital works may require other means of protection than did paper-based works. Building and enforcing a technological fence and then regulating access through that fence may be one of the ways that content can be protected in digital form.

Among the issues in *Corley* was the typical weak rights argument that an expansion of rights for copyright owners wrongfully reduces users' fair use rights.²³² *Corley* involved access controls applied to digital copies of motion pictures.²³³ The defendants argued that the DMCA access device wrongfully prevented them from making fair use of the motion pictures by copying them in their digital form.²³⁴ The court responded:

Appellants have provided no support for their premise that fair use of DVD movies is constitutionally required to be made by copying the original work in its original format. . . . We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. Although the Appellants insisted at oral argument that they should not be relegated to a "horse and buggy" technique in making fair use of DVD movies, the DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.²³⁵

This is a rejection of what is a repeated effort to restrict rights by arguing that user privileges trump the rights of the copyright owner

229. 273 F.3d 429, 457 (2d Cir. 2001); see also Nimmer, *supra* note 82.

230. *Corley*, 273 F.3d at 452–53.

231. *Id.*

232. *Id.* at 458.

233. *Id.* at 436.

234. *Id.* at 459.

235. *Id.* at 459.

and methods of implementing them, like the preemption argument rejected in *Davidson*.²³⁶

Again, § 1201 distinguishes between technologies that control *access* to a work and technologies that *protect rights* in copyrighted works. As this statutory framework indicates, access control is different from technology protection of copyright rights. Most courts have recognized this distinction.²³⁷ A line of cases originating from the Court of Appeals for the Federal Circuit, however, has blurred it. For example, *Chamberlain v. Skylink Technologies, Inc.*,²³⁸ an opinion striking in its hostility to DMCA, imposed a limitation on § 1201 that Congress did not intend and the statutory language does not support.

Chamberlain involved an alleged DMCA violation, in which a competitor of a garage door manufacturer marketed a “universal” garage door opener that could operate doors manufactured by the plaintiff.²³⁹ The plaintiff contended that this system circumvented a system in its doors that controlled access to the door opener software (the copyrighted work) it used.²⁴⁰ In a strained reading of the statute, the court concluded that the DMCA contained an implicit element grounded in protecting rights under copyright law: “We conclude that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”²⁴¹ One searches the language of the DMCA in vain for any indication that a “reasonable relation” to rights protection is required to protect an access control technology. The statute does distinguish between “access control” and “rights protection,” but the court’s opinion overrides that distinction by requiring that access controls be tied to rights protection.

Even though the court ultimately admitted that access control is separate from rights protection (indeed, the statute requires this), it apparently thought that the scope of those rights was unacceptably broad as a matter of policy:

Were § 1201(a) to allow copyright owners to use technological measures to block *all* access to their copyrighted works, it would effectively create two distinct copyright regimes. In the first regime, the owners of a typical work protected by copyright would

236. See *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005) (finding that fair use does not preclude contrary contract terms).

237. See, e.g., *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 943 (9th Cir. 2010).

238. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004); see also *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).

239. *Chamberlain Grp., Inc.*, 381 F.3d at 1183.

240. *Id.* at 1184.

241. *Id.* at 1202–03.

possess only the rights enumerated in 17 U.S.C. § 106, subject to the additions, exceptions, and limitations outlined throughout the rest of the Copyright Act—notably but not solely the fair use provisions Under the second regime . . . owners of a work protected by *both* copyright *and* a technological measure . . . would possess *unlimited* rights to hold circumventors liable under § 1201(a) *merely for accessing that work*, even if that access enabled *only* rights that the Copyright Act grants to the public.²⁴²

Putting aside the claim that the statute would create two copyright regimes when in fact it merely creates an option for all copyright owners to use access controls and enjoy statutory protection if they do so, the court's approach adopts as a matter of policy a recurrent rights-restrictive theme, emphasizing the limited nature of copyright rights and the dominant right of public access:

Chamberlain's proposed construction would allow copyright owners to prohibit exclusively fair uses It would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work—or even selected copies of that copyrighted work. . . . Copyright law itself authorizes the public to make certain uses of copyrighted materials. . . . What the law authorizes, Chamberlain cannot revoke.²⁴³

This policy judgment, which drives the entire opinion, resonates with the rights-restrictive argument that the copyright user privileges should override any contractual or technological effort to protect copyrighted works—but that premise should be rejected and was rejected by Congress when it enacted § 1201. Indeed, § 1201(c) underscores that copyright rights, along with fair use and other copyright defenses, are separate from the access and rights protection rules: “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”²⁴⁴ But a §1201 claim is not a claim for copyright infringement, whereas all of the elements mentioned in 1201(c) are solely connected to copyright infringement claims. The section simply means that copyright rules are not altered by the anti-circumvention regime. Interpreting the access control provision as it is written—a provision whose enforcement is unrelated to potential infringement of the underlying work—would not create two copyright regimes. It would present a choice to all copyright owners to use or not use access control measures in digital works.

There are many other flaws in the *Chamberlain* opinion,²⁴⁵ but it is more important to note that it represents only one approach and

242. *Id.* at 1199–200 (emphasis added).

243. *Id.* at 1202.

244. 17 U.S.C. § 1201(c)(1) (2006).

245. For example, it noted that the exercise of Congressional power must be “rational” and that “Chamberlain’s proposed construction of § 1201(a) implies that in enacting the DMCA, Congress attempted to ‘give the public appropriate access’ to copyrighted works by allowing

that other courts reject it. *MDY Industries, L.L.C. v. Blizzard Entertainment Inc.*, for example, involved a DMCA trafficking claim against a company that sold software bots that enabled users to play a popular online game automatically.²⁴⁶ In *MDY*, the game provider used software (called “Warden”) to detect the use of bots to play the online version of the game. The court described the technology as follows:

Warden has two components. The first is a software module called “scan.dll,” which scans a computer’s RAM prior to allowing the player to connect to WoW’s servers. If scan.dll detects that a bot is running, such as Glider, it will not allow the player to connect and play. After Blizzard launched Warden, MDY reconfigured Glider to circumvent scan.dll by not loading itself until after scan.dll completed its check. Warden’s second component is a “resident” component that runs periodically in the background on a player’s computer when it is connected to WoW’s servers. It asks the computer to report portions of the WoW code running in RAM, and it looks for patterns of code associated with known bots or cheats. If it detects a bot or cheat, it boots the player from the game, which halts the computer’s copying of copyrighted code into RAM.²⁴⁷

The fact that Warden controlled access only to the Internet version of the game proved important.

Unlike the court in *Chamberlain*, the *MDY* court recognized the importance of, and applied the statutory distinction between, access control and rights protection, specifically rejecting the *Chamberlain* analysis.²⁴⁸ The right to enforce controls on access comprises a new, independent form of protection (the right to prevent circumvention of access controls) given to a copyright owner to encourage distribution and offer protection for works distributed in digital form. Given the statutory framework, this is clearly the only way to properly interpret § 1201—an additional form of protection not connected to copyright infringement.

copyright owners to deny all access to the public. Even under the substantial deference due Congress, such a redefinition borders on the irrational.” *Chamberlain Grp., Inc.*, 381 F.3d at 1200. This refers to a mythical world in which a copyright owner markets a motion picture that cannot be used, seen or heard (even by the purchaser of a copy). Otherwise, it is fully rational to say that allowing copyright owners to make choices as to how to market their works will increase public availability of those works.

246. 629 F.3d 928, 935 (9th Cir. 2010).

247. *Id.* at 942.

248. *Id.* at 950 (“While we appreciate the policy considerations expressed by the Federal Circuit in *Chamberlain*, we are unable to follow its approach because it is contrary to the plain language of the statute. In addition, the Federal Circuit failed to recognize the rationale for the statutory construction that we have proffered. Also, its approach is based on policy concerns that are best directed to Congress in the first instance, or for which there appear to be other reasons that do not require such a convoluted construction of the statute’s language.” (emphasis added)).

The court cited four textual differences between the access and rights protection provisions that compelled this result.²⁴⁹ The most telling is that § 1201(a)(2) prohibits the circumvention of a measure that “effectively controls access to a work protected under this title,”²⁵⁰ whereas § 1201(b)(1) concerns a measure that “effectively protects a right of a copyright owner under this title in a work or a portion thereof.”²⁵¹ The court read § 1201(b)(1)’s rule as an effort to reinforce copyright owners’ traditional exclusive rights under § 106 by granting them an additional means to protect an existing right.²⁵² Sections 1201(a)(1) and (a)(2) (the access control sections), however, use the term “work protected under this title,” referencing and creating a new right.²⁵³ The court read this term “as extending a new form of protection, i.e., the right to prevent circumvention of access controls, broadly to . . . copyrighted works.”²⁵⁴

The court also referred to the legislative history of the DMCA, which confirms what is apparent on the face of the statute. Congress intended a distinction between technology that protects rights and technology that controls access, even if the latter “limits access to the plain text of a work only to those with authorized access, but provides no additional protection against copying, displaying, performing or distributing the work”²⁵⁵ As to the *Chamberlain* analysis, the court commented:

*While we appreciate the policy considerations expressed by the Federal Circuit in Chamberlain, we are unable to follow its approach because it is contrary to the plain language of the statute. In addition . . . its approach is based on policy concerns that are best directed to Congress in the first instance, or for which there appear to be other reasons that do not require such a convoluted construction of the statute’s language.*²⁵⁶

MDY sets the right standard for when an access device is circumvented in separating § 1201(a) from any relationship to the risk or actuality of infringement. It also underscores a technology or design consideration that applies when a copyright owner elects to rely on the anti-circumvention rules to protect its digital product. The design issue is that the access technology must “effectively control”

249. *Id.* at 945–46.

250. 17 U.S.C. § 1201(a)(2)(A) (2006) (emphasis added).

251. *Id.* § 1201(b)(1)(A) (emphasis added).

252. *MDY Indus., L.L.C.*, 629 F.3d at 944–45.

253. *See* 17 U.S.C. § 1201(a).

254. *MDY Indus., L.L.C.*, 629 F.3d. at 945.

255. S. REP. NO. 105–190, at 12 (1998).

256. *MDY Indus., L.L.C.*, 629 F.3d at 950 (emphasis added).

access to the work protected.²⁵⁷ If all or part of the work can be accessed outside the protective umbrella of the technology, the copyright owner risks a court ruling that the access control is not effective, at least as to the part outside the umbrella.

In *MDY*, the Warden technology restricted access solely to the Internet-interactive features of the game (the most valuable part of the work).²⁵⁸ A purchaser (licensee) of the game could access it on his own computer without bypassing the access control technology. Because of this, the court found no valid anti-circumvention claim as to the literal and non-literal features of the game contained on the media delivered to the purchaser.²⁵⁹ As to those elements of the work, access was made possible by the mere purchase of the license and delivery of the media.²⁶⁰ However, the interactive game was a separately copyrightable work and Warden effectively regulated access to it.

III. CONCLUSION

In the midst of a period of rapid technological and social change, a conflict exists in modern law and policy between those who favor maintaining and expanding copyright and related rights tailored to digital contexts, and those who favor reducing rights or letting their enforceability atrophy. This conflict permeates copyright law and also spills over to other legal regimes that are used to augment commercialization or control of informational works.

While many of the legal policy foundations of copyright law focus on establishing incentives for the creation of works of authorship and their dissemination, perhaps an even more fundamental issue is the role that copyright law must play in shaping social norms against copying the work of others without permission. The core of the copyright system must hold and support the view that comprehensive

257. 17 U.S.C. § 1201(a)(1)(A). “A technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” *Id.* § 1201(a)(3)(B).

258. *MDY Indus., L.L.C.*, 629 F.3d at 952.

259. *Id.* at 953 (“Here, a player’s purchase of the WoW game client allows access to the game’s literal elements and individual non-literal elements. Warden blocks one form of access to these elements: the ability to access them while connected to a WoW server. However, analogously to the situation in *Lexmark*, Warden leaves open the ability to access these elements directly via the user’s computer. We conclude that Warden is not an effective access control measure with respect to WoW’s literal elements and individual non-literal elements, and therefore, that MDY does not violate § 1201(a)(2) with respect to these elements.”).

260. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 528 (6th Cir. 2004).

copying without permission is ordinarily inappropriate. If most people and companies think that they can freely duplicate and transfer any digital work produced by anyone, copyright will have fundamentally failed, and copyright incentives will be either marginalized or eliminated. But the social function of persuading people that copying is often inappropriate is not well served by a weak rights regime. Court rulings, legislation, or public positions that purport to allow one party to profit from copying the work of another as a matter of legal right and without permission signal a world of copying as the norm. The better social signal would convey the message that comprehensive copying without express or implicit permission from the copyright owner is presumptively inappropriate.

There is often a disjunction in the argument between weak and strong rights advocates. In most cases, the ability to copy small parts of a work for purposes of criticism, or to reproduce ideas, or facts, is not realistically in dispute.²⁶¹ What is in dispute, however, is how to deal with the broader more comprehensive copying on websites, across P2P systems, cell phones, and for commercial purposes. The two sides of the debate often approach this issue from diametric perspectives. One side views widespread and easy copying as a valuable change in culture for the better, while the other views it as a threat to the economic underpinnings of important, information producing enterprises.

Copyright law, like most areas of law, ultimately involves a balance of interests. One point of balance concerns what types of works are supported. Reduced or weakened rights in digital, networked environments are conducive to low-cost works that borrow heavily from the work of others. Weakened rights support the ability of individuals and the service provider to “create” and post works based largely or entirely on the work of another, under the protection of fair use or protective interpretations of doctrines of contributory infringement or of a statutory safe harbor. Strong rights, in contrast, would better support works that often involve significant investments to create or distribute them. A balance that provides sufficiently strong protection for high-cost (often high-value) work in digital contexts is necessary.

261. There are times, however, where small scale copying is truly at issue, such as in the reverse engineering cases discussed earlier. *See supra* notes 186–189 for discussion on reverse engineering. But more often, when arguments focus on true forms of fair use, such as copying small parts for criticism or the like, lurking in the background is a claim for protection of a system that would open up a protected work to wholesale copying. *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001).

In copyright law, however, a second point of balancing involves at least three interests: the creative author (and its distributor), end users, and online facilitators (search engines or aggregators). The latter group, of course, represents a new factor unique to the digital era. While copyright rights debates often focus on rights owners as compared to end users, many important issues regarding the Internet actually impact the extent to which an online facilitator bears obligations or risks regarding copyright infringement. Overall, weak rights rules on the Internet not only place more control and value in ordinary users, they also shift value from content creators to corporate aggregators or search engines. Strong rights rules, of course, tend to produce the opposite impact by, for example, imposing costs or taking control away from facilitators in return for retaining value and control for the property rights owner. Some degree of balance should be drawn in this area, rather than simply protecting the interests of the facilitators, if only to enhance the enforceability of rights in Internet environments.

Copyright law, of course, does not exist as an island, but interacts with other rules systems. As we have seen, these are becoming increasingly important as copyright becomes unstable, and often inadequate to protect valuable digital works. One alternative is contract law and licensing agreements. Another involves technological and other controls on access to digital works, online and in digital copies. In both respects, we may be witnessing a shift in the old copyright paradigm that thrived on the sale of tangible copies, the broadcast of performances, and other old media arrangements. But a transition is inevitable.

Given the continuing, rapid change of distribution systems and of information products, there is no single, silver bullet that will restore stability to the information industries. How we as a society can create a structure in which adequate resources and protections exist for high-quality and often high-cost content production is unclear. But what is clear is that the solution will include both adjustments inside and outside of copyright law.

